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What to Expect In Your Lawsuit

"*A lawsuit is a marathon not a sprint*." Stewart R. Albertson.

There is a saying that the "wheels of justice move slowly." That is as true today as when it was initially stated. A litigation case is "quickly" resolved if it is either settled or tried within 12 to 18 months of initially being filed (that is the equivalent of legal light-speed). The average litigation case lasts from 2 to 3 years, and sometimes longer. Pretrial discovery, motions, the Court system, the lawyers and the parties all factor into the delay. This memorandum discusses the steps of a lawsuit so that you will have some understanding of how the process works and what you can expect to occur in the coming months.

Starting the Process—The Initial Court Pleadings.

A lawsuit begins with a complaint, in civil matters, or a petition, in probate matters (for purposes of this memorandum the term "probate" includes anything filed in Probate Court, including trust matters). Once the initial petition is filed, the opposing party has an opportunity to file an answer, response or objection. This set of initiating pleadings (complaint and answer for civil matters, or petition and objection for probate) must be complete before the case can get underway.

Attacking the Initial Pleadings.

In some cases a party may decide to attack the initial pleadings filed. This can only be done for very limited purposes. For example, a petition must state certain fundamental elements to be properly pleaded. If a certain element is missing, it can be attacked by either a "demurrer" or "motion to strike". In most cases, even if a demurrer or motion to strike is successful, the opposing party will have the right to amend their pleadings and file them in a proper form. Therefore, most of the time demurrers and motions to strike are not necessary. But the process of filing and arguing a demurrer or motion to strike will add time and expense to the litigation.

The Initial Court Hearing – Probate.

In probate, every petition filed receives a hearing date. The initial hearing date is usually scheduled from 30 to 60 days after the petition is filed. Very little happens at the initial hearing

date set by the Court. The initial hearing date is NOT a trial date. In fact, nothing is decided. The date is simply the first opportunity for the Court to review the Petition and determine if anyone is going to object to the petition. Under California law, anyone wanting to object to the petition can appear at the initial hearing date and place their verbal objections on the record. The court will then order that the objections be made in writing by a date certain after the hearing date. Or written objections can be filed before the initial hearing date. Either way, the hearing date will be continued to allow the parties to engage in discovery. You typically do not need to appear at the initial Court hearing because we will appear on your behalf. Of course, you are always welcome to attend every Court hearing in your matter. We will notify you when your appearance in Court is required.

The Initial Hearing Date—Civil Lawsuit (all non-Probate Court matters).

The first hearing date in a civil lawsuit is the Case Management Conference hearing. A Case Management Conference is usually scheduled for six (6) months after the initial complaint is filed. Again, this is NOT the trial date, it is just the first chance the Court has to check in with the parties and determine how much time they will need for the discovery process. You typically do not need to appear at a Case Management Conference hearing because we will appear on your behalf. Plus not much occurs at these hearings. Of course, you are always welcome to attend every Court hearing in your matter. We will notify you when your appearance in Court is required.

The Discovery Process (Written Discovery and Depositions).

Discovery is the processes by which we attempt to obtain information, documents, statements, and any other relevant facts pertaining to your case, some of which will be used as evidence at trial. You can think of discovery in two broad categories (1) written discovery, and (2) depositions.

Written Discovery

The discovery process typically starts with written discovery. Written discovery includes the following methods:

Document Demands.

Documents demands are served on opposing parties and require them to produce relevant documents that are in their possession or control pertaining to the lawsuit. Once a document

demand is served on an opposing party, that party has 30 days in which to respond. They may ask for an extension of time, which is routinely granted because the Court does not look kindly on refusals to grant reasonable extensions. As such, the document demand may not be responded to until 45 to 60 days after it is served.

Once a response is received it may be insufficient. It may contain baseless objections or refuse to provide all relevant documents. California law requires that the parties attempt to "meet and confer" on such disputes, meaning that we send a letter to the opposing party outlining our problems with their response. The opposing party usually agrees to provide a supplemental response within a set period of time. Once the supplemental response is received, it may still be insufficient. If so, another "meet and confer" is required. If the opposition refuses to supplement their response again, then we must file a motion with the Court and ask the Court to force the opposition to respond. See the discussion of Discovery Motions listed below.

Note that Document Demands may only be served on parties to the lawsuit. They are not allowed to third-party witnesses, such as banks, brokerage firms, insurance companies, healthcare providers, or any other individuals who are not parties to the lawsuit. To obtain documents from third parties requires that we issue a subpoena. See our discussion of Subpoenas below.

Subpoenas

Subpoenas are demands made to third-parties requiring them to hand over relevant documents or other information. Subpoenas are also used to take the deposition of non-party witnesses. When bank records or medical records are required, we will issue a subpoena to the entity that has the records.

Obtaining documents through subpoenas is time consuming. For example, when requesting bank records, we are required to give a "Consumer's Notice" to everyone whose name is associated with the bank account. Only after each person associated with a given bank account is given time to voice an objection can we serve the subpoena on the bank. The bank then has 20 days in which to comply and produce the documents, but they rarely meet this deadline. Thus, it can take from 30 to 60 to 90 days in some cases to receive documents from a bank or any other third-party such as an insurance company or medical provider. And if the bank is located outside California (meaning they do not do business in California), then the process can take twice as long.

Interrogatories.

Interrogatories are just written questions asked of the opposing party. There are two types of interrogatories—Form Interrogatory (asking a set of pre-printed questions) and Special Interrogatories (attorney drafted questions). As with all other written discovery, once interrogatories are served on the opposing party they have 30 days in which to respond. Typically, extension of time is required and must be granted for a reasonable amount of time. If the responses to interrogatories are inadequate, then the "meet and confer" process must be used. If the opposition refuses to provide satisfactory answers, then a Motion to Compel is required to be filed with the Court. See Discovery Motions below.

Requests for Admissions.

Requests for admissions are unique in that they demand the opposing party to either admit or deny a given statement. They can be hard to draft because they must not be ambiguous in their language. They typically are used to admit the authenticity of documents. They can also be used to establish fundamental facts about the case. Once admitted, the fact is considered proven for all purposes at trial. If Request for Admission is denied, then the facts contained in that particular request must be proven at trial. Again, if a response is received that is insufficient, the parties must first "meet and confer" and then file a Motion to Compel if the response is not adequate.

Discovery Motions.

Once a response to discovery is received, a party only has 45 days in which to file a motion compelling additional responses if the original response is not adequate. Before a motion can be filed, the parties must "meet and confer", which is usually done in a letter, but can also be done by telephone, email, or fax. If the parties cannot agree by meeting and conferring on the discovery issue, then a Motion to Compel must be filed with the Court.

Generally speaking, the Court disfavors Motions to Compel. One Judge has likened such motions to "two kids in a sandbox." As such, parties must be certain that the items for which they are filing a Motion are important and relevant to the lawsuit. Filing a Motion for an irrelevant or unnecessary purpose is not only frowned upon by the Court, but could also subject the moving party to sanctions for bringing the motion in the first instance.

Technically, the party who prevails on a Motion to Compel is awarded sanctions to compensate them for the attorneys fees they spent to bring the motion. ***This rarely occurs***.

More often, the Court either refuses to issue sanctions whatsoever or the amount of sanctions is nominal in comparison to the actual costs of the motion.

Depositions

A deposition is the live questioning of a witness under oath with a Court reporter present. Depositions are typically scheduled once the written discovery is complete or near completion. Depositions can be taken of parties and third-party witnesses. Once a person has his or her deposition taken, it cannot be taken a second time without Court permission. However, there are times when a deposition cannot be completed in a single day, in which case a continuation day may be scheduled at a later time.

Any party to the lawsuit has a right to attend a deposition. During your case, you may have your deposition taken. If that occurs, we will schedule a time to meet with you prior to your deposition date to prepare you for your deposition. When we are taking the deposition of an opposing party or third-party witness, we will prepare for and take the deposition. You have the right to be at all depositions if you are a party to the lawsuit, but you are not required to attend any depositions (other than your own deposition of course).

Once the deposition is complete, the Court reporter will prepare a written transcript. You will have an opportunity to review your own deposition testimony and the deposition testimony of all other witnesses. At times, we may choose to video record a deposition as well.

Generally, deposition testimony *cannot* be used at trial. However, if a witness testifies differently at trial than he did at his deposition, then that inconsistency can be read into the record. There are other limited exceptions to when deposition testimony can be used at trial.

Finally, there are times when disputes arise as to what a witness can or cannot testify to at deposition. When that occurs, again, the parties must meet and confer. If an agreement is not reached, then a Motion to Compel is required.

Mediation and Mandatory Settlement Conferences.

At some point throughout your lawsuit the Court will either ask you or order you to attend a form of settlement conference. Sometimes, the parties will agree informally to attend a mediation in hopes of reaching a settlement. Below are two of the most common settlement conference used in civil and probate matters:

Mediation.

Mediation is an informal meeting between the parties and a neutral third-party called a "mediator." The mediator is usually a retired judge or a practicing lawyer with some expertise in the area of law at issue in your case. Mediations usually last a full day. The parties are placed in separate rooms and the mediator moves back and forth between the parties attempting to reach a compromise that both parties can agree to. If the parties do not voluntarily come to an agreement, then the mediation ends and the lawsuit continues in Court. In other words, mediation does not result in a forced or involuntary result or ruling. The mediator is simply trying to come to a brokered agreement—not make any final or binding decisions in your case.

Statistics show that around 97% of all civil and probate cases settle before trial. And a large part of that settlement occurs at mediation. There is a very good chance your case could settle at mediation or even after mediation. But your case will only settle if you agree to do so voluntarily at the mediation—there is no forced settlement of cases at mediation.

Your attendance at mediation is mandatory. We will inform you of any mediation in your matter before it occurs.

Mandatory Settlement Conference.

Different Courts handle mandatory settlement conferences (MSC) in different ways. But basically it is a conference with a Judge at the Court where a resolution is negotiated. Again, the decision to compromise a case at an MSC is voluntary and no ruling or binding decision will be made at the MSC. Your attendance at an MSC is mandatory. We will inform you of any mediation in your matter before it occurs.

In San Bernardino probate court, the MSC is with the Probate Judge, the same Judge hearing your case. The Judge will take the attorneys only into his chambers and discuss the facts of the case and the possible resolutions to be made. The attorneys then meet with their respective clients and discuss the proposed resolution. This process goes back and forth until either a compromise is reached or the parties fail to reach an agreement at the end of the day (the Court usually stops the MSC at 4:30 p.m.).

In Riverside, MSC's are conducted by Judge Rich, a retired Judge who is locally famous for his settlement negotiations. The parties literally wait in the Court hallway while Judge Rich goes from party to party attempting to reach a compromise. If no compromise is made, then the MSC ends and the case continues in Court as before.

Arbitration.

Do not confuse arbitration with mediation. They are two very different procedures. Mediation is an informal meeting of the parties with a neutral third-party who tries to reach a voluntary compromise. Arbitration is like a mini-trial where an arbitrator makes a binding decision in your case. In other words, arbitration replaces your right to a trial in Court with either a Judge or jury (not all lawsuits are entitled to juries—such as probate, trust, and will cases). We rarely, if ever, agree to voluntarily arbitrate a case. Arbitrators are allowed to make decisions without the rules of evidence, they oftentimes limit the amount of discovery that can be done (thereby impeding your ability to obtain evidence) and their decisions cannot be appealed in Court. As a result, we do not favor arbitrations. But there are times when arbitrations are required. If that is the case in your matter, we will inform you of this.

Summary Judgment and Summary Adjudication

In some cases, one of the parties may believe that they are entitled to a decision in their favor before trial because there is not enough evidence to decide against them. The procedure used to ask the Court to decide in a party's favor before trial is called Summary Judgment (for a decision on the entire case) or Summary Adjudication (for a decision on only part of a case). Summary Judgments and Summary Adjudications (referred to as "MSJ", which stands for "Motion for Summary Judgment") are generally not favored by the Court. Under California law, the Court prefers to hear matters at trial or contested hearings. And in many Probate Court matters MSJ's are rarely granted.

MSJ's are used in cases where the evidence, even if viewed in a light most favorable to the other party, is not sufficient to support the claim requested. It is a very technical procedure and requires a great deal of time and preparation to file with the Court. Once filed, the opposing party has the right to respond and give their reasons why an MSJ should not be granted. While such motions are not routinely granted, they must be taken seriously because losing an MSJ would mean the end of a case before trial. Again, filing or opposing an MSJ adds additional time and expense to any lawsuit.

Trial Preparation and Experts

Once the discovery process is complete, and at some time throughout the lawsuit, a trial date, or contested hearing date, will be set by the Court. Once the date is set a number of deadlines are also set, including the time by which experts must be retained and possibly disclosed to the other side (assuming a party requests disclosure). Also, all pending discovery must be wrapped-up no later than 30 days prior to your trial date.

Trial preparation can be very time consuming due in large part to the scope of your lawsuit. There are witnesses to prepare for, motions to prepare and file, evidence to assemble, and documents to be subpoenaed directly to the trial court. Aside from discovery, trial preparation is the most time consuming part of most cases.

It is not uncommon for the Court to continue the trial date after it has been set. This occurs either because the Court does not have the time to hear the trial (the Court often double or even triple books its courtrooms for trials in anticipation of settlement) or one of the parties will ask for a continuance.

Trial

For those cases that make it to trial, this is what you have been waiting for from the beginning. Trial is the point in the process where evidence is presented to the Court and a decision is made by the Judge or jury. In probate matters, which is just about anything filed in Probate Court including trust matters, a Judge will decide your case. In civil matters, either party may request a jury trial. If neither party request a jury trial, or if both parties agree, then a Judge will hear and decide the case.

Once the actual trial is over, there may be any number of filings, closing briefs, motions, or other items required to be prepared and filed with the Court. And in Judge trials (called "bench trials") a decision is usually taken "under submission", which means you will not know the result of your case for a month or two after the trial is complete and all closing briefs are filed with the Court.

Need More Information?

We will keep you informed regarding your case throughout the process. If you ever have any questions or would like more information regarding your case, feel free to contact us:

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