Scribbles Squibs* #63 (June 30, 2018):

A SUPERIOR COURT CASE FROM BEGINNING TO END: THE LITIGATION PROCESS[1]

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I. INTRODUCTION.

It's difficult when a contractor is about to enter into litigation but has little idea as to what actually happens in a court case. That lack of knowledge can hurt that party's chances in litigation and can cause that party to make poor choices with regard to that litigation. It is to help minimize that unfortunate result that I offer this greatly-oversimplied explanation of the different stages of a court case in the superior court. We'll also discuss some ways to save some money, here and there, and to improve your chances for success.

Much as the different stages of a construction project are scheduled through a critical path or some other form of scheduling method, the various stages of a civil litigation are established by a 'tracking order', which is a court, computer-generated list of the key stages/tasks in a court case that need to be performed and how long a party has to accomplish them. For simplicity's sake, most of this explanation will be from the viewpoint of the plaintiff, the one who is suing or making the claim. But, as some of the steps are only taken by the defendant, the one being sued and against whom the claim is being made, such as counterclaims and third party claims, we'll discuss these, as well.

So, a construction company has decided that it is going to sue someone. Or, for that matter, your company has been sued. This discussion is not oriented towards fairly simple collection cases in which the defendant's liability for the claim is reasonably clear. Rather, this article is oriented towards litigations where the defendant's liability for the plaintiff's claim is not crystal clear and, therefore, there really are issues to litigate.

One must realize that almost all of these steps are imposed upon the parties and their attorneys by the court. In other words, a party's attorney will have to conduct his/her activities in accordance with a variety of different sets of rules, the sum total of which is thick enough to choke a horse![2] If the clerk's office or a judge tells a party and his/her attorney to be present in court at any particular time, that party and attorney must comply with that order or direction or risk having his/her complaint dismissed (as to plaintiffs) or have a judgment enter against the non-appearing parties (as to defendants).

Often times, clients are anxious to get before a judge to tell their story. Generally speaking, though, there are no hearings before a court with witnesses until trial, about five years away. So, unless something unusual happens, we will not be able to get any witnesses before a judge for roughly five years from the date of filing the complaint.

Whether this should be the case or not, civil procedure can vary from county to county. And, in the ordinary course, you don't get to select a judge to hear your case. You get the judge that is sitting in your session at the time your matter comes to hearing or trial. For more complicated matters, a dozen different judges may conduct hearings as to a variety of different matters that arise in the case.

What are the decisions and steps a plaintiff must take?[3]

II. THE LITIGATION PROCESS.

A. FILING THE CASE.

A case is filed by a plaintiff filing a complaint with the Clerk's Office. The filing fee is currently $275.00, which is the fee for a case seeking twenty-five thousand dollars and the fee for a case seeking twenty-five *million* dollars. Complaints are served on defendants with 'summonses', a court-produced form that cost five dollars per summons. An average charge for a sheriff to serve a defendant with process is more than fifty dollars.[4] This is different from arbitration before the American Arbitration Association, for which the amount of the filing fee is determined by the amount of the claim. Arbitration filing fees can be astoundingly expensive.

Certain types of cases can only be filed in one particular court. And, they can only be filed within periods of time known as 'statutes of limitations'. For example, one generally has six years to file the average contract suit. However, for some kinds of contracts, the plaintiff might have twenty years to file suit. A claim against a payment bond, which is a form of contract claim, generally speaking has to be filed within one year.

Once the complaint has been filed, it will be assigned a docket number, which is just the case file number. At that point, the plaintiff has approximately ninety days to serve the defendants with the complaint, a summons, a copy of the tracking order and, often, initial discovery. Such service has to be generally accomplished by the sheriff's department for the county in which the defendant lives or has its business. Under some situations, the process can be served by constables, this being discussed later.

B. WHAT TRACK TO CODE THE CASE UNDER.

There are only two kinds of 'tracks' construction cases are coded to.[5] These are the 'Fast Track' (FT) and the 'Average Track' (AT). FT cases generally have all activities in the case taken in about three years. AT cases generally have all activities in the case taken in about five years. These are estimated lengths and they can vary from county to county. Worcester County cases, for example, have taken longer to conclude in recent years by as much as an additional year.

There are different case descriptions associated with the different tracks.

For example, cases described as ‘construction disputes’ and cases described as against a ‘general contractor payment bond’ are both coded to the AT.

On the other hand, cases meeting the description of ‘services, labor and materials’ are coded to the FT. I think the idea behind this case designation is for a case that is significantly less complicated than an average construction dispute. This might be for claims by an individual or small company which provided labor and/or material to a job which was a relatively simple undertaking. But, I’ve seen complex construction cases coded under this description in order to get a case in as an FT case. My experience has been that the various clerks’ offices accept the track designation as made by the plaintiff’s attorney, who is the individual who actually chooses the track.

One might think, then, ‘why wouldn’t I want to code all of my cases to the FT?’ The answer to that may depend on how complicated the case is going to be. Under the AT, the parties get two years for discovery, which sounds like a lot of time, but, which, in reality, goes by very quickly. Under the FT, there is less time for case preparation, including a shortened period for discovery.[6]

There is a delicate balancing act that may be involved with this.

On the one hand, a plaintiff needs to have enough time to do such discovery as is necessary to prepare its case. A plaintiff needs to keep in mind that in a civil case it has the burden of production of evidence and the burden of proof. The various parties against which the plaintiff wants to take discovery against might resist that discovery. One might get involved with things such as motions to compel production of documents and motions for protective orders. These things take time, as from start to finish such a motion might take three months to receive an actual court decision.

On the other hand, my experience has been that the closer one gets to an actual trial, the more likely a defendant will be to agree to a settlement.

Shortly after the filing of the complaint, a court will issue a ‘tracking order’, which identifies the key activities that are typically encountered in the preparation of a superior court case and assigns time periods by which each activity has to be concluded.

C. PLEADINGS.

These are documents which reflect what are the claims that are made by the plaintiff (the ‘complaint’) and what are the responses to those claims as made by the defendant, which are made in an ‘answer’. There are different additional documents which might be filed by the defendant. A defendant can file a ‘cross-claim’ against a co-defendant under some circumstances in which the defendant asks the court to assess some or all of its responsibility for damages to another defendant. And, when the defendant has claims that it could make against the plaintiff, these are asserted by a ‘counterclaim’. If the defendant believes that some non-party to the case may have some obligation to reimburse the defendant for some or all of the claims that are being made against it, that defendant can file a ‘third party complaint’.

D. JURY CLAIM OR NO JURY CLAIM.

Typically, either side can request a jury trial. Generally speaking, this selection is made at the very beginning of the case, made with the complaint (for the plaintiff) and with the answer (for the defendant). The time within which such a claim can be made is limited and very short. And, not all kinds of cases can be heard by a jury. A claim in contract can be heard by a jury. But, a claim under most statutory remedies, such as unfair and deceptive trade practices (C. 93A), can't. All parties don't have to agree as to whether there will be a jury or not. If either the plaintiff or the defendant requests a jury, then it is a jury case.

The next question to be answered is 'do I really want a jury?' Jury service is something that the state compels and that a great many people are not happy about. It's a fair assumption, then, in considering any particular jury that probably half or more of the people on the jury wish they weren't on the jury. Construction cases, other than for the parties and their attorneys, are boring. And, they are also complicated, full of a lot of paper (exhibits) and hard for the average person to understand. In addition, a construction case usually takes many days to try. Since most counties follow a 'one day or one trial' rule, those on the jury want to get off of it as quickly as possible. The longer a boring case takes to try, the more likely that a jury is going to punish one of the parties and/or their counsel.

This is not to say that judges like construction cases. By and large, they *hate* construction cases for some of the reasons set forth above.[7] They are, however, paid to do this and, unlike members of the jury, are not constantly looking at their phones to figure out how much work they are missing inasmuch as they are already at their place of employment!

Conventional wisdom is that most construction cases should not go to the jury. There are, of course, exceptions, depending on the circumstances of any particular case.

E. SCHEDULING CONFERENCES.

These are more common in the state district court (cases with damages sought of less than twenty-five thousand dollars) and in federal court (cases with damages sought of more than seventy-five thousand dollars, with certain additional factors). They are usually scheduled through the clerk's office. Although the Rule does not specifically provide for this, I have seen situations where attorneys have requested them.

The purpose of them is to try to establish an agreed-to schedule for the events of the case that is more tailored to the parties' actual case rather than just be subject to the arbitrary event durations established by a tracking order.

A further purpose of these are to get the lawyers together at the same time. This doesn't happen all that much today. Every time they are brought together provides the possibility for settlement discussions. And, like any business deal, the better the attorneys get to know one another, the greater the possibility for an earlier resolution. As strange as this may seem, after attorneys actual try a case together, some of them achieve a relationship with a certain element

of bonding or trust or business friendship. After all, they have both been through the same very trying experience.

There are the usual subjects of a scheduling conference.

(1) The simplification of the issues;
(2) The necessity or desirability of amendments to the pleadings;
(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(4) The limitation of the number of expert witnesses;
(5) The timing and extent of discovery;
(6) The preservation and discovery of electronically stored information;
(7) Agreements or proceedings for asserting claims of privilege or of protection as trial preparation material after information is produced;
(8) The advisability of a preliminary reference of issues to a master;[8]
(9) The possibility of settlement;
(10) Agreement as to damages; and
(11) Such other matters as may aid in the disposition of the action.

F. MOTIONS

These are the work horses of litigation. They can cover a wide variety of subjects. But, basically, they occur because one side wants to do something and the other side is not inclined to do that. There are other many other times they are used. These can occur throughout the entire pendency of a case. They are the way of putting an issue in front of a judge for that judge's decision/direction as to a particular problem applicable to a specific case.

Prior to 1988, parties could schedule hearings on motions in as little as seven days. This was a great vehicle for young, inexperienced lawyers to learn how to conduct themselves in court and in how to speak to a judge. Among other things, this tended to somewhat limit discovery abuses (where one party is seeking more discovery than the case merits, sometimes done to try to force the other party to settle and/or to cause the other side to run up a big legal bill that is more difficult for one party to pay than the other.)

They also allowed lawyers to get to know one another. If two parties don't file motions or conduct depositions, they attorneys might not even meet for three or four years after a case is filed. It's often a relationship between the attorneys which transcends the adversarial process that leads to better chances of achieving settlements.

However, since 1988, there are, generally speaking, no motion sessions and motion hearings are set down by the clerk's office only as to issues a judge determines there should be a hearing on. A party is not entitled to a hearing on any particular motion although, presumably, a party will get a hearing for dispositive motions, which are motions that might end the case, such as motions to dismiss and motions for summary judgment.

G. DISCOVERY.

This is how parties prepare their cases through 'discovering' or obtaining information from the other side and access to the other side's witnesses and documents. Although there are other potential choices, there are basically three fundamental discovery devices. The first is for one party to provide the other party with written questions (interrogatories) that the other party will have to answer, the signing party (meaning the client) answering these questions under the pains and penalties of perjury. The second discovery device is through requests for production of documents, where one party asks the other party to provide access to its documents with regard to the subject matter of the dispute. The third discovery device is to bring the other party or an outside witness to your lawyer's conference room to answer questions in front of a stenographer this, again, under the pains and penalties of perjury. Under our Rules of Civil Procedure, this allows a party fairly open access to the other side's witnesses, with their lawyer having very limited grounds for objecting to questions and/or directing the witness not to answer. This is the way for one person to get that witness's story down before trial, which is useful for a variety of reasons.

Discovery is fairly liberal and broad. All that a party seeking discovery need show is that the requested discovery is likely to lead to the discovery of admissible evidence. Judges interpret discovery requests quite broadly. The idea behind this is that the more a party learns about the other side's claims and defenses, the more likely there will be a settlement of the claim.

When a case is coded to the Average Track, the parties have two years within which to conduct discovery.

H. MOTIONS FOR SUMMARY JUDGMENT.

This is where one side is going to try to hit a homerun ball. It's essentially a trial by affidavit. The moving party has to be able to demonstrate, however, that there are no genuine issues of material facts and that the moving party is entitled to a judgment as a matter of law. They are very hard to be successful with in disputed construction disputes because, generally speaking, there are usually genuine issues of material fact involved with the case. During a motion for summary judgment, a judge does not try to resolve those genuine issues of material fact. Once such issues have been identified, pursuant to the applicable rule, the motion has to be denied.

These types of motions can be expensive. They will require: (a) the preparation of a motion with proposed order; (b) the preparation of a legal brief in support of the motion; (c) the preparation of one or more affidavits (sworn statements); (d) an identification of what the moving party considers to be the material facts in the case, which the moving party has to present to the other side in a statement of material facts. The opposing party will file similar documents in opposition to the motion for summary judgment.

Sometimes a motion for partial summary judgment might be in order. This seeks a decision that the moving party is entitled to a judgment or dismissal of a portion of the case.

This can simplify and shorten trials in some circumstances by removing issues that otherwise would be involved in a trial.

Generally speaking, such motions are filed fairly late in the case, after both parties have had an opportunity to discover the other party's facts, documents and witnesses.

These motions are attempted, generally speaking, just before the pretrial conference or just after the pretrial conference.

I. MEDIATION.

At around this time, the parties can consider mediation, which is an attempted resolution of the dispute outside of the context of the actual court case. This is not part of your actual case. In years gone by it was, although in those days it was referred to as a 'conciliation' and was conducted through the clerk's office. By and large, this is no longer the case in part due to budget cut-backs for the court system.

Although there are any number of companies offering mediation services, experienced construction attorneys will usually agreed to a mediator out of a pool of probably less than twelve possible mediators, which the attorneys know to be excellent construction attorneys with experience in mediating cases. This offers more flexibility to the parties (and their attorneys) and this is usually a lot less expensive than some alternatives. In addition, if the lawyers use a mediator they have been in front of before, this can increase the possibility of a settlement.[9] The mediators are compensated by the parties, each party paying half. My last mediation was in front of a mediator whose hourly charge was $475. (And, he was and is worth it!)

This is not conducted in a courtroom but usually in a mediator's conference room. The mediator does not 'decide the case', determining who is right and who is wrong. A mediation is a controlled settlement meeting where the mediator works for both sides in attempting to negotiate some form of settlement.

After hearing the different parties' attorneys make opening statements, the parties are separated into two conference rooms. Then, the mediator essentially commutes between the parties, relaying to one side the other party's demands or offers. A useful thing that a good mediator will do is to advise the different parties as to the strengths and weaknesses of their case. This is of some use to attorneys who have been advising their clients to proceed with the case in a certain manner, which advice the client is not following. Hearing something similar from a mediator is often helpful in changing the client's mind, which is usually to the client's advantage (whether s/he realizes this at the time or not!)

The parties will not come together until the case has been settled, if it is settled. Better mediators will require the parties to draw up a settlement agreement right on the spot, setting forth what the terms of the settlement are, having both the parties and their attorneys sign the document. This is to try to avoid having the parties and their attorneys going back to their offices and then having second thoughts about the settlement they had agreed to.

If the mediation is unsuccessful, no aspect of it can be referred to by either party in any subsequent litigation. It is literally without prejudice to any rights that any party has in court.

Although, historically, mediations have tended to be scheduled until some time around the time of the pretrial conference, increasingly, parties are seeking mediations much earlier in the court process. If a case is going to settle, then it's going to settle, saving the parties the aggravation and expense of further litigation.

J. PRETRIAL CONFERENCES.

At this point in time, the parties are very deep into the case. By this point, most of the discovery has taken place. What is required at this point is for the parties to attend a pretrial conference. The attorneys are required to prepare a pretrial conference memorandum, which they will both sign. It is comprised, usually, of eight specific things: First, the preparation of a statement of agreed facts. Secondly, each side must provide a brief statement of what each party expects the evidence to show. Thirdly, there has to be an agreed suggested description of the case, which would be something that would be read to the jury. Fourthly, the parties have to identify any particular unusual legal issues in the case. Fifthly, they will have to provide the name and address of each witness. Sixthly, the parties have to identify the names and addresses and qualifications of the expert witnesses. Seventhly, the parties have to provide an estimation of the likely length of the trial. Lastly, the parties have to advise as to what settlement discussions there might have been and what possible alternative dispute resolution methiods (i.e. mediation, arbitration) that the parties can agree to.

At this conference, generally, a trial date will be picked, which will most likely be at least several months in advance.

At that point, the parties will get a trial order, which will require a significant amount of additional work for your attorney. Among other things, the parties have to come to agreement as to which of their exhibits they agree to going into evidence as joint exhibits and which exhibits are going to be objected to. The attorneys are likely to send out subpoenas to the witnesses that they don't control – i.e. non-employees, outside witnesses -for the date of this trial.

In addition, the trial order is likely to direct the attorneys to enter into as many stipulations as to the relevant facts they can agree to. The parties will be directed to prepare jury instructions for jury trials and requests for findings of fact and for rulings of law in jury-waived cases.

Closer to the trial, your attorney will want to meet with your witnesses, both to prepare them to testify and to identify what they have knowledge to testify to.

The chance that the court will be ready for your trial on the date selected is not likely. At some point you may be directed to appear on another date. It may also happen that you have to appear on a certain date with your witnesses lined up only to be told to come back on another day. This can happen several times, which is both annoying (to your witnesses) and expensive in terms of getting ready to try a case that you won't be able to try on that date.

At some point, you will actually get reached for trial, giving you an opportunity to tell your story to either a judge or a jury for them to decide your case.

III. POTENTIAL WAYS OF SAVING MONEY, RESOLVING CASES AND OTHER (HOPEFULLY) HELPFUL IDEAS:

A. Keep very good job records including plenty of dated pictures and videos and good daily reports on *all* of your jobs. Construction cases are largely tried on the parties' files. Remember that yesterday's good customer might turn out to be the customer from h*** today or tomorrow. When it comes time to present your claim or defense to your attorney for the first time, give him/her a comprehensive and documented position with all supporting documents. This could cut the attorney's review charges down some and will help the attorney in making his/her evaluation of the case.

B. Although the superior court accepts cases where damages are in the amount of $25,000 (and up), unless there is a clear attorney's fee provision in your contract and/or you are suing under a statute that provides for the payment of attorneys' fees, keeping this activity economical is a serious challenge for cases at around twenty-five thousand dollars. Exceptions could include cases against general contractors' payment bonds on public projects, which claims include a successful plaintiff's attorneys' fee award. It's not that with these cases you will actually be getting attorneys' fees when you settle them because, in most cases, you won't. It's just that sureties tend to settle cases more quickly than do contractors. As unlikely as this may seem, they are as cost conscious as you are, possibly even more so.

C. For cases which appear as if they are going to be uneconomical for an attorney being paid on an hourly rate, try to find a collection lawyer who will handle it on a contingency fee. By and large, they don't have the construction law knowledge and experience that a construction lawyer will have. Also, since they accept cases on a contingency fee, they tend to have a fairly large volume of cases and usually don't push their cases very hard. This can mean that it will take longer for your case to be resolved. If you are going this route, don't be afraid to negotiate the percentage of the recovery the lawyer will be paid. So, for example, if the case settles before suit is filed, then s/he might get a certain percentage of the recovery. If the case settles during litigation, s/he might get a different percentage of the recovery. And, if the case is tried, s/he might get a different percentage. Realistically, the contingency fee lawyer is going to get between 25% and 40% of the recovery. But, you won't be paying an attorney's fee if you don't win and you will have capped the fee you will pay if you do win.

D. Look for a mediation as soon as is practical. This has been described above. Generally speaking, this is without prejudice to whatever litigation rights you have as to a pending case. It's a way of seeing how far the parties are really apart. In addition, it is a way of learning the other side's positions and theories, knowledge of which may benefit you for the remainder of the case. Also, for a case that looks like it will be uneconomical once arbitration is demanded or litigation is filed, *before* you send the case to a collection

lawyer, you might want to see if the other side will be interested in pursuing mediation as the first event in the dispute process. Here, the construction law experience of a construction lawyer is likely to be helpful. Mediation is a cost-effective method – as compared with arbitration or litigation - to attempt to settle your case.

E. Minimize the use of depositions. These are, perhaps, the most expensive part of discovery, being when one attorney brings a witness into his/her office and asks him/her questions until s/he can no longer think of any further questions to ask. All of this is done before a stenographer, whom you will pay. The transcript for an all day deposition could be as much as $750.00, as stengographers get paid by the page for most jobs with a certain minimum charge. Taking depositions later in the discovery period gives other, less expensive options (such as mediation) an opportunity to work. One option is sometimes just the simple passage of time. The farther away people get from the passion of the moment, the more likely they will be to be thinking about ways of resolving the dispute.

F. Keep in mind that if you need documents from a public agency, it might be quicker to obtain these through a Freedom of Information Act request than through discovery.

G. In the ordinary course, your attorneys' fees will not be something the other side expects to pay or is willing to pay, unless the contract you are suing on specifically provides for them (which is almost always a good clause to strive for to include in your contracts.) Ordinarily, in MA, the attorneys' fees the court awards, set by statute, are either $1.25 or $2.50.[10] In courtspeak, they are not, strictly speaking, awarded as 'attorneys' fees' but are awarded as 'costs'.

H. Don't insist on every last dime. Litigation is an imperfect manner to resolve disputes. Getting out of it as quickly as possible usually will work to your advantage. It is uneconomical to use quarters to fight over dimes! Your key people, including yourself, make money through good estimating and good project management. Not by spending a lot of time with lawyers and court processes.

I. Make sure your lawyer has some familiarity with the law applicable to your dispute. Much as in medicine, most lawyers will ultimately specialize in doing something specific. If you see an ad on the internet or in print where a lawyer claims to do ten different things, in all likelihood, s/he doesn't do any of them particularly well. By using someone who has had some experience in this type of case, you will not have to pay for his/her education as to the core law applicable to the dispute, as s/he is likely to already know most of the general law. The more knowledgeable your lawyer is as to your kind of dispute, the greater your chances are of getting a better result.

J. As with any form of formal dispute resolution (i.e. arbitration, litigation) be sure to tell your lawyer about all the difficulties and things that are wrong with your claim *first*. In the majority of cases, if the case goes on for any period of time, the other side is going to learn about them in any event. And, by telling them to your lawyer up front, s/he can determine what form of dispute resolution can and should be pursued. Also, your attorney can try to determine how this information will be presented to the fact-finder, putting the best

possible spin on it. Remember, the 'good facts' takes care of themselves. It's the 'bad facts' that your lawyer needs to know about right from the beginning.

K. Don't ever sue when you are doing so just 'for the principle of the thing' and not for the money. Court is not set up to provide you with any satisfaction along these lines. In the ordinary civil dispute, a judge is not likely to get outraged by either party's conduct for the job in question five years down the road. Only sue for money.

L. Remember that, first and foremost, court is about *process.* Ideally, it will (hopefully) also provide some form of justice but process is, first and foremost, the first thing to know about court.

M. Since only about one percent of superior court civil cases go through a complete trial, try to come up with some kind of plan with your attorney to pursue settlement discussions as early, as hard and as often as is possible.

N. The better prepared you are to try your case, the less likely you will actually have to try it.

O. Never lose sight of the fact that although you may be represented by an attorney, the subject matter of the case is *your* dispute. Lawyers are trained in the adversarial process. Some attorneys are just not that good at settling cases. A party can always talk to the other parties directly, whether the attorneys want them to do this or not.

P. Particularly where the case is more or less about one party seeking a more or less liquidated sum, your case may be capable of being settled through the payment of less money. A defendant general contractor might say that it will roll some of the cost of the settlement into your next job. For that matter, a defendant might settle a case by stating it will be providing contracting opportunities to the other side as partial/full settlement of a case. Don't lose sight of the fact that neither promise is legally binding in and of itself. This works best when the parties are companies who have worked together in the past (and have gotten along) who have come upon, for whatever reason, this dispute and who otherwise would not object to working with each other in the future.

Q. There are some lawyers who conduct litigation like General Sherman's March To The Sea. Sometimes, for some clients this is gratifying, especially at first. Keep in mind that being *aggressive* doesn't mean that the lawyer is *good.* While being aggressive can sometimes work, if possible, you want to conduct your litigation so that bridges are not unnecessarily burned between the parties. I can think of one case in particular where the plaintiff subcontractor was very aggressive over a poor claim, ultimately settling the claim for about ten cents on the dollar. Then, the subcontractor asked this general contractor if he had any work for the subcontractor. The general contractor replied that it didn't. And, it never would.

R. A factor affecting the resolution of some cases is that the parties just get sick and tired of the case and of how much it is costing and of how long the process goes on and on. With regard to mediations, since they often take most of the day, cases sometimes get settled

simply because the parties get bored sitting in a conference room most of the day with little or nothing to do!

S. Court cases can require a significant time investment of a party's principals. Answering interrogatories, preparing for a deposition, reviewing and preparing exhibits, assisting in drafting the pretrial conference memorandum, preparing witnesses and preparing for trial itself are all time intensive activities for *you*. This becomes all the more so the closer the case gets to trial.

T. While possibly belaboring the obvious, half of the parties win cases and half of the parties lose cases. Most lawyers have won cases they thought they would lose. And, many have lost cases they thought they would win.

U. If the court schedules any kind of hearing, your lawyer *has* to go.

V. When you file your case, file a motion for the appointment of a special process server, which is usually a constable. These motions are routinely granted. They are generally significantly cheaper than a sheriff and can serve the complaint much more quickly than a sheriff. Since a plaintiff generally has only ninety days to serve a defendant with process, a plaintiff can wait longer before sending the matter out for service with a constable, which gives it a greater opportunity to try and settle the case. A constable serves a party with process in a matter of *days*. A sheriff serves a party in a matter of *weeks*. I use a constable that makes service within one day anywhere in Massachusetts. I have had sheriffs take more than one month to effect service. Constables, being small business men and women, care more about your business than do sheriffs.

W. The judicial system moves the judges around from county to county, almost on a monthly basis for most of the different court sessions. This has certain advantages and certain disadvantages. You never know for sure what judge you are going to be in front of until just before a hearing or a trial.

X. Before you commence arbitration or litigation and, then, during the arbitration or litigation, periodically ask your attorney as to his/her opinion as to your chances in the arbitration or litigation. If you don't trust your attorney's judgment, then get a different attorney.

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* A 'squib' is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a 'squib' as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

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[1] This is greatly-over simplified, intended for the limited purpose of giving non-lawyers just a general idea of the process.

[2] No horses were deliberately harmed in the writing of this Squib. Some horses to whom this Squib was read fell asleep almost uniformly before the fourth page was reached. One or two did bang their heads on the side of the stall as they went night night. But, that's on them, by our way of thinking. Besides, injuries to horses is not likely covered by my E&O insurance.

[3] You might ask: 'Aren't these the things my lawyer is supposed to do for me?' Of course, the answer is 'yes'. But, many of the decisions to be made in a case will depend on choices the client can/should make or at least participate in and some of these choices are best made before litigation commences. And, understanding the basic steps will allow you to be of greater assistance to your lawyer, which should work to your good. A basic knowledge of these procedures will also give readers an idea of where it is possible to save some money in some cases.

[4] As discussed later, savings in both time and money can be achieved by using constables for the service of court process, for which you'll need the permission of the court in question, which is, generally speaking, fairly easy to get.

[5] There is a third kind of track, known as the accelerated or "X Track". These cases will reach trial in the shortest amount of time. Construction claims can not be filed under this track under any theory.

[6] One can usually obtain more time to accomplish a certain result through filing a motion to extend the tracking order. These are usually granted, providing that they are not abused for a particular case. The most common form of motion to extend is to attempt to extend the time period within which discovery can be taken.

[7] One of the criteria by which judges are evaluated is how many cases they can clear or close within a month. It works to the judge's advantage, then, to clear four or five smaller trials each month rather than one large construction case.

[8] A 'master' is a lawyer sitting as a judge. There's a whole set of rules that are applicable just as to masters My sense is that they are not used as much for construction cases as they were forty or fifty years ago. One of the reasons is that, typically, once the master has issued a finding, the party which prevailed will then have to file a case in court to confirm the master's report and convert it into a court judgment. This is also a problem with arbitrations where an arbitrator has made a certain finding and the party which prevails wishes to convert this into a judgment. This will require an action in court to do so, also. Such court cases are generally very limited in scope.

[9] I once had a mediation conducted by a company whose mediators were, by and large, retired judges. Whether retired or not, to the attorneys, this individual is still a *judge* and judges make most lawyers at least a little nervous. And, they probably get a fair measure of respect and deference more than an average mediator. In that case, this service was more expensive than other services I have used but the case got resolved.

[10] This is not a misprint and doesn't reflect my getting into the cooking sherry. Besides, I think we may be running very low on cooking sherry. I wonder. Would wine vinegar be an acceptable substitute?