

## **First shots fired: Filing of suit and initial pleadings - Civil litigation basics - by Michael Brangwynne**

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In earlier publications, my colleagues have written about best practices to avoid civil litigation. Those articles are available on Fletcher Tilton's website under the Knowledge Center, and I recommend giving them a read. The purpose of this series is to provide some basic information for individuals or businesses that find themselves beyond the point of avoidance, and have either been brought unwillingly into the world of civil litigation as a party to a lawsuit, or find themselves in a position where the filing of a lawsuit against another individual or business seems to be the only remaining option.

### Civil Litigation Generally

"Civil Litigation" is a term that describes the process of resolving a legal dispute between two or more parties and often involves one or both parties seeking monetary compensation, referred to as the party's damages, from the other for the wrongs they claim to have suffered. Other forms of relief that may be sought through the litigation process are injunctive relief – asking for a court order to stop the other party from doing something, and specific performance – asking for a court order compelling the other party to do something. The party that files the lawsuit is known as the plaintiff, and the party against whom the lawsuit has been brought is referred to as the defendant.

Unlike transactional law, which is characterized by two adverse parties negotiating toward a common goal such as a purchase and sale agreement – civil litigation involves an existing legal dispute that has arisen between two or more parties and must be resolved by a third party, either a judge in a courtroom or an arbitrator in an arbitration proceeding

Civil litigation should also be distinguished from criminal litigation where the state, through a prosecutor, brings a prosecution against an individual accused of committing a crime, and seeks prison time or other punishment for the alleged criminal. There are some important differences between a criminal prosecution and a civil lawsuit, most notably the burden of proof that the plaintiff must meet. In a civil lawsuit, the plaintiff must prove his claims "by a preponderance of the evidence," which in simpler terms means "more likely than not." In a criminal prosecution, the

defendant must be found guilty “beyond a reasonable doubt,” which is difficult to simplify other than to say that it is considered a substantially higher standard than the “more-likely-than-not” standard applied in civil cases. The prosecution must present evidence that removes any reasonable doubts from the jurors’ minds that the defendant is guilty of the alleged crime.

Anyone who followed O.J. Simpson’s criminal “Trial of the Century” for the murder of Nicole Brown and Ron Goldman, and the subsequent civil proceedings by the Brown and Goldman families for wrongful death, has seen the different outcomes that can result between a criminal lawsuit and a civil lawsuit arising out of the same occurrence, due to the different legal rules and standards applied. Simpson was acquitted of murder charges and thereby avoided prison time in his criminal trial. But following a civil lawsuit, he was found liable to the Brown and Goldman families for the deaths, and the families were awarded \$33.5million in damages.

#### Filing of the Lawsuit and Initial Pleadings

The plaintiff in a civil lawsuit initiates the lawsuit by filing with the court and serving upon the other parties a Complaint which is the first of the initial pleadings filed with the court. The Complaint sets forth in numbered paragraphs the plaintiff’s version of the relevant facts and the ways in which the defendant(s) violated the plaintiff’s rights. Each specific basis for relief is known as a cause of action, and a single dispute may give rise to several causes of action. For example, if a dispute arose between a property owner and a general contractor over whether certain construction work was performed properly, the owner might assert claims against the contractor for breach of the parties’ contract, negligent performance of the work, breach of express or implied warranties, and negligent or intentional misrepresentations that were allegedly made by the contractor. The plaintiff’s Complaint is served on the defendant with a summons, which directs the defendant to file a response to the Complaint within a certain period of time or risk being defaulted in court.

Once he has been served with a copy of the Complaint, our defendant contractor is on the clock to respond to the plaintiff’s claims. Within twenty days (twenty-one in federal court), the defendant can file an Answer which responds to each of the assertions contained in the plaintiff’s Complaint paragraph-by-paragraph. Or he may file a Motion to Dismiss the claims. By filing a Motion to Dismiss, the defendant is asserting that there is some legal defect with the plaintiff’s claims – for example the statute of limitations to file the plaintiff’s claims has run and therefore the plaintiff’s claims are time-barred. This is also the time at which the contractor may want to assert claims of his own.

The contractor in our dispute may feel that he completed the work in accordance with the parties’ agreement, in a workmanlike and appropriate manner, and therefore is entitled to full payment. If the owner has failed to make full payment, then the contractor will want to include with his Answer a Counterclaim, which sets forth his version of the relevant facts and his own claims for relief against the owner. The contractor may also feel that, if in fact work was performed incorrectly as alleged by the owner, that work that was the responsibility of one of his subcontractors. The contractor could therefore also include in his initial pleadings a Third-Party Complaint, which would bring one or more of his subcontractors into the lawsuit. With the number of owners, professionals, contractors, subcontractors and suppliers that can be involved in a large development project, the docket can

become crowded in a hurry.

Once all parties have been named in the initial pleadings and have responded to the assertions made against them, and all preliminary legal issues have been resolved (such as our statute of limitations issue above), the parties can proceed to the next stage of the civil litigation process – discovery.

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