



# INTRODUCTION To CIVIL LITIGATION



September 24, 2012  
Richard S. Wayne  
Joseph J. Braun  
STRAUSS TROY CO., LPA

## **I. INTRODUCTION**

### **A. THE LITIGATION PROCESS**

**Litigation** is the resolution of disputes through the court system. **Civil litigation** is the resolution of disputes between private parties through the court system.

### **B. OVERVIEW FOR LITIGATION CASES**

In this outline, we will review the state and federal court systems where civil disputes are resolved. In addition, we will address the four basic stages of litigation: (1) information gathering; (2) pleading; (3) discovery and motions; and (4) trial.

## **II. COURTS**

### **A. OHIO STATE COURT SYSTEM**

The primary function of the judicial branch is to fairly and impartially settle disputes according to the law.

#### **Municipal and County Courts**

- Each County has at least one Municipal or County Court with Cuyahoga County having fourteen municipal courts.
- Amount in controversy must be under \$15,000.
- Judges are elected to six year term.

#### **Courts of Common Pleas**

- There is a Court of Common Pleas in each of the 88 Counties, usually separated into Divisions: General, Probate, Juvenile and Domestic Relations.
- Common Pleas judges elected to six year term.
- Civil cases controversy amount must be more than \$15,000.
- General Division also has appellate jurisdiction over the decisions of some state administrative agencies.

### **Court of Claims**

- Original jurisdiction to hear and determine all civil actions filed against the State of Ohio and its agencies.

### **Court of Appeals**

- Intermediate Appellate Court.
- Primary function is to hear appeals from the Common Pleas, Municipal and County Courts.
- Each case heard and decided by a three-judge panel.
  - Elected for six years

### **Supreme Court of Ohio**

- Established by the Ohio State Constitution.
- Constitution sets the size at seven (7) – a Chief Justice and six (6) Justices.
  - Elected every six years.
- Court of last resort in Ohio.
- Most cases are appeals from the 12 District Courts of Appeals.
- Court must accept appeals of cases:
  - that originated in the Court of Appeals;
  - involve the death penalty;
  - involve questions arising under the U.S. Constitution or the Ohio Constitution;
  - cases in which there have been conflicting opinions from two or more Courts of Appeals
  - Board of Tax Appeals; and
  - Public Utilities Commission
- Original Jurisdiction
  - writs of *habeas corpus* (unlawful imprisonment);
  - writs of *mandamus* and *procedendo* (a public official to do a required act);

- writs of prohibition (ordering a lower court to cease an unlawful act), and
  - writs of *quo warranto* (against a person or corporation for usurpation, misuse of abuse of public office or corporate office or franchise); and
  - contested elections
- Court has established rules governing practice and procedure on Ohio's courts, general superintendence over all state courts through its rule-making authority and has authority over the admission of attorneys to the practice of law in Ohio.

## **B. FEDERAL COURT SYSTEM**

The Judiciary Act of 1789 – established three (3) types of federal courts and divided the country into 13 Judicial Districts or “Circuits”. The court system is further divided into “Districts” geographically across the country. Within each District, there is a Circuit Court of Appeals, District Courts and Bankruptcy Courts.

Federal Judges are nominated by the President and confirmed by the Senate. If confirmed, their appointment is for life.

### **District Courts**

District Courts are the trial courts of the federal judicial system. There are 94 District Courts, including at least one District Court in each state (some have as many as four), the District of Columbia and Puerto Rico. Three territories of the United States – the Virgin Islands, Guam, and the Northern Mariana Islands also have a District Court.

District Courts have jurisdiction to hear nearly all categories of federal cases, including both civil and criminal matters.

District Courts have jurisdiction in the following situations:

- (1) *Federal Question Jurisdiction.* Federal courts may decide cases that involve the U.S. government, the U.S. Constitution or federal laws, or controversies between states or between the U.S. and foreign government. A case that raises a “federal question” may be filed in federal court. These are cases that arise under federal statute.
- (2) *Diversity Jurisdiction.* A case may be filed in federal court based on the “diversity of citizenship” of the litigants. These are cases between citizens of different states, or between U.S. citizens and those of another country. For a Federal District Court to exercise diversity jurisdiction it must also involve more than \$75,000 in potential damages. Cases involving diversity, regardless of the amount of money involved, may also be brought in a State Court rather than a Federal Court.

### **Appeal Courts**

In the Federal Court system the intermediate Appellate Court is the United States Circuit Courts of Appeals. The losing party in a decision by a trial court (U.S. District Court) normally is entitled to appeal the decision to a Circuit Court of Appeals. In a civil case either side may appeal the verdict.

- No original jurisdiction
- There are 13 of these intermediate courts.
- Twelve of these courts exercise jurisdiction over appeals taken from the decisions of the U.S. District Courts within a specified region, called a “Circuit”

The Court of Appeals makes its decision based upon the record of the case established in the trial court.

- It does not receive additional evidence or hear witnesses.
- It reviews the factual findings of the trial court and can only overturn a decision on factual grounds if the findings were “clearly erroneous.”

Appeals are decided by panels of three judges.

Some cases are decided on the basis of written briefs alone; however, many cases are selected for an “oral argument.”

The litigant who loses in a Federal Court of Appeals, or in the highest State Court, may file a petition for a “*writ of certiorari*,” which is a request to ask the U.S. Supreme Court to review the case.

### **Supreme Court**

The U.S. Supreme Court consists of the Chief Justice and eight (8) Associate Justices. The U.S. Supreme Court considers a limited number of cases per term. The annual terms of the Court runs from the first Monday in October to early summer (late June or early July).

The limited number of cases the U.S. Supreme hears:

1. The most common way is on appeal from a Circuit Court. A party seeking to appeal a decision from a Circuit Court files a petition for a writ of *certiorari*. The Court will only issue a writ if four of the nine Justices vote to do so. If *certiorari* is denied, the decision of the lower court is final.
2. Through an appeal from a State Supreme Court. The U.S. Supreme Court will generally not challenge a State Court’s ruling on an issue of state law but may grant *certiorari* in cases where the State Court’s ruling deals with constitutional issues.
3. “Original jurisdiction.” Original jurisdiction is set forth in the United States Code. The U.S. Supreme Court has original and exclusive jurisdiction to hear disputes between different states.

Once *certiorari* is granted, the attorneys for the parties submit briefs on the issues and then an oral argument is scheduled.

## **III. CIVIL LITIGATION – AN OVERVIEW**

- The procedural rules of the court in which the lawsuit is brought must be followed.
- All federal, civil trials are governed by the *Federal Rules of Civil Procedure* (“FRCP”).
- State courts have their own rules of civil procedure. In many states these rules are similar to the FRCP.

- Additionally, many courts have their own local rules of procedures that supplement the federal and state rules.

#### **IV. INFORMATION GATHERING**

The first step in any civil litigation is to: (i) meet with the client; (ii) determine the facts supporting the claim; (iii) review all relevant documents; (iv) interview potential witnesses; and (v) research the potential common law and statutory claims.

#### **V. PLEADINGS**

##### **A. THE COMPLAINT**

1. The *Complaint* is a document that sets forth the plaintiff's claims against the defendant.

##### **B. FILING THE COMPLAINT**

1. Traditional Method of Filing – Personal Filing with the Court
2. Electronic Filing Methods
  - (i) Federal Courts now require that the Complaint be filed electronically via the court's Electronic Case Filing ("ECF") System (with the exception of prisoner complaints and certain *pro se* plaintiffs).
  - (ii) Many courts at the state level allow electronic filing.

##### **C. SERVICE OF PROCESS**

1. The Summons
  - (a) The *summons* is a document that identifies the parties to the lawsuit and the court in which the case is pending. It also directs the defendant to respond to the complaint within a specified time period.
2. Serving the Complaint and Summons
  - (a) Service of a Complaint is governed by the rules of the court or jurisdiction in which the lawsuit is filed.

3. Serving Corporate Defendants
  - (a) The summons and complaint are served on an officer or a *registered agent* of the corporation.
  - (b) The corporation's registered agent can be obtained from the Secretary of State's office.
4. The Defendant Can Waive Service
  - (a) If the defendant is aware the lawsuit is being filed, they may *waive* his/her right to be formally served with a summons.
  - (b) Defendants who agree to waive formal service of process receive additional time to respond to the complaint under the FRCP.

#### **D. DEFENDANT'S RESPONSE**

1. If the defendant fails to respond to the complaint within the specified time period, a *default judgment* is entered by the court against the defendant.
2. The Answer
  - (a) A defendant's *answer* responds to each allegation in the Complaint.
  - (b) The Answer should include all of defendant's affirmative defenses to plaintiff's claims.
3. Motion to Dismiss
  - (a) The *motion to dismiss* requests the court to dismiss the case for reasons provided in the motion (i.e., lack of personal jurisdiction, lack of subject matter jurisdiction, failure to state a claim, etc.).
  - (b) A *memorandum of law* supporting the motion is usually required to be submitted in support of the motion to dismiss.
  - (c) A motion to dismiss cannot be based upon evidence which is not included in the Complaint.



## **E. THE SCHEDULING CONFERENCE**

Both Federal and State Courts will, early in the process, hold a scheduling conference to establish cut-off dates for discovery, dispositive motions and a trial date for the litigation.

## **VI. JOINDER OF CLAIMS AND PARTIES**

### **A. JOINDER OF CLAIMS [*FRCP 18*]**

1. *FRCP 18* permits any claims to be joined.
2. A party asserting a claim for relief may join, either as independent or alternate claims, as many claims as he has against the opposing party.

### **B. PERMISSIVE JOINDER OF PARTIES [*FRCP 20*]**

1. The standard for permissive joinder of parties is a common question and transaction or occurrence.
2. Common standard for joining parties:
  - (a) A party can join anyone whose claims arise out of the same transaction or occurrence.
  - (b) A party join them only if there is a common question tying all parties together.

### **C. COMPULSIVE JOINDER OF PARTIES [*FRCP 19*]**

1. *FRCP 19(a)* provides that a person shall be joined as a party if:
  - (a) *FRCP 19(a)(1)* – outsider's absence prevents granting complete relief to those already involved.
  - (b) *FRCP 19(a)(2)* – outsider will be prejudiced, his/her rights will be impaired or impeded, if he isn't joined.

### **D. COUNTERCLAIMS [*FRCP Rule 13*]**

1. This is a claim that defendant makes against plaintiff; counterclaim can basically be anything.

- (a) *FRCP 13(a) Compulsory Counterclaim* – Any claim arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.
  - (i) If defendant files a counterclaim, plaintiff is required to file any compulsory counterclaims of his/her own, if they are transactionally related.
  - (ii) If either party fails to assert a compulsory counterclaim, he/she waives his/her right to assert it later.
- (b) *FRCP 13(b) Permissive Counterclaim*
  - (i) A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

#### **E. CROSS-CLAIMS [FRCP 13(g)]**

- 1. Cross-claims must arise out of the transaction or occurrence that is the subject matter of the original action or a counterclaim.

#### **F. THIRD-PARTY CLAIMS [FRCP 14(a)]**

- 1. Unlike a counterclaim and cross-claim, a third-party claim is in effect a new action. These are often claims for contribution or indemnification.

#### **G. INTERPLEADER [FRCP 22]**

- 1. This claim is used by a stakeholder of property who has multiple parties claiming the property.
  - (a) This Rule is used because *res judicata* doesn't prohibit subsequent claimants to sue for same property.

#### **H. INTERVENTION [FRCP 24]**

- 1. This is a claim brought by an outsider to the pending litigation in which he/she alleges that he/she belongs in the case because his/her interest is not being protected.
  - (a) *FRCP 24(a)*: applicant has a right to intervene when either:
    - US statute confers an unconditional right to intervene; or

- Disposition of action may impair or impede applicant's ability to protect his/her own interest.
- (b) *FRCP 24(b)*: applicant may intervene when:
- US statute confers a conditional right to intervene; or
  - Applicant's claim or defense and main action have a question of law or fact in common.

## **I. CLASS ACTIONS [*FRCP 23*]**

Class certification is appropriate when a plaintiff initiates an action on his/her own behalf and on behalf of a similarly situated group of individuals with the same claim.

### **1. Class Action Procedure:**

- (a) Class certification requires several prerequisites.
- (b) Threshold questions that must be answered before certification; implied prerequisites *FRCP 23(a)* and *FRCP 23(b)*:
  - (i) Must have a class – an identifiable, discrete group
  - (ii) Plaintiff representative must be a member of the class
  - (ii) Numerosity requirements [*FRCP 23(a)(1)*]
    - Class must be large – at least 30-40 people to demonstrate efficiency and economy
  - (iv) Common questions of law or fact [*FRCP 23(a)(2)*]
    - Class must be tied together by a common question
    - Low threshold – only need normal commonality
  - (v) Typicality requirements [*FRCP 23(a)(3)*]
    - Class representative's claims must be typical of all the class members' claims.
    - Want representative to look like class member and not be subject to unique defenses

(vi) Adequacy requirements [*FRCP* 23(a)(4)]

- Representative and attorney must be adequately represent interest of the class.

(vi) Types of Class Actions [*FRCP* 23(b)]

a. Action must fall within a category that is recognized as a legitimate class action.

b. [*FRCP* 23(b)(1)] – To avoid inconsistent adjudications.

- Covers limited fund situation

c. [*FRCP* 23(b)(2)] – Social action class action

- Injunction or declaratory judgment where everyone wants same thing.

d. [*FRCP* 23(b)(3)] – Consumer/Investor cases

- Group injured by common practice and all want damages.

(C) Class action is binding on all members of class who do not opt-out.

(D) Decisions to settle class actions must be approved by the judge.

(E) Procedural protections are built into *FRCP* (b)(3) class actions that are not included in *FRCP* (b)(1) or *FRCP* (b)(2).

1. Notice must be given to the class members.

2. There must be a right to opt-out.

3. There must be a predominance of the common question of law or fact.

4. Must demonstrate that class action is the superior form of adjudication.

## **VII. PRETRIAL MOTIONS**

### **A. MOTION FOR JUDGMENT ON THE PLEADINGS**

1. A *motion for judgment on the pleadings* indicates that no facts are in dispute and the only question is how the law applies to a set of undisputed facts.

## **B. MOTION FOR SUMMARY JUDGMENT**

1. A *motion for summary judgment* asks the court to grant a judgment (without a trial) on behalf of the party filing the motion.
2. The court will only grant this motion if it determines that no facts are in dispute and the only question is how the law applies to a set of facts agreed on by both parties.
3. When the court considers this motion, it can take into account *evidence outside the pleadings*.

## **VIII. DISCOVERY**

**A. DISCOVERY** is the process of obtaining information from the opposing party and other witnesses in preparation for trial.

**B. DISCOVERY RULES** have been designed in both State and Federal Courts to make sure that a witness or a party is not unduly harassed, that *privileged information* (communications that ordinarily may not be disclosed in court) is safeguarded, and that only relevant matters are discoverable.

## **C. INTERROGATORIES**

1. *Interrogatories* are written questions that must be answered in writing.
2. Interrogatories may only be served on a party to the lawsuit.
3. The party receiving the interrogatories must answer them within a specified time period (30 days under *FRCP 33*), in writing and under oath.

## **D. DEPOSITIONS**

1. *Depositions* are oral questions, given under oath.
2. Depositions may be taken of witnesses as well as parties.
3. The Role of the Deponent's Attorney
  - (i) Under *FRCP 30*, the deponent's attorney's role is limited at the deposition.
  - (ii) In general, the attorney may instruct a deponent not to answer a question only when necessary to preserve a privilege.

4. The Deposition Transcript

- (i) A court reporter will usually record the deposition proceedings and create a *deposition transcript*.
- (ii) The deposition transcript may be used by either party during the trial to prove or *impeach* the credibility of a witness.

**E. REQUESTS FOR PRODUCTION AND PHYSICAL EXAMINATION**

- 1. *FRCP 34* authorizes each party to request documents and other forms of evidence from any other party.
- 2. If the mental or physical condition of a party is in controversy, the court (upon request) may order the party to submit to a physical or mental examination by a licensed examiner.

**F. REQUESTS FOR ADMISSION**

- 1. *FRCP 36* permits one party to request that the opposing party admit the truth of matters relating to the case.
- 2. Any matter admitted under this request is conclusively established as true for the trial.

**G. THE REQUIREMENTS OF *FRCP 26***

- 1. Under the *FRCP*, each party to a lawsuit has a duty to disclose to the other party specified types of information before discovery begins.
- 2. These rules do not replace traditional discovery methods. Rather, the rules impose a duty on attorneys to disclose specified information early on, so that attorneys can craft an appropriate discovery plan.
- 3. Initial Disclosures
  - (a) Under *FRCP 26(a)(1)*, each party must disclose specified information at the initial meeting or within ten days following the meeting.

**H. THIRD-PARTY SUBPOENAS (*FRCP45*)**

The Rule provides the mechanism to obtain relevant documents and deposition testimony from non-party witnesses.

## **IX. DISCOVERY OF ELECTRONIC EVIDENCE**

**A. THE DISCOVERY OF *E-EVIDENCE* IS FUNDAMENTALLY DIFFERENT FROM THE DISCOVERY OF PAPER DOCUMENTS AND PHYSICAL EVIDENCE.**

**B. TRADITIONAL DISCOVERY METHODS SUCH AS INTERROGATORIES AND DEPOSITIONS ARE STILL USED TO OBTAIN *E-EVIDENCE*.**

1. A great deal of data, or *metadata* can be obtained from a computer's hard drive [as well as electronic versions - .pdf or word processing documents such as Word™ and Word Perfect™].
2. This data can only be obtained from the file in its electronic format, not from printed versions.
3. E-mail communications.

**C. OTHER SOURCES OF E-EVIDENCE**

1. Electronic evidence is not limited to computer system data.
2. Voicemail, video, electronic calendars, laptops, tablets, smartphones and flash drives are other sources of e-evidence.

**D. THE SPECIAL REQUIREMENTS OF ELECTRONIC EVIDENCE**

1. To ensure that e-evidence is admissible as evidence in court, two things are required:
  - (a) Make sure an exact image copy of the e-evidence is obtained.
  - (b) Make sure that you can prove nothing has been altered or changed from the time the image copy was made.
2. Preserving the Chain of Custody
  - (a) The phrase *chain of custody* refers to the movement and location of evidence from the time it is obtained to the time it is presented to the Court.
  - (b) Chain of custody is particularly crucial when dealing with e-evidence – since e-evidence is particularly prone to addition, change, or deletion.

## **IX. PREPARING FOR TRIAL**

### **A. FINAL PRETRIAL CONFERENCE/PRETRIAL STATEMENT (*FRCP 16(e)*)**

1. Prior to trial, the attorneys for both sides usually meet with the trial judge at a *pretrial conference*.
2. At the pretrial conference the attorneys and judge decide whether or not a settlement is possible.
3. If settlement is not possible, the attorneys and judge decide how the trial will be conducted and what types of evidence will be admissible.
4. A *motion in limine* (to *limit evidence*) may be made by one or both of the attorneys at the pretrial conference.

### **B. JURY SELECTION**

1. The jury-selection process is called *voir dire*.
2. During *voir dire* attorneys for both sides question jurors to determine if bias exists or if, for other reasons, certain jurors should be excluded from the jury.
3. Challenges during *voir dire*. Attorneys can exclude prospective jurors from sitting on the jury through the exercise of *challenges for cause* and a limited number of *preemptory challenges*.
  - (a) *Challenge for cause* is exercised where a particular prospective juror is biased for some reason.
  - (b) *Preemptory challenge* challenges a prospective juror, without a reason. However, such challenge cannot be discriminatory.

## **XI. THE TRIAL**

### **A. THE TRIAL**

1. Opening Statements
  - (a) In the *opening statements*, the attorneys give brief version of the facts and the supporting evidence that they will use during the trial.



## 2. Plaintiff's Case

- (a) After opening statements, the plaintiff's attorney presents evidence supporting the plaintiff's claim.
- (b) *Direct examination* is the questioning of a witness by the attorney who calls the witness to testify on behalf of the attorney's client.
  - (i) During direct examination, *leading questions* (questions that lead the witness to a particular desired response) are not allowed.
- (c) After plaintiff's attorney finishes questioning a witness on direct examination, the defendant's attorney may question that witness in what is known as *cross-examination*.
- (d) Redirect and Recross
  - (i) After the defense has cross-examined the witness, plaintiff's attorney may question the witness again by *redirect examination*.
  - (ii) Following plaintiff's attorney's redirect, defense attorney will be given an opportunity for *recross-examination*.

## 3. Motion for Directed Verdict

- (a) After the plaintiff's attorney has presented his/her client's case and both attorneys have examined the witnesses, the defendant's attorney may make a *motion for directed verdict*.
- (b) The motion asserts that plaintiff has not offered enough evidence to support the validity of the plaintiff's claim against the defendant.
- (c) If the judge grants the motion, the case will be dismissed.

## 4. Defendant's Case

- (a) After plaintiff's attorney has presented his/her case, the defendant's attorney presents evidence and testimony to refute plaintiff's claims.
- (b) Any witness called to the stand by defendant's attorney will be subject to direct examination, cross-examination, redirect examination, and recross-examination.

5. Closing Arguments

- (a) After defendant's attorney has finished his/her presentation, both attorneys give their closing arguments.
- (b) Each attorney summarizes the major points that he or she made during the trial and attempts to show how the evidence presented favors a verdict in his/her client's favor.

6. The Verdict

- (a) After the judge instructs or charges the jury, the jury then begins its deliberations.
- (b) When the jury has reached a decision, it issues a *verdict* in favor of one party or another.