THINGS
YOU NEED TO KNOW ABOUT
LAWSUITS

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INTRODUCTION

Most people have little idea about how a lawsuit works. This is true even if they are currently involved in a lawsuit! Nevertheless, if you find yourself in a lawsuit you should know how the system is designed to resolve disputes between litigants. You are taking the right steps now by reading this book. We will look at the five things you should know about lawsuits before you go to court. The five things you will learn include: (1) what papers are used to start lawsuits, (2) how the facts are discovered, (3) what methods are available to resolve the lawsuit early in the process, (4) how a trial works, and (5) what to do with a judgment. After finishing this book you will have armed yourself with more knowledge of the legal system than most people ever will.

LEGAL COUNSEL

Usually, you should hire an attorney when you become involved in a lawsuit. While you may do it yourself (e.g., acting pro se), hiring an attorney usually avoids costly mistakes. Initially, you have a decision to make, which is what type of attorney do you want? Do you want an attorney who does a little bit of everything, or one that specializes in lawsuits and trials? The type of attorney you hire may also be dictated by geographical concerns. If there is not a suitable attorney that you want to hire within your community, you may need to travel to find one.

You may be wondering where to look for an attorney. A good place to start is to ask people you know and trust if they have ever used an attorney in the past. Referrals are usually the best way to find an attorney. However, there are other methods. For example, social media is becoming more and more prominent: Facebook, Instagram, and Twitter are all common places to find attorneys. Simply search the relevant hashtags you are looking for such as #attorney, #lawyer, etc., for your community. Other places to look are: Google (of course!) and Martindale Hubbell (it has a service that reviews and rates lawyers), www.martindale.com. Other third-party sites are available, such as www.superlawyers.com, www.avvo.com, www.linkedin.com, and so on.

Another good method to finding an attorney is to search for reviews online from former clients. This often can tell you how you can expect to be treated by the attorney you are considering hiring. Are the reviews favorable? Do they state that the attorney was attentive and responsive to the client's needs? Was the outcome favorable? These are all things you should consider when deciding whether to hire a particular attorney.

Some people use the Yellow Pages, but I find it is less relevant as the rise of social media becomes more prominent. You may find that you cannot find a good lawyer in the Yellow Pages. Look for advertisements that promote a lawyer representing you in your area of dispute. Questions to ask an attorney before you hire them are: will the attorney collaborate with another attorney in his or her office? Will there be paralegal support, which may drive down the fees charged? Are there others in the firm who can fill in for the attorney when needed? All of these are additional considerations.

Another primary consideration in finding an attorney is determining (to the extent possible) what your fees will be or what they attorney will charge for the representation. For example, will the representation be hourly? Find out exactly what the hourly rate is for the attorney. Does the attorney bill to the nearest tenth of the hour, or does the attorney bill in "blocks" of time? Compare the attorney's quoted rate to others you have checked. Find out if the attorney requires an advance (sometimes known as a "retainer"). Is your bill to be paid in full each month? If not, will the attorney charge you interest? Is there a grace period of 30 days or so before you have to pay, or is payment due immediately upon receipt of the attorney's bill? Can you pay with a credit or debit card? Can you pay on the attorney's website?

Sometimes attorneys charge a flat fee. Is the attorney open to charging this? If so, what will it be? How is the attorney calculating the flat fee? Does it include a possible appeal? What is the scope of the representation?

You may also want to ask if there are alternative ways to pay that are acceptable under law. For example, can the fee be contingent on the outcome? This usually arises in the context of a personal injury case where an attorney will take a percentage of the recovery, if any. In certain circumstances, contingent fees are not allowed (such as in family law cases). Find out if there will be a separate agreement for the contingent fee. Make sure you read it completely and ask your attorney any questions about it.

The First Thing You Need To Know

THE LAWSUIT PAPERS & PARTIES

A lawsuit is started with simple written papers. No fancy words are needed on the lawsuit papers, but you do have to follow some rules.

The Summons and Complaint

First, the lawsuit is initiated with a document called a "Summons." A Summons states that a lawsuit has been started. It states where the lawsuit will be heard, known as jurisdiction; and in what court, usually small claims or district court, known as venue. The Summons must tell you how long you have to respond in writing. It must say that if you don't respond a default judgment may be taken. This means the person who is suing you wins the case and will likely get all of the relief asked for in the lawsuit. So if you are being sued, you don't want a de-

fault judgment.

The Summons is usually accompanied by another document called a "Complaint." The Complaint is where the meat of the lawsuit is. The rules for lawsuits generally provide that all that is needed is a short statement of the facts and a short statement of the claims made. This short statement of the facts and claims is supposed to be just enough so that the person being sued has reasonable notice of what the claims are. This is the reason that a Complaint usually does not contain all the facts. This may be frustrating if you are the one being sued, or an advantage if you are the person suing.

For example, in a lawsuit for personal injury, a complaint will state that one person was injured because of another's fault. It will state what the fault was in some fashion and will demand money damages. In another example, a Complaint may be used to "quiet title" in real property where there is a dispute about the ownership of property. The Complaint will describe the land in legal terms and then demand that title be determined in one person's ownership and that the other is not an owner. A final example is where there is a dispute about a contract. The Complaint will describe the contract, what the parties did to act under the contract, if the contract was broken and what the money damages are. These are only three examples, but there are many other claims that can be spelled out by a Complaint, such as for divorce, child custody, stealing trade secrets, wrongful termination from a job, and so on.

The person bringing the claim is known as the "plaintiff." The person being sued is known as the "defendant." Sometimes there are multiple plaintiffs and multiple defendants in a lawsuit. This means that a number of individuals may have the same claim against the same defendant and are able to bring their lawsuits together. Similarly, when multiple defendants are named as a party to a lawsuit brought by one plaintiff, it means that the plaintiff believes that several legal claims exist against those defendants. Sometimes several defendants may have their interests aligned and may set up a joint defense against the plaintiff. The defendants will enter into written agreements promoting their joint defense and providing for the secrecy of shared information. This is called a "joint defense agreement."

You must be "served" with the lawsuit, which means that it is placed into your hands (or in certain circumstances, someone else at your home or by sending it by mail) by someone who is not interested in the lawsuit. This person can be a sheriff or a private process server.

The Answer

Usually, but not always (I will talk about this later), the response to a Complaint is called an "Answer." An Answer is a legal document that sets out several things. First, it can deny outright or in part any fact or claim in the lawsuit. Second, it can admit things. For example, it can admit facts that are not in dispute or are incontrovertible. It can also admit that some claims are valid. Third, it can state that there is not enough information known about the facts or claims in the lawsuit to either admit or deny them. Finally an Answer can set up several other legal things such as "affirmative defenses," a "counterclaim," or a "cross-claim." I will talk about each of these things next.

i. Denial of Facts and Claims in Answer

The Answer can deny facts that are not true or are only partially true (by saying what part is not true). Denials have the legal effect of making the person suing you prove their facts and claims later on in court. This is the most common tactic taken by people who answer a Complaint. They deny everything and "put you to your proof" later in court.

The best defense starts with the facts. Sit down and write out the facts of the claims. Try to remember all of your interactions with the persons involved in the claims. Did they say something that contradicts what they wrote in the lawsuit? Are they stretching the truth in places? Are there outright lies (what we in the legal world call misrepresentations)?

Next, gather up all the writings about the lawsuit. That means everything you can put your hands on. Check all your files, boxes and cloud storage sites; check your closets and attics. You may want to ask your business associates or significant other if they know where you can look for your writings.

Then compile. Do you have a contract that is in dispute? Find it and put it in a binder together with all prior versions. If you have emails between you and the person suing you gather them up and print them off. Into the binder they go. Any other emails you have (maybe with a third party, for example) about the dispute also go in the binder. Letters are becoming less common these days but if you have any gather them up. If you were sent any certified letters note the day that you signed for it. If you sent any letters to anyone (the party suing you or a business for example) gather them up and put them in the binder. Text mes-

sages are becoming ubiquitous as a way to communicate. Get in contact with your wireless provider and see how to extract any relevant text messages. Print them off and get them in the binder. They say photos tell a thousand words. From experience, I can tell you that they are invaluable. Search your phone, computer, and tablet for any photos you may have that would possibly be relevant to the lawsuit. Ask others who may have photos to do the same.

Continue marshalling the facts by creating a timeline. Download examples from the internet or use a spreadsheet program from Microsoft or Google. Organize everything (facts, documents, photos) chronologically. Have links to supporting websites if necessary and where appropriate.

Now that you have the facts and documents together, you can help find out what law applies to your case. If you are good at internet research there are a multitude of legal websites that you can use to research the law that may be applicable to your case. In North Dakota, start with www.ndcourts.gov. You will find links to the statutes and cases that will help you determine what the law is. In other states and for federal statutes and cases, look at Cornell Law School's Legal Information Institute for more information. Point your browser at www.law.cornell.edu. If you have access to pay services, try www.westlaw.com or www.lexisnexis.com.

Other things that you should do if you become involved in a lawsuit is to "marshall" up your insurance policies. This means gather all insurance policies that you think may have any type of involvement in the claims being made. Of course, this only applies to a defendant or third-party defendant. What I am talking about here are certain types of insurance policies known as "personal injury protection," certain liability policies known as "commercial general liability," "personal liability policies," "umbrella policies," "homeowner policies," "director and officer policies," "errors and omissions for professionals," and possibly other policies, such as "farm and ranch," etc. Take the complaint or third-party complaint and contact your insurance company and tell them about the lawsuit. You do this by "tendering" the lawsuit to them for defense and indemnity. This means that you are asking the insurance company to defend you against the allegations brought in the complaint or third-party complaint and for them to indemnify you for any money that you may have to pay as a result of the claims being proven against you. So, if you have been sued as a result of a car crash, your automobile liability policy will likely be there to cover you for any injuries that you may have caused. Similarly, if you become injured in a car accident, your coverage known as "personal injury protection" should be available

to you to pay medical expenses and wage loss. On the other end of the spectrum, if you have been sued in a business context, a policy known as a "commercial general liability" policy may be available to provide a defense and indemnity. It is good practice to have an umbrella insurance policy. If you have one, you should marshall it up and make sure the umbrella insurance company is on notice of the claim being made against you. In certain circumstances the umbrella policy will be there to provide additional coverage and indemnity for you in case the liability policy becomes exhausted.

ii. Admission of Facts and Claims in Answer

The Answer does not have to be an all out knock-down denial. In fact, it can and should admit those things that are incontrovertible and not in reasonable dispute. This would include such things as if you are living at a certain address, that you work at a certain job, or that you know the person suing you. You may also be required to admit things like proper venue and jurisdiction (if indeed they are proper) and that service of process is proper (if it is). If some of the claims against you are incontrovertible you may be required to admit those as well but this is less common. Admissions can help narrow the issues for the parties in the lawsuit and will therefore save them time and money later on.

iii. Neither Admit or Deny - Not Enough Information

The person being sued can deny the claims made in the Complaint and also deny that the facts asserted in the Complaint are correct. The person being sued can also raise something called "affirmative defenses." Affirmative defenses are set up in the Answer. Affirmative defenses are things that you can claim to be in your favor, and would defend you against the allegations raised in the Complaint. This includes things like the party who is suing you has waived their claim against you (note that the term "waiver" has specific legal meaning). Another affirmative defense is that the party suing you is "estopped" from suing you because of their own actions or because they have brought a lawsuit against you on the same or similar claims in the past. This is also known as "res judicata."

Another affirmative defense is "failure to state a claim." Failure to state a claim means that under all circumstances taken in favor of the person suing you that no actual legal claim can be made out against you. This would be the case if someone was suing you for breach of contract when you didn't enter into a

contract with them, or if they have alleged you have caused a car accident when you were not driving the car at issue. Furthermore, additional defenses include lack of jurisdiction, improper venue, improper service of the lawsuit papers upon you, and others.

If you are being sued because of something that happened years ago, you may set up a defense called a "statute of limitations defense." This is one of the biggest defenses that can be made. Essentially, the statute of limitations is a rule that prevents people from bringing stale claims against another. The timeframe for a statute of limitations is usually contained in the state statutes but occasionally can be set by contract between parties. If the claim is brought outside of the statute of limitations we call it "barred" and an appropriate affirmative defense can be set up claiming that the case is barred under the statute of limitations.

Still other affirmative defenses may be that the Complaint does not address other parties who may have a role in bringing the Complaint or are at fault for the case. This is known as failure to join "indispensable parties." This means that the lawsuit cannot proceed until all parties who have an interest in the lawsuit are joined. Other defenses also exist and depend on the facts of the case, such as comparative fault, set-off, or accord and satisfaction.

iv. Defenses to a Complaint Setup in Answer

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v. Counterclaims, Crossclaims, and Third-Party Complaints

Just as it is possible to set up defenses in the Answer, it is also possible to "Counterclaim" against the party who is suing you. This is essentially a "counter-suit." You actually become the counter-plaintiff in the lawsuit instead of the defendant. If you are the plaintiff you become the counter-defendant. A counterclaim is just like a regular lawsuit; it stands on its own merit. You have to set out a plain statement of the facts and a plain statement of the claims that you are alleging against the person who is the counter-defendant. You must allege things like jurisdiction, venue, and facts that give rise to your Counterclaim as well as the legal theories behind your counterclaim. The Counterclaim is subject to defenses just like those that can be set up in an Answer. For example, the plaintiff will have an opportunity to file an "Answer to Counterclaim," which will set up various legal defenses either admitting or denying claims and alleging affirmative defenses. It is important to understand that if the plaintiff's main claim goes away for some reason, either through dismissal or trial, the Counterclaim still proceeds as if it is standing alone. This is because it is its own law-

suit. For this reason, Counterclaims must not be taken lightly. Due diligence must be done into the facts supporting any legal claim. Furthermore, legal research should be conducted to determine what applicable legal theories are available that fit the facts for a Counterclaim.

Perhaps you are in a lawsuit with multiple defendants. If that is the case, and you are a defendant, you may choose to start a "Crossclaim." A Crossclaim is similar to a Counterclaim, except that it is usually made against parties on the same side of the lawsuit. Typically, a Crossclaim is made against defendants in a lawsuit when one of the defendants believes the other bears responsibility for the lawsuit that has been brought against them. A Crossclaim must be investigated to determine if there are facts, circumstances, and law to support it. Crossclaims are subject to the same affirmative defenses, admissions, and denials that a regular lawsuit has.

Sometimes a defendant may believe that a third-party is to blame. In that case, the legal rules provide for something known as a "Third-Party Complaint." A Third-Party Complaint is a legal document where a defendant sets out legal claims (just like in the Complaint) against a third-party and formally brings them into the lawsuit. Typically, these types of claims are made when a defendant believes that another party is at fault for what the plaintiff is suing the defendant for. This so-called "third-party practice" means that the defendant is suing the third-party defendant just like the plaintiff is suing him or her. The third-party defendant must respond with a motion or answer or a default judgment may be entered against him or her. Typically, a third-party defendant will answer the Third-Party Complaint and assert denials, admit what they must, and set up affirmative defenses just like the defendant did in response to the plaintiff's Complaint. Sometimes it is best to have all parties involved in the lawsuit from the beginning; however, there are instances where parties can or must be added later. This usually occurs when facts come out later in the lawsuit that point to another person or company's fault. We will discuss more about this later, but for now, know that the process is known as "discovery" and can sometimes take a while. If a third-party is added later in the lawsuit there is typically time provided in the lawsuit for the third-party to "catch up" in the lawsuit.

Motions for Temporary Relief

Sometimes a party to a lawsuit needs immediate relief and cannot wait until the court or a jury acts on the complaint or defenses. In those circumstances,

the party bringing the lawsuit may move for temporary relief. One type of temporary relief is "injunctive relief." What this means is the moving party is trying to get someone to act or stop acting in a certain way. An injunction may be used to prevent an employee from using a customer list to compete against a business. Similarly, an injunction could be used to prevent another from diminishing an asset such as a bank account in a divorce context. If you have given power of attorney to someone and you want them to stop acting as your power of attorney and stop spending money out of your account you could use an injunction to attempt to stop that or to remove or cancel the power of attorney.

i. Injunctions

Injunctions prevent or mandate someone from doing something until further order of the court. They include temporary restraining orders, preliminary injunctions, and permanent injunctions. They are either granted or denied by a trial court. If an injunction is disobeyed, a court may enforce it with contempt proceedings. Temporary restraining orders or preliminary injunctions may be granted for: (1) acts producing injury during litigation; (2) a defendant is acting or threatening to violate the plaintiff's rights; or (3) the defendant is about to remove property with intent to defraud creditors.

So what is a temporary restraining order/injunction and why should you care? A temporary restraining order is a short-lived injunction the court may issue with less notice to prevent irreparable injury until issuing a preliminary injunction. After a temporary restraining order has issued, generally a preliminary injunction hearing takes place within a short period of time. The preliminary injunction is used to prevent irreparable injury until the court determines whether or not to issue a permanent injunction at trial and after notice to the opposing party. There are certain factors that must be considered before a temporary restraining order or a preliminary injunction will be issued. These include: (1) substantial probability of success on the merits; (2) irreparable injury; (3) harm to other interested parties; and (4) effect on the public interest. Each of these questions is fact specific and depends on the circumstances of the case. There are many court cases throughout the United States that interpret these factors and seek to apply them to wide-ranging circumstances. In the end the litigants may seek a permanent injunction. This may be done when: (1) the pecuniary compensation is inadequate (i.e., money damages are inadequate); (2) the amount of compensation is difficult to determine; (3) the restraint prevents multiple judicial proceedings; or (4) for obligations arising

from trust. For a permanent injunction, the court holds a trial on the merits within six months from the temporary restraining order or preliminary injunction unless good cause exists otherwise, or the party against whom the injunction is sought consents to an extension.

There are also things known as "domestic violence protection orders" and "disorderly conduct restraining orders." As the names suggest, domestic violence protection orders and disorderly conduct restraining orders may be issued without notice to a respondent and last until there is a hearing on order, generally within two weeks. Sometimes, emergency protection orders and disorderly conduct orders can last up to 72 hours. Generally, a domestic violence protection order seeks to prevent physical harm, bodily injury, assault, or threats from the alleged household abuser. A disorderly conduct restraining order seeks to prevent unwanted acts, words, or gestures intended to adversely affect another's safety, security, or privacy.
All of these things are classified under the umbrella term "preliminary relief" or "injunctive relief."

Class Actions

Sometimes a lawsuit proceeds with many plaintiffs who have the same interest in the outcome. In other words, sometimes there are so many plaintiffs that share a common claim against a single or multiple defendants, that they bring their case in what is known as a "class action." A class action is governed by certain rules in the law about how it is started and managed. First, there is usually a class representative who is the one person or company who will speak on behalf of the class (this is generally speaking, of course; everyone gets their own right in the lawsuit). Class actions go through all the same procedures as a regular lawsuit, but usually are governed by the court very closely. Sometimes, in huge class actions, a single judge will be assigned to handle all of the cases in federal court. You may have heard of diet drug class actions, or, you may be familiar with opiate drug class actions. For example, class actions can involve: products ("products liability cases"), discrimination against women, hiring decisions based on gender, internet privacy and social media, or misleading and false advertising. Usually, if a settlement is reached, each member of the class gets a share of the settlement after attorney's fees are taken out. Of course, you can "opt-out" of the class if you think your lawsuit is strong enough to proceed on its own and you have the means to finance it. Most people, however, become members of the class and allow the class lawyers to speak for them as their legal representatives. You may have seen notices in magazines or the

newspaper advertisements for class action lawsuits. People are usually notified of a class action by mail, if the company being sued has a record of them using their product, etc. However, if this is not the case people are notified of the class by advertisements in newspapers, magazines, and TV.

Motions to Dismiss and Other Early Dispositive Relief

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Publicity and the Lawsuit

Until a lawsuit is actually "filed," meaning it is deposited into court and a filing fee is paid, a lawsuit is not public. However, once it is filed with the court it becomes public record, except in very limited circumstances (such as juvenile proceedings and the like). So unless you have very nosy neighbors, they will not know about the lawsuit unless it is filed. However, every document that is filed under the lawsuit's case number will be public and is searchable on various websites, unless the court orders otherwise. Therefore, it is best to keep out salacious details, personal information, bank account information, etc. from filings. Indeed, some court rules require this.

The Second Thing You Should Know

DISCOVERY

The next thing you should know about a lawsuit is a process called "discovery." The term "discovery" is a broad term used to describe a system meant to encompass many different tactics used to "discover" the facts of the case. Usually, absent other extraordinary circumstances, the parties use written questions called "interrogatories" or "requests for admissions," along with "requests for production of documents or things" to begin the process of discovering a lawsuit.

Interrogatories

Interrogatories are written questions that one party sends to another that must be answered within a certain timeframe provided for under law. Typically, these questions are limited to the facts and circumstances of the lawsuit, but sometimes they can also appear to be more broad than the facts of the lawsuit. This is because the other side is entitled to determine facts that may lead it to

admissible information at trial. So while the interrogatories may seem obtrusive and invade your privacy, they may not be under the law. Interrogatories such as, "Name all facts that support your claim," or "Describe the factual basis for your defense to the Complaint," are usually proper questions to be asked and must be answered in a timely fashion. Interrogatories are one of the most important discovery tools used in lawsuits because they must be answered under penalty of perjury. A lot of the facts can be discovered by using interrogatories because of these reasons. The party receiving the interrogatories may object to the interrogatory, but typically, absent court involvement, that party must answer the interrogatory subject to the objection. Interrogatories can be used in depositions (to be discussed later), at trial, or in motions (also to be discussed later). Again, this makes them a very useful tool in the discovery process.

Requests for Production of Documents or Things

Sometimes in a lawsuit a party will send "requests for production of documents or things." These are requests that you produce relevant documents to the lawsuit. These would include emails, letters, notes, memos, drawings, photographs, and the like. In certain circumstances they also require you to produce tangible things that may be at issue in the lawsuit. For example, in a products liability lawsuit you may be asked to produce the product or item that caused the injury. In a personal injury lawsuit you may be asked to produce the medical records showing your treatment. In a breach of contract case you may be asked to produce the contract, and all previous versions of it. You get the idea - document requests can be used in a multitude of ways to produce evidence and I have found them to be very useful in discovering the facts of a lawsuit. Again, these have to be answered, and the documents and things produced, within a certain time frame provided under the law. You must produce all documents requested. If you fail to do so, you may find yourself in trouble. This trouble may include being precluded from using a document or thing at trial because you didn't produce it earlier to the other side. This could be, depending on the facts, very troublesome or devastating to your case if it is an important piece of evidence.

i. Injunctions

Sometimes a party may want to inspect something. Typically, this is a piece of property or a product.

Sometimes the party will need to enter a piece of property to inspect something on it, or to inspect the property itself. This type of inspection is allowed under the discovery rules. Usually, such an inspection is conducted at a mutually convenient time for the parties. Similarly, an inspection of a product could be important in a product liability case. Such things as cars, lawn mowers, boats, and even homes, have been the subject of inspections in the past. Really, any time a piece of property is in dispute, or a thing is in dispute, it is subject to an inspection pursuant to the rules of discovery.

Requests for Admissions

Requests for admissions are another useful tool for discovering the facts and narrowing the issues in a lawsuit. A request for admission is a written question to you, or sent by you, requesting that the other side either admit or deny a certain fact. For example, you could use a request for admission to make a party admit that they ran a red light and caused an injury. You could also use a request for admission to lay foundational facts so that the parties can avoid having to go through the trouble of proving them at trial. For example, you may send or receive a request for admission asking you to admit to the authenticity of a certain document or record. The difference with requests for admissions to the other discovery tools we have talked about so far are that requests for admission must be answered within a certain time frame or else they are deemed admitted. Depending on the questions asked, this may be troublesome for you. Usually the lawyer involved in the case receiving requests for admissions gets to work on them right away so that the answers can be property prepared.

Depositions

A deposition is an interesting and very useful discovery tool. Essentially, it is when parties to the lawsuit sit down in one room with a "court reporter" and go over the facts of the case. The court reporter takes down everything that is said in the room using a small machine known as a "stenograph." Lawyers, including your own in some circumstances, will be asking questions about the facts of the lawsuit. Sometimes the questions even delve into legal areas. You are sworn to tell the truth and provide testimony with the same force and effect as if you were testifying live in a court of law. Therefore, the penalties of perjury attach to a deposition. Depositions are probably the most important discovery tool used in a lawsuit. Their usefulness is increased when interrogatories and document requests have been answered prior to the deposition.

Questions can be open-ended, requiring you to explain something, or leading, which requires you to answer a question with an affirmative or negative response. These are the questions that you see most often on television, where a lawyer is thundering away at a witness. This is rarely the case in a deposition; however, leading questions are asked from time to time.

After the deposition is finished, the court reporter types a transcript and you are given it to read. Your lawyer may have a conference with you to discuss how your deposition went, how the facts came out, and what did not go well. Depositions can be used at trial. They can be used to bolster testimony or to impeach the credibility of a witness. One of the worst things that can happen is if a witness testifies one way in a deposition and then testifies another way at trial on the same fact or issue. This will lead to an immediate challenge of the witness' credibility. Other times, depositions are used on appeal so that the appellate court knows what the testimony was. Depositions can be used at hearings as well; they can help judges narrow the issues based on the testimony so that the trial can be shortened. All-in-all, depositions are an important part of the discovery process, and preparing for and taking them must be given proper attention.

Motions to Have Medical Examination

Sometimes a person's medical or emotional condition is in dispute. In this circumstance, one party may wish to have a so-called independent medical examination ("IME") of the party. This is when an independent professional, such as a psychologist or medical doctor, is hired to perform the examination and give an opinion about the examined person's emotional state or physical condition. Later, this professional can then testify at trial, or at other hearings, relative to the person's emotional or physical state. These types of examinations are routinely used in personal injury cases.

Subpoenas

Sometimes a person's medical or emotional condition is in dispute. In this circumstance, one party may wish to have a so-called independent medical examination ("IME") of the party. This is when an independent professional, such as a psychologist or medical doctor, is hired to perform the examination and give an opinion about the examined person's emotional state or physical condition. Later, this professional can then testify at trial, or at other hearings, relative to the person's emotional or physical state. These types of examinations are routinely used in personal injury cases.

i. Electronically Stored Information

There are, of course in this digital age, documents, notes, memos, etc. that are stored electronically. This is referred to as electronically stored information, or ESI. ESI can be found on virtually any electronic device and in the cloud. For example, ESI can be found on telephones, computers, tablets, portable hard drives, and the like. Similarly, ESI can be found "in the cloud" on such sites as Dropbox and Google Drive. All of these places must be searched when doing discovery to see if there are documents, notes, memos, letters, etc. that are relevant to the case.

Sometimes the retrieval of ESI requires a person specialized in computers and forensics to find the ESI if it is buried in a computer hard drive or hidden in files. In these cases the party will have to retain an expert to help them.

Motions to Compel

Sometimes a party will not cooperate in the discovery process, or a party may not fully cooperate with the discovery process only producing part of the requested documents or failing to appear at a deposition or at trial. In these circumstances, a "motion to compel" can be filed. A motion to compel is a powerful tool used when a party fails to cooperate in the discovery process. It essentially asks the court to issue an order compelling answers to discovery, a deposition, or for the production of documents and things. Attorney's fees may be awarded for bringing a motion to compel.

ESI

i. Social Media

Social media has exploded in prominence over the past few years. People use social media instant messages applications for a number of functions, but most importantly, to communicate with each other. Sometimes social media is used to post information about lawsuits that is relevant to a parties' position. For that reason, it is important to store all social media posts, to the extent you are able. It is important if you are seeking information from social media to ask specifically for that electronically stored information.

ii. Text Messages

Text messages have been the downfall of many public servants. In one case, the mayor of Detroit was indicted because of text messages he sent outlining a conspiracy for a public bidding process concerning construction contracts. In many cases in family law there have been incriminating text messages discovered that can affect the outcome of the case. If you believe there are text messages you have relevant to the case, you are required to preserve and protect those messages. Again, just like social media, instant messages, and posts, it is important to ask the other side to produce those text messages in the course of the litigation during discovery.

iii. GPS Information and Cell Phones

GPS information and cell phones are important in criminal investigations, as well as in civil matters. In criminal matters, the prosecutors can use the GPS information in the phone to determine the location of witnesses and of the accused, including during the committing of a crime. In civil cases, while not as ubiquitous, it is smart to contact the mobile carrier to determine if that information is available, should it be relevant to issues in your lawsuit.

iv. Emails

Emails are probably the most important electronically stored information. Nearly everyone communicates by email. In a typically case emails can range from several emails to thousands of emails. Emails often lead to witnesses and other evidence. It goes without saying, since they are so important, that you must ask for emails and preserve the ones in your possession during the course of the litigation.

v. Cloud Storage Sites

Cloud storage sites such as Google, Microsoft, and Apple's Icloud, to the extent they contain information that may be relevant to the lawsuit, should be sought out during discovery. Specific interrogatories directed to finding cloud storage sites and documents contained within them (documents, photos, memos, correspondence) must be served. Similarly, you must preserve these sites and all the documents in them for production.

vi. Electronic Data Records

Your car likely has, if it is a newer model, a "black box" that records information in the event of a crash. For instance, if the airbag deploys the black box will record the speed of the vehicle, whether the brakes were applied, among other things, that lead to the deployment of the airbag. To the extent that you can, you should ask your towing company or insurance company to maintain possession of the black box until the data can be downloaded in connection with a lawsuit.

vii. Scheduling Conferences

Either before discovery starts, or any time after it starts, the parties may request that the court held a scheduling conference. A scheduling conference is just like it sounds - the parties get together with the judge and ask him to set deadlines for doing things in the case so it moves along promptly and efficiently. These things usually include setting deadlines for the close of discovery, setting deadlines for certain dispositive motions, and often times it sets deadlines for the disclosure of expert witnesses. It may also include a trial date, and how many days are set aside for trial. After the scheduling conference, the parties have a good understanding of how the case will proceed through the courts bringing it to trial in a speedy manner.

DISPOSITION OR EARLY RESOLUTION

There are a few ways that a lawsuit can be disposed of before trial. One way is called "summary judgment" or "judgment on the pleadings." Another way is through an alternative dispute resolution method, which is most commonly used through mediation.

Summary Disposition

Summary disposition of a lawsuit means that a judge finds that one party, for a specified reason, is entitled to judgment or dismissal of a lawsuit as a matter of law. This means there are no facts under which the plaintiff could prove that would entitle the plaintiff to relief under the facts of the complaint. On a dispositive motion called "summary judgment" a party seeks judgment as a matter

of law on facts that provide for judgment in its favor or for dismissal of all or a part of the case. Usually, these are granted when there are no facts in dispute that would allow judgment in favor of the other party. You must be entitled to judgment as a matter of law before you are entitled to summary judgment. Summary judgment can also be used to narrow the issues at trial by disposing of one or more claims made by the plaintiff. Summary judgment is a useful tool in narrowing or disposing of claims early before trial. Similarly, "judgment on the pleadings" can narrow the issues at trial, or eliminate the entire case. This is typically because there are no facts pled that would entitle the plaintiff to a judgment. Both of these techniques are commonly used in legal cases.

Another way a case may be resolved is through an alternative dispute resolution method. This may be arbitration, mediation-arbitration, early neutral evaluation, or mediation. Mediation is by far the most popular alternative dispute resolution method. Usually what happens in mediation is the parties agree on a third-party neutral individual to help them settle their case. Usually, but not always, the third-party individual is a lawyer who has been specially trained in alternative dispute resolution methods. The parties often get together in an office setting to attempt to resolve their case. The mediator separates the parties in different rooms. The mediator will then caucus with each party to discuss the facts and circumstances of their case, including strengths and weaknesses and what the likely settlement range would be. After the mediator caucuses with one party, he will go to the other party's room, caucus with them, and determine their settlement range. This is known as "shuttle diplomacy." The mediator then goes back and forth between the parties conducting shuttle diplomacy and seeking to come to a middle ground where the plaintiff will accept some type of monetary settlement from the defendant. This is usually the case, but not always. In some circumstances, the defendant will offer other things besides money that may be acceptable to the plaintiff to resolve the case.

Sometimes the parties will agree to split property. Sometimes the parties will agree that one party is entitled to a future stream of income from things like mineral or oil and gas distributions. Sometimes the parties will agree to do one thing that may be unpleasant for them, such as writing letters of apology or other expressions of regret and sympathy.

Most cases are resolved either through summary disposition or through alternative dispute resolution methods. These seem to be more cost-effective and a quicker resolution for the parties.

The Fourth Thing You Need to Know

THE TRIAL

The trial is the most important part of the case. It is here that you set forth your case and submit your proof and evidence. The trial is where you ask the fact finder to agree with your side of the case and award you the relief you have asked for in your complaint. Or, if you are the defendant, the trial is where you ask the fact finder to find that the plaintiff has failed to carry the burden of proof and the case should be dismissed. After hearing all of the evidence, the fact finder will enter a verdict in favor of one party and against another. This is what you usually see on television.

The Trial

Once all of the discovery is done and the motions have been heard, it is time to go to trial. You must submit your case to the fact finder who will make the decision about who wins.

There are two types of fact finders. The first type is the judge. The judge may,

with the consent of the parties, act as the person interpreting and explaining the law, and also as the fact finder who will make the decision on who wins and who loses. Sometimes it is best to have a judge in a case when you think it can be tried quickly and that the judge's experience in lawsuits would be beneficial.

The second type of fact finder is a jury. A jury can be made up of (in civil cases) six or nine members. These individuals come from a panel of jurors who are chosen at random by the clerk of court. Once there is a big enough panel of jurors they are brought into the courtroom to undergo "voir dire" or jury selection.

i. Selection of the Jury

Jury selection is the process of eliminating jurors who may be unfavorable to your case and finding jurors who may be more inclined to decide in your favor. This is done through questioning by the lawyers. The lawyers question the potential jurors on issues such as their background, belief system, whether they think the judicial system is fair, etc. Then the questions become more specific to the case. Many times the lawyers will ask a juror who may be unsure of thoughts about the case if they could be fair and unbiased. If one of the lawyers believes that a juror cannot be fair, impartial, and unbiased, then the lawyer can issue a "challenge" to disqualify that juror from participating in the trial. After all of the challenges are complete and the jurors who will not serve are excused, you are left with a jury that will hear the case and make decisions based on the law given to them by the judge.

ii. The Opening Statement and the Case in Chief

After the jury is selected, the party bringing the case makes an opening statement. The opening statement is supposed to be non-argumentative (but sometimes lawyers slip some in). It is designed to inform the jury of the basic facts of the case and to describe what they will hear in terms of evidence during the trial. Lawyers sometimes say, "we will prove that . . . " or "the evidence will show . . . " when they are putting on their opening statement. The opening statement is limited to evidence that will be introduced during the trial. In some cases, the opening statement can be quite long, other times it is short and to the point; it all depends upon the lawyer's style and the facts of the case.

After the opening statement is made, the plaintiff is asked to put on his/her "case in chief." This is the proof of the case for the plaintiff. To prove his/her

case, the plaintiff introduces witnesses, documents and things, or other evidence that will tend to show that the plaintiff has been wronged in some manner by the defendant. Fact witnesses can be called to go through examination and cross examination by the defense to establish certain points. A trial can have as few as one fact witness, or as many as 30; it all depends upon the facts of the case and what witnesses are used to prove each needed point. Of course, the fact and expert witnesses are subject to cross examination by the defense. The cross examination will seek to diminish, impeach, or impune the credibility of the witness testifying, and generally show that the evidence introduced is not applicable, relevant, or is diminished in some way that makes it show that the defendant is not liable. The defendant also gets to challenge the authenticity or foundational elements of each document introduced as evidence.

When specialized knowledge or training will help the fact finder (the judge or jury) decide an issue, usually that will come from an expert. Experts are used quite commonly in lawsuits to bolster or attack one party's claim or counterclaim. Experts can be in engineering, medicine, physical therapy, vocational rehabilitation, or just about any other specialty or area where specialized knowledge, training, or experience comes into play. The problem with hiring experts is that they are usually expensive. Sometimes more than one expert is needed to address multiple issues in the case. Like fact finding of an expert, they are subject to discovery. Most typically, the discovery used on an expert is a deposition. That is, the parties will gather in a conference room, much like a fact witness deposition, and ask the expert questions based on the expert's opinions about facts and the lawsuit. For example, in a construction case, the expert might be an engineer or architect who has opinions about the structure or construction of a building. In other cases, such as a medical malpractice case, the expert may be a physician who has an opinion about another physician's care and treatment of a patient. The areas where an expert may render an opinion are wide and varied. Nevertheless, some attorneys consider them vital to presenting their case, or defending their case. The expert will also testify at trial, just like a fact witness. There are some techniques that can be used to exclude an expert from testifying or to limit the testimony, which I will not go into here, but you should generally know that it is available.

Documents may also be introduced. These documents are called "exhibits." The exhibits introduced tend to show that the plaintiff's case is correct and that they should win the case. These are additional pieces of evidence. Documents can be a very important part of the case and they should not be overlooked.

After all of the evidence has been admitted, the plaintiff will "rest" his/her case, telling the judge and jury that the plaintiff has no more witnesses or evidence to put on in support of the plaintiff's case. At this time, the defendant may elect to file a motion to dismiss all or part of the plaintiff's claim for failure to prove it. This is called "moving for a directed verdict." the motion for directed verdict is up to the judge to decide. If one is sustained it means that all or part of the case is over and that the question about that part of the case, or the entire case, will not be heard by the jury. So a motion for a directed verdict at the close of the plaintiff's case in chief is a very effective tool used by the defense to dispose of all or part of the claim against him/her.

If the judge denies the motion for directed verdict, or if the defendant elects not to bring any motions, the defendant puts forth its case in chief. This is very similar to the case in chief set forth by the plaintiff. This means that the defendant makes an opening statements, calls witnesses, introduces exhibits, brings experts in to testify, and so forth. All of the witnesses are subject to cross examination by the plaintiff. All of the documentary evidence is subject to challenge by the plaintiff, just as it was in the plaintiff's case in chief.

iii. The Closing

An important part of the case is the closing argument. The closing argument should, as one commentator said, be able to "stop a train in its tracks while you are delivering it." It is the part of the trial where the lawyer makes the most arguments about the case. The closing ties the facts together with the law and argues to the court or jury for their client's position in the case. The closing argument goes through the positive proof and evidence, states what each witness told the jury, attempts to reinforce the impeachment of witness' credibility and/or testimony, and seeks to limit the effect of harmful testimony or evidence. It can be a powerful event in the trial, evoking emotion, logic, rational thoughts, and deep contemplation by the jury.

iv. Instructions

After closing arguments are made by the lawyers, the judge will instruct the jury on the law. If the judge is acting as the fact finder, then of course, this is not necessary since the judge knows the law. However, if there is a jury then they need to be told what the law is so they can apply the facts to the law. The instructions are part of the case where the lawyers also get input into the law

that will be delivered. Sometimes the lawyers will submit proposed instructions stating what they think the law is. The lawyers then submit arguments on what they think the law is and the judge makes a ruling on the law to be given to the jury.

v. Deliberations

After the jury has heard the closing arguments, received the law from the judge, and has been given the verdict form, they will then retire for deliberations. Typically, in a civil case the deliberations are done within a few hours. Sometimes the jury will ask questions about the evidence and the judge will invite the lawyers to help answer their questions. After the deliberations are done the jury returns its verdict.

vi. The Verdict

Generally, there is a verdict form that the jury will fill out. In the verdict form they announce who has won the case and what the end result should be. For example, the verdict could be for an award of money, costs, and interest. The verdict could also be for the return of property or for a permanent injunction, if that is what is sought at the beginning of the case. After the verdict is entered into the court record, the jury service is over.

After the verdict is read the lawyers may file post-trial motions, which may include motions to reduce the jury verdict's monetary award, motions to set aside the verdict, or motions for a new trial. These motions are all taken up by the district court and usually disposed of by written opinions issued by the judge.

The Judgment

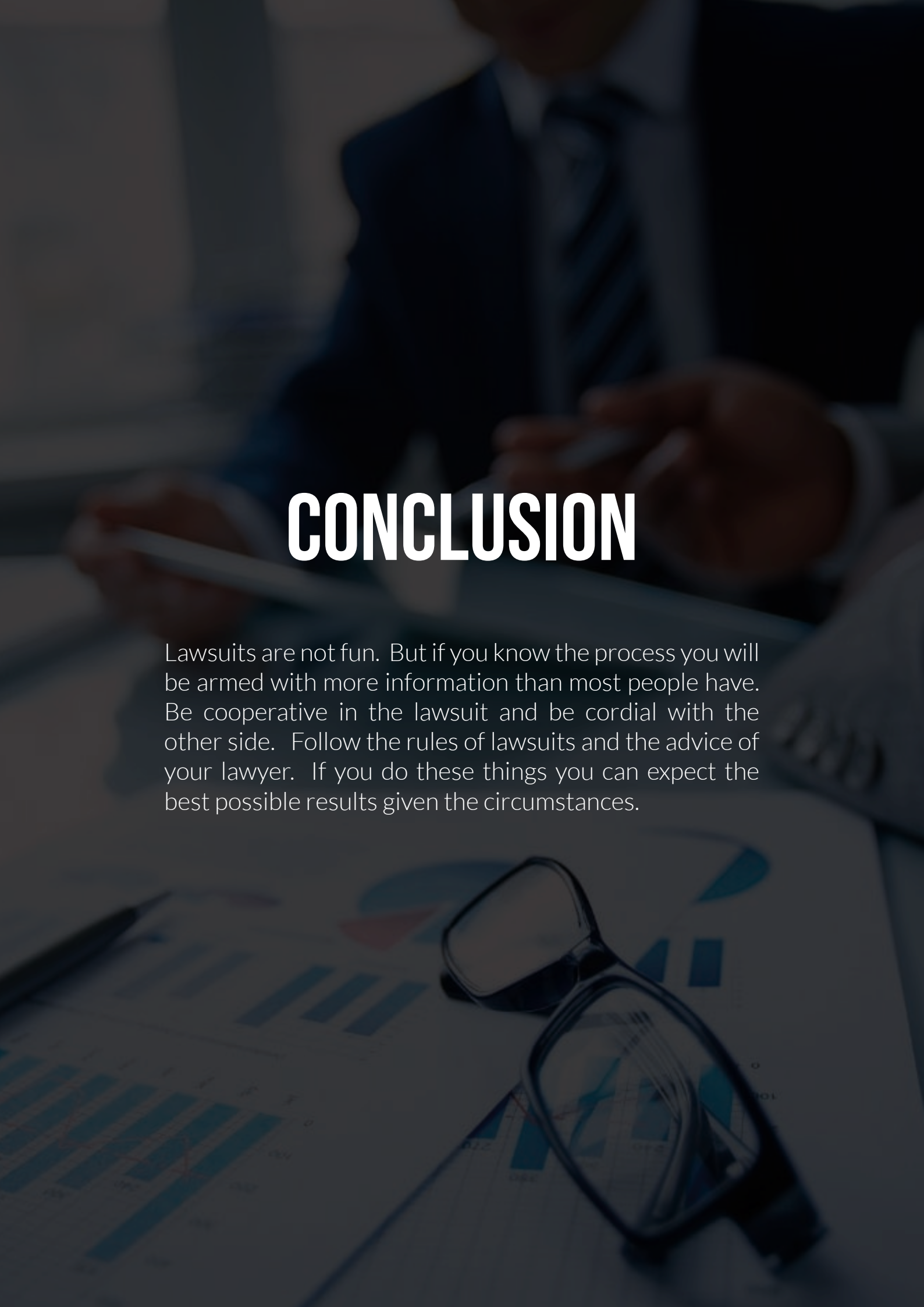
After the court or jury enters its decision on behalf of one party, the clerk of court enters a judgment. The judgment is a piece of paper that can be enforced against the party for money damages or other things. It forces action on the part of the judgment debtor. The judgment debtor will usually have to pay the plaintiff money to resolve

the judgment. Judgments attach to real property so that if a party tries to sell property subject to a judgment it usually won't go through.

What can you do to enforce a judgment? Usually there are steps that can be taken in the lawsuit post-judgment that allow for the collection of the debt. For example, post-judgment interrogatories and document requests can be served on the judgment debtor. Those questions must be answered under oath and will disclose what assets are available to satisfy the judgment. Then you can actually force a sale of the assets. This is usually done by the sheriff of the county where the assets are. However, if you were to force a sale of things that the judgment debtor has a loan on you will probably be in line behind the loaner who will get paid first.

Not all assets can be used to satisfy judgments however. There are various exemptions in the law for some assets. These modest exemptions prevent someone from losing everything to a judgment. You can find the exemptions in state statutes or rules. They are for things like the family car or homestead.

One thing that is important to realize about judgment is bankruptcy. If the judgment is so substantial that there is no hope of repaying you must be aware of the possibility of bankruptcy. If the judgment debtor files for bankruptcy you will fall in the line of "unsecured" judgment creditors. What that means is that you will fall behind the "secured" creditors (those with mortgages or financing statements) to get your money. Usually, the bankruptcy courts sets the way that creditors are paid. If you are unsecured you can expect a substantial reduction in your recovery, if you recover at all. Sometimes it is just a threat to file bankruptcy that can spur judgment creditors to action. The rules about alternative resolutions can apply when you are trying to collect a judgment. For example, you can attempt to negotiate some reduction in the judgment in exchange for forgoing bankruptcy. This reduction then results in the judgment creditor "satisfying" the judgment and releasing it.



CONCLUSION

Lawsuits are not fun. But if you know the process you will be armed with more information than most people have. Be cooperative in the lawsuit and be cordial with the other side. Follow the rules of lawsuits and the advice of your lawyer. If you do these things you can expect the best possible results given the circumstances.

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