

(BASIC) ANATOMY OF A LAWSUIT

I. Town is served with a ‘Complaint’ or ‘Petition’ containing allegations about the Town and asking for some kind of relief or asserting that some decision the Town made was wrong and asking that it be reversed.¹

II. A ‘Litigation Hold Notice’ is sent from the Town legal department to potential record custodians. The purpose of the Litigation Hold Notice is to put record custodians on notice of the nature of the allegation in the Lawsuit and notify them that all records that may be related to that Lawsuit must be preserved until the later of final resolution of the Lawsuit or the retention period set forth in the [Municipal Records Disposition Schedule](#). All records must be preserved, including those for which there is normally no duty to retain (‘transitory records’ including phone messages, personal notes and the like). See [Attachment 1-A](#) for the Litigation Hold for council members and [Attachment 1-B](#) for the Litigation Hold for all other record custodians.

III. Outside counsel is appointed to represent the Town if there is insurance coverage or outside counsel is retained by the town attorney if there is no insurer. Presently, the Town has ‘deductibles’ under its insurance policies. That means that the Town is responsible for paying the deductible amount before the insurance company will begin paying defense costs.

IV. The Town files its answer or response (‘Answer’) to the Lawsuit. The Answer sets out the Town’s response to the allegations and sets out the Town’s defenses and usually must be filed within thirty days of service of the Complaint on the Town. This thirty days is frequently, but not always, extended another thirty days. In appropriate cases, the Town may file its own claim against the plaintiff (‘Counterclaim’).

Typically, the legal department will send a copy of the Complaint or Petition (jointly ‘Complaint’) to the director of the department involved in the Lawsuit. The director, with the assistance of departmental staff involved develops their response to each allegation in the Complaint. Outside counsel will use these draft answers in developing the Town’s Answer which will be filed with the court. All records created in developing answers to the Lawsuit should be protected as privileged records and treated as Confidential. Emails between the legal department or outside counsel and a Town official or employee after the commencement of the Lawsuit should also be regarded as Confidential, unless told otherwise by the attorney. In some cases Council may be involved in developing the Answer.

V. The ‘discovery period’ commences (‘Discovery’). Discovery is the investigative process the parties go through to gather information and evidence about their case. During discovery the parties serve ‘Interrogatories,’ ‘Requests for Production’ and ‘Requests for Admissions’ on each other.

¹ Sometimes the Town simply receives a notice that someone has a ‘claim’ against the Town. The need to impose a Litigation Hold and retain all records arises at the time we know of a claim.

Interrogatories are written questions one party serves on the other that must be answered in writing under oath. Unless an extension of time is obtained, answers to Interrogatories are due thirty days after they are served on a party.

‘Requests for Production’ are requests from one party on the other that the other produce physical evidence related to the Lawsuit. Unless an extension of time is obtained, production of documents is due thirty days after the Request is served on a party.

‘Requests for Admissions’ are requests that a party admit that records are authentic or facts are true. Unless an extension of time is obtained, responses Requests for Admissions are due thirty days after they are served on a party.

During the Discovery Period officials and staff may be asked to produce all pertinent records. The obligation to produce records and evidence related to discovery is broader and more demanding than a request for records under the public records law. For instance, under the public records law producing the requested record is usually a sufficient response from the Town. In discovery, all existing copies of a record should be produced, even if the production is redundant. Council members, who use the services of the Town Clerk for maintenance of email and other electronic records, can rely on the Clerk to search the server and produce the member’s emails and other electronic records that are in the Clerk’s custody. However, if the Council member retains records on personal computers or other electronic devices, or if the Council member has printed copies of records in their possession, or if the Council member maintains a website or blog or uses other social media services, these sites and records must be searched and produced by the member.

Typically, the outside attorney or the legal department will forward discovery requests to the departments and officials involved and will ask that they provide draft answers to any questions and produce all requested records. The outside attorney will review and assemble these answers and records and put them in the appropriate format. If an official or staff member believe any record to be confidential or otherwise protected, they should bring that record to the attention of the legal department.

A Town staff member or official may also be asked by the Legal Department or by the Town’s outside attorney to execute an “Affidavit.” An Affidavit is a written statement made under oath. An Affidavit may be used by the Town’s attorneys to support one of the Motions the Town may make (see Motions below).

Please note – if you are asked to sign an Affidavit by a party to a lawsuit that does not involve the Town, contact the legal department.

‘Depositions’ are also held during Discovery. A Deposition is formal questioning, under oath, of a party or a witness or expert. Staff members, and occasionally council members, are ‘deposed.’

On a related note, ‘Subpoenas’ may also be served on the Town or a Town official or staff member. If the Town is a party to the lawsuit that the Subpoena is issued in, such Subpoena is likely improper and you should notify the Legal Department and outside Counsel immediately. If the Subpoena relates to a lawsuit that does not involve the Town, then it is good practice to let the Legal Department know about the Subpoena. Legal can offer its assistance as requested or as necessary. Similarly, if a Town official or staff member is asked to execute an Affidavit by an attorney or other person who is not the Town’s attorney, notify the Legal Department prior to agreeing to execute the Affidavit.

VI. ‘Motions’ are filed either with the Answer or afterwards. Frequently the Town will ‘move to dismiss’ or one or both parties will ‘move for summary judgment.’ If an action is dismissed or summary judgment is granted for one party, an ‘Appeal’ to the Court of Appeals may be filed.

A ‘Motion to Dismiss’ is often the first motion filed. When ruling on a Motion to Dismiss, the judge must accept as true all allegations in the non-moving party’s Complaint. In other words, when the Town files a Motion to Dismiss, we are making the legal argument that even if everything in the Complaint is true (which we will argue is not the case), the Complaint should be dismissed because of some legal defect, which could be procedural or substantive. For example, reasons to dismiss a case at this stage include improper service of the Complaint, running of the statute of limitations, and “failure to state a claim upon which relief can be granted,” the latter of which means essentially that no legal theory supports the plaintiff’s case and requested relief.

A ‘Motion for Summary Judgment’ is usually made after some period of Discovery has taken place. Affidavits may be submitted in support of this motion. For this motion, the judge does not necessarily assume that everything in the Complaint is true, but rather looks to the evidence that is presented by both parties and then decides if either party is “entitled to judgment as a matter of law.” When the Town files a Motion for Summary Judgment, we are usually arguing that the plaintiff cannot provide evidence in support of its claim or that we have a defense which precludes the claim. Summary Judgment is only appropriate when the material facts of the case are not in dispute. If there are material facts in dispute, the motion will be denied and a trial will be held (see below).

VII. The courts usually require a ‘Mediated Settlement Conference’ before the trial (‘Mandatory Mediation’). With Mandatory Mediation the parties agree on a certified

mediator and share the expenses of the Mediation. Each party must come to the Mediation represented by a person authorized to make a decision on settlement. The Mediator acts as a facilitator only and has no authority to force any settlement. If a settlement is reached, the Mediator will see that the settlement terms are reduced to writing and signed by the parties and will notify the court of the settlement. If no settlement is reached, the Mediator will notify the court of an 'impasse' and the matter will proceed to trial. Nothing said in the Mandatory Mediation can be later used against a party in the trial.

VIII. If Lawsuit is not dismissed, if summary judgment is not granted to either party and if the matter is not otherwise resolved, say by Mandatory Mediation or other 'settling' there is a 'bench' or a 'jury' trial. A 'bench' trial is tried before the judge. A jury trial is tried before jurors. A trial involves introduction of evidence including testimony from witnesses. Various motions can arise during the course of a trial. Depending on the outcome, there may be an Appeal.

IX. Depending on the outcome, there may be an appeal to the Court of Appeals (if in state court) or to the Fourth Circuit (if in federal court).

When a case is appealed to the N.C. Court of Appeals or the Fourth Circuit, the party appealing ('appellant') must prepare a 'Record on Appeal' (NC) or 'Joint Appendix' (US) for the court, which includes all the documents and evidence presented to the trial court. The Appellant then files a brief to the court. The appellee then has thirty days to file its brief, and the appellant generally has two weeks after the appellee's brief is filed to file a reply brief. The court then decides the case based on the Record, the briefs submitted by both parties, and briefs submitted by any amicus curiae ('friends of the court'). The court may, in its discretion, have oral argument in the case. It typically takes a year or more for a case to be resolved at this stage.

X. After the case is resolved by the Court of Appeals or Fourth Circuit, the losing party may petition the N.C. or U.S. Supreme Court, respectively, to hear the case. When the N.C. Court of Appeals issues a decision, the losing party may petition the N.C. Supreme Court to hear an appeal of the case. The N.C. Supreme Court must hear appeals of cases in which the Court of Appeals decision was not unanimous or of certain cases involving constitutional questions; otherwise, the N.C. Supreme Court has complete discretion in deciding which cases to hear and most petitions for appeal are denied. Similarly, when the Fourth Circuit issues a decision, the losing party may petition the U.S. Supreme Court to hear an appeal of the case. For cases in which the Town is likely to be involved, the U.S. Supreme Court has complete discretion to decide which cases to hear and the overwhelming majority of petitions are denied. Finally, if the N.C. Supreme Court issues a decision interpreting federal law, the losing party may petition the U.S. Supreme Court to hear the case. Again, that review is discretionary.

Generally both parties will prepare documents in support of or in opposition to the petition. If the petition is granted, a new Record will be prepared and a new set of briefs by each party (and amicus curiae, if any) will be submitted. Generally, if the N.C. or U.S. Supreme Court grants the petition for review there will be an oral argument before that court before the case is decided. This process may also take a year or more to resolve.

BASIC INFORMATION ABOUT THE COURTS

State Court System

State courts in North Carolina generally hear state criminal cases, probate (wills/trusts) cases, contract cases, tort (personal injury) cases, family law (divorce, child custody) cases, and cases involving the interpretation of state law and the N.C. Constitution. All state court judges are elected, with their terms of office varying from 2 years to 8 years.

District Court consists of (i) Small Claims Court, (ii) Civil Division, (iii) Criminal Division, and (iv) Juvenile Division. District Court sits in the county seat of each county. For Cary, that may be Raleigh or Pittsboro.

From nccourts.org:

Civil cases such as divorce, custody, child support and cases involving less than \$10,000 are heard in District Court, along with criminal cases involving misdemeanors and infractions. The trial of a criminal case in District Court is always without a jury. The District Court also hears juvenile cases involving children under the age of 16 who are delinquent and children under the age of 18 who are undisciplined, dependent, neglected or abused. Magistrates (see magistrate section) accept guilty pleas for minor misdemeanors, accept guilty pleas for traffic violations and accept waivers of trial for worthless-check cases among other things. In civil cases, the magistrate is authorized to try small claims involving up to \$5,000 including landlord eviction cases.

Collections cases of the Town may be brought in District Court. The losing party in a civil case heard in District Court may appeal to the Court of Appeals. The losing party in small claims court may appeal for a trial by jury in District Court.

2. Superior Court Division

Superior court consists of eight divisions with 46 districts. Wake County is located in District 10, while Chatham County is in District 15b. Judges rotate among the districts within their division every six months. Superior Court has civil sessions and criminal sessions.

From nccourts.org:

All felony criminal cases, civil cases involving more than \$10,000 and misdemeanor and infraction appeals from District Court are tried in Superior Court. A jury of 12 hears the criminal cases. In the civil cases, juries are often waived.

Most cases concerning the Town are brought in civil Superior Court. The types of cases most often include 'declaratory judgment actions' and 'appeals' of Council or Zoning Board of Adjustment cases. Eminent domain cases ('condemnations') are also brought in

Superior Court. A person or entity who loses in Superior Court may appeal to the N.C. Court of Appeals (and in some rare cases, directly to the N.C. Supreme Court).

3. N.C. Court of Appeals

From nccourts.org:

The Court of Appeals is North Carolina's intermediate appellate court. Fifteen judges hear cases in panels of three. The Court of Appeals reviews the proceedings that occurred in the trial courts for errors of law or legal procedure; it decides only questions of law - not questions of fact. All cases appealed from the Superior and District courts in civil and criminal cases, except capital murder cases in which the Superior Court pronounces a judgment imposing the death penalty, are heard by the Court of Appeals. In addition, direct appeals from certain of the state's administrative agencies are heard by the Court of Appeals. In the 2011 calendar year, 1,615 appeals, 953 petitions, and 3,833 motions were filed in the Court of Appeals; during the same period the Court disposed of 1,835 appeals, and 4,301 petitions and motions. If a member of the three-judge panel dissents from the decision of the majority, there is a right of appeal to the North Carolina Supreme Court; otherwise, further review of a decision of the Court of Appeals is limited to those cases that the Supreme Court accepts in its discretion. Judges of the Court of Appeals serve eight-year terms and are elected in a non-partisan election.

Council decides whether the Town will appeal a case.

4. N.C. Supreme Court

From nccourts.org:

The Supreme Court of North Carolina is the state's highest court, and there is no further appeal in the state from their decisions. This court has a chief justice and six associate justices who sit together as a panel in Raleigh. The Supreme Court has no jury, and it makes no determination of fact; rather, it considers error in legal procedures or in judicial interpretation of the law.

For additional information on the state court system, see:

<http://www.nccourts.org/Citizens/Publications/Documents/JudicialSystem.pdf>

Federal Court System

Federal courts generally hear cases regarding whether a law or action violates the U.S. Constitution, cases involving federal laws (civil or criminal), disputes between two states, and bankruptcy cases. Federal court judges are appointed by the President with advice and consent of the Senate, and are appointed for life, except for bankruptcy court judges who serve 14 year terms and are appointed by appellate judges. Basics of the federal court system are presented below. For a more comprehensive look at the federal courts, please visit: <http://www.uscourts.gov/FederalCourts.aspx>

1. U.S. District Court

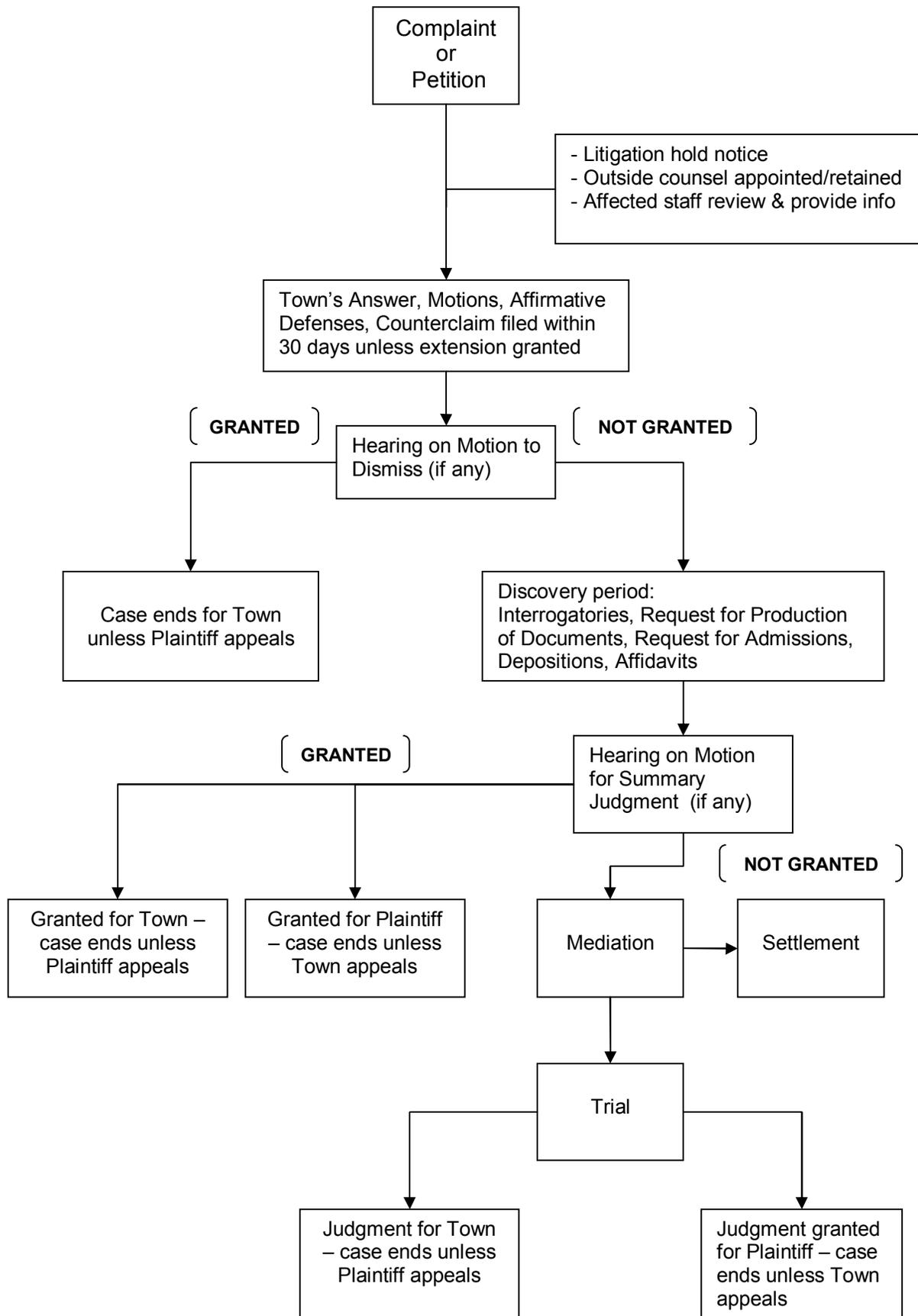
District courts hear civil and criminal federal cases. There are 94 federal judicial districts, three of which are in North Carolina – the Eastern, Middle, and Western Districts of North Carolina. Wake County is in the Eastern District while Chatham County is in the Middle District. Bankruptcy courts are located in each of the districts as well. Cases brought against the Town should typically be filed in the Eastern District. Cases in the Eastern District may be heard in courthouses in Raleigh, New Bern, Elizabeth City, Fayetteville, Greenville, or Wilmington. Appeal is to the Fourth Circuit Court of Appeals.

2. Fourth Circuit Court of Appeals

There are 12 Circuit Courts of Appeal for the United States. The Fourth Circuit, headquartered in Richmond, Virginia, hears appeals from all the district courts in South Carolina, North Carolina, Virginia, West Virginia, and Maryland. As with the North Carolina Court of Appeals, the Fourth Circuit hears cases in panels of three. The losing party may request that the full membership of the Circuit, currently 15 judges, rehear a case (*rehearing en banc*). The losing party also may petition the U.S. Supreme Court to review the case.

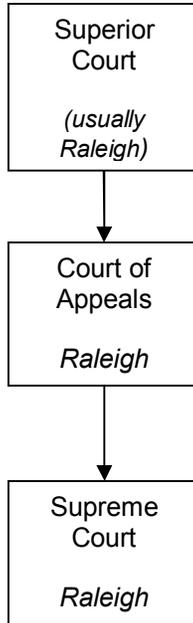
3. U.S. Supreme Court

Nine Supreme Court justices hear appeals, in their discretion, from all 12 Circuit Courts of Appeal. The Court has approximately 10,000 cases on its docket each year; however, it will grant a petition for review and actually hear and decide only about 100-150 of those cases. This is the highest court in the United States, from which there is no appeal.



Appeals

North Carolina



Federal Courts

