

## Litigation Process

Filing a lawsuit, defending a lawsuit, and pursuing the litigation process can be scary and intimidating. This article is intended as a descriptive summary of the steps and processes often encountered in litigation. In summary, a plaintiff files and serves a lawsuit on the defendant. The defendant then files an answer, defenses, and counter-claims. The parties then engage in the discovery process to gain an understanding of the case and evidence. The parties may then engage in alternative dispute resolution, such as arbitration and mediation. Finally, if the case has not been settled or otherwise resolved, a trial will be held before a judge and possibly a jury.

### Filing a Lawsuit

Generally, the litigation process begins with the filing of a lawsuit in the county court where the parties reside or where the transaction, incident, or occurrence giving rise to the lawsuit occurred. The plaintiff files with the Court a document called a Complaint. The Complaint must set forth a plain and concise statement of the ultimate facts giving rise to the lawsuit. In addition, the Complaint must establish the legal basis for the claim(s) alleged in the lawsuit as well as a demand for the relief or remedy sought by the plaintiff. It is acceptable for the Complaint to include multiple claims for relief, and the claims for relief can be different, inconsistent, and pled as alternatives.

### Serving a Lawsuit

After filing, the plaintiff must serve the defendant(s) with a summons and with a copy of the Complaint. A summons is a legal document advising the defendants of their obligation to “appear” in the lawsuit by filing with the court documents responsive to the Complaint (discussed in more detail below). Generally, the plaintiff must hire a sheriff or process server to serve the documents on the defendant(s). There are multiple ways to serve a defendant, but personal service is generally the best and most preferred method. Personal service simply means that the process server physically hands the documents to the defendant. Sometimes, personal service is not possible. Depending upon the circumstances, service can also be effectuated through substitute service (leaving true copies of the documents with a person over the age of 14 at the defendant’s dwelling house or usual place of abode), office service (leaving true copies of the documents with a person in charge at the office of the defendant), service by mail (mailing true copies of the documents to the defendant), or service by publication (posting notices in local newspapers or other publications). It should be noted that these methods of service are not always valid in all circumstances. The plaintiff must file a certificate with the court certifying the date, time, and type of service effectuated.

## Answering a Lawsuit

Within 30 days of the date the Summons and Complaint were served, a defendant must file with the court a legal document called either a “motion” or “answer”, plus a filing fee. If a defendant fails to “appear” in the lawsuit by filing a motion or answer within 30 days, the plaintiff can seek a default judgment against the defendant. A default judgment is a court order giving to the plaintiff the relief plaintiff sought against the defendant in the Complaint.

### Answer

An Answer is a legal document whereby the defendant admits, denies, or states a lack of sufficient knowledge as to each of the allegations contained in the plaintiff’s Complaint. An Answer also contains any defenses that the defendant may have to the plaintiff’s claims. In addition, the Answer will contain any relevant claims that the defendant may have. This includes counter-claims (claims defendant has against the plaintiff), cross-claims (claims defendant has against other defendants), and third party claims (claims a defendant has against a person or entity not yet made a party to the lawsuit, but which relate to the issues present in the lawsuit).

### Motion

If the defendant believes that there exists a legal basis by which the defendant should be excluded from the case, or if the defendant believes plaintiff has failed to follow the rules in filing and serving the lawsuit, the defendant may file a motion with the court instead of an Answer. To give a few examples: a defendant may file a motion asking the court to dismiss the case if the defendant believes the court lacks jurisdiction over the subject matter of the case or over the defendant; a defendant may file a motion to dismiss if the defendant believes that the plaintiff failed to properly serve defendant with the lawsuit; and, a defendant may file a motion to dismiss if plaintiff failed to file and serve the lawsuit within the applicable statute of limitations. This is not an exhaustive list as there are many other reasons why a defendant may file a motion instead of an Answer.

## Arbitration & Mediation

Generally, people think about judges, juries, and trials when they think about litigation and filing a lawsuit. However, parties are engaging more and more in various forms of alternative dispute resolution, such as arbitration and mediation, instead of going through trial. Sometimes the choice to mediate or arbitrate is voluntary and sometimes it is compulsory. However, with the expense of taking a case through trial skyrocketing, mediation and arbitration are great alternatives for resolving a case on a budget.

### Arbitration

Arbitration is similar in form to a trial in the sense that evidence is presented to an independent party who will make an ultimate decision regarding the outcome of the case. However, instead of a judge or jury hearing the case at the court house, arbitrations are generally held in a private office in front of an arbitrator. Generally,

retired judges or experience attorneys act as arbitrators. The arbitrator performs all of the functions that a judge and jury perform during a trial. The arbitrator hears all of the evidence, rules on legal issues, and ultimately decides the outcome of the case.

## **Types of Arbitrations**

There are types of arbitrations that may be encountered. First, there are binding arbitrations. In a binding arbitration, the decision of the arbitrator is final, and the parties have no opportunity to appeal the decision. Binding arbitrations generally occur as the result of a dispute over a contract that contains a binding arbitration provision. Conversely, in a non-binding arbitration the parties do not have to accept the decision of the arbitrator and may appeal the decision. Some arbitrations are voluntary. For example, the parties to a law suit might agree to save expense by having an arbitrator decide the case instead of having a trial. Likewise, some arbitrations are mandatory. For lawsuits with claims less than \$50,000, ORS 36.400 requires the parties to submit to non-binding arbitration, called Court Annexed Arbitration. Since it is non-binding, the parties have the right to appeal the arbitrator's decision and have a trial. However, a party appealing the decision of an arbitrator under Court Annexed Arbitration should be aware that, pursuant to ORS 36.405, if that party does not improve his or her position at trial then he or she will be taxed the attorney fees and costs incurred by the other party to the action.

## **Mediation**

Mediation is a form of settlement negotiation which is facilitated with the help of an independent third party who acts as the mediator. The mediator does not have the power or authority to make rulings or a determination on the case. Rather, the mediator's objective is to improve the dialogue between the parties and assist the parties in coming to an agreement or resolution. Parties often appreciate mediation because it allows the parties to reach a settlement on their own terms, rather than have a resolution of the case imposed by a third party (like a judge or arbitrator). Generally, mediation is a voluntary process that parties agree to engage in to resolve a dispute or litigation. However, mediation can sometimes be compulsory if the dispute between the parties is based upon a contract, and the contract requires the parties to first mediate the dispute before moving forward with a lawsuit.

## **Discovery**

Once a plaintiff files and serves the Complaint, and once the defendant files an Answer to the Complaint, the parties typically engage in the discovery process. This process generally precedes arbitration, mediation, and trial. This is a process by which the parties attempt to learn about the opposing party's case. This process can include sending Requests for Production of Documents, sending Requests for Admissions, and taking depositions. A Request for the Production of Documents is simply a formal request that the opposing party produce or make available documents that are relevant to the issues in dispute in the case. A Request for Admissions is a formal request sent to the opposing party asking that they either admit or deny the truth of statements prepared by you or your attorney. A deposition provides a party with the opportunity to sit down, in the presence of a court reporter, with an opposing party or important witness and ask questions regarding the

issues and facts in the case. For more information on depositions, please refer to the article by attorney J. Andrew Weerts at <http://www.pmblaw.com/attorney-article-key-considerations-having-your-deposition-taken.php>.



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