Trials and Tribulations: An overview of the litigation process in the United States

by Frances Turner Mock

State and federal laws vary as to the litigation process. This article is intended to be a general overview. The process may be different in certain jurisdictions.

It is one of your worst nightmares—you walk to the reception area of your office and find someone you have never met standing there. She hands you a neatly folded piece of paper that says "Summons" and another titled "Complaint" and leaves before you can ask her what this is all about. You hurriedly open the papers and see that you are being sued. "What does this mean? Who is suing me? Why? What do I do now?" are some of the thoughts racing through your head. This article explains the general process of litigation in the United States and makes suggestions for preparing for and responding to a lawsuit filed against you.

What the documents mean and what they tell you

A lawsuit is initiated by "serving" a Summons and a Complaint (two different documents) on the party being sued. The person suing you usually does NOT serve you; rather, it is usually a sheriff or "process server," someone who delivers these types of documents for a living.

The top of the Complaint will indicate the court where you are being sued. The rules about where you can be sued are complicated but, in general, you can be sued in state or federal court, in the state in which you reside or in another state if you have significant connections to that state. A foreign company (like a Canadian company) can be sued in the United States if it has significant connections to the United States.

The person suing you, called "Plaintiff," will be on the top left side of the Complaint. The persons being sued are called "Defendants." Businesses, non-profit organizations, and individuals can all be sued. The text of the Complaint describes what the Plaintiff alleges to be the facts and why he is suing you. Remember that the Complaint is only the Plaintiff's version and that it will not contain all the important facts. You will have a chance to give your side of the story.

What the Complaint typically will NOT tell you is how much money the person is seeking from you. Towards the end of the Complaint, there will be a list of things the Plaintiff wants, including a reference to a sum of money. However, the amount listed may not be the actual amount the person is seeking. Many jurisdictions prohibit Plaintiffs from saying the exact amount. Instead, they can only state a minimum. For example, in North Carolina, a Plaintiff can only say that it is seeking "in excess of $10,000" even if he is seeking over $1 million. Therefore, the Complaint will not necessarily indicate how much money the person is seeking.

What to do first

The first order of business is to read the two documents so that you can determine who is suing you, for what, and where (in what court). If you have liability insurance, contact your insurance company immediately. There is a limited amount of time to file a formal response to the Complaint and the courts are unforgiving about missing that deadline. In most places you have 30 days to respond, but in federal court you only have 20 days. If you do not have insurance, contact an attorney as soon as possible. You should also designate one person in your office to coordinate with the attorney and the insurance company. Be prepared for what could be a long process. Litigation can take several months or even years. Federal court cases can take a particularly long time because the court sometimes literally takes years to rule on issues that arise prior to trial. The attorneys can complete most of the process but you will be required to participate in various ways.

Who will find and pay for the attorney who represents you

If you have insurance for the type of claim that is being asserted, your insurance carrier will hire an attorney for you. It will select the attorney and oversee the attorney's work. It will also pay the cost of the litigation unless you have a deductible or self-insured retention (SIR) that requires you to pay the first expenses that are incurred, including attorney's fees. (You should check with your carrier to see if you will be required to pay any of the attorneys' fees.) The possibility of you paying some part of the attorneys' fees is significant because even if the lawsuit is frivolous, it will likely take a fair amount of money to prove your case. Attorney fees can range from $100/hour or less in small towns, to over $500/hour in large cities or large law firms. Therefore, it will not take much to accumulate $10,000 or more in attorneys' fees.

Your attorney needs to be someone who specializes in litigation. The lawyer who sits on your Board or who volunteers some *pro bono* time for your organization may not be the best person for the job. The insurance company also usually has a list of "approved" attorneys and only attorneys on that list may be hired. If you know an attorney you want to represent you, you should work with your carrier far in advance of being sued to see if the carrier will agree to use that attorney. You will also need an attorney who is licensed to practice law in the state where you are being sued. For example, if your office is in Colorado but you are being sued in Arizona, you will need an attorney who is licensed to practice law in Arizona. Your local attorney can work in conjunction with the attorney in

the state where you are being sued, but at least one attorney must be licensed in the state where the lawsuit is taking place.

What happens next

After your attorney files a formal response to the Complaint, "discovery" begins. Discovery generally describes the process by which both sides get information to build their cases. Each side has the opportunity to send written questions ("interrogatories") to the opposing party. Discovery may also include "depositions," a means for the opposing attorney to ask someone questions in a face-to-face meeting where every word is transcribed by a stenographer. Depositions are usually taken of the parties, witnesses, or experts.

Each side is also entitled to get various documents from the opposing side by serving a "request for production of documents." The discovery processes is complicated—you can object to the interrogatories or to the documents that are requested—but the purpose of discovery is to help everyone learn the relevant facts so that the "right" result can be reached. It is critical to understand that you may have to turn documents over to the other side even if you think those documents are confidential. Documents where your organization admits it did something wrong may have to be given to the person suing you. The potential of having to reveal this type of information is another reason you want an attorney involved as early as possible. Your lawyer will help counsel you about what documents will have to be disclosed and whether there are ways to protect certain communications. In fact, you may want to consult with an attorney before you are sued to discuss whether documents you consider to be confidential would have to be disclosed to the opposing side in the event of litigation. In particular, the results of a safety review conducted after a significant incident are likely to have to be given to the other side if they ask for them.

Who controls the litigation and the decisions about the case

If an insurance company will be paying any judgment or settlement that is incurred, the insurance company, and not the organization, makes the key decisions about the case. Most importantly, it is usually the insurance company who will decide whether a case gets settled. Insurance companies and their insured (the organizations or businesses) often have different feelings regarding whether the case should settle. While most insurance companies try to consider the views of the organization, they are usually most concerned about the total costs they will have to pay (for attorneys' fees and any judgment or settlement), whereas the organization may be more concerned about what seems fair or what will impact its program.

Alternatives to a trial—arbitration and mediation

The parties may agree to use arbitration to resolve a dispute. Arbitration differs from traditional litigation in that the process is often much shorter, less cumbersome, and less expensive. An arbitrator—not a jury—hears the evidence and decides your case. The downside to arbitration is that the decision generally cannot be appealed.

In mediation, a neutral third party works with both sides to help reach a settlement. The mediator has no power or authority; rather he helps each side see the strengths and weaknesses of its case. The case only settles if both sides agree. The parties can also try to negotiate on their own but mediation is usually a more successful process. In fact, some courts require the parties to go to mediation before they can have a jury trial. A benefit to settling a case is that there is some finality to the decision. If a case proceeds to trial, either side can appeal the verdict or any portion of the case where the Court ruled against it. An appeal can add several months, a year, or longer to the entire process.

Conclusion

Being sued can be a complex, confusing, and frustrating process. However, your attorney should guide you through the procedures and explain each step. Because your attorney and your insurance company will be such an important part of your team when you are sued, you should develop relationships and stay in touch with both long before you receive a Summons and Complaint. With the right representation, you can get through a potential nightmare without losing too much sleep.

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