

New Attorney's Guide to the Steps in a Lawsuit

A listing of the basic steps and procedures.

1. Filing a Complaint or Petition

Any complaint or petition for relief in a court must be filed within the statutory time limit (*Statute of Limitations*). These statutes vary from state to state. These statutes also vary depending on what your cause of action is. For example, in many states, the statute of limitations regarding a cause of action for breach of contract is three years, while the cause of action for an intentional tort, like slander, is one year.

A *complaint* is a general statement of the plaintiff's claim. The complaint must describe the actions that led to the claim of a violation (i.e., violation of rights). The claim can be for money damages. It could also be a claim for equitable remedies like specific performance (e.g., court forcing a party to abide by a contract) or an injunction (e.g., stopping a person from doing something). The complaint must establish jurisdiction of the court in which it is filed. For example, if the complaint is filed in federal court, it must show diversity of citizenship or that a federal statutory or constitutional question is involved.

Class actions are sometimes filed against large companies. A class action can occur when a group of plaintiffs have same cause of action against one defendant. For example a group of consumers might sue a lender for failure to pay abide by federal truth-in-lending disclosures on their loan forms. One advantage in a class action is that legal expenses can be shared by a large group of plaintiffs. Class actions have been the subject of abuse. Oftentimes individual plaintiffs get a small amount, while their lawyers get a fee based on the total amount paid to all members of the class. This amount can be huge. This practice has led to some frivolous class action suits.

2. Service of Process

This generally involves attaching a copy of the complaint to a summons which is served on the defendant. The summons explains to the defendant what is going on and certain rights that the defendant has.

The summons explains:

- A. That the defendant is being sued;
- B. The name of the Court in which he is being sued;
- C. When he must file an answer; and
- D. The fact that a default judgment will be entered if no answer is filed.

The *summons* (or process) is delivered by an *office of the court*. In many state courts, this can be a deputy sheriff or a professional process server. Deputy Marshals or process servers are used in federal court. Constables are used in justice court of some states. In exceptional circumstances, when the defendant can not be found, service may be made by publication in a newspaper.

The summons must normally be served on the individual defendant. Some states allow service on a member of defendant's household if the defendant is not available. A plaintiff must serve a corporate defendant by serving the registered agent or an appropriate officer of the corporation.

3. The Answer

In the *answer*, the defendant tells his side of the story. He is supposed to admit facts that are true and deny allegations that are not true. This answer must be filed within a certain period of time which is usually stated on the summons. Failure to file an answer can result in a default judgment against the defendant. This is a judgment for failure to defend that is entered against the defendant just like there had been a trial.

The defendant can file a counterclaim against the plaintiff as part of his answer. The effect of the counterclaim is that the defendant is suing the plaintiff in the same action. The plaintiff must file an answer to the counterclaim or a default judgment will be taken against him.

4. Ending a Suit through Motions

Motions are formal requests for the court to take some sort of action. The pleadings generally will consist of the complaint, the answer, any counterclaim, and all motions. In a *motion for judgment on the pleadings*, the defendant is arguing that even if everything said in the complaint were true, plaintiff would still have no cause of action against defendant. For example, suppose you have a business partner who calls you a liar in a room where only you and your partner were present. You sue your partner for slander. He would be entitled to a judgment on the pleadings since there was no publication (verbally or in writing) of your slanderous remark. Only he heard it. If the court grants this motion, the case is over unless you appeal the judgment.

Another type of motion that is often filed is a *motion to dismiss*. Two common grounds for this motion are expiration of the appropriate statute of limitations or that the court lacks jurisdiction over the case. For example, courts of equity in some states have jurisdiction over disputes involving land. If such a dispute were filed in a circuit court, a motion to dismiss for lack of jurisdiction would be appropriate.

A *motion for summary judgment* is appropriate in situations where there are no important facts in dispute and the only dispute is how the law should be applied to the facts. If there is no dispute over the important facts of the case, there is nothing for a jury to determine since that is their job, to decide what the facts are based on the evidence presented at trial. The judge will therefore apply the law to the facts and render a judgment. That will be the end of the case unless there is an appeal. Generally, this motion is not made unless all discovery has been completed.

5. Discovery

The period allowed for discovery is when the plaintiff and defendant get information from each other and other people to use as evidence at trial. Discovery pleadings generally consist of the following:

A. *Requests for Production of Documents:* These are written requests served on the opposing party's attorney requesting that documents relevant to the case be produced for inspection and copying.

B. *Requests for Admission:* These are requests from one party to another to admit facts that are not in dispute so that the evidence produced at trial will basically include matters that are in dispute. Honest and complete responses can shorten the trial.

C. *Depositions:* These are statements of the parties or potential witnesses taken under oath by a court reporter. Depositions are usually taken by a private court reporter (*i.e.*, one not employed by a court) in the office of one of the lawyers. Depositions are used to pin down the testimony of witnesses and to find out what witnesses are going to say at trial.

Courts are generally very liberal regarding what information is subject to discovery. It must be generally relevant in some way although, technically, courts will allow the parties to ask for *anything that is reasonably calculated to lead to discoverable evidence*.

Attorneys do not have to disclose *work product*. Work product consists of the thoughts, strategies and theories of the attorneys of the parties, whether it is in the form of memos, notes, letters or any similar document.

Pretrial Conferences always are required in Federal Courts and are being required more and more in some state courts. The following usually occur in pretrial conferences:

- A. The parties agree on the facts not in dispute.
- B. They tell each other whom their witnesses will be.
- C. They identify what their evidence will be and provide copies of documents that will be offered into evidence.

Each party will submit in writing the facts they intend to prove and the law or jury instructions that should be applied to the facts. The Judge will

generally act somewhat as a mediator, at least in federal court, and try to get the parties to settle case.

6. The Trial

Facts have to be in dispute to make a trial necessary. The trier of fact can either be a jury or a judge alone, unless a jury is required by law. A jury trial is generally required by Constitution if the amount in controversy exceeds \$20. However, a jury trial is generally not required if it is an equitable issue like an injunction action. The right to a jury can be waived. There is an absolute right to a jury trial in criminal cases.

Prospective jurors are drawn at random from voting lists or other lists (like licensed drivers) and make up the pool from which the juries are picked. Some prospective jurors are excused, like mothers of small children or someone on whom serving would be a hardship like an accountant during tax season.

Voir dire is used to weed out jurors that may be biased in some way. The judge and the attorneys ask questions about a prospective juror's knowledge of the case, occupation, relationship to the attorneys or parties, and similar questions. Most states have jurors fill out a questionnaire on general topics to save time. Jurors can be challenged for cause. The argument would be that they were incapable of making an impartial decision. For example, they might be friends of one of the parties or one of the attorneys.

Attorneys can also use a limited number of *peremptory challenges* to remove potential jurors with whom they are uncomfortable. A peremptory challenge is a right to strike a juror with or without cause. However, the challenge can't be based on race or sex. In a personal injury action involving a big company, plaintiff attorneys sometimes will want jurors of limited education rather than business people. People with limited education are sometimes more likely to rule on emotion against a *big rich insurance company*, for example.

In the *opening statement*, each party's attorney gives a summary of what he intends to prove and the evidence that will be used. Next, the plaintiff presents his evidence, which will primarily consist of the testimony of witnesses. The plaintiff has the burden of proof. The standard of proof is the *preponderance of evidence* in most civil cases. The standard in criminal cases is *beyond a reasonable doubt*. The standard in some civil cases, like in a suit charging fraud, is *clear and convincing* evidence. This standard is somewhere in between beyond a reasonable doubt and preponderance of evidence.

In *direct examination* of a witness, the attorney calling the witness will ask the questions. In the *cross-examination* of the witness, the opposing counsel asks questions. He will often try to discredit the witness. For example, if accident that is the subject of the suit occurred at night, the questioning might go something like this:

- You testified that you were 60 ft. from the accident, is that correct?
- The accident happened on August 15, is that correct?
- It was cloudy that night, wasn't it?
- It was dark, wasn't it?
- You couldn't see very well, could you?

A good cross-examiner will only ask questions that he knows the answer to and which will yield a yes or no answer. However, a witness has the right to explain his answer.

In *redirect examination*, the attorney who called the witness will try to undo any damage caused by the cross examination. The opposing counsel will then have the right to *re-cross*. This is similar to cross-examination.

The witness must have personal knowledge of what he is testifying about. He must have direct or indirect contact with facts of case, *e.g.*, actually witnessed the accident in question or overheard the contract in dispute being negotiated. A witness must testify based on his

personal knowledge. He generally cannot give his opinion unless it is based on his five senses. Examples:

- Looked dark.
- Smelled smoke.
- Saw the defendant take the item from the store.
- Felt pain.
- Heard the misrepresentations made by the salesman.

An expert witness can give opinions. For example, in a medical malpractice case involving a doctor, an expert witness (usually another doctor) will have to give an opinion that the defendant doctor's actions were negligent in that they were not in accordance with the standard of care of the medical community. In an eminent domain suit a main issue will be the fair market value of the real property that is to be condemned. Both parties will need to call an appraiser as an expert witness to give his opinion as to the fair market value of the property.

After the plaintiff presents all his evidence, he *rests* his case. In a jury trial, the plaintiff will ordinarily make a motion for a directed verdict. This motion is to be granted by the judge if the plaintiff has not made a *prima facie* case. The plaintiff must offer proof of each legal element of his claim. This is called making a *prima facie* case. For example, to prove fraud, you would normally have to prove:

- that a false statement had been made;
- that defendant knew it was false;
- that defendant made statement to deceive plaintiff;
- that plaintiff was deceived;
- resulting in damages to plaintiff.

Failure to offer proof on one of these elements could cause a motion for directed verdict to be sustained. That would be the end of the trial.

Next, the defendant (*i.e.*, the defendant's attorney) calls his witnesses and introduces his evidence. Evidence, other than testimony, that either party could introduce would be documents, like a contracts or a letter, or tangible items like a defective piece of equipment.

Hearsay evidence is testimony that is offered by a witness who does not have personal knowledge of the information being given but just heard it from someone else. This type of evidence is generally inadmissible. In a suit where the issue is whether or not a contract was breached, suppose that testimony is offered by a witness to the effect that the witness heard the defendant say that he had no intention of strictly abiding by the terms of the contract. Such evidence would be hearsay and generally not admissible. There are several exceptions to the hearsay rule.

In the *closing argument* each attorney summarizes what he has proven. Hopefully, each attorney will have proven what he promised to prove during his opening statement. Attorneys for each party will also try to point out defects in the case of the opposition.

In a jury trial jury instructions are given to the jury at the end of the case. These instructions are prepared by the attorneys of both parties and presented to the judge for approval. The instructions tell the jurors what the law is and how to apply the law to the facts that have been proven. Here are some possible samples of jury instructions in a case involving conversion (civil theft of personal property):

Instruction to Jury as to the Definition of Conversion: You are instructed that conversion consists in the exercise of dominion and control over property inconsistent with, and in denial of, the rights of the true owner or the party having the right of possession. It is the exercise of a wrongful claim of right or dominion over the property which assumes that the converter is entitled to its possession. This taking to oneself of another person's property is a conversion.

Instruction to Jury that Refusal to Deliver Goods after Demand and Tender of Freight and Storage Charges can Constitute Conversion: You are instructed that if you believe from the evidence that plaintiff was the owner of the property in question, and made proper demand and tender prior to this suit, but that defendant refused to deliver the property unless plaintiff paid freight and storage charges on other property

not received or stored at the same time as the property in question, then such refusal of delivery by defendant constituted a conversion.

Instruction to Jury that Unauthorized Sale of Personal Property can Constitute Conversion: You are instructed that any assertion of title to, or any act of dominion over, personal property inconsistent with the rights of the owner, such as a sale of the property of one person by another, is a conversion. Therefore, if you find that the plaintiff was the owner of the *(describe personal property)* at the time of the alleged taking, and that the defendant sold it without the plaintiff's consent you should find for the plaintiff.

Instruction to Jury Regarding Compensatory Damages for Conversion: You are instructed that if, under the evidence and the instructions of the court, you find the defendant liable to the plaintiff for damages for conversion of the *(describe personal property)*, then the measure of the plaintiff's damages will be the value of the property at the time and place of the conversion, with *(number)* percent interest since that date.

During jury deliberations, the jurors will decide on a *verdict*. A unanimous verdict is ordinarily not required in civil cases. In some states, only nine out of twelve of the jury must agree on a verdict. A *hung jury* occurs when the jury cannot agree on a verdict. The case must be tried over again or dismissed.

Post trial motions generally consist of the following:

- *Motion for a new trial*. Sample grounds would be if the jury misconstrued a jury instruction or the jury clearly should have found more damages.
- *Motion for a judgment notwithstanding the verdict* (JNOV). If the judge grants a JNOV, the judge reverses the decision of the jury and enters judgment for the other side because, for example, the jury's verdict clearly did not conform to the evidence. It is rare for a judge to grant a JNOV.

An *appeal* to a higher court can be made by the party who lost the case or if the party who won believes that damages do not conform to the

evidence. There are time limits on appeal. The time in which a party has to file a notice of appeal depends on the court.

The appellate court makes its decision on selected portions to the transcript of the trial, legal briefs of the attorneys, and oral arguments of the attorneys, if permitted by court. No witnesses are heard or evidence is presented.

William (Bill) H. Glover received his B.B.A. from the University of Mississippi in 1973 and his J.D. from the University of Mississippi School of Law in 1976. He joined the firm of Wells Marble & Hurst in May 1976 as an Associate and became a Partner in 1979. While at Wells, he supervised all major real estate commercial loan transactions as well as major employment law cases. His practice also involved estate administration and general commercial law. Bill joined the faculty of Belhaven College, in Jackson, MS, in 1996 as Assistant Professor of Business Administration and College Attorney. While at Belhaven he taught Business Law and Business Ethics in the BBA and MBA programs; Judicial Process and Constitutional Law History for Political Science Department; and Sports Law for the Department of Sports Administration. In 2004 he left Belhaven for a short stay at Wells Marble & Hurst, PLLC, as General Counsel and then joined the staff of US Legal Forms, Inc., in January of 2007, where he drafts forms, legal digests, and legal summaries. Bill is the author of The Sports Law Book (For Coaches and Administrators) [Click here for purchase details.](#)

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