A Litigation Overview and What to Expect in Litigation

A Litigation Overview and What To Expect in Litigation

I. Overview of the Process

Litigation is an inevitable part of community association operations. Yet many community association board members and managers have concerns or even fears about litigation. The purpose of this article is to provide education and guidance about the litigation process. Demystifying some of the process and procedures will help participants effectively utilize litigation for the community's best interests.

Litigation is defined as a controversy in a court, or a judicial contest through which legal rights are sought to be determined and enforced. The term generally refers to civil actions as opposed to criminal or administrative processes. Nevertheless, those processes have many similarities to the civil litigation process. This article explains the typical events and procedures found in civil litigation.

Community association leaders are often frustrated by the delay and expense involved in litigation, which limit the ability of a community to promptly resolve litigation by a favorable court ruling. There are several reasons why this occurs, one of which is historical. Prior to the adoption of the Magna Carta and other protections for citizens in medieval Great Britain, the ruling class had unrestrained powers to control people's lives, liberty and property. As a consequence, the judicial system evolved to create a level playing field between the powerful rulers and the common citizen. Over many years, this led to a situation where access to the courts was made easy, as well as the prompt conclusion of litigated matters were made more difficult, except in the clearest of circumstances. To promote effective legal rights for the less powerful, procedural and evidentiary rules ensured that most cases could be heard by either a judge or jury, except in limited circumstances.

Practically speaking, this means it is often difficult to promptly conclude cases without going through many of the pretrial procedures such as the exchange of information required before trial can occur. The judicial process allows for uncertain claims to be asserted in the early phases of litigation. Those claims (and the corresponding defenses to such claims) can be enhanced or weakened during the pretrial discovery or disclosure phases, when both sides are required to exchange information they may not have had access too previously.

Additional contributing factors causing delay in the litigation process may be attributed to crowded court dockets, judicial scheduling priorities, and limited funding for the judicial system. The courts give priority to criminal cases, as well as cases involving the rights of children, the elderly, and emergency or extraordinary situations requiring immediate attention. This means civil lawsuits about money or property rights go to the end of the line in terms of scheduling. Moreover, civil disputes often consume relatively more judicial time due to the complexities and details of civil litigation. Many people turn to the courts for relief, and the court dockets are full. The judicial system has not been spared from budget cutbacks which decrease staff and other judicial resources. Thus, it may take many months, even years, to have your "day in court."

With this backdrop, we now delve into some details about the litigation process. We have included a glossary of recurring terminology at the end of this article, together with a time line showing many of the Colorado District Court civil litigation deadlines.

II. Keys Steps in the Process

Community associations often have the opportunity for a pre-litigation investigatory phase, whether the association is considering filing a lawsuit or another party is threatening litigation. If available, such opportunity

should be utilized because it allows an association to obtain accurate and complete information before embarking on the litigation process. Litigation can be time-consuming, distracting and expensive; so an early and objective evaluation of the issues and the chances (and costs) of success (or failure) represents responsible governance. Whether or not utilizing counsel, it is important to fully develop the history, context, knowledgeable witnesses, and documents before starting down the litigation path.

It has been our experience that many board decisions concerning whether to move forward with litigation, or to resist another party's pre-litigation demands, are often made without the benefit of having complete information. Obtaining complete information on a particular dispute may cause a board of directors to modify its stance concerning potential litigation. Once the lawsuit process is underway, every witness, event, and document will be closely scrutinized, often leading to different conclusions and impressions than originally existed. Therefore, the discussion later in this article about preserving evidence once litigation is underway applies with equal force to any pre-litigation investigation and analysis.

A. You are sued or you file a suit

1. Legal deadlines

The legal system has many critical deadlines which must be followed to prevent the permanent loss of legal claims. Legal deadlines most frequently missed and misunderstood are those relating to actions which must occur in a timely manner before suit is filed. These are referred to as "statutes of limitation." The theory behind these statutes of limitation is that memories fade, witnesses move (or die), and documents disappear. The law considers it unfair for "stale" claims to be brought before the court when too much time has passed so as to create a loss of evidence for the party who is sued.

Moreover, there are different and complicated rules concerning what events trigger (or delay) the time periods within which a lawsuit must be brought. Examples include a one year statute of limitation to file suit to enforce building restrictions, and a six year statute of limitation to files suit for unpaid assessments. It is beyond the scope of this article to discuss these time deadlines. The overarching point is that the expiration of such deadlines means permanent loss of a legal remedy. Legal counsel should be consulted in all instances concerning strategies to preserve legal deadlines and how to avoid the loss of legal rights.

Another common misperception is the belief that sending a letter, recording a lien, or taking some other informal action protects legal rights and prevents deadlines from expiring. This is inaccurate. Generally speaking, the only way to avoid expiration of legal rights is to actually file a suit with a court.

If a lawsuit is delivered to an association's management office, a manager or director, it is very important to note the precise date, method of delivery, to whom delivered, and to keep complete copies of everything which was delivered—this is typically considered the date of "service of process". The deadline to respond to many lawsuits is measured from the date of "service of process", so it is important to have this information. In other

lawsuits, the papers which are delivered will already include a court date by which the association must file a formal response. The requirements for service of process have been

relaxed, so an association should not disregard a delivery which it assumes is improper to trigger a legal obligation to respond.

The routing and delivery of lawsuit documents to lawyers is often delayed, and very little time may be left to prepare response to the lawsuit by the time paperwork gets into the hands of attorneys. This is not a time to be assuming legal deadlines or delaying action. Communication with responsible community leaders and legal counsel is critical in order to preserve legal rights and to avoid the entry of "default judgment." A default judgment is a situation where the court decides that the other side has won the litigation simply because there has been no timely response.

2. Preserving evidence

It is very important to preserve evidence if one anticipates either bringing or defending some form of litigation. The law imposes a requirement upon parties to preserve evidence and to not allow evidence to be lost or destroyed, even if inadvertently. There are two types of data repositories where potentially critical evidence is often stored and later lost: hard copies of written files and electronically stored copies of such files. But these are not the only types of evidence that must be preserved. Product samples, defective materials, audio recordings, and similar bits of information need to be considered and preserved if they might be material information either for asserting a claim on behalf of the community association or responding to a claim made by another. This requirement to preserve evidence extends to evidence both helpful and harmful to the position advanced by the community association.

Thus, if a community association becomes aware of circumstances where it may be starting or defending litigation, it should suspend all document destruction policies, segregate the information, and instruct others who may have such information to do the same. This recommendation is not made simply because it is a good idea. The courts take a very dim view of the destruction of evidence, even if inadvertently done. In appropriate circumstances, the court can decide the loss of evidence means there should be a judicial finding against the party responsible for the loss or destruction of such evidence.

3. Development of a litigation strategy

Whether it's before litigation or immediately after the onset of litigation, one of the most important steps in the litigation process is the development of a litigation strategy. Creation of a litigation strategy will be based upon: (a) reviewing the issues in the litigation; (b) determining, what testimony and documents can be gathered to establish the desired outcome through evidence which is admissible in court; (c) assessing the practicalities and costs of continuing with litigation, and, (d) developing a plan in conjunction with legal counsel to fulfill the objectives of the litigation strategy.

It is important to be objective at this juncture and not be overly emotional, aggressive, or reactive because of the litigation. This is an ideal moment for responsible and knowledgeable decision-makers to carefully and objectively evaluate the situation

including favorable and unfavorable factors, evaluation of the obstacles or uncertainties that might prevent or delay a successful outcome, and an evaluation of the costs of litigation should be taken into consideration. Litigation costs include financial considerations such as the litigation budget and the availability or lack of insurance. Non-monetary considerations include the time and distraction associated with litigation, determination as to whether the litigation may set a poor precedent for similar situations, and whether litigation may damage existing relationships with involved constituencies. Any litigation strategy should consider whether the dispute can be resolved favorably through early settlement discussions. Litigation strategies need to be reviewed and updated as the lawsuit progresses to account for updated information, priorities and developments in the lawsuit.

One of the best times to consider a negotiated resolution to a lawsuit is immediately before or after a lawsuit is filed. Assuming some amount of dialogue and exchange of information between the disputing parties before, or just after, a lawsuit is filed, there often is enough information, both quantitatively and qualitatively, to decide if the matter should be resolved out of court, or whether litigation should be pursued. If more time is needed to explore resolution, the parties could negotiate and sign an agreed-upon extension of deadlines to preserve legal rights, yet avoid or delay the legal expense of going forward with litigation. In some circumstances, the parties are too polarized and positional in the early phases for effective settlement dialogue to occur. However, if the parties can act objectively and exchange information and viewpoints to facilitate negotiations, this is an opportune time to avoid the expense, delay and uncertainty associated with litigation.

B. Responsive Pleadings

There are three broad options for responsive pleadings to be filed with the court in response to the filing of a lawsuit. These are not mutually exclusive options, and may be utilized in conjunction with one another depending on the circumstances. This first phase of the litigation process is a busy one due to the need of developing and sharing information with legal counsel who can guide the client's decisions concerning which type of pleading to file. The client generally has much more knowledge and data available to them, and since legal counsel needs reliable factual details to formulate a legal strategy, the client should expect considerable interactions with legal counsel in very short time frames.

The first type of response is a "motion to dismiss." A motion to dismiss presents certain legal arguments based on undisputed and unchallenged facts, which, if successful, will end the lawsuit without further hearings or a trial. A motion to dismiss presents dispositive arguments for the court's consideration such as the running of legal deadlines, or the lack of a court's jurisdiction (authority) to entertain the dispute, and/or certain legal defenses which may arise as a result of specific statutes or documents governing the parties' relationship. A motion to dismiss requires the presence of no doubts concerning key facts and events, and the clear application of legal doctrines to those facts. The burden rests entirely on the party filing the motion to convince the court there is no need for the lawsuit to move forward, and at the party filing the motion to dismiss is entitled to prevail early in the process.

For the reasons previously discussed in section 1 summarizing the policy considerations about making the courts accessible for those who wish to pursue a legal claim, motions to dismiss must

clear a high legal hurdle with the court. They are not frequently granted, and, in many instances, may not be worth the time, effort and expense. Nevertheless, if such a motion is warranted, it may cause the party filing the complaint to reconsider his/her litigation stance, and/or reveal additional information about the claim. A motion to dismiss may engender a more realistic settlement dialogue, or at a minimum, allow the filing party to learn how the court is analyzing the case on the front end.

The second type of response is an "answer" to the complaint. This filing simply responds to the various allegations, and includes what are known as affirmative defenses. Affirmative defenses are various legal doctrines that may entitle the answering party to prevail even if the allegations of the complaint are established. If a motion to dismiss has been filed, and later denied by the court, then the answer must be filed.

The third type of responsive pleading is a "counterclaim." The counterclaim is often included with an answer. A counterclaim is asserted by a defendant who disputes the complaint and also seeks affirmative relief from the court against the party that filed the lawsuit, known as the plaintiff. If a counterclaim is filed, the plaintiff has the opportunity to respond to those allegations.

The procedural rules governing civil lawsuits include a liberal policy allowing the parties to add to or modify their claims as a lawsuit proceeds. For example, a party might find that it has additional facts, additional damages or additional legal theories that it wants to bring to the court's attention after a lawsuit has been initiated. The procedural rules allow for such amendments, even late in the proceedings.

C. Disclosure and Discovery Phase

The disclosure and discovery phases of the lawsuit are extremely important as neither side in a lawsuit has all the information at the beginning and important documents, knowledge, and witnesses are often in the hands of an opponent or third parties. The procedural rules governing civil lawsuits recognize this reality, and force the parties to share information having a bearing on the issues in the lawsuit, both favorable and unfavorable, with the parties involved. The exchange of this information allows for disputing sides to evaluate the relative strengths and weaknesses of their positions. In Colorado, the obligations, processes, and timing for disclosure and discovery vary depending upon the type of case.

In a small claims court case, there is virtually no disclosure and no discovery. The parties simply bring their witnesses and exhibits to trial, and then proceed without any advance notice of what witnesses or exhibits the other side may bring. In a county court case, a party can require the opposing party to provide disclosure of witnesses and exhibits, by sending copies of documents and lists of witnesses to the other side, after which the opposing party must reciprocate. This usually occurs about a month or less before trial.

In district court cases, the parties are required to make automatic disclosures of witnesses, documents, damage claims, and insurance information. This process generally occurs after the answers and/or counterclaims have been filed. The disclosure process is automatic and precedes any written discovery requests. The theory behind these rules is to limit utilization of discovery processes, which can be expensive.

If a party contends the automatic disclosures from an opponent are not sufficient, the parties can use several "discovery" devices to pry additional information loose. Discovery is the pretrial exchange of factual information about claims and defenses, which allows evidence for trial to be gathered. Discovery can include interrogatories, requests for production of documents, requests for inspection, requests for admissions, and depositions. The procedural rules governing district court cases call for certain presumptive limits on discovery in order to lessen expensive discovery and to tailor needed discovery to each individual case.

"Interrogatories" are written questions submitted to the opponent, which must be answered under oath. "Requests for production of documents" are lists of specific documents or categories of documents submitted to the opponent asking for copies provided by the responding party of such documents. A "request for inspection" seeks permission to enter onto the land of the opponent to inspect and test conditions. (In a personal injury lawsuit, a party can request a medical examination of an opponent.) "Requests for admission" are narrowly drafted requests asking the opponent to admit certain facts, or to admit the application of certain legal principles to facts relevant to the litigation. "Depositions" are recorded proceedings whereby the attorney for one party asks questions of the other party who is under oath. The party responding to the questions has a right to have his/her attorney present during the questioning.

The purpose of discovery is to clarify and reduce disputed issues of fact, and to share available information concerning the claims and defenses so that a realistic evaluation of the case can be made. In certain circumstances discovery can be used to file pretrial motions to limit or resolve certain claims and defenses. The purpose of such pretrial motions is to eliminate the need to go to trial on some or all of the issues in dispute, and to make the trial process quicker, more efficient, and less expensive.

D. Pre-Trial Motions

A "motion" is a request to the court to undertake certain enforceable actions affecting the rights and obligations of the litigating parties through entry of an order. There are a wide variety of pretrial motions utilized in civil litigation. It is beyond the scope of this article to address all of these potential motions. There is no fixed list of motions as different cases generate circumstances for unusual motions. Frequent topics of motions include orders to: add or dismiss parties to the litigation; add or dismiss claims and defenses to the litigation; determine whether the case should be heard by a judge or a jury; enter preliminary injunctions, to maintain or enforce a certain status or condition until trial; require parties to provide discovery to other parties if there is a lack of cooperation; limit the types of evidence which will be admissible at trial; and resolve claims or defenses without the need to proceed to trial.

A motion that resolves claims and defenses without a trial are referred to as "motion for summary judgment." The judicial threshold for obtaining an order granting (approving) a motion for summary judgment is high, however not as high as for a motion to dismiss. . Nevertheless, after disclosure and discovery have occurred, a motion for summary judgment may be appropriate. At that point, each party has had an opportunity to develop evidence from materials previously in the opponent's control, and the relevant facts and information have been made available to both sides. The burden on the party filing a motion for summary judgment is to show, based upon the disclosures, discovery, and relevant documents there is no genuine issue of disputed material fact, and the party filing the motion is entitled to judgment as a matter of law.

At this juncture in the lawsuit, the party responding to a motion for summary judgment cannot simply rely upon unproven allegations or the prospects that evidence may later come to light supporting his/her claims or defenses. Instead, the party resisting the motion must demonstrate through documents, affidavits, sworn deposition testimony, or other evidence there are genuine factual disputes, such as a viable contest about how to evaluate all of the evidence and the facts. If successfully shown, the court is not allowed to weigh the disputed evidence, and a trial must take place.

On the other hand, if disclosure and discovery have been focused and there are no genuine factual disputes, the delay and expense associated with a trial can be avoided. A summary judgment motion can posture the case for a favorable settlement because the responding party may realize it faces the risk of loss without a trial. Moreover, a summary judgment motion often brings to light additional details in the evidence not previously been revealed during the disclosure and discovery process.

Nevertheless, summary judgment is not a magic wand. The law requires the court to resolve all doubts about disputed issues against the party filing the motion. In addition, such motions tend to be long, perhaps complex, and with many exhibits. Such motions constitute a burdensome workload for courts, which are already overworked and understaffed. The motion may not be addressed by the court for many months, perhaps not until the very eve of trial. Therefore, the calculus about whether and when to file such a motion is an important part of any well-developed litigation strategy.

E. Settlement Discussions

Statistics from the Colorado judicial system demonstrate that the vast majority of civil cases are resolved before going to trial. Some cases are dismissed because of successful motions to dismiss or motions for summary judgment, discussed above. Other cases settle early in the life of the case, but most remaining cases settle shortly before trial, “on the courthouse steps”. Settlements occur just before trial because all parties are confronting the reality of a decision which a third-party (Judge or jury) will make concerning their claims. This is the time when the risk/benefit analysis and cost/benefit analysis come into focus for all sides to the dispute.

Because most cases do settle, and since parties will expend considerable resources in the time shortly before trial, virtually all courts require the parties to engage in some sort of settlement dialogue before trial. The court will not learn what concessions may have been made by either party, so any settlement dialogue will not affect the court’s later evaluation of the lawsuit. In small claims court and county court cases, the court may order a settlement dialogue to occur only days or minutes before trial begins. In district court cases, virtually all judges will require the parties to participate in some form of settlement dialogue to be completed approximately three months before trial.

The parties usually participate in mediation, although there are other less frequently utilized types of dispute resolution processes. Other examples include arbitration, a hybrid of mediation and arbitration referred to as “med-arb”, early neutral evaluation and mini-trials. “Mediation” is a process where a neutral party (mediator) upon whom the parties agree in advance, facilitates a dialogue about the claims and defenses in the lawsuit. The mediator does not make factual findings, draw any conclusions about the claims, nor impose any decision affecting the ultimate

issues in the lawsuit. Instead, the mediator tries to broker a deal by encouraging the parties to evaluate their respective risks and potential expenses and liabilities. The mediator encourages the benefits of compromise and closure to the situation. Mediators separately encourage each side to acknowledge potential weaknesses in their case. A mediator inquires whether the litigation process will solve the dispute, and if the parties want to fashion a creative resolution which a court cannot or may not undertake. The mediator's role is to fully explore alternatives to an outcome imposed by a third-party after a trial. The parties involved in civil litigation may be required to engage in good faith settlement dialogue during mediation, but they are never required to settle their dispute.

F. Trial Preparations

1. Preparing for testimony

The prospect of testifying in court under oath, in front of strangers, and under cross-examination from the opposing party's attorney can be very intimidating. There are some very simple rules to make the process endurable: tell the truth, be yourself, and testify only to what you know. While nervousness about speaking in front of strangers is completely understandable, and the judge and jury are generally tolerant of natural reactions to the stress of being in court, the opposing attorney, judge, and juries are also perceptive. Judge, juries, and opposing attorneys will typically notice: testimony from the same witness that varies from point to point; testimony that is vague and lacks specifics or corroboration; testimony that is inconsistent from prior statements; or testimony based upon factors beyond that witness' knowledge, training or expertise.

Overcoming nervousness and embarrassment is important for witnesses to prepare for their testimony including reviewing history of the dispute and the documents likely to be used as exhibits during their testimony. The witnesses should be aware of the topical areas where questions will be asked. Competent legal counsel representing you or your client should prepare you by going through anticipated areas of inquiry and likely exhibits, both from that attorney and the opposing attorney. The key to calm and effective testimony is to prepare, to act as you would in any other conversation, and to not "reach" or guess about testimony or conclusions beyond one's actual knowledge and expertise.

There are several guidelines for testimony which will ensure a smooth and successful presentation. If testimony is lengthy and complex, legal counsel should prepare the witness in greater detail about how to deal with issues that may arise during testimony. The cardinal rule is to tell the truth. This means not only avoiding misrepresentation or exaggeration, but avoiding guesses. As a witness this means answering questions based on personal knowledge known with certainty. There is nothing wrong with a witness admitting that he or she does not remember or is not certain.

The witness should take all the time needed to provide clear and accurate answers. The witness should listen carefully to the question, and it is always appropriate to ask that the question be clarified or rephrased. There is no obligation to respond to an unintelligible question. The witness should think about the answer and it is appropriate to ask to refer to documents or exhibits in evidence. Once ready to respond, the witness should give the most direct plea answer without volunteering additional information. One manifestation of nervousness is that witnesses give long narrative answers which go far beyond the direct

question posed. Resist this urge and wait for the next question. The responsibility of the witness is to give answers, not explanations.

The witness should be courteous and professional, but not friendly or humorous. Despite nervousness, frustration or confusion, it is important to maintain an objective tone without obvious emotion. Witnesses should not argue or become sarcastic with an interrogating attorney. If either attorney objects, stop the response immediately, even if in midsentence, and wait for the Judge to make a decision about the objection prior to completing the response. If in doubt about how to proceed in circumstances where there is an uncomfortable question or an objection, it is appropriate to ask the judge whether the question should be answered. Avoid strategizing about what is the "best answer." If there are particular areas of testimony that need to be cleared up after cross-examination, the attorney working with you will ask follow-up questions to clarify the record.

2. What to expect at trial

Once the actual day of trial arrives, there is a fairly predictable process for the proceedings. Allow plenty of time to arrive at the courtroom before the anticipated testimony. Court security lines can be long, and courthouses can have confusing layouts. Unless you are the designated party or representative of a party, you may have to wait in the hallway outside the courtroom if witnesses are sequestered. "Sequestration" means witnesses are excluded from the courtroom while other witnesses are testifying. This is to ensure truthful testimony, and to lessen the chances that witnesses will modify or adapt their testimony to match that of an earlier witness. There may be delays in the proceedings due to other cases, or because of earlier witnesses or legal arguments, all of which may consume unexpected time. The wheels of justice turn slowly, so anticipate delays.

The attorney who calls a witness begins the inquiry with what is called direct examination. That attorney will ask all the questions he or she believes are necessary for that witness. There may be objections raised to certain questions by the opposing attorney. Those objections will be resolved by the judge, who will inform the witness whether and how to answer. Once the direct examination is completed, the opposing party conducts cross-examination. Cross-examination enables a party (or the party's attorney) to ask focused, leading and somewhat argumentative questions. Cross-examination is the very heart of a trial because it is where the difficult facts and answers are brought forth. Cross-examination has been described as the greatest invention ever in the search for truth.

The responsibility of the witness is to answer the question posed, and to not argue with interrogating attorney. Elaboration may not be permitted. After cross-examination is concluded, the first attorney is allowed to conduct re-direct examination to clarify and elaborate upon testimony raised during cross-examination. The opposing attorney then gets to conduct re-cross examination. At this point, the testimony will be concluded, unless the judge or jury has questions. The judge will ask questions directly. Any jury questions must be approved by the court before they may be asked. If any judge or jury questions are asked and answered, then each side is permitted to conduct some brief follow up examination based on those questions alone.

3. Time required

Depending upon the number and complexity of issues, actual testimony (for either a deposition or a trial) may be a short as 15 or 20 minutes, or as long as a day. There are usually 15 minute mid-morning and mid -afternoon breaks, and a 90 minute break during the lunch hour. If a trial is to a jury, the trial will proceed on consecutive business days until concluded. Nevertheless, if a trial is to a judge, and the trial is not completed in the allotted time, the trial may not resume until after an interruption of several days, weeks or months. This is due to the very busy schedules of most judges, and the lack of law clerks or research assistants to assist the judges.

G. Trial

1. Layout of a typical case

Trials have a fairly predictable pattern. When a trial first begins, the judge will call the case to discuss certain procedural and legal issues with the attorneys (or parties if there are no attorneys involved). Topics include timing and scheduling considerations, outstanding motions awaiting a ruling by the court, witness schedules, and other logistical matters. If the case involves a trial to a jury, the next step is jury selection. In actuality, picking a jury is a de-selection process. An initial large group (usually fourteen) of potential jurors is winnowed down through individual questioning about the person's capacity to serve as a fair and impartial juror. The parties then each exercise their right to strike (reject) certain jurors, leaving a jury acceptable to both sides. The final jury is usually a group of six persons, with an alternate who does not help decide the case unless another juror is excused during the trial.

Next, each side makes an opening statement, to summarize what the evidence will show. Opening statements are neither testimony nor argument, but rather an outline or preview of what testimony and evidence the judge or the jury should expect during the course of the trial. After opening statements, the plaintiff calls each of the witnesses it relies upon to prove plaintiff's case. Each witness goes through the direct, cross, redirect and re-cross examination processes discussed above. After the plaintiff has presented its case, defendants will usually make a motion to dismiss (known as a motion for a directed verdict with a jury) on the grounds that not enough evidence has been shown to entitle plaintiff to any relief. Such motions are only infrequently granted.

Thereafter, the defendant brings forward the witnesses it relies upon, defenses, and counterclaims, if any. Each defense witness goes through the direct, cross, redirect and cross-examination processes discussed above. All witnesses may testify to facts for which they have personal knowledge. All witnesses may testify to certain documents and photographed items introduced into as exhibits.

The court will usually allow certain limited opinions from lay (non-expert) witnesses. An important consideration in any case is whether expert testimony is necessary for that party to establish its claims through proper expert opinions acceptable to the court. Sometimes that

requires expert testimony. Not everyone is an expert in the eyes of the law. Testimony involving scientific, technical or other specialized knowledge is only allowed if the witness

is qualified as an expert by having knowledge, skill experience, training or education in the relevant area.

After the defendant has elicited testimony from all of its witnesses, the plaintiff is allowed to call certain rebuttal witnesses. Rebuttal is a response to unanticipated information developed during the defendant's case. A defendant is allowed to put on a sur-rebuttal to address the new evidence arising from the plaintiffs' rebuttal witnesses.

The court will then allow each side to make closing arguments. Closing arguments are a summation of the evidence and argument to try and convince the judge or jury to enter relief in favor of one party. Unlike opening statements, argument and hyperbole are allowed during closing. If the case is a trial to a jury, the state court judge will then read certain instructions of law aloud to the jury to guide them during their deliberations.

The jury then takes its notes about the testimony, the exhibits admitted into evidence, and jury instructions into the jury room and deliberates until a verdict is reached. If the trial is to the judge alone without a jury, the judge may render a decision immediately, or the same day of trial after a short delay. In many cases, the court will enter a verbal ruling and ask the winning party to write up a written form of judgment, which is a summary of the court's decision. The judge will review and modify it, and sign the final judgment. On the other hand, in a case tried to the judge alone, the judge may instead decide to issue a written decision after reviewing the evidence. This might take days, weeks and even months. There is no fixed time for the judge to issue a decision. As mentioned above, in a jury case the jury retires after receiving the jury instructions, and then deliberates until it has reached a decision. The jury's decision is called a verdict. The court receives the jury's decision and then enters a judgment promptly based upon that decision of the jury.

H. Injunctions

A judge, but not a jury, has the power to enter orders called injunctions requiring a party to maintain, preserve, or restore a certain conditions, either before trial (preliminary injunction) or after trial (permanent injunction.) Examples include orders requiring: a party to restore improperly performed construction, removal of an improper structure, or prohibiting use of a storage unit. The evidence for an injunction is somewhat different, and requires several factors to be proven to the satisfaction of the court. The most important factors are a clearly articulated right to such extraordinary relief, and a danger of imminent harm which cannot be corrected by a monetary award.

I. Post-Trial/Judgment

After the Court has entered a judgment, the parties have an opportunity to file post-trial motions to amend, correct or reverse the initial court decision in case of any error. Such motions are infrequently granted, but in the right circumstances, can be used to correct mistakes arising from

the trial process without the ordeal of an expensive and time-consuming appeal. In addition, the winning, or prevailing, party has the opportunity to file a bill of costs to recover certain out-of-pocket expenses arising from the litigation. If a statute, rule, contract, or declaration of covenants contains provisions entitling the prevailing party to recover attorney fees, a post-trial motion is filed seeking reasonable

attorney fees, in an amount determined by the court during such post-trial proceedings. In some instances there may be hearings to establish the amount of reasonable attorney fees.

III. Appeals

After the court has resolved any post-trial motions, the losing party may decide to appeal. In a small claims or county court case, the appeal is to the district court. In a district court trial, the appeal is to the Colorado Court of Appeals. If a party chooses to appeal a decision from the Court of Appeals, the Colorado Supreme Court may accept a further appeal in limited cases involving important legal principles affecting all persons in Colorado, not simply the disputing parties.

The appellate court cannot alter the factual findings made by the judge or jury. The appellate court's review is limited to correcting any legal errors made by the court below in applying or interpreting the law to the facts. The success rate for most civil appeals is very low before the Colorado Court of Appeals. Such appeals may take 18 to 24 months to be resolved. The appealing party pays for the cost of transcribing the trial record, and submitting all of the exhibits and other pleadings to the Court of Appeals. The parties are allowed to file briefs summarizing their arguments and to request oral argument. The Court of Appeals may affirm or uphold the decision of the trial court, reverse, or undo, the decision of the trial court, and may also remand, or return, all or part of the case to the trial court for further proceedings.

IV. Costs of Litigation

Litigation can become a lengthy, complicated and expensive process which can be difficult to halt once underway. While a small and simple county court case may cost under $1,000 in attorney fees and costs, district court litigation, depending upon the issues, the complexity of the case, and the inflexibility or motives of the parties, or the importance of the dispute, can easily grow into many thousands or hundreds of thousands of dollars. A cost benefit analysis and risk benefit analysis should be taken before and during litigation due to the expense of litigation.

Colorado statutes and case law allow the party prevailing trial recover certain expenses of litigation such as filing fees, subpoena fees, fees for depositions, fees for expert witnesses, etc. If a statute or rule allows an award attorney fees based on the claims proven, or if a contract or covenants contain an enforceable attorney fee provision, the prevailing party is also entitled to recover attorney fees. For example, many recorded covenants contain a provision that the successful party enforcing any obligation arising under the covenants can recover attorney fees. Colorado's comprehensive statute for community association governance is known as the Colorado Common Interest Ownership Act (CCIOA). That statute contains a provision enabling any party who successfully enforces the statute or governing instruments covered by that statute to recover attorney fees.

The amount actually spent is not necessarily the amount which will be awarded by the court. The court determines if the amount of time spent and the hourly rates for the attorneys are reasonable under the circumstances. There

are many instances where civil litigation progresses to the point where the substantive issues are resolved, but the parties cannot agree regarding the obligation to pay attorney fees. This can often turn into litigation requiring as much effort as the underlying dispute.

Roles of Key Players

A. Board

The board of directors' role in litigation is the same as for other governance issues. The board remains the ultimate decision maker concerning litigation issues. While a final court order may limit or impact the board's decision making abilities, during litigation, the board needs to keep abreast of significant developments. Certain litigation matters may be relatively straightforward, and the board will be able to make decisions about whether and how to proceed without additional or extensive consultations. Other matters will require significant factual research and utilization of one or more of the following groups/persons to assist the board in its deliberations and decisions. When litigation issues are discussed, the board should maintain the confidentiality of attorney-client communications and related matters by going into executive session to discuss privileged and sensitive issues. Moreover, the minutes of any board meeting should only reflect the fact, but not the content, of any executive session discussions

B. Litigation committee

Committees of the board are a helpful and useful device to delegate certain functions, accomplish certain tasks and report back to the board. If litigation is particularly complicated, the litigation committee established to assist the board by undertaking research and then bringing recommendations back to the board. Any litigation committee should have a board member as a chairperson. Depending upon the governing documents of a community, other non-board member participants may be included. If litigation involves a board member directly, as a plaintiff or as a named defendant, then that board member has a conflict of interest, and should not be participating in privileged discussions or decision-making concerning the lawsuit. In those instances, the board of directors as a whole should pass a resolution creating a litigation committee which does not include the affected board member. Is also permissible for a board to delegate, to the committee, final decision-making authority regarding the litigation in such situations.

C. Attorney

Legal counsel will guide and advise the client concerning the litigation process as summarized above. However, a board needs to provide the attorney with reliable and updated information concerning historical facts and ongoing factual developments so the attorney can properly counsel the association. Legal advice based on incorrect assumptions or information serves neither the client, nor the attorney well. The board should expect the attorney to provide updated recommendations how to proceed in litigation, how to enhance the client's position, and about the anticipated costs and risks associated with further litigation. These discussions should occur on a confidential basis during an executive session.

D. Manager

The community manager is the conduit for communications between the attorney and the board of directors. Since the board will only be meeting periodically, the manager may have the day-to-day responsibility of relaying information between the board and attorney. In such case, the board should adopt a written resolution specifying that the manager is an authorized agent of the board for purposes of relaying lawsuit information. This is a frequently overlooked step and important to

preserve attorney-client privilege. Because managers frequently spend lengthy periods in court and away from their other duties, many community association management companies justifiably include fee schedules in their contracts to address time spent in court proceedings.

E. Others/Experts

During the course of litigation, the board may need to communicate with witnesses and experts in order to make informed decisions about the litigation. In certain instances, a board may want to extend the protection of privileged communications with attorneys to those witnesses and consultants, which is known as the work product doctrine. Examples include consultations with engineers or contractors before considering whether to pursue litigation involving defective construction. Another example is consultations with legal counsel about an expert and deciding how to proceed. There may be several witnesses, or categories of witnesses, for whom there is no privilege or protection. Nevertheless, it is important for the board to identify to legal counsel potential or likely witnesses so that legal counsel can evaluate whether those witnesses can help or hurt the association’s position in the litigation process. In district court cases, expert witnesses need to prepare and share reports with the opponent setting forth their proposed testimony.

CONCLUSION

The purpose of this article is to provide a general overview of the litigation process and instill familiarity with recurring issues that arise in most lawsuits. The litigation process is a formal and structured process used to find the “truth” and resolve disputes fairly. An awareness of these overarching goals leads to a greater appreciation of the intense, time consuming, and challenging nature of the litigation process. An awareness of how the mechanisms and details of the litigation process fulfill its purposes should help make the process more understandable. Each lawsuit involves different factors and considerations. Many lawsuits will include topics discussed this article, and other lawsuits will involve topics not even mentioned. Please contact us if there is anything we can do to clarify this article or the litigation process.

GLOSSARY OF TERMS

Answer: A document filed with the court responding to the allegations of a Complaint, and including affirmative defenses.

Affirmative defenses: Various legal doctrines that may entitle the answering party to prevail even if the allegations of the complaint are established.

Complaint: A document filed with the court and delivered (served) to the responding party (defendant) which sets forth factual allegations and asserts the right to legal relief against another party based on the circumstances.

Counterclaim: A document filed by a defendant who disputes the complaint and also seeks affirmative relief against the party that filed the lawsuit, known as the plaintiff.

Default judgment: An order entered by the court where the judge decides that a party has won the litigation simply because there has been no timely response by the party obligated to respond.

Deposition: Out of court recorded proceedings whereby the attorney for one party asks questions of the other party who is under oath. The party responding to the questions has a right to have his/her attorney present during the questioning.

Discovery: The pretrial exchange of factual information about claims and defenses, which allows evidence for trial to be gathered. Discovery can include interrogatories, requests for production of documents, requests for inspection, requests for admissions, and depositions.

Injunction: A court order to maintain, prohibit or require a certain status or condition.

Interrogatories: Written questions submitted to one of the parties to the lawsuit inquiring about facts in dispute, which must be answered under oath.

Mediation: A process where a neutral party (mediator) facilitates a dialogue about the claims and defenses in the lawsuit. The mediator tries to broker a resolution by encouraging the parties to evaluate their respective risks and potential expenses and liabilities, leading to an agreement to settle the dispute.

Motion: A request that the court to undertake certain enforceable actions affecting the rights and obligations of the litigating parties through entry of an order.

Motion for summary judgment: A request for an order from the court which resolves claims and defenses without a trial based upon undisputed facts.

Motion to dismiss: A request that the court terminate the litigation without any trial.

Requests for admission: Narrowly drafted written inquiries asking the opponent to admit certain facts, or to admit the application of certain legal principles to facts relevant to the litigation.

Request for inspection: A written request seeking permission to enter onto the property of the opponent to inspect, measure and test conditions on said property.

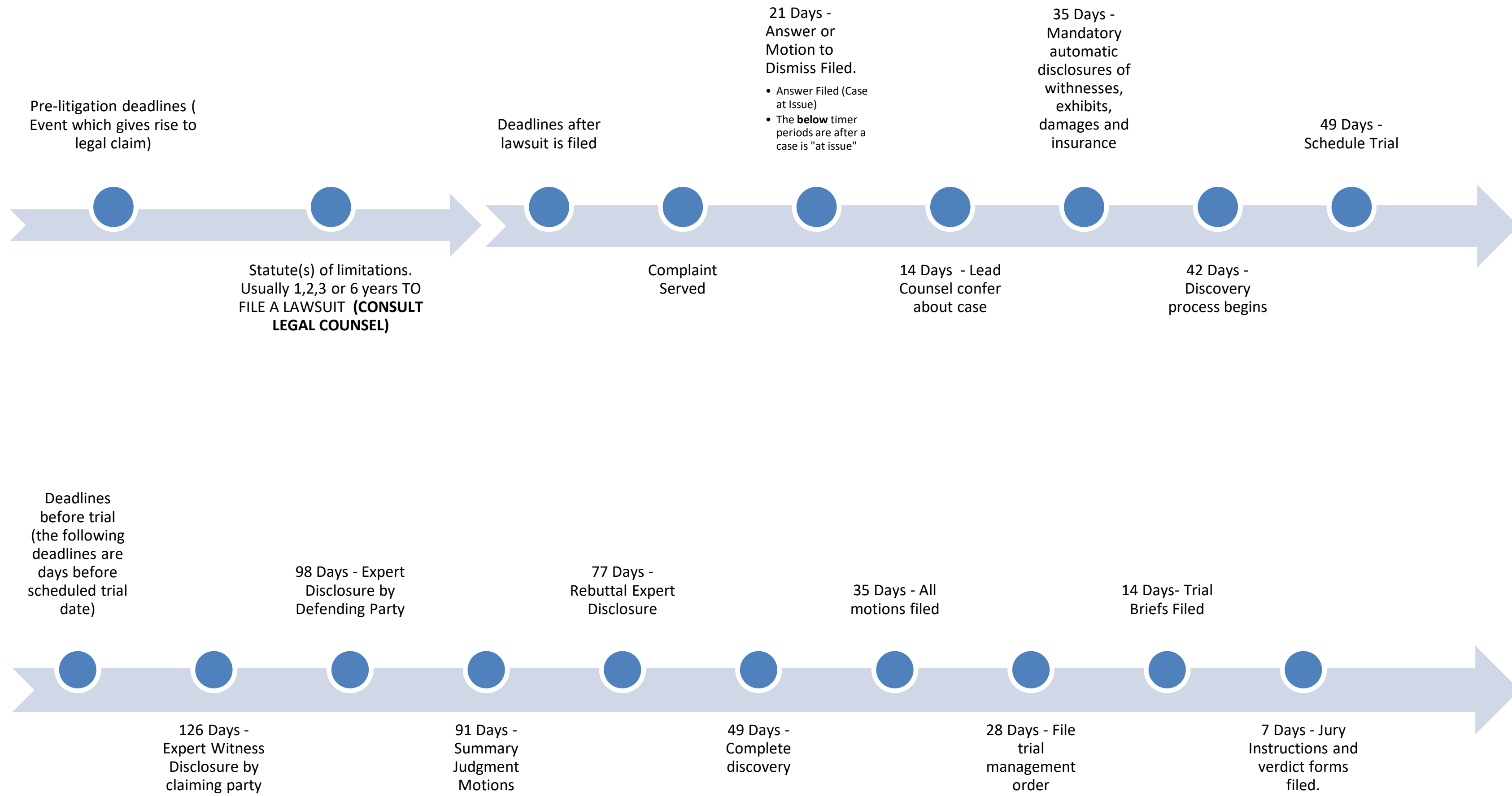
Request for production of documents: A written lists of specific documents or categories of documents submitted to a party in litigation the opponent asking for copies of such documents from the responding party.

Sequestration: A court order that witnesses are excluded from the courtroom while another witness is testifying.

Service of process: Delivery in person of the summons and complaint to the defendant.

Statutes of limitation: Laws passed by the legislature setting forth the time periods, usually measured in years, within which a lawsuit must be filed after an event which gives rise to legal rights.

DISTRICT COURT PROCESS



Altitude Community Law P.C. *Attorneys at Law | Denver | Loveland | Colorado Springs | Frisco | Durango*
555 Zang Street, Suite 100, Lakewood, Colorado 80228-1011 **Tel** 303.432.9999 **Free** 800.809.5242 www.altitude.law