GOING TO COURT

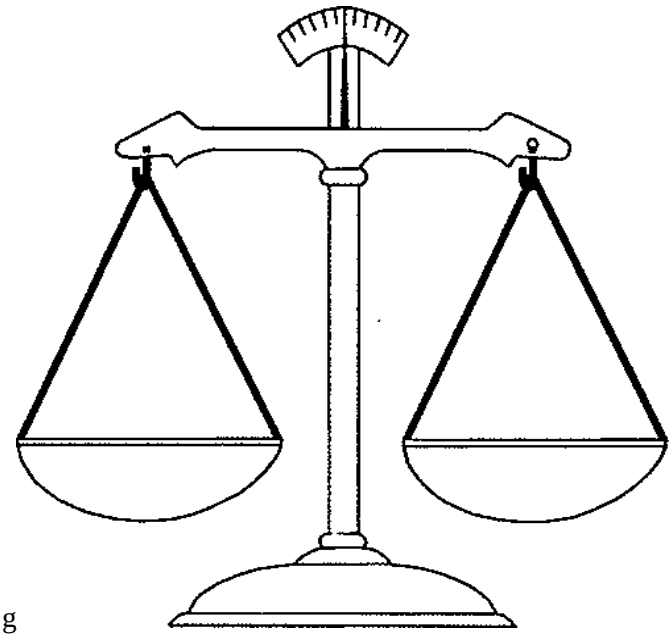

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TABLE OF CONTENTS

PURPOSE

This pamphlet will give you a general understanding of the various phases of a typical lawsuit. It is designed for persons who have retained an attorney to represent them in a lawsuit. It does not take the place of legal advice for your specific case, but it is intended to give you general background information so that you can better use the legal advice your attorney gives you.

This pamphlet addresses civil lawsuits rather than criminal lawsuits. Civil lawsuits generally include contract disputes, such as leases, loans, purchase agreements, and other contracts. They also include personal injuries, such as car accidents, defective products, and malpractice, as well as dissolution of marriage cases, including custody disputes. Civil lawsuits are usually between private parties, such as individuals, partnerships, businesses, and corporations.

Criminal lawsuits have a governmental body as a party, such as the federal, state or county government. These parties seek criminal penalties, such as fines and imprisonment, in criminal cases.

OVERVIEW OF A TRIAL

The typical civil lawsuit goes through one or more of the following phases: pleadings, temporary relief, discovery, summary judgment, trial, and appeal. Each of these phases is discussed in this pamphlet. However, most civil lawsuits eventually settle. Therefore, settlements are discussed in this pamphlet as well as alternatives to lawsuits.

Most civil lawsuits in Minnesota are resolved within one year of the case being filed with the court. However, a few can take two or even three years. Appeals generally take about nine months for each appellate court. An appeal to the Minnesota Court of Appeals takes about nine months to complete. An appeal to the Minnesota Supreme Court adds another nine months.

Lawsuits can be expensive and time consuming. Lawyers generally charge by the hour. Their rates generally range from $200.00 per hour to $500.00 an hour and up in Minneapolis. Lawyers must investigate all the facts involved and present this information at trial. They must also determine the law applicable to these facts. This can be time consuming.

Some cases are handled on a contingency. This means the lawyer receives a percentage of the money recovered. The percentage is usually, but not always, 33-1 /3% in personal injury cases. It is typically 40% percent in malpractice cases. If no funds are recovered, the lawyer receives nothing for his or her work.

PLEADINGS

Pleadings are formal legal documents which are filed with the court and served on the other party to the lawsuit. They usually consist of a summons and complaint, and an answer. They can also include other documents, such as a counterclaim, a reply, a crossclaim, and a third-party complaint. Pleadings inform the court what the case is about.

The party bringing the lawsuit is referred to as "the plaintiff." In dissolution of marriage cases, this party is referred to as "the petitioner". The party defending the lawsuit is referred to as "the defendant". The defending party is referred to as "the respondent" in dissolution of marriage cases.

A summons tells the other party that they are being sued and that they must answer the complaint within a certain number of days (usually 21), or a judgment may be entered against them. A summons is usually served on the defendant personally. In some cases, it may be served "by publication." This means the summons is published in a newspaper. Service by publication usually occurs when the defendant cannot be found or when the lawsuit is to foreclose a mortgage. Service by publication also often occurs in probate cases. The purpose of publication is to notify others who may have an interest in the outcome of the case.

A complaint sets forth the specific grounds for the lawsuit. The complaint usually states who the parties are, where they are located, the general background facts, the specific facts causing injury or damage to the plaintiff, and the relief the plaintiff is seeking.

The answer is prepared by the defendant's attorney. It responds to each paragraph of the complaint and gives the defendant's version of the facts. The defendant is required to answer each paragraph of the complaint by admitting it, denying it or saying he does not know if it is true or not. This last response is taken as a denial. The answer may also assert "affirmative defenses." These are additional facts or doctrines of law which the defendant believes give him or her additional defenses against the plaintiff's claim.

These affirmative defenses typically include one or more of the following:

(a) Statute of limitations. The plaintiff may not have sued in time.
(b) Statute of frauds. The plaintiff may not succeed because the contract in question had to be in writing to be enforceable.
(c) Failure of consideration. The defendant may not have received what he or she was supposed to receive under the contract.
(d) Accord and satisfaction. The plaintiff may have received a full settlement of his or her claim previously.
(e) Insufficiency of service. The summons may not have been properly served.
(f) Lack of jurisdiction. The court may not have jurisdiction or power over either the defendant or the type of lawsuit involved.

A counterclaim is a claim asserted by the defendant against the plaintiff. If it arises out of the same facts as the plaintiff's claim, it is called a "compulsory counterclaim" and it must be asserted in the pending lawsuit or it is deemed waived by the defendant. If it arises out of facts unrelated to the plaintiff's claim, it can be asserted or not asserted at defendant's option. If it is asserted, the plaintiff must file and serve a reply to it within a specified number of days, usually 21 days.

A crossclaim is a claim by one defendant against one or more of the other defendants. In effect, the defendant is trying to shift liability to another defendant.

A third-party complaint is similar to a crossclaim except the defendant is trying to shift the liability to a person or an entity who is not yet a party to the lawsuit. The defendant brings this other party into the lawsuit by serving this third party with a summons and a third-party complaint. (The other two parties are the plaintiff and the defendant.) The new party is referred to as "the third-party defendant." He or she may answer the third-party complaint and assert his or her own counterclaim. He or she may even bring his or her own third-party complaint against yet another person. These new parties are always referred to as third parties, regardless of their number.

As you can see, the addition of new parties can make the pleadings quite involved. This frequently happens in construction disputes where, for example, an owner may sue a general contractor who tries to pass the liability on to one or more of the subcontractors. Third-party complaints are allowed so that all disputes arising out of the same facts are resolved in one case.

Pleadings serve to outline the basic facts in dispute and the positions of each of the parties to the case. As more facts are developed in preparation for trial, the parties are often allowed to amend their pleadings.

TEMPORARY RELIEF

A party may need some temporary help from the court before the case comes to trial. This is especially true if the case will not come to trial for a long time. In such a situation, a party (either the plaintiff or the defendant) may ask the court for temporary relief.

Such temporary relief is common in dissolution of marriage cases. It normally includes maintenance (alimony) and child support.

In other cases, temporary relief may include an injunction prohibiting certain conduct or requiring certain conduct by the parties. For example, in an employment case, the court may issue an injunction prohibiting the defendant from terminating the plaintiff or requiring the defendant to keep the plaintiff on the defendant's health insurance policies.

Temporary relief is sometimes made conditional upon the moving party doing something to protect the other party's interests during the pendency of the case. For example, a bank moving for repossession of collateral may have to post a bond to pay for the defendant's damages if the repossession is later found to have been improper. Another example is a rent dispute, where the tenant may be required to pay the rent into an escrow account during the pendency of the case.

It is important to remember that temporary relief is only temporary. It is not the final decision of the court. It is only temporary relief designed to last until it is superseded by the final decision of the court. It is often based upon sworn statements of the parties (affidavits) and not upon testimony in front of the judge or jury.

DISCOVERY

The discovery phase of a lawsuit allows the parties to discover from the other side what they believe the "facts" are. Frequently, the actual facts as to what happened may be hotly contested. Due to the passage of time and the uncertainties of human memories, the true facts may never be known. However, the decision at trial will be based on the facts as developed and presented by the parties during the case. Hence, it is often very important to learn what the other side claims are the relevant facts.

There are several tools a lawyer uses in the discovery phase of a lawsuit. These include depositions, production of documents, interrogatories, requests for admissions and requests for access. One, some or all of these may be used in a single lawsuit.

A "deposition" is a questioning under oath. Usually, the defendant's counsel takes the deposition of the plaintiff and the plaintiff's key witnesses. Likewise, the plaintiff's counsel usually takes the deposition of the defendant and the defendant's key witnesses. The questions and answers are taken down by a court reporter. The court reporter transcribes every word that is said, unless specifically told that a discussion is off the record. The court reporter is usually not an employee of the court. In most metropolitan locations, the court reporter is in a private business. However, his or her job is based upon his or her accuracy and integrity. Additionally, the party being questioned ("the deponent") has the right to review the transcript of the questions and answers and make corrections or additions within 30 days after the transcript is completed by the court reporter. It generally takes about two weeks for the court reporter to prepare the transcript.

Your attorney should prepare you for your deposition if it is being taken. This preparation should include reviewing the facts with you and going over the procedures of a deposition. Your attorney may also consult you for factual information prior to his or her deposing the other side. Usually both parties are allowed to be present for all depositions.

A "production of documents" is a formal request for the other side to produce documents about the matter in controversy. The documents to be produced must include favorable as well as unfavorable documents. These documents frequently include business records or, in personal injury cases, medical records.

"Interrogatories" are written questions sent by one side to the other side. They are often used where the answers take time to prepare, such as listing damages like medical expenses and lost wages, listing witnesses, and other details.

"Requests for admissions" are formal requests by one side for the other to admit the truth of certain statements of fact. These requests must be formally answered in writing within 30 days or they are deemed admitted. This device is frequently used when the other side has not been cooperating regarding discovery or when certain facts are thought to be uncontested.

A "request for access" is a formal request for entry into a specific area, such as the other side's residence or place of business. It can be used for inspection, measuring, testing, valuation and the like.

"Games" are sometimes played with discovery. One side may attempt to "bury" the other side with so many discovery requests that a settlement is forced. Sometimes a party refuses to answer reasonable discovery requests or gives incomplete or evasive answers. Resort to the judge is then necessary and most judges will impose sanctions against the party playing these types of "games." Such sanctions can include requiring the disobedient party to pay some of the other side's attorneys' fees, dismissing parts of the case, or finding the disobedient party in contempt of court.

SUMMARY JUDGMENT

Sometimes cases are decided by the judge without a trial. This can occur when there is no genuine issue of material fact to be determined and one side is entitled to win as a matter of law. This sometimes occurs where the relevant facts are not really in dispute or where the law determines the outcome of the case regardless of how certain facts are resolved. This frequently occurs, for example, if the statute of limitations expired before the plaintiff sued. In such cases, the court may decide that a trial is unnecessary, and it will enter summary judgment for the prevailing party without a trial.

TRIAL STAGES

In civil cases, trials are usually tried either to the judge or to the jury. In a case tried to the judge, the judge is the sole decider of the facts and the law. Judge-tried cases usually take less time to try because there is no time spent selecting the jury. Judges who are experienced also tend to get to the heart of the case more quickly.

In a jury case, the jury is the sole decider of the facts and the judge is the sole decider of the applicable law. The number of jurors in a civil case can range from six to twelve. Jury trials in civil cases usually have six jurors. Sometimes. there are more than six jurors in case one or more of the jurors becomes ill or is dismissed from the case for other reasons. Such other reasons can include not following the judge’s instructions not to do independent investigation outside the courtroom, such as visiting the scene of the accident or researching on the internet.

Sometimes a case involves an "advisory jury.” This is still a case which is tried and decided by a judge as to both the law and the facts. However, the judge has decided to have a jury advise him or her as to deciding the facts. The decision of the advisory jury is not binding on the judge. An advisory jury is rare and is usually used in large cases involving many disputed questions of fact.

A trial has several distinct phases, including selection of the jury, opening statements, plaintiff's case, defendant's case, closing arguments, jury instructions. and the verdict. Each phase of the trial is under the overall supervision of the judge. The lawyers act in a dual role as advocates for their clients and as officers of the court.

The selection of the jury is sometimes referred to as "voir dire.” The purpose of voir dire is to allow questioning of the potential jurors to see if they can be fair and impartial. Some judges do all the questioning and lawyers do none. Some judges have the lawyers do all the questioning. In Minnesota state courts, the judge usually does some general questions and the lawyers ask more specific questions. In federal courts in Minnesota, the judge usually does all the questioning.

In Minnesota, juries usually consist of six persons in civil cases. Jurors who state that they cannot be fair or impartial are removed from the case "for cause.” Each side is also usually allowed to remove two potential jurors without giving any reason. These are called "peremptory strikes.”

After the jury is selected and sworn in, the lawyers have the right to make opening statements. In Minnesota, the plaintiff's attorney goes first. The purpose of the opening statement is to give the jury a preview of what the plaintiff's attorney expects (or hopes) to prove. The defendant's attorney has the right to give his or her opening statement immediately after the plaintiff's attorney finishes his or her opening statement. Alternatively, the defendant's attorney may elect to give his or her opening statement at the beginning of the presentation of the defendant's evidence.

In Minnesota, opening statements are limited by the rules of court to statements of what the lawyer expects to prove. They cannot be argumentative. After the opening statement or statements, the case

proceeds to the introduction of evidence. The plaintiff goes first. The evidence may consist of testimony from witnesses as well as the introduction of documents and "real evidence." "Real evidence" is "the thing itself;" for example, the gun that misfired or the battery that exploded. "Documentary evidence" consists of contracts, letters, notes, diaries, computer records, photographs, public records, emails, texts, and the like. Usually, documentary evidence must be identified and stated to be genuine (authenticated) by a witness.

Witnesses usually testify in person in the courtroom. However, sometimes they testify on videotape. This frequently happens with testimony from doctors. They are questioned by the lawyers for each side prior to trial and the testimony is recorded on videotape by a court reporter. The videotape is then played at trial on a television screen to the judge and jury. They may also testify remotely via Zoom or other programs.

The attorney who called the witness to testify questions the witness first. This is called "direct examination." Then the opposing attorney questions the witness by "cross-examination." Then the attorney calling the witness may conduct "re-direct examination" and then opposing counsel may then do "re-cross-examination." This procedure can continue back and forth for a while for each witness.

The rules of evidence provide limits on the types of questions and answers which may be used in the courtroom. This naturally results in testimony which is less entertaining than that seen in movies or on television. For example, questions cannot be argumentative. They must simply seek to elicit the facts from the witness, rather than arguing with the witness. Likewise, "hearsay" is generally not admissible in evidence. "Hearsay" is when the witness is trying to testify as to what he heard someone else say.

There are also many exceptions to each rule of evidence. For example, the exceptions to the hearsay rule include the following: excited utterance, dying declaration, state of mind, admission against interest, evidence introduced for separate purpose, and declarant unavailable.

The judge decides what is admissible and what is not admissible. Frequently, the judge can use his or her own discretion as to what is or is not going to be admitted into evidence. Due to the technical nature of the rules of evidence and the discretionary power of the judge, there may be interruptions in the presentation of the evidence while the lawyers attempt to persuade the judge to admit or reject evidence on behalf of their clients.

After the plaintiff has introduced his or her evidence, the defendant has the right to introduce his or her evidence. The defendant may elect to present no evidence at all. The defendant may rely solely upon what has already been presented during the plaintiff's case. Sometimes, the defendant moves for dismissal of all or part of the plaintiff's case at this point in the trial, claiming that the plaintiff has not proved all that was required. If the defendant presents any evidence, he or she follows the same rules of evidence and procedure as applied to the plaintiff.

After the close of the defendant's case, the plaintiff may introduce more evidence to refute the defendant's evidence. This is called "rebuttal evidence." The defendant may then do the same. Eventually, both parties have presented all the evidence they deem relevant, and they so inform the court by saying they "rest".

After both parties have rested, closing arguments take place. In Minnesota, the defendant's attorney makes his or her closing argument first. He or she summarizes the evidence from his or her client's point of view and asks the jury to rule in his or her client's favor. The plaintiff's attorney then does the same on behalf of his or her client.

In closing arguments, the attorneys are allowed to argue to the jury based upon the facts as presented at trial. However, there are limits. For example, the attorney is not supposed to express his or her personal opinion as to the merits of the case or the credibility of a witness. His or her arguments are supposed to be based upon the facts presented at the trial. If the lawyer exceeds these rules, opposing counsel may object and have the judge rule on the issue of whether the lawyer's argument is improper.

The court then instructs the jury on the law. Jury instructions are published in guide books available to the judges for typical cases. The lawyers also submit proposed jury instructions on the law to the judge.

The judge then gives the jury verdict form to the jury. The form usually asks the jury who they find in favor of - the plaintiff or the defendant. Jury verdict forms, however, frequently include other questions, such as how much money they think would fairly and adequately compensate the plaintiff. The jury may also be asked to allocate the fault or negligence between the parties. The jury may also be asked other relevant questions specific to factual issues in the case. In some cases, the jury will not know, and will not be told, the effect of their answers on the ultimate outcome of the case. Here again, guide books are available to the judge for typical questions and the lawyers for the parties may submit additional proposed jury questions to the judge.

The amount of time jurors take to reach a verdict varies from case to case. Generally, verdicts must be unanimous. In Minnesota state courts, a verdict may be entered after six hours if it is supported by five of the six jurors. If there are more than six jurors, the verdict may be rendered by 6/7, 7/8, 8/9, 9/10, 10/11 or 10/12 jurors. If a sufficient number of jurors cannot agree on a verdict, a mistrial is declared, and the case may be tried again to a different jury. If the jury is able to reach a verdict, it is then presented to the bailiff who gives it to the judge for reading.

If a case is tried to a judge without a jury, the phases of the trial are the same except there is no voir dire and no jury instructions. The trial consists of opening statements, plaintiff's case, defendant's case, and closing arguments.

APPEALS

After the jury renders its decision, the verdict is reduced to a judgment which is entered against the losing party. The losing party may decide to appeal.

The appeal may be from the verdict itself or from other decisions made before, during or after the trial. Issues on appeal typically include whether the evidence supported the verdict, whether the verdict was excessive due to passion or prejudice, whether the judge abused his or her discretion in ruling on questions of evidence, and whether certain pretrial orders were correctly decided by the judge.

There are very specific and strict time deadlines within which an appeal must be taken. If these deadlines are missed, the appeal is usually rejected. In Minnesota state courts, an appeal from a jury verdict must be taken within 60 days after the judgment is entered by the court administrator. An appeal from an appealable order must usually be taken within 60 days after the other side serves a written notice stating that the order has been filed.

An appellate court can affirm the lower court's decision, reverse it or grant such other relief as it deems appropriate. This other relief can include remanding for a new trial on some of the issues or granting some parts of the appeal and denying other parts of the appeal. In Minnesota, the Court of Appeals is usually the first place to appeal trial court decisions. Appeals to the Minnesota Supreme Court are granted only upon permission of the Minnesota Supreme Court.

The appeal process usually takes about nine months to complete for each appeal level. The appeal process usually starts with the losing party filing a notice of appeal and a statement of the basis for the appeal. The other side usually has the right to file a "notice of related appeal" if it would like some additional issues reviewed on appeal.

A transcript of the trial testimony is usually ordered by the appealing party. This transcript is prepared by the court reporter who was present (in person or remotely) during the trial. This court reporter usually is employed by the court and prepares this transcript when the court reporter is not otherwise occupied with court business. It normally takes about 60 to 90 days to receive the trial transcript. Trial transcripts can be quite long and cost several thousand dollars. Frequently, the appellate court will order the party losing the appeal to bear this cost. Until the appellate court rules, this expense is borne by the appealing party.

After the trial transcript is available, the briefing process begins. The appealing party is referred to as "the appellant.” The appellant's brief is usually due within 30 days after receipt of the trial transcript. The appellant's brief normally gives the appellate court the history of the case, including the trial, and sets forth the reasons why the appellant believes the trial court's decision should be changed.

The opposing party then usually has 30 days to reply. The opposing party is normally called "the respondent.” The respondent's brief usually cites the evidence and law supporting the verdict. The appellant normally is then given 14 days to file a brief replying to the respondent's brief.

Most appellate courts now allow briefs to be typed and bound, rather than printed. They are often also filed and served electronically. There are also specific rules about the length and permitted contents of briefs.

Meanwhile, the trial court transfers its file to the appellate court. This file will include the pleadings, the decision, the memoranda of law filed in the trial court, and the exhibits used at trial.

Oral argument is usually then scheduled by the appellate court. Normally these arguments are open to the parties and the public. Usually the appellant goes first and then the respondent. The appellant is often allowed a short period of time to reply to the respondent's argument.

Usually three or more appellate judges hear the oral argument. They frequently ask questions of the lawyers based upon their review of the trial transcript, the briefs and the trial court's file.

Normally, a decision of the appellate court is issued within 90 days after oral argument. The decision is frequently published in legal publications for the information of other attorneys.

Some states, including Minnesota, then allow a further appeal to the next highest court depending on the circumstances. This appeal process is substantially similar to that described above, consisting of a notice of appeal, briefs and oral argument.

An appeal does not suspend the effect of the trial court's decision unless the court otherwise orders or a supersedeas bond is filed. This means the prevailing party can try to collect the judgment during the appeal process. Also, the judgment normally bears interest until it is paid. If the judgment exceeds $50,000, the current annual interest rate is 10% in Minnesota.

A supersedeas bond is one filed by the appellant to supersede the trial court decision during the appeal process. If the trial court decision is affirmed on appeal, the proceeds of the supersedeas bond can be used to pay the other party the judgment plus interest and any money damages suffered by the other party during the appeal. If the verdict is reversed on appeal, the bonding company is released from liability.

Sometimes other matters heard by the trial court regarding the case during the appeal. These can include motions for a new trial based upon newly discovered evidence or motions for the trial court's assistance in interpreting the judgment or collecting it.

ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution, or "ADR", is a term used to describe ways to resolve disputes other than by trials through the courts. Due to the time and expense of trial procedures, many parties try ADR. Typically, ADR includes one or more of the following procedures: mediation, arbitration, and mini-trials. There are also several other types of ADR which are used less commonly.

Mediation is a procedure where a third-party acts as a mediator between the parties to try to get them to agree to a settlement of their dispute. Federal mediators are frequently used in employment disputes. A mediator is specially trained to assist the parties in airing their differences in a constructive fashion and then reaching a mutually agreeable settlement. Mediators do not make rulings or decide matters for the parties.

Arbitration is a procedure where a third-party renders a decision in a dispute, which decision is binding on the parties even if they do not agree with it. The American Arbitration Association is an example of an arbitration service. There are many other arbitration providers. The rules of evidence and discovery are generally less formal and less strictly followed in arbitration. Arbitrators are also not required to follow the law as judges are. Rights to appeal from arbitration decisions are also more limited.

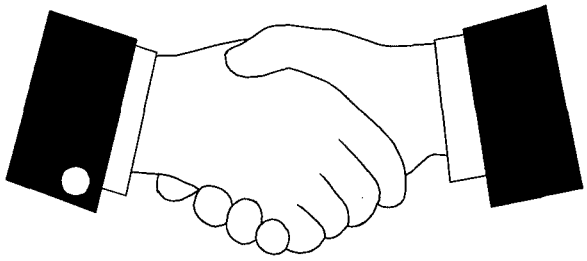
Mini-trials are where the parties present summaries of their evidence to juries for their reaction. These mini-trials usually last only a few hours. Normally, the verdicts are not binding but they can be useful to give the parties a feeling that they had their "day in court." They can also educate the parties as to the strengths and weaknesses of their case.

Frequently, ADR is used in connection with a trial proceeding. A judge may order the parties to try mediation, non-binding arbitration or other ADR in the hope the case will settle. If ADR fails to resolve the case, the matter can still be tried. Many cases settle during ADR.

SETTLEMENTS

The vast majority of cases will eventually settle. Lawyers are trained in settlement negotiation techniques as well as in ADR. A negotiated settlement can frequently be more creative, and fair, to all sides than a trial decision. For example, taxes and future relationships can be considered in a settlement agreement.

A settlement can be reached at any time. Some disputes are resolved before a lawsuit is commenced. Some are settled after the summons is served. Many settle after discovery is completed when the parties know what facts they probably can and cannot prove at trial. Other cases settle at the close of the plaintiff's case or even while the jury is deliberating. Other cases settle after judgment is entered or at various stages of the appeal process.



ABOUT THE AUTHOR

Mark G. Ohnstad is a cum laude graduate of the Harvard Law School, Cambridge, Massachusetts. He has practiced law in the Minneapolis-St. Paul, Minnesota area for about 50 years. He has handled many lawsuits for a variety of clients at various levels, including the U.S. Supreme Court. He is a member of the litigation department of DeWitt LLP, a general practice law firm located in Minneapolis, Minnesota and in Madison and Milwaukee Wisconsin. He is married and has 2 children. His leisure interests include playing basketball, golf and piano**.**