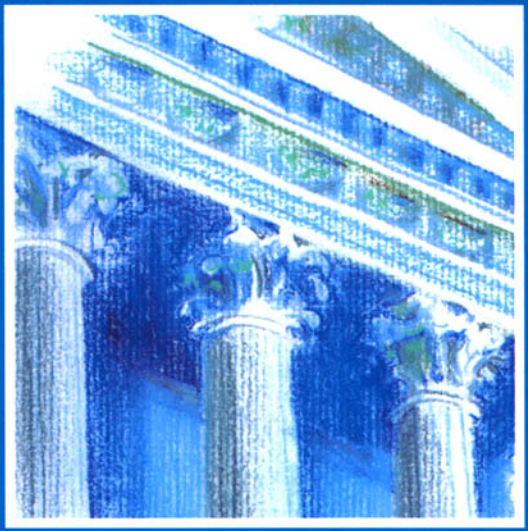
CIVIL LITIGATION FOR PARALEGALS

Second Edition



ELIZABETH RICHARDSON • MILTON REGAN

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PREFACE

Civil litigation instructors may recall some uneasy moments in their first-year law school civil procedure courses. They may recall sitting in class thinking that the concept of federal question jurisdiction is well and good, but what does it really mean—how do you apply it in a real live lawsuit?

Civil Litigation for Paralegals answers such uneasy questions for paralegal students, giving them a practical introduction to civil litigation. It is a comprehensible guide to civil procedure for students in all types of paralegal programs. There are many approaches for teaching civil litigation—as one basic course, as a basic and then an advanced course, and in conjunction with other areas of law, such as personal injury. *Civil Litigation for Paralegals* is suitable for all approaches.

ABOUT THE TEXTBOOK

One goal of *Civil Litigation for Paralegals* is to enable students to understand the rules that govern civil procedure and to apply the rules to actual lawsuits. To accomplish this goal, *Civil Litigation for Paralegals* applies the rules of civil procedure to two sample cases. The text tracks the primary case, involving product liability, from the initial client conference through the trial and posttrial procedures, enabling students to follow a lawsuit through the entire litigation process and grasp an overview of civil procedure.

A second goal of *Civil Litigation for Paralegals* is to enable students to understand the principles that underlie the rules that govern civil litigation. An important principle underlying the Federal Rules of Civil Procedure is to provide for the fair and orderly disposition of lawsuits, and this is illustrated throughout the text. *Civil Litigation for Paralegals* devotes an entire chapter to the rules of evidence. Although paralegals will not actually try cases, they must understand the goals of the rules—to ensure fairness and to ascertain the truth. Chapter 3 focuses on these basic principles that underlie the rules of evidence and applies them to factual situations so that paralegal students can grasp the practical application of the rules of evidence as well.

There are several important organizational features in the textbook. First, the text focuses on the Federal Rules of Civil Procedure, because these rules give a cohesive overview of the litigation process and because many states have rules that are the same as or similar to the federal rules. Throughout, the text emphasizes the importance of state rules of civil procedure and local rules of court as well. Second, the text follows a sample case (product liability) throughout the

litigation process, and supplements this with a second case involving employment discrimination.

The second edition of *Civil Litigation for Paralegals* explains the changes brought about by the Civil Justice Reform Act of 1990 and the 1993 amendments to the Federal Rules of Civil Procedure. In light of these changes, the sections on discovery, local court rules, and alternative dispute resolution have been expanded significantly. The discussion of interviews and interview techniques in Chapter 4 has also been expanded. Each chapter contains an Ethics Block, which explains one or more ethics rules pertinent to litigation.

The text contains features at the end of each chapter to help students retain and apply the information they have learned. Each chapter contains a Summary and Review Questions. To enhance students' critical thinking skills and to apply their knowledge, each chapter has Practical Application exercises. Students read certain Federal Rules of Civil Procedure and local court rules, together with other chapter materials, and answer questions based on the sample cases in the text. This approach helps students overcome their fear of reading court rules. Each chapter also has a Case Analysis exercise, in which students read portions of a case and answer questions that reinforce the concepts of civil litigation taught in that chapter. The text reprints numerous excerpts from the Federal Rules of Civil Procedure and local court rules to illustrate points throughout the text.

Another special learning aid in this text is the appearance of Sidebars—practical observations for paralegals. Sidebars not only clarify the text, but also prepare paralegals to be useful litigation team members from the outset of their careers. For example, paralegals often prepare numerous exhibits to attach to the complaint. A Sidebar tells students that it is helpful to tab each exhibit so that judges do not have to plow through a mass of papers to sort out exhibit numbers.

ABOUT THE STUDENT RESOURCE MANUAL

For each chapter of the text, the Resource Manual features a Chapter Overview that reviews the important rules and concepts covered. The overview is a helpful aid for test review. Each overview is followed by a series of Study Questions and a section entitled Test Your Knowledge, which presents short-answer, multiple choice, and true/false questions. These exercises are also excellent review and test preparation tools. Answers to all questions appear at the end of the chapter. As an aid for students to locate their own states' rules, each chapter has a list of state-specific cites, including state rules of procedure, rules of evidence, and so forth.

ABOUT THE INSTRUCTOR'S MANUAL

Designed for the busy instructor, the Instructor's Manual features a lecture guide in the form of an Annotated Outline for each chapter. It also contains Teaching Suggestions, which give supplemental explanatory material for difficult concepts, point out appropriate places to discuss state and local rules, suggest classroom exercises, and give other practical suggestions for teaching civil litiga-

tion. The manual also contains a list of Learning Objectives for each chapter. Because every busy instructor needs test questions, the manual provides tests for each chapter, including objective questions and short essay questions.

ABOUT THE AUTHORS

Elizabeth C. Richardson earned her Juris Doctor degree from the University of North Carolina School of Law, where she was a member of the Jessup Cup International Moot Court Team and the Order of Barristers. Ms. Richardson earned her Bachelor of Arts degree from the University of North Carolina at Greensboro, where she was inducted into Phi Beta Kappa. She also earned a Master's degree from the University of Cincinnati, where she was a Louise Taft Semple Fellow.

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Milton C. Regan, Jr., earned his Juris Doctor degree from Georgetown University Law Center, where he was articles editor of the *Georgetown Law Journal*. Mr. Regan earned his Bachelor of Arts degree from the University of Houston and his Master's degree from the University of California at Los Angeles. Mr. Regan served as a law clerk to the Honorable Ruth Bader Ginsburg of the United States Court of Appeals for the District of Columbia Circuit. Mr. Regan also was a law clerk to the Honorable William J. Brennan, Jr., of the United States Supreme Court. He served as a litigation associate at Davis Polk & Wardwell in Washington, D.C., before becoming a professor at Georgetown University Law Center. Professor Regan's publications include *Family Law and the Pursuit of Intimacy*.

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We extend our special thanks to all the reviewers who contributed greatly to make this an effective learning and teaching package. Other colleagues, students, and friends have enhanced the text with their knowledge and experience, and we are grateful to them all. We owe particular thanks to Donna Bennick, Ed Lyons, Erwin Spainhour, and Fletcher Hartsell, Jr. Georgetown University Law Center students Jonathan Gewurz, David Fromm, and Thomas Giovanni provided invaluable research assistance.

Finally, we express our gratitude to our spouses, Michael Pawlyk and Nancy Sachs. We are likewise indebted to our parents, Richard and Stuart Richardson, and Milton and Lucie Regan, who have inspired us throughout our lives. Without the understanding and guidance that our spouses and parents have so generously given, this book would not have been possible, and to them we gratefully dedicate our work.

Elizabeth C. Richardson
Milton C. Regan, Jr.

CASES FOR LITIGATION: AN INTRODUCTION

The best way to understand civil litigation is to follow a lawsuit throughout its course. The text follows *Bryson Wesser v. Woodall Shoals Corporation and Second Ledge Stores, Incorporated*, a lawsuit arising from a fire allegedly caused by defects in an electric blanket. As a result of that fire, Mr. Wesser suffered injury to his person and damage to his home.

The second lawsuit is *Equal Employment Opportunity Commission v. Chattooga Corporation*. This lawsuit involves an engineer who claims that her employment was terminated for reasons that constitute a violation of Title VII of the Civil Rights Act of 1964.

Read the fact situations for our two sample cases. You may need to refer back to these fact situations as we follow these cases throughout our discussion of civil litigation.

WESSER V. WOODALL SHOALS CORPORATION AND SECOND LEDGE STORES, INCORPORATED

On January 16, 1994, Bryson Wesser drove through the snow to Second Ledge, a local department store, to purchase an electric blanket. He chose an electric blanket manufactured by Woodall Shoals Corporation, a company whose products he had used before. That night Mr. Wesser read the instructions that accompanied the blanket. He put the blanket on his bed, plugged it in, and slept soundly beneath the warm blanket. Shortly after the first cold snap the next winter, Mr. Wesser resumed use of the blanket. The blanket worked fine, and Mr. Wesser noticed nothing unusual.

On the evening of January 3, 1995, Mr. Wesser went to bed around 11:30, turned on the electric blanket, and soon was asleep. About two hours later Mr. Wesser was awakened by flames leaping from the electric blanket. He threw the blanket off, jumped out of bed, and ran from his room. The fire had ignited a bedspread that lay crumpled on the floor at the foot of the bed and near it a newspaper that Mr. Wesser had been reading before he fell asleep. Mr. Wesser sustained burns both while he was in his bed and as he ran through the burning bedspread and newspaper on his way out of the bedroom. He ran to the kitchen and called the fire department and then waited outside the house until firefighters arrived about eight minutes later.

By the time the fire was extinguished, Mr. Wesser's bedroom was gutted and his house damaged by smoke throughout.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION V. CHATTOOGA CORPORATION

Chattooga Corporation, located in Philadelphia, Pennsylvania, is a consulting firm that serves utilities that operate nuclear power plants. On June 23, 1995, Chattooga Corporation hired Sandy Ford as a consulting engineer. This position involved going on-site at nuclear power plants and rendering advice on safe plant operation and on inspections by the Nuclear Regulatory Commission.

Before Sandy Ford was hired, she was advised at length in an interview about specific qualifications for the position of consulting engineer. One requirement was that she have no felony convictions, and this was clearly delineated as a condition of employment in her employment contract. A Chattooga personnel representative explained that nuclear plants have rigid security requirements and will not allow on the premises anyone with a felony conviction. Sandy Ford filled out the job application and signed it. To the specific question "Have you ever been convicted of a felony?" Ms. Ford checked "no." In fact, she had been convicted of a felony eight years earlier.

At the bottom of the application, in bold type, was the following statement: "I hereby certify that the facts set forth in the above employment application are true and complete. I understand that if employed, falsified statements on this application shall be considered sufficient cause for dismissal."

Chattooga Corporation hired Sandy Ford as a consulting engineer. She received five weeks of training before she was permitted to visit a nuclear plant. During this time, Ms. Ford helped a fellow employee file a claim of employment discrimination against Chattooga Corporation with the Equal Employment Opportunity Commission. Both Ms. Ford's supervisor and the director of personnel knew this.

Although her security check had not been completed, Ms. Ford made her first visit to a nuclear facility about six weeks after she was hired. Ms. Ford and her supervisor arrived at the nuclear plant, where according to usual procedure, plant personnel ran their own security check, which included checking local police records. Security officials refused to let Ms. Ford enter the plant. The reason: she had a felony conviction.

As the two traveled back to their office, Ms. Ford's supervisor explained that because Ms. Ford had the felony conviction and had falsified her application, she could not continue employment with Chattooga Corporation. The supervisor explained that Ms. Ford would not have been hired had the felony conviction been known, because the nuclear plants where she would work would not allow her to enter. Sandy Ford stated that she understood and that she would resign, effective one week later.

Four days later Sandy Ford attempted to rescind her resignation. Chattooga Corporation refused to accept the withdrawal of the letter of resignation, and Ms. Ford was forced to leave the company that day. Ms. Ford filed a charge with the Equal Employment Opportunity Commission alleging that Chattooga Corporation had violated section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, which prohibits retaliation against an employee who has opposed an unlawful employment practice or has participated in an investigation, proceeding, or hearing involving a Title VII matter. (See 42 U.S.C § 2000-e for the complete text of the retaliation section of Title VII.)

Attempts at conciliation failed, and the Equal Employment Opportunity Commission filed suit on behalf of Sandy Ford.

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Chapter 1

INTRODUCTION TO CIVIL LITIGATION AND THE LAW OFFICE

You have just been hired as a paralegal in the law firm of Heyward and Wilson. Leigh Heyward, one of the partners, calls you into her office first thing Monday morning to discuss a case that she has just been hired to litigate.

"I just took a product liability case, and I would like for you to help me with it," she says.

"That sounds interesting," you reply. "I am eager to get started with litigation. I took a course in litigation as part of my school's paralegal program, and even though I had a great textbook, there are some terms I cannot quite recall."

Ms. Heyward smiles and says, "Relax. I remember how I felt when I first graduated from law school and did not know where the local courthouse was. I have no court appearances this morning. Grab a big mug of coffee, and I will give you a refresher session on civil litigation."

CIVIL LITIGATION: OVERVIEW OF THE LITIGATION PROCESS

Before exploring the steps in the litigation process, it is important to understand just what civil litigation is. *Litigation* is the process of carrying on a lawsuit—that is, the process of seeking a remedy or enforcing a right in a court of law.[1] *Civil litigation* refers to lawsuits that involve only noncriminal matters. Note that another term for a lawsuit is an *action*. The terms *lawsuit* and *action* are used interchangeably in this text.

The Litigation Process

Ms. Heyward is ready to explain the litigation process for Mr. Wesser's action involving the electric blanket fire. Refer to Figure 1–1, which is a short outline of that process.

FIGURE 1–1 The Litigation Process

Occurrence of the cause of action
Initial client conference
Preliminary investigation
Complaint and summons: prepare and serve
Responsive pleadings: answer, motions to dismiss, and so on
Discovery
Motions for entry of judgment without trial and other pretrial motions
Sometimes further discovery
Settlement attempts
Pretrial conferences
Trial preparation
Trial
Appeal (if necessary)
Enforcement of judgment

The basis for the litigation process has already occurred. It is the fire that injured Mr. Wesser and damaged his home. This is the ***cause of action***, the event or state of facts that gives rise to a claim for which a party seeks relief from a court. The facts that give rise to Mr. Wesser's cause of action are the fire, which occurred because the blanket ignited, and the injuries suffered by him as a result, as well as the damages to his house. Mr. Wesser is the ***plaintiff***—that is, the party to the lawsuit who is seeking relief from the court. He seeks damages from Woodall Shoals Corporation, the manufacturer of the blanket, and Second Ledge Stores, Incorporated, the seller of the blanket.

Woodall Shoals and Second Ledge are the ***defendants***—that is, the parties from whom recovery is sought in the lawsuit.[2] Mr. Wesser seeks to recover ***damages:*** monetary compensation for the injuries he has suffered and the damage to his property.

The initial client interview has already been conducted. At that interview, Ms. Heyward asked Mr. Wesser about the basic facts—what occurred the night of the fire, where the blanket was purchased, the name of the manufacturer, where he received medical treatment and how extensive the treatment was, and other facts necessary to determine whether Mr. Wesser has a viable claim. Ms. Heyward explained to Mr. Wesser the way the litigation will proceed, and they entered a fee agreement.

Your first task will be to set up the file. Next, you and Ms. Heyward will conduct a preliminary investigation to ascertain more facts about the case. For example, you will contact the insurance carrier for the defendants. In the Wesser case, the same carrier represents both defendants, and the defendants have chosen to defend the action together and use the same attorney, David Benedict. Note that in some cases codefendants use different attorneys, and codefendants may even assert claims against each other, as well as defending against the

plaintiff's charges. You will also review Mr. Wesser's expenses for medical treatment and the records of that treatment. You will conduct further investigation and interview witnesses, as described in Chapter 4.

Your preliminary investigation will involve more than finding out the basic facts. You may also need to research the law to make sure that your client has a legally sufficient claim. One important point to research at the beginning is the ***statute of limitations***. These statutes establish a specific number of years within which a lawsuit must be filed. For instance, a statute may state that a lawsuit for personal injury must be filed within two years of the date the injury occurred. If a party fails to commence the lawsuit within the period specified in the statute of limitations, the party is barred from ever filing the lawsuit. Obviously clients can lose important legal rights if a lawsuit is not filed within the statute of limitations, so it is imperative that the attorney-paralegal team check the applicable statute of limitations right away.

The next step is to draft the ***complaint***, the document filed by the plaintiff to commence the lawsuit. **Filing** a document in litigation means taking the document to the office of the clerk of court, where it is received by the clerk's personnel and placed in the clerk's file. When a complaint is filed, the clerk assigns the lawsuit a case number, which must then appear on every subsequent document filed. The clerk maintains a file for every pending lawsuit. After the complaint and other essential documents (see Chapter 5) are filed in the clerk's office, the complaint and summons are served on the defendants. The ***summons*** is a form that accompanies the complaint and explains in simple terms to the defendants that they have been sued and must file an answer with the clerk of court within a prescribed period of time. The delivery of the summons and complaint to the defendants is called ***service of process*** and must be accomplished in accordance with rule 4 of the Federal Rules of Civil Procedure. The complaint is the first pleading filed in a lawsuit. ***Pleadings*** are the formal documents in which the parties allege their claims and defenses.[3]

After the defendants receive the complaint and summons, they conduct their own preliminary investigation and then file pleadings, responding to the complaint. The defendants may file several types of motions seeking dismissal of the plaintiff's complaint.[4] The defendants also file an ***answer***, which is the defendants' formal written statement stating the grounds of their defense.[5]

The next stage in the litigation process is the discovery phase. ***Discovery*** is the primary means for gathering facts in the litigation process in order to prepare for trial; it includes several methods for obtaining information from the opposing party. ***Interrogatories*** are written questions submitted to the opposing party, who must answer the questions and sign a sworn statement that the answers are true. Another common discovery device is the ***deposition,*** where an attorney orally examines a witness, who takes an oath that the answers given will be truthful. A court reporter transcribes the testimony and sends copies of the questions and answers to all the parties. There are other discovery devices, which will be discussed in Chapter 8.

The next step in the litigation process involves motions by parties requesting that a judgment be entered in their favor without having to go through a trial. The plaintiff may seek a ***default judgment*** if the defendant fails to respond to the complaint within the allotted time period. Either party may seek a ***judgment on the pleadings***, requesting that the court examine the facts set forth in the pleadings and enter judgment in that party's favor based only on the pleadings. A motion frequently made is a motion for ***summary judgment***. Here the court looks at facts beyond the pleadings and determines whether the moving party is entitled to judgment as a matter of law based on the undisputed material facts in the lawsuit.[6]

After the court makes a ruling on these pretrial motions, there may be further discovery, if the parties request it and the court allows it. Bear in mind that the parties can discuss and agree on a settlement at any stage in the litigation. A ***settlement*** is an agreement between the parties to resolve the lawsuit without having a trial. When parties settle a lawsuit, they enter into a written settlement agreement stating the terms of their settlement—for example, how much money Mr. Wesser would receive for personal injury and property damage. When a lawsuit is settled, the parties also agree to dismiss the lawsuit and file with the court a formal dismissal.

The final pretrial conference generally takes place after the completion of discovery and before the final stage of trial preparation. At the final pretrial conference, the attorneys for the parties meet with the judge and determine which facts are in dispute and try to narrow the issues. The attorneys may also settle the case at this point, and some judges actively encourage the parties and their attorneys to do so. If the lawsuit cannot be settled, the attorneys disclose, if they have not already, the witnesses and exhibits they will use at trial. The judge may also rule on some pretrial motions, such as motions concerning the admission of certain evidence. The decisions reached by the judge and attorneys are written up in a pretrial order.

The final few weeks before the actual trial are busy with pretrial preparations. You must prepare witnesses for their testimony, arrange exhibits in order and make the proper number of copies of each exhibit, issue subpoenas if necessary, and do everything else necessary to prepare for the trial.

Throughout the trial you will help keep track of exhibits, take notes of testimony, and perform other activities to assist your employer.

If the judgment entered at trial is not satisfactory, it can be appealed. As discussed at greater length in Chapter 2, an appellate court is different from a trial court.[7] A trial court hears the testimony of witnesses and examines the exhibits that the parties present. In contrast, appellate courts hear no testimony. The appellate court reviews the record of the trial to determine whether the trial judge made any mistakes that warrant a new trial. Paralegals help to compile the ***record on appeal***, which consists of copies of the pleadings and judgment entered, the transcript of the trial with notations as to which pieces of evidence were objected to, a statement of the questions presented to the appellate court for review, and all other documents from the litigation that are necessary for

understanding the issues before the appellate court. If a satisfactory judgment is entered in Bryson Wesser's favor at the trial level, no problems enforcing the judgment are anticipated. That is, the defendants' insurance company is expected to pay promptly, although it too has the option to appeal the judgment.

Rules That Govern Civil Litigation

The preceding overview of the litigation process demonstrates that a lawsuit proceeds in a predictable pattern. The entire litigation process—from the filing of the complaint to commence the lawsuit to the entry of judgment at the conclusion of the lawsuit—is governed by detailed rules. Several sets of rules must be followed. The goal of all the rules that govern civil procedure is described well in rule 101 of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina. Rule 101 states the philosophy of the rules as follows: "These rules shall be construed and enforced in such manner as to avoid technical delay, permit just and prompt determination of all proceedings, and promote the efficient administration of justice."

Considering the tremendous number of lawsuits filed in the federal and state court systems, it is obvious why detailed rules of court are essential. Without the strict enforcement of rules of procedure, the court system would be extraordinarily chaotic.

The consequences of failure to follow the rules of procedure are drastic. In particular, failure to meet filing deadlines can have devastating consequences. For instance, a party may have a constitutional right to trial by jury. However, if the party does not request a jury trial within the time limitations of rule 38 of the Federal Rules of Civil Procedure, the party waives his or her right to a jury trial. As another example, after judgment is entered, a party may seek relief from the judgment for certain reasons, but only within one year from entry of the judgment, as set forth in rule 60 of the Federal Rules of Civil Procedure. Do not be disturbed if you do not yet understand the intricacies of these examples. For now, just remember that the rules that regulate civil litigation must be followed or your client will lose important rights.

The Federal Rules of Civil Procedure. This text concentrates on the Federal Rules of Civil Procedure, which are printed in Title 28 of the *United States Code* (28 U.S.C.). The Federal Rules of Civil Procedure (FRCivP) apply to all civil actions filed in the United States district courts, that is, the trial courts in the federal court system.

The Federal Rules of Civil Procedure regulate the course of the lawsuit from start to finish. Rules 3 through 5 concern the commencement of a lawsuit.[8] The Federal Rules of Civil Procedure provide numerous deadlines for filing certain documents. FRCivP 6 explains how to compute the time limits prescribed.[9] Rules 7 through 16 govern the various pleadings filed after the complaint, the pleading that commences the lawsuit.[10] Rules 17 through 25 deal with the parties to a lawsuit.[11]

Rules 26 through 37 govern the discovery process, delineating the types of information that can be elicited through discovery and the various discovery procedures for obtaining the information.[12] Rules 38 through 53 apply to the trial, covering such topics as right to jury trial, dismissal of actions, subpoenas, and instructions to the jury.[13] Rules 54 through 63 concern entry of judgment.[14] These rules delineate the various ways a party can obtain a judgment, such as a default judgment when the defendant does not respond to the complaint.[15] FRCivP 56 governs summary judgment, which entitles a party to judgment without having a full-blown trial.[16] Other rules discuss how to obtain relief from a judgment entered against a party.

The remainder of the rules are termed "miscellaneous." Probably the most important of these is FRCivP 65, which deals with temporary restraining orders and preliminary injunctions.[17]

State Rules of Civil Procedure. Civil actions filed in state court are governed by that state's rules of civil procedure. Most state rules of civil procedure are modeled closely after the Federal Rules of Civil Procedure. There may be important differences, however, so you must consult the state rules of civil procedure. The state rules are found in the state statutes. They also can be found in commercial publications that contain the rules of court (procedure, evidence, appellate procedure, and so on) for a specific state.

Federal Local Court Rules. Each federal district court has its own local rules, some of which address matters such as how many copies of pleadings to file with the clerk, paper size, format, and rules for case citation. Most federal district courts have had in place for many years local rules addressing general pretrial matters such as the timing and content of pretrial conferences. In recent years, however, the federal local court rules have been expanded and have taken on tremendous importance.

In the Civil Justice Reform Act of 1990, Congress mandated that each of the ninety-four federal district courts identify the principal causes of cost and delay in civil litigation and recommend measures to reduce the cost and delay. Congress required each federal district court to form an Advisory Group and issue a Civil Justice Expense and Delay Reduction Plan. Further, Congress stated several principles for courts to consider. One of these is the systematic, differential treatment of civil cases so that some cases are placed on an expedited track and are subject to more stringent deadlines than others. A second principle is "early and ongoing control of the pretrial process by the involvement of a judicial officer."[18] Three recommendations address the process of exchanging information, known as *discovery*. Finally, Congress encouraged the use of alternative dispute resolution, that is, the disposition of litigation by methods less formal and expensive than trials, such as arbitration. Although Congress made these specific recommendations, each district court formulated its own plan, and there are substantial variations among the plans.

There are also substantial variations in discovery requirements among the federal district courts. In 1993, amendments to several of the Federal Rules of

Civil Procedure went into effect. Some of the most substantial amendments were to rule 26, which governs discovery. Rule 26, however, permits each federal court by local rule to exempt all cases or certain categories of cases from some of the rule's requirements.[19] Thus, the attorney-paralegal team must know whether the local rules of the courts in which they litigate have adopted the amendments to rule 26.

As a practical matter, the federal local court rules affect the daily tasks of paralegals in several areas. First, certain cases may be designated for the "fast track," and for these cases, the attorney-paralegal team has to give particular attention to development of the facts before even filing the lawsuit and must be prepared for pretrial conferences and discovery early in the litigation. Second, the discovery process may move rapidly, with a freely flowing exchange of information and little judicial intervention. Further, an attempt at alternative dispute resolution may be required.

As you begin your study of civil litigation, these terms may seem complicated and their context unclear. The text, however, addresses concerns in scheduling, pretrial conferences, discovery, and alternative dispute resolution in detail, using excerpts from actual federal court local rules. Thus, regardless of whether the district courts in which you are involved in litigation have adopted all, part, or none of the amendments to rule 26, and regardless of the content of the district's Civil Justice Expense and Delay Reduction Plan, you will know where to find the local court rules, and you will understand the types of procedures that they may require.

State Local Court Rules. You must also check your state's general rules of practice for its state trial courts. The state rules of practice supplement the state rules of civil procedure. The state general rules of practice govern the mechanics of a lawsuit, such as what size paper to use for pleadings. Topics may also include procedure for pretrial conferences and enlargement of time for filing motions. The state court rules of general practice, like the state rules of civil procedure, are contained in the state statutes and in commercial publications.

Finally, judicial districts within a state often have local rules of practice. In North Carolina, for instance, Mecklenburg County comprises Judicial District 26, which publishes its local court rules in the *Mecklenburg Bar Handbook*. These rules address procedural matters such as how cases are scheduled, how to submit proposed orders to the judge, and how to schedule emergency hearings.

General Remarks About Procedural Rules. The preceding description may sound like an unworkable maze of rules. All the rules, however, are easy to understand. Just remember that in federal court, the Federal Rules of Civil Procedure apply; and for more mechanical procedural questions, the local rules for the district in which the action is filed should be consulted. For state court actions, follow the state rules of civil procedure; and for the more mechanical procedural questions, consult the state general rules of practice. For very specific questions, such as how to calendar (schedule) a case, check the local procedural rules for the judicial district.

SIDEBAR If your state judicial district does not have written rules, consult the office of the clerk of court or trial court administrator, or consult your supervising attorney or another paralegal in the firm.

Federal and State Rules of Evidence. The rules discussed so far concern procedure. Another very important set of rules concerns the evidence that can be presented at trial. Evidence includes the testimony of witnesses, documents related to the event in question, and objects such as the control unit of the electric blanket in the Wesser case. Evidence will be discussed more fully in Chapter 3.

Not every piece of evidence is admissible. A piece of evidence is ***admissible*** if it is proper information for the decision maker to consider in reaching a decision at trial and if the judge determines that it may be introduced at trial. Litigators must look to the rules of evidence to determine whether evidence is admissible. The Federal Rules of Evidence govern proceedings in federal court and can be found in Title 28 of the *United States Code* (28 U.S.C.) and in commercial publications. In state court, the rules of evidence for the state in which the action is tried must be followed. Most states have rules similar to the Federal Rules of Evidence. There can be important differences, however, so you must consult the state rules of evidence, which can be found in state statutes and commercial publications.

Rules of Professional Responsibility. There is a final set of rules to consider. The rules of professional responsibility govern the conduct of attorneys during litigation and in every transaction they undertake. The penalties for conduct in violation of the rules of professional responsibility range from a private letter of reprimand to revocation of a lawyer's license to practice law. Although paralegals cannot be disciplined directly for violations of the rules of professional conduct, the attorneys with whom they work can be penalized for the paralegals' conduct. Refer to Ethics Blocks in each chapter for further discussion.

Types of Lawsuits

As part of the paralegal-attorney team, you will probably work on lawsuits involving a wide range of subject matter. You may work on anything from a property division in connection with a divorce action to an action to collect a debt owed a hospital or an action challenging the constitutionality of a new law. The text discusses some of the most common types of lawsuits. In the course of your career, you will work on these and many other types of litigation.

Torts. One of the largest areas of litigation involves ***torts***, which are injuries to a person or property. Torts are usually the result of a person's negligent conduct or his or her intentional conduct. ***Negligence***, the source of a large percentage of these lawsuits, involves the concept that all people have a duty to exercise due care in their conduct toward others so that others are not injured. A person's careless behavior can result in a negligent act, as when an inattentive driver runs a stop sign and causes a car accident.

Litigation concerning torts is frequently *personal injury* litigation. Personal injury cases occur when a person has been physically injured by the wrongful act of another person, as in a car accident. Another area of tort litigation is *product liability*, when a person is injured by a defective product. The Wesser case involves product liability: Mr. Wesser contends that Woodall Shoals manufactured and Second Ledge sold a defective electric blanket, which ignited and caused injury to him and damage to his home.

Torts are civil cases, not criminal cases. A person does not necessarily break a law every time he or she injures another person. For instance, if someone makes a left turn and hits another person's car, that person has not necessarily broken a law, even if he or she injures the other person. However, a person can commit a tort and break a law at the same time. Suppose the driver makes the left turn because he or she is driving under the influence of alcohol. Now the person has committed a tort *and* committed a criminal offense. The personal injury litigation will involve the tort only. The criminal offense will be handled by a prosecutor in criminal court.

Contracts. A ***contract*** is an agreement between two or more parties that one party is obliged to perform an act in exchange for something from the other party. For example, if you enter a contract with your bank to finance your car, the bank agrees to lend you the money to pay for the car, and you agree to pay the bank back through a series of payments. When one party fails to honor his or her obligation, this is a ***breach of contract***. Contract litigation arises when one party breaches the contract.

Another example of contract litigation is when a person enters a hospital and signs a statement promising to pay the hospital for the services rendered. If the person fails to pay the hospital, the hospital may sue to collect the debt. A frequent subject of contract litigation involves construction of buildings. Suppose you enter a contract with a builder to construct your home to certain specifications for a certain price. If the builder does not complete the house or build it to the agreed specifications, you may sue the builder, asking that the house be finished to meet the agreed-upon specifications or that you be allowed to pay the builder less than the agreed-upon price because the house was not constructed according to the terms of the contract.

Corporate. Lawsuits involving corporations come in many varieties and often involve contract disputes. They may also involve trademark violations and actions against persons who reveal trade secrets. Other corporate lawsuits may arise from personnel matters, such as overtime pay, terminating an employee, or declining to promote an employee. If an employee feels that the action is the result of discrimination, a lawsuit such as the Chattooga case may arise. Lawsuits based on charges of discrimination are discussed under Civil Rights, following the next section.

Property. Disputes over the ownership of property can give rise to litigation. For instance, if two neighbors have a boundary dispute they cannot

settle, they may go to court for a resolution. Disputes over the possession of property can also result in lawsuits. For example, two people may disagree as to whether one gave or simply lent the other a very expensive piece of jewelry. Disputes between landlord and tenant can also result in litigation.

Civil Rights. Civil rights cases involve violations of personal rights protected by the United States Constitution and state constitutions and by certain federal and state laws. An example of such a federal law is Title VII of the Civil Rights Act of 1964, as amended, which is the statute involved in the Chattooga case. Title VII prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ." (42 U.S.C. § 2000e-2).

There exist a host of other civil rights statutes, designed to give force to basic personal rights guaranteed by the Constitution. Just a few examples are the Voting Rights Act, the Age Discrimination in Employment Act, and the Equal Pay Act.

There are often prerequisites to filing a lawsuit in court to enforce a right under a civil rights statute. Title VII is a good example. Before a lawsuit can be filed in federal court, certain procedures must be completed within the Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing Title VII. First, the aggrieved party visits the EEOC office and files a charge of discrimination. The EEOC investigates the charge. If the EEOC determines that there is "reasonable cause" to believe Title VII has been violated, the EEOC must attempt conciliation, with the aim of eliminating the practices that violate Title VII. Conciliation involves corresponding and meeting with the party against whom the charge is made, as well as an informal hearing to determine the facts. If conciliation is unsuccessful and the EEOC is convinced that the charging party has a legitimate claim, the EEOC can file suit on the charging party's behalf. If the EEOC chooses not to file suit, the charging party may sue in federal court, using his or her own attorney and proceeding at his or her own expense. The completion of the procedures within the administrative agency (here, the EEOC) before filing a lawsuit is known as *exhaustion of administrative remedies.*

Domestic Relations. The termination of a marriage can spawn extensive litigation. Besides obtaining a divorce, the spouses must resolve issues including division of property, child custody, child support, and sometimes alimony. Aside from obtaining a court judgment granting a divorce, the other matters can often be settled by the parties and their attorneys outside court. If not, litigation ensues and can continue for a long time. This is especially true when young children are involved because the issues of custody, visitation, and the amount of child support can arise repeatedly until the children are no longer minors.

Remedies Available in Civil Litigation

Plaintiffs file lawsuits because they seek relief from the court. That is, plaintiffs ask the court to enter judgment directing the defendants to remedy the wrong they have inflicted upon the plaintiffs.

Money Damages. Plaintiffs frequently seek ***money damages***—that is, monetary compensation from the defendants for the injuries and losses suffered. For example, Mr. Wesser requests in his complaint that the defendants be ordered to compensate him for his injuries and property loss. A creditor suing a debtor on a promissory note requests that the court order the debtor to pay the money and interest owed. Various types of monetary damages are discussed in Chapter 4.

Equitable Remedies. When a plaintiff 's loss cannot be compensated by monetary damages, the plaintiff seeks equitable remedies. An ***injunction***, which is a court order forbidding a party from a particular activity, is an equitable remedy. For instance, your neighbor may want to cut down a 100-year-old tree in your yard because it casts too much shade on the neighbor's house. You do not want monetary compensation for the timber value. You want an order forbidding your neighbor from cutting down the tree, so you seek an injunction.

The contrast between monetary relief and injunctive relief can be seen in the complaint in the Chattooga case. The plaintiff seeks monetary relief in the form of back pay for Sandy Ford. The plaintiff also seeks injunctive relief—that is, an order that the defendant cease from retaliation against employees who complain of acts believed to be unlawful under Title VII.

Another type of equitable relief is ***specific performance***, where the court orders a party to comply with the terms of a contract. For instance, the court may order the defendant to sell to the plaintiff a piece of real estate, as agreed in a contract. This remedy is used only when the thing to be purchased is unique.

This is by no means an exhaustive discussion of equitable remedies. However, you should now understand the difference between equitable remedies and monetary damages.

THE LAW OFFICE

Every law office has its own special office procedures, personnel categories, and personnel management techniques. An understanding of certain common characteristics and procedures, however, will help you jump right in on your first day in a law firm.

Law Office Personnel and Organization

Usually there are two types of lawyers in a firm—partners and associates. *Partners* are owners of the firm; they share in the profits of the firm rather than work for a straight salary. Partners also participate in the management of the firm. A larger firm may also have *senior partners*, lawyers who have been partners for the longest time and who share in the largest portion of the firm's profits.

Associates are the more recently hired lawyers, who are not partners. They are paid salaries, with occasional bonuses depending on the firm's profitability in a given year. In a litigation firm, the newer attorneys participate in the pretrial aspects of litigation, such as discovery and arguing simple motions in court, before they gain enough experience to conduct an entire trial.

As you no doubt know, *paralegals* are persons who possess legal skills and work under the supervision of attorneys.[20] The particular duties commonly assigned to paralegals are discussed at the end of this chapter.

Law clerks are persons not yet licensed to practice, usually law students, who work in law firms during breaks from law school. They perform research and writing tasks and often are hired by the firm as associates after they graduate from law school and pass the bar examination.

Depending on its size, a law firm may employ a wide variety of support personnel. Obviously, legal secretaries are essential for word processing and other duties. A large law firm may have persons who do word processing exclusively, employing legal secretaries for other duties. A firm may also have employees responsible solely for billing matters. The time that the lawyers and paralegals spend on a particular case is carefully recorded, and the amount of the client's bill depends on how much time is spent on the case, when the client is paying an hourly rate for legal services. Obviously, a case involving a simple divorce will be far less expensive for a client than a case defending against a medical malpractice suit. For further discussion of billing, see the material in the following text on Timekeeping Procedures.

The Litigation Atmosphere

The atmosphere in which a litigation attorney-paralegal team works is different from that in many other types of law. Litigators cannot control their schedules to the extent that some other types of lawyers can. The trial court administrator or clerk of court, not the attorney, generally sets the date for trials. The attorney must be ready when the case is scheduled. Typically, the administrative office of the court in a state court publishes a ***calendar***, sometimes called a ***docket*** or ***trial list***, which lists a number of cases to be heard on a certain day or during a certain week. When the court calendar is published, it has an amazing effect on the rate at which cases on the calendar are settled. A calendar may contain a list of fifty cases to be heard during a week-long session of court, and your case may be thirtieth on the list. The attorney must still be ready to try that case, however, because the twenty-nine cases before it may settle. Attorneys have a little more control over their schedules in federal court, where the trial calendar tends to be more carefully tailored for a particular day and hour for a trial to begin.

The point of this example is that litigators often have little control over their schedules which causes a fair amount of stress and even frustration. An attorney may spend days preparing for trial, only to have the court grant a ***continuance***—that is, move the trial to a later date.

Litigators also have to work at a fast pace. As you progress through this text, you will learn more and more about the importance of deadlines. Attorneys

often have many important documents due at the same time. On a given day, an attorney may have to file an answer to a complaint, mail a memorandum of law in an appellate case, and travel to another city to conduct a deposition. Thus, you can see how essential litigation paralegals are! On this busy day, you can go to the courthouse to file the answer and be sure that copies are mailed to all the parties to the lawsuit. After the attorney has approved the memorandum of law, you can make sure that all the copies are made, that everything is in order, that the letter to the office of the clerk of court is included, and that the package is sent out in the express mail. If you were not there to help while the attorney went out of town for a deposition, the attorney would have a very stressful day indeed.

Working with Lawyers

In many ways, working with lawyers is no different from working with any other group of persons. Lawyers come in all varieties and all personality types. You may work with a litigator who is the calmest individual you have ever met—a person who is not upset when there are two clients waiting (without appointments), three phone calls on hold, and two people in the lawyer's office asking questions. On the other hand, you may work with litigators who find such situations extremely stressful and become a bit testy. There is no magic formula for working with lawyers. Like all persons, no two are alike. Your best approach is to be a keen observer of human nature and learn how best to deal with each lawyer. If there is a lawyer in the firm with whom you have problems working, consult with your supervisor immediately.

Important Office Procedures: Billing/Timekeeping

When a client hires a lawyer, they enter a fee agreement specifying how the lawyer will be compensated. Fee agreements are discussed in detail in Chapter 4. The two most common fee arrangements are ***hourly rate*** and ***contingent fee***. In the hourly rate system, the number of *billable hours* spent on the client's case is multiplied by the hourly rate agreed on. In the contingent fee arrangement, the lawyer's compensation is an agreed percentage of the amount recovered by the client. A common arrangement is for the attorney to receive one-third the amount awarded.

In addition to the fee for professional services rendered, the fee agreement usually provides that the client will pay certain costs, or out-of-pocket expenses, such as photocopies, long-distance calls, postage, and filing fees. These expenses are sometimes referred to as *disbursements*.

Obviously, a careful record must be kept of all time spent on a client's case and of all disbursements made. The paralegal's time is also figured into the billable hours, so you must keep careful records.

Timekeeping Procedures. The methods for keeping track of time spent on a client's case vary among law firms. A variety of forms can be used, and some law firms make extensive use of computers for timekeeping. You must carefully review your firm's written procedures for timekeeping and discuss them with your supervisor.

No matter what type of forms you use, the same basic timekeeping information must be recorded. Examine Figure 1–2, which illustrates the time sheet used by the law firm Heyward and Wilson. This particular form consists of an 8 ½- × 11-inch sheet with a series of rows of information with the same headings for each row. Every day each attorney and paralegal records the work he or she performs, putting the appropriate information under each heading. This particular form has a sheet underneath it on which a carbon copy is made of everything entered on the face sheet. Heyward and Wilson uses a combination of handwritten and computer systems for billing. Each row on the form is detachable, and usually at the end of each day, the individual slips are given to the clerk in charge of billing, who puts the billing entries in the computer. At the end of the month, a statement is sent to the client. If the fee agreement is for an hourly rate, the monthly bill is calculated by the number of billable hours times the hourly rate.

SIDEBAR It is important to write your entries on the time sheet throughout the day. At the end of a hectic day, you may not be able to remember every task you performed that day, much less how much time it took. You can fill in the rows as you complete the task.

FIGURE 1–2 Time Sheet of Heyward and Wilson

TC telephone conference	LF letter from	I investigation
R review	C conference	Misc miscellaneous
RV revision of	CA court appearance	NC no charge
P preparation	TR travel	RS research
LT letter to		

Date	File No.	Client	Atty/ Par	Code	Description of Services	Time Spent

Because the amount of space on the time sheet is limited, the firm uses a series of abbreviations to describe services rendered. The abbreviations appear at the top of the form. The columns for information entered are straightforward. Enter the date the work was performed in the Date column, and under File Number, insert the number the law firm has assigned to that file.

SIDEBAR Do not confuse the firm's file number, used to keep track of the file within the firm only, with the file number assigned by the clerk of court when the lawsuit is commenced. The clerk's file number—for example, 3:96 CV 595-MU in the Wesser

case—identifies the location of the file in the clerk's office and ensures that court documents are filed properly in the clerk's office.

Under the Client column, enter the client's name. Be consistent, always using the last name for an individual and the proper designation for a corporation. In the Attorney/Paralegal column, enter your initials. The column designated Code is filled in with an abbreviation to indicate the type of task done—telephone conference, for example, or letter. Description of Services elaborates on this information, describing to whom the call was made or letter written as well as its subject matter. The detail in which services are described varies among law firms; some require a finely detailed description, while others require only a brief notation. Under Time Spent, write the amount of time it took to perform the task. For increments of time less than a full hour, most law firms record the time spent by one-tenth of the hour. Thus, if a phone conversation took 18 minutes, you would enter .30.

There are many other methods of timekeeping. For instance, some attorneys keep a manual journal, which looks more like a daily diary. A typical entry might be the following:

1.50 File 0832-A R of discovery documents.

Here the letter *R* stands for review.

Disbursements. As noted, clients are billed for expenses such as postage and photocopying. There are many systems for keeping track of disbursements. Slips similar to those for timekeeping are frequently used. As with timekeeping slips, you enter the date, file number, client's name, and your initials. Then you designate the nature of the expense and the amount. Each slip may be torn off at the end of the day and placed in the client's file in an envelope or subfile. Disbursements are also entered on the computer and included in the client's bill.

Time Management Techniques

Because the number of hours paralegals spend on a case is so important, it is essential to develop time management techniques. Among reading material available on this subject are publications of the American Bar Association's section on Law Practice Management.[21] Here are just a few tips:

- Always fill out time slips promptly. Otherwise, at the end of the day, you may not be able to account for all the time you worked.
- Keep a list of tasks you must perform, arranged by importance and/or date due. Consult the list every morning and plan your day accordingly.
- Use the tickler system (discussed later in this section) for reviewing files. If you request a reasonable number of files each day, you may be able to concentrate on just a few files and wrap up several tasks.

- If you have to draft a difficult document, work on it early in the morning. Not only will your mind be fresher, but you will have fewer interruptions.
- Meet regularly with the attorneys on your team and determine who can handle certain matters most quickly and efficiently. While a heavy workload may be expected, if yours becomes unmanageable, discuss the problem with the attorneys.
- Review your time sheets to be sure that you have sufficient billable hours. If you have been at the office for eight hours and have done only three hours' worth of billable work, you have probably wasted a good bit of time. Of course, there will be days when you have to spend a substantial amount of time on nonbillable matters, such as attending professional meetings or training.

Important Office Procedures: Docket Control

Docket control means maintaining a system for keeping track of deadlines. While the docketing of deadlines is important for all types of law practice, it is particularly crucial for litigation. As the discussion will emphasize, there are a multitude of deadlines to be tracked in the course of litigation, from the statute of limitations to the trial date to the deadline for filing an appeal. Docket control is one of the most important tasks assigned to paralegals.

Examples of Docket Control Systems. A variety of docket control systems are used by law firms. A firm may use more than one system, with one or more systems serving as backup for the others. Because there are so many permutations, you must become familiar with all the details of your firm's docket control system(s).

Computer Systems. Many firms, especially larger ones, use a computerized docket control system. When paralegals enter the appropriate information into the computer system, the deadlines are readily available. For instance, if you represent Chattooga Corporation, you enter the date that the summons and complaint were served and the date that a responsive pleading is due. The computer can generate a calendar of deadlines for all the cases the firm is litigating. You may wish to put the calendar on the wall or in some other conspicuous place in your office. The computer may be programmed to flash upcoming deadlines on your personal computer first thing in the morning. Ideally, the computer will give multiple warnings that become more frequent as the deadline nears.

Tickler Forms. One manual type of docket control system is the use of tickler forms. Examine Figure 1–3. This shows a simple tickler form. The paralegal fills in the file number, client's name, action to be completed, and deadline for the action to be completed. Then the paralegal writes three dates on which to be reminded of the action to be completed. The tickler form has three carbon copies, and on each of the three dates, the employee in charge of the tickler system gives the reminder to the paralegal.

FIGURE 1-3 Tickler Form

File No.	Client	Action to Be Completed	Deadline
1st reminder _____			
2nd reminder_____			
3rd reminder _____			

The purpose of a tickler system is for you to receive a copy of the tickler form at specified times to remind you to complete a task. Assume that you have to prepare the first draft of an answer to a complaint. You indicate on the tickler form three dates on which you want to receive a copy to remind you to draft the answer. On those dates, the employee in charge of the tickler system will give you the written reminders.

Calendars. This discussion refers to regular month-by-month calendars. (Remember, a court's schedule of hearings and trials is called a *court calendar*. Also helpful in tracking deadlines, the court calendar is discussed later in this section.) Paralegals and attorneys may use regular calendars to record deadlines. For instance, if an answer is due on January 27, write "answer due" on that date on your calendar. This system may cause problems if you do not also enter reminders well in advance of the date the answer is due. You may become busy and forget to review the coming weeks. If January 27 falls on a Monday and you have forgotten to check the calendar in advance, you will have a rude surprise first thing Monday morning. Regular calendars are best used in conjunction with other backup systems. Small calendars may be handy for checking deadlines when you are away from your office, suddenly get a sinking feeling, and need to check a deadline immediately.

Sources of Information for Docket Control. Obviously, in order to keep a record of deadlines, first you have to determine the deadlines. Whenever a document related to one of the files assigned to you arrives—whether it is a pleading, a notice of motion, or a notice of a scheduled deposition—you must note the deadline immediately in your docketing system. Entering deadlines and scheduled events is like recording the information in your checkbook register. If you do not do it immediately, you may forget.

Records of Proceedings in the File. The client's file needs to contain a readily viewable record of everything that transpires in the course of litigation. You should be able to open the file and quickly find what pleadings have been filed, when depositions are scheduled, dates that motions are scheduled, and any other transaction in the course of litigation. In this way, when your docket control system alerts you that a deadline is approaching, you can double-check the proper date and see whether the transaction has already been completed. Enter deadlines

promptly in this record of proceedings, even though the docket control system will generate reminders.

One important component of the record of proceedings is the ***pleadings record***. This may be part of the larger record of proceedings, or it may be easier to follow if maintained as a separate document. The pleadings record tracks every pleading filed and received and the response date. For the pleadings that you file, record the date the pleading was filed, the date it was served on the other party or parties, and the date a response is due. For pleadings served on your client, enter the name of the pleading, the date it was served, and the date a response is due.

SIDEBAR A good way to review the record of proceedings is to establish a tickler system for file review. The method can be simple. When you finish the work you are doing with a file, mark on the outside of the file the date that you want to see the file again. Have the filing clerks maintain a calendar on which they enter the date you and the attorneys want to see files again. The clerks will enter the date in the calendar before refiling each file. First thing each morning, the file clerks will pull and distribute to each paralegal and attorney the files they have requested for review that day. This is yet another backup system to make sure you do not neglect any files. Even if there are no deadlines within the next few weeks, you can still monitor the progress of the litigation—for example, settlement negotiations—and keep the client informed.

Review the Clerk of Court's Records. The clerk of court keeps a record of all documents filed in the clerk's office, and in the front of the clerk's file, there is usually a record of the date all documents were filed in that case. Reviewing the clerk of court's records helps you double-check the dates you have entered in the firm's docket control system.

While you are checking the dates, you should also check for proof of service. Suppose that you have multiple defendants in a federal court action. You have 120 days to effect service of process on each defendant, or else the action may be dismissed as to each defendant not served. Proof of service will be in the clerk's file, and you must monitor it closely for all defendants in order not to miss the 120-day deadline. See Chapter 5 for a discussion of service of process under FRCivP 4.

Court Calendars. As noted earlier, the *court calendar* is a court's schedule for hearings, pretrial conferences, and trials. One important task for paralegals is to check the calendars for all courts in which you have actions pending. You may have actions pending in state and federal courts, and each court may have its own system of publishing its calendar. In many cities, calendars are published in periodicals to which attorneys subscribe. You may be assigned the task of reviewing the periodicals to find all references to cases your firm is litigating. Other courts mail their calendars directly to the attorneys involved. Still others may require that you go by the office of the clerk of court or trial administrator to pick up copies of the court calendars. Become familiar with all the methods for

distributing court calendars in the courts in which you are involved, and monitor the calendars carefully.

Important Deadlines and Dates. A wide array of deadlines and dates must be docketed for a litigation practice. Some of the most important ones are discussed here.

Statutes of Limitations. This is the first date you should determine when a client comes in to discuss potential litigation. This topic was discussed earlier, but it is important enough to reemphasize: a ***statute of limitations*** is the time within which a lawsuit must be commenced, or else the plaintiff can never bring suit. For example, the applicable law may provide that an action for breach of contract must be filed within two years of the breach. If your lawsuit will be filed in state court, check the applicable state statutes concerning statutes of limitations. The amount of time allowed for filing suit differs according to the type of action involved, and some states have fairly complex statutes of limitations. In federal court actions, check the applicable federal laws. Remember, even if a plaintiff has a case that is almost certain to win, if the lawsuit is not commenced before the statute of limitations expires, the plaintiff is forever barred from filing suit. If the law firm is responsible for the failure to file the action within the time allowed, a malpractice suit is likely to ensue.

Dates for Filing Pleadings. The rules of civil procedure, both state and federal, provide a certain number of days within which a response to a pleading must be filed. There are deadlines for responding not only to complaints but also to counterclaims and other pleadings. (These deadlines are discussed in Chapters 6 and 7.) Mark the reminder of the deadline well in advance so that the attorney-paralegal team may make a timely request for an extension if necessary.

Discovery Deadlines. Often a judge enters a pretrial order setting forth the dates by which discovery must be completed. Many courts have applicable local court rules that impose deadlines for discovery—for example, discovery must be completed within 120 days of the filing of the complaint unless the court specifies otherwise. Check all applicable discovery deadlines and enter them in the docket control system. (See Chapter 8 for details on discovery.)

Deadlines for Filing and Responding to Motions. As the text discusses in Chapters 6 and 7, many motions are filed before a lawsuit goes to trial. Both state and federal rules of civil procedure, as well as local court rules, impose deadlines for filing certain motions and for responding to motions. For example, certain motions to dismiss under FRCivP 12 must be filed within the time allowed to file an answer. Local court rules may impose rules for filing responses to motions. For example, a court may consider a motion unopposed if a response is not filed within ten days of service of the motion. Because pretrial motions are such an important part of the litigation process, all deadlines regarding motions must be monitored very carefully in order to ensure that your client does not lose the right to make important assertions.

Court Appearances. Enter dates for court appearances well in advance. The attorney-paralegal team needs as much time as possible to prepare for hearings on motions, pretrial conferences, and the trial itself. Monitor the mail for notices of motions, and monitor the court calendars as discussed above.

Appeals and Posttrial Motions. At the conclusion of a trial, prompt action must be taken to preserve the right to appeal the verdict and to file other posttrial motions. You must consult the applicable state and federal rules of civil procedure, as well as the rules of appellate procedure for the court in which the appeal will be taken.

Other Deadlines. There are a host of other deadlines that paralegals must monitor. For instance, in open court at a motion hearing, the judge may orally impose deadlines for filing memoranda of law or other documents. Thus, if the attorneys on your team make a court appearance and you do not accompany them that day, be sure to find out if any response deadlines were announced. Federal and state rules of civil procedure and local rules of courts are full of various deadlines, and you must take care to monitor all of them.

COMMUNICATING WITH CLIENTS

Paralegals are in constant contact with clients. Ideally, they are introduced to one another at the initial conference so the client will feel comfortable with the paralegal. Paralegals interview clients and frequently communicate with them by phone and letter. There are important guidelines to keep in mind in all your communications, not only with clients but with witnesses and other persons as well.

The Importance of Regular Communication

Few things make clients more unhappy than thinking that the law firm representing them is neglecting their case. In fact, this is one of the most common bases for grievances filed against attorneys.

Avoiding grievances, however, is not the only reason that regular communication with clients must be maintained. You need to obtain much information from clients in order to draft pleadings, answer interrogatories, and perform tasks at all stages of litigation. All of this must be accomplished in a timely manner, so obviously you have to give clients plenty of lead time to compile and forward information. Regular communication ensures that you advise clients of upcoming deadlines well in advance.

Telephone Contact

You may talk to some clients even more often than the attorney does. Often the attorney is out of the office or otherwise unavailable, and the paralegal receives the telephone calls from clients.

There are some important guidelines to keep in mind when communicating with clients, especially on the telephone. Clients often call because they have a question that requires legal advice, which only attorneys are permitted to give.

You must take down the information and give it to the attorney for a response. One method is to dictate a memorandum to the attorney, outlining the conversation and the client's question. The attorney can contact the client and render the necessary legal advice. If the attorney is involved in a trial or otherwise unavailable for an extended period, the paralegal may be authorized to relay the attorney's responses to the client. In such a case, get the advice in writing and relay it to the client, emphasizing that it constitutes the attorney's opinion, and not your opinion.

Letters to Clients

You will frequently correspond with clients through letters. Letters are a particularly effective method for explaining detailed information that you need from the client. Be sure to keep the letters simple and to the point. At times a letter may need to be lengthy to explain much detailed information, but it need not be convoluted.

You must always indicate in the way you sign the letter that you are a paralegal. Refer to Figure 1–4 for an example of a proper signature.

FIGURE 1–4 The Proper Way for a Paralegal to Sign Letters

Please provide the requested information as soon as possible. We look forward to hearing from you.

Sincerely yours,

Leslie A. Armstrong
Paralegal

If you need a response by a certain date, be sure to include the deadline in the letter. Then note the deadline and follow up with a phone call if necessary. If you are asking the client to fill out forms, be sure to enclose the forms, along with an explanation of how to fill them out.

The Memorandum to the File

After a telephone conversation or a meeting with a client, you need to make a record of what transpired. This is important for several reasons. First, you may have learned information important to the case, and you need a written record of the precise information. Second, if there is a question later about what you said or what the client said, you have a record. This can be very important if a client suggests that you neglected to convey certain facts or that you conveyed the wrong information.

Route the memo to the file to the attorneys working on the case if the memo contains information they should know before their next review of

the file. If the information is extremely significant, bring it to their attention immediately.

THE ROLE OF THE PARALEGAL ON THE ATTORNEY-PARALEGAL TEAM

You need to understand the importance of your position as a litigation paralegal and of the assignments you will perform.

Importance of Paralegals

The importance of paralegals cannot be overemphasized, especially in the area of litigation. Attorneys who litigate work on many cases simultaneously, and the activities in one case do not cease just because the attorney is in court trying another case. This is one reason litigation paralegals are particularly valuable. Paralegals can keep the files moving and current when the attorney is tied up in court or in depositions. Litigation attorneys are often out of the office, especially when they are involved in lawsuits in other geographical regions. Paralegals are essential in tracking the many deadlines encountered in litigation.

Paralegals are invaluable for the delivery of competent, cost-efficient legal services. Paralegals handle a wide range of very important duties in the litigation process. Short of rendering legal advice and making court appearances, the range of duties delegated to a trained paralegal can be very expansive.

Litigation Tasks for Paralegals

The variety of tasks performed by litigation paralegals varies according to the law firm and the paralegal's level of experience. The following list describes tasks commonly assigned to litigation paralegals. The tasks are listed sequentially according to the stage in the litigation at which they are usually performed. This overview is not all-inclusive but is designed to give you an indication of the duties that may be assigned to you.

Prior to Commencement of Action

- Attend initial client conference.
- Informal investigation (interview potential witnesses, check public records, and so on).
- Make preliminary arrangements for expert witnesses.
- Set up file.
- Follow up with client on any documents or other information needed to prepare complaint.

Commencement of Action

- Prepare initial draft of complaint for attorney review.
- Prepare summons for attorney review.
- Assemble any exhibits to the complaint.
- Prepare civil cover sheet.

- Arrange for service of process.
- Ensure that proof of service of process is in clerk's file.
- Now and throughout litigation process, enter deadlines in docket control system.

Motions and Responsive Pleadings

- If you represent defendant, prepare initial draft of answer and/or other responsive motions such as motions to dismiss or to strike.
- If applicable, prepare initial draft of counterclaim and cross-claim for attorney review.
- If applicable, prepare initial draft of amended pleadings and motions to amend.
- Discovery
- Draft for attorney review interrogatories and requests for admission and production.
- Depositions: arrange place and court reporter, send notices, and prepare any necessary subpoenas. At the deposition, take notes and help with exhibits.
- Producing documents: organize, screen, and number documents to be produced. Make an index of documents. Make arrangements for copies to be made.
- Documents produced by other parties: review, organize, and index.
- Prepare digests of documents and of testimony from depositions.

Motions for Entry of Judgment Without Trial

- If defendant filed no response to complaint, prepare documents for default judgment.
- If attorney-paralegal team deems it warranted, prepare for attorney review initial drafts of motion for judgment on the pleadings or summary judgment.
- Assist with supporting exhibits, affidavits, and memoranda of law.

Pretrial Conferences and Settlement

- Monitor court calendar and correspondence for dates of pretrial conferences.
- Review and organize file in preparation for pretrial conference and settlement discussions.
- Assist with determining settlement value and assist with settlement brochure or letter.
- If settlement is reached, prepare for attorney review settlement documents such as release, settlement agreement, stipulation to dismiss, and so on.

Trial Preparation

- Monitor court calendar for trial date.
- Confer with witnesses regarding trial date and their availability.
- Assist with witness preparation.
- Review organization of all documents and ensure that they are easily retrievable.
- Organize, label, and index exhibits for trial.
- Ensure sufficient copies of all exhibits.
- Prepare demonstrative evidence (*e.g.*, charts).
- If videotape testimony will be used, make technical arrangements.

- Jury investigation.
- Prepare subpoenas for witnesses.

Trial

- Ensure that witnesses arrive on time.
- Take notes of testimony.
- Arrange and give to attorney exhibits in proper order.
- Keep track of exhibits admitted into evidence.
- Share observations with attorney.

Posttrial

- If appeal is taken:
  Assist with preparation of record on appeal and ensure that necessary exhibits and transcripts are appended.
  Assist with timely filing of notice of appeal.
  For appellate brief, check case citations and any attachments.
- If no appeal is taken:
  Assist with enforcement of judgment (*e.g.*, execution, garnishment).

In addition, there are certain duties litigation paralegals perform at all stages of litigation, such as ensuring regular communication with clients, keeping files updated and organized, following all deadlines, conducting legal research, and other tasks as assigned by the supervising attorney.

ETHICS BLOCK

Your paralegal curriculum most likely devotes an entire course to ethics. From the outset, however, you should be familiar with the sources of the ethical guidelines. The American Bar Association (ABA) has developed standards of professional conduct for lawyers. Every state has its own ethics code, based on the ABA's Model Rules of Professional Conduct or the ABA's Model Code of Professional Responsibility, which predated the Model Rules. Paralegals must consult their state statutes to find the rules of ethics applied to lawyers in their state. The state bar has the authority to discipline attorneys who violate a state's ethics rules. Although state bars do not sanction paralegals directly, it is imperative that paralegals comply with their state's ethics rules because an attorney can be disciplined for conduct of nonattorney employees. In recent years, several states have adopted guidelines for paralegals and the attorneys who supervise them. Many of the state guidelines are patterned after the ABA Model Guidelines for the Utilization of Legal Assistant Services, adopted by the ABA in 1991.

SUMMARY

This chapter provides an overview of the litigation process and an introduction to working in a law office, including office procedures important for litigation

paralegals. The first important concept is the order in which a lawsuit progresses. First, the incident that necessitates a lawsuit occurs. This is called the cause of action. After the initial client conference, in which the basic facts are received from the client, the attorney-paralegal team conducts further investigation, such as interviewing potential witnesses and checking public records. Next, the complaint and summons are drafted and served on the defendant. The defendant then does some investigation and files an answer and/or other response, such as a motion to dismiss. The litigation then enters the discovery phase, in which all parties conduct formal investigation of the facts through interrogatories, depositions, and other discovery methods. After some discovery, the parties usually can determine whether they may be entitled to judgment without trial through the methods of judgment on the pleadings or summary judgment. Note that earlier in the litigation process, if the defendant failed to respond to the complaint in a timely manner, the plaintiff could seek a default judgment.

The parties may file a wide range of other pretrial motions, such as motions to amend pleadings or motions to compel a response to a discovery request. By this point, the parties may explore settlement possibilities. Frequently settlement is reached at the final pretrial conference, where the attorneys for each party meet with the presiding judge to define and narrow the issues, determine witnesses and exhibits, and perhaps have the judge rule on some pretrial motions such as those concerning the admissibility of certain evidence.

Preparation for the actual trial includes issuing subpoenas for witnesses to appear, copying and organizing exhibits, and a host of other tasks. After a verdict is entered, if there is no appeal, the prevailing party takes the necessary steps to enforce the judgment. If an appeal is entered, the record on appeal must be prepared, together with an appellate brief.

The second major concept in this chapter has to do with the rules that govern civil procedure to ensure an orderly litigation process in a busy court system. If you are litigating in federal court, the Federal Rules of Civil Procedure must be followed. In federal court, you must also follow the local court rules, which address some of the more ministerial concerns such as how many copies of a document to file and the size of paper, as well as more substantive matters such as how many days are allowed for a response to a motion before the motion is deemed unopposed and the court's method for scheduling arguments on motions. Federal court local rules have become more detailed due to requirements to expedite litigation pursuant to the Civil Justice Reform Act of 1990.

In state court, you must follow that state's rules of civil procedure. These rules will probably mirror the federal rules to some extent but can differ in such important areas as the amount of time allowed to file an answer to a complaint. State courts may have local rules of court that address the same matters discussed in federal local rules. There may be a further set of local rules for that particular state judicial district. When in doubt about any rules, confer with your supervising attorney or call the office of the clerk of court.

Also important are the federal and state rules of evidence, which govern whether evidence is admissible. Finally, it is always important to bear in mind the

rules of professional responsibility that govern the conduct of attorneys. Although paralegals cannot be disciplined directly for conduct in violation of the rules of professional responsibility, the attorneys for whom they work can be disciplined for the paralegals' conduct.

The third important concept in this chapter concerns the types of lawsuits in which paralegals may be involved. Lawsuits span a wide range of subject matters. One common type of suit is the tort, which is initiated when the negligent conduct of one person has caused bodily injury and/or property damage to another. Another object of frequent litigation is a contract, when one party to an agreement fails to fulfill its terms. A wide range of matters related to corporations may be litigated, from contract disputes to employment disputes. Disagreements also arise over property, both real property (land) and personal property (other types of possession, such as jewelry or cars). Civil rights litigation may involve major constitutional questions and alleged violations of federal and state statutes. An example is the Chattooga case, which involves Title VII of the Civil Rights Act. Title VII lawsuits are preceded by administrative proceedings in which the Equal Employment Opportunity Commission (EEOC) attempts to fashion a conciliation without a trial. The process of completing all administrative procedures and appeals before filing a lawsuit is known as exhaustion of administrative remedies. This is frequently a prerequisite to filing an action in court when an administrative agency is involved.

Another major area covered in this chapter concerns the remedies available through litigation. Plaintiffs frequently ask for money damages—that is, monetary compensation for the injuries and losses suffered. A plaintiff may seek an equitable remedy when facing a loss for which there can be no monetary compensation. An example is an injunction, which is a court order to refrain from an act.

It is important to understand the basic setup and office procedures of a law firm. There are generally two types of lawyers in a firm. First are the partners, who own the firm, derive compensation based on the firm's profits, and make management decisions. Second are associates, who are usually the more recently hired lawyers and receive a set salary. Some law firms employ law clerks, law students who are not licensed and who usually perform research and writing duties. Providing an important staff function are the paralegals, who possess legal skills and work under the direct supervision of attorneys. Linking these professionals you will find a variety of support personnel, including legal secretaries, word processors, receptionists, and file clerks; the number and exact positions will depend in part on the size of the firm.

The litigation atmosphere is different from that of other types of law. The schedule of litigators is controlled more by the courts than by the lawyers themselves. An attorney will litigate several cases simultaneously and may have several court appearances in one week, as well as ongoing discovery procedures and pleadings that are due. Paralegals are essential in helping the litigator to meet all deadlines and avoid overlooking anything. Litigators come in all personality types, and you must adjust to the personalities of your coworkers and remember that the litigation atmosphere can be tense when time pressures abound.

Paralegals have many important law office procedures to learn for their particular firms. Some of the most important involve timekeeping and billing. There are two common types of fee agreements. One is the hourly rate, in which the client agrees to an amount per hour for the billable time devoted to the case. The other major type of fee agreement is the contingent fee, in which the law firm receives a certain percentage of the award received by the plaintiff, often one-third. In addition, clients are generally billed for disbursements such as postage, photocopies, and travel. Thus, it is apparent that you must keep careful records of the disbursements and of your time and tasks performed. There are a variety of methods for keeping time records. Many firms have each attorney and paralegal keep a written record of the time spent and tasks performed, and this information is entered into the computer billing system at the end of each day, week, or month. From this information, the client is sent a monthly bill. Time is usually recorded by tenths of an hour, so if you spent 18 minutes drafting a complaint, this would be .30 hours.

Because billable hours is such a crucial factor, paralegals must employ time management techniques such as filling out time slips promptly, keeping a list of tasks to be performed and consulting it each morning, reviewing files regularly using a tickler system to schedule a manageable number of files per day, and performing the most difficult tasks first thing in the morning. In addition, paralegals should meet regularly with the attorneys on their team to discuss cases.

One of the most crucial tasks assigned to paralegals is docket control, which is keeping track of the deadlines for filing pleadings and memoranda of law, completing discovery, and all the many deadlines that litigation entails. A variety of docket control systems exist, and you can use multiple systems so that you have a backup. Computerized docket systems have become common and can produce printouts of upcoming deadlines. Computerized systems can also flash deadline warnings on your word processor screen every morning. A manual system is the tickler form, where you fill out the name and file number of the case, together with the action to be taken, the deadline, and the reminder dates you desire. The forms are given to a person who is responsible for distributing the reminder slips to you on the designated days. Many attorneys and paralegals enter deadlines on calendars, but with this method, you must review the upcoming weeks carefully and enter reminders as well as the actual deadlines.

In order to keep apprised of all impending deadlines, paralegals must review all incoming mail, monitor court calendars, and check the docket sheets in the files in the office of the clerk of court. Litigation paralegals should keep in each file a pleadings record to note the pleadings filed and when responses are due.

In addition to deadlines for filing and responding to pleadings, other deadlines include statutes of limitations, which govern the time allowed for commencement of a lawsuit after a cause of action arises. You must consult the applicable federal or state statute, and this is one of the first tasks you address when a new client comes in. Deadlines are also imposed in the discovery process. For example, if a timely response to requests for admissions is not made, important matters may be deemed admitted. Motions also must be filed within

certain limitations, as must responses to motions. Court appearances for hearings or trial are obviously important dates to enter into the docket control system. Even after the trial, time limitations apply to entering notice of appeal and submitting the record on appeal and filing certain posttrial motions.

Another very important function of paralegals is to maintain regular communications with clients by telephone, meetings, and letters. Informing clients of deadlines for submitting information and following up are very important duties. When communicating orally, you will often dictate a memorandum to the file to record the substance of your conversation. Paralegals must be cautious not to render legal advice but, instead, relay the facts and questions to the attorney and let the attorney call the client to render the advice. If the attorney is tied up in trial, get the legal advice in writing and relay it to the client, emphasizing that it constitutes the attorney's opinion, and not your opinion.

Finally, this chapter addresses the litigation tasks commonly assigned to paralegals. Paralegals are essential to successful litigation, as can be seen by the vast array of duties they perform. Review the tasks outlined in this chapter, which are arranged according to the stage of litigation at which the tasks are generally performed. You will see that you have much to look forward to.

REVIEW QUESTIONS

1. The Civil Justice Reform Act of 1990 encourages the use of which of the following to expedite litigation?
   a. arbitration
   b. the placement of some cases on an expedited track, with more stringent deadlines
   c. early control of the pretrial process by judges
   d. all of the above
   e. b and c only
2. Paralegals should enter which of the following deadlines in the docket control system?
   a. the date that an answer is due
   b. the date that responses to a discovery request are due
   c. the trial date set for each lawsuit
   d. all of the above
3. Which of the following apply in lawsuits in federal court?
   a. Federal Rules of Civil Procedure
   b. state rules of civil procedure
   c. Federal Rules of Evidence
   d. all of the above
   e. a and c only
4. Which of the following determines the time within which a lawsuit must be filed or be forever barred?
   a. statute of limitations
   b. summons

c. answer
d. court calendar

5. T F Federal Rules of Civil Procedure cover pretrial matters only.
6. T F The event that gives rise to a claim for which a plaintiff seeks relief from the court is called a cause of action.
7. T F The admissibility of evidence is governed primarily by local court rules.
8. T F The Civil Justice Reform Act of 1990 required each federal district court to formulate a plan to expedite litigation.
9. T F When a lawyer's fee is based on the amount the plaintiff recovers, this is known as an hourly rate.
10. T F Summary judgment can be entered only at the conclusion of a trial.

PRACTICAL APPLICATIONS

1. You are working on the Chattooga case, which has been filed in the United States District Court for the Eastern District of Pennsylvania. What are two sets of procedural rules that you must consult?
2. Assume that the Wesser case was filed in a state court in North Carolina rather than federal court. What are the procedural rules that you must consult?
3. Refer to the discussion of types of lawsuits in this chapter. For each set of facts below, state the type of lawsuit being brought.
   a. Mr. Montana borrowed $14,000 from a bank to buy a car, and he signed a promissory note. He stopped making payments after his third car payment.
   b. Mr. Bush and Ms. Hickory are neighbors. They have a dispute over the location of the boundary line between their yards.
   c. Mr. Green suffered injuries when he was walking through an intersection and was struck by a car.

CASE ANALYSIS

Read the excerpt from *Colorado v. Carter*, 678 F. Supp. 1484 (D. Colo. 1986), and answer the questions following the excerpt.

SHERMAN G. FINESILVER, Chief Judge.

THIS MATTER came before the Court for trial on August 11, 1986. We have carefully considered all of the evidence presented, the testimony of the witnesses, and the applicable law. The following constitutes the Court's findings of fact and conclusions of law. Fed.R.Civ.P. 52.

I.

This action was instituted by the State seeking to enjoin defendant from initiating or prosecuting any pending civil claim in this federal district without the representation of counsel. Defendant has alleged in several court filings that he is a fulltime college student and that his college program precludes any outside employment. He asserts he has no assets, and lives on his college entitlements and

intermittent contributions from his family. Defendant has a long history of filing pro se complaints generally without payment of filing fees. For chronological purposes, *see Carter v. Telectron*, 452 F.Supp. 944 (S.D. Tex. 1977). The vast majority of these cases have been found to be frivolous and/or vexatious. In recent years, Mr. Carter has initiated at least fifteen civil actions in this district. *See* plaintiff's Exhibit 12 attached hereto as Appendix A. Most of these cases have been dismissed as frivolous or lacking subject matter jurisdiction. *See, e.g., Carter v. Goldberger, et al.*, No. 85 F 2231, Oct. 9, 1985.

We first note that we have jurisdiction of this action by virtue of the Court's inherent authority to control judicial actions taken by litigants who come before the Court. *Turner v. American Bar Association*, 407 F.Supp. 451 (N.D. Tex. 1975). Second, we find that plaintiff has standing to pursue this matter. *In re Martin-Trigona*, 737 F.2d 1254 (2d Cir. 1984).

II.

The United States Constitution lacks any explicit guarantee of access to the federal courts. *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) (Rehnquist, J. dissenting). Nevertheless, this right is deeply embedded in federal constitutional law. *See Gulf, Colo. & S.F. Ry. v. Ellis*, 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666 (1897). Court access remains premised, however, on the assumption that litigants will obey the rules and proceed in good faith. There is "no constitutional right of access to the courts to prosecute an action that is frivolous or malicious". *Phillips v. Carey*, 638 F.2d 207, 208 (10th Cir. 1981); *Duhart v. Carlson*, 469 F.2d 471, 478 (10th Cir. 1972), *cert. denied* 410 U.S. 958, 93 S.Ct. 1431, 35 L.Ed.2d 692 (1973); *Board of County Comm'rs v. Barday*, 197 Colo. 519, 594 P.2d 1057 (1979). A pro se litigant must recognize the authority of judicial decision and conform his behavior to it. *Kane v. City of New York*, 468 F.Supp. 586 (S.D.N.Y.), *aff'd mem.*, 614 F.2d 1288 (2d Cir. 1979).

The Court has authority to control and manage matters pending before it. This includes trial and pre-trial actions. *Turner v. American Bar Association*, 407 F.Supp. 451 (D.C. Tex. 1975); *In re Sarelas*, 360 F.Supp. 794 (D.C. Ill. 1973), *aff'd*, 497 F.2d 926 (7th Cir. 1974). The need for such control bears noting. First, Rule 1 of the Federal Rules of Civil Procedure provides that the rules shall be construed to secure the just, speedy, and inexpensive determination of every action. Three fundamental goals underlie this mandate: maintaining the quality of justice, avoiding delay, and improving the efficiency of dispute resolution. In order to secure these values, we must recognize that judicial resources are limited in the short run and need to be protected from wasteful consumption. *See Hanson v. Goodwin*, 432 F.Supp. 853 (W.D. Wash. 1977). Frivolous, bad faith claims consume a significant amount of judicial resources, diverting the time and energy of the judiciary away from processing good faith claims. *See, e.g., In re Green*, 598 F.2d 1126 (8th Cir. 1979).

The most apparent effect of excessive litigation is the imposition of unnecessary burdens on, and the useless consumption of, court resources. *See In re Martin-Trigona*, 573 F.Supp. 1237, 1242 (D. Conn. 1983) (noting plaintiff's fifty cases before one judge). As caseloads increase, courts have less time to devote to each case. A lack of adequate time for reflection threatens the quality of justice. *See Franklin v. Oregon*, 563 F.Supp. 1310, 1319 (D. Or. 1983). Second, long delays in adjudication create public dissatisfaction and frustration with the courts. Such delays also result in the unfortunate continuation of wrongs and injustices while the cases that would correct them sit on court calendars. Third, abusive litigation results in prolonged, repetitive harassment of defendants causing frustration and often

extraordinary and unreasonable expenditures of time and money defending against unfounded claims.

Defendants have a right to be free from harassing, abusive, and meritless litigation. *See Theriault v. Silber*, 574 F.2d 197 (5th Cir. 1978). Federal courts have a clear obligation to exercise their authority to protect litigants from such behavior. *Chatmon v. Churchill Trucking Co.*, 467 F.Supp. 79 (D. Mo. 1979). The Court may, in its discretion, place reasonable restrictions on any litigant who files non-meritorious actions for obviously malicious purposes and who generally abuses judicial process. *Phillips v. Carey*, 638 F.2d 207, 209 (10th Cir. 1981). These restrictions may be directed to provide limitations or conditions on the filing of future suits. *Id.*

. . .

III.

We must decide whether, on the facts presented by this case, enjoining Mr. Carter from proceeding as a pro se plaintiff in this district is a reasonable restriction, warranted by his abuse of the legal process. In so deciding, we will consider the *Telectron* decision only to the extent that it establishes a chronological history of the defendant's current practices. We note, however, that since the *Telectron* decision (in which the court documented that Mr. Carter had filed at least 178 cases), there have been at least forty-five federal cases reported in Westlaw involving defendant. *See* Plaintiff's Exhibit 13. Moreover, the defendant has initiated at least fifteen civil actions in this federal district.

. . .

(5) *Mr. Carter files actions for vexatious and harassing purposes, with total disregard for the legal merits of the action.*

Mr. Carter's response to people who act in a manner which he perceives as adverse to his interests is to sue them. When a judge renders an adverse decision, he sues the judge. *See Carter v. Goldberger*, 85 F 2231, *Carter v. Lavergne Marshall*, 85 F 2325, *Carter v. Richtel*, 86 M 1167, *Carter v. Carl O. Bue*, 85 M 2579. Further, he does so with the knowledge, gained through adverse decisions, that his cases are frivolous. Each of the above cases was dismissed for lack of jurisdiction. If Mr. Carter perceives that he has been wronged by other court personnel, he sues them also. *See Carter v. Bachman*, 86 K 1219 (suit against state clerk of court for allegedly misfiling a notice of appeal). The only conclusion that can be reached from this course of conduct is that Mr. Carter uses the court system not to seek redress for legitimate injury, but rather as a means of harassing innocent citizens residing in this district.

. . .

For the reasons stated, we feel that it is necessary to enjoin Mr. Carter from filing or appearing in any civil action in this district in which he is the proponent of a claim, without representation by a licensed attorney.

. . .

ACCORDINGLY, it is hereby ORDERED that Mr. Albert H. Carter is ENJOINED from proceeding as a proponent of any civil claim in the United States District Court for the district of Colorado without the representation of an attorney licensed to practice in the State of Colorado and admitted to practice in this Court. It is further ORDERED that all cases pending in the United States District Court for the District of Colorado in which Mr. Carter is plaintiff, and in which he does not proceed reasonably to employ counsel to represent him, shall be subject to dismissal.

The Clerk of the Court is DIRECTED not to accept any new pleadings initiating a civil action by Mr. Albert Carter unless he is represented by an attorney licensed

to practice in the State of Colorado and by the United States District Court for Colorado.

This Order constitutes our findings of fact and conclusions of law. The Clerk is DIRECTED to enter judgment in favor of the plaintiff and against the defendant. Each party is to bear their own costs.

1. Did the state of Colorado seek to prohibit the defendant from ever being a plaintiff in a Colorado court again?
2. How many cases had the defendant filed in Colorado federal court in recent years?
3. Why were the cases dismissed?
4. Is there an absolute right to access to federal court under the United States Constitution?
5. What are the three fundamental goals that underlie the mandate in FRCivP 1 that the Federal Rules of Civil Procedure must be construed to secure the just, speedy, and inexpensive determination of every action?
6. Judge Finesilver entered an order prohibiting the defendant from proceeding as a proponent in a civil claim in the United States District Court for the District of Colorado without representation of an attorney licensed to practice in Colorado. If the defendant files a lawsuit while unrepresented, what is the clerk of court directed to do?

ENDNOTES

1 *Black's Law Dictionary* 841 (5th ed. 1979).
2 *Black's Law Dictionary* 377 (5th ed. 1979).
3 *Black's Law Dictionary* 1037 (5th ed. 1979).
4 See Chapter 6 for a discussion of motions to dismiss.
5 In addition to the answer, a defendant may file a counterclaim against the plaintiff. Counterclaims are claims asserted by a defendant against a plaintiff and are discussed in Chapter 6. It is not anticipated that the defendants in the Wesser case will assert counterclaims.
6 The standards for granting these motions are fairly technical and are discussed in Chapter 7.
7 See Chapter 2 for a discussion of the federal and state court systems.
8 The commencement of a lawsuit is discussed in detail in Chapter 5.
9 This rule is discussed in Chapter 6.
10 See Chapters 5, 6, and 7.
11 The discussion of these rules is largely outside the scope of this text. The denomination of the proper parties can be complex and will be determined by your supervising attorney or in conjunction with your supervising attorney.
12 See Chapter 8 for a detailed discussion of discovery.
13 See Chapter 11 for a discussion of the trial.
14 See Chapter 12 for a discussion of judgments.
15 See Chapter 7.
16 See Chapter 7.

17 See Chapter 5.
18 28 U.S.C. § 473 (1993).
19 Donna Steinstra, "Implementation of Disclosure in United States District Courts, with Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26," 164 F.R.D. LXXXV (April 1996).
20 *Black's Law Dictionary* 1001 (5th ed. 1979).
21 The American Bar Association section on Law Practice Management publishes *Law Practice Management,* which contains articles on time managementand a wide array of other law office practice techniques. An audiocassette on time management for lawyers is also available. You may wish to pursue these resources now so that you are ready to be effective from day one in the law office.

You may wish to become an associate of the American Bar Association. The ABA offers associate affiliations for legal assistants. You may obtain information by writing: ABA Membership Department, 750 North Lake Shore Drive, Chicago, Illinois 60611.

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Chapter 2

COURT ORGANIZATION AND JURISDICTION

Your first few days on the job have been a whirlwind of activity, but now you have a quiet moment to return to the Wesser case. Ms. Heyward comes in your office and asks, "Can you meet with me this afternoon to discuss further preparation of the Wesser lawsuit? We need to decide in which court the lawsuit should be filed."

You remember from your litigation course that a lawsuit filed in the wrong court can be dismissed, so it is critical to choose a proper court. You reach for the statutes in the law firm's library, eager to recall the details of jurisdiction—which court can hear this type of case and has the power to bring the defendant into court and enter a binding judgment. You should have just enough time to review the federal and state court systems in order to understand which courts you can consider for filing the lawsuit.

Finally, you will need a few minutes to consider the proper venue—in which geographical district it is fair to litigate. "These questions require serious concentration," you think aloud. "Luckily, I should be able to work without interruption, and my meeting with Ms. Heyward is not until 2:00 this afternoon."

INTRODUCTION

The lawsuits in which you participate will not all be tried in the same court. Some cases will be heard in a federal court, others in a state court. There exist a number of different types of courts within both the federal and state systems. Many factors determine in which court a case is tried. These factors are discussed in the section headed Jurisdiction. **Jurisdiction** is the authority of a court to preside over claims in a judicial proceeding. If a court does not have proper jurisdiction over a case, the case can be dismissed at any time during the course of the litigation. This is true even on appeal, after a judgment has been entered. If too much time has passed since the cause of action, the plaintiff may not be able to refile a claim in the appropriate court because the statute of limitations will have expired. Furthermore, any judgment the court enters in a case where it has no jurisdiction is void and unenforceable. Thus, it is imperative that a plaintiff file the lawsuit in the correct court.

As a paralegal, you may work with the attorney on your team to determine in which court a case should be filed. Even if the question of jurisdiction has

been determined before you start working on the case, you must understand the way the state and federal court systems are organized and understand the types of cases over which the courts may exercise jurisdiction.

DEFINITIONS

Every state has its own court system. Within every state there is also a separate federal court system. In order to understand how both systems work, you must be familiar with certain terms that pertain to both systems. If you do not grasp the practical meaning of each term simply by reading the definition, do not panic. The practical meanings will become clear as you study the court organization and apply the definitions to the federal and state court systems.

Both the state and federal court systems have trial courts and appellate courts. The ***trial court*** is the court in which the lawsuit is commenced. The trial court is where both parties present their case—lawyers make opening arguments, witnesses testify, the judge rules on motions made at trial, and the judge or jury (if it is a jury trial) renders a verdict.

The trial courts in the federal court system are called United States district courts. Trial courts in the state court system have different names in different states. Common names include state, district, superior, county, or common pleas, to name a few.

After judgment is entered, a losing party may appeal an unfavorable outcome. The losing party requests an ***appellate court*** to review and overturn the trial court's decision. In contrast to the trial court, the appellate court hears no testimony. The appellate court bases its decision on the record of the trial court. The ***record on appeal*** consists of the testimony at trial, the pleadings, discovery materials, and other documents from the litigation at the trial level. The appellate court reviews the record to determine whether the relevant law was properly applied. It does not readjudicate the facts of the case. The attorneys for both the party that brings the appeal (***appellant***) and the party that opposes the appeal (***appellee***) present briefs to the appellate court arguing why their side should prevail on appeal. The attorneys also present oral arguments, unless the appellate court waives oral argument. The role of the appellate court is to review the record and determine whether the appellant received a fair trial and whether the evidence supports the verdict. See Chapter 12 for more details on appeals.

In discussing appeals, one often refers to the trial or decision "below." Trial courts are often referred to as **inferior courts.** This is just another way of describing the distinction between trial courts and appellate courts. The inferior (trial) court is where the case is first heard and judgment entered. The appellate court is superior to the trial court in that it can overrule the trial court, and the appellate court's decision is binding on the trial (inferior) court. Thus, if the appellate court determines that the trial judge committed an error that justifies a new trial, the trial court must conduct a new trial whether it cares to or not.

Two other terms are used in reference to the trial court. The trial court is often called the *court of original jurisdiction*. Again, this merely means that the case

is initiated and heard at this level, not reviewed and appealed. The trial court, at least in the federal system, is a ***court of record***. This means that all transactions and arguments that take place in the courtroom are recorded by a stenographer, the court reporter. If a court is not a court of record, no recording or stenographic transcription is made. Some state courts at certain levels are not courts of record, as will be discussed later.

Another important distinction is a *court of limited jurisdiction* as opposed to a *court of general jurisdiction*. A court of limited jurisdiction can hear only specific types of cases. For instance, federal district courts have jurisdiction only over the types of cases that Congress has authorized them to hear. (See the section headed Subject Matter Jurisdiction later in this chapter.) An example is the bankruptcy court, which obviously has jurisdiction only over matters related to bankruptcy. A state court system may have a traffic court that hears only traffic cases. A court with general jurisdiction is not limited in the type of cases it can hear. Most state courts are courts of general jurisdiction, except for certain specialized courts such as traffic court or juvenile court.

THE FEDERAL COURT SYSTEM

At the outset it is important to understand that federal trial courts are not superior to state trial courts. Federal courts are a separate, independent system of courts.

Three basic groups comprise the federal court system: the United States district courts, the United States courts of appeals, and the United States Supreme Court. The district courts are trial courts, and the courts of appeals and the United States Supreme Court are appellate courts.

United States District Courts

United States district courts are courts of original jurisdiction—that is, lawsuits are commenced and tried at this level. Every state has a federal district court. The more populous states have more than one federal district court. For example, New York has four federal district courts—the United States District Court for the Southern District of New York, the United States District Court for the Eastern District of New York, the United States District Court for the Western District of New York, and the United States District Court for the Northern District of New York. For states that have only one federal district court—for example, New Mexico—that court is called the United States District Court for the District of New Mexico, or the particular state in question.

Federal district courts are courts of limited jurisdiction; that is, they can hear only the types of cases that federal law authorizes them to hear. Congress has defined certain types of cases as falling within federal court jurisdiction. Two of the most common categories are cases involving a ***federal question*** and cases with ***diversity of citizenship.*** Briefly defined, federal question jurisdiction includes cases that involve federal laws or the United States Constitution. For example, the plaintiff in the Chattooga case claims that the defendant violated federal law prohibiting

employment discrimination; therefore, federal question jurisdiction exists. Diversity of citizenship jurisdiction exists in cases where the plaintiffs and the defendants are from different states and the claim involves more than $50,000.

Both the Wesser and Chattooga cases are federal district court actions, so you will become familiar with the procedure for litigation in federal district court as we follow the proceedings in these cases in subsequent chapters. Many, though not all, of the decisions rendered by federal district judges are published in the *Federal Supplement* (F. Supp.). A decision is published if it may provide useful guidance for other courts dealing with the issue in the future.

United States Courts of Appeals

The United States courts of appeals hear appeals from the federal district courts. They are the intermediate appellate courts in the federal system. A party dissatisfied with the decision of a United States court of appeals can appeal to a higher appellate court—the United States Supreme Court.

The United States Court of Appeals is divided into twelve geographical regions, termed *circuits*. Refer to Figure 2–1, which shows the states covered by each circuit. As an example, the Eleventh Circuit encompasses Florida, Georgia, and Alabama. The Eleventh Circuit Court of Appeals hears appeals from the federal district courts in these three states. Note that the District of Columbia has its own circuit court of appeals because many of the cases involving the federal government are litigated in Washington, D.C.

FIGURE 2–1 Circuit Courts of Appeal

Circuit	Areas Covered
First	Maine, New Hampshire, Massachusetts, Rhode Island, Puerto Rico
Second	New York, Connecticut, Vermont
Third	New Jersey, Pennsylvania, Delaware, Virgin Islands
Fourth	Maryland, Virginia, West Virginia, North Carolina, South Carolina
Fifth	Texas, Louisiana, Mississippi, Canal Zone
Sixth	Michigan, Ohio, Kentucky, Tennessee
Seventh	Illinois, Indiana, Wisconsin
Eighth	Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Missouri, Arkansas
Ninth	Washington, Oregon, California, Idaho, Nevada, Montana, Arizona, Hawaii, Alaska, Guam
Tenth	Colorado, New Mexico, Utah, Wyoming, Kansas, Oklahoma
Eleventh	Alabama, Georgia, Florida
District of Columbia	District of Columbia
Federal Circuit	Appeals from specialized federal courts

In addition to the twelve ***circuit courts of appeals*** based on geographical regions, there is the United States Court of Appeals for the Federal Circuit. This is a specialized court of limited jurisdiction, which can hear only the types of cases enumerated in 28 United States Code section 1295. The Court of Appeals for the Federal Circuit is authorized to hear appeals from federal courts of any district where the case relates to certain copyright, trademark, and patent issues. It also may hear appeals of certain decisions concerning contracts with government agencies and appeals of final decisions of the United States Court of International Trade, as well as certain other types of appeals delineated in 28 United States Code section 1295. This is only a general description of the appeals that the Federal Circuit Court of Appeals can hear; there is no substitute for reading 28 United States Code section 1295 when you are involved in a case over which this court may have appellate jurisdiction.

Some decisions of administrative agencies can be appealed directly to the circuit courts of appeals, without having to appeal first to the federal district court, which is the usual avenue of appeal. The direct appeal of an administrative agency decision is created by specific statutes. For example, 7 United States Code section 136n(b) provides for direct appeal of orders of the administrator of the Environmental Protection Agency with respect to registration of environmental poisons and pesticides.

As with other appellate courts, the circuit courts of appeals base their decisions on the record from the trial court below. The appellant and appellee present memoranda of law supporting their arguments, and the attorneys present oral arguments. A panel of judges, usually three to a panel, considers the case and renders an opinion. If the opinion is a published one, it can be found in the *Federal Reporter* (F., F.2d, or F.3d). If a party does not appeal to the United States Supreme Court, the decision of the circuit court of appeals stands as the final decision.

SIDEBAR The various circuits have their own court rules. The rules can differ significantly among circuits, so it is imperative that you consult the court's own rules.

United States Supreme Court

The United States Supreme Court is the highest court in the country. It is comprised of nine justices—one chief justice and eight associate justices. The justices exercise a great deal of discretion in choosing the cases the Court will hear. If a party wants the United States Supreme Court to hear its appeal, that party must file a *petition for* ***certiorari,*** asking the Court to hear its appeal and explaining why the Court should hear the appeal.[1] If the Court decides that the case involves an important enough question of law, the Court will issue a *writ of certiorari*, which is an order by the Court stating that it has decided to hear the appeal and ordering the lower appellate court to send up the record. If the Court denies the petition for certiorari, the lower court decision stands as the final decision in the case.

The United States Supreme Court often chooses to hear a case when there is a conflict among the United States courts of appeals on a specific question of law. For example, in the case of *Immigration and Naturalization Service v. Cardoza-Fonseca,* the United States Supreme Court granted certiorari because there was a conflict among the circuit courts regarding a question of law concerning persons seeking political asylum in the United States. To gain political asylum, persons must establish that they have a "well-founded fear of persecution"—that is, a well-founded fear that if they were forced to return to their home country, they would be persecuted because of their race, religion, nationality, membership in a particular social group, or political opinion. Different circuit courts had arrived at different conclusions about the degree of proof necessary to establish a well-founded fear of persecution, so the United States Supreme Court granted certiorari to resolve this conflict.[2]

The United States Supreme Court has original jurisdiction in a few very limited types of cases. They are enumerated in 28 U.S.C. § 1251. These types of cases include controversies between two states, controversies between the United States and a state, and actions by a state against the citizens of another state or against aliens. An *alien* is not a person from outer space. This is the common legal term for a person who is not a citizen of the United States. The United States Supreme Court also has original jurisdiction over "actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties."

Specialized Federal Courts

Several specialized federal courts were created by statute to hear specific types of cases. The Federal Circuit Court of Appeals, with its limited jurisdiction, has already been discussed. Another example is the United States Court of Claims, which hears cases concerning claims against the United States when such claims arise from a federal law or the United States Constitution or involve a contract with the United States. The United States Tax Court, another example of a specialized federal court, decides actions concerning federal income, death, or gift taxes.

STATE COURT SYSTEMS

Each state has its own court system, established and governed by the constitution and statutes of that state. There is a great deal of variety from state to state in the names assigned to various levels and divisions of courts in the state systems. The general structure, however, is basically the same—trial courts and appellate courts. There are various divisions within each of these two basic court levels. This discussion is intended to give you a broad overview of state court structure. You must learn the names, jurisdiction, and operating procedures of each level and division in your state.

State Trial Courts

Commonly, one primary trial court is the nucleus of a state trial court system. Various names are given to this trial court: district, circuit, county,

superior, or common pleas, for a few examples. It is a court of general jurisdiction as opposed to the federal trial courts, which have limited jurisdiction.

This core trial court system is often split into two sets of trial courts—one that hears cases involving amounts exceeding, for example, $10,000, and the other that hears cases involving lesser amounts. For instance, a case involving damages of $10,000 or less may be filed in the "district court," while cases involving more than $10,000 may be heard in the "superior court." The district court has its own set of judges, as does the superior court. Trials are conducted similarly in both trial courts. There may be some differences, however, such as whether the proceedings are recorded by a court reporter. The courts dealing with the lesser amounts are sometimes not courts of record.

A state trial court of general jurisdiction hears cases involving issues such as contract disputes, personal injury, property damage, and divorce-related matters. Some states also have specialized courts that deal only with specific issues. There may be a separate court division that hears only divorce-related issues such as custody and child support. There may be special courts exclusively for juvenile matters or probate (trusts and estates) matters. It is common to have a separate division for all criminal trials.

Another common special court is one that deals exclusively with cases involving no more than a small dollar amount: say, $2,000. This court is often called small claims, municipal, or magistrate's court. Cases heard frequently include those dealing with issues such as past-due rent, money owed on promissory notes, and other contract disputes involving small sums. Often parties litigate these small claims by themselves—that is, without attorneys. The filing fee is usually small, and simple forms are used to file a complaint. The employees in the clerk of court's office usually help people with their questions about filing a claim and initiating a lawsuit. The court hearings are generally simple, and the pretrial procedure is not complex—that is, the pleadings usually include just a complaint and answer, with none of the more intricate pretrial motions and discovery procedures that occur in more complex litigation.

A party who loses in small claims court can usually appeal to the next highest trial court. The party is generally entitled to an entirely new trial at the next level. This is termed a trial *de novo*.

SIDEBAR It is important to grasp the distinction between a trial *de novo* and a regular appeal. At a trial *de novo*, the entire case is heard again. The witnesses testify again, and the judge makes a decision on the evidence he or she actually hears and reads. In contrast, in a regular appeal, no new testimony is given, and the appellate court bases its decision on the record made at the trial below. The appellate court reviews the trial below for errors; it does not conduct a new trial.

State Appellate Courts

When a final judgment has been entered in the highest state trial court, a dissatisfied party may seek appeal with a state appellate court. A state appellate court system usually has two levels of appellate courts. The first level of appeal is to the intermediate appellate court, often called the court of appeals, and the second level is to the highest court in the state, usually called the state supreme court. Some states split the intermediate court into the court of civil appeals and the court of criminal appeals.

A party usually has an appeal as of right to the intermediate appellate court (court of appeals). An *appeal as of right* means that by statute the party is granted an appeal to the next level and does not have to petition the court to hear its case. Usually a panel of three or more judges hear oral argument and sign the court's decision. If one of the members of the panel dissents from the court's decision, there is often an appeal as of right to the state supreme court.

A party dissatisfied with the decision of the intermediate court of appeals may ask the highest state court (supreme court) to review the decision. In most types of cases, review by the supreme court is not automatic. Instead, a party must file a petition for certiorari or petition for discretionary review. State statutes sometimes provide for an appeal as of right to the state supreme court when the case involves an important constitutional question.

In rare instances, state statutes provide for appeal of a trial court judgment directly to the state supreme court. The most common example is the appeal of a criminal conviction that imposes the death penalty.

Decisions rendered by state administrative agencies also may be appealed to the appellate courts. This may involve special rules of appellate procedure and state statutes. It is important to remember that all appeals within the administrative agency itself must be exhausted before an appeal can be made to a court.

JURISDICTION

You now understand that there exist many types of courts in both the state court systems and the federal court system. A particular court can hear a case and enter a judgment only if it has jurisdiction over the case. As noted earlier, ***jurisdiction*** is defined as a court's power to decide a case or controversy. State statutes define the power of state courts, and federal statutes delineate the types of cases that federal courts can hear. Some courts, particularly federal courts, have the authority to hear only certain types of cases.

In order to adjudicate a case, the court must have authority over both the type of case and the parties involved in the case. The authority to hear a particular type of case is called ***subject matter jurisdiction***. The power of the court to bring a party before it and enter a judgment against that party is called ***personal jurisdiction***. You should note that a plaintiff submits to the court's jurisdiction by filing the lawsuit in the court. Thus, the issue of personal jurisdiction involves the court's authority to make a defendant come into that court.

Subject matter jurisdiction and personal jurisdiction are two separate analyses. The analysis for subject matter jurisdiction focuses on whether the court has the authority to hear this type of case. The focus of the analysis for personal jurisdiction is twofold. The first consideration is whether the defendants can be brought into the court without violating their constitutional right to due process. The second question is whether the defendants received proper notice that they are being sued. This involves giving the defendant proper written notice, or service of process, which is discussed in Chapter 5.

The concepts of subject matter jurisdiction and personal jurisdiction are best understood by examining how they are applied at the state and federal trial court level.

Subject Matter Jurisdiction

Subject matter jurisdiction is an extremely important matter. A case may be dismissed at any time if the court does not have subject matter jurisdiction. Even if all parties wish to have a case litigated in a certain court because it would be convenient, that court cannot hear the case if subject matter jurisdiction is not conferred on the court by statute. Furthermore, even if neither party raises the issue, a court may on its own *(sua sponte)* dismiss a case for lack of subject matter jurisdiction.

Subject Matter Jurisdiction in State Courts. Because most state courts are courts of general jurisdiction, subject matter jurisdiction is not as finely delineated by statute as it is in federal courts. As discussed earlier, in state courts, the trial court's jurisdiction is frequently limited by the amount in controversy. If a small amount is involved, the claim may have to be brought in small claims court. A state may have two or three levels of trial courts, with jurisdiction based on the amount in controversy. When a court's jurisdiction is based on the amount at issue in the case, that amount is called the ***jurisdictional amount***.

State courts do have some specialized courts that handle only certain types of cases, such as traffic court and juvenile court. These are exceptions, however, to the practice that most state courts are courts of general jurisdiction.

Subject Matter Jurisdiction in Federal Courts. The federal court system was created by article III, section 1, of the United States Constitution, which states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Congress created the federal district courts, which have jurisdiction as set forth in several federal statutes. Numerous statutes confer on the federal courts jurisdiction over particular types of cases. Some of the most important types of jurisdiction are as follows:

Statute	Type of Case
28 U.S.C. § 1333	admiralty
28 U.S.C. § 1337	commerce and antitrust regulations

28 U.S.C. § 1338	patents, copyrights, trademarks, and unfair competition
28 U.S.C. § 1340	Internal Revenue, customs duties
28 U.S.C. § 1343	civil rights and elective franchise
28 U.S.C. § 1345	United States as plaintiff
28 U.S.C. § 1346	United States as defendant

Although this list is by no means exhaustive, it names some of the major jurisdictional statutes. Various grants of jurisdiction are contained in 28 *United States Code* sections 1331 through 1364.

The bulk of the cases heard by federal district courts are those in which jurisdiction is based either on a federal question under 28 *United States Code* section 1331 or on diversity of citizenship under 28 *United States Code* section 1332.

Federal Question Jurisdiction. According to 28 *United States Code* section 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This is the broadest grant of jurisdiction of all the federal statutes. Obviously it is not as specific as, for example, 28 *United States Code* section 1346, which grants jurisdiction whenever the United States is a defendant. The meaning of *arising under* is in some circumstances open to interpretation. The many litigated interpretations are beyond the scope of this text, which concentrates on the more obvious examples so that you can understand the concept of federal question jurisdiction.

The general meaning of federal question jurisdiction is that a claim is based on federal law. The Chattooga case involves a federal statute. The plaintiff's claim of employment discrimination is based on an alleged violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*). This claim clearly arises under a law of the United States.

A party may also initiate a federal question lawsuit based on a claim that its rights have been violated under the United States Constitution. For example, a plaintiff may claim that a zoning ordinance has deprived it of property in violation of the due process protection of the Fifth and Fourteenth amendments to the Constitution. This claim arises under the United States Constitution and, thus, constitutes a federal question.

Plaintiffs who base their claims on a federal question must state affirmatively in the complaint the law, treaty, or section of the United States Constitution on which their claim is based.

Diversity Jurisdiction. Diversity jurisdiction is the second major category of federal subject matter jurisdiction. It is based on diversity in the citizenship of the parties to a lawsuit. According to 28 *United States Code* section 1332(a), diversity of citizenship exists when the action is

1. between citizens of different states;
2. between citizens of a state and citizens or subjects of a foreign state;

3. between citizens of different states and in which citizens or subjects of a foreign state are additional parties; and
4. between a foreign state as plaintiff and citizens of a state or of different states.

Categories 2, 3, and 4 apply when a party is a foreign state or citizen of a foreign state. Because United States law refers to noncitizens of the United States as aliens, these three categories are sometimes called the *alienage sections*.

By far the most commonly used category is the first: when plaintiffs and defendants are citizens of different states. This is the only category that is explored in detail in this text.

Determining Citizenship. Because diversity is determined by the *citizenship* of the parties, one must first understand the meaning of that term. Persons are considered to be citizens of the state where they have their ***domicile***—that is, the place where a person has his or her permanent home and intends for the permanent home to remain.[3] A person can have only one domicile at a time. Note that the word *state* is defined by 28 *United States Code* section 1332(d) to include the District of Columbia and the Commonwealth of Puerto Rico.

Corporations are considered to be citizens for purposes of diversity jurisdiction; 28 *United States Code* section 1332(c) states that a corporation is deemed to be a citizen of the state where it is incorporated and has its principal place of business. *Principal place of business* is generally considered to mean the place where the majority of the corporation's business takes place or where the corporate headquarters is located. A corporation can be a citizen of more than one state; section 1332(c) also provides rules to determine the citizenship of a liability insurer and the legal representative of the estate of a decedent. (See Figure 2–2.)

In the Wesser case, both Woodall Shoals and Second Ledge are incorporated in Delaware and have their corporate headquarters in New York. Both companies are considered citizens of Delaware and of New York. They are not considered citizens of North Carolina. Although they do business in North Carolina, North Carolina is not their principal place of business.

Diversity jurisdiction requires *complete diversity*, which means that each plaintiff must have a citizenship different from each defendant. If there are multiple parties, and one plaintiff and one defendant are citizens of the same state, diversity is destroyed. For example, if the plaintiffs in a lawsuit are citizens of Arkansas and Oklahoma and the defendants are citizens of Texas and Missouri, complete diversity exists. However, if citizens of Arkansas and Oklahoma bring an action against citizens of Texas, Missouri, and Oklahoma, complete diversity does not exist.

If plaintiffs are citizens of the same state, this does not destroy diversity as long as no defendant is a citizen of the same state as a plaintiff. Likewise, diversity exists where two defendants are citizens of the same state, but the defendants are not citizens of the same state as any of the plaintiffs.

FIGURE 2–2 Diversity of Citizenship Explained in 28 U.S.C. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business, and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

SIDEBAR Sometimes diversity jurisdiction can become confusing as you try to sort out the parties. A simple way to sort them out is to make a chart. List on one side each plaintiff and the state of that plaintiff's residence, then do the same on the other side of the chart for each defendant.

Diversity Jurisdiction: The Jurisdictional Amount. Read again 28 *United States Code* section 1332 in Figure 2–2. You will see that even if there is complete diversity between or among the parties, this alone is not enough to confer diversity jurisdiction on the federal court. The lawsuit must also meet the second requirement for diversity jurisdiction: the jurisdictional amount. As section 1332(a) states, the amount in controversy must exceed the sum or value of $75,000, exclusive of costs

and interest. The purpose of the jurisdictional amount is to limit the federal court caseload to the more significant cases.

To determine whether more than $75,000 is at issue, the court looks at the plaintiff's complaint. If the amount at issue is clearly not in excess of $75,000, the plaintiff cannot rely on diversity jurisdiction. The burden is on the defendant to show that the amount in controversy does not exceed $75,000. Courts are usually liberal in assessing whether the $75,000 test is met, although the plaintiff's assertion of damages in excess of $75,000 must be well-founded. That is, the plaintiff cannot merely state that the damages meet the jurisdictional amount just for the sake of getting into federal court.

Some complex questions arise in multiparty litigation in regard to whether parties can aggregrate, or lump together, their claims when individually the claims do not exceed $75,000 and do not meet the jurisdictional amount. This issue is beyond the scope of this text, but usually the propriety of aggregration depends on how many plaintiffs and how many defendants are involved in the lawsuit and whether the claims the plaintiff wishes to aggregrate are separate and distinct claims or involve only one right or title. For example, in a lawsuit with one plaintiff and two defendants, the plaintiff may not aggregrate two claims if the claims arise from two separate contracts. If the two defendants are jointly liable, however, as with partners in a business, the plaintiff may aggregrate the amounts in controversy to attain the jurisdictional amount.[4]

Concurrent and Exclusive Jurisdiction

When a court has ***exclusive jurisdiction***, that court is the *only* court that has jurisdiction. The authorization of one court to hear a certain type of case, to the exclusion of all other courts, is often specified by statute. For example, 28 *United States Code* section 1338(a) provides for exclusive federal jurisdiction over patent, copyright, and trademark cases.

As a general rule, when there is no statute explicitly stating that the federal or the state court has exclusive jurisdiction, then federal and state courts have ***concurrent jurisdiction***—that is, subject matter jurisdiction is not limited to just one court. Sometimes, however, there exists implied exclusive jurisdiction, when no statute establishes exclusive jurisdiction but the courts nonetheless determine that jurisdiction is exclusive. An example is Title VII of the Civil Rights Act (42 *United States Code* section 2000e *et seq.*), the statute involved in the Chattooga case. No statute explicitly states that federal courts have exclusive jurisdiction over Title VII claims, but numerous court decisions have held that Congress intended that Title VII cases be filed exclusively in federal court.[5] Obviously, it is very important that the attorney-paralegal team carefully consider the issue of exclusive jurisdiction in preparing a lawsuit.

Consider the Wesser case. Here concurrent jurisdiction exists. There is no statute or judicial decision stating that any type of court has exclusive jurisdiction. The attorney-paralegal team representing Mr. Wesser decided to file the lawsuit in federal court, with diversity jurisdiction as its basis because none of the defendant corporations are citizens of the same state as Mr. Wesser. The amount

in controversy exceeds $75,000, so the jurisdictional amount requirement is met. Thus, diversity jurisdiction in federal court exists.

However, Mr. Wesser could have filed this action in state court, if he had chosen. There is no applicable statute requiring that this case be heard in federal court. Mr. Wesser might have chosen state court for a number of reasons. The court might be closer and more convenient for him and the witnesses. He might wish to avoid a certain judge. He might be able to have a very receptive jury in his county. There are numerous reasons that parties choose a certain court. As part of the paralegal-attorney team, you will probably have occasion to analyze these choice-of-court decisions.

PERSONAL JURISDICTION

After it is determined that a court has jurisdiction over the subject matter, one must determine whether the court has jurisdiction over the parties in the lawsuit. As noted earlier, personal jurisdiction means that the court has the power to bring a defendant into that court and enter a judgment against that person.

Recall that personal jurisdiction over the plaintiff is not at issue because the plaintiff submits to the court's jurisdiction by filing a complaint with the court. Nor is personal jurisdiction a problem when the defendant is a resident of the state in which the lawsuit is filed. A state has the power to adjudicate claims concerning the persons and property within the state. Note that the state in which the lawsuit is commenced is called the ***forum state***.

The underlying principle of personal jurisdiction is fairness to the defendant. The rules for personal jurisdiction are designed to protect defendants from having to go to distant states to defend a lawsuit when they have very little connection with that state. The rules that govern personal jurisdiction have evolved from the requirement that a person cannot be deprived of life, liberty, or property without ***due process of law***. The right to due process is founded in the Fifth and Fourteenth amendments of the United States Constitution. The concept of due process simply means that persons must be given notice of lawsuits against them and be given the opportunity to be heard in order to defend their position.

Determining Whether the Court Has Personal Jurisdiction over a Defendant

The easiest way to determine whether a court has personal jurisdiction over a nonresident is to answer three questions. The first question is whether there is an applicable ***long-arm statute***. A long-arm statute is a law authorizing jurisdiction over an out-of-state defendant because the defendant has been involved in certain transactions in the forum state. For example, states have nonresident motorist statutes, which provide that if an out-of-state motorist is involved in an accident in that state, the local resident may sue the out-of-state motorist in the state where the accident took place. The theory behind this law

is that the out-of-state motorist submits to the jurisdiction of the state through which he or she drives.

State Long-Arm Statutes. Long-arm statutes vary greatly from state to state. Some long-arm statutes are very broad and basically provide that if a defendant has minimum contacts with a state and jurisdiction would not offend the defendant's due process rights, the defendant may be sued in the forum state. (The concept of minimum contacts is discussed below.) Other states have specific long-arm statutes. For example, North Carolina's long-arm statute provides for jurisdiction in the following instance:

> (5) Local Services, Goods, or Contracts.—In any action which:
> a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff . . .[6]

When a state has a broadly worded long-arm statute, the courts have great latitude to decide whether a transaction falls within the statute; with a very specific statute, the courts have less discretion.

Even if a party is involved in a transaction that arguably falls within a state's long-arm statute, a second question arises: Can the defendant be compelled to defend the lawsuit in the forum state without violating the defendant's right to due process? This is where the concept of minimum contacts applies. The concept of minimum contacts has evolved over the years through a series of United States Supreme Court decisions. The classic statement concerning minimum contacts is in the case of *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). There the Court held that jurisdiction was proper when a corporation's minimum contacts within the forum state were such that being forced to defend a lawsuit in that state would not offend "traditional notions of fair play and substantial justice."

This general rule is best understood by considering a specific example. If a defendant who is a resident of Arizona cashes a check in North Carolina, and the check bounces, is it fair to make the defendant come into court in North Carolina? This will depend on whether the defendant has other connections with North Carolina. If the defendant has no bank account in North Carolina, has entered into no contracts in North Carolina, and was just passing through on vacation when the check was written, then the defendant probably does not have sufficient contacts with North Carolina to require the defendant to defend a lawsuit in North Carolina. This means that the plaintiff will have to sue the defendant in Arizona.

A final question is whether the defendant was given adequate notice of the lawsuit. This is answered by determining whether the defendant received adequate service of process—that is, written notification of the action against the defendant. A discussion of service of process is found in Chapter 5.

Federal Long-Arm Statutes. In federal court actions, one should first check to see whether there are any specific federal long-arm statutes that are applicable.

While they are few in number, such statutes are wide in scope. Statutes that pertain to jurisdiction in antitrust actions, for instance, contain no geographical restrictions. The federal statute allows nationwide service on defendants in antitrust actions.

Suppose that there is no federal long-arm statute and that no state long-arm statute applies because the defendant does not have sufficient minimum contacts with any state. FRCivP 4(k)(2) may provide a solution for obtaining personal jurisdiction over the defendant. This provision, enacted in 1993, has been called the "general federal long-arm statute" by some commentators. The provision states:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

A detailed discussion of FRCivP 4(k)(2) is beyond the scope of this text. For details, paralegals may refer to the extensive commentary to FRCivP 4 in Title 28 of the *United States Code Annotated*, which details fact situations in which this long-arm provision may be used to gain personal jurisdiction over a defendant. Paralegals should be aware of this provision as a possible source of personal jurisdiction when no state or specific federal statute applies. Be aware, however, that FRCivP 4(k)(2) affects personal jurisdiction only. Subject matter jurisdiction requires a separate analysis. Further, FRCivP 4(k)(2) applies only when the basis of subject matter jurisdiction is a federal question; it does not apply when subject matter jurisdiction is based on diversity of citizenship.[7] Bear in mind the policy underlying FRCivP 4(k)(2): it "is not designed to change in any particular the substantive law to be applied in the action against the defendant, but only to add the federal courts to the list of forums that can hear the action."[8]

VENUE

By now you understand that in order to enter a binding judgment, a court must have subject matter jurisdiction over the type of controversy in a lawsuit and personal jurisdiction over the parties. The court also needs venue. ***Venue*** designates the particular county or court district in which a court with jurisdiction may hear a lawsuit.

The Relationship of Venue to Jurisdiction

Venue is the third determination you must make to identify the court in which a lawsuit may be heard. First you determine whether to file the case in federal or state court. If there are different levels within the trial court, such as district and superior courts in a state court system, you must determine in which level to file. This is the subject matter jurisdiction analysis. Second, you must determine in which state you can obtain personal jurisdiction over the defendant. Third, you must examine the venue statutes to determine in which geographical

district within the state or federal court system venue is proper. In state courts, you must decide in which county the action will be filed. In federal court, you must decide in which federal court district within a state the action will be filed, if there is more than one district in the state.

Consider the following example. Suppose that Mrs. Hearne wants to file a complaint seeking a divorce from Mr. Hearne. Mrs. Hearne is a resident of Carteret County in the state of North Carolina. Mr. Hearne is a resident of Buncombe County, also in the state of North Carolina but hundreds of miles away. The North Carolina venue statutes provide that any county district court in North Carolina has subject matter jurisdiction to hear a divorce action when one party is a resident of North Carolina. Therefore, subject matter jurisdiction is not a problem. Mr. Hearne lives in the same state, his address is known for service of process, so there is no problem with personal jurisdiction. The next question is which county district court has venue. The North Carolina venue statute provides that venue is proper in the county where the plaintiff resides or the county where the defendant resides. Therefore, Mrs. Hearne may file the action in Buncombe or Carteret County. In all likelihood, Mrs. Hearne's own county is most convenient, so she will choose Carteret County.

The Purpose of the Venue Requirement

The aim of venue statutes is to ensure that the lawsuit is heard in a geographical location that is fair to the defendant. Bear in mind that when a party must litigate in a distant location, it can be both inconvenient and expensive. For a trial, the parties and witnesses incur travel expenses and have to take more time off work. Unless the party's local lawyer is licensed to practice in the distant state, the party has to hire an attorney in the forum state to handle the case entirely or to serve as associate counsel. These are just some of the inconveniences and expenses of litigating in a distant forum.

How to Determine Venue

As we have discussed, venue is governed by statute. There are two types of venue statutes: special venue statutes and general venue statutes.

Special Venue Statutes. First you must check to see whether a special venue statute covers the type of case in question. For instance, 42 *United States Code* section 2000e5(f)(3) is a special venue statute for Title VII employment discrimination cases. It reads as follows:

> (3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the unemployment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found

> within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

This special venue statute applies to the Chattooga case, which is a Title VII claim. The Chattooga Corporation office where Sandy Ford worked is in Philadelphia, in the Eastern District of Pennsylvania. The United States District Court for the Eastern District of Pennsylvania is the appropriate venue because the alleged unlawful employment practice took place in this district and the relevant employment records for Chattooga Corporation are located in this district.

General Venue Statutes. If there is no special venue statute, refer to the general venue statute. For federal district courts, the general venue statute is 28 *United States Code* section 1391. Section 1391(a) governs cases based solely on diversity jurisdiction. It states that venue is proper in the district (1) where any defendant resides, if all defendants reside in the same state; (2) where a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) where any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought. For example, suppose that a plaintiff who is a resident of Georgia wants to sue two defendants, one a resident of Michigan and one a resident of Ohio, for damages incurred in an automobile accident in Georgia. Venue is proper in Georgia, where the event giving rise to the claim occurred. Venue is not proper in Michigan or Ohio, because only one of the two defendants resides in each of the two states.

If the lawsuit is not based on diversity jurisdiction, 28 *United States Code* section 1391(b) governs. Its provisions are the same as section 1391(a), except that the third section reads where any defendant "may be found" instead of where any defendant "is subject to personal jurisdiction." It provides for venue (1) where all plaintiffs reside; or (2) where the cause of action arose.

Determining a Party's Residence. Obviously, the means for determining a party's residence is crucial. For purposes of venue, residence is based on the party's domicile, which, as you recall, is also the means by which a party's citizenship for purposes of diversity jurisdiction is determined. Remember, domicile means the place where a person lives and intends to have his or her permanent home.

In 28 *United States Code* section 1391(c) is an explanation of how corporate residence is determined for purposes of venue. Section 1391(c) provides as follows:

> (c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such

> corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

Thus, the attorney-paralegal team must consider under what circumstances a corporation is amenable to jurisdiction in a certain judicial district. This must be evaluated in conjunction with FRCivP 4(d)(3), which explains how to obtain service of process on a corporation. (See Chapter 5.) As a practical matter, one may obtain jurisdiction over a corporation in the district in which it is incorporated, in which it is licensed to do business, and in which it is doing business because one can find an agent of the corporation to receive service of process in those locations. A corporation is also deemed a resident of a state for purposes of venue when that state's long-arm statute establishes personal jurisdiction over the company.

Consider the Wesser case. Venue is proper in the Western District of North Carolina, where both Woodall Shoals and Second Ledge are subject to personal jurisdiction. Both companies have agents to receive service of process in North Carolina. Even if they did not, assume that North Carolina has a long-arm statute that would allow service of process out of state—that is, at corporate headquarters in New York—because of the companies' extensive contractual dealings in North Carolina.

For further determinations, 28 *United States Code* section 1391(d) addresses venue when the defendant is an unincorporated association, and 28 *United States Code* section 1391(e) governs venue when the defendant is the United States or one of its agencies, officers, or employees. A detailed discussion is beyond the scope of this text, but you should refer to these sections when litigation involves those types of defendants.

Change of Venue

A determination of where venue is proper is made at the outset of a lawsuit. A party may challenge venue either with a motion under FRCivP 12(b)(3) or in the answer. (Chapter 6 presents a discussion of answers and rule 12 motions.) Remember, the defendant is the party that challenges venue because the plaintiff has already chosen venue by filing the lawsuit in a certain district. Pursuant to 28 *United States Code* section 1406, a court may dismiss or transfer a case when the original venue is improper. Transfer is preferred over dismissal. Courts have the discretion to transfer venue "for the convenience of parties and witnesses, in the interest of justice" under *United States Code* section 1404.

In a case in which venue is proper in more than one district, and the court determines that one district is more convenient overall, the court may transfer the case from the district in which the plaintiff filed the lawsuit to the more convenient district. Section 1404(a) provides that the district to which the case is transferred must be a district in which the plaintiff could have brought the action

initially. Thus the court may not transfer the case to a state where the plaintiff could not have obtained personal jurisdiction over the defendant at the outset.

ETHICS BLOCK

Both the ABA Model Rules and Model Code provide that a lawyer shall not assist a nonlawyer in the performance of activity that constitutes the unauthorized practice of law. This is not a prohibition against a lawyer employing nonlawyers and delegating certain tasks to them. Lawyers must, however, supervise their nonlawyer employees, and lawyers retain the ultimate responsibility for the delegated work. In determining what constitutes the practice of law, attorneys and paralegals must consult their own state's law. The definition of *practice of law* is determined by state law and can differ from state to state. Often it is easy to determine when a person is engaging in the practice of law. For instance, a paralegal cannot appear in court on behalf of a client or conduct depositions. Sometimes, however, clients ask paralegals questions, the answers to which may constitute practicing law. Anytime you are unsure whether you can answer a certain question, check with your supervising attorney.

SUMMARY

This chapter explains the basic concepts necessary to determine the proper court in which to file a lawsuit. A court can hear a case and render a judgment only if it has jurisdiction. The court must have both subject matter jurisdiction, *i.e.*, the authority to hear the particular type of action, and personal jurisdiction, *i.e.*, the power to bring defendants into court and enter a binding judgment against them.

To apply the concepts of jurisdiction, you must understand the structure of our court systems and master some basic definitions. First, distinguish between trial courts and appellate courts. At the trial court level, the actual trial determines the pertinent facts based on witness testimony, exhibits, and so on. In the event that judgment of a trial court is appealed, an appellate court reviews the proceedings that took place in the trial court and are contained in the record. The appellate court does not hear new testimony but reviews the record of the trial court to determine whether the applicable law was followed and applied.

A court of original jurisdiction is the trial court where a case is commenced and tried. A court of record is a court where a stenographer is present to record the trial court proceedings. Not all trial courts are courts of record.

A court of limited jurisdiction can hear only certain types of cases, as established by statutes. Federal courts are courts of limited jurisdiction. A court of general jurisdiction is not constricted by statute as to what types of cases it can try. State courts are usually courts of general jurisdiction, but a state may have some courts of limited jurisdiction. For example, small claims court may be limited to claims of less than $1,500.

The federal court system has three basic components. The trial courts are the United States district courts. They are courts of limited jurisdiction. Every

state has at least one district in its federal court system, and the more populous states have more than one district. The second component consists of the United states courts of appeals, which are appellate courts, reviewing decisions from the United States district courts. These appellate courts are divided into circuits, each of which covers a specified geographical region. The United States Circuit Court of Appeals for the Federal Circuit is an exception in that it hears appeals from certain specified federal trial courts. The United States circuit courts of appeals are also authorized to review decisions of some administrative agencies, as specified by statute.

The third component is the United States Supreme Court, the highest level appellate court in the country. The United States Supreme Court is authorized to review decisions of the United States circuit courts of appeals and the highest state appellate courts. The United States Supreme Court does not have to hear every appeal. Rather, a party must file a petition for certiorari, requesting review by the Supreme Court. If the Supreme Court exercises its discretion to review a decision, it issues a writ of certiorari. It often reviews cases where the circuit courts of appeals have reached different conclusions regarding a certain legal issue. At the federal trial court level, there are also some specialized courts, such as the United States Tax Court, whose jurisdiction is constricted by statute to very specific types of cases.

Every state has its own system of state courts, established and governed by that state's constitution and statutes. The trial court system may be split into divisions, often delineated by the dollar amount of the claim. Although most state courts have general jurisdiction, there exist some courts of limited jurisdiction, such as small claims and juvenile courts.

Many states have two levels of appellate courts. The intermediate level is often called the court of appeals, and a party may usually appeal to that court as a matter of right—that is, without petitioning the court to exercise its discretion to consider the appeal. However, the highest state appellate court, usually called the state supreme court, generally must approve a petition for discretionary review. The state supreme court hears appeals from the court of appeals and some administrative agencies.

Subject matter jurisdiction determines what type of case a court is authorized to hear. A case may be dismissed at any time if the court does not have subject matter jurisdiction.

Subject matter jurisdiction is a key factor in federal courts, which are authorized to hear only certain types of cases. Many statutes delineate the jurisdiction of the federal courts, but the two most frequently invoked bases of federal jurisdiction are federal question jurisdiction and diversity jurisdiction. Federal question jurisdiction is governed by 28 U.S.C. § 1331, which provides that federal courts may hear civil actions "arising under the Constitution, laws, or treaties of the United States." Diversity jurisdiction is governed by 28 U.S.C. § 1332. The most common type of diversity case involves citizens of different states. Complete diversity is required; that is, each plaintiff must be a citizen of a different state from each defendant. If one plaintiff is a citizen of the same state

of which one defendant is a citizen, complete diversity does not exist. Diversity jurisdiction also requires that the amount in controversy exceeds $75,000. For purposes of diversity jurisdiction, the citizenship of individuals is determined by their domicile, the place where they have their permanent home and intend for their permanent home to remain. A corporation is considered a citizen of the state where it is incorporated and where it has its principal place of business.

A court may have exclusive jurisdiction over certain matters. For example, claims involving Title VII must be filed in federal court. Courts may have concurrent jurisdiction when no statute explicitly states that one court has exclusive jurisdiction over a certain type of case. For example, a personal injury action where diversity jurisdiction exists may be brought in state court, if the plaintiff so chooses.

Personal jurisdiction is the court's power over a defendant—the power to make the defendant litigate in that court. The underlying principle of personal jurisdiction rules is fairness to the defendant. Defendants are entitled to due process—that is, notification that a lawsuit has been filed against them. Most states have long-arm statutes, which delineate circumstances in which an out-of-state defendant has enough contacts within a state to deem litigation fair in that state. Long-arm statutes are founded on the concept of minimum contacts: defendants must have sufficient contacts with the state that their due process rights will not be violated if they are forced to come into that state to defend a lawsuit.

There are a few federal long-arm statutes that allow nationwide service on defendants in particular types of lawsuits, such as antitrust. An example is FRCivP 4(k)(2), a "general federal long-arm statute" that may be used in some cases, but only when subject matter jurisdiction is based on a federal question.

Venue determines in which geographical district an action will be tried. In federal courts, venue governs the judicial district in which the trial will be held, and venue in state court usually determines the county for the trial proceedings. The determination of the proper court in which to file an action for purposes of venue is your third consideration after you determine which court has subject matter jurisdiction and whether the court has personal jurisdiction over the defendants.

The first step in the venue analysis is to see whether any special venue statutes apply, specifying the proper judicial district(s). If no special venue statute applies, and the action is filed in state court, check the state's applicable general venue statutes. If the action is in federal court, check the federal general venue statute, 28 U.S.C. § 1291.

To determine venue, you must look at the residence of the parties. According to 28 U.S.C. § 1391(a), in actions based on diversity jurisdiction, venue is proper in the district where all plaintiffs reside, all defendants reside, or the cause of action arose. In actions not based on diversity jurisdiction, 28 U.S.C. § 1391(b) states that venue is proper where all plaintiffs reside or where the cause of action arose. An individual's residence for purposes of venue is based on domicile. A special rule for corporations is provided in 28 U.S.C. § 1391(c). For

purposes of venue, a corporation is a resident of any judicial district in which it is subject to personal jurisdiction at the time the action was commenced. Defendants may file a motion for a change of venue if they feel venue is improper. If venue is not proper, the court may either dismiss the action or transfer it to a judicial district where venue is proper. Courts generally choose transfer over dismissal.

REVIEW QUESTIONS

1. What are the trial courts in the federal court system called?
   a. United States district courts
   b. United States courts of appeals
   c. Supreme Court
   d. none of the above
2. In which of the following circumstances may federal long-arm statutes give personal jurisdiction over a defendant?
   a. There is a specific statute that provides for nationwide service of process.
   b. FRCivP 4(k)(2) applies and subject matter jurisdiction is based on diversity of citizenship.
   c. FRCivP 4(k)(2) applies and subject matter jurisdiction is based on a federal question.
   d. all of the above
   e. a and c only
3. Which of the following are courts of limited jurisdiction?
   a. federal trial courts
   b. small claims courts
   c. state trial courts
   d. all of the above
   e. a and b only
4. Federal question jurisdiction applies to which of the following?
   a. any controversy that involves an amount exceeding $75,000
   b. employment discrimination claims based on federal statutes
   c. allegations of violations of due process under the United States Constitution
   d. all of the above
   e. b and c only
5. The United States Supreme Court is empowered to hear which of the following?
   a. cases involving a controversy between states
   b. decisions of the United States courts of appeals
   c. decisions of the states' highest courts
   d. all of the above
6. T F Small claims courts are courts of limited jurisdiction.
7. T F When a transcript of a trial is made, the court is called a court of record.
8. T F State courts are all courts of general jurisdiction.

9. T F All judicial decisions generated by the United States circuit courts of appeal are published.
10. T F Jurisdictional amounts are found only in federal statutes and not in state statutes.

PRACTICAL APPLICATIONS

1. Under the following set of facts, does diversity jurisdiction exist, so that this lawsuit can properly be filed in federal court? Plaintiff is a citizen of California. Defendant is a citizen of Florida. This lawsuit involves a breach of contract, and the amount in controversy is $20,000.
2. Under the following set of facts, does diversity jurisdiction exist, so that this lawsuit can properly be filed in federal court? An automobile accident occurred in Oklahoma. Four cars were involved. Driver A, a plaintiff, is a citizen of Nebraska. Driver B, a coplaintiff, is a citizen of Nebraska. Driver C, a defendant, is a citizen of Kansas. Driver D, a codefendant, is a citizen of Texas.
3. Under the following set of facts, does federal question jurisdiction exist, so that this lawsuit can properly be filed in federal court? Ms. Nguyen challenged a new immigration law, which is a section of the Immigration and Nationality Act, recently enacted by Congress. One basis of her claim is that the new law is a violation of the due process clause of the Fifth Amendment of the United States Constitution.

CASE ANALYSIS

Read the excerpts from *Shelar v. Shelar*, 910 F. Supp. 1307 (N.D. Ohio 1995), and answer the questions following the excerpt.

CARR, District Judge.

This is a diversity tort action between former spouses. Defendant has moved to dismiss under Fed.R.Civ.P. 12(b)(6), arguing that res judicata principles—claim and/or issue preclusion—bar this action. For the following reasons, defendant's motion shall be granted.

I. *Facts*

Plaintiff filed her complaint on August 19, 1994, in the Lucas County Court of Common Pleas. At the time, she and the defendant were engaged in a pending divorce proceeding in that court's Domestic Relations Division. Her complaint alleges that, "during the pendency of the divorce," defendant intentionally inflicted emotional distress by "concealing his assets, refusing to pay obligations he has previously agreed to meet, directing his counsel to breach agreements previously reached, [and] failing to honor financial commitments" (Complaint ¶ 2).

Defendant removed the action to this court on September 23, 1994. He based this court's jurisdiction on diversity of citizenship, 28 U.S.C. § 1332 (Doc. 1 ¶ 5).

Issues relating to distribution of marital property and spousal support were tried in the divorce proceeding on December 29, 1994 (Doc. 17, Exh. 2 at 1). In that proceeding, the parties stipulated that their marriage ended on August 25, 1992 (Doc. 25 at 3; Doc. 27 at 2). For purposes of her present complaint, plaintiff treats the 1994 trial date as the completion of her divorce. Hence she defines the phrase "pendency

of the divorce" in her complaint (the time period during which defendant allegedly tortiously injured her) as August 26, 1992, through December 29, 1994 (Doc. 27 at 2).

On March 21, 1995, the divorce court filed its judgment dividing the Shelars' property and determining spousal support obligations (the equitable-division decree) (Doc. 27, Exh. 2). This judgment awarded plaintiff a portion of marital property worth $426,354, and awarded defendant a portion thereof worth $447,665 (*id.* at 4). It also awarded the parties equal portions of several partnerships (*id.*). Finally, it awarded plaintiff $3,000 per month in spousal support (*id.* at 4, 6). The court refused to award plaintiff any interest in two corporations, Sterling Pipe and Tube and Shelar Investments, because it saw "no evidence that the parties['] assets were invested without plaintiff's knowledge and consent or that the parties['] assets were dissipated" (*id.* at 4–5).

In a Memorandum and Order dated September 13, 1995, I asked the parties to brief issues concerning the equitable-division decree's res judicata effects on plaintiff's complaint in light of recent developments in Ohio law (Doc. 28).

II. *Jurisdiction*

Federal jurisdiction over plaintiff's complaint is premised on diversity of citizenship. The diversity-jurisdiction statute, 28 U.S.C. § 1332, incorporates a "domestic relations exception," which "divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 697–701, 703–704, 112 S.Ct. 2206, 2212–13, 2215, 119 L.Ed.2d 468 (1992). In *Ankenbrandt*, however, the Supreme Court held that § 1332 granted a federal district court jurisdiction over a mother's diversity action, brought on behalf of her daughters, to recover for alleged tortious sexual and physical abuse by the girls' father and his companion. *Id.* 504 U.S. at 706, 112 S.Ct. at 2216. Because the plaintiff in *Ankenbrandt* had not sought a divorce, alimony, or child custody decree, the Court stated, her complaint did not fall within the domestic relations exception. Hence the district court had jurisdiction under § 1332. *Id.*

The plaintiff in this case, like the plaintiff in *Ankenbrandt*, seeks damages for tortious conduct. She is not calling on this court to issue a divorce, alimony, or child custody decree. The diversity-of-citizenship and amount-in-controversy prerequisites of § 1332 being otherwise satisfied, this court has jurisdiction.

. . .

For these reasons, it is
ORDERED THAT defendant's motion to dismiss is granted.
So ordered.

Note: The plaintiff and the defendant divorced, and a state court entered a divorce judgment and divided the marital property. The plaintiff filed this lawsuit as a separate action, in state court, seeking damages on a related tort claim. The defendant removed the lawsuit to federal court. The federal court dismissed the lawsuit because the issues had already been litigated in the marital property lawsuit. This exercise addresses only the question of whether the federal court had jurisdiction over the tort action.

1. The defendant removed the tort action to federal court. Did the defendant allege jurisdiction based on federal question or diversity jurisdiction?
2. Does the diversity jurisdiction statute give federal courts jurisdiction to issue divorce, alimony, or child custody decrees?

3. The Ohio federal court cited *Ankenbrandt*, a case brought to recover for alleged tortious abuse of children by the father. Why did the United States Supreme Court hold that the federal court had jurisdiction in *Ankenbrandt*?
4. Did the Ohio federal court find that it had jurisdiction over the plaintiff's tort claim?
5. Why?

ENDNOTES

1 There is a narrow exception in 28 U.S.C. § 1253 concerning decisions of three-judge courts.

2 The Court's decision in *INS v. Cardoza-Fonseca* is found in 480 U.S. 421, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987).

3 *Black's Law Dictionary* 435 (5th ed. 1979).

4 *See* Thomas A. Mauet, *Fundamentals of Pretrial Techniques* 66 (1988).

5 *See, e.g., Dickinson v. Chrysler Corp.*, 456 F. Supp. 43 (E.D. Mich. 1978); *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1985).

6 N.C. Gen. Stat. § 1–75.4(5)a (1988). This is only one specific instance contained in the North Carolina long-arm statute; it provides numerous other situations in which North Carolina courts have jurisdiction.

7 David Siegel, "Supplementary Practice Commentaries," Rules of Civil Procedure, rule 4, p.29, 28 U.S.C.A. (Supp. 1997).

8 *Id.* at 85.

Chapter 3

EVIDENCE

You and Ms. Heyward are working on several lawsuits at the same time. The Wesser case is still in an early stage of development, but other cases are almost ready for trial. Every Tuesday morning, you and Ms. Heyward meet to discuss the status of each case. At this morning's meeting, you observe, "I never knew that attorneys and paralegals had to juggle so many cases at one time. There is so much evidence to gather and organize. I know that we have some evidentiary issues to resolve on the cases that are almost ready for trial, but it seems that the rules of evidence influence case development from the very moment that a client walks in the door."

"That is right," Ms. Heyward replies, "before you can effectively gather the pertinent facts and prepare a case for trial, it is essential that you have a basic understanding of the rules of evidence. Paralegals will not personally make objections to the evidence at trial, but the rules of evidence will affect you from the very beginning of the litigation process. Would it help if I quickly reviewed the rules of evidence most applicable to your work as a litigation paralegal?"

"That would be helpful, if you have time."

"Of course, we have time. For now, do not concentrate on trying to memorize every rule of evidence and all the exceptions to the rules. Remember, though, that you will be a more effective litigation paralegal if you understand the basic principles that underlie the rules and the application of these principles to the tasks you perform."

INTRODUCTION

When you think of the rules of evidence, you probably envision a dramatic courtroom scene where an attorney leaps from a chair and actually yells "I object!" while a stunned witness is rendered speechless by the abrupt interruption. Your next thought may be "How do the rules of evidence affect me, if I cannot go to court and try a case myself?"

The rules of evidence affect paralegals and lawyers at every stage of the litigation process, not just at trial. The attorney-paralegal team may decide early that a particular piece of evidence would be inadmissible and that their efforts would be better spent pursuing evidence more likely to be admissible at trial. As paralegals screen documents during the discovery process, they must keep in mind that certain documents are privileged—that is, the information in them is protected from disclosure and cannot be obtained by the opposing party. A

paralegal who does not understand the principles of privileged information may mistakenly divulge to an opposing party information that should never have been revealed.

DEFINITIONS AND TYPES OF EVIDENCE

The text discusses various definitions as it explores different concepts of evidence. However, some definitions are so basic to an understanding of the rules of evidence that they are addressed at the outset.

The first and most obviously important term is ***evidence***. Evidence includes testimony of witnesses, documents, and physical objects that a party presents at trial to prove a fact.[1] Evidence refers to the testimony, documents, and objects that the parties wish the finder of fact to consider in determining which party is entitled to a favorable judgment. The finder of fact is the jury in a jury trial and the judge in a nonjury (or "bench") trial.

At trial, all the parties present their own version of the facts, and it is the duty of the finder of fact to determine which facts are true. The finder of fact does this by considering which evidence is persuasive—which witnesses seem more credible, which documents seem most conclusive, and other factual conclusions. For instance, in the Wesser case, Mr. Wesser asserts that the fire was caused by defects in the electric blanket. The defendants contend that Mr. Wesser misused the electric blanket and damaged it, thus causing the fire by his own actions. The finder of fact must assess the evidence and determine which version of the story is true.

Evidence is either direct or circumstantial. *Direct evidence* is evidence that a witness personally observed, and the evidence directly establishes a fact. For instance, Mr. Wesser testifies that he woke up and saw the electric blanket on fire and that he saw no fire in any other area of his room. This is direct evidence that the fire started in the area around the electric blanket.

Circumstantial evidence is evidence not based on personal observation. The evidence does not directly establish the fact in dispute. Rather, from the circumstantial evidence, a conclusion is inferred about the fact in dispute. For instance, when Mr. Wesser testifies that the fire was only in the area of the electric blanket, it may be inferred that the blanket was the cause of the fire. If the fire inspector prepares a report stating that the fire began in the vicinity of the electric blanket, this too is circumstantial evidence that the blanket caused the fire, since the report is not based on the fire inspector's personal observation.

Although direct evidence is generally considered more reliable, both direct and circumstantial evidence can be important in proving a case. As you gather evidence, do not become preoccupied with classifying your evidence as direct or circumstantial. The label is not important. Rather, you should concentrate on gathering all evidence that may be helpful in proving the facts necessary to win the lawsuit. At the same time, you will hear evidence described as *direct* and *circumstantial* often, so it is important to understand the concepts.

As you gather any type of evidence, there is one important question that you must always consider: Is the evidence admissible? A piece of evidence is ***admissible*** if the judge determines that the evidence may be introduced at trial and considered by the finder of fact.

The actual procedure for presenting evidence is discussed in Chapter 11. However, a quick overview will help you understand the basic rules of evidence. Assume that the Wesser case has gone to trial. The fire inspector is on the witness stand, and Leigh Heyward has just asked him to state his opinion about the cause of the fire. Before he has a chance to answer, the defense attorney, David Benedict, says "I object." Mr. Benedict states why he objects to the admission of this evidence, the fire inspector's opinion. Ms. Heyward then states why the evidence should be admitted. The judge decides whether the evidence is admissible. If the judge decides that the fire inspector should be allowed to state his opinion in response to Ms. Heyward's question, this means that the judge has ruled that the evidence is admissible.

Throughout the various stages of litigation, you will see that there are many types of evidence that you can present to prove a case. The attorney-paralegal team will present ***testimonial evidence***—that is, witnesses such as Mr. Wesser and the fire inspector will talk about what they have seen and observed about the fire. The attorney-paralegal team will present *documentary evidence*—that is, documents such as the written warranty that came with the blanket. The attorney-paralegal team will also present *physical* (or "real") *evidence*—that is, objects that a jury can actually touch and handle, such as the remains of the electric blanket and its control unit. In some lawsuits, the attorney-paralegal team may use ***demonstrative evidence***—that is, charts, photographs, or other means of illustrating a scene or incident. For instance, in the Wesser case, you may prepare a chart showing the location of items in Mr. Wesser's room, such as the bed with the blanket, the door through which he escaped, and the location of other objects that could conceivably ignite.

Paralegals should not be obsessed with categorizing by type every piece of evidence. The important consideration is whether the piece of evidence will be helpful to prove the case.

THE RULES OF EVIDENCE

How do judges, attorneys, and paralegals know whether a piece of evidence is admissible? They consult the rules of evidence. The Federal Rules of Evidence (FRE) govern lawsuits in federal courts. In state court, the rules of evidence for the state in which the lawsuit is tried are followed.

Federal Rules of Evidence

The Federal Rules of Evidence (FRE) are found in Title 28 of the *United States Code* (28 U.S.C.) and in commercial publications. You may find it helpful to use the *United States Code Annotated* (28 U.S.C.A.). The meaning and application of the rules of evidence are not always apparent from merely

reading the rules. To understand many of the rules, you need to read the judicial opinions that apply the rules to the facts of particular cases. The cases discussed in the annotations to the *United States Code* provide a starting point for finding helpful cases.

State Rules of Evidence

The state rules of evidence can be found in the state's statutes and in commercial publications. For example, the North Carolina Rules of Evidence appear in chapter 8C of the North Carolina General Statutes. They are also found in commercial publications that print the rules of evidence together with other court rules, such as the North Carolina Rules of Civil Procedure.

You may also need to read commentaries and treatises on evidence to understand some of the more difficult concepts. One well-known treatise is *McCormick on Evidence*. There are also treatises on the rules of evidence in particular states. For instance, *Brandis on North Carolina Evidence* is the standard text for questions about the rules of evidence in that state. Check your law library for treatises on the rules of evidence in your state.

The discussion in this chapter focuses solely on the Federal Rules of Evidence. Most states have rules similar to the Federal Rules of Evidence. There can be important differences between state and federal rules, however, so you must consult your state rules of evidence when the state rules are applicable.

THE PURPOSE OF THE RULES OF EVIDENCE

The Federal Rules of Evidence have two primary goals: to ensure fairness to all parties and to ascertain the truth. As FRE 102 states:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

This text focuses on these two underlying principles of the rules of evidence. A discussion of every rule of evidence, and every exception to the rules, would fill volumes. The purpose of this chapter is to give paralegals a useful understanding of the underlying principles of the rules of evidence and the specific rules most frequently encountered by paralegals. This will serve as a foundation for your research and application of the rules of evidence to the lawsuits on which you work.

The Federal Rules of Evidence ensure fairness by the requirement that evidence must be relevant. Evidence is *relevant* if it tends to prove the existence of a fact that is important to the outcome of the dispute. Several rules of evidence stem from the relevance requirement.

Closely related to the concept of relevance is the term *probative evidence*. Probative evidence is simply evidence that proves or tends to prove an issue in dispute. If a piece of evidence is totally unrelated to the issues in the lawsuit, there is no need to present that evidence.

The Federal Rules of Evidence ensure truthfulness by the requirement that evidence must be *reliable*. Evidence is generally considered to be reliable when the person asserting a fact has firsthand knowledge of the fact and has not made previous statements that are inconsistent with the fact asserted. Many rules of evidence stem from the reliability requirement, including the hearsay rule, rules requiring personal knowledge, rules regarding opinions, and rules regarding the authenticity of documents. The text first addresses the rules related to relevance.

The Requirement of Relevance

Only relevant evidence is admissible to resolve the issues in a lawsuit. (See FRE 402.) This is because the requirement of fairness dictates that the trier of fact consider only evidence that has a logical bearing on the issues in dispute. For instance, suppose that Mr. Wesser's dog frequently digs up his neighbor's garden, causing the neighbor to conclude that Mr. Wesser is a bad person. This has nothing to do with the cause of the fire in Mr. Wesser's home and, therefore, is not relevant to a resolution of Mr. Wesser's lawsuit against Woodall Shoals and Second Ledge. However, if the neighbor sued Mr. Wesser for damages because the dog destroyed vegetables worth hundreds of dollars, the fact that Mr. Wesser let his dog roam in his neighbor's garden would be relevant in that lawsuit.

The Definition of Relevant Evidence

FRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This definition embodies several important concepts.

First, in order for evidence to be relevant, it does not have to address the one ultimate fact that proves the issue in dispute. Much background evidence is necessary to understand and establish the ultimate fact. Rule 401 allows the introduction of background facts necessary to understand the ultimate fact.

Consider, for example, the Wesser case. One of the ultimate issues is whether Second Ledge Stores, Incorporated, failed to inspect the electric blanket and whether an inspection would have revealed the defects that allegedly started the fire. Many background facts are necessary before the trier can decide the ultimate fact of whether Second Ledge failed to inspect and whether an inspection would have revealed defects. Some of these background facts include when Second Ledge received the blanket from the manufacturer; who was working in the stockroom that day; the procedures that Second Ledge employees use when merchandise arrives; the condition of the blanket when it was received—for example, whether it appeared to have been damaged in transit; and what happened to the blanket between the time Second Ledge received it and Mr. Wesser bought it. Another basic background fact that Mr. Wesser must establish is that Second Ledge is the store where he bought the blanket. All these facts are necessary to understand and decide the ultimate issue.

Another important concept in FRE 401 is that evidence is relevant if it has "any tendency" to establish a fact of consequence. Consider the background facts discussed in the previous paragraph. Each background fact does not in and of itself tend to prove the ultimate fact of consequence. However, all the background facts have a tendency to help determine the fact of consequence—whether Second Ledge failed to perform an inspection that would have revealed defects in the blanket.

Thus, FRE 401 requires only that evidence have a logical bearing on the dispute. It does not require that a piece of evidence by itself convince the trier of fact that a particular fact is true. It is sufficient if the piece of evidence helps the trier of fact understand and reach a conclusion about the fact in issue.

Exclusion of Relevant Evidence

Just because evidence is relevant does not mean that it is admissible. FRE 403 provides that relevant evidence may be excluded when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

When it appears that a piece of evidence has any of these undesirable characteristics, the court must determine whether the undesirable characteristic outweighs the probative value of the evidence. For instance, after two witnesses give virtually the same testimony, the court may ask the lawyer whether the next witness will testify about the facts already stated. If the answer is yes, the court may determine that the testimony would be needlessly cumulative. There is no rule that states how many witnesses may testify about similar facts before the testimony is deemed cumulative, so the court must exercise considerable discretion in deciding this issue.

Similar discretion is required in determining whether evidence is unduly prejudicial. For instance, Leigh Heyward may try to introduce photographs of Mr. Wesser's burns right after the fire occurred. The defense attorney may object to their admission, arguing that the photographs are unduly prejudicial because they are too gruesome, especially compared to Mr. Wesser's condition after treatment and plastic surgery. The judge must then weigh the probative value of the photographs against their potentially prejudicial nature in order to decide if the evidence should be excluded under FRE 403.

Character Evidence

One type of evidence that can be excluded under certain circumstances is character evidence. *Character evidence* is evidence of a person's reputation in the community or of a particular trait that a person possesses, such as honesty or dishonesty. FRE 404 states the general rule for the admissibility of character evidence. It provides that character evidence is not admissible for the purpose of proving that a person "acted in conformity" with his or her character traits on a particular occasion. For example, assume that Mr. Wesser keeps a rather sloppy house and that he does not maintain his car properly. From this one could infer

that he has the characteristics of sloppiness and failure to maintain his possessions. However, defense counsel cannot use these characteristics as evidence that Mr. Wesser does not take care of his belongings and, therefore, did not take proper care of the blanket.

When Character Evidence Is Admissible. Character evidence is admissible when a person's character or trait is an essential element of a claim or defense, according to FRE 405(b). In such a case, it is said that character is in issue. The classic example is a case involving defamation—that is, making a statement that damages a person's reputation. Suppose that Ms. Stanfield makes a statement that her ex-husband is a thief, and Mr. Stanfield sues her for defamation. Truth is a defense, so evidence that Mr. Stanfield committed several thefts would be admissible.

Distinguish Character Evidence Used for Impeachment. So far the text has discussed character evidence that constitutes ***substantive evidence***—that is, evidence introduced to prove a fact in issue. Another type of evidence is ***impeachment evidence***—that is, evidence introduced to attack the credibility of a witness. The purpose of impeachment is to discredit the witness, causing the trier of fact to question whether the witness's version of the facts is correct. There are several ways to impeach a witness, such as pointing out inconsistencies in the witness's prior statements and questioning whether the witness actually had firsthand knowledge of the facts. Impeachment is discussed later in this section.

The important point about impeachment evidence in the context of character evidence is that even in civil cases, character evidence may be introduced to impeach a witness. FRE 608 provides that the credibility of a witness may be attacked, but that the impeachment evidence may refer only to the witness's character for truthfulness or untruthfulness. Suppose that the defense attorney, David Benedict, questions Mr. Wesser about the events of the day the fire occurred, specifically, whether Mr. Wesser had folded the blanket or placed objects on it after he turned it on, and whether he had left it on for several days prior to the fire. Mr. Benedict then introduces public records to show that Mr. Wesser was convicted of embezzlement one year earlier. The conviction may be admissible as impeachment evidence—that is, to show that Mr. Wesser has been convicted of a crime involving dishonesty and thus may be an untruthful person. However, the conviction is not admissible as substantive evidence—that is, to show that Mr. Wesser is not a responsible person and thus probably handled the blanket carelessly.

Distinguish Evidence of Habit. Evidence of habit is different from evidence of character. Character evidence refers to a person's general traits or disposition—honesty, peacefulness, prudence, and so on. However, a *habit* is a person's consistent response to a particular situation. For instance, Mr. Wesser may live on a street that has little traffic, and he may fail to stop and look for traffic every time he backs out of his driveway. It is his habit not to stop, because he fails to stop every time he backs out.

FRE 406 provides that "evidence of the habit of a person or of the routine practice of an organization . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." For instance, Mr. Wesser's testimony may include the fact that every morning he not only turns the electric blanket off, but also unplugs it. This is evidence of Mr. Wesser's habit. The basis for deeming evidence of the habit to be relevant is that the habit is an automatic response, which Mr. Wesser invariably follows. The key to admission of evidence of a person's habit is to introduce sufficient evidence of the repeated pattern of behavior.

Other Rules Concerning Relevance in Civil Cases

You will encounter other rules of relevance in civil litigation. Four of these are Rules 407, 408, 409, and 411 of the Federal Rules of Evidence. You should be familiar with their basic provisions.

FRE 407 provides that evidence that remedial measures were taken after an accident is not admissible to prove negligence. The rule states further, however, that evidence of the repairs may be admissible when offered for other purposes. These purposes include "proving ownership, control, or feasibility of precautionary measures" when these issues are in controversy, or impeachment.

For example, if a tenant falls on the steps of an apartment building and the landlord subsequently repairs the steps, the repairs may not be admitted as evidence that the landlord was negligent. The reason for this rule is to avoid creating a disincentive for persons to remedy conditions that may be dangerous. However, if the landlord had previously asserted that he did not own the area where the accident occurred, evidence of the repairs by the landlord may be introduced to show ownership. The landlord would have no incentive to repair the steps if he did not own them.

FRE 408 provides that offers to settle a dispute are not admissible to show liability or nonliability. The rationale for this rule is to encourage settlement discussions. However, evidence of settlement offers may be "offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, . . ."

FRE 409 states that "evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." The rule is intended to avoid creating any disincentive for tendering such assistance. Like the rules discussed in the preceding text, there may be times when the evidence is admissible for purposes other than proving liability.

FRE 411 provides that evidence as to whether a person had liability insurance is not admissible to show that a person acted negligently. This rule is designed to avoid creating a disincentive for obtaining insurance. However, evidence of insurance may be admissible "when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness."

Each of these four rules reflects a public policy judgment that the limited relevancy of the evidence is outweighed by the desire to encourage certain

socially useful behavior. As with other rules of evidence, paralegals must study the rules and exceptions to understand them, and must research variations in the rules among various jurisdictions. However, understanding the principle underlying the rules helps to understand their application.

The Requirement of Reliability

As noted, one of the primary goals of the rules of evidence is to ascertain the truth. If the truth is to be ascertained, the evidence that the trier of fact considers must be reliable. The reliability requirement has generated rules applicable to both documents and testimony.

Rules for Witnesses. The text considers first the reliability rules applicable to the testimony of witnesses.

The Requirement of Oath or Affirmation. Before testifying, witnesses must declare that they will testify truthfully. FRE 603 requires that every witness take an oath or affirmation "in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." The purpose of this requirement is to impress the witness's mind with the duty to do so.

The Requirement of Personal Knowledge. One way to ensure that the testimony is reliable is to require that the witness have firsthand knowledge of the facts. For instance, testimony by Mr. Wesser that he awoke and discovered a fire burning at the foot of his bed, where the electric blanket lay, is reliable testimony as to the area where the fire started. However, testimony by Mr. Wesser's neighbor that he smelled smoke and saw Mr. Wesser's house on fire is not reliable evidence as to the area where the fire started, because the neighbor has firsthand knowledge only that there was a fire, not where the fire started.

The requirement of personal knowledge is set forth in FRE 602, which states that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that [the witness] has personal knowledge of the matter." Because of this requirement, at trial the attorney will first ask a witness questions to establish that the witness has personal knowledge of a fact before asking the witness about that fact. For instance, before asking Mr. Wesser where the fire originated, Leigh Heyward will first ask questions to establish Mr. Wesser's personal knowledge of this fact. Such questions include where Mr. Wesser lives, whether he spent the night at home on the night the fire occurred, in which room he slept, whether he was using the electric blanket on the night of the fire, and similar questions to establish firsthand knowledge. This process of asking background questions to establish a witness's personal knowledge of the facts to which the witness testifies is known as laying a ***foundation***.

The requirement to lay a foundation to establish firsthand knowledge affects the way paralegals interview potential witnesses. Paralegals and attorneys must find out more than just the facts that the witnesses purport to know. They must also find out how the witnesses know the facts—that is, whether the witnesses have firsthand knowledge. For instance, suppose that Mr. Wesser's neighbor tells you

that the fire started in the bedroom. You must ask the neighbor how he knows that. He may say that he actually saw flames coming from the bedroom, but from no other room. On the other hand, he may say that he just thought that was the probable place for the fire's origin because the fire happened late at night, showing that he does not have firsthand knowledge of the fact.

SIDEBAR Do not confuse the requirement of personal knowledge with the hearsay rule, discussed later in this chapter. The hearsay rule applies when a witness testifies about a statement another person made. When witnesses testify about something that the witnesses themselves supposedly saw or did, the objection is lack of personal knowledge.

Opinion Testimony

In addition to allowing witnesses to testify about facts they have observed, the Federal Rules of Evidence also allow witnesses to testify about their opinions. An opinion is the witness's conclusion or belief about the facts in dispute, as opposed to the witness's statement of the facts observed. For instance, if Mr. Wesser's neighbor testifies that he saw Mr. Wesser's house on fire, this is a statement of the fact observed. However, if Mr. Wesser's neighbor testifies that he believes that the electric blanket caused the fire, this is a statement of an opinion.

To discuss opinion testimony, it is helpful to divide witnesses into two types—expert witnesses and lay witnesses. An ***expert witness*** is a person who has "scientific, technical, or other specialized knowledge" that will "assist the trier of fact to understand the evidence or to determine a fact in issue" (FRE 702). The expert is qualified "by knowledge, skill, experience, training, or education" to explain and give an opinion about technical subjects that average laypersons generally do not understand.

Expert witnesses explain technical matters and give their opinions in order to help the trier of fact understand the evidence. For instance, in the Wesser case, Ms. Heyward will present an expert witness to explain how wiring in an electric blanket can short-circuit or how an electric blanket may contain certain design defects. The expert will also state an opinion as to whether the blanket had defects that caused the fire. Because the average layperson does not possess technical knowledge about electrical wiring and design criteria for electric blankets, the expert witness's testimony is helpful.

The other type of witness is the *lay witness*, that is, a person without expert knowledge. Basically, witnesses who are not expert witnesses are lay witnesses. There are separate rules regarding opinion testimony by lay witnesses and expert witnesses. The text discusses lay witnesses first.

Opinion Testimony by Lay Witnesses. FRE 701 provides that lay witnesses may testify about their opinions, but only if the opinions or inferences "are (a) rationally based on the perception of the witness and (b) helpful to a clear

understanding of the witness' testimony or the determination of a fact in issue." Obviously lay witnesses should not be allowed to state an opinion unless they have perceived the facts on which to form an opinion. It would not be proper for Mr. Wesser's neighbor to testify that the blanket caused the fire just because he saw Mr. Wesser run out of his house during the fire. The requirement that the opinion be helpful to understanding the facts in issue is a refinement of the relevance requirement. There is simply no need to allow opinion testimony about matters that do not facilitate an understanding of the facts in issue. In fact, such testimony would probably be prejudicial. For instance, a statement by Mr. Wesser's neighbor that Mr. Wesser is a bad neighbor because he does not mow his lawn regularly is not only unhelpful, but potentially prejudicial; from such a statement a jury could infer that Mr. Wesser does not take care of his possessions and thus probably misused the blanket.

Before a lay witness may state an opinion, a foundation must be laid establishing that the witness has personal knowledge of the events that form the basis of the opinion. This meets both the rational basis requirement of FRE 701 and the personal knowledge requirement of FRE 602.

SIDEBAR Throughout your study of the rules of evidence, remember that multiple rules are applicable at the same time. For instance, FRE 701 states certain requirements for opinion testimony. However, the testimony must also be relevant (FRE 402), and the witness must have personal knowledge of the facts (FRE 602).

Opinion testimony of lay witnesses is most helpful to describe an event succinctly and in a manner the finder of fact can understand. For example, Mr. Wesser's neighbor may testify that when Mr. Wesser ran out of his house during the fire, he (Mr. Wesser) was frightened but rational enough to explain calmly what happened. This is more effective than saying that Mr. Wesser was wide-eyed, spoke fairly quickly, looked like his heart was beating fast, but maintained a fairly even tone of voice. Opinion testimony can be helpful to give the finder of fact an understandable description of the events in issue, provided the testimony meets the requirements of being based on the witness's perception of the events and being helpful to an understanding of those events. When you interview lay witnesses, they will no doubt express a number of opinions. Your primary goal is to question the witnesses to determine that their opinions meet the requirements that make opinion testimony admissible.

Opinion Testimony by Expert Witnesses. Recall that FRE 702 describes expert witnesses as persons with scientific, technical, or other specialized knowledge that will assist the trier of fact to understand a fact in issue. In the Wesser case, both the plaintiff and the defendants will have expert witnesses testify about the cause of the fire. These expert witnesses will have knowledge of electronic design and the causes of short circuits. Both will offer opinions as to whether the electric blanket caused the fire.

Expert testimony about many subjects may be appropriate in various types of lawsuits. As discussed in Chapter 4, it is possible to find expert witnesses for a wide range of subjects. Doctors frequently testify in personal injury lawsuits concerning the extent of clients' injuries and the prognosis for their recovery. For instance, in the Wesser case, Leigh Heyward may arrange to have a neurologist testify about the severity of the pain Mr. Wesser has suffered from his burns.

Two Requirements for Admissibility of Expert Testimony. FRE 702 provides two basic requirements for expert testimony to be admissible. First, the subject matter must be appropriate for expert testimony. FRE 702 states the underlying principle for the subject matter that is appropriate: the testimony must assist the finder of fact "to understand the evidence or to determine a fact in issue." The testimony of a neurologist would help a jury understand the issue of the severity of Mr. Wesser's pain because the average layperson does not possess detailed knowledge about the nervous system and the effect of burns and scar tissue on the body.

At the same time, FRE 702 does not require that the subject matter be so technical that the average person would know nothing about it. For instance, one issue in the Wesser case is the amount of the damage to Mr. Wesser's house. Ms. Heyward may present a real estate appraiser to testify about the decrease in value of Mr. Wesser's house after the fire and a contractor to testify about the cost of repairs to the house. Some members of the jury may already have some knowledge in these areas because they have recently bought houses or made home repairs. Even though the members of the jury have some background knowledge, the specialized knowledge of the appraiser and contractor are helpful to the jury to determine issues in the litigation. As you help to determine what kind of expert testimony would aid your client's case, remember the general principle that the testimony should be helpful to the finder of fact to understand the issues in the case.

The second requirement for expert testimony to be admissible is that the expert witness must have sufficient "knowledge, skill, experience, training, or education" to qualify as an expert witness. Thus, when attorneys and paralegals arrange for expert witnesses, they must be sure that the expert has sufficient credentials and experience. For example, in choosing a neurologist, you and Ms. Heyward will consider the degrees the neurologist holds as well as the type of residencies and fellowships completed, further research conducted, how many years the neurologist has practiced, any articles or books published, and any other qualifications.

Degrees and publications, however, are not always necessary to qualify an expert. An expert may be qualified by many years of experience. For instance, the contractor who testifies about the repairs to Mr. Wesser's house may qualify as an expert by virtue of thirty years of experience in making similar repairs.

One of your duties as a paralegal may include researching the qualifications of not only your expert witnesses but also the expert witnesses of the opposition. You may discover that a proposed witness lacks sufficient expertise to qualify as an expert witness.

SIDEBAR There are many resources available to help you locate expert witnesses. See Chapter 4 for a discussion of these resources.

Rules Regarding Bases and Form of Expert Testimony. Recall that when lay witnesses state opinions, the Federal Rules of Evidence require personal observation of the events or facts on which the opinion is based. The Federal Rules of Evidence do not impose this requirement on expert witnesses. FRE 703 provides that expert witnesses can base their opinions on observations of other persons. FRE 703 further provides that the evidence on which the expert bases an opinion does not have to be admissible evidence if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." For instance, a doctor may base an opinion on a physical examination of a client and discussions with the client and his or her relatives about the client's limitations as the result of the injuries in issue. The doctor's discussions with the relatives are probably not admissible evidence, but the doctor may still consider the discussions in forming an opinion.

The rules regarding the bases for expert testimony may differ under state rules of evidence. In particular, the interpretations of which type of evidence is "reasonably relied upon" may vary widely. When paralegals investigate an expert witness, they should explore the expert's background and the bases for the expert's opinion as fully as possible. Expert testimony can become quite complex, and the attorney-paralegal team will need to discuss all its aspects. Therefore, you should have ample opportunity to discuss with your supervising attorney any questions about the bases of the experts' testimony and other complex issues related to expert testimony.

FRE 705 provides that an expert does not have to disclose the facts upon which the opinion is based unless the court requires it. On cross-examination, opposing counsel may require the expert to disclose the underlying facts or data. As discussed in Chapter 11, the purpose of cross-examination is to bring out weaknesses in a witness's testimony. An attorney may ask an expert questions that tend to show that the expert's opinion is not based on reliable evidence. One way to undermine a witness's testimony, for instance, is to point out inconsistencies in his or her statements. Both during trial and in statements made before trial, a witness may make contradictory assertions. Paralegals frequently read and summarize an expert's prior statements, including publications, to find inconsistencies.

Impeachment

Asking questions to undermine the credibility of a witness is known as *impeachment*. Impeachment is not limited to the testimony of expert witnesses. In fact, FRE 607 states that the credibility of any witness may be attacked. The purpose of impeachment is to test the witness's reliability and ensure that testimony is true. Several factors may indicate that a witness is not telling the truth.

Contradictory and Inconsistent Statements. One way to impeach a witness is to point out contradictory and inconsistent statements. For instance, if a witness testified in court that a stoplight was red, and ten minutes later said that it was green, you would wonder whether this witness was telling the truth. A witness may also make statements before trial, during the discovery phase, that are inconsistent with the testimony during the trial. For example, a witness may provide written statements in answering interrogatories and may make oral statements during a deposition. Suppose that during a deposition Mr. Wesser says that he occasionally folded the blanket or tucked it in at the foot at the bed. If Mr. Wesser testifies at the trial that he never folded the blanket and tucked it in, the defense attorney may impeach Mr. Wesser by pointing out his prior inconsistent statement. FRE 613 specifically allows the impeachment of witnesses by their prior inconsistent statements. FRE 613 provides that attorneys do not have to show a witness the prior inconsistent statement before questioning the witness about it; however, they must allow the witness an opportunity to explain or deny the inconsistent statement.

Attorneys must deal at trial with more technical considerations about inconsistent statements. The important duty for paralegals is to be attentive to possible inconsistencies in witnesses' statements throughout the litigation process. A witness may make a statement in your initial interview, only to contradict that statement in a deposition. Your job is to bring such inconsistencies and contradictions to the attorneys' attention. Look for inconsistencies everywhere: from oral statements in interviews to letters and documents that surface during the discovery process.

Bias. A witness may have a motive for being less than truthful. There are many bases for suspecting that a witness is biased and, therefore, not telling the truth. One obvious example is when a witness has accepted a bribe, but usually the basis for suspicion is much more mundane. For instance, a relationship between the witness and one of the parties may cause the witness either to lie or to be so partial that he or she simply cannot recognize the truth. If there is a close family relationship, the witness may be unable to accept the fact that a family member did something bad. If there is a business relationship, one partner may hesitate to admit being deceived by the other, who took excessive money out of the partnership. A witness may be prejudiced against a party or have a long-standing grudge.

These are just a few of the reasons why a witness may be biased. Paralegals must always think about possible bases for bias and discuss them with the attorneys. When paralegals interview witnesses, they should be particularly alert for bias and subtly ask questions to determine whether bias actually exists.

Other Methods of Impeachment. As noted earlier in this chapter, character evidence may be used to imply that a witness is not a truthful person. Character evidence may include a person's criminal convictions, with limitations provided in FRE 609. As in many areas of evidence, limitations on the admissibility of character evidence may be quite complex and can vary among jurisdictions. Your goal as a paralegal is to investigate a witness's character, including convictions, and inform the lawyer of your findings. The lawyer can then address the fine points of how to use the evidence at trial.

Evidence rules do not exist in isolation from one another. Rather, you may have to apply more than one rule to a piece of evidence. For example, recall that FRE 602 requires that witnesses have personal knowledge of the facts to which they testify. If a witness lacks personal knowledge, the evidence is objectionable because of the requirement of FRE 602. The lack of knowledge, however, is also a basis to impeach the witness's testimony. Remember that testimony does not have to be an outright lie in order to be grounds for impeachment. A person may be impeached even if there is no conscious effort to tell less than the truth. A person simply may not know the facts, but this is still grounds for questioning the witness's credibility.

Special Reliability Rules for Documents

So far the discussion has addressed only the rules that relate to reliability of oral testimony. No less subject to the reliability requirement is documentary evidence. There are two primary rules to ensure the reliability of documents: the first rule requires that the document be authentic, and the second expresses a preference for original documents.

Authentication. FRE 901(a) sets forth the requirement of authentication or identification. To authenticate a document, the person presenting the document as evidence must establish that the document is what it purports to be. In the Wesser case, Ms. Heyward will present the warranty that came with the electric blanket. Before that warranty can be admitted into evidence, Ms. Heyward must present evidence to show that this is in fact the warranty that came with the electric blanket. The concept of authentication is basically the same as the more common word *identification*. The person presenting a document must identify the document. Ms. Heyward will ask Mr. Wesser, "Is this the warranty that came with the electric blanket that you purchased?" Mr. Wesser will reply, "Yes, that is the warranty."

In the Chattooga case, Nancy Reade Lee, who represents Chattooga Corporation, will present Sandy Ford's employment application and ask the personnel manager, "Is this the application that Sandy Ford filled out and signed?" The personnel manager will state that it is Sandy Ford's application.

Methods of Authentication. FRE 901(b) gives ten examples of acceptable authentication methods. See Figure 3–1. The examples cited in the preceding text use the first method—testimony of a witness with knowledge. The figure is largely self-explanatory, but bear in mind a few observations. First, note that FRE 901(b) does not require expert testimony to identify documents and signatures. FRE 901 accepts identification of a person's handwriting by either an expert or a layperson who has personal knowledge of the writer's handwriting. Second, the authentication rules apply to voice identification as well as documents. A person familiar with a speaker's voice may identify the voice.

Note FRE 901(b)(8), which refers to "ancient documents." A document need not be the Rosetta Stone to qualify for this method of authentication. FRE 901(b)(8) provides that a document may be authenticated by evidence that it is at least twenty years old, that it is free from suspicion concerning its authenticity,

FIGURE 3–1 FRE 901: Examples of Authentication Methods

Rule 901. Requirement of Authentication or Identification

(a) General provision

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge

Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting

Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness

Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like

Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances,

(5) Voice identification

Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations

Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports

Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation

Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system

Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule

Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursu-

ant to statutory authority

and that it was found in the place where it would likely be kept. This method is most often applied to documents such as deeds and wills.

FRE 901(b)(7) provides one way to authenticate public documents. Using this method, the attorney presents the original document, with testimony by an employee in the public office to confirm that the document came from that office. There are other, simpler methods to authenticate public documents.

Self-Authentication. It is not necessary to present testimony to establish the authenticity of all documents. FRE 902 sets forth several types of documents that are self-authenticating—that is, documents that are deemed authentic on their face, without the necessity of a witness to state that the documents are what they purport to be. Figure 3–2 sets forth the types of documents that are self-authenticating pursuant to FRE 902.

One of the most common methods of self-authentication is to present a certified copy of public records. This method illustrates the rationale behind the self-authentication rule. Real estate, for example, is a frequent subject of litigation. It would be impractical to require the Register of Deeds to come to court every time ownership of property is in dispute and identify the deed as a document kept in the Register of Deeds office. One of your duties in trial preparation may be to go to the Register of Deeds office and obtain a certified copy of a deed. The process is usually quite simple. Just tell an employee in the office that you need a certified copy of the deed. The employee locates the deed in the book where it is recorded and makes a copy. The employee then stamps the deed with a short statement of certification, signs the statement, and enters the date.

There is little chance that the documents specified in FRE 902 have been fabricated. Of course, opposing counsel is free to introduce evidence that the document is not authentic.

SIDEBAR Often parties agree before trial that certain documents are genuine, and they stipulate to their authenticity. A ***stipulation*** is a statement that the parties agree on a certain issue and will not contest it. This is an efficient way to weed out the issues that are not in dispute and to expedite the litigation. Judges encourage the parties to stipulate to issues on which they agree, and the parties often state their stipulations in a pretrial order.

The Original Writing Rule

So far you have proved only that the document is what it purports to be—a warranty, a deed, or the like. Sometimes there remains a dispute as to whether the content of a document is genuine. FRE 1002 states the original writing rule, often called the best-evidence rule. FRE 1002 requires that "to prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by Act of Congress." This means that when the content of a document is directly in issue, the Federal Rules of

FIGURE 3–2 FRE 902: Self-Authenticating Documents

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following.

(1) Domestic public documents under seal

A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal

A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents

A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records

A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications

Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals

Printed materials purporting to be newspapers or periodicals.

FIGURE 3–2 (Continued)

(7) Trade inscriptions and the like
Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents
Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents
Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress
Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

Evidence require the original document, unless the original is unavailable or unless another evidence rule or statute permits submission of a copy.

An original is often required when the contents of the document state the terms of what the parties have agreed to do. Examples include when the terms of a contract, or the contents of a will or deed, are in dispute. Consider a deed that has been recorded in the Register of Deeds office. The copy is fine to show that a deed was recorded. Assume, however, that a dispute arises about the size of the parcel of land that was transferred in that deed, with the persons who sold the land asserting that the buyer altered the description of the land before recording the deed. Now the content of the original deed is in question. The original writing rule requires that the original deed be produced, if possible, before the court can hear oral testimony about the contents of the deed.

To understand the rationale for requiring the original, consider how a description in a deed sounds—thirty degrees north to the large elm, twenty degrees northwest along the creek, and so on. You can imagine that a person may not be able to recite the exact metes and bounds of the deed by memory. It would be unrealistic for the sellers to state that they are certain the original deed read ten degrees north to the large oak instead of thirty degrees north to the large elm. The buyers' testimony is likely to be less accurate than the deed, so the Federal Rules of Evidence prefer production of the original deed.

If the original document is not available, the witness may still be able to testify about its contents. Before testifying, the witness must give sufficient reason for not producing the original. For example, the original may have been destroyed, or it may be in the possession of a person in another state, and the court may be unable to compel that individual to produce the document. See FRE 1004 for other acceptable reasons.

As a practical matter, an original document will be more persuasive to the trier of fact than a copy. However, FRE 1003 permits admission of a duplicate

unless "(1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Thus, if the original of a person's will cannot be located, a photostatic copy may be admissible unless there is a genuine question about the authenticity of the will. One party may contend that the other party took the copy of the will and added a paragraph. The authenticity of the will is now in issue because one party asserts that the document is not what it purports to be: that is, the testator's statement of how the estate should be distributed.

Hearsay

The hearsay rule is a rule commonly invoked to ensure reliable testimony. The application of the hearsay rule is sometimes complex. Once you understand the basic principles that underlie the rule, however, you can apply the principles to the evidence you encounter during litigation without undue difficulty.

Rules 801 through 806 of the Federal Rules of Evidence address hearsay. Basically, the rules provide that if a statement is hearsay, it is not admissible as evidence unless it fits into an exception to the hearsay rule. Thus you must understand what hearsay is and know the exceptions to the rule.

Definition of Hearsay and Principles Underlying the Rule. Hearsay is testimony in court about a statement made out of court, where the out-of-court statement is offered to prove the truth of the matter asserted in the out-of-court statement. For instance, Mr. Wesser may testify in court that the fire inspector came to his house immediately after the fire and told him that the electric blanket caused the fire. If the fire inspector's statement is offered as proof that the blanket started the fire, it is hearsay.

The best way to understand the definition of hearsay is to grasp the principles underlying the rule. The purpose of the rule is to ensure that testimony is truthful. At trial, attorneys test witnesses' truthfulness through cross-examination. Attorneys question whether witnesses have adequate personal knowledge of the facts about which they testify. Attorneys also question the accuracy of a witness's memory. Witnesses may remember events incorrectly, especially when the events occurred perhaps two years before the trial. In addition, the credibility of witnesses is important. Recall that there are many factors that may make a witness seem less than credible—bias, prejudice, and so on.

If Mr. Wesser were allowed to repeat the fire inspector's statement to prove the cause of the fire, it would be unfair to deprive the defendants of the opportunity to cross-examine the fire inspector. Obviously, the statement of the fire inspector about the cause of the fire is far more reliable when the fire inspector himself states his opinion in court. When the fire inspector testifies about the cause of the fire, the defense attorney can explore the basis for the fire inspector's opinion and can probe his testimony, looking for inconsistencies or other weaknesses in his conclusions. To allow Mr. Wesser to state the fire inspector's opinion and deprive the defense attorney of the opportunity to cross-examine the inspector would be unfair.

Assume that Mr. Wesser testifies about the inspector's statement for some purpose other than to establish the cause of the fire. For instance, Ms. Heyward

may offer the out-of-court statement to establish the fact that the fire inspector came to Mr. Wesser's home immediately after the fire. Here, the out-of-court statement is offered not to prove the truth of the facts in the statement. Rather, the purpose is to show that the statement was made by the fire inspector immediately after the fire, establishing that the inspector was present immediately after the fire. In this instance, the statement would not be regarded as hearsay.

Hearsay is not limited to oral statements. Documents also may be hearsay. A document must be reliable if the document is offered as evidence to prove that the matters in the document are true.

Exceptions to the Hearsay Rule. There are many exceptions to the hearsay rule, which means that there are many types of hearsay that fit into an exception and thus are admissible. The exceptions to the hearsay rule are set out in FRE 803 and FRE 804. You should become familiar with all the exceptions. The text discusses some of the exceptions paralegals frequently encounter.

First, however, be aware that FRE 801(d) sets forth certain types of evidence that by definition are not hearsay. Because FRE 801(d) defines these types of evidence as nonhearsay, you do not need to fit them into an exception. You should become familiar with all the categories in 801(d), but those you will encounter most frequently are prior inconsistent statements and admissions of a party opponent.

A witness's prior inconsistent statement fits the definition of nonhearsay when the statement was made under oath at a prior trial or hearing or in a deposition. Paralegals should stay constantly alert for prior inconsistent statements. One important task paralegals often perform is to review witnesses' depositions or other statements to find inconsistencies in their testimony. Such inconsistencies greatly undermine a witness's credibility.

Paralegals also should be alert for admissions by a party opponent. When a party to the litigation makes a statement admitting a fact, that statement can be used against the party at trial. For instance, if Mr. Wesser said that he often folded the blanket and forgot to turn it off in the morning, this statement could be used against him at trial when he testified that he never folded the blanket and that he always turned it off in the morning.

SIDEBAR State rules of evidence sometimes consider the "nonhearsay" categories in FRE 801(d) to be hearsay exceptions rather than "nonhearsay." Do not dwell too long on the definition used by the state. Rather, concentrate on your primary consideration—whether the statement is admissible at trial.

FRE 803 and 804 set forth the exceptions to the hearsay rule. If you can fit a hearsay statement into one of these exceptions, it may be admissible. It is important to remember that a statement is not automatically admissible just because it fits into an exception to the hearsay rule. The statement must still comply with the other rules of evidence, such as relevance.

Examine Figure 3–3, which shows FRE 803. One exception frequently encountered is the excited utterance (FRE 803(2)). Suppose that Mr. Wesser's neighbor heard Mr. Wesser when he ran out of his burning home, shouting, "My electric blanket caught on fire!" This is an excited utterance and should be admissible. The rationale behind this exception is that the person was so excited that he would not have had time to fabricate the statement.

FRE 803(4) provides that statements made for the purpose of medical diagnosis or treatment constitute a hearsay exception. The rationale here is that a person wants to be treated and helped by the doctor and, thus, will be likely to tell the doctor the truth.

FRE 803(6) contains a very important exception, commonly called the business records exception. Records kept in the course of a regularly conducted business activity generally fit into this exception. The rationale is that businesses require accurate records for their operation. In addition, business employees cannot be expected to remember every fact recorded in business records. For instance, a large hospital may have several thousand former patients who owe money to the hospital. The collections manager cannot be expected to remember the names of all former patients and the amounts of money they owe. However, the hospital keeps accurate records, so the hospital's business records accurately reflect the information needed.

Many types of public records fall within hearsay exceptions (see FRE 803(8) through (17)). The key to these exceptions is that the records are regularly kept by an agency or organization, so there is usually no reason to doubt their trust worthiness. An example is a deed recorded in the Register of Deeds' office. Note, however, that if circumstances indicate a lack of trustworthiness, the records do not fit the hearsay exceptions.

Examine Figure 3–4, which shows FRE 804. In order to use the exceptions in FRE 804, the declarant must be unavailable. This means that the person who made the out-of-court statement (the declarant) is unable to be present—that is, he or she is dead or ill; or the subject matter of the person's statements is privileged; or the person persistently refuses to testify; or the witness cannot remember the subject matter of the statement; or the court cannot secure the presence of the witness.

FRE 804(b)(1) contains an important exception to the hearsay rule. If a witness is unavailable at trial, former testimony at another hearing or in a deposition is generally admissible if the party against whom the testimony is offered had the opportunity to question the witness. Often when attorneys fear that a witness may be dead by the time of the trial, or too ill to attend, they take the witness's testimony to preserve it. This also may be necessary with witnesses who are likely to disappear.

Another noteworthy exception is a statement against interest, in FRE 804(b)(3). When persons have made previous statements that are against their financial, legal, or business interests, it is assumed that the statements must be true, because persons presumably have no motive to fabricate statements that are detrimental to them.

FIGURE 3–3 Rule 803

Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(1) Present sense impression

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6)

Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the

FIGURE 3–3 (Continued)

provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics

Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry

To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records

Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to

FIGURE 3–3 (Continued)

have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents

Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications

Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history

Reputation among members of a person's family by blood adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history

Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character

Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

FIGURE 3–3 (Continued)

(23) Judgment as to personal, family, or general history, or boundaries

Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The attorneys on the team must make the final decisions about the admissibility of hearsay, but it is important for paralegals to recognize hearsay and try to fit the hearsay into an exception for the attorneys to consider.

PRIVILEGES

The rules of evidence discussed so far focus on disclosing evidence relevant to the lawsuit. In contrast, the purpose of the rules related to privileges is to prevent the disclosure of certain types of information.[2] Privileged communications are statements that are protected from forced disclosure because the statements were made between persons who have a confidential relationship with each other. The public policy in favor of protecting these confidential communications overrides the need for full disclosure of all evidence related to the litigation. For example, communications between an attorney and client are privileged—that is, protected from disclosure. This privilege exists because it is essential that the client tell the attorney all the facts, even the damaging and embarrassing ones, in order for the attorney to provide adequate representation.

Sources of Rules Regarding Privileges

The Federal Rules of Evidence do not contain specific rules regarding what types of information are privileged. Instead, FRE 501 leaves to the courts and state legislatures the task of developing the rules for privileges. In other words, the Federal Rules of Evidence do not adopt certain privileges that apply uniformly to every case litigated in federal court.

FIGURE 3–4 Rule 804

Rule 804. Hearsay Exceptions: Declarant Unavailable

(a) Definition of unavailability

"Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death

In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FIGURE 3–4 (Continued)

(4) Statement of personal or family history

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Thus, the first step is to determine which rules apply to the case. If your lawsuit is in state court, you use that state's rules. A state's rules regarding privileges can be found in the state's statutes and case law.

For lawsuits in federal court, the basic rule is that when your lawsuit is based on federal question jurisdiction, you apply the privilege rules developed by the federal courts. When jurisdiction is based on diversity of citizenship, you apply the privilege rules of the state in which the federal court is located.

Looking beyond the Federal Rules of Evidence is necessary to determine whether evidence is protected by a privilege. This requires detailed and accurate legal research. You may be confused initially when you try to figure out whether federal law or state law applies. Discuss your questions with the other members of the attorney-paralegal team and clarify whether federal law or state law applies. Then you can conduct your research and discuss the results with the attorney to determine whether the evidence in question is privileged and thus protected from disclosure.

How Privilege Rules Direct Paralegals' Work

Whether you are using federal or state privilege rules, it is important to remember that the rules apply throughout the litigation. If a client's statement is privileged, the client cannot be forced to testify about the statement at trial. In fact, the privileged statement is protected from disclosure throughout the litigation process, which means that an opposing party cannot find out the contents of the statement during informal investigation or through formal discovery.

A primary responsibility of the paralegal is to ensure that protected information is not disclosed. This is particularly critical during the discovery phase of the litigation, when the parties sometimes exchange huge numbers of documents. As discussed in Chapter 8, one of your tasks is to screen the documents to make sure that no privileged evidence is released to other parties.

Thus, you must be able to spot evidence that may be privileged. Once you recognize evidence that you think is privileged, you can discuss with the attorney the exact federal or state rules of privilege that apply. These rules differ among jurisdictions. Not every privilege is recognized in every jurisdiction. The important goal for now is that you understand the basic, most common privileges.

The Attorney-Client Privilege

The privilege you will encounter most frequently is the attorney-client privilege. The ***attorney-client privilege*** protects from disclosure confidential communications between the client and attorney. The effect of the privilege is that attorneys cannot be forced to testify about confidential communications with their clients, and clients can refuse to testify about the confidential communications and can prevent anyone else from testifying as well. For instance, suppose that you, Mr. Wesser, and Ms. Heyward met to discuss how Mr. Wesser handled the electric blanket—that is, whether he folded it or misused it in any way that would have damaged the blanket. At no stage in the litigation can you, Mr. Wesser, or Ms. Heyward be forced to testify about the content of your conversation. To illustrate how the client asserts the attorney-client privilege, suppose that at trial the defense attorney asked Mr. Wesser, "Did you ever fold the blanket, contrary to the instructions that came with the blanket?" Mr. Wesser would have to answer this question. However, the defense attorney might ask, "What did you tell Ms. Heyward when you were preparing for trial and discussed how you handled the electric blanket?" Mr. Wesser would be entitled to refuse to answer this question, based on the attorney-client privilege.

The attorney-client privilege is closely related to the ethical duty to preserve confidential information. The American Bar Association (ABA) Model Code directs that an attorney may not disclose the client's "secrets" and "confidences," and ABA Model Rule 1.6 protects all information relating to the representation of the client. The communications protected by the attorney-client privilege are somewhat narrower. However, paralegals should not dwell on the differences among the various definitions but should concentrate on practical

ways in which to recognize the kinds of evidence that the attorney-client privilege covers.

Determining When the Attorney-Client Privilege Applies

In order for the attorney-client privilege to apply, two primary factors must exist. First, the purpose of the communications must be to render legal advice to the client, and second, the communications must be confidential.

When the Purpose of Communications Is to Render Legal Advice. The attorney-client privilege attaches only to communications concerning legal advice. If your best friend is a lawyer and you discuss the local basketball team or the weather, your conversation is not covered by the attorney-client privilege. But if Mr. Wesser and Ms. Heyward discuss the weather on the night of the fire because there was a thunderstorm during which Mr. Wesser's house was struck by lightning, this concerns the cause of the fire and is protected by the attorney-client privilege.

Suppose that Mr. Wesser is talking to Ms. Heyward at their initial conference, and he is not yet sure that he will hire Ms. Heyward as his lawyer. Are their statements covered by the attorney-client privilege? Yes. Communications made in the course of determining whether to hire a lawyer are privileged, regardless of whether the lawyer is actually hired. The protection is needed from the very beginning so that both the attorney and the potential client can get enough information to determine whether it is worthwhile to pursue the litigation.

When Communications Are Confidential. Communications between attorney and client are considered to be confidential when the speakers intend that their communications not be heard by persons other than the persons they are addressing. The primary factor in determining the speakers' intent is the presence of persons other than the attorney and client. The presence of third parties can destroy the confidentiality of the communication. For instance, if the attorney and client are discussing the facts of the case in an elevator crowded with persons they do not know, one may safely assume that they do not intend that their conversation be confidential.

However, the presence of persons employed by the attorney, such as paralegals and clerks, does not destroy confidentiality. This is because the third parties are representatives of the attorney, and their purpose is to assist with rendering legal services to the client.

Confidential Communications Include Documents. So far the text has addressed only spoken communications between attorney and client. It is imperative to understand that confidential communications also include documents exchanged between the attorney and the client. For instance, if Ms. Heyward writes a letter to Mr. Wesser explaining that the defendants have asserted that he misused the blanket and asking for information about how he handled the blanket, this letter is a confidential communication.

A document that existed before the attorney-client relationship was established, however, does not become privileged simply because the client gives the document to the lawyer. If Mr. Wesser gives to Ms. Heyward the warranty that came with the blanket, that does not make the warranty a privileged document.

It is very important that paralegals understand that documents can be covered by the attorney-client privilege. One danger paralegals must avoid is turning over documents that contain confidential information to the opposing party during the discovery process. Paralegals may screen thousands of documents during discovery, and it is imperative that each document be carefully reviewed for confidential information.

Determining When the Attorney-Client Privilege Does Not Apply to Client Communications

The attorney-client privilege does not prevent the disclosure of all communications between the attorney and client. There exist a number of exceptions to the attorney-client privilege, and the client may waive the privilege. These subjects are discussed below.

Exceptions to the Attorney-Client Privilege. The text addresses the exceptions you will encounter most frequently in litigation. Other exceptions exist, such as disputes over a deceased client's will when all the parties claim through the deceased client. Remember that the rules and exceptions may vary among jurisdictions, since the Federal Rules of Evidence do not dictate uniform rules to apply in all jurisdictions.

Future Crimes or Fraud. Communications between the attorney and client are not privileged when the purpose of the communications is to help a person commit a crime or fraud. It would be against public policy to allow clients to consult attorneys for advice on how they might successfully commit a crime or perpetrate a fraud on another person. This is the same exception that applies to the ethical obligation to protect confidential client information. As with the ethics exception, be sure to distinguish between acts the client has already committed and future crimes or fraud.

Disputes Between the Attorney and Client. Suppose a client asserts that the attorney did not perform the services agreed on. In order to defend against the accusation, the attorney may have to reveal some of the confidential communications that transpired between them. The attorney may have to testify about the exact nature of the work the client hired the attorney to perform. This exception is like the exception to preserving confidential information. As with the ethics exception, the attorney should reveal no more confidential client information than is necessary to assert a defense.

Disputes Between Joint Clients. An attorney may undertake representation of multiple parties to a lawsuit when it appears that the parties do not have adverse interests. As the litigation progresses, however, the parties may have a falling out. For instance, in the Wesser case, David Benedict represents both defendants.

Suppose that during the litigation, Second Ledge decides that Woodall Shoals is at fault and decides to file a cross-claim against Woodall Shoals. Mr. Benedict would have to withdraw from representing either of the codefendants. In regard to the attorney-client privilege, communications between Mr. Benedict and the corporate officers of Woodall Shoals and Second Ledge, when they were both meeting with Mr. Benedict, would not be covered by the attorney-client privilege.

Waiver of the Attorney-Client Privilege. The client may waive the attorney-client privilege. This happens when the client voluntarily discloses to others communications with the attorney. Consider again the example of an attorney and a client discussing facts on a crowded elevator. The communications are clearly not confidential because other people are right there listening. In this example, the client has waived the attorney-client privilege in regard to the facts discussed on the elevator by voluntarily disclosing the facts to third parties.

In contrast, assume that the defense attorney asks Mr. Wesser, "Did you ever fold the blanket, contrary to the instructions?" and that Mr. Wesser answers this question. Even though Mr. Wesser had discussed this fact with his attorney prior to trial, he has not waived the attorney-client privilege protecting their conversation. When a client takes the stand and testifies about facts that he has discussed with his lawyer previously but does not reveal what he actually discussed in his conversation with the lawyer, this does not constitute a waiver.

Similarly, consider the example of Mr. Wesser testifying at trial about how he handled the blanket. Suppose that the defense attorney asks Mr. Wesser, "What did you tell Ms. Heyward when you were preparing for trial and discussed how you handled the electric blanket?" If Mr. Wesser answers this question, revealing the contents of his conversation, then he has waived the attorney-client privilege in regard to this conversation. He has testified about his actual conversation with his attorney, and this constitutes a waiver. As a practical matter, Ms. Heyward would object to this question before Mr. Wesser answered it, so he would not unwittingly waive the privilege. If Mr. Wesser nonetheless answered the question after being alerted that it called for privileged information, he would be deemed to have waived the privilege.

You will often read that the privilege belongs to the client and thus the client can waive the privilege. This means that the attorney cannot waive the privilege for the client. However, you must not confuse this with asserting the privilege. Attorneys can assert the attorney-client privilege on a client's behalf to protect their confidential communications.

Duration of the Attorney-Client Privilege. The attorney-client privilege attaches to the confidential communications from the very outset of the discussion between attorney and client. As discussed above, the privilege covers the communications even at the initial conference when the client has not yet decided whether to employ the attorney. Once the privilege attaches, it covers the communications forever unless the client waives the privilege. The attorney-client privilege continues even after termination of the attorney's employment,

protecting all the confidential communications made during the attorney-client relationship.

The Work Product Privilege

Suppose that David Benedict, lawyer for the defendants in the Wesser case, knows that Leigh Heyward has interviewed Mr. Misenheimer, the fire inspector. Mr. Benedict requests a copy of Ms. Heyward's interview notes. These notes are not protected by the attorney-client privilege because they are not communications between the client and attorney. However, the notes are protected by the work product privilege.

The work product privilege is very important in the discovery phase of the litigation and is discussed at greater length in Chapter 8. The privilege is set forth in FRCivP 26(b)(3) and refers to the work product of the attorney. The privilege affords protection to two types of work product.

First, the rule provides absolute protection to the "mental impressions, conclusions, opinions on legal theories" that the attorney forms in preparing for trial. Thus, if Ms. Heyward wrote a memorandum describing how Mr. Misenheimer's statements could be helpful at trial, this memorandum is absolutely protected by the work product privilege.

Second, there is a qualified privilege for other documents "prepared in anticipation of litigation" by a party's "representative." A representative can include the party's attorney, as well as other of the party's agents, such as paralegals or claims investigators. Thus, a report on the reason the electric blanket caught fire, prepared for the defense attorney by the insurance claims investigator, would be protected. The protected trial preparation documents may be obtained by another party only if the other party has a "substantial need" and cannot obtain a "substantial equivalent" of the documents "without undue hardship." Thus, these documents do not enjoy absolute protection, but they may qualify for the more limited privilege. The meaning of these phrases is addressed further in Chapter 8.

Husband-Wife Privilege

Federal law and the law in most states recognize a privilege protecting confidential marital communications. The husband-wife privilege applies to confidential communications made during the course of the marriage. There are two basic requirements in order for the husband-wife privilege to apply. First, a valid marriage must exist. Second, the communications must be confidential. The method for determining whether the communications were intended to be confidential is the same as for attorney-client communications; that is, the presence of third parties generally destroys the confidentiality.

The husband-wife privilege applies to communications during the marriage. A conversation that took place before the couple was married or after they were divorced would not be protected. A conversation during the marriage, however, continues to be protected even if the spouses subsequently divorce. In

addition to surviving divorce, the privilege also survives annulment of a marriage and death of a spouse.

There are exceptions to the husband-wife privilege. When a case involves crimes against a spouse or the children of either spouse, the privilege does not apply. Nor does the privilege apply in lawsuits between the spouses.

In many states, there is a second type of marital privilege that applies only in criminal cases. Although the discussion addresses civil cases, you should be aware of the privilege in criminal cases and some quasi-criminal cases. Many states grant criminal defendants a privilege to keep the spouse from testifying against them in criminal cases. The privilege does not apply when the defendant is accused of crimes against the spouse or their children.

Physician-Patient Privilege

Most jurisdictions recognize a physician-patient privilege, which protects disclosure of information a physician obtains in treating a patient. There are variations on this privilege among jurisdictions, but generally the privilege protects all information that a doctor obtains about a patient.

For the privilege to attach, patients must consult the doctor on their own accord for treatment or diagnosis. Sometimes a patient is directed by another to consult a doctor, in which case the privilege does not apply. Court-ordered examinations and insurance physicals are two examples of unprivileged examinations.

As with other privileges, the presence of third parties destroys the privilege because the communications are not confidential. However, when the third persons are agents of the doctor, such as nurses and X-ray technicians, the privilege is generally not destroyed. The privilege also may be preserved when the third party is a close family member, but there are variations among jurisdictions, so you must research the applicable law.

Waiver of the Physician-Patient Privilege. The physician-patient privilege is frequently and easily waived. Often attorneys must have the doctor's records to assess and prove a client's claim. When a client signs an authorization for a doctor to release information to the client's attorneys, this is an effective waiver of the privilege. Patients often waive the privilege for insurance companies. You have probably signed forms in your insurance claims for doctor visits in which you give the insurance company permission to obtain the doctor's records for your treatment. This is a waiver of the privilege.

Only the patient can waive the privilege. The physician can assert the privilege on the patient's behalf but cannot waive the privilege. This is like the attorney-client privilege where the attorney can assert the privilege on the client's behalf but cannot waive it.

Other Privileges

The attorney-client, husband-wife, and physician-patient privileges are the privileges you are most likely to encounter frequently. You should be aware, however, that other privileges may arise. Some jurisdictions recognize a priest-

penitent privilege, to protect communications with a priest or pastor. In some jurisdictions, a reporter's informants, government secrets, and an accountant's records are privileged. The existence and scope of these privileges vary considerably and require accurate research. Finally, the Fifth Amendment privilege against self-incrimination may sometimes be asserted in civil proceedings.

ETHICS BLOCK

Both the ABA Model Code and the ABA Model Rules state that the duty to preserve confidential client information is mandatory. Most information relating to the representation of a client is confidential. Confidentiality is essential in the client-lawyer relationship because only with full disclosure can the lawyer find out all the pertinent facts and fully develop a case. Clients often have to reveal embarrassing information to their attorneys, and the assurance of confidentiality encourages full disclosure.

There are exceptions to the rule against disclosure of confidential client information. Attorneys may reveal confidential information when the client consents to disclosure, but only after the attorney has fully informed the client of the consequences. An additional exception is when a dispute arises about the lawyer's conduct. A client may accuse a lawyer of wrongdoing, or a dispute may arise over the amount of the attorney's fee. An attorney may need to use confidential information to prove services rendered if necessary to collect fees.

Another exception to the rule against disclosure of confidential information is when the attorney reveals the information to prevent commission of a future crime. An attorney may reveal a client's intention to commit a crime and information necessary to prevent the crime. The ABA Model Code allows disclosure in regard to any crime; however, Model Rule 1.6 limits disclosure to crimes that are "likely to result in imminent death or substantial bodily harm." It is important to distinguish between past crimes and future crimes. The exception does not apply to past crimes. Thus, if a client confesses to a murder that has already been committed, the rule of confidentiality applies.

SUMMARY

This chapter presents the basic principles of the rules of evidence. The rules of evidence determine which evidence is admissible, that is, which evidence the finder of fact may consider in reaching a verdict. Evidence includes testimony of witnesses, generally called testimonial evidence, and documents, generally called documentary evidence. Parties may also present physical objects, referred to as physical, or real, evidence. Evidence is direct when a witness has firsthand knowledge of the facts. Evidence is circumstantial when it is not based on personal observation. Direct evidence generally carries more weight. Do not be unduly concerned about categorizing by type every piece of evidence. Rather, keep in mind the general principles of evidence to determine when evidence is admissible.

The discussion focuses on the Federal Rules of Evidence, published in the *United States Code* and in commercial publications. In state court, apply that state's rules of evidence, which can be found in the state statutes and commercial publications. You may also refer to various books about evidence, because the application of the rules is not always clear. Remember that state rules of evidence may have significant differences from the federal rules.

The rules of evidence have two primary purposes: to ensure fairness and to ascertain the truth. Ensuring fairness is the requirement that evidence be relevant. Ensuring truthfulness is the requirement that evidence be reliable.

FRE 402 states that only relevant evidence is admissible to resolve the issues in a lawsuit. Evidence is relevant when it tends to prove the existence of a fact that is important to the outcome of the dispute. The evidence must have a logical bearing on the issues in dispute. It need not prove the ultimate issue in dispute; background information to understand the ultimate issue is important.

Even relevant evidence may be excluded under certain circumstances. FRE 403 provides that relevant evidence may be excluded when its probative value is outweighed by the danger of prejudice, confusion, or misleading the jury; or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The court weighs these dangers against the probative value to determine whether evidence is admissible, and great discretion is exercised in making this decision.

Character evidence is evidence of a person's reputation in the community or evidence of a particular trait. Often character evidence is not relevant. The general rule in civil litigation (FRE 404) is that character evidence is not admissible to establish that the person acted in conformity with the trait on a particular occasion. Character evidence is admissible when a person's trait is an element of a claim or defense, such as in a defamation case. This does not occur often. It is important to distinguish between character evidence used to show that a person acted in conformity with a trait and character evidence of a person's truthfulness or untruthfulness used to impeach (discredit) the witness's testimony. For instance, if a person has been convicted of a crime that involves dishonesty, such as embezzlement, character evidence may show that a person is not generally truthful.

Evidence of habit is generally admissible. Habit refers to a person's consistent response to a particular situation, not evidence of that person's general traits (character evidence). It is assumed that if a person reacts to a certain situation in the same way every time, it is likely he or she reacted that same way during the event in question.

The Federal Rules of Evidence have other specific rules regarding relevance. FRE 407 provides that evidence that remedial measures were taken after an accident is not admissible to prove negligence. The public policy behind this rule is to avoid creating a disincentive for persons to remedy dangerous situations. FRE 408 states that offers to settle a dispute are not admissible to show liability. The rationale here is to encourage settlement discussions. FRE 409 provides that evidence of paying or promising to pay medical expenses is not

admissible to prove liability for the injury, and FRE 411 provides that evidence as to whether a person had liability insurance is not admissible to show that a person acted negligently. The rationale for these rules is to avoid creating a disincentive to tender assistance for medical expenses or to keep liability insurance.

Several rules of evidence are designed to ensure reliability. Witnesses must take an oath that they will tell the truth (FRE 603). A very important requirement is that witnesses have personal knowledge of the matters about which they testify (FRE 602). At trial, lawyers ask witnesses questions to show that they have personal knowledge of the facts about which they testify. This is known as laying a foundation.

Lay witnesses (as distinguished from expert witnesses) may state their opinions about questions in dispute if they have observed the facts on which they base their opinions. According to FRE 701, opinion testimony by lay witnesses is allowed when it is rationally based on the perceptions of the witnesses and is helpful to a clear understanding of the witnesses' testimony or the determination of a fact in issue. Thus, witnesses cannot come into court and state their opinions simply because they happen to have opinions about an issue in dispute.

In contrast, expert witnesses are allowed to state opinions based on other persons' observations. The requirement for expert testimony is that the opinion be based on facts of a type reasonably relied on by experts in that particular field. Before witnesses can testify as experts, they must be qualified as experts. An expert witness must have sufficient knowledge, skill, experience, training, or education to explain and give an opinion about technical subjects that average laypersons generally do not understand. For example, the average person does not know enough about electrical malfunctions to know what caused the electric blanket in the Wesser case to catch on fire. However, a person with sufficient knowledge about electrical wiring and design knows enough to state an opinion about the cause of the fire. To determine whether a person is qualified to be an expert witness, you review that person's education, experience, and other credentials. Paralegals often research the background of the other parties' experts as well as their own.

If a witness's testimony is inconsistent, the testimony may not be reliable. One way to attack the reliability of testimony is to attack the witness's credibility. This is known as impeachment. Several factors may indicate that a person is not telling the truth. A person may give contradictory and inconsistent statements or have a bias—that is, a motive for not telling the truth. For instance, a witness's family or business relationship with a party may influence his or her testimony. Another impeachment device is to show that a person is untruthful, and here character evidence can be used. Distinguish this from the use of character evidence to show that a person acted in conformity with a trait during an event in question. If a person has been convicted of embezzlement, character evidence may show that the person is dishonest and unlikely to tell the truth. It does not, however, establish that the person is bad and, therefore, must have committed a negligent act.

There are two rules designed to ensure that documents are reliable. The first is the requirement that all documents be authenticated. To authenticate a document, the person presenting the document must establish that the document is what it purports to be. For example, in a contract dispute, the person introducing the contract into evidence must establish that this is the contract that the parties entered. At trial, attorneys generally authenticate documents by asking the witness whether, for instance, "this is the contract which you and the defendant entered." FRE 901 allows laypersons to identify signatures. A common way to authenticate documents that are public records, such as deeds, is to have an official in the office where the record is kept certify that the document is a true copy. For instance, an employee in the office of the Register of Deeds can certify that a deed is a true copy of the deed recorded in that office. FRE 902 sets forth several types of documents that are self-authenticating, that is, documents deemed on their face to be authentic without further proof. Examples are certified copies of public records, such as deeds and newspapers.

The second rule for documents is the original writing rule (FRE 1002). This is sometimes called the best-evidence rule. The rule requires that when the content of a document is in issue, the original of the document must be produced unless the original is unavailable or unless another evidence rule or statute permits submission of a copy. FRE 1003 permits submission of a duplicate in many circumstances unless a genuine question is raised as to the authenticity of the original or it would be unfair to admit the duplicate in lieu of the original.

The hearsay rule, like the authentication rule, is designed to ensure reliability. Hearsay is testimony in court about a statement made out of court, where the out-of-court statement is offered to prove the truth of the matter asserted in the out-of-court statement. If a statement is hearsay, it is not admissible to prove the truth of the content of the statement unless the statement fits into an exception to the hearsay rule. The hearsay rule is designed to prevent one person from coming into court and testifying about what another person said, when that other person is not available for cross-examination. Cross-examination is the primary means of testing the truthfulness of a statement.

There are many exceptions to the hearsay rule, as set out in FRE 803 and 804. The exceptions in FRE 804 require that the declarant (the person who made the out-of-court statement) be unavailable for trial. A person may be dead or too ill to attend. The witness may not be able to remember the subject matter of the statement, or the court may not be able to secure the witness's presence.

One frequently encountered exception to the hearsay rule is the excited utterance, where a person is so excited when making a statement that he or she would not have had time to fabricate it. Statements made to a doctor for diagnosis or treatment also form an exception, because it is assumed that a person tells a doctor the truth in order to receive proper treatment. Many types of public records fall within the hearsay exceptions (FRE 803(8) through (17)). The trustworthiness of the documents is accepted because the records are kept regularly by agencies such as the Register of Deeds.

If a person is unavailable for trial, testimony given at another hearing or in a deposition fits into the exception in FRE 804(b)(1). A person's statement against his or her own interest is also an exception because it is assumed that persons will not say things to their detriment unless the things are true.

The last major topic in evidence is privileges. Privileged communications are statements that are protected from forced disclosure because the statements were made between persons who have a confidential relationship with each other. The Federal Rules of Evidence do not address specific privileges, so the applicable statutes and case law must be consulted. In state court, consult the state's statutes and case law. In a federal court case, where jurisdiction is based on diversity, look to the statutes and case law of the state in which the court sits. If federal jurisdiction is based on subject matter jurisdiction, apply the privilege rules developed by the federal courts.

Privilege rules are important at every stage of litigation. Paralegals must be constantly alert lest they unwittingly disclose privileged information. In particular, paralegals should screen documents for privileged information before releasing them to another party and should note potentially privileged matters and discuss them with the attorneys on the team.

One frequently encountered privilege is the attorney-client privilege, which protects confidential communications between clients and their attorneys. A communication is confidential when it is not intended to be heard by a third party. For example, discussions in the attorney's office are likely to be confidential, and the presence of persons on the attorney's staff does not destroy confidentiality. But if an attorney and client discuss a matter in a crowded bar where they know that people can overhear them, their communications are not confidential. In addition, the purpose of the communications must be to render legal advice. A discussion of last night's baseball game or the weather is not for the purpose of rendering legal advice, unless questions about the weather or the baseball game are at issue.

Note that confidential communications include documents, such as letters from attorneys to clients. The attorney-client privilege attaches to confidential communications from the first meeting with a client seeking legal advice and continues to protect the communications even after the attorney has closed the client's file.

There are exceptions to the attorney-client privilege. For example, statements to the attorney concerning future crimes or fraud that the client intends to commit are not privileged. Information necessary to resolve a dispute between an attorney and a client is not privileged. When disputes arise between joint clients, the information the attorney gained while meeting with the parties together is not privileged. For other exceptions, consult the law in your jurisdiction.

Clients may waive the attorney-client privilege by voluntarily sharing the information with third parties. The attorney can assert the privilege for the client, but may not waive it—only the client can waive it.

Another important privilege is the work product privilege (FRCivP 26(b)(3)). An attorney's mental impressions, conclusions, and opinions on legal theories are absolutely protected. A qualified privilege attaches to documents "prepared in anticipation of litigation" by a party's "representative," such as a report prepared for the attorney by an insurance investigator. The other party may obtain the information only if that party has a "substantial need" and cannot obtain a "substantial equivalent" of the documents "without undue hardship." The quoted phrases are open to interpretation, so you must check the law in your jurisdiction.

The husband-wife privilege protects confidential communications between husband and wife. The presence of third parties destroys confidentiality. Only communications made during a valid marriage are included. The husband-wife privilege does not apply in cases involving crimes against a spouse or the children of either spouse, or in lawsuits between the spouses.

Another privilege recognized in most jurisdictions is the physician-patient privilege, which protects information that a doctor obtains in treating a patient. Patients frequently waive this privilege, as when they sign authorizations for the physician to release their medical records in personal injury litigation.

Other privileges exist in certain jurisdictions, for example, a journalist's informants, government secrets, and an accountant's records. As with other privilege rules, you must consult the law of the proper jurisdiction.

REVIEW QUESTIONS

1. Which of the following are exceptions to the hearsay rule?
   a. ancient documents
   b. excited utterances
   c. records of vital statistics
   d. all of the above
   e. a and c only
2. Which of the following may be used to impeach a witness?
   a. bias
   b. prior inconsistent statements
   c. evidence that the witness is dishonest
   d. all of the above
   e. a and b only
3. Which of the following statements about authentication of documents are true?
   a. The parties may stipulate to the authenticity of documents before trial.
   b. Some documents are self-authenticating.
   c. A witness may at trial identify a document as being authentic.
   d. all of the above
   e. a and b only

4. Which of the following methods could be used to authenticate Sandy Ford's signature on the employment application?
   a. Ask Sandy Ford to identify the signature.
   b. Ask the personnel manager, who saw Ford sign the application, to identify the signature.
   c. Have the defense attorney stipulate that the signature is Sandy Ford's signature.
   d. all of the above
   e. a and c only

5. To be relevant, evidence must do which of the following?
   a. help the finder of fact understand the ultimate fact
   b. answer the ultimate fact
   c. have a tendency to establish a fact of consequence
   d. all of the above
   e. a and c only

6. T F A witness must have a PhD in order to qualify as an expert witness.

7. T F The attorney-client privilege does not protect statements made by an attorney in the presence of a third party who is not an agent of the attorney.

8. T F Lay witnesses are allowed to identify signatures and voices.

9. T F The original writing rule does not allow the submission of duplicates of documents.

10. T F Evidence that the parties engaged in settlement discussions is never admissible.

PRACTICAL APPLICATIONS

For each set of facts below, discuss whether the evidence is admissible and cite the Federal Rule of Evidence on which you base your conclusions.

1. Mr. Smith owns an office building. Mr. Anglada works in that building and fell down the stairs because Mr. Smith had not repaired the rubber cover on one of the steps, which was loose. After the accident, Mr. Smith did repair the step cover. Can the repair after the accident be introduced as evidence that Mr. Smith was negligent?
2. One week after the accident, Mr. Smith offered a settlement of $500. Mr. Anglada refused the offer. Is this offer of settlement admissible at trial to show Mr. Smith's liability?
3. Mr. Smith was standing at the bottom of the stairwell when Mr. Anglada fell. Mr. Smith, obviously startled by Mr. Anglada's rapid arrival, blurted out "Are you all right? I knew I should have repaired that step before someone got hurt!" Is Mr. Smith's statement admissible at trial?

CASE ANALYSIS

Read the excerpt from *Dallis v. Aetna Life Ins. Co.*, 768 F.2d 1303 (11th Cir. 1985), and answer the questions following the excerpt.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY, FAY and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

The present case stems from the refusal of defendant-appellant, Aetna Life Insurance Company ("Aetna"), to reimburse the plaintiff-appellee, Park A. Dallis, for bills incurred in the treatment of his wife's cancer. Plaintiff-appellee and his wife (now deceased) were covered by a group health insurance policy issued by Aetna to Mr. Dallis' employer, DeKalb County. The policy provided for reimbursement for several enumerated categories of reasonable medical expenses, including the fees of a physician or surgeon. The policy also specifically excluded reimbursement for care, treatment, services, or supplies which were not necessary for the treatment of the disease concerned or which were unreasonable.

After undergoing various other treatments for her cancer that proved ineffective, Mrs. Dallis was treated at the Immunology Researching Centre, Ltd. ("IRC") in Freeport, Bahamas. The treatment given by the IRC, described as "immuno-augmentative therapy," has never been approved by any of the various agencies of the United States Government, nor has it ever been proven to be effective. Mrs. Dallis submitted claims to Aetna in the amount of eleven thousand dollars ($11,000) to cover the cost of her treatment at the IRC. Aetna failed to pay these claims on the grounds that the treatment had not gained broad professional acceptance as essential to the treatment of cancer. Aetna advised Mrs. Dallis that Aetna would reimburse her neither for services and supplies which were not necessary for treatment of her disease, nor for charges which were unreasonable.

Mrs. Dallis filed suit against Aetna in state court, and Aetna removed the action to federal district court. The jury returned a verdict against Aetna for eleven thousand dollars ($11,000). The court entered a judgment in that amount, and Aetna appeals on several grounds. 574 F.Supp. 547.

. . .

II. *Admissibility of Anecdotal Testimony*

At trial, plaintiff introduced deposition testimony of two doctors concerning several successful case histories of people who had received treatment at the IRC. The second issue appellant raises is that anecdotal testimony concerning approximately 10 patients of the nearly 1700 who had been treated at the IRC was irrelevant and should have been excluded. Alternatively, Aetna contends that the testimony should have been excluded because it was misleading to the jury and unfairly prejudicial to Aetna, and of little or no probative value.

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed.R.Evid. 401. The determination of whether evidence is relevant lies within the discretion of the trial court. *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 750 F.2d 1516, 1524 (11th Cir. 1985). One of the issues contested at trial was whether the IRC treatments were "necessary" treatments. The anecdotal testimony that several patients had been successfully treated

at the IRC had some tendency to show that such treatments were "necessary" to fight cancer, and thus was relevant evidence.

Evidence, although relevant, may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1347 (5th Cir. 1978); Fed.R.Evid. 403. However, like determinations of relevance, determinations of admissibility of evidence under Rule 403 are subject to review only for abuse of discretion. *Rozier*, 573 F.2d at 1347. The trial judge acted well within his discretion in deciding to admit the anecdotal testimony. If the testimony that 10 out of 1700 patients were successfully treated was not particularly strong evidence that the IRC treatments were necessary, Aetna could have exposed the weakness of this testimony on cross-examination or through Aetna's own witnesses.

III. *Admissibility of Lay Opinion Testimony*

Plaintiff presented several live witnesses who testified that they had been treated at the IRC. None of these witnesses qualified as experts. All testified that they had had cancer before receiving treatment at the IRC, and that they were feeling in good health at the time of trial. All of these witnesses expressed their opinions, over appellant's objections, that the IRC treatment had helped improve their condition. Appellant contends that these statements of opinion by lay witnesses should not have been admitted into evidence.

Lay testimony in the form of opinions or inferences may be admissible if such opinions or inferences are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Fed.R.Evid. 701. The ultimate decision on admissibility under Rule 701 rests in the hands of the trial judge, whose exercise of discretion in this regard will not be overturned absent clear abuse. *Scheib v. Williams-McWilliams Co., Inc.*, 628 F.2d 509, 511 (5th Cir. 1980).

The testimony of these witnesses was relevant to the determination of a fact in issue, namely, whether the IRC treatment was a "necessary" treatment for cancer. Furthermore, the opinions of all of these witnesses were rationally based on their own perceptions. The witnesses were not asked whether they believed the IRC treatment was helpful in treating all cancers but, rather, whether it had improved their own condition. The witnesses were in the special position of having experienced the IRC treatment and having first-hand knowledge of how they felt before and after the treatment. *Cf. Miller v. Universal Studios, Inc.*, 650 F.2d 1365, 1374 (5th Cir. 1981) (author permitted to testify as a lay witness regarding similarities between his book and a movie).

Appellant complains that, in effect, all of the witnesses diagnosed their own cancer, explained that conventional treatment was of no value, described the IRC treatment, and opined that the IRC treatment alleviated or ameliorated their cancer. To the extent that the witnesses' opinions lacked a scientific basis, appellant had the opportunity to expose this fact. In short, Aetna's objection to this evidence goes to its weight and not its admissibility. The trial court did not abuse its discretion in admitting this evidence.

. . .

The judgment of the district court is AFFIRMED.

1. This is an opinion issued by the Eleventh Circuit Court of Appeals. Give the name of the trial court that entered the judgment being appealed.
2. The defendant argued that doctors' depositions that the cancer treatment had been successful for several patients were irrelevant. Did the Eleventh Circuit find the testimony was relevant? Why?
3. In regard to the same evidence, does the trial judge have discretion to find that the probative value is not outweighed by prejudice?
4. The defendant attacked the admissibility of testimony of witnesses who testified about their own treatment. Were they offered as expert witnesses?
5. What are the criteria for admissibility of lay testimony under Rule 701?
6. Did the Eleventh Circuit Court of Appeals hold that the lay witnesses had firsthand knowledge of the treatment in question?
7. Did the trial court abuse its discretion in admitting the lay testimony?

ENDNOTES

1 *Black's Law Dictionary* 498 (5th ed. 1979).

2 *McCormick on Evidence* 171 (E. Cleary ed., 3d ed. 1984). Chapter 8 in *McCormick* contains a detailed discussion of evidentiary privileges.

Chapter 4

DEVELOPMENT OF THE CASE

In the Wesser case, Leigh Heyward had already conducted the initial interview before you began working with her. For now, imagine that you had already been hired when Bryson Wesser telephoned your law firm on a Wednesday afternoon and asked to speak to Leigh Heyward, to whom he was referred by a coworker, Michael Buchanan. Ms. Heyward was in court, and the receptionist referred the case to you. Mr. Wesser explained briefly that his electric blanket had caught on fire, causing injuries to him and damage to his home.

"What was the date that the fire occurred?" you asked. You know that this is an important fact because clients often wait months or years to contact an attorney, and the statute of limitations may be close at hand. You also asked the name of the manufacturer of the electric blanket and the store where it was purchased. Identification of the other parties to a potential lawsuit is critical, and you know that one of your first tasks is to check for conflicts of interest.

Mr. Wesser then asked, "Do you think I have a case?"

You replied, "I am a paralegal who works with Ms. Heyward, who is an attorney. We work together as a team, and she is the one who can give you legal advice. Let me schedule a time for you to come in and meet with Ms. Heyward and me. You can give us some more information about your injuries, and Ms. Heyward can assess the facts and give you legal advice about your potential lawsuit. Are you able to meet with us this Friday at 4:00 P.M.?"

Mr. Wesser replied, "No, I cannot get off work earlier than 4:00, but I can be at your office by 4:30. I know where your office is located."

"That will be fine," you replied. "I have Ms. Heyward's calendar on my computer screen, and both she and I are available Friday at 4:30. We look forward to seeing you then."

THE INITIAL CLIENT INTERVIEW

Usually the first step in developing a case is the initial client interview, sometimes called the intake interview. The main purposes of the initial client interview include gathering the facts and determining whether there is a viable cause of action. If the attorney agrees to represent the client, they will discuss the terms of a fee agreement. The initial client interview involves giving legal advice, agreeing to undertake representation of the client, and entering into a fee agreement. These areas of discussion involve the practice of law and, therefore, must be handled by an attorney. Paralegals do, however, have an important role in the initial client interview and the development of

the case. In fact, paralegals may perform a number of tasks even before the initial client interview.

Preparing for the Initial Client Interview

Paralegals often receive the phone calls of potential clients with inquiries about possible litigation. One of the first and most important tasks is to find out when the cause of action occurred and to determine whether there are problems with the statute of limitations that would preclude the lawsuit altogether. Having determined the date of the fire in the Wesser case, you can research the statute of limitations and advise Ms. Heyward of any problems. Paralegals can check the law firm's records to determine whether there is a potential conflict of interest. For instance, assume that Ms. Heyward had recently defended Second Ledge Stores in a lawsuit in which a customer had fallen down an escalator in one of their stores and suffered a broken hip. You would want to pull this file and bring it to Ms. Heyward's attention immediately.

Paralegals must consider from the outset the types of evidence that must be gathered for each lawsuit. The types of evidence are discussed later in this chapter. Even before the initial client interview, however, paralegals must anticipate the types of evidence and even prepare forms for the client to sign at the initial interview so that the information can be gathered. For instance, in the Wesser case, it is clear that the attorney-paralegal team will need to take a close look at Mr. Wesser's medical records. Thus, you will have ready for Mr. Wesser's signature the forms necessary for doctors and hospitals to release his medical records.

Paralegals also may need to conduct some legal research before the initial client interview. The Wesser case involves several potential breaches of warranty, and the law of warranty is complex and worthy of review. You may wish to photocopy pages from a treatise or digest discussing warranty law in your state and include it in the file that you present to Ms. Heyward.

Many law firms send out letters to clients, confirming the date and time of the initial interview. The letter also may request that the potential client bring documents to the first meeting. In the Wesser case, you may request the warranty that came with the electric blanket, the sales receipt for the blanket, copies of any medical records that Mr. Wesser already possesses, and information about his insurance coverage.

SIDEBAR In the Wesser case, the initial inquiry came on a Wednesday afternoon, and you have only forty-eight hours to conduct your research and report your findings to Ms. Heyward. This is typical of the challenges in a litigation firm to balance your workload and work quickly.

The overall goal of the attorney-paralegal team prior to the initial client interview is to prepare as thoroughly as possible. The tone of the initial meeting

sets the tone for the course of the entire lawsuit. When the attorney and paralegal are well prepared, their confidence shows and, in turn, inspires the client's confidence.

Participating in the Initial Client Interview

Although the attorney asks most of the questions in the initial client interview, it is important for paralegals to be present, because one purpose of the initial interview is to build a trusting relationship. The paralegal's confident and competent presence does much to foster this relationship. Beyond this, there are several more concrete tasks for paralegals to perform.

Attorneys often take few, if any, notes during the initial client interview when paralegals are present. It is easier for attorneys to maintain eye contact and to engage clients in meaningful conversation if paralegals take the necessary notes. One essential task for paralegals is to ensure that attorneys ask all the necessary questions. You may diplomatically bring up a question that the attorney has omitted. Likewise, you may ask questions if facts remain unclear to you. It is better to obtain as many facts as possible at the outset. It can be embarrassing to have to call the client the next day to ask a question that easily could have been asked at the initial interview.

One method to ensure that all necessary questions are asked is to use a checklist. Many law firms have preprinted checklists for different types of cases. Obviously, an initial interview for a bankruptcy case is going to involve different questions from those posed in a personal injury case. Law firms that handle personal injury cases may have computer-generated interview forms. Refer to Figure 4–1 for a sample form. All such forms include basic information such as name, address, and employer. You need to know the client's age, education, occupation, salary, assets, and family history. This information helps to direct future settlement negotiations. If a client has been permanently disabled by an injury, for example, his or her age, education, salary, and work history are crucial to calculate future lost earnings.

Particular types of lawsuits require particular types of information. Compare Mr. Wesser's case to a case involving a head injury from an automobile accident. From both clients, you need to obtain information such as names and addresses of doctors, how many days of work they missed, and what limitations they face as a consequence of their injuries. Mr. Wesser's limitations are primarily physical: for instance, pain in his arms that limits his ability to lift and hardened skin on his legs that limits his ability to walk. In contrast, the client with head injuries may have physical and mental limitations, such as inability to concentrate or to remember and even an actual lowering of the client's IQ. Mr. Wesser may still be able to perform his job even with some physical limitations, while the client with head injuries no longer has the capacity to concentrate and recall facts that are needed to perform his or her job.

SIDEBAR In all interviews with the client, but especially in the initial client interview, you should assess the client's credibility as a witness. You may observe the client's

FIGURE 4–1 Personal Injury Interview Sheet

PERSONAL INJURY INTERVIEW SHEET

Client Code:_____ Interview Date:_____

CLIENT: Name:_____ Age:____ DOB:_____

Address _____ Driver's Lic. #_____

_____

Phone Numbers: (Home)_____ (Work)_____

Date of Accident:_____ Time of Accident:_____

Place of Accident:_____

Description of Accident:_____

_____

Police Investigating:_____

DEFENDANT: Owner:_____ Driver:_____

Address:_____ Address:_____

_____ _____

Tag Number:_____ _____

CITATIONS:_____

DEFENDANT'S INSURANCE: Adjuster:_____ Phone:_____

Company:_____ Agent:_____

Address:_____

Claim No.:_____ Policy No.:_____

Limits:_____

****

PRIMARY Insured:_____

Adjuster:_____ Phone:_____

UM/UIM MEDPAY Company:_____ Agent:_____

Address:_____

Claim No.:_____ Policy No.:_____

Medpay Limits:_____ UM/UIM Limits:_____

Collision:_____ Deductible:_____

****

SECONDARY Insured:_____

Adjuster:_____ Phone:_____

UM/UIM MEDPAY Company:_____ Agent:_____

Address:_____

Claim No.:_____ Policy No.:_____

Medpay Limits:_____ UM/UIM Limits:_____

FIGURE 4–1 (Continued)

****
INJURIES:_____
MEDICALS: Ambulance:_____ Hospital:_____
Doctors:_____
_____
Prescription Drugs:_____
LOST WAGES: Employer_____
Address:_____
LOST TIME:_____ RATE/PAY:_____
MISCELLANEOUS LOSSES:_____
PRIOR INJURIES:_____
PRIOR ACCIDENTS:_____
PROPERTY DAMAGE:_____
_____

demeanor and delivery and make notes for reference in trial preparation. For instance, if a client hesitates inordinately before responding to questions, you should point this out, because a halting witness is less credible than one who answers promptly. The information on the client's background can also help you assess the client's credibility as a witness. A person who has been a police officer for seven years will be more credible to a jury than will a person who has been a drug dealer.

It is also necessary to question the client about possible defenses that may be raised. For instance, in the Wesser case, the lawyer can be sure that the defendants will assert the defense of contributory negligence. They will claim that Mr. Wesser misused the electric blanket by folding it, tucking it in, or leaving objects on top of it, contrary to the written warnings in the package when the blanket was purchased. Thus the attorney-paralegal team must find out whether Mr. Wesser did anything to affect the condition of the blanket.

Another important topic to cover with clients is whether there are witnesses to the matters in question. There may be all sorts of potential witnesses, depending on the nature of the case. Compare the Wesser case and the Chattooga case. In the Wesser case, there were no eyewitnesses to the outbreak of the fire except Mr. Wesser, who was at home alone. In the Chattooga case, however, there are many witnesses who can testify about the events in question. If you interview Sandy Ford, she can tell you the name of the employee whom she helped to file a claim with the Equal Employment Opportunity Commission against Chattooga Corporation. She can tell you the name of her supervisor, the human resources personnel involved in her hiring and termination, and other employees who may have knowledge of the events surrounding her termination. If Chattooga Corporation is your client,

you can find out from Sandy Ford's supervisor and human resources personnel the same basic information about persons with knowledge of the events surrounding Sandy Ford's termination.

Subsequent Client Interviews

As the attorney-paralegal team develops the case, more information will be needed from clients. Although attorneys are present at initial client interviews, paralegals may conduct subsequent client interviews by themselves. Paralegals may need to interview clients to obtain more information to answer interrogatories or to prepare for depositions. Often pretrial motions, such as motions for summary judgment, are supported by affidavits signed by clients. Paralegals may meet with clients to review a draft of an affidavit, make any necessary corrections, and have the client sign the final affidavit.

SIDEBAR When a client comes in to sign a document that requires a notarized signature, such as an affidavit, ensure that a notary is available in your office. In a large office, this may not be a problem; however, if a client suggests dropping by during the lunch hour to sign a document, check first to be sure that at least one of your firm's notaries will be in the office.

As trial approaches or as settlement becomes imminent, contact between paralegals and clients increases. As paralegals continue the informal investigation of a case, they interview people other than clients, such as potential witnesses. Regardless of the person being interviewed, the subject matter, or the timing of an interview, there are certain interview techniques that always apply.

CONDUCTING INTERVIEWS

It is difficult to specify all the skills that make a good interviewer. You need only listen to the radio or watch television to observe that there are some interviewers to whom people will talk willingly and openly, while other interviewers make people feel hesitant to open up, even about small matters. Most interviewers fall somewhere in between the two extremes of this spectrum. Regardless of where you are on the spectrum, you can acquire certain interview skills that will enhance your ability to gather information from other people.

The Interview Setting

Paralegals may not always be able to choose the setting for an interview, particularly when interviewing potential witnesses. With clients, however, and with many witnesses, paralegals may choose the setting. Most often the interview takes place in the law firm, either in the paralegal's office or in a small conference room. Conduct the interview in a friendly, private setting.

SIDEBAR Throughout the remainder of this section on conducting interviews, the discussion will focus on clients, unless otherwise specified. The general points, however, are equally applicable to witness interviews.

Go to the lobby and greet the client, then proceed to the office or conference room where you will conduct the interview. Do not linger in public areas where there is the potential for other people to overhear the exchange of confidential information. Sit facing the client, but not so close that you make the person uncomfortable. Do not, however, sit too far away, such as at the other end of a long conference table. This would make you appear distant and even confrontational. The last thing you want to do is make a client uncomfortable. An uncomfortable person is an unwilling participant in an interview.

Putting the Client at Ease

Many clients and witnesses who come to your law firm for an interview will be nervous. Clients are nervous because they already have a problem of sufficient import to require the attorney-paralegal team's help. Witnesses may be nervous because they fear the consequences of "getting involved." They may be concerned that they will have to testify in court. This alone makes most people nervous. If they also fear losing time from work, they may be not only anxious but also resentful.

To help put the client at ease, explain your role as a paralegal at the outset. Make certain that the client knows that your role is to gather information, and not to give legal advice. Remember, some people may not even be familiar with the terms *legal assistant* or *paralegal*. Explain to clients that the information they share with you is confidential. The attorney should explain the attorney-client privilege at the initial interview; however, it does not hurt to remind clients of it so that they are more willing to share potentially embarrassing information.

If it is your firm's policy to make coffee or soft drinks available, offer them to the client. Establish a rapport by giving the client your full attention and being pleasant. Contrary to some popular notions, many successful attorneys and paralegals do smile.

Help the client to relax. Remember that you are comfortable in the law firm setting, and even in court where most people become nervous beyond description, but many people whom you interview have never set foot in a law firm or a courtroom. Their only images of these settings may be the sometimes inaccurate depictions seen on television. In trying to understand just how nervous the client may be, there is no substitute for empathy. Put yourself in the other person's shoes. For instance, you may recall how nervous you were the first time you went to a law firm for a job interview.

Communication and Listening Skills

Making the client feel comfortable in a law office setting is part of good communication skills. Your tone of voice can help the client feel at ease. A harsh voice can make you sound unsympathetic, if not impolite.

Paralegals must use simple and direct language. If you try to impress clients with "legalese," not only will they question your ability to use the English language, but they may think you are trying to be tricky or evasive. Communicate in plain English. If you must use a legal term, explain its meaning. Remember the first time someone dropped the term *res ipsa loquitur* and then walked away without an explanation. You probably felt resentful at best. Consider also the background and educational level of the client. You will need to spend less time explaining contributory negligence to Mr. Wesser if he has a degree in electrical engineering than if he dropped out of school in the eighth grade.

There may be special considerations with communication in certain types of cases. Suppose that a client wishes to sue the Immigration and Naturalization Service. This client may have been in the United States for only a short while and may have little command of the English language. In fact, there are times when you will need to arrange for an interpreter to be present.

Interruptions impede all interviews. In addition to ensuring that the receptionist sends through no phone calls, let your support staff know that you will be busy with an interview so that no one will knock on your door. Be careful not to interrupt clients too often as they speak. Some people have a tendency to interject untimely questions and jump in and finish other people's sentences. Not only is this annoying, but it also makes clients quieter and quieter, even to the point that they become uncommunicative.

Listening is an important communication skill. Paralegals should be attentive to both verbal and nonverbal responses. Eye contact is important. Not only does it show that you are paying attention, but it also enables you to observe facial expressions that may import meaning, such as a frown or an expression of great hesitancy. Paralegals should be familiar with the technique of *active listening*, which involves listening and observing attentively and giving appropriate feedback to ensure the client that you are listening intently. For instance, if a client gives a description of some event and then pauses, you may say, "I understand. Please go on." Developing good communication skills and improving them throughout your career will make you a good interviewer.

Types of Questions to Ask

One common approach to interviews is to start with a general question that allows clients to tell their stories in their own words. Your first question may simply be "What happened?" There are several advantages to allowing clients to tell their stories in an open-ended manner.

There is more than a little psychology involved in being a lawyer or a paralegal. Attorneys and paralegals alike should understand that people communicate by telling stories. A lawyer who makes an effective closing argument is a lawyer who can weave together a good story. The same is true with effective writing, even in memoranda of law in support of motions. A judge is more likely to be interested in and sympathetic to a case when the facts make an interesting story. Further, people have a need to tell their stories when they feel that they have been wronged. An interview near the beginning of the case is the best time

to let clients tell their stories. There may not be sufficient time in the initial client interview, in light of certain facts that have to be gathered at the outset, but remember that clients who feel they have not had the opportunity to tell their stories fully will not be happy clients.

Paralegals cannot, however, give clients unfettered rein to ramble on for hours at a time. It is possible to direct the rendering of even the most heartfelt story with some well-placed questions. You may be able to steer clients by asking about particular facts. Suppose that Mr. Wesser starts talking at length about how his neighbor, who does not like him, should have seen the smoke from his house, called the fire department immediately, and come over to help put out the fire. Mr. Wesser begins a lengthy explanation of why he and his neighbor do not get along. You may intervene by asking questions such as whether the neighbor told Mr. Wesser the time that he saw the blaze and what he observed. Not only will you get Mr. Wesser back on track, but you also will begin to determine whether the neighbor is a potential witness.

After a client gives a narrative of events, a paralegal may then ask specific questions and establish the precise events in chronological order. Strive to gather all the information you need at this point in the lawsuit. Clients have less confidence in attorneys and paralegals who follow up with repeated phone calls to find out "one more thing" that they meant to ask. Additional information will be needed as the attorney-paralegal team develops the case, but the well-organized team will not have to pelt clients with unnecessary and ill-timed questions.

Flexibility

Although paralegals may work with a checklist to ensure that they gather all the pertinent facts, they must be mindful that they are not tied to the order or the content of a checklist. The checklist is a method for remembering important questions, not a rigid format. If paralegals insist on interrupting too often and guiding the client too closely, they will fail to discover important information. Flexibility is an important attribute for paralegals, both in interviews and throughout the litigation process.

The paralegal is involved in gathering all the facts necessary to develop the case. Once the initial facts are gathered from the client, the paralegal pursues all other avenues for obtaining information. First, it is necessary to organize the information already obtained. This involves opening and organizing the new file.

OPENING AND ORGANIZING FILES

Every law firm has its own system for opening new client files and organizing the materials kept in those files. The text discusses the general principles that apply to file opening and organization, and you can apply them to the system in your law firm. (Note that this chapter discusses how to set up files, and Chapter 9 looks at systems for retrieving filed materials.) The underlying principle in both setup and retrieval is that attorneys and paralegals must be able to find the documents in their files quickly. Fast and accurate document retrieval is

especially important in litigation, where you must be able at all times to locate documents immediately, especially during depositions and trials.

Opening Files

Because every law firm has its own procedures for opening files, the discussion of the opening of files is general. Let it serve as a useful background for learning your firm's system.

Master List of Files. When a law firm undertakes representation in a new matter, the common procedure is for the case to be assigned to a lawyer who will be responsible for all aspects of that case. Usually the case is also assigned at the outset to a paralegal who will remain responsible for paralegal duties for the duration of the case. The responsible lawyer and responsible paralegal must maintain close communication. Therefore, it is imperative that each keep a master list of the files assigned to them.

When a new file is assigned to you, you should immediately add that file to your master list, which must be updated regularly. Your master list should include the name of the file, the name of the responsible attorney, and the general status of the file. You and the responsible attorney should review together the status of your files at least once a month. At your meetings, you can review the files and the specific tasks that need to be performed. As you keep track of your files, remember the docket control techniques discussed in Chapter 1.

Case Opening Sheets. Every time a file is opened, a *case opening sheet* is completed. It contains basic information that you will need throughout the course of litigation. Most of the information needed to complete the sheet will be available to you by the completion of the initial client conference, with one exception. At the time the file is opened, the name of the opposing party's attorney may not be known. When you represent the plaintiff, for example, as in the Wesser case, you may not know at the outset who will represent the defendants unless the parties' attorneys have held discussions prior to the filing of the lawsuit. Compare this situation to the Chattooga case, where the names of opposing counsel are known to Chattooga Corporation from the summons and complaint.

Figure 4–2 illustrates the case opening sheet in the Wesser case. Some law firms may include more or less information, but this example illustrates the basic information usually necessary to open a file. First is the file number. This is the number assigned for use in the law firm's filing system. Do not confuse it with the file number assigned by the clerk of court when a lawsuit is commenced. Some law firms use file numbers that include the year in which a file was opened and a designation to indicate the subject matter of the litigation. For example, a file opened in 1996 where the subject matter concerns immigration law may be designated as file 96-0423-I.

The next pieces of information needed are simply the name, address, and phone number of your client and of the opposing party. Note, in the example, that there is also a category of information called client contact. You may not always contact the clients themselves. For instance, when the client is a

FIGURE 4–2 Case Opening Sheet

File No.: 96-1235-L **Client:** Bryson Wesser	**Opposing Party:** Woodall Shoals Corporation and Second Ledge Stores, Incorporated
Client Information **Address:** 115 Pipestem Dr. Charlotte, North Carolina 28226 **Client Contact** **Address:** Same	**Phone:** (704) 555-1933 **Phone:**
Opposing Party Woodall Shoals Corporation and Second Ledge Stores, Incorporated **Address:** 300 West Blvd. New York, NY 10019-0987	**Phone:** (212) 555-3100 (WS) 250 E. 88th St. (212) 555-9263 (SL) New York, NY 10019-3521
Opposing Lawyer **Address:**	**Phone:**
Responsible Lawyer: Leigh J. Heyward	**Responsible Paralegal:** Christina Anderson
Date File Opened: December 4, 1995	**Date File Closed:**
Fee Agreement: Contingent—25%	
Referred by: Michael Buchanan	**Attorney who brought case in:** Leigh J. Heyward

corporation, you will insert the name of the contact at the corporation, such as the president or human resources manager. Next are the name, address, and phone number of the attorney for the opposing party. As mentioned earlier, you may not always know who the opposing attorney is when the file is opened, but you should know as soon as the defendant retains counsel.

The next designations on the case opening sheet are the names of the attorney and the paralegal responsible for the case, followed by the date the file was opened. When the lawsuit is over and the file is closed, the date of closing is noted.

The example in Figure 4–2 also contains a designation of the fee agreement. The arrangement may be for a contingent fee—that is, a certain percentage of the amount the client recovers. This is the arrangement in the illustration

for Mr. Wesser's personal injury lawsuit. As discussed in Chapter 1, another common fee arrangement is the hourly rate, which would most likely be the fee arrangement used in the Chattooga case for the defense of Chattooga Corporation.

Finally, you enter the name of the person who referred the case to the law firm. The referral may have come from a friend of the client or from another attorney who does not handle this type of case. The "attorney who brought case in" in the example refers to the attorney to whom the case was referred, which is not necessarily the attorney responsible for the case. For instance, in the Chattooga case, if the attorney who received the initial inquiry was an attorney who does only corporate law and no litigation, the case would have been assigned to an attorney who regularly litigates.

After the case opening file is completed, it is usually routed to a clerk, secretary, or bookkeeper, who enters the information into the firm's bookkeeping system so that billing information can be kept up to date. The case opening sheet may also be placed in a master litigation notebook and in a notebook used to track the statute of limitations for all pending cases. The procedures vary among law firms. Usually the information is entered by computer so that in addition to having the information for billing purposes, the information is in the system for docket control and for screening potential conflicts of interest. One very common step, after the case opening sheet is completed, is for a clerk to prepare an index card with the basic information about the parties involved. Many firms keep this manual system in addition to their computer system. See Figure 4–3 for an example of the card made for the Wesser case.

SIDEBAR Note that on the Wesser index card, the corporate addresses for the defendants are used. This is because at the time the file was opened, the name of counsel for

FIGURE 4-3 Sample File Card

Our File No.: 96-1235-L
Client:
Bryson Wesser

Address:
115 Pipestem Dr.
Charlotte, North Carolina 28226

Date opened:
December 4, 1995

Adverse Party:
Woodall Shoals Corporation and
Second Ledge Stores, Incorporated
Address:
Woodall:
300 West Blvd.
New York, NY 10019-0987
Second Ledge:
250 E. 88th St.
New York, NY 10019-3521

the defendants was not yet known. Once the name and address of counsel for the defendants are known, you should prepare for the file a master list for service of documents. Remember that after the complaint is filed, subsequent pleadings and motions are served on all parties by mailing them to the parties' attorneys. A master list of the proper names and addresses is particularly important when there are numerous parties to the lawsuit.

Other Documents in Newly Opened Files. Be sure that all documents are put in the newly opened file immediately. There may not be many documents initially. Usually attorneys and clients enter a written fee agreement, which should be ready when the file is opened. Notes and memoranda regarding the information obtained at the initial client conference will be ready to go in the file. You may have obtained important documents from the client that are ready to be filed, such as contracts or correspondence with adverse parties. Other documents will follow quickly, so the file must be organized at the outset.

Organizing Files

Files may be organized in different ways, depending largely on the complexity of the litigation. A file for a simple collections matter will not be as large as the file for a complex product liability case; therefore, it may be organized more simply. The key to file organization is to ensure that any single document can be found easily. The organization of a file may have to be modified during the course of the litigation, as more documents accumulate.

Mechanics of Setting Up Files and Subfiles. The basic organizational units are similar in most files. The main file is labeled by file number and/or client name. Because a file soon grows too cumbersome if all documents are lumped together in one big folder arranged, for instance, in chronological order, the main file must be subdivided into smaller categories. Therefore, within the main file are a number of smaller files called "subfiles" or "working files." The types of subfile categories listed in the following text are typical in litigation.

Use a rigid jacket to enclose the subfiles, which should be self-contained in manila folders or clipped together with a cover sheet indicating the subfile category. Careful labeling and indexing are crucial.

Subfile Categories. The subfiles in a litigation file will vary somewhat, depending on the complexity of the litigation. The following categories suggest typical subfiles in a litigation file.

1. *Court papers.* Court papers are the documents filed with the court that are exchanged between and among the parties. This category includes the pleadings—complaint, answer, counterclaim, and the like. Motions, together with supporting documentation, also belong in this subfile.[1] (This subfile may include discovery materials if they are required to be filed with the court. In most cases, however, it is better to maintain a separate subfile for discovery materials.)

Within the subfile for court papers, documents usually are arranged in chronological order, particularly the pleadings, which need to be in chronological order to follow the progression of the litigation. This subfile also contains the orders and judgment entered by the court, together with any judicial opinions, as well as consent orders and stipulations.

SIDEBAR This section discusses only the subfiles typically set up at the beginning of the litigation. As the litigation progresses, you will develop further subfiles. You may develop subfiles by names of witnesses or by issues. You may have some discovery materials that are so lengthy, such as depositions, that they require their own subfiles. Remember that the key is easy retrieval of documents. See Chapter 9 for further discussion of document retrieval.

2. *Correspondence with court and counsel.* This subfile includes letters to the court. Usually these are general cover letters stating the documents being submitted to the court. Correspondence with counsel for all parties also belongs in this subfile. These letters generally reflect information exchanged between counsel and settlement discussions. Correspondence is arranged in chronological order.

3. *Correspondence.* In simple cases, *all* correspondence may be in this file, but when a case is complex and its file large, it may be best to separate the correspondence with the court and counsel from other correspondence. General correspondence includes correspondence with the client, the witnesses, insurance carriers, hospitals and doctors to obtain medical records, and a host of other persons involved in the litigation.

General correspondence is usually arranged in chronological order. If litigation is protracted over the course of several years, the subfiles may need to be further subdivided by year and even by person. A subfile may be labeled "Correspondence/Lee Smith," for instance, or "Correspondence/1990–1997."

4. *File memoranda.* In the course of litigation, you and the attorneys on your team will write many memoranda to the file. Paralegals write memoranda relating information to the attorney, such as synopses of initial witness interviews or the contents of telephone conversations with the client. Attorneys write memoranda to paralegals outlining information they want the paralegals to gather. Attorneys also write memoranda to the file, often to record facts from a conversation with a client or opposing counsel.

5. *Legal research.* This subfile may include memoranda summarizing legal research. It may also include copies of judicial opinions pertaining to the legal issues in the litigation. In a very complex case, the legal research working file may need to be further subdivided into specific legal issues.

6. *Memoranda of law.* The memoranda of law, or briefs, submitted to the court during the litigation may be lengthy and thus require a separate subfile. In simpler cases, the memoranda of law may be included with court documents.

7. *Discovery*. Discovery materials may be filed a number of ways, depending on their bulk. As noted earlier, if you are in a jurisdiction that requires that discovery materials be filed with the court, the discovery documents may be routed to the court documents subfile. When extensive discovery documents are involved, however, further subdivisions are usually necessary. For instance, when the parties exchange lengthy interrogatories, you may need subfiles for each one. Thus a subfile may be labeled "Plaintiff 's Second Set of Interrogatories to Defendant Woodall Shoals—6/5/96." See Chapter 9 for further discussion of document retrieval from discovery documents.

8. *Lawyer's notes*. This subfile will contain the lawyer's notes, usually handwritten, concerning legal and factual research. It may also contain the lawyer's outlines of important documents or oral arguments.

9. *News clippings*. This subfile is important for cases that generate publicity. Some cases generate enough press coverage that clippings can provide information about events that gave rise to the lawsuit and about the parties in the case.

10. *Billing matters*. There may be a subfile for documents related to billing the client, especially if the law firm uses a timekeeping method that involves tearing time slips off a master sheet each day and submitting them for computer entry. Even after the computer entries are made, the slips are often retained. Copies of billing statements to the client also may be kept in this subfile.

Indexing Files

A good index is crucial to quick and accurate document retrieval. The purpose of the index is to keep a record of the subfile in which a document can be located. In simple lawsuits, one index at the front of the file may be sufficient, but in more complex cases, the subfiles themselves can become so large as to require an index for each subfile.

The index may appear in different places in different files. It may be placed in the inside front cover of a folder. A common method for arranging pleadings is in groups of about twenty-five documents, either in a subfile or a binder, with an index placed on top. Each pleading in the group can be flagged with a separate numbered tab, which can be referenced along with the document name in the index.

The index must describe the documents very specifically. Instead of entering a document simply as "Defendant's Answers to Interrogatories," for instance, call it "Defendant Woodall Shoals's Answers to Plaintiff 's Second Set of Interrogatories."

Central Files and Working Files

Because of the large number of documents in a file and the large number of persons using the file, many law offices keep the original of each document in a central file area. The original documents generated and received in a lawsuit are stored in the central file and cannot be removed from the central file area without formally checking them out. Employees are encouraged to make a copy

of a document rather than remove it from the central file area. This reduces the dreaded risk of losing an original document.

With a central file system, when an original document arrives, a copy is made immediately and placed in the working file for that case. The lawyers and paralegals use the working file for their daily activities on the case. This way they can make notations on the documents when necessary and avoid the risk of losing an original document. The organization of and indexes for the central file and the working file should be uniform.

CONTINUING THE INFORMAL INVESTIGATION

Assume that your attorney-paralegal team has conducted sufficient legal research to determine the bases for Mr. Wesser's lawsuit. You have reviewed the applicable statutes and case law for a product liability case. You know that Mr. Wesser has three basic grounds for his claim: negligence, breach of express warranty, and breach of implied warranty. You will assert these grounds against the manufacturer of the blanket, Woodall Shoals, and the seller, Second Ledge. Now you must determine whether the facts support the legal theories on which you wish to base Mr. Wesser's claims.

Organizing the Informal Investigation

Before you begin interviewing witnesses and gathering extensive documentation, it is crucial to organize your investigation. You must determine the facts your client must prove and identify all the defendants against whom you will assert claims.

Determine the Facts Your Client Must Prove. Before the commencement of a lawsuit, it is imperative that you determine through informal investigation whether you can gather enough evidence to prove Mr. Wesser's claims. You have already researched the substantive law of negligence, breach of express warranty, and breach of implied warranty. From your research, you determine the ***essential elements*** of each claim. An essential element is a fact that the law requires to exist in order to establish a particular cause of action. To establish a cause of action against Woodall Shoals based on express warranty, you must establish these essential elements: that Woodall Shoals made an express warranty that the blanket would remain free of electrical and mechanical defects for a certain period of time and that the fire occurred within the warranted period; that the blanket contained electrical and mechanical defects that caused it to ignite; and that this breach of express warranty caused the injuries and property damage sustained by Mr. Wesser.

You must also establish that the facts support a claim for breach of express warranty by Second Ledge and for breach of implied warranty and negligence by both Woodall Shoals and Second Ledge. You may find it helpful to make a chart showing the bases for your claims against all defendants. See Figure 4–4 for an example. The chart for the Wesser case is fairly simple because there are only two defendants, and the bases for the claims are the same. However, you

FIGURE 4-4 Bases For Claims

Defendant #1
Woodall Shoals Corporation
1. Breach of express warranty
2. Breach of implied warranty of merchantability
3. Negligence in design and manufacture

Defendant #2
Second Ledge Stores, Incorporated
1. Breach of express warranty
2. Breach of implied warranty of merchantability
3. Negligence in inspection and failure to warn

may encounter more complex litigation with numerous defendants and several claims, with some claims asserted against some defendants but not others. In such an instance, a chart becomes indispensable.

Identify All Defendants. In the initial client interview, Ms. Heyward was able to ascertain the identity of both defendants in the Wesser case. Mr. Wesser knew the store at which he purchased the blanket and had his receipt. He also had the warranty that came with the blanket when he purchased it. The investigation is greatly simplified by the fact that these important documents were not destroyed in the fire.

The determination of all parties to join as defendants, however, is not always so simple, particularly when the defendants are corporate entities. It is important to name the corporate defendant correctly. Many corporate entities are subdivisions of other corporations, and the names can be confusing. Some preliminary investigation may be necessary just to name the proper defendants. There are many sources for this information. The office of the secretary of state for the relevant state may be able to provide the information. Directories of corporations are available in public and university libraries.

It is important to join all parties necessary to resolve the dispute entirely. The Federal Rules of Civil Procedure seek to resolve in one lawsuit all claims arising out of the same transaction or occurrence. This is why the rules allow defendants to assert counterclaims and codefendants to assert cross-claims, as explained in Chapter 6. Rule 19 of the Federal Rules of Civil Procedure has the same goal. It provides that "those who are united in interest must be joined as plaintiffs or defendants. . . ." FRCivP 19 also allows the court to summon parties to appear in the action when a complete determination cannot be made without their presence.

The Federal Rules of Civil Procedure also allow the court to drop from the action a party that is not properly joined in the lawsuit. FRCivP 21 states that "on such terms as are just parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action." Thus, it is

important that you name the proper defendants. If you join the wrong party, you will incur delay and expense as a result of the motions and arguments as to whether that entity is a proper party to the action.

Consider the Rules of Evidence. As noted in Chapter 3, the attorney makes the final decision on objections to the admission of evidence. However, it is important for paralegals to consider the rules of evidence throughout the litigation process, even at this early stage. You may come across some evidence that is clearly protected by a privilege. You may find some evidence that does not appear to be relevant. You will not want to waste time on evidence that clearly cannot be used.

Bear in mind that when you encounter evidence that you think may not be admissible, you should discuss the matter with the attorney before abandoning that route of investigation. The attorney may know of an exception that would make the evidence admissible. Even if the evidence is not admissible, the attorney may want to pursue the avenue of investigation in the hope that it will lead to other evidence that is admissible.

Sources of Information

When you investigate the facts of a case, the sources of information are limited only by your imagination. Your first and most obvious source is your client, who can tell you many facts and provide you with important documents. From there the sources of information depend to some degree on the type of case you are investigating. For instance, in an automobile accident case, you will obtain police reports and records from the Department of Motor Vehicles, interview witnesses, visit the scene of the accident, obtain emergency room and hospital records, and perhaps obtain an official weather report from the United States Weather Bureau.

In different types of litigation, your evidence will come from different sources. If a case involves the division of marital property in connection with a divorce, for instance, your goal will be to identify and determine the value of the marital assets. Thus the evidence you gather in a property division case will be quite different from the evidence in a case involving a car accident, where you will seek to determine who caused the event. In the property division case, you will gather data and analyze the parties' bank accounts, credit cards, and other financial records, and you will investigate the salaries and education of the parties and analyze business records if either is self-employed. You will obtain appraisals of real estate and valuations of personal property.

Although the sources of information can vary from case to case, three sources serve as a starting point in most cases: the client, witnesses, and physical and documentary evidence.[2] And in many cases, including products liability cases, there is an important fourth source: expert witnesses. An expert witness, as we noted in Chapter 3, is one whose scientific, technical, or specialized knowledge can help persons without such knowledge to understand and form a conclusion about a technical fact in issue.

A chart of the facts you must prove and the sources for obtaining those facts can be useful. Refer to Figure 4–5, which concerns proving the claim based on breach of express warranty by Woodall Shoals in the Wesser case. The chart has three headings: elements of the claim, sources of information, and method of obtaining information. When you set out your evidence in a simple form like this, any lack of evidence to support a particular element of your claim becomes very clear. Examine Figure 4–5 and you see that the Wesser case involves evidence obtained from the three major sources—the client, witnesses, and physical and documentary evidence. The Wesser case also involves expert witnesses, which is typical of a products liability case.

FIGURE 4–5 Chart of Facts to Prove

Woodall Shoals: Express Warranty

Elements of Claim	Sources of Information	Method of Obtaining Information
1. Woodall Shoals made express warranty that blanket would be free of defects for two years from date of purchase	Written warranty that came with blanket	Obtain from Mr. Wesser
2. Electric blanket had defects, which constitutes breach of warranty	Fire inspector Fire inspector's report Remains of blanket and control Inspection of scene Testing and testimony of expert witnesses	Interview Request by letter Obtain from Mr. Wesser Go to scene Retain expert witnesses
3. Defects caused Mr. Wesser's damages	Same as #2	

Clients. Clients are generally the principal witnesses in their own cases and are the starting point for obtaining information through informal investigation. The types of information that the attorney-paralegal team needs to obtain from clients, together with the mechanics of conducting interviews, has been covered in the preceding text. The discussion of interview skills in regard to the client is equally applicable to interviews of other potential witnesses.

Other Witnesses. Once you have determined the identity of some prospective witnesses, it is time to plan interviews with them. Careful preparation for witness interviews is crucial. Consider the type of information you need from each one.

You are still in the initial investigation stage, and you are seeking information about what happened and who was involved.

Locating Witnesses. Unlike clients, other witnesses generally do not seek out the attorney-paralegal team. In fact, witnesses may go to great lengths to avoid talking to attorneys and paralegals. Paralegals must first identify and locate potential witnesses. The first source for this information is the client. For instance, Mr. Wesser can recall any other people who were present at the scene of the fire, if he knows their names. Mostly likely he will not, however, remember the name of any of the firefighters who came to his house. He may remember the name of the fire inspector. If he is unable to remember, this name is not difficult to track down. Simply telephone the local fire department and ask for the name of the fire inspector who prepared the report on Mr. Wesser's house fire. If you do not know the procedure, simply ask.

SIDEBAR Much information is available from local, state, and federal government agencies. One task for paralegals is to find out the agency's procedures for obtaining information if no one else in the law firm knows. Some agencies have their own authorization forms that must be used. Others may require the client's signature for release of information due to requirements of the Privacy Act or some other statute or ordinance. A cooperative, nonadversarial approach is best for approaching government agencies.

There are different sources for locating witnesses for different types of lawsuits. For instance, when injuries result from an automobile accident, the police report is the first source to check for names. The accident may have generated a newspaper article that will yield additional names and information.

In lawsuits involving employment issues, such as the Chattooga case, the client can provide the names of supervisors and other employees who are potential witnesses. In cases that involve violations of government agency regulations, such as illegal disposal of hazardous waste, contact the agency involved. In this instance, the paralegal would contact the Environmental Protection Agency (EPA), together with any state or local agencies that share the EPA's enforcement responsibilities. These are just a few examples of sources for locating potential witnesses. Paralegals should consult with their supervising attorneys and other paralegals who may have handled similar cases before.

Interviewing Witnesses. The interview techniques discussed in the context of client interviews apply equally to witness interviews. The main difference between client and witness interviews is the willingness of the interviewee to talk. Potential witnesses are frequently hesitant to get involved with the litigation.

Arranging witness interviews may be more difficult than scheduling client interviews because of the hesitancy of the witnesses. Some witnesses may seek to avoid you, while others may be openly hostile because their sympathies lie with

the other side. If a witness does not want to meet with you, you may have to surprise the witness with a visit at home or after work. Remember that the witness has no obligation to talk with you, and you can arrange a deposition during the discovery phase if the witness is unwilling to talk. The witness may be more willing to talk if you promise to the keep the interview short, which is another reason to plan your questions beforehand.[3]

SIDEBAR Remember that ethical considerations pertain to talking with witnesses. If a person is represented by counsel, you must obtain counsel's consent to talk with that person. If the person is unrepresented, the attorney-paralegal team has an ethical obligation to inform the person of the attorney's interest in the case and/or to advise the person to obtain counsel.

Usually you will have a general idea of what a witness knows. For instance, you may know that Sandy Ford's supervisor told her in the employment interview the importance of being able to gain security clearance to enter nuclear power plants. You should consider the specific information you need from this witness. For example, you may elicit the details of Ford's statements regarding her criminal record, both before and after the discovery of her felony conviction. You may ask about the supervisor's knowledge of the claim filed with the EEOC by Ford's friend, including the names of other persons with knowledge of these events.

As you interview the initial witnesses, try to ascertain the names of others who are familiar with the events of the case. One method for eliciting witnesses' full knowledge is to let them tell everything they know, in their own words, before asking very specific questions. This may lead to new evidence and additional witnesses you would not otherwise learn about. Allowing a witness to ramble a bit may prove to be time well spent.

As you do with clients, obtain information about the witness's personal background—occupation, residence, family. This will help you assess how effective the witness is likely to be. Someone described as an excellent potential witness may turn out to be such an excessive talker that you decide against calling him or her to testify.

Paralegals will often need to prepare more thoroughly for witness interviews than for client interviews. You should ascertain before the interview what facts the witness might know and then direct your questions to elicit more specific information. As with clients, you may first let witnesses tell the story in their own words, and then ask more specific questions. However, you may encounter witnesses who are unwilling to share much information, so be prepared to drag the information out with a series of questions. Witnesses generally are not as willing as clients to grant subsequent interviews, so you may be forced to elicit the information in one short session. Preparation is very important. Flexibility is also important in witness interviews, because it is more difficult to predict how a witness will respond to questioning.

Preserving Information from the Interview. For several reasons, it is important to preserve the information you gain in any interview. You cannot expect to remember indefinitely everything each person tells you, and as you prepare for discovery and trial, you will need to review their prior statements. You may need exact statements to impeach the testimony of those who change their versions of the facts later.

When paralegals interview without attorneys present, they must be able to pass the information on to the attorneys. There are several methods to preserve the contents of an interview. You may actually tape-record a person's statements, but you must obtain the person's permission beforehand or the recording may not be admissible in evidence. You may take notes during the interview, but this is advisable only if the attorney is doing the actual questioning. If you are questioning the person and taking notes at the same time, you may lose your rapport. If you cannot take notes during the interview, you may make notes directly after the interview. You may take a dictaphone with you and dictate a memo. Whatever method you use, record your notes immediately after the interview, or you may forget crucial information.

Another method is to have the witness sign a statement. In some instances, a witness may write out and sign a short statement during the interview. Another approach is to send the witness a letter recounting the statements made and request that the witness sign an acknowledgment at the bottom of the letter, signifying that the letter accurately reflects the statements made.

Expert Witnesses. Expert witnesses are not necessary in every type of case. For instance, in a case involving an automobile accident where the issue is whether the light was red or green, you do not need an expert witness to make that determination. A person who just happened to be standing near the intersection when the accident occurred can tell a jury what color the light was. Compare this case with one involving an automobile accident in which only one car was involved where the issue is whether the car was negligently designed. This issue calls for a conclusion by a person with specialized knowledge and experience in such matters as automobile design, metallurgy, and accident reconstruction.

Expert witnesses are almost always used in lawsuits involving products liability and medical malpractice, as well as in other types of lawsuits involving negligence. Expert witnesses are important to establish that a product had defects and that the defects caused a person's damages. This is true in the Wesser case. As the outline of evidence in Figure 4–5 shows, an expert witness will be used to establish that the electric blanket had defects during the period that it was still under warranty and that these defects caused the damages suffered by Mr. Wesser in the fire in his house.

How to Locate Expert Witnesses. The attorney determines whether expert witnesses will be used in a particular lawsuit. Paralegals often help to locate appropriate experts. There are numerous ways to locate expert witnesses. First, find out whether the attorney on your team prefers any particular expert. If not, check with other litigators in the firm to see whether they know of any appropriate

experts. If no one in your firm knows an appropriate expert, ask litigators in other law firms.

If no one has personal knowledge of an expert you can use, there remain many ways to locate one. Many trial lawyer associations, such as the American Trial Lawyers Association, have directories and information about experts. There are numerous publications and directories in libraries. You may consult the Technical Advisory Service for Attorneys (TASA), an organization that maintains references for experts. Local universities may have faculty with expertise in the type of issue in your case.

Professional publications such as bar association newsletters and the *ABA Journal* contain advertisements for expert witnesses. You will find it interesting to scan the ads to get an idea of the various types of expert witnesses available. Experts are available for subjects ranging from aquatic safety to vehicle crashworthiness.

Consider the types of expert witnesses that may be helpful in the Wesser case. An expert on electrical wiring and malfunctions could help establish that a defect in the electric blanket caused the fire. An expert who analyzes the readability of warning labels may be useful to examine the warnings that accompanied the blanket. A neurologist may analyze the physical aspects of Mr. Wesser's pain and suffering, and a plastic surgeon may testify about surgical procedures on scar tissue that may be necessary in the future. A rehabilitation expert may be useful to discuss the requirements and cost of therapy. Mr. Wesser's treating physicians also may be able to provide opinions about these matters.

SIDEBAR The discussion focuses on finding expert witnesses to testify at trial, but it is often advisable to have an expert review a case even before the attorney decides to undertake representation. This is particularly true with complex cases, especially ones that involve issues with which the attorney has not dealt before.

Physical and Documentary Evidence. In addition to testimony of witnesses, a wide array of other types of evidence may be necessary to prove the client's claim. The types of physical and documentary evidence you use depend upon the nature of the lawsuit. In litigation concerning a breach of contract, for instance, the contract itself is a crucial piece of evidence. In an action to collect on a promissory note, you need the promissory note with the debtor's original signature. You also need records of how much the debtor paid on the note and how much is still owed. The lender can provide accounting records to establish the amount paid. You may obtain the debtor's canceled checks, although you may need to do this through the formal discovery process because the debtor is an adverse party and may not be willing to cooperate initially.

SIDEBAR For most lawsuits, you cannot obtain all the documents you need in the informal investigation stage, especially documents in the possession of an adverse party. However, you usually can obtain the documents through formal discovery procedures later in the litigation process.

Documentary evidence is very important in personal injury litigation, both to establish liability and to determine the client's damages. Consider the Wesser case. One crucial document is the written warranty that came with the blanket. Reports on any tests conducted to find defects in the electric blanket are important. Tests also may show that Mr. Wesser damaged the blanket and was negligent. The written report of the fire inspector is an important piece of evidence to help establish liability because the inspector may state an opinion about the cause of the fire.

Documentary evidence is crucial to establish the amount of the damages in a personal injury lawsuit. Reports and office notes of Mr. Wesser's treating physicians help to establish the extent of his injuries, including pain and suffering. Hospital and emergency room records are necessary evidence and also may include results of laboratory tests performed in the hospital and physical therapy notes.

Documentary evidence in the Chattooga case would include Sandy Ford's employment application and employment contract, as well as other personnel records of Chattooga Corporation, such as notations in her file regarding the discovery of her felony conviction. It also would be necessary to obtain court records of her conviction.

Physical evidence refers to objects involved in the incident in question, such as the electric blanket in the Wesser case. Physical evidence can be crucial in many personal injury cases and includes such objects as the cars involved in an accident or a gun involved in an accidental shooting. In the case of an airplane crash, the remains of the plane and the "black box" recording what happened prior to the crash are crucial pieces of evidence. As with other types of evidence, the types of physical evidence vary according to the type of case you are litigating.

It is important to preserve physical evidence for use at trial. Some types of evidence cannot be maintained in the same condition from the time of an accident until the time of trial. For example, parties will have their cars repaired long before a trial is held or even before a settlement is reached.

Photographs are an important way of recording the condition of an object just after the incident in question. Photographs are also important to preserve the appearance of the scene of an accident. For instance, in an automobile accident case, photographs record the way an intersection looked, including such important features as skid marks left from the accident. Photographs of Mr. Wesser's burn injuries prior to plastic surgery can help to prove the extent of his injuries and his degree of pain and suffering.

Many types of physical evidence can emerge as you investigate a case. It is important to be alert for new pieces of evidence as you interview witnesses and review written reports.

As you begin to gather physical and documentary evidence, remember that you need to establish your client's damages as well as the elements of the claim. The chart in Figure 4–5 is a guide for gathering evidence to prove the elements of the claim. It is helpful to prepare another chart to plan the evidence necessary to prove the amount of your client's damages. Examine Figure 4–6, which outlines the information you need to prove Mr. Wesser's damages.

Review Figures 4–5 and 4–6, which show the types of physical and documentary evidence that will be used to establish the essential elements of the claim and the amount of damages in the Wesser case. The types of evidence needed in the Wesser case are fairly typical of evidence used in many types of cases and, thus, serve as the focus of this discussion. Remember that there are many other kinds of evidence used in other types of lawsuits.

FIGURE 4–6 Proof of Mr. Wesser's Damages

Type of Damage	Sources of Proof	Method of Obtaining Information
1. Property damage	List of items damaged	Mr. Wesser
	Value of items damaged	Receipts for purchase Comparative replacement values Appraisals
2. Personal injury	Hospital records, including emergency room, lab tests, physical therapy notes	Letter to request, with authorization
	Ambulance report	Letter to request, with authorization
	Records and reports of treating physicians, including follow-up office visits	Letter to request, with authorization
	Testimony of Mr. Wesser *re* pain	Interview
	Testimony of friends and relatives *re* pain and restrictions of activities	Interviews
3. Lost wages	Records of employer *re* salary and days missed	Letter to request, with authorization

Obtaining and Preserving Physical Evidence. In the Wesser case, the primary piece of physical evidence consists of the remains of the electric blanket and its control. Assume that this evidence is still in Mr. Wesser's possession. In that case, you need only to obtain it from him. It is possible, however, that by the time a client retains an attorney, the evidence may be in another person's possession. For instance, Mr. Wesser's insurance adjuster may have already picked up the blanket and control for inspection or testing, or the fire inspector may have it. Usually the person who has the evidence will allow others to inspect the evidence or even to take it in order to conduct their own inspection and testing.

However, the evidence may be in the hands of an adverse party or its agent, such as its insurance adjuster. In that case, if the adverse party does not consent to your examining the evidence, you may obtain the evidence by use of a subpoena later in the litigation process. A ***subpoena*** is a document issued by the clerk of court directing persons to appear in a certain place at a certain time, to testify, or to produce documentary or physical evidence in their possession.[4] The preferable method is to obtain the evidence by agreement as early as possible. If you have to wait for the issuance of a subpoena, the evidence may be in a different condition from its condition just after the incident in question. Further, not having immediate access hinders your informal investigation because you do not have all the evidence needed to develop the case.

As mentioned earlier, it is important to preserve evidence in the condition it was in at the time of the incident in question, but it is not always possible to keep a damaged piece of property in the same condition until a trial several months later. For instance, Mr. Wesser does not want to leave his home unrepaired until after the trial, yet the jury may want to see the damage. The attorney-paralegal team must obtain photographs of the house directly after the fire. You may want to hire a professional photographer to ensure clear pictures.

Once the attorney-paralegal team is able to get the actual physical evidence, it is important to preserve the evidence in its original condition. It is also important to document how, when, and where you got the evidence and the steps you take to preserve it. The evidence is usually labeled and kept in a protective container of some sort. Often a person other than the attorney or paralegal obtains, labels, and prepares the evidence for storage. In the Wesser case, this may be done by the fire inspector. It is imperative that the physical evidence be properly stored. You must ensure that it is not damaged or even lost. If you must let another person have temporary possession, such as an expert witness who wishes to conduct tests, document carefully when the expert took the evidence and what the expert did to it. The preservation of physical evidence and associated recordkeeping is known as establishing the ***chain of custody***. The attorney must show the location of the evidence from the time of the accident to trial in order to prove that the evidence has not been altered. This is crucial for the admission of the physical evidence at trial.

Obtaining and Preserving Documentary Evidence. In most lawsuits, there is far more documentary evidence than physical evidence. As Figures 4-5 and 4-6

show, numerous documents are necessary to establish the essential elements of a claim and the amount of a client's damages.

Most forms of documentary evidence are obtained by sending a letter requesting the documents. Consider the fire inspector's report. All you need to do is send the inspector a simple letter requesting a copy of the report and explaining why you need it. See Figure 4–7 for a sample letter.

Other request letters require more explanation, particularly when you obtain medical records. When you request hospital records, you may need to specify the exact documents—discharge summary, patient's chart, results of all laboratory tests, physical therapy notes, X-ray reports, admission notes, and final bill for services rendered.

Even more specificity is necessary when you request information from the client's treating physicians. Be sure to specify whether you want only the doctor's office records or a narrative of the client's treatment and prognosis as well. You may actually want different information at different stages of the litigation. At

FIGURE 4–7 Letter Requesting Documentary Evidence

Heyward and Wilson
401 East Trade Street
Charlotte, North Carolina 28226-1114
704/555-3161

Mr. John Misenheimer
Fire Inspector
Charlotte Fire Department
509 Savannah Street
Charlotte, North Carolina 28226-5431

Dear Mr. Misenheimer:

We represent Mr. Bryson Wesser in a lawsuit against the manufacturer and seller of an electric blanket. It appears that defects in the electric blanket caused a fire at his home on January 3, 1995.

We understand that you inspected the scene at 115 Pipestem Drive, Charlotte, North Carolina, immediately after the fire. We would appreciate your forwarding a copy of your report of that investigation. We would appreciate any other information that you have concerning the cause of this fire. If you have questions or require further information, please contact me. We look forward to your prompt response.

Sincerely yours,
Heyward and Wilson

Leigh J. Heyward
Attorney at Law

the informal investigation stage, the final outcome of the client's treatment may not be known, and thus you may simply request the doctor's office notes to date. As you approach serious settlement discussions and trial, you want more detailed information on the client's condition: in addition to the doctor's most recent office notes, you want the doctor's narrative report explaining the treatment rendered, the results of the treatment, and an opinion as to any permanent disability the client may have.

Doctors may charge a minimal fee for sending copies of their office notes. A detailed medical narrative report may cost several hundred dollars. Thus, it is imperative that you plan the information you want at each stage of the litigation and indicate the information specifically in your letter.

Medical records are confidential; therefore, you need written authorization from the client before the records may be released. See Figure 4–8 for a sample authorization. You may have the client sign several authorizations at the initial interview so that you can request records as needed without having the client come to the office to sign additional authorizations. Some institutions, however, require that the authorization be signed fairly recently, usually within sixty days of the request. Some institutions require that the client's signature be notarized, so it is a good idea to have all the authorization forms notarized. You may encounter certain medical establishments that require you to use their own authorization form, in which case you will have to write or call to obtain their form. This is particularly true when you request mental health records, especially from a state institution.

SIDEBAR Any time you request documents from an institution, find out that institution's procedures before sending the request letter. In particular, find out the charge for sending the documents and whether the institution requires payment before releas-

FIGURE 4–8 Sample Authorization for Release of Information

This is to authorize you to furnish, release and give to Heyward and Wilson, Attorneys at Law, any and all information or opinions which they may request regarding my mental or physical condition and to allow them to see or copy any records which you may have regarding my treatment.

Yours very truly,

Subscribed and sworn to before me
this_____ day of_____,19____.

_____
Notary Public
My commission expires:_____

ing the records. You can easily obtain the information by telephoning the medical records department of a hospital or institution or by talking to the office manager or a nurse at a doctor's office.

Employment records, like medical records, are confidential, so again you need written authorization from the client to release the records. As with medical records, specify the precise information you need. For Mr. Wesser, you would need to know his position, salary, and number of days lost from work after the fire. In the Chattooga case, the Equal Employment Opportunity Commission would request Sandy Ford's employment application, information about her position and salary, and other information about her termination. Bear in mind that some of this information may be privileged. Other information may be obtainable, but only through the formal discovery process. The EEOC also would request other information, such as further facts about the employee whom Sandy Ford assisted in filing a claim against Chattooga Corporation. The amount of information obtainable at the informal investigation stage depends on the parties involved. In some administrative procedures, such as EEOC claims, a fact-finding conference and a written statement of the employer's position are required. Thus, in this type of procedure, you may be able to obtain more information in the early stages of investigation than in other types of cases.

SIDEBAR Your law firm will most likely have on file standard authorization forms and request letters used frequently in litigation. This can save you a great deal of time and help ensure that you request all the proper information. However, you should review the forms to be sure that they include the information you need in a particular case. If you have a case unlike any the firm has handled before, you may need to modify the existing forms.

Once you receive the documents requested, review them immediately. There may be facts that you need to clarify. You may not be able to read handwritten treatment notes. You should resolve immediately any ambiguities, so that your investigation can proceed on the right course. You may require some assistance to understand some documents. For instance, medical personnel use many abbreviations. The abbreviations, however, are usually standard ones, and you can use a book that explains medical abbreviations to laypersons.

ANALYSIS OF AVAILABLE REMEDIES

At the conclusion of the informal investigation and before you draft the complaint, review all the facts carefully. Determine whether the facts support the legal theories that you formulated before the investigation. Consider also whether you now have a basis for any additional theories for recovery.

SIDEBAR Remember that FRCivP 11 requires attorneys to certify that the facts and law support the claim or defense asserted. A thorough investigation of the facts and review of the applicable law is essential to ensure that your attorney-paralegal team has complied with FRCivP 11.

Now that you have determined the claims you will assert in the complaint, you should review the various remedies that may be available for the client. As discussed in Chapter 1, the plaintiff is seeking a remedy for the wrong allegedly done by the defendant. Various remedies are available, and you must determine what remedies to request in the complaint. You should request every type of relief that is appropriate. The Federal Rules of Civil Procedure allow parties to amend their complaints to include additional requests for relief after the complaint is filed, but it is best to try to include all appropriate forms of relief in the complaint so that the litigation will be more focused.

Money Damages

As you recall from Chapter 1, ***money damages*** means monetary compensation that one party pays to another party for losses and injuries suffered. The text discusses damages in the context of damages owed to the plaintiff by the defendant, but remember that other parties besides defendants may have to pay damages. For instance, a plaintiff may be ordered to pay damages to a defendant as a result of a counterclaim filed by the defendant.

Money damages constitute the most frequently requested relief and are of several types.

Compensatory Damages. As the term implies, the aim of ***compensatory damages*** is to compensate the injured party for the harm caused by another party. For instance, when a plaintiff is owed money by a defendant pursuant to a promissory note that the defendant failed to honor, the plaintiff requests compensation in the amount due on the promissory note. For another example, consider the Chattooga case. Here the Equal Employment Opportunity Commission asks that Sandy Ford be compensated for the damage done by Chattooga Corporation's alleged unlawful employment practices. Specifically, the complaint requests that Sandy Ford be awarded back pay, with interest, as compensation for being terminated from her job.

Compensatory damages are often termed either *general* or *special* damages, especially in personal injury litigation. ***Special damages*** are awarded for items of loss that are specific to the particular plaintiff. Examples of special damages in a personal injury lawsuit include compensation for lost wages and medical expenses. Consider the Wesser case. Mr. Wesser's special damages include his hospital bills, doctor bills, pharmacy bills, and loss of wages while his injuries prevented him from working. Special damages can be measured accurately. Mr. Wesser can produce the bills from the hospital, doctors, and pharmacy and can

prove what he would have earned each day that he could not work. Such specific proof of the exact amount of special damages is usually required at trial.

General damages are awarded to the plaintiff as compensation for less tangible losses, such as pain and suffering, temporary or permanent disability, and temporary or permanent disfigurement. In contrast to special damages, general damages do not lend themselves to precise calculation. For instance, pain and suffering is a rather nebulous concept that encompasses factors such as the plaintiff's inability to engage in the activities and hobbies enjoyed before the injury. The emotional trauma of disfigurement is another aspect of pain and suffering. There is no fixed rule to calculate such general damages, and thus there is wide latitude for the amount that may be awarded.

Punitive Damages. Punitive damages, also called exemplary damages, are sometimes awarded to a plaintiff when a defendant's conduct was malicious, wanton, or fraudulent. As the term implies, ***punitive damages*** are intended to punish defendants for egregious conduct and to make examples of them. These damages are based on the public policy of punishing the defendant. Punitive damages are awarded in addition to the compensatory damages and frequently equal three to five times the amount of the compensatory damages.

Equitable Remedies

Sometimes a plaintiff's loss cannot be compensated by monetary damages. ***Equitable remedies*** protect parties when monetary damages cannot make them whole. A common equitable remedy is an ***injunction.*** An injunction is a court order directing a person to refrain from doing an act.[5] As explained in Chapter 1, if your neighbor is about to cut down your trees, you do not want compensation in the form of the timber value of the trees. Rather, you want an order to prevent the neighbor from cutting down the trees.

A lawsuit may request both monetary damages and injunctive relief, as in the Chattooga case. Here the Equal Employment Opportunity Commission requests that Sandy Ford be awarded back pay as compensation for being unlawfully terminated from her job. The EEOC also requests injunctive relief in the form of an order restraining Chattooga Corporation from retaliating against employees in the future. Ford may also request reinstatement—that is, to be put back on her job. This, too, is a form of equitable relief.

Another common equitable remedy, ***specific performance,*** arises in disputes about contracts. When one party to a contract fails to comply with its provisions, and money damages cannot compensate the other party, the court can order specific performance of the contract. This means that the party in breach of the contract is ordered to comply with its terms. Specific performance is appropriate when a party contracts to sell something that is unique, such as a parcel of real estate or a painting. Even if the other party were awarded damages in the amount of the agreed purchase price, that party would not be adequately compensated because the object to be sold is unique.

Attorneys' Fees

As a rule, the prevailing party is not entitled to payment of attorneys' fees by the other party in the absence of a statute providing for payment. Many plaintiffs have the mistaken notion that if they win, the other party has to pay their (the plaintiffs') attorneys' fees. This question frequently arises at the initial client conference, and it is important that clients understand the general rule from the outset.

In analyzing the remedies to request in the complaint, it is important to check applicable federal and state statutes to determine whether they provide for an award of attorneys' fees to the prevailing party. An example of a federal statute is the Magnuson-Moss Act, which concerns consumer products warranty protection.[6] A provision for attorneys' fees appears in some statutes concerning civil rights and employment discrimination, including Title VII. Some state consumer protection statutes also provide for attorneys' fees, as do some child support and alimony statutes.

After gathering the facts and analyzing the available remedies, the attorney-paralegal team should be ready to draft the complaint and commence the lawsuit. This is the subject of Chapter 5.

ETHICS BLOCK

A lawyer has a mandatory duty to avoid conflicts of interest. Conflicts of interest can take many forms, and there are several potential conflicts common in litigation. A frequent potential conflict is representation of a client when that representation would be directly adverse to another client. ABA Model Rule 1.7 provides that a lawyer shall not represent a client if representation would be "directly adverse to another client." The comments to rule 1.7 give examples of impermissible conflicts, such as when parties' testimony is substantially discrepant or the parties hold discrepant views of what constitutes a good settlement. These potential conflicts arise when lawyers are asked to represent multiple clients—for instance, coplaintiffs and codefendants.

Determining the propriety of multiple representation can be complex, and lawyers must make this decision. Paralegals can help, however, by spotting potential conflicts when new cases are brought into the law firm. This is an especially important task because lawyers also have a duty to protect the interests of former clients by declining representation of another person "in the same or a substantially related matter" when the other person's interests are "materially adverse" to the interests of a former client. Lawyers also must avoid conflicts with their own interests, which may arise when the lawyers' own financial, business, property, or personal interests interfere with their professional judgment. Law firms have procedures to prevent conflicts of interests, such as computer programs to identify former clients whose interests may be adversely affected by representation of a new client.

SUMMARY

The object of this chapter is to help you understand the steps in the litigation process from the time you open a client's file through the informal investigation stage. The attorney-paralegal team must develop the case before preparing the complaint and commencing the lawsuit.

Paralegals often participate in the initial client interview, which is one of the first steps in gathering information. Prior to the initial client interview, paralegals may check for conflicts of interest, gather pertinent documents, and perform legal research. The attorney asks most of the questions at the initial interview and enters into a fee agreement with the client. Paralegals assist by taking notes and ensuring that all necessary questions are asked. Subsequent interviews with clients and other witnesses may be conducted by the paralegals themselves.

Several skills are necessary to conduct effective interviews. Choose a comfortable, private setting. Do not allow interruptions. Put the client at ease, and explain your role as a paralegal at the outset. Use simple and direct language, and listen carefully to the interviewee. You may start the interview with broad questions and then ask more detailed questions later.

The next step is opening and organizing the files. The text discusses the general procedures, but it is important to remember that different law firms have different procedures. At the outset, you should understand the necessity of keeping a master list of the files assigned to you. List the client name, file number, and general status of the case. Attorneys in the firm keep master lists of the cases assigned to them also.

You may not be the person in your firm who actually opens the file, but you must understand the procedure. The first step is to complete a case opening sheet. This contains the basic information you need to identify and contact your client and the other parties, or their attorneys if they are represented. Remember that when your client is a corporation you have a contact person there. Include the contact person's name, address, and phone number.

After the case opening sheet is completed, the file is routed to the appropriate clerical personnel, who enter the information in the computer system. This is important for maintaining an index of the firm's clients and for maintaining records for billing. The firm may also keep a manual index of client information. Before routing the file, be sue that all documents already obtained are put in the file. Throughout the litigation process, remember the importance of preserving all evidence, including original documents.

File organization is important because a common duty of paralegals is to maintain the voluminous documents in a file in an orderly manner. A standard format is the large, rigid file container housing subfiles in manila folders. Subfile methods may vary from one firm to another, but the main goal is to organize the documents so they can be found quickly.

A common subfile category is court papers—the pleadings and other documents filed with the court. If discovery materials are filed with the court, they

may be kept in this subfile unless they are too bulky. This subfile also contains the orders and judgment entered by the court.

Another common subfile category is correspondence with court and counsel, which includes letters to the court and to the attorneys representing the other parties. A subfile for general correspondence contains letters to and from the client and letters to obtain information from other persons. Correspondence is generally arranged in chronological order. If the litigation is protracted, you may have to split the correspondence into separate subfiles according to years.

Another subfile category is file memoranda. This includes memos the attorneys and clients write to record information, such as the content of conversations with clients and others. Still another category is legal research, which includes copies of pertinent judicial opinions and memos summarizing the results of legal research.

A subfile may be set up for memoranda of law, commonly called briefs. In simple cases, the memoranda of law may be included with court documents, since they are filed in support of motions.

Discovery materials often fill several subfiles. If there is extensive discovery in a lawsuit, you may need very specific subfiles, such as "Plaintiff's First Set of Interrogatories to Defendant Second Ledge."

Another subfile may be set up for the lawyers' notes. Such notes may outline legal theories or the results of factual research. Paralegals may need subfiles for their notes as well. A subfile also can be created for news clippings if there are any concerning the lawsuit or related matters.

A common subfile is billing matters. It contains receipts for out-of-pocket expenses, and perhaps the individual time slips filled out for work on that case.

Indexing files is an important task often assigned to paralegals. A given law firm may use one of several indexing systems, but the goal is to make it possible to find documents quickly. Sometimes an index in the front of the main file is sufficient. In complex cases, however, you may need an index in the front of each subfile. Describe the documents in each subfile specifically. Include dates if necessary to avoid confusion, especially for correspondence subfiles. In pleadings subfiles, it is common to attach a tab to the side of each document to provide ready identification.

Many law firms have a central file area where they store the original documents. Originals must be examined or copied in the central storage area and often can be removed only if they are formally checked out. The purpose is to lessen the risk of losing original documents. For their everyday work, attorneys and paralegals use the working files, which contain copies of the documents. The organization of and indexes for the central file and working file should be uniform.

The first step in organizing the informal investigation is to chart the essential elements of each claim. Then you must decide how to obtain the information necessary to prove the essential elements of each claim. Recall that an essential element is a fact that the law requires to exist in order to establish a particular cause of action.

Next you must identify all defendants, taking special care to designate correctly corporate defendants. The company may be a subdivision of another company, and the names may be confusing. It is important to join all defendants. The goal is to adjudicate all claims in one lawsuit. It would be confusing and wasteful to adjudicate the claims against one defendant in one lawsuit and then repeat the entire process against another defendant in a second lawsuit. FRCivP 19 requires that all parties who are "united in interest" should be joined in the lawsuit.

At every stage of litigation, including informal investigation, consider the rules of evidence. Your goal is to avoid wasting time on evidence that is unlikely to be admissible at trial.

Next, determine the sources of information for the facts you must prove. The sources vary, depending on the subject matter of the lawsuit. If you need ideas for sources, talk to the other paralegals and lawyers in the firm and examine similar files.

Your first source of information is the client. Find out as much general information as you can about what happened. Obtain all pertinent documents that the client can supply. Also find out names of potential witnesses. Paralegals may have to pursue various sources to locate witnesses.

Building upon the facts obtained from the client, determine the specific information you want from the witnesses. Get information about each witness's personal background. The same interview skills discussed in regard to clients apply equally to witnesses.

Documents are an important part of the evidence in most lawsuits. Determine the documents you need and where you can obtain them. If the opposing side has the documents, you may have to obtain them through the discovery process. Other persons with pertinent documents may voluntarily share them with you.

Next, consider whether there is pertinent physical evidence, such as the electric blanket in the Wesser case. Get possession of physical evidence as soon as possible, and strive to preserve it in its condition at the time the claim arose. If it cannot be preserved in that condition, take photographs.

You must also determine whether you need expert witnesses. They are not necessary in every lawsuit, but they are frequently used in personal injury litigation. There are many methods for locating experts. Start in your law firm by asking the attorneys and other paralegals for recommendations. If that fails, consult with attorneys and paralegals in other firms. You also may review advertisements in professional publications, such as the *ABA Journal.* Sometimes you use experts to review the file early on to assess the claim, even if you do not use those experts at trial.

Physical evidence must be obtained and preserved promptly. You may obtain it from the client or from another source, such as an insurance adjuster. Preserve its condition, if possible. If this is not possible, take photographs. If you keep the evidence, label it and place it in a protective container. If you must let someone else borrow the object, record this in a log.

Frequently you will need to obtain large numbers of documents. Your sources will vary according to the types of documents you need. If the documents you seek are confidential, such as medical or personnel records, obtain signed authorization from the client to release the information. Check with the person or institution to determine whether they have special authorization forms you must use or any special procedures. Also ask how much they charge for copies. This can save you time and expense. Once you receive the documents, review them immediately. Determine whether you received everything you requested. Your review of the documents also may alert you to other documents that you need to obtain.

The next step is to analyze the remedies available to the client. There are two major categories of remedies—money damages and equitable relief. There are two primary types of money damages. The first is compensatory damages, which aim to make the party whole by payment of an amount to compensate the client for personal injury or property damage. Compensatory damages are often divided into special damages and general damages. Special damages are awarded for items of loss that are specific to the particular plaintiff, such as lost wages due to injury. General damages are awarded as compensation for less tangible losses, such as pain and suffering.

The second primary type of money damages is punitive damages, sometimes called exemplary damages. Punitive damages, as the name implies, are intended to punish defendants for egregious conduct and to make examples of them. Punitive damages are awarded in addition to compensatory damages and frequently amount to three times the amount of compensatory damages.

Equitable remedies are appropriate when the plaintiff 's loss cannot be compensated by monetary damages. A frequently encountered equitable remedy is the injunction, a court order for a party to refrain from a certain action. Sometimes a party must be stopped from taking an action for which the damaged party could not be compensated monetarily, such as the loss of a one-hundred-year-old tree.

Another common equitable remedy is specific performance. This remedy arises in contract disputes. A court can order a party to perform the action that it promised to do in the contract. This remedy is appropriate when the object in question is unique, such as real estate or a priceless painting that one party promised to sell.

Another remedy is the award of attorneys' fees. The important point is that each party must pay its own attorneys' fees unless a statute gives the court authority to order one party to pay the other party's attorneys' fees. Certain types of statutes contain an attorneys' fee provision, such as those governing civil rights and alimony actions.

REVIEW QUESTIONS

1. Which of the following are sources of information in the informal investigation of a personal injury case?
   a. the client
   b. automobile accident reports

c. the client's medical records
d. all of the above
e. a and c only

2. Which of the following may paralegals need to do prior to an initial client interview?
   a. Send a letter confirming the date and time of the interview.
   b. Conduct legal research.
   c. Contact the potential client and agree on a fee arrangement.
   d. all of the above
   e. a and b only
3. Which of the following are types of general damages?
   a. temporary disability
   b. pain and suffering
   c. lost wages
   d. all of the above
   e. a and b only
4. Which of the following are acceptable methods for preserving the content of witness interviews?
   a. Dictate a memo immediately after the interview.
   b. Take notes during the interview.
   c. Tape-record the conversation without the witness's permission.
   d. all of the above
   e. a and b only
5. T F It is not advisable to begin an interview by allowing clients to tell the story in their own words.
6. T F Checklists cannot be used during interviews because they are too confining.
7. T F It is necessary to obtain personal background information from clients but not from other witnesses.
8. T F Correspondence is usually arranged in chronological order within subfiles.
9. T F Physical evidence may be obtained from an opposing party only through the formal discovery process.
10. T F Judges may order that parties be added as defendants regardless of whether the plaintiff named the parties as defendants.

PRACTICAL APPLICATIONS

You are a paralegal working with Nancy Reade Lee, who represents Chattooga Corporation in the lawsuit involving Sandy Ford. You may need to refer to the facts in this case, in the front of the text, as well as Chapter 4.

1. You are analyzing the remedies that Sandy Ford seeks.
   a. Describe the monetary damages that she seeks.
   b. Describe the equitable remedies that she seeks.

2. You are helping to plan the interviews to gather the facts in the informal investigation. Which employees of Chattooga Corporation should you interview?
3. Looking at the facts before you at this early stage, what documents do you need to review?

CASE ANALYSIS

Read the excerpt from *Tolentino v. Friedman*, 46 F.3d 645 (7th Cir. 1995), and answer the questions following the excerpt.

GEORGE C. PRATT, Circuit Judge:

FACTS AND BACKGROUND

In this action under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692–1692o ("FDCPA"), the parties cross-appeal from a judgment entered in the United States District Court, Northern District of Illinois, *Judge* Charles R. Norgle, Sr. Friedman's appeal challenges the determination of liability and claims the attorney's fees awarded to plaintiff were excessive; Tolentino's cross-appeal claims that the attorney's fees awarded to her were inadequate. . . .

The district court entered judgment in favor of Tolentino for $1,000, the maximum amount of individual damages permitted by the statute, under § 1692k(a)(3), as well as $553.43 costs, and $10,132.50 attorney's fees.

. . .

B. *Attorney's Fees.*

The FDCPA provides for an award of costs and attorney's fees to the successful consumer.

> [A]ny debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—
>
> * * * * * *
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

15 U.S.C. § 1692k(a). The statutory language makes an award of fees mandatory. "Because the FDCPA was violated * * * the statute requires the award of costs and a reasonable attorney's fee * * *" *Pipiles*, 886 F.2d at 28.

The reason for mandatory fees is that congress chose a "private attorney general" approach to assume enforcement of the FDCPA.

> Given the structure of the section, attorney's fees should not be construed as a special or discretionary remedy; rather, the act mandates an award of attorney's fees as a means of fulfilling Congress's intent that the Act should be enforced by debtors acting as private attorneys general.

Graziano v. Harrison, 950 F.2d 107, 113 (3d Cir. 1991).

"Unlike most private tort litigants, [a plaintiff who brings an FDCPA action] seeks to vindicate important * * * rights that cannot be valued solely in monetary terms;" *City of Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986), and congress has determined that the public as a whole has an interest in the vindication of the statutory rights. *Id.*

The district court found that Tolentino's counsel normally received rates of $275 per hour for Mr. Edelman and $225 per hour for Combs. The record shows that other courts have awarded fees at those rates in similar types of cases. However, Judge Norgle held that these rates should be reduced in FDCPA cases because

> [f]ew paying clients would be inclined to pay voluntarily an hourly rate of $275 to seek damages not exceeding $1,000 * * * There is no dispute in the right case and under the appropriate circumstances, counsel for plaintiff's fee would be reasonable at the rate of $275 hourly, as indicated in counsel's supplemental affidavit. But not in this case, as the court has previously ruled.

The Supreme Court has explained the calculation for an award of attorney's fees:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. The calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services.

Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983).

There are several factors that a court should consider when calculating attorney's fees, including (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) any time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the plaintiff's attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Id. at 441, 103 S.Ct. at 1943–44.

The Supreme Court has also stated:

> "[T]he degree of the plaintiff's overall success goes tot he reasonableness" of a fee award under *Hensley v. Eckerhart*. Indeed, "the most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained." *Hensley*.

Farrar v. Hobby, ___U.S. ___, ___, 113 S.Ct. 566, 574, 121 L.Ed.2d 494 (1992).

Tolentino contends that the district court abused its discretion by not awarding attorney's fees at her normal hourly rate. Tolentino does not, however, object to the reduction in the number of hours expended. Friedman, on the other hand, claims that the district court's award of fees was excessive.

In order to encourage able counsel to undertake FDCPA cases, as congress intended, it is necessary that counsel be awarded fees commensurate with those

which they could obtain by taking other types of cases. As we noted in *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993),

> Our recent cases have stressed that the best measure of the cost of an attorney's time is what that attorney could earn from paying clients. For a busy attorney, this is the standard hourly rate. If he were not representing this plaintiff in this case, the lawyer could sell the same time to someone else. That other person's willingness to pay establishes the market's valuation of the attorney's services.

The Third Circuit has similarly stated:

> Congress provided fee shifting to enhance enforcement of important civil rights, consumer-protection, and environmental policies. By providing competitive rates we assure that attorneys will take such cases, and hence increase the likelihood that the congressional policy of redressing public interest claims will be vindicated.

Student Public Interest Research Group v. AT & T Bell Laboratories, 842 F.2d 1436, 1449 (3d Cir. 1988).

Here, Tolentino prevailed on summary judgment, thereby protecting her rights under the statute, and has recovered the maximum statutory damages allowed to an individual plaintiff. Under *Farrar*, therefore, Tolentino has obtained a high degree of success.

Paying counsel in FDCPA cases at rates lower than those they can obtain in the marketplace is inconsistent with the congressional desire to enforce the FDCPA through private actions, and therefore misapplies the law. *Florin v. Nationsbank of Georgia, N.A.*, 34 F.2d 560, 562–63 (7th Cir. 1994).

CONCLUSION

The summary judgment that the "IMPORTANT NOTICE" violated § 1692e(11) of the FDCPA is affirmed. Plaintiff is entitled to statutory damages of $1,000 plus $553.43 in costs. The district court's award of attorney's fees is reversed and the case is remanded to the district court to fix an appropriate attorney's fees award in light of this opinion.

1. The defendant was an attorney who was found to have violated the Fair Debt Collection Practices Act (FDCPA) while trying to collect a debt from the plaintiff. The FDCPA allows a maximum recovery of how much in individual damages?
2. The FDCPA allows, as a further remedy, that the plaintiff may recover attorneys' fees. Is there a dollar cap on the amount of attorneys' fees recoverable?
3. Why is the award of attorneys' fees mandatory?
4. What factors should the court consider when calculating attorneys' fees?
5. What is the most critical factor for the court to consider in calculating attorneys' fees?
6. The trial court had awarded a fee calculated on less than the plaintiff's attorney's standard hourly rate. The Seventh Circuit Court of Appeals found that the attorney's standard hourly rate should have been used. Why?

ENDNOTES

1 For a discussion of the documents that are filed with the court to support motions, see Chapter 7.
2 For further discussion of informal investigation, especially the use of litigation charts, *see* Thomas A. Mauet, *Fundamentals of Pretrial Techniques* 17 ff. (1988).
3 *Id.* at 41.
4 See Chapters 8 and 9 for further explanation of subpoenas in the discovery process and at trial.
5 The procedure for obtaining injunctive relief is discussed in Chapter 5.
6 15 U.S.C. § 2310(d)(2).

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Chapter 5

COMMENCEMENT OF THE PLAINTIFF'S LAWSUIT

Every morning you check your computer's calendar program, which includes, among other things, reminders of important deadlines. Even before your first cup of coffee, you are jolted awake by your computer's reminder that the statute of limitations in one of Ms. Heyward's personal injury cases runs in one week. You bring this to her attention immediately.

"That's right. Thank you for reminding me. We are actually in good shape because we have completed the informal investigation and have all the facts we need to draft the complaint and prepare all the other documents that must be filed with it. Could you have those ready for me to review tomorrow morning?"

"I think that is possible. Do you recall the name of any files that had similar issues that I could use as a model for the complaint?"

"Yes," Ms. Heyward replies, "look at the Nguyen case. Those facts are very similar."

Relieved, you head to the file room, reviewing as you go the other documents that you must draft to accompany the complaint.

INTRODUCTION

You have developed your case and are ready to initiate the lawsuit. Now you need to draft a complaint and prepare a summons. You will likely have to prepare other documents too, depending on the type of lawsuit you are filing.

The ***complaint*** is the first pleading filed in a lawsuit. ***Pleadings***, as you know by now, are the formal documents in which the parties allege their claims and defenses. As discussed in Chapter 1, the Federal Rules of Civil Procedure set forth the rules that govern pleadings in federal trial courts, including the rules for serving the pleadings on the other party. The Federal Rules of Civil Procedure ensure that each party knows the facts that the other party alleges against it by requiring that the pleadings state the claims and defenses in comprehensible language and that each party receive proper notice so that it can prepare an adequate response.

INTRODUCTION TO PLEADINGS

The discussion in this chapter focuses on the Federal Rules of Civil Procedure. You may wish to review the discussion in Chapter 1 of the importance of

the Federal Rules of Civil Procedure and the other rules that will govern litigation of the Wesser case in federal court. The Federal Rules of Civil Procedure most pertinent to the format and content of complaints and other pleadings are discussed here. Recall that the federal local court rules also affect pleadings by regulating paper size, how many copies to file, and other details.

Purpose and Types of Pleadings

Rule 7 of the Federal Rules of Civil Procedure states the types of pleadings that are allowed:

> a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served.

Do not worry about counterclaims, cross-claims, and third-party pleadings for now. They will be explained in Chapter 6. For now, just remember that a party can assert a claim in a complaint, counterclaim, cross-claim, or third-party complaint and that rule 8 of the Federal Rules of Civil Procedure states the general rule for the content of all four pleadings that set forth a claim.

FRCivP 8 requires a "short and plain statement of the claim showing the pleader is entitled to relief." Rule 8 reflects the concept of ***notice pleading,*** the concept on which the Federal Rules of Civil Procedure are based. Thus, a pleading should not contain an excruciatingly detailed recitation of every fact in the case. The fine details can be ascertained in the discovery process. (See Chapter 8.) Notice pleading requires only that a party state a claim concisely and plainly enough for the other party to know the nature of the claim and prepare a defense. Rule 9 sets forth the exceptions to notice pleading and cites the matters that must be alleged specifically. For example, when alleging fraud, "the circumstances constituting fraud . . . shall be stated with particularity."

Format for Pleadings

Pleadings follow a standard format, and it is important to follow the rules governing format.

Rule 10 Requirements. Rule 10 of the Federal Rules of Civil Procedure governs the general format for pleadings. FRCivP 10 specifies the following requirements for all pleadings. They are shown in Figure 5–1.

1. *Caption.* FRCivP 10 requires a caption with the following information:
   a. The name of the court in which the action is filed.
   b. The title of the action. This is the designation of the parties in the lawsuit. It is imperative that each party be named correctly. This is simple when only an individual is the party. You must take particular care, however, when a party is a corporation or is acting on behalf of another party. For example, the title of a complaint when Mr.

FIGURE 5–1 FRCivP Pleading Format

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE CENTRAL DISTRICT OF CALIFORNIA
CIVIL NO.: C-C-96-129-M

MICHAEL ANDREOU AND ELIZABETH ANDREOU,
Plaintiffs,

-vs-

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE,
Defendant

COMPLAINT

Jurisdiction

1. This court has jurisdiction pursuant to 8 U.S.C. section 1329, 28 U.S.C. section 1331, and 18 U.S.C. section 2201.
2. Plaintiff Elizabeth Andreou is a citizen of the United States and a resident of Los Angeles, California.
3. Plaintiff Michael Andreou is a citizen of Greece and a resident of Los Angeles, California.
4. Defendant Immigration and Naturalization Service ("INS") is an agency of the United States Department of Justice empowered to implement the Immigration and Nationality Act, 8 U.S.C. section 1101 *et seq.*

Wesser sues two corporations for injuries must be specific, as shown in Figure 5–2.

c. The name of the pleading. Designate the type of pleading: "COMPLAINT," "ANSWER," and so on.
d. File number. When you file a complaint with the clerk of court, the complaint is stamped with a file number, sometimes referred to as a civil action number. This file number must be on all subsequent pleadings.

2. *Numbered Paragraphs.* Allegations and defenses must be set forth in numbered paragraphs. As far as practicable, each paragraph should contain a statement of a single set of circumstances. This requirement furthers the objective of a plain and simple statement of the facts.

Other Requirements. There are other format requirements in addition to the Rule 10 requirements. The attorneys who sign the pleadings should include their addresses and telephone numbers on the last page of the pleadings beneath the signatures. See Figure 5–3. Always consult your local rules for further format requirements. A good example is rule 130 of the Rules of Practice and Procedure of the United States District Court for the Eastern District of California, which reads as follows:

FIGURE 5–2 Specific Title in Suit Involving Corporation

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,
-vs-
Woodall Shoals Corporation,
Defendant
and
Second Ledge Stores, Incorporated,
Defendant.

COMPLAINT

Rule 130. General format of papers

All documents presented for filing or lodging shall be on white, unglazed opaque paper of good quality with numbered lines in the left margin, 8 ½" by 11" in size, and shall be flat, unfolded (except where necessary for presentation of exhibits), firmly bound at the top left corner, pre-punched with two (2) holes (approximately 1/4" diameter) centered 2 3/4" apart, ½" to 5/8" from the top edge of the document, and shall comply with all other applicable provisions of these Rules. Matters contained thereon shall be presented by typewriting, printing, photographic or offset reproduction or other clearly legible process, without erasures or interlining which materially defaces the document, and shall appear on one side of each sheet only. Documents shall be double-spaced except for the identification of counsel, title of the action, category headings, footnotes, quotations, exhibits and descriptions of real property. Quotations of more than fifty (50) words shall be indented. Each page shall be numbered consecutively at the bottom.

FIGURE 5–3 Attorney's Address and Telephone Number

7. That the plaintiff be granted such other and further relief as the Court may deem just and proper.

Leigh J. Heyward
Attorney for the Plaintiff
Heyward and Wilson
401 East Trade Street
Charlotte, NC 28226-0114
Telephone: (704) 555-3161
FAX: (704) 555-3162
N.C. State Bar No. 12779

You should be able to determine format requirements by examining recently filed pleadings in other files, but you can never go wrong by checking the rules.

Signing and Verification of Pleadings

Signing by Attorney. Rule 11 of the Federal Rules of Civil Procedure requires that one attorney of record must sign every pleading, motion, and other paper filed with the court. Parties unrepresented by counsel sign their own pleadings.

Rule 11 provides that by signing pleadings and motions, attorneys make several important representations to the court regarding the assertions stated in them. These representations are stated in FRCivP 11(b), reprinted in Figure 5–4.

If a pleading or motion is signed in violation of FRCivP 11, the court may impose sanctions on the attorneys, law firms, or parties that violated the rule. The court may, on its own initiative, require a law firm, attorney, or party to show

FIGURE 5–4 FRCivP 11(b)

> **(b) Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

cause why it has not violated rule 11. Another party also may bring a violation to the court's attention. Rule 11 provides, however, that before filing a motion asking the court to impose sanctions, the person accused of a rule 11 violation must be given twenty-one days to withdraw or correct the pleading or motion in question. FRCivP 11(c)(2) describes the sanctions that the court may impose. (Refer to Figure 5–5.) Attorneys should make every effort not to violate rule 11, and paralegals can help by assisting with a thorough investigation and detailed preparation.

FIGURE 5–5 FRCivP 11(c)(2)

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

. . .

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

Verification of Pleadings by a Party. Pleadings in federal court actions and state actions usually do not require verification by the client; however, in some cases, the party is required by law to verify the pleading. For example, some states require parties to verify by affidavit every pleading filed in a divorce action or child custody action. Clients verify a pleading by signing an affidavit stating that they have read the pleading and everything in it is true. (See Figure 5–6.) The purpose of client verification is to prevent the filing of false claims.

PREPARING THE COMPLAINT

The ***complaint*** is the initial pleading filed by the plaintiff. The filing of a complaint commences a lawsuit under rule 3 of the Federal Rules of Civil Procedure. In state court, a lawsuit does not commence until the summons and complaint are served on the defendant.

Substance of a Complaint

FRCivP 8(a) requires three substantive elements for every complaint:

1. a statement of jurisdiction;
2. a short and plain statement of the claim showing that the plaintiff is entitled to relief; and
3. a demand for judgment for the relief sought.

FIGURE 5–6 Client Verification

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK,

_____X Index No.

Plaintiff,

-vs- VERIFICATION

Defendant

_____X

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

_____, being duly sworn, deposes and says that: I am the plaintiff in the within action for a divorce; I have read the foregoing Complaint and know the contents thereof; the contents of the Complaint are true to my knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

_____
Plaintiff

Sworn to before me
on December 9, 1996

_____
Notary Public

Like all pleadings, the complaint must follow the format requirements discussed in the preceding text. This means that the complaint will include the name of the court, the names of the parties, and the title of the pleading ("Complaint"). These appear at the top of the complaint, in the caption. (See Figures 5–1 and 5–2.)

After the statement of jurisdiction, statement of the claim, and demand for judgment come the name, address, and signature of the plaintiff's attorney. In addition, if the plaintiff wants a jury trial, the complaint must contain a demand for jury trial. It may be helpful at this point to turn to the Appendix and examine the complaint in the Wesser case. Now that you are familiar with the format for a complaint, the text addresses the substantive elements of the complaint.

Allegation of Jurisdiction. As discussed in Chapter 2, federal courts are courts of limited jurisdiction. Thus, it is crucial to establish in the complaint that the federal court has subject matter jurisdiction to hear the plaintiff's case. The safest method to ensure that you allege jurisdiction correctly is to follow the language in the Appendix of Forms to the Federal Rules of Civil Procedure.[1] See Figure 5–7, which reprints Official Form 2. This form illustrates how to allege jurisdiction

based on diversity of citizenship, a federal question, or the existence of a question arising under a particular statute, as well as jurisdiction based on the admiralty or maritime character of the claim. The complaints in the Wesser and Chattooga cases (see Appendix) illustrate jurisdictional allegations in federal court actions, and Figure 5–1 illustrates the caption and jurisdictional allegations where individuals sue an agency of the United States government.

Statement of Claims. Now you are ready to state the facts that show that the plaintiff is entitled to judicial relief. A claim for which courts can grant relief is called a ***cause of action***. Common causes of action include negligence, breach of contract, and fraud. Courts do not provide a remedy for every wrong or unkind act that a person directs against another person. For instance, Mr. Green may wish to sue Mr. Jones because Mr. Jones called him a "nincompoop" when they were arguing about presidential candidates. Mr. Green may approach a lawyer and state that he wants to sue Mr. Jones for intentional infliction of emotional distress. Most states, however, require a showing of "outrageous conduct" in order to recover damages for intentional infliction of emotional distress. Because Mr.

FIGURE 5–7 FRCivP Official Form 2

Form 2. Allegation of Jurisdiction

(a) Jurisdiction founded on diversity of citizenship and amount.

Plaintiff is a [citizen of the State of Connecticut][1] [corporation incorporated under the laws of the State of Connecticut having its principal place of business in the State of Connecticut] and defendant is a corporation incorporated under the laws of the State of New York having its principal place of business in a State other than the State of Connecticut. The matter in controversy exceeds, exclusive of interest and costs, the sum of seventy-five thousand dollars.

(b) Jurisdiction founded on the existence of a Federal question and amount in controversy.

The action arises under [the Constitution of the United States, Article_____, Section_____]; [the _____Amendment to the Constitution of the United States, Section _____]; [the Act of _____, _____Stat. _____ U.S.C., Title_____, §_____]; [the Treaty of the United States (here describe the treaty)],[2] as hereinafter more fully appears.

(c) Jurisdiction founded on the existence of a question arising under particular statutes.

The action arises under the Act of _____, _____ Stat._____; U.S.C., Title _____, §_____, as hereinafter more fully appears.

(d) Jurisdiction founded on the admiralty or maritime character of the claim.

This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears. [If the pleader wishes to invoke the distinctively maritime procedures referred to in Rule 9(h), add the following or its substantial equivalent: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

Green cannot establish that Mr. Jones's conduct was outrageous, he cannot establish an essential element of the tort termed intentional infliction of emotional distress.

Rule 8(e) of the Federal Rules of Civil Procedure states that a "pleading shall be simple, concise, and direct." This means you should use plain English. Use short sentences and common words. This is not the place for *whereas* and *witnesseth*. Do not go into excruciating detail; allege only the facts necessary to establish that the plaintiff is entitled to the relief requested and to give the defendants fair notice of the claims against them.

Essential Elements of the Cause of Action. A complaint that does not properly allege a cause of action must be amended or dismissed. You must be careful to allege sufficient facts to establish all the essential elements of the plaintiff's cause of action. An ***essential element*** is a fact that the law requires to exist in order to establish a particular cause of action. For example, to establish a cause of action for fraud, a plaintiff must establish the essential elements of fraud, which include a false representation of a present or past fact made by the defendant, action by the plaintiff in reliance upon the defendant's statement, and damage resulting to the plaintiff from that misrepresentation.[2] Thus, if a plaintiff did not rely on a defendant's false statement, the plaintiff could not establish fraud. As a further example, if a plaintiff sued a defendant for failure to pay a $5,000 promissory note, the plaintiff would need to allege that the defendant signed and delivered to the plaintiff a promissory note in the amount of $5,000, payable with eight percent interest, on August 2, 1996; that the defendant failed to pay the note as promised; and that the defendant owes to the plaintiff the amount of the note and interest.

There are several ways to ensure that you allege the essential elements of a claim, but first you must know the substantive law of the jurisdiction. You can find the essential elements by researching the case law in the jurisdiction and examining successful pleadings in similar cases. You can probably find similar pleadings in files in your law firm, and you can examine files in the clerk's office that involved the same substantive law. The Appendix of Forms to the Federal Rules of Civil Procedure contains examples of legally sufficient pleadings, as may an appendix in your state rules of civil procedure. You also can find books of forms in your law library, although you must be cautious in using generic forms. Be sure you tailor the forms carefully to the specific facts of your case rather than follow the forms blindly.

SIDEBAR If you have a complex case or a case dealing with a novel question of law, you will work closely with your supervising attorney. It may be your task to obtain a copy of the pleadings filed in a similar case in a distant state. The office of the clerk of court for that judicial district can copy the pleadings and mail them to you. Call the clerk's office to find its procedure for sending copies. Find out its mailing address, how much it charges per page for copies, and whether it will bill you or you will need to

send a check. Then follow up with a letter stating precisely the documents you need copied, enclosing a check if necessary.

State Separate Claims in Separate Counts. Often a plaintiff relies on more than one legal theory as a basis for recovery of damages. For example, Mr. Wesser bases his claim on three theories: negligence, implied warranty, and express warranty, which are all set out in separate counts. Setting out the claims in separate counts clarifies the legal theories on which the plaintiff is proceeding.

When there are multiple defendants, as in the Wesser case, specify which count applies to which defendant. For instance, in the Wesser complaint, Count One is "BREACH OF EXPRESS WARRANTY BY THE DEFENDANT WOODALL SHOALS" and Count Four is "BREACH OF EXPRESS WARRANTY BY THE DEFENDANT SECOND LEDGE."

Note that when you begin a second count, you need to incorporate by reference the allegations in the first count.

Demand for Judgment (Prayer for Relief). The third component that FRCivP 8 requires is the demand for judgment, sometimes called the prayer for relief. FRCivP 8 provides that a plaintiff may request relief of several different types or alternative forms of relief. (These were discussed in Chapter 4.) The demand for judgment should state each type of relief sought in a separate numbered paragraph. Be sure to specify every type of relief sought, including general damages, punitive damages, special damages, equitable remedies, interest, costs, and attorneys' fees. A demand for judgment in the Wesser complaint appears in the Appendix.

Demand for Jury Trial. A party must specifically request a jury trial. If a party fails to request a jury trial within the time limits set out in FRCivP 38, the party waives the right to a jury trial. In state court actions, you must check the state rules of procedure and other statutes concerning the right to a jury trial and comply with the state requirements for requesting a jury trial. A party is not entitled to a jury trial in every type of lawsuit. For instance, there is no right to a jury trial in a lawsuit alleging a violation of Title VII, as in the Chattooga case. The right to a jury trial is a subject paralegals frequently need to discuss with the attorneys on their team.

Rule 38 of the Federal Rules of Civil Procedure allows a party to demand a jury trial in the complaint or in writing at any time after the complaint is filed, but "not later than 10 days after the service of the last pleading directed to such issue." If your supervising attorney has already determined that your client will request a jury trial, it is best to include the demand for jury trial in the complaint itself. The jury trial request is placed in a conspicuous place, often in the caption below the word *Complaint* or at the end of the complaint. The Wesser complaint (see Appendix) contains an example of a request for a jury trial.

Signing and Verification

Remember to insert after the demand for judgment the name, address, and telephone number of the attorney who signs the complaint. Double-check to be sure the attorney actually signs the complaint. If client verification is required, insert the signed verification. (See Figure 5–6.) The simplest way to include the client verification is to put it on a separate sheet of paper and attach it after the page with the attorney's signature.

Exhibits and Appendices

Often you will attach exhibits to prove the plaintiff's claim. Some states require that a copy of the written contract on which a breach of contract action is based be attached as an exhibit. Other common exhibits include copies of promissory notes, warranty statements, invoices, and correspondence. Retain the original of each document to be presented at trial. Place the exhibits after the signature and verification pages, and refer to them in the body of the complaint, for example:

> 11. The defendant signed and delivered to the plaintiff a promissory note in the amount of $5,000 payable with 8% interest on August 2, 1996, a copy of which is attached as Exhibit A and incorporated herein.

SIDEBAR If the complaint requires numerous exhibits, it is helpful to insert a List of Exhibits before the first exhibit. It is also helpful to tab each exhibit so the judge will not have to plow through fifty exhibits searching for the crucial Exhibit 35.

PREPARING OTHER DOCUMENTS NECESSARY TO INITIATE THE LAWSUIT

The complaint is not the only document necessary to commence the lawsuit. This section discusses the other documents you must prepare.

The Summons

The ***summons*** is the form that accompanies the complaint and explains in simple terms to the defendants that they have been sued and that they must file an answer with the clerk of court. The summons further states that if the defendants fail to file an answer in the allotted time, a ***default judgment*** will be entered against them. (See Chapter 6 for a discussion of default judgments.) The summons and the complaint are then served on the defendants. Service of process means that the summons and complaint are delivered to the defendants in accordance with FRCivP 4, which is discussed throughout the remainder of this chapter. When the defendants have been properly served, the court has personal jurisdiction over them.

First the paralegal must learn how to prepare the summons. FRCivP 4(a) establishes the contents of the summons. Read rule 4(a) of the Federal Rules of Civil Procedure, but remember that you can acquire the proper preprinted form for the summons from the clerk of court. Your law firm will probably have blank summonses on file for your use. Look at Figure 5–8, a preprinted summons

FIGURE 5-8 A Completed Summons

AO 440 (Rev. 5/85) Summons in a Civil Action

United States District Court

Western DISTRICT OF North Carolina

Bryson Wesser

SUMMONS IN A CIVIL ACTION

V.

CASE NUMBER:

Woodall Shoals Corporation and
Second Ledge Stores, Incorporated

TO: (Name and Address of Defendant)

Woodall Shoals Corporation
300 West Blvd.
New York, NY 10019-0987

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Leigh J. Heyward
Heyward and Wilson
401 East Trade Street
Charlotte, NC 28286-1114

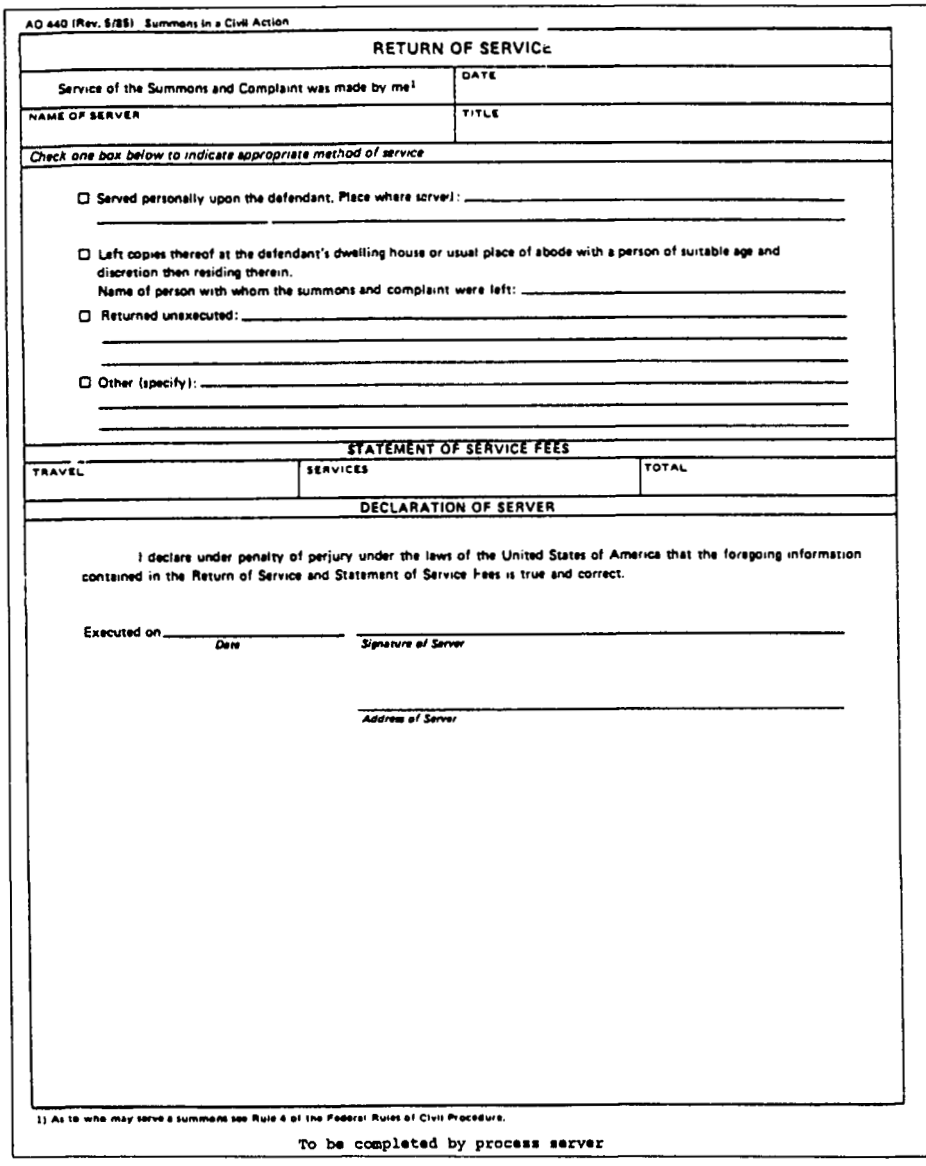
an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK

DATE

BY DEPUTY CLERK

FIGURE 5–8 (Continued)



AO 440 (Rev. 5/85) Summons in a Civil Action

RETURN OF SERVICE

Service of the Summons and Complaint was made by me[1]	DATE
NAME OF SERVER	TITLE

Check one box below to indicate appropriate method of service

☐ Served personally upon the defendant. Place where served: _____

☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left: _____

☐ Returned unexecuted: _____

☐ Other (specify): _____

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ _____
Date *Signature of Server*

_____
Address of Server

1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

To be completed by process server

form. You will see that you fill in (1) the name of the court district, (2) the name of the plaintiff(s), (3) the name of the defendant(s), (4) the address of the defendant to whom this particular summons is addressed, (5) the name and address of the plaintiff's attorney, and (6) the number of days the defendant has to file an answer. The Return of Service appears on the back of the summons. Leave the

Return of Service blank because the person who serves the complaint and summons completes this section.

When you go to the clerk's office to file the lawsuit, the clerk will "issue" the summons, as directed in FRCivP 4(a). This means that the clerk signs and dates the summons, stamps it with the court seal, and fills in the case number assigned to the lawsuit. Prepare enough summonses so that the clerk can issue one summons for each defendant, at least one summons for your file, and the proper number of summonses that the clerk's office requires for its file.

The Civil Cover Sheet

The civil cover sheet is another preprinted form that you must prepare and file with the complaint. This is a very simple form. Examine Figure 5–9, which shows a civil cover sheet filled out for the Wesser case. The civil cover sheet provides information the clerk of court needs to docket the case—that is, to record basic information about the lawsuit and keep track of its progress. You need to file one civil cover sheet. Be sure to keep at least one copy. Before filing the civil cover sheet, check to be sure that the attorney has signed and dated the form.

Other Forms

Check the local rules to determine whether the judicial district requires any other forms to accompany the complaint. In state court actions, determine whether the local rules require a civil cover sheet. Many state judicial districts have their own civil cover sheet, which you can obtain from the clerk's office. Your state judicial district may require special forms for certain types of lawsuits. For instance, in an action for child support, the court may require each party to file an Affidavit of Income and Expenses.

You are almost ready to go to the courthouse and file the documents to initiate the lawsuit, but first the procedure and the documents required for service of process are examined.

SERVICE OF PROCESS

Service of process means delivery of the summons and complaint to the defendant in accordance with rule 4 of the Federal Rules of Civil Procedure. FRCivP 4 establishes who may serve the summons and complaint and on whom these documents must be served. When the defendant is properly served, the court acquires personal jurisdiction over the defendant.

How Process Is Served

FRCivP 4 provides several methods for service of process. You need to discuss with the attorneys on your team which method is proper for each defendant.

Personal Service by a Person Not a Party. FRCivP 4(c)(2) provides that a person who is not a party to the lawsuit and is not less than eighteen years of age may serve the summons and complaint on the defendant. The person who serves

FIGURE 5-9 Civil Cover Sheet

JS 44
(Rev 07/89)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I (a) PLAINTIFFS

Bryson Wesser

DEFENDANTS

Woodall Shoals Corporation
Second Ledge Stores, Incorporated

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Mecklenburg
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
Leigh J. Heyward
Heyward and Wilson
401 East Trade Street
Charlotte, NC 28226-1114

ATTORNEYS (IF KNOWN)
Not yet known

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☒ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

28 U.S.C. 1332

Personal injury and property damage caused by defective electric blanket

V. NATURE OF SUIT (PLACE AN x IN ONE BOX ONLY)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury PERSONAL INJURY ☐ 362 Personal Injury—Med Malpractice ☒ 365 Personal Injury—Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability		☐ 610 Agriculture ☐ 620 Food & Drug ☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 630 Liquor Laws ☐ 640 R.R. & Truck ☐ 650 Airline Regs ☐ 660 Occupational Safety/Health ☐ 690 Other LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 730 Labor/Mgmt. Reporting & Disclosure Act ☐ 740 Railway Labor Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark SOCIAL SECURITY ☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC (405(g)) ☐ 863 DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609	☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce/ICC Rates/etc. ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 810 Selective Service ☐ 850 Securities/Commodities/Exchange ☐ 875 Customer Challenge 12 USC 3410 ☐ 891 Agricultural Acts ☐ 892 Economic Stabilization Act ☐ 893 Environmental Matters ☐ 894 Energy Allocation Act ☐ 895 Freedom of Information Act ☐ 900 Appeal of Fee Determination Under Equal Access to Justice ☐ 950 Constitutionality of State Statutes ☐ 890 Other Statutory Actions
REAL PROPERTY ☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	CIVIL RIGHTS ☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/Accommodations ☐ 444 Welfare ☐ 440 Other Civil Rights	PRISONER PETITIONS ☐ 510 Motions to Vacate Sentence ☐ 530 Habeas Corpus ☐ 540 Mandamus & Other ☐ 550 Civil Rights			

VI. ORIGIN (PLACE AN x IN ONE BOX ONLY)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION ☐ UNDER F.R.C.P. 23

DEMAND $ in excess of $75,000

Check YES only if demanded in complaint:
JURY DEMAND: ☒ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See instructions): None

JUDGE _____ DOCKET NUMBER _____

DATE

SIGNATURE OF ATTORNEY OF RECORD

UNITED STATES DISTRICT COURT

the defendant completes the Return of Service on the back of the summons. Your law firm may have you serve process on the defendant. Some law firms hire a process server, especially when the defendant lives far away.

Service by United States Marshal. FRCivP 4(c)(2) allows the court to direct that service be made by a United States marshal, but only in limited circumstances. Only plaintiffs who have been authorized to proceed *in pauperis* (as a poor person) pursuant to 28 *United States Code* section 1915 or as a seaman under 28 *United States Code* section 1916 may request that the court order service by a United States marshal. The rationale is that the plaintiff cannot afford to pay for a private process server. Before requesting service by a United States marshal, the attorney-paralegal team must ensure that the plaintiff fits within one of the two designated categories.

Person to Be Served

FRCivP 4(e)–(j) explains who is the proper person to serve, which differs according to the defendant's status. Infants or incompetents, business organizations, individuals in foreign countries, and agencies of the United States or state government are served according to specific rules. FRCivP 4(e)–(k) states that service shall be made as follows:

> **(e) Service Upon Individuals Within a Judicial District of the United States.** Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:
>
> **(1)** pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
>
> **(2)** by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.
>
> **(f) Service Upon Individuals in a Foreign Country.** Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:
>
> **(1)** by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or
>
> **(2)** if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:
>
> **(A)** in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or
>
> **(B)** as directed by the foreign authority in response to a letter rogatory or letter of request; or
>
> **(C)** unless prohibited by the law of the foreign country, by
>
> **(i)** delivery to the individual personally of a copy of the summons and the complaint; or
>
> **(ii)** any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

(g) Service Upon Infants and Incompetent Persons. Service upon an infant or an incompetent person in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.

(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

SIDEBAR The secretary of state keeps a record of the person authorized by foreign and domestic corporations to accept service of process. As to other persons authorized by statute to accept service, see the section on "long-arm statutes" that follows.

(i) Service Upon the United States, and Its Agencies, Corporations, or Officers.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the

summons and of the complaint by registered or certified mail to the officer or agency.

(2) Service upon an officer, agency, or corporation of the United States, shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and of the complaint by registered or certified mail to the officer, agency, or corporation.

(3) The court shall allow a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States.

(j) Service Upon Foreign, State, or Local Governments.

(1) Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608.

(2) Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(k) Territorial Limits of Effective Service.

(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant

(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or

(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or

(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or

(D) when authorized by a statute of the United States.

(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

SIDEBAR Rule 4 is quite technical. Review it before attempting service. While most paralegals are likely to prepare documents for service on individuals in the United States (FRCivP 4(e)), those who work in certain areas of law must learn the technical requirements in other sections of rule 4. For instance, paralegals involved with clients who engage in multinational business transactions should become familiar with the technical requirements for service on individuals in a foreign country, set forth in FRCivP 4(f). Paralegals who work in the area of administrative law should pay special attention to FRCivP 4(i), which governs service when a federal agency

is a defendant. Proof of service can also differ. For instance, there are special requirements when the United States government is a defendant. Refer to Figure 5–10 and to the following discussion.

Timeliness of Service of Process. FRCivP 4(m) requires that service of process be accomplished within 120 days of the filing of the complaint. The action against the unserved defendant will be dismissed without prejudice unless good cause is shown for failure to complete service within 120 days. The plaintiff may file a motion with the court requesting additional time to accomplish service.

Geographical Area of Service. A summons is not servable anywhere in the United States just because it has been issued by a federal court. The state in which the federal court sits is the basic unit in which service of process is permissible.[3] Thus, as a general rule, when a federal court issues a summons, the court may obtain personal jurisdiction over defendants in that state. There are, however, several provisions that allow in federal court actions ***extraterritorial service***, that is, service of process on a defendant outside the state in which the court sits. These include state long-arm statutes, discussed in detail in Chapter 2. Certain federal statutes, such as antitrust, provide for nationwide service of process. When neither a state long-arm statute nor a specific federal statute applies, FRCivP 4(k)(2) may apply, as explained in Chapter 2. When subdivision 4(k)(2) is applicable, it allows for service not only outside the state in which the federal court sits but even outside the United States.[4]

Subdivision (k)(1)(B) of rule 4, the so-called "100-mile bulge" provision, allows service of process within 100 miles of the place where the lawsuit is commenced, even if this entails crossing state lines. The "100-mile bulge" provision can, however, be used only in certain circumstances, that is, to bring in third-party defendants under FRCivP 14 or as necessary parties under FRCivP 19. This is another very technical point in rule 4 that requires close consultation between paralegals and supervising attorneys.

Proof of Service

After the summons and complaint have been served on the defendants, the documents proving that service has been completed must be filed with the clerk of court. FRCivP 4(l) provides that the person who serves the summons and complaint must "make proof of service thereof to the court." If anyone other than a United States marshal serves process, that person must file an affidavit attesting that service has been effected. The summons itself has a Return of Service on the back, on which the process server indicates the date and the manner in which service was made. (See Figure 5–8.)

Sometimes, particularly when there are multiple defendants, a separate affidavit is necessary. Figure 5–10 illustrates an affidavit of service when the

defendant is a federal agency. Note that the affidavit describes how each defendant was served. Here the United States Attorney's office was personally served, and proof of this will appear on the back of the summons, which will be filed simultaneously with the affidavit. The United States Attorney General and the Immigration and Naturalization Service were served by certified mail, and the return receipts from the postal service are attached as exhibits to the affidavits.

FIGURE 5–10 Affidavit of Service

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO.: 3:96 CV 821-MU

MICHAEL ANDREOU AND ELIZABETH ANDREOU,
Plaintiffs,

-vs-

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE,
Defendant.

AFFIDAVIT OF SERVICE

The undersigned attorney for the Plaintiffs, being first duly sworn, deposes and says:

1. This is an action for declaratory and injunctive relief challenging the constitutionality of 8 U.S.C. section 1154. The Defendant has been duly served with process in this action, in accordance with Rule 4(d)(4) and (5) of the Federal Rules of Civil Procedure, as described below.
2. On July 3, 1996, the undersigned personally served a copy of the Summons and three copies of the Complaint in this action on Judith K. Wagner, in the Office of the U.S. Attorney in Charlotte, North Carolina.
3. On July 3, 1996, the undersigned sent by certified mail, return receipt requested, a copy of the Summons and Complaint in this action to Doris Meissner, Commissioner, Immigration and Naturalization Service, 425 "I" Street NW, Washington, DC 20536. The copy of the Summons and Complaint were in fact received on July 6, 1996, as evidenced by the Return Receipt attached as Exhibit "A."
4. On July 3, 1996, the undersigned sent by certified mail, return receipt requested, a copy of the Summons and Complaint in this action to Janet Reno, Attorney General, United States Department of Justice, Tenth Street and Constitution Ave. NW, Washington, DC 20530. The copy of the Summons and Complaint were in fact received on July 6, 1996, as evidenced by the Return Receipt attached as Exhibit "B."

FIGURE 5–10 (Continued)

This the_____day of July, 1996.

_____

Leigh J. Heyward
Attorney for the Plaintiff
Heyward and Wilson
401 East Trade Street
Charlotte, NC 28226-0114
704-555-3161
FAX: 704-555-3162
N.C. State Bar No. 12779

Sworn to and Subscribed before me
this the _____ day of _____,
1996.

_____

Notary Public
My Commission Expires: _____
(SEAL)

Waiver of Service

Service of process can be complicated, time-consuming, and expensive. FRCivP 4(d) presents an alternative, designed to save the cost of service of a summons.

The procedure, known as waiver of service, is simple. The plaintiff sends to the defendant, by first class mail or "other reliable means," a copy of the complaint, two copies of the request for waiver, the waiver itself, and a "prepaid means of compliance in writing." This last requirement can be met by enclosing a self-addressed envelope with prepaid postage affixed. Note that no summons is enclosed; the idea is to inform the defendant of the lawsuit by adequate but less formal means than the summons.

The language of the waiver, entitled Notice of Lawsuit and Request for Waiver of Service of Summons, is simple. The necessary language is set forth in Form 1A of the Appendix of Forms annexed to the Federal Rules of Civil Procedure, illustrated in Figure 5–11. The request for waiver informs the defendant of the lawsuit, gives instructions and deadlines for returning the actual waiver, and informs the defendant that the plaintiff will pursue formal service of process if the waiver is not returned. FRCivP 4(d)(2)(F) states that the defendant should be allowed thirty days to return the waiver, or sixty days if the defendant's address is outside the United States. The language of the Waiver of Service of Summons is equally straightforward. The language is found in Form 1B, illustrated in Figure 5–12. The defendant acknowledges receipt of the request for waiver and acknowledges being informed of the need to file an answer or rule 12 motion within a certain number of days.

FIGURE 5–11 Form 1A, Appendix of Forms, FRCivP

Form 1A. Notice of Lawsuit and Request for Waiver of Service of Summons

TO: (A)
[as (B) of (C)]

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint is attached to this notice. It has been filed in the United States District Court for the (D) and has been assigned docket number (E).

This is not a formal summons or notification from the court, but rather my request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within (F) days after the date designated below as the date on which this Notice and Request is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent (or before 90 days from that date if your address is not in any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, to the extent authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth on the reverse side (or at the foot) of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this _____ day of _____, _____.

Signature of Plaintiff's Attorney or Unrepresented Plaintiff

Notes:

A—Name of individual defendant (or name of officer or agent of corporate defendant)

B—Title, or other relationship of individual to corporate defendant

C—Name of corporate defendants, if any

D—District

E—Docket number of action

F—Addresses must be given at least 30 days (60 days if located in foreign country) in which to return waiver.

FIGURE 5–12 Form 1B, Appendix of Forms, FRCivP

Form 1B. Waiver of Service of Summons

TO: (name of plaintiff's attorney or unrepresented plaintiff)

I acknowledge receipt of your request that I waive service of a summons in the action of (caption of action), which is case number (docket number) in the United States District Court for the (district). I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after (date request was sent), or within 90 days after that date if the request was sent outside the United States.

Date Signature

Printed/typed name: _____

[as_____]

[of_____]

To be printed on reverse side of the waiver form or set forth at the foot of the form:

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

Defendants are also informed that they do not lose the right to raise certain defenses to the lawsuit by signing the waiver of service of the summons. FRCivP 4(d)(1) specifies that defendants who waive service of a summons do not thereby waive any objection to venue or personal jurisdiction. There is an advantage to defendants who choose to waive service. FRCivP 4(d)(3) provides that a defendant who timely returns the waiver has sixty days after the date on which the request for waiver of service was sent to serve an answer to the complaint. A defendant whose address is outside the United States has ninety days.

If a defendant declines to waive service of a summons, the plaintiff must turn to formal service of process. The time spent unsuccessfully trying to get the defendant to waive service counts as part of the overall 120-day time limit for service of process. Thus, paralegals should keep careful records of the time elapsed in trying to obtain a waiver of service, particularly if the statute of limitations looms near.

There are some restrictions on use of the waiver procedure. It may be used only when the defendant is an individual or private business entity. Thus, the waiver method is not available when the defendant is an infant or incompetent or part of a government, such as a federal agency.

SIDEBAR If the defendant signs and returns a waiver of service, the waiver is filed as proof of service. A separate affidavit is not required.

Service of Process Under State Law. It is imperative that you review your state's rule for service of process. State service of process tends to be similar to rule 4 of the Federal Rules of Civil Procedure, but technical differences may exist. Some states may have methods of service not found in FRCivP 4, such as service by publication. In state court actions, it is common for the sheriff of the county in which the defendant lives to serve process.

MECHANICS OF FILING THE LAWSUIT

You have now prepared the forms necessary to file the lawsuit—the complaint and the summons. You have also determined the proper manner to serve the summons and complaint on the defendant and prepared the necessary forms. You are ready to go to the clerk of court's office to file the lawsuit. It is helpful to prepare a checklist of the items you need to take. Until you have gained experience filing lawsuits, review the documents with your supervising attorney or another paralegal in your firm. Double-check all documents for accuracy and signatures. To file the lawsuit in federal court, you need the following items:

1. The original complaint, with enough copies for each defendant, for the clerk's files (check local rules), and a copy for your file
2. The original summons, with enough copies for each defendant to be served and a copy for your file

3. A check for the filing fee
4. The civil cover sheet, with a copy for your file

The clerk will stamp the complaint and copies "filed," stamp a date, and assign a civil case number. Some district courts assign the judge at this time. The clerk of court will issue the summons and return the summons for service on the defendants. The clerk will check over and retain the civil cover sheet.

The filing procedure in state court is generally the same, except that most often the sheriff or other appropriate law enforcement officer serves the summons and complaint. If you do serve process by mail, be sure to file an affidavit of service after service has been accomplished.

INJUNCTIONS

The litigation process takes months, sometimes years, to reach a conclusion and determine the relief that each party will get. In some cases, however, the client needs immediate relief. In some situations, a party will lose property forever unless a court quickly enters an order directing another party to leave the property alone. When a client needs an immediate court order directing the other party to refrain from some act, you must have ready to file with the complaint the documents seeking an injunction.

An ***injunction*** is a court order directing a person to refrain from doing an act. The classic example of a situation appropriate for injunctive relief is the boundary dispute involving one-hundred-year-old trees. If Ms. Taylor's neighbor is about to cut down these trees, it is appropriate for Ms. Taylor to seek injunctive relief from the court to prevent her neighbor from cutting down the trees.

Distinguishing a Temporary Restraining Order from a Preliminary Injunction

Both a temporary restraining order (TRO) and a preliminary injunction provide injunctive relief. Injunctive relief is considered equitable relief—that is, relief appropriate when a party shows that money damages will not protect his or her rights. Both are governed by rule 65 of the Federal Rules of Civil Procedure. A TRO can be issued only when a party establishes that he or she will suffer immediate and irreparable harm; it is issued immediately and normally is valid for only ten days. The TRO preserves the parties' rights until the court can hold a hearing to determine whether the injunctive relief should be continued. If the court elects to continue injunctive relief, the court issues a preliminary injunction, which preserves the parties' rights until the issues can be determined at trial.

Procedure for Obtaining a Temporary Restraining Order and Preliminary Injunction

FRCivP 65(b) provides that a court can issue a TRO *ex parte*—that is, without a hearing at which both parties are present. However, the attorney must try to give notice of the TRO request to the other party. The plaintiff also must post

a bond to protect the defendant in case it is later determined that the defendant was wrongfully enjoined.

An application for a TRO and preliminary injunction must be submitted along with the complaint. It is customary to combine the request for a TRO and preliminary injunction in the same application because a hearing must be held on the preliminary injunction as soon as possible after a TRO is issued. Thus, the title will be "Application for Temporary Restraining Order and Preliminary Injunction." The application sets forth the threatened acts and states that the plaintiff will suffer immediate and irreparable harm if the defendant is not enjoined. The application can refer to the complaint and incorporate the facts alleged in the complaint. The complaint must be verified, that is, the plaintiff must sign an affidavit stating that the facts alleged are true. The relief requested in the application reads as follows: "WHEREFORE, plaintiff requests that the court enter a temporary restraining order against defendant and set a hearing for a preliminary injunction at the earliest practical time." The court issues the preliminary injunction for a specified period of time, usually until the issues can be determined at trial.

CLASS ACTIONS

A class action is a complex type of litigation. If you assist with a class action, it will no doubt be under the direction of lawyers with much experience in this complicated area. It is important for paralegals to understand the nature of class actions and when a class action is appropriate. The purpose of a class action is to allow a large group of persons with similar grievances to bring one lawsuit on behalf of themselves and other persons with the same grievance. A class of plaintiffs can include thousands of individuals, so not every plaintiff will be named. Rather, just a few of the plaintiffs will be named, and they will serve as representatives of the thousands of other persons in the class. Note that a group of defendants can constitute a class as well.

The court must determine whether a lawsuit can be maintained as a class action. Not just any group of aggrieved persons can get together and decide that it will constitute a class. Rather, a court must decide that they meet the prerequisites to a class action set forth in rule 23(a) of the Federal Rules of Civil Procedure. Those prerequisites include a class "so numerous that joinder of all members is impracticable" and "questions of law or fact common to the class." In addition, the claims or defenses of the representative parties must be "typical of the claims or defenses of the class" and the representative parties must "fairly and adequately protect the interests of the class."

If you are involved in class action litigation, you will refer not only to FRCivP 23 but also to reference books that address complex litigation. As noted, you will no doubt be working with attorneys experienced in class action litigation.

ETHICS BLOCK

Lawyers have a duty to keep their clients informed. ABA Model Rule 1.4(a) explains that this duty includes keeping clients "reasonably informed about the status of a matter" and promptly complying with "reasonable requests for information." Lawyers must keep clients informed of developments so that clients can make decisions, in conjunction with the lawyers' advice, about matters concerning their case, such as whether to accept an offer of settlement. A lawsuit can go on for years, and this is particularly true of complex litigation. It is important to communicate with clients regularly to inform them of the status of their case, even if there have been no recent developments. Paralegals' tasks often include talking with or writing to clients to apprise them of the status of their cases. This is an important duty, because failure to communicate is a frequent cause of clients' filing grievances against lawyers with the state bar.

SUMMARY

This chapter explains how to prepare the documents necessary to commence a lawsuit. The first document is the complaint, which is the first pleading filed and which explains the plaintiff's claim for relief. Before preparing a complaint, it is necessary to review the general rules that apply to all pleadings. FRCivP 7 states the various types of pleadings that are allowed. FRCivP 8 states the general rule for the content of pleadings—that is, that pleadings must provide a "short and plain statement of the claim." This is the concept of notice pleading, which means that parties plead in a clear, concise manner the reasons why they are entitled to relief, but need not state every detail. Rather, FRCivP 8 requires enough detail to allow the other parties to prepare a defense.

Next, the text discusses the basic format requirements for pleadings, which are set forth in FRCivP 10. All pleadings require a caption and numbered paragraphs. The illustrations in this chapter and in the Appendix show how a completed complaint looks. Pleadings must be signed by the attorney of record in accordance with FRCivP 11, which states that attorneys' signatures indicate that they have reviewed the facts and law and are not filing a pleading that is frivolous or one that is filed only to delay the litigation. Clients have to sign a verification of the facts in a pleading only in limited circumstances, such as when they are also seeking a temporary restraining order or when a state law requires client verification in certain types of state court actions.

FRCivP 3 provides that the filing of a complaint commences the lawsuit. A complaint must contain three substantive elements—a statement of jurisdiction, a statement of the claim, and the demand for judgment. Statements of jurisdiction are illustrated in Figures 5–1, 5–7, and in the Wesser and Chattooga complaints in the Appendix. The statement of the claim must explain the plaintiff's cause of action—that is, a claim for which a court can grant relief. Not every perceived wrong constitutes a cause of action. To state successfully a cause of action, one must plead the essential elements of the claim—that is, the facts that the law requires to exist in order to establish a particular cause of action. The

demand for judgment states the types of relief the plaintiff seeks, including monetary damages, equitable relief, attorneys' fees, and so on. Finally, the attorney signs the complaint, and the paralegal checks to be sure all necessary exhibits are attached.

The next document to prepare is the summons, which is the form that accompanies the complaint and informs the defendants that they have been sued and within how many days they must file a response. Another document that accompanies the complaint in federal actions is the civil cover sheet. This is a preprinted form on which you check the type of action you are filing and other details that help the clerk to keep track of the litigation.

Service of process is the delivery of the summons and complaint to the defendants in accordance with FRCivP 4. Proper service of process is necessary to gain personal jurisdiction over defendants. FRCivP 4 has technical provisions as to how and on whom process can be served. Personal service may be made by a person who is not a party to the lawsuit, and service by a United States marshal is available, though only in very limited circumstances. The person on whom service can properly be made depends on the type of defendant. Different subsections of FRCivP 4(e)–(j) apply, depending on whether the defendant is or is not an infant or incompetent; a corporation, partnership, or other unincorporated association; the United States; an agency or officer of the United States; or a state or municipal corporation or other governmental organization that is subject to suit. Plaintiffs may mail the complaint and a waiver of service if the defendant is a person or an individual business entity. If the defendant signs and returns the waiver of service, the waiver is filed as proof of service.

In federal court actions, if service of process is not accomplished within 120 days of the filing of the complaint, the complaint may be dismissed as to the unserved defendants. Service of process in state court actions may be subject to different technicalities concerning deadlines for service and manner of service, depending on the state rules of civil procedure. State long-arm statutes often provide for substituted service on nonresident defendants.

The actual mechanics of filing a lawsuit include taking to the clerk of court's office the complaint, summons, filing fee, and civil cover sheet. The clerk assigns a civil file number, stamps the complaint "filed," and issues the summons. Be sure to take sufficient copies of all documents. Then arrange for service of process. After service has been made, file proof of service with the clerk. This can be done by filing the summons with the completed Return of Service on the back or by filing a separate affidavit with other proof of service, depending upon how service was accomplished.

At the commencement of a lawsuit, the plaintiff may need injunctive relief if he or she faces a situation involving immediate and irreparable harm for which money damages are insufficient. The plaintiff first requests a temporary restraining order, which orders the defendant to refrain from the harmful activity. A TRO is commonly issued for ten days, at which time a hearing is held on whether a preliminary injunction should issue. A preliminary injunction prevents the harmful activity until a trial can be held.

A final topic to consider is the class action. This type of lawsuit is designed to allow a large group of persons with similar grievances to bring one lawsuit on behalf of themselves and other persons with the same grievance. The rules for certifying a class action are technical and are set forth in FRCivP 23.

REVIEW QUESTIONS

1. Which of the following must be mailed to a defendant in order to obtain waiver of service?
   a. complaint
   b. waiver
   c. two copies of request for waiver
   d. all of the above
   e. b and c only
2. Which Federal Rule of Civil Procedure governs service of process?
   a. FRCivP 10
   b. FRCivP 4
   c. FRCivP 65
   d. FRCivP 23
3. Proof of service may in general be shown by which of the following?
   a. completion of the Return of Service on the back of the summons
   b. filing an affidavit of service, if the defendant is a United States government agency
   c. phoning the clerk's office to inform them that service has been completed
   d. all of the above
   e. a and b only
4. When must a client verify a complaint?
   a. when seeking a temporary restraining order at the time the complaint is filed
   b. when state law requires verification
   c. never
   d. all of the above
   e. a and b only
5. T F If a defendant fails to return the waiver of service form, the plaintiff must use formal service of process.
6. T F State rules of civil procedure are always the same as the Federal Rules of Civil Procedure.
7. T F A claim for which a court can fashion relief is called a cause of action.
8. T F A plaintiff's request for a jury trial may be implied and need not be expressly stated in the complaint.
9. T F Any wrong that a person suffers constitutes a cause of action.
10. T F The civil file number appears on the complaint and all subsequent pleadings.

PRACTICAL APPLICATIONS

You are working with Kathy Mitchell on the Chattooga case. She asks you to complete a draft of the civil cover sheet. Refer to Figure 5–9 and answer the following questions.

1. In Block II, BASIS OF JURISDICTION, which box do you choose?
2. Which box, if any, do you choose in Block III?
3. In Block V, which box do you choose to describe the nature of the suit?

CASE ANALYSIS

Read the excerpt from *FDIC v. Floyd*, 827 F. Supp. 409 (N.D. Tex. 1993), and answer the questions following the excerpt.

MEMORANDUM OPINION AND ORDER

SANDERS, Chief Judge.

Before the Court are FDIC's Application for Preliminary Injunction, filed June 28, 1993; Defendant's Materials in Opposition to the Motion, filed July 9, 1993: and the FDIC's Materials and Affidavits in Support of the Motion, filed July 9, 1993.

I. BACKGROUND

This is a suit for collection of a promissory note for $240,000, plus interest in the approximate amount of $23,372.83. The obligation is allegedly owed by Defendant Floyd to American National Bank—Post Oak ["the bank"]. Plaintiff FDIC is acting in its capacity as Receiver of the bank. . . .

II. PRELIMINARY INJUNCTION
UNDER 12 U.S.C. § 1821(d)(18)

A. Requirement of Fraudulent Conduct

The FDIC brings this motion for preliminary injunction under a subsection of the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub.L. No. 101–647, Stat. 4789. *See* 12 U.S.C. § 1821(d)(18) (Supp. 1991). Section 1821(d)(18) of Title 12 authorizes the Court to issue a preliminary injunction enjoining certain assets at the request of the FDIC, as receiver of a failed banking institution. That section follows in relevant part:

> Subject [to] paragraph (19), any court of competent jurisdiction may, at the request of . . . the Corporation (in the Corporation's capacity as conservator or receiver for any insured depository institution) . . . issue an order in accordance with Rule 65 of the Federal Rules of Civil Procedure.

12 U.S.C. § 1821(d)(18) limits the above section:

> Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under paragraph (18) without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

12 U.S.C. § 1821(d)(19).

Generally, under Rule 65, one who petitions for a preliminary injunction must prove (1) a substantial likelihood of success on the merits of the underlying claim; (2) a substantial threat of irreparable injury should the injunction not issue, for which there is no adequate remedy at law; (3) that the threatened injury outweighs any damage that the injunction may cause; and (4) that the injunction will not disserve

the public interest. *Doe v. Duncanville Indep. School Dist.*, 994 F.2d 160 (5th Cir. 1993); *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984); Fed.R.Civ.P. 65. Under § 1821(d)(19), the FDIC need not show irreparable injury for which there is no adequate remedy at law. 12 U.S.C. § 1821(d)(19); *see FDIC v. Faulkner*, 991 F.2d 262 (5th Cir. 1993).

The question that confronts the Court today is whether § 1821(d)(18)–(19) may be invoked by the FDIC in a lawsuit for the simple collection of a promissory note. The Court finds no authority directly on point. In the decisions that have construed and applied 1821(d)(18)–(19), the underlying suit involved, at least in part, allegations of fraudulent conduct. *See, e.g., Faulkner*, 991 F.2d at 264–65; *RTC v. Cruce*, 972 F.2d 1195 (10th Cir. 1992); *FDIC v. Cafritz*, 762 F.Supp. 1503 (D.D.C. 1991). In those cases, the complaining federal banking agency sought temporary restraint of assets in conjunction with its attempt to avoid allegedly fraudulent transfers under 12 U.S.C. § 1821(d)(17).

. . .

For the reasons given above, the Court concludes that a petition for preliminary injunction brought under 12 U.S.C. § 1821(d)(18)–(19) must include a showing of fraudulent conduct. Otherwise, the statute operates to afford Draconian relief to the FDIC under everyday circumstances. If the underlying lawsuit alleges fraudulent conduct, as in a case brought under § 1821(d)(17), the issue is necessarily addressed in the traditional requirement of showing a substantial likelihood of success on the merits. If the underlying lawsuit does not allege fraudulent activity, as in this case, a petition for preliminary injunction must show some potential injury evidenced by a clear nexus between past fraudulent conduct and the property for which restraint is sought under the facts of the underlying suit.

. . .

The FDIC is unable, however, to show any fraudulent activity by Floyd that would support a claim of potential injury. In this case, the FDIC cannot argue that it is attempting to avoid an allegedly fraudulent transfer. The funds at issue are proceeds from the sale of Floyd's house. When released to Floyd from the Court's registry under the mandate in the criminal action, the funds will still be under Floyd's—and not a third party's—ownership and control. Although it is true that Floyd sent the funds out of the country in Fall 1992, prior to the filing of this case, that "transfer" has already been avoided in the criminal action. *See United States v. Floyd*, 814 F.Supp. 1355 (N.D.Tex.) *rev'd*, 992 F.2d 498 (5th Cir. 1993).

III. PRELIMINARY INJUNCTION UNDER RULE 65

Neither does the FDIC meet the traditional standards for preliminary injunction under Rule 65. *See Apple Barrel*, 730 F.2d at 386; Fed.R.Civ.P. 65. In support of its application, the FDIC offers no proof of irreparable harm that cannot be undone with money damages. *See Spiegel v. Houston*, 636 F.2d 997, 1001 (5th Cir. 1981); *see also In re Fredeman Litig.*, 843 F.2d 821, 824 (5th Cir. 1988) ("The general federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment.") Accordingly, the FDIC fails to meet its burden for preliminary injunctive relief.

IV. CONCLUSION

For the reasons given above, the temporary restraining order in this case is DISSOLVED. The FDIC's application for preliminary injunction is DENIED. The funds will be released from the Registry of the Court by separate order in the criminal action.

SO ORDERED.

1. What is the cause of action in this lawsuit?
2. What are the five elements that generally must be established for a court to issue a preliminary injunction under FRCivP 65?
3. The FDIC, as the receiver of a failed banking institution, filed a motion for a preliminary injunction enjoining certain of the defendant's assets under 12 U.S.C. § 1821(d)(18). Does this statute require the FDIC to show that it would suffer irreparable injury in order to get an injunction?
4. Had the court ever before addressed the issue of whether it could issue a preliminary injunction under 12 U.S.C. § 1821(d) on the simple collection of a promissory note?
5. Did the court find that allegations of fraudulent conduct were necessary for a preliminary injunction to issue under 12 U.S.C. §1821(d)?
6. Did the court conclude that the FDIC was attempting to prevent an allegedly fraudulent transfer?
7. The court declined to issue a preliminary injunction under the traditional standards of FRCivP 65. Why?

ENDNOTES

1 The Appendix of Forms is found in 28 *United States Code*, at the end of the Federal Rules of Civil Procedure.
2 *Black's Law Dictionary* 594 (5th ed. 1979).
3 David Siegel, "Supplementary Practice Commentaries," Rules of Civil Procedure, Rule 4, p. 75, 28 U.S.C.A. (Supp. 1997).
4 *Id.* at 62.

Chapter 6

SUBSEQUENT PLEADINGS

You are well into your first year as a litigation paralegal. You and Ms. Heyward are working together on increasingly complex lawsuits. Your calendar system has become even more important as the various lawsuits progress. Now you are tracking the deadlines for answers to complaints, as well as pretrial motions, such as motions to dismiss under rule 12. Some of the lawsuits involve multiple parties, and some defendants have asserted their own claims in addition to responding to the plaintiff's allegations. You are dealing with counterclaims, where a defendant asserts a claim against a plaintiff, and cross-claims, where a defendant asserts a claim against a codefendant.

Just when you thought a lawsuit could not get more complicated, you are assigned a case that involves third-party practice, where a defendant wishes to assert a claim against a person not already a party to the lawsuit. In other lawsuits, you have discovered new facts that necessitate drafting amendments to the pleadings. In yet another case, you must draft a motion opposing a request for removal, the process for transferring a lawsuit from state court to federal court. Luckily, you remain flexible and calm, even in the face of lawsuits with more characters than novels such as War and Peace.

INTRODUCTION

Review rule 7 of the Federal Rules of Civil Procedure, which sets forth the types of pleadings allowed. So far the text has discussed only one type of pleading, the complaint. Once the plaintiff asserts a claim, the defendant must either admit that the plaintiff is entitled to relief or assert defenses. The defenses are asserted in responsive pleadings, that is, all the other pleadings set forth in rule 6.

This chapter also addresses defenses made pursuant to rule 12(b), (e), and (f) of the Federal Rules of Civil Procedure. Although these rule 12 defenses are technically denominated motions rather than pleadings, they are included in Chapter 6 because they are often filed as part of the answer.

This chapter concentrates on drafting and filing answers and rule 12 motions, as well as counterclaims and replies to them. Counterclaims are pleadings in which defendants assert claims against plaintiffs. Litigation paralegals are likely to be involved in more complex actions as well, involving third-party complaints and answers and interpleader, but because attorneys will be more involved with such complex pleadings, these are discussed only briefly.

At this time, review rule 10 of the Federal Rules of Civil Procedure, which discusses the format requirements for pleadings. Review also rule 8, which states the general rules of pleading. Recall especially the rule 8 requirement that pleadings be concise and direct. This rule of thumb for drafting applies to answers as well as to complaints, as we discussed in Chapter 5.

TIMING

It is absolutely essential that responsive pleadings be filed on time. Failure to meet the filing deadline can result in waiver of the right to raise a defense and can actually result in entry of judgment against the party who failed to respond.

Deadlines for Filing Responses

Rule 12(a) of the Federal Rules of Civil Procedure delineates the deadlines for most responsive pleadings in federal court actions. For example, as a general rule, a defendant must file an answer within twenty days after service of the summons and complaint. A defendant who waives service of the summons is allowed sixty days after the request for waiver was sent, or ninety days if the defendant was addressed outside any judicial district of the United States. For actions filed in state court, you must check your state rules of civil procedure to determine deadlines. Some state rules permit a different period for response. For instance, some states allow thirty days, rather than twenty, to file an answer. The summons usually will tell the defendant how many days are allowed for filing an answer.

Computing Time for Responses

By now you are probably thinking that twenty days is not a very long time to formulate a response. Your next question may be whether you have to include weekend days and holidays in the number of days allowed for the response. Rule 6 of the Federal Rules of Civil Procedure explains precisely how to compute any period of time allowed for any response.

FRCivP 6(a) gives three general rules in computing deadlines for responses. Assume that you are figuring on what day your defendant must file an answer. First, in counting your twenty days, do not include the day on which the summons and complaint were served, because FRCivP 6(a) states that "the day of the act, event, or default from which the designated period of time begins to run shall not be included." Second, if the last day of your twenty-day period falls on a Saturday, Sunday, or legal holiday, do not include that day. Rather, your last day to file the answer is the next day that is not a Saturday, Sunday, or legal holiday. Thus, if your twenty-day period ends on the Saturday before Labor Day, your answer is due on the Tuesday after Labor Day.

The third general rule is that if the time allowed to respond is less than eleven days, intermediate Saturdays, Sundays, and legal holidays are excluded in the computation. For response periods of eleven days or more, you must include Saturdays,

Sundays, and legal holidays. Thus in computing the twenty-day deadline for filing the answer, you must include Saturdays, Sundays, and legal holidays.

Rule 6(a) of the Federal Rules of Civil Procedure contains the definition of "legal holidays," and you should read the definition. You should keep a copy of rule 6 handy, because its computation rules apply not just to answers but also to all other responsive pleadings, motions, and any other filing deadlines provided by the Federal Rules of Civil Procedure, local court rules, court orders, or any applicable statute.[1] The various deadlines will make more sense after more pleadings and motions have been discussed.

Finally, rule 6(e) of the Federal Rules of Civil Procedure states an additional rule in computing time when service is by mail. When a party receives a notice that he or she is required to file a response or take other action and that notice is served by mail, three days are added to the prescribed period for the response. Thus, if you are served a complaint by mail, first calculate your response deadline according to the guidelines discussed previously, then add three days, excluding Saturdays, Sundays, or legal holidays in your computation.

Keeping a Record of Response Dates

Review the docket control discussion in Chapter 1. Remember to calculate the date a response is due as soon as you receive a document that requires a response. Enter the date in the docket control system immediately.

Extensions of Time to Respond

Sometimes an adequate response cannot be prepared within the prescribed period. For instance, a complaint may address multiple alleged grounds of liability and the attorney-paralegal team may need additional time to gather and review extensive documents before an answer can be filed.

Rule 6(b) of the Federal Rules of Civil Procedure governs the extension of time for filing responses. When the motion to extend time is filed before the prescribed period ends, the court may grant an extension of time for "good cause." There is no universal definition for "good cause." However, when the party expresses a legitimate reason that will not result in great prejudice to the opposing party, the court will grant an extension when the prescribed response period has not yet expired. Examples of "good cause" may include a trial in another case, difficulty in locating documents, or the attorney's illness.

As a practical matter, when the response period has not yet expired, before seeking the court's approval of an extension, the party seeking an extension first contacts opposing counsel to seek consent to an extension. If opposing counsel agrees, the parties submit a consent order, stating their agreement to the extension. When the parties agree to an extension, the judge usually signs the consent order. Chapter 7 further discusses procedures for extension of time.

If the motion to extend time is filed after the prescribed response period has elapsed, FRCivP 6(b) requires a higher standard for granting an extension. The responding party must establish that the failure to file a timely response was the result of "excusable neglect." Again, there is no universal definition, but the

fact that the lawyer has a busy schedule generally will not suffice. On the other hand, if the attorney promptly asked the client to deliver extensive documentation for review and the client failed to bring the documents until two days before the response was due, this may be an acceptable reason.

SIDEBAR As with any action taken, you should check the local rules to determine whether they impose additional requirements. For instance, some federal district court local rules require a showing that the opposing attorney was contacted and his or her views solicited before the motion was filed.

Rules regarding extensions of time may vary in state courts. Some state court rules follow exactly rule 6(b) of the Federal Rules of Civil Procedure. The equivalent state rule of civil procedure, however, may be more lenient. It may allow the clerk of court to grant the extension when the motion is filed before the prescribed period ends. The state rule may allow an extension of twenty or thirty days without court approval if all parties agree to the extension, whether the stipulation is entered before or after the prescribed period. See Figure 6–1 for an example of a motion for an extension of time to file a response to a motion to dismiss. In this instance, local rules allowed only ten days to file the response.

RULE 12 MOTIONS

Introduction

Rule 12(b) of the Federal Rules of Civil Procedure states seven defenses that can be raised by either a motion to dismiss or the answer. Rule 12(e) addresses the motion for a more definite statement, and rule 12(f) provides for the motion to strike certain types of allegations from a pleading. It is important that you understand the rule 12 motions so that you can review complaints and find defects that the rule 12 motions address. The attorney-paralegal team can then discuss the rule 12 defenses and when to raise them.

Motions to Dismiss Under Rule 12(b). The defenses that can be raised in a motion to dismiss pursuant to Rule 12(b) are as follows.

1. Lack of jurisdiction over the subject matter (rule 12(b)(1)). This means that the type of claim that the plaintiff has brought does not address a subject matter that this particular court is authorized to hear. For instance, the bankruptcy court does not have subject matter jurisdiction to grant a divorce.

2. Lack of jurisdiction over the person (rule 12(b)(2)). This means that the court does not have personal jurisdiction over the defendant and thus cannot enter a binding judgment over the defendant. For example, suppose that a resident of Virginia writes a check in New Jersey, and the check bounces. If the resident of Virginia does not have minimum contacts with New Jersey, the New Jersey court cannot make the Virginia resident come into court in New Jersey, because the New Jersey court lacks personal jurisdiction.

FIGURE 6–1 Motion for an Extension

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

MOTION

(For additional time to respond to Defendant's Motion to Dismiss)

Plaintiff, by and through his attorneys, moves that the Court grant additional time, through April 25, 1996, for filing of a response to Defendants' Motion to Dismiss and a Memorandum of Law in support of Plaintiff's response. In support of his Motion, Plaintiff shows unto the Court:

1. Plaintiff's attorneys received by mail Defendants' Motion to Dismiss and Memorandum of Law on March 30, 1996.
2. A period of ten days from date of service will not provide sufficient time for filing a response to Defendants' Motion to Dismiss and Memorandum of Law.
3. On March 31, 1996, Leigh Heyward, Esq., telephoned David Benedict, Esq., to inquire whether he would agree to the granting of additional time. Mr. Benedict stated that he consented to additional time, specifically, through April 25, 1996 (a period of two additional weeks), for Plaintiffs to file a response to Defendants' Motion to Dismiss and Memorandum of Law in support of Plaintiff's response.

WHEREFORE, Plaintiff, through Counsel, respectfully requests that the Court grant Plaintiff additional time, through April 25, 1996, to file a response to Defendants' Motion to Dismiss and a Memorandum of Law supporting Plaintiff's response.

Leigh J. Heyward
Attorney for the Plaintiff
Heyward and Wilson
401 East Trade Street
Charlotte, NC 28226-1114
704-555-3161
N.C. State Bar No. 12779

FIGURE 6–1 (Continued)

CERTIFICATE OF SERVICE

I, Leigh Heyward, attorney for the plaintiff, do certify that service of the within and foregoing Motion for additional time to respond to Defendant's Motion to Dismiss was made upon David H. Benedict, attorney for the defendants, by enclosing a true copy in an envelope addressed to Mr. David H. Benedict, Benedict, Parker & Miller, Attorneys at Law, 100 Nolichucky Drive, Bristol, NC 28205-0890, postage prepaid, and depositing same in the United States mail at Charlotte, NC, on the _____ day of April, 1996.

Leigh J. Heyward
Attorney for the Plaintiff
401 East Trade Street
Charlotte, NC 28226-1114

3. Improper venue (rule 12(b)(3)). This means that the case has been filed in the wrong geographic district: in federal court, the wrong district; in state court, the wrong county. For example, a state statute may provide that when a plaintiff sues a railroad, proper venue is in the county where the cause of action arose or where the plaintiff resided at the time of the cause of action. If the lawsuit is filed in a county other than those allowed by the statute, venue is improper.

4. Insufficiency of process (rule 12(b)(4)). This motion challenges the form of process—that is, the content of the summons. If a defendant is misnamed on the summons, this makes the summons invalid. For instance, a corporation may be misnamed.

5. Insufficiency of service of process (rule 12(b)(5)). This motion challenges the method of service used. FRCivP 4 specifies the correct manner of service of process. Suppose that a summons and complaint are left at a defendant's home with the defendant's brother, who is obviously schizophrenic and out of touch with reality. The brother is not a person of suitable discretion, so service of process is not sufficient.

6. Failure to state a claim upon which relief can be granted (rule 12(b)(6)). This means that based on the facts the plaintiff has alleged and the applicable law, no set of facts will support the plaintiff's claim under any legal theory. For example, if a lawsuit is filed after the statute of limitations has expired, this is an insuperable bar to relief, so the complaint can be dismissed.

7. Failure to join a party under rule 19 (rule 12 (b)(7)). This motion generally asserts that there is a party who has not been brought into the lawsuit without whom complete relief cannot be granted or who would be prejudiced by not being included. For instance, if two general partners own a company, and the

company is sued for breach of contract, both partners are potentially liable, so they are both indispensable parties.

When you are asked to draft a motion or answer that includes rule 12 defenses, refer to the usual sources of sample pleadings and motions: other similar files to which the attorney refers you, your firm's file of sample pleadings, form books, and the forms in the Appendix to the Federal Rules of Civil Procedure in 28 *United States Code*.

Consolidation of Rule 12(b) Motions. Rule 12(g) and (h) provide some technical rules regarding when certain rule 12 motions must be consolidated—that is, joined together—in order not to be waived. Some defenses cannot be asserted unless they are included in a motion to strike or an answer. Thus, a party can lose the right to assert the following defenses at a later stage of the litigation if they are not asserted in one consolidated motion to dismiss: lack of personal jurisdiction, venue, insufficiency of process, and insufficiency of service of process. A detailed discussion of these waiver provisions is beyond the scope of this book, but you should read rule 12(g) and (h) and be prepared to discuss with the attorney the combination of defenses that you recommend asserting and how to assert the defenses at the proper time in order to avoid waiving them.

In contrast, the defenses of failure to state a claim upon which relief can be granted (rule 12(b)(6)) and failure to join an indispensable party (rule 12(b)(7)) can be asserted later in any pleading permitted by rule 7, in a motion for judgment on the pleadings, or at the trial on the merits. Note that the defense of lack of subject matter jurisdiction (rule 12(b)(1)) can never be waived and thus can be raised at any time.

When to File Rule 12(b) Motions to Dismiss. Rule 12(b) defenses can be filed either in the answer or in a separate motion to dismiss. Whether the rule 12(b) defenses are in the answer or are filed as a separate motion, the defendant must file within the time permitted for filing an answer to the complaint. Figure 6–2 illustrates a separate motion to dismiss. Turn to the Appendix and examine the answer in the Wesser case for an example of a motion pursuant to rule 12(b)(6) filed as part of the answer.

As with consolidation of defenses, whether to file a separate motion to dismiss or to file the defenses in the answer is a determination you will discuss with the lawyer. You should be aware of the purpose of rule 12(b) defenses, however, which is to point out defects in the complaint and to terminate the litigation at an early stage if possible. You should bear in mind that many of the defects that rule 12(b) addresses can be cured. For instance, if process or service of process is defective, the plaintiff can serve process on the defendant again in the correct manner. If venue is improper, the action usually will be transferred to a proper venue rather than dismissed.

The most frequently asserted 12(b) defense is rule 12(b)(6), failure to state a claim upon which relief can be granted. The defendant is generally given permission to amend the complaint to correct defects and state a claim upon which relief can be granted, but if for some reason the court does not permit the

FIGURE 6–2 A Separate Motion to Dismiss

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION NO.: C-96-2388-B

Equal Employment Opportunity Commission,
Plaintiff,

-vs-

Chattooga Corporation,
Defendant.

DEFENDANT'S MOTION TO DISMISS

Defendant, by its undersigned Counsel, hereby moves for dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b) (6) on the ground that plaintiffs have failed to state a claim upon which relief can be granted.

Nancy Reade Lee
Attorney for the Defendant
Gray and Lee, P.A.
380 South Washington Street
Philadelphia, PA 19601-1115
215-555-2500

+ Certificate of Service

plaintiff to amend the complaint or if an essential element of the claim simply does not exist, the grant of the 12(b)(6) motion will end the lawsuit.

Motion for a More Definite Statement

Rule 12(e) of the Federal Rules of Civil Procedure states that "(i)f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading." This motion permits a party to request sufficient facts to determine the claim or defense asserted against that party. Then the party can fashion an intelligent

response and not unwittingly admit to liability for something he or she could not detect from the pleadings. Note that rule 12(e) requires the moving party to "point out the defects complained of and the details desired." Thus, the moving party cannot simply state in a motion that he or she does not know what the other party is talking about.

Paralegals should review pleadings and bring to the attorney's attention those statements that are so ambiguous that a response is difficult to formulate. Bear in mind that rule 8 requires "short and plain statements" in pleadings, and thus, not every pertinent fact appears in the pleadings. Not every question you have will require a motion for more definite statement. Remember that you can ascertain more details in the discovery process. If, however, the pleading is so vague that you cannot formulate a response, discuss with the attorney whether to file a motion for a more definite statement.

Finally, note that the motion for a more definite statement may have a different name in some state court actions, such as a bill of particulars. Regardless of the name, the purpose remains the same.

Motion to Strike

Rule 12(f) of the Federal Rules of Civil Procedure provides that a party may file a motion asking the court to "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." A defendant making a motion to strike would file the motion before filing the answer. The motion would have to be filed within the period allowed to file the answer.

The purpose of the motion to strike is to keep out of the pleadings material that is unnecessary and scandalous and, therefore, would result in prejudice. Such language, if left in the pleading, would be harmful if the pleading were read to the jury in the course of a trial.

How to File Rule 12 Motions

The format for motions and the mechanics of filing all types of motions are discussed in Chapter 7. The rules discussed there apply to all rule 12 motions. Remember that every motion, together with a notice of motion, must be served on all parties.

The certificate of service must be attached to these documents. FRCivP 5 requires that every pleading filed after the complaint, and every motion, discovery request, or other document filed with the court, be served on every party. The service in FRCivP 5 is different from service of process, the FRCivP 4 procedure for delivering the summons and complaint to the defendants. FRCivP 5(b) states that when a party is represented by an attorney, the motion or other document must be mailed or personally delivered to the party's attorney. The documents are usually mailed, although they can be hand-delivered to the attorney or the attorney's office. If a party is unrepresented, the motion or other document is mailed or personally delivered directly to the party. Figure 6–1 shows a certificate of service for a motion. The certificate of service may be attached as a separate page, or it may be typed on

the last page of the motion or pleading. The attorney signs both the motion or pleading itself and the certificate of service. Figure 6–3 illustrates a certificate of service for an answer. Note that the language is the same; you just change the description of the document being served and the names and addresses of the attorneys on whom the document is being served.

FIGURE 6–3 Certificate of Service

CERTIFICATE OF SERVICE

I, Leigh Heyward, attorney for the plaintiff, do certify that service of the within and foregoing Answer and Counterclaim was made upon David H. Benedict, attorney for the defendants, by enclosing a true copy in an envelope addressed to Mr. David H. Benedict, Benedict, Parker & Miller, Attorneys at Law, 100 Nolichucky Drive, Bristol, NC 28205-0890, postage prepaid, and depositing same in the United States mail at Charlotte, NC, on the _____ day of April, 1996.

Leigh Heyward
Attorney for the Plaintiff
401 East Trade Street
Charlotte, NC 28226-1114
704-555-3161

Motions are usually accompanied by supporting ***affidavits*** that state the facts on which the motions are based. In fact, some states require supporting affidavits. Motions are also frequently supported by ***memoranda of law***, which state the reasons why the motions should be granted. The text discusses affidavits and memoranda of law at great length in Chapter 7.

ANSWERS

An ***answer*** is the formal written statement in which the defendant states the grounds of his or her defense. Rule 8(b) of the Federal Rules of Civil Procedure governs the statement of defenses and provides that "(a) party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." The precise method for stating the denial is discussed in the following text. Note that rule 8(b) includes the general rule for pleadings that appears throughout the Federal Rules of Civil Procedure, namely, that the statements should be "short and plain."

Other general rules of pleadings that we have discussed in connection with the complaint apply equally to the answer. The rule 10 requirements for captions and paragraphs apply, as does the the rule 11 requirement that the attorney sign the pleading. As with complaints, you also may attach exhibits and appendices

to substantiate your assertions. As always, check local rules for special requirements, especially to determine whether the client has to sign a verification for the answer.

In addition to the responses to the allegations in the complaint, an answer may contain rule 12 motions and affirmative defenses (statute of limitations, contributory negligence, and so on). Indeed, as discussed earlier, some defenses may have to be included in an answer if they are not to be waived. If an answer has multiple parts, each part should be set out separately and clearly. Refer to the answer in the Wesser case (see Appendix), which designates the rule 12(b)(6) motion as the FIRST DEFENSE, the responses to plaintiff's allegations as the SECOND DEFENSE, and the affirmative defensive of contributory negligence as the THIRD DEFENSE.

Timing

Rule 12(a) of the Federal Rules of Civil Procedure provides the general rule for when an answer must be filed. This discussion of time limits refers to answers. Recall, however, that if the defendant files a motion to dismiss, motion to strike, or motion for a more definite statement pursuant to rule 12, the time limit for filing the motion is the same as that for filing the answer. The general rule is that the answer must be filed within twenty days of service of the complaint and summons, except for defendants who waive service. As noted, this is the general rule for federal court actions; states may have different rules.

Rule 12(a) also provides some exceptions to the general rule. For instance, when the United States or one of its agencies or officers is the defendant, the defendant is allowed sixty days to file a responsive pleading. Another exception is that a different time limit may apply if the defendant lives in another state and service is made in that other state in accordance with rule 4(e) of the Federal Rules of Civil Procedure. Finally, a different federal or state statute may apply and alter the time limit.

Rule 12(a) also explains how filing a rule 12 motion prior to filing an answer alters the twenty-day rule. If the court denies the rule 12 motion, the defendant must file an answer within ten days after notice of the court's action. If the court grants a motion for a more definite statement, the plaintiff must file an amended complaint containing the more definite information within ten days of service of the motion for a more definite statement.

Format

Review the general format requirements of rule 10 of the Federal Rules of Civil Procedure in Chapter 5. Refer in the Appendix to the answer in the Wesser case, which shows the caption requirements—the name of the court, the title of the action, the name of the pleading, and the file number. In this example, there are two defendants, and they filed a joint answer. Often multiple defendants each file a separate answer, and the caption must specify which party is answering. Figure 6–4 illustrates how the caption would appear if defendant Woodall Shoals filed a separate answer.

FIGURE 6–4 Caption for a Separate Answer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

ANSWER OF DEFENDANT
WOODALL SHOALS CORPORATION

When the plaintiff has already requested a jury trial, it is not necessary for the defendant to repeat the request, although the defendant may do so. If the defendant requests a jury trial, the request must appear in a conspicuous place. The jury demand should be placed in the caption below the word "Answer" and/or at the end of the answer. (See Chapter 6 for a review of demand for jury trial.)

As with the complaint, every paragraph is numbered, which makes the responses clearer and easier to follow.

Responses

The defendant must admit or deny every averment in the complaint. Therefore, the answer must be constructed very carefully so that it is clear that every paragraph in the complaint has been addressed.

Requirement to Admit or Deny Every Allegation. Rule 8(b) of the Federal Rules of Civil Procedure provides that the defendant must admit or deny all averments in the complaint. Rule 8(d) states that the consequence of failing to respond to an averment in the complaint is that the averment is deemed to be admitted when not denied.

Insufficient Knowledge. FRCivP 8(b) provides that a defendant may, as an alternative to an admission or denial, state that "he is without knowledge or information sufficient to form a belief as to the truth of an averment . . . and this has the effect of a denial." The statement that a defendant is without sufficient knowledge or belief must be made in good faith, and not just for the purpose of avoiding a harmful response. An example of the insufficient knowledge response is paragraph 4 of the Second Defense section in the answer in the Wesser case

(see Appendix). At this point in the pleadings, the defendants do not know when or under what circumstances the plaintiff purchased the electric blanket. This information will come out during the discovery process.

Denial of Only Part of an Allegation. FRCivP 8(b) also states that "(w)hen a pleader intends in good faith to deny only a part . . . of an averment, he shall specify so much of it as is true and material and shall deny only the remainder." Thus, it is acceptable to admit part of an allegation but deny or plead insufficient knowledge as to the rest of the allegation. These partial denials must be drafted very carefully. In paragraph 9 in the Second Defense in the Wesser case, for instance, the defendant admits that the plaintiff received certain injuries but states insufficient knowledge to form a belief as to whether the plaintiff incurred extensive medical expenses and lost wages and suffered severe emotional distress as a result of the injuries.

Affirmative Defenses

An ***affirmative defense*** goes beyond a simple denial of an allegation in the complaint. It brings out a new matter, not mentioned in the complaint, that serves as a defense even if all the allegations in the complaint are admitted. A commonly raised affirmative defense is statute of limitations, which means that the plaintiff did not file the claim within the period specified by statute and, therefore, is barred from any recovery from the defendant. For example, in a suit on a promissory note, the defendant may admit to signing a promissory note in May 1994 and to not paying the money back to the plaintiff by May 1995, as agreed in the promissory note, but then plead the affirmative defense of statute of limitations because the plaintiff did not file the complaint until after the deadline for doing so. Different statutes of limitation apply to different claims. A party may have two years, for instance, to file a suit for breach of contract and three years to file a personal injury suit.

Rule 8(c) of the Federal Rules of Civil Procedure specifies additional affirmative defenses, including such common affirmative defenses as assumption of risk, contributory negligence, discharge in bankruptcy, fraud, release, *res judicata,* and waiver. Rule 8(c) also refers to "any other matter constituting an avoidance or affirmative defense." The substantive law of your jurisdiction may designate additional affirmative defenses. You should review with the attorney any possible affirmative defenses and determine which of them the attorney believes will apply.

The exact format in which affirmative defenses are asserted varies among jurisdictions. It is best to set out each affirmative defense in a separate paragraph. The language in that paragraph should specifically state the particular affirmative defense. Each paragraph should be labeled as a defense, whether the paragraph title includes the word "affirmative," as in Figure 6–5, or simply a number, as in the Third Defense in the answer in the Wesser case (see Appendix). Note that some affirmative defenses may require more explanation than others. Compare the statement of the statute of limitations defense in Figure 6–5 with the Third Defense in the answer in the Wesser case in the Appendix.

FIGURE 6–5 Answer

NicholasTheodoris,
Plaintiff,
-vs-
Sock-em-Dog, Incorporated,
Defendant.

ANSWER

The defendant, answering the plaintiff's complaint, alleges that:

1. Paragraphs 1 and 2 are admitted.
2. Paragraphs 3 through 5 are denied.

FIRST AFFIRMATIVE DEFENSE

3. The plaintiff's cause of action set forth in the complaint did not occur within three years of the commencement of this action and is, therefore, barred by the applicable statute of limitations.

SECOND AFFIRMATIVE DEFENSE

4. The plaintiff failed to exhaust his administrative remedies and is, therefore, barred from pursuing this action.

(remainder of answer omitted)

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+ Certificate of Service

Filing the Answer

The answer, like the complaint and other pleadings, must be filed in the office of the clerk of court. Before filing, check the answer for accuracy and signatures. Be sure the certificate of service is signed and dated and includes the attorneys for all parties. If exhibits are attached to the answer, check that they are in the correct order and properly labeled.

Generally, there is no filing fee for the answer and other pleadings subsequent to the complaint.[2] Nor is there a civil cover sheet, although local rules

may require some type of cover sheet, especially if the defendant asserts a counterclaim.

The original answer stays in the clerk's office. Check your local rules to determine whether the clerk also requires an additional copy, known as a "working copy," of each pleading and motion for the file. Some judicial districts require a working copy for the judge's use. As with the complaint, the clerk will stamp the original and each copy with the date filed. After you have all copies file-stamped by the clerk, mail a copy to each party in the lawsuit. Keep a copy for your file, and send a copy to your client.

COUNTERCLAIMS AND CROSS-CLAIMS

One of the consistent guidelines in litigation is that all related claims among parties should be adjudicated in one lawsuit if possible. This prevents multiple trials involving the same issues and facts. Suppose that Jones is injured when he falls on the stairs of the office building that he rents from Smith. Smith is the owner of the office building, and Green is the architect who designed the building.

Several issues arise from Jones's accident. Jones asserts that Smith is negligent because he did not properly maintain the stairs. Jones also asserts that Green negligently designed the stairs. Smith asserts in his answer that Jones's own behavior was negligent and caused the accident because Jones was carrying a large box that partially blocked his vision. Smith also asserts that Green negligently designed the stairs, and therefore, if Smith is found liable to Jones, then Green must reimburse Smith for all or part of the sum paid to Jones. Green also files an answer defending against allegations of negligence. Finally, Smith asserts in a counterclaim against Jones that Jones is $55,000 in arrears in rental payment and in another counterclaim asserts property damage resulting from damage to the steps when the objects in Jones's box fell on them.

All these issues should be resolved in one trial. If a jury found that the stairs were defective in either design or maintenance, it would be a waste of time and money to have a second trial to determine whether Smith, the owner, or Green, the architect, was responsible for the defect.

In this example, Jones files a *complaint* against both Smith and Green for their alleged negligence. Smith files an *answer* stating that he was not negligent in maintaining the office building. Smith also files a *counterclaim* against Jones for unpaid rent and for damage to the building from the materials in Jones's box hitting the steps. Smith files a *cross-claim* against Green for the alleged negligent design of the stairs. This section explains the basic rules and format for counterclaims and cross-claims. Paralegals encounter these pleadings often, especially in litigation involving multiple parties.

Counterclaims: Definition and Timing

We have already discussed two ways a defendant can respond to a complaint, namely, by filing an answer and/or rule 12 motions. A defendant may, in

addition, file a counterclaim. In a ***counterclaim***, the defendant asserts a claim against the plaintiff. A counterclaim is essentially a complaint in which the original defendant takes the role of a plaintiff and the original plaintiff takes the role of a defendant. In the example, plaintiff Jones must defend against the charge that he was negligent in causing his own accident.

A counterclaim must be filed within the time prescribed for filing the answer, with certain exceptions explained in FRCivP 13(e). The counterclaim is made part of the answer, as will be explained in the discussion of format later in this section. The plaintiff must file a response to the counterclaim, and this response is called a *reply*. The plaintiff's reply is like an answer and must be filed within the time limit allowed for an answer. The plaintiff may also file rule 12 motions in response to a counterclaim.

Rule 13 of the Federal Rules of Civil Procedure governs counterclaims. FRCivP 13 allows two types of counterclaims.

Compulsory Counterclaims

A *compulsory counterclaim* is a claim that a defendant *must* assert against the plaintiff or else be barred from bringing the claim in a separate lawsuit. The purpose of the requirement that the counterclaim must be asserted is that the court already has jurisdiction over the plaintiff and defendant, as well as the subject matter of the lawsuit. Therefore, it would be a great waste not to resolve all the issues in one lawsuit. This is the same principle discussed earlier, sometimes referred to as judicial economy.

FRCivP 13(a) explains the factors that make a counterclaim compulsory. First, the claim must arise "out of the transaction or occurrence that is the subject matter of the opposing party's claim. . . ." Second, the claim must "not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." However, FRCivP 13(a) provides that a counterclaim may not be asserted if it is already the subject of another pending action.

The question of whether a claim involves the same transaction or occurrence can be quite complex. In the example, it is clear that Smith's claim arises out of the same transaction as Jones's claim—that is, Jones's fall on the stairs. Some cases, however, may involve several complicated transactions, such as complex contracts litigation. You should be aware of the general concept of the compulsory counterclaim and know that complex situations will arise in which you must discuss the matter with the attorney.

Permissive Counterclaims

A counterclaim is *permissive* when the defendant may bring a claim but does not have to bring it in the same lawsuit that the plaintiff initiates. Permissive counterclaims are governed by rule 13(b), which explains that permissive counterclaims concern "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."

In the stairway example, at the time Jones filed the lawsuit against Smith, Jones was behind on his rental payments and owed Smith $76,000. Smith may

want to assert as a permissive counterclaim the claim for the rent Jones owes. This counterclaim is permissive because it did not arise out of the stairway incident. If judgment were entered against Smith for $80,000, this amount could be offset by the $76,000 that Jones owed Smith.

There are limitations on permissive counterclaims. If the counterclaim makes the lawsuit too complex, the court can order that the counterclaim be tried separately. In addition, a permissive counterclaim must have its own separate basis of jurisdiction. This contrasts with compulsory counterclaims, which do not require an independent jurisdictional ground because the court already has jurisdiction over the transaction from which both the complaint and compulsory counterclaim arose.

In the example, suppose the complaint was filed in federal court with diversity jurisdiction as its basis—that is, the parties are residents of different states. Smith is a resident of Idaho, Jones is a resident of North Carolina, and Green is a resident of California. Smith's counterclaim requested $76,800 in damages. Now it must be determined whether the permissive counterclaim meets the jurisdictional requirements. In this case it does, because there is complete diversity among the parties and the amount in the counterclaim meets the $75,000 jurisdictional amount requirement.

Cross-Claims

A ***cross-claim*** is a pleading that states a claim by one party against a coparty. That is, a defendant may file a cross-claim against a codefendant. If a defendant filed a counterclaim against two coplaintiffs, one plaintiff may file a cross-claim against the other plaintiff. In the example, defendant Smith may file a cross-claim against defendant Green, the architect, claiming that if Smith is liable to Jones, then Green is liable to Smith because the accident was actually Green's fault.

Rule 13(g) of the Federal Rules of Civil Procedure governs cross-claims. FRCivP 13(g) requires that the claim by one coparty against another coparty must arise "out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action." This is like the test for compulsory counterclaims. The subject matter requirement gives the court the authority to order that a coparty may not file a cross-claim when the subject matter is insufficiently related to the pending lawsuit.

FRCivP 13(g) provides that a cross-claim may be contingent, that is, a party may assert that a coparty is *or may be* liable to the party. The cross-claimant also has the option of asserting that the coparty is liable to him or her for all or part of the claim against the cross-claimant. In the example involving Jones's accident, Smith, the owner of the building, may file a cross-claim against Green, the architect who designed the building, asserting that if Smith is liable to Jones, then Green is liable to Smith, because Green's negligent design caused the accident. There is flexibility in the assertions a coparty may make in a cross-claim.

A cross-claim is usually filed as part of the answer. The cross-claim must be filed within the time prescribed for filing the answer. A party must file a reply to a cross-claim within twenty days of service of the cross-claim.

Format and Content of Counterclaims and Cross-Claims

The format and content of a counterclaim are like those of a complaint because a counterclaim is essentially a complaint, filed by the defendant against the plaintiff. A counterclaim included with an answer will bear the title "Answer and Counterclaim." If multiple defendants are involved, it is important to designate which defendant is asserting the counterclaim—for example, "Answer and Counterclaim of Woodall Shoals Corporation." If there are multiple plaintiffs, be sure to designate against which plaintiff the defendant is asserting the counterclaim—for example, "Answer and Counterclaim of Defendant Teglasy Against Plaintiff Carlton." The rest of the caption has the same components as a complaint: name of the court in which the action is filed, title of the action, and file number. (See Chapter 5 for a review of these components.)

The counterclaim is inserted after the paragraphs responding to the paragraphs in the complaint. The counterclaim requires its own heading so that it will be clear that the defendant is asserting a counterclaim. This is important because the right to assert a counterclaim can be waived if not included with the answer. Because a counterclaim requests relief from the plaintiff, the defendant must include all essential elements to support the claim.

The counterclaim has the same general pleading requirements of a clear and concise statement of the claim and an attorney signature (which appears at the end after the answer and counterclaim). Local rules also may require verification by the client, which means that the client attests to the truthfulness of the statements in the counterclaim. If the defendant demands a trial by jury for the counterclaim, this must be conspicuously noted in the counterclaim. Finally, be sure to state the relief requested in a demand section at the end of the counterclaim.

The cross-claim also must be a part of the answer. The drafting requirements are like those for a counterclaim—that is, it is much the same as a complaint. Like the complaint and counterclaim, the cross-claim will end with the demand for relief ("wherefore" clause). Under the Federal Rules of Civil Procedure, the coparty will have twenty days from service to file a reply. See Figure 6–6 for a sample cross-claim in the stairway accident case.

SIDEBAR An answer and counterclaim must be served on all other parties in the same manner as all pleadings and motions made after the complaint is filed. Make sure that the certificate of service states the exact document (answer and counterclaim) that is being mailed and includes the names and addresses of all attorneys to whom the document is sent.

FIGURE 6–6 A Sample Cross-Claim

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION
CIVIL NO.: C-96-5687-B

Joe Jones,
Plaintiff,

-vs-

Lee Smith,
Defendant,
and
Sue Green, d/b/a
Green Designs,
Defendant.

ANSWER AND CROSS-CLAIM OF DEFENDANT LEE SMITH

*Note: only the cross-claim is shown

CROSS-CLAIM AGAINST DEFENDANT GREEN

3. Defendant Smith incorporates by reference paragraphs 1 and 2 of his answer.
4. Defendant Sue Green is the architect who designed the building at 110 Burnet Avenue, including the stairs upon which the plaintiff fell. Defendant Sue Green owed a foreseeable duty to users of the premises, including the plaintiff, to exercise reasonable care in the design of the premises. Defendant Sue Green failed to exercise reasonable care in the design of the premises, including the stairs, and her failure proximately caused the plaintiff's injuries.

WHEREFORE, in the event that defendant Smith is liable to the plaintiff, defendant Smith demands judgment against defendant Green for any amount that defendant Smith is required to pay to the plaintiff.

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+ Certificate of Service

See also Figure 6–7, which shows Smith's simple answer and permissive counterclaim based on the stairway accident case. A complaint is not illustrated. Assume that Smith admits the paragraphs in the complaint pertaining to jurisdiction and ownership of the building and denies the paragraphs regarding liability. Note that Smith must allege jurisdiction because this is a permissive, not a compulsory, counterclaim. Remember that under the Federal Rules of Civil Procedure, the plaintiff must file a reply to the answer and counterclaim within twenty days of service. See Figure 6–8 for a reply to the counterclaim.

THIRD-PARTY PRACTICE (IMPLEADER)

So far the text has discussed only the original parties to a lawsuit: the plaintiff, coplaintiff, defendant, and codefendant. It is possible to bring additional parties into the lawsuit by a procedure known as ***impleader*** or ***third-party practice***. Impleader is governed by rule 14 of the Federal Rules of Civil Procedure. FRCivP 14(a) explains the purpose of impleader. A defendant asserts that a person who is not already a party to the action may be liable to the defendant (third-party plaintiff) for all or part of the plaintiff's claim against the defendant (third-party plaintiff).

It is important to grasp the difference between impleader and counterclaims or cross-claims. Counterclaims and cross-claims involve claims between the original parties. Recall that in a cross-claim, defendant *A* asserts that not defendant *A*, but rather defendant *B*, should be liable for any damages; and in a counterclaim, defendant *A* asserts that the plaintiff, not defendant *A*, is responsible for any damages. In contrast, impleader brings in a new party to the lawsuit.

Terminology

To understand impleader, one must understand the terms used to refer to each party in the action. Consider the stairway accident case. Defendant Smith wants to assert that Robertson, the contractor who built the building, is liable to Smith for all or part of Jones's claim against Smith. Note that Robertson is not a party to the lawsuit yet. To bring Robertson in as a party, Smith files a third-party complaint. In the complaint, Jones is still called the plaintiff. Smith is now called the defendant and third-party plaintiff. Robertson is the third-party defendant. See Figure 6–9, which shows a third-party complaint from the Appendix to the Federal Rules of Civil Procedure (Form 22-A). This simple form helps clarify the party designations. If you become confused about the parties in a complex case, refer to a simple form like Figure 6–9, and plug each party into the appropriate slot.

Mechanics of Filing a Third-Party Complaint

A third-party plaintiff files a third-party complaint, which has the same basic components as an original complaint—allegation, a short and plain statement of the claim, and prayer for relief. See Figure 6–9, and pay special attention to the way the parties are labeled in a third-party complaint. Note that a copy of the original complaint should be attached as an exhibit to the third-party complaint.

FIGURE 6–7 Answer and Counterclaim

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION
CIVIL NO.: C-96-5687-B

Joe Jones,
Plaintiff,

-vs-

Lee Smith,
Defendant,
and
Sue Green, d/b/a
Green Designs,
Defendant.

ANSWER AND COUNTERCLAIMS
OF DEFENDANT LEE SMITH

The defendant Lee Smith, answering the complaint of the plaintiff, alleges and says that:

1. Paragraphs 1 through 3 are admitted.
2. Paragraphs 4 through 7 are denied.

FIRST COUNTERCLAIM

1. Plaintiff is a citizen of the state of Texas. Defendant Lee Smith is a citizen of the state of Idaho. Defendant Sue Green d/b/a Green Designs is a citizen of the state of California. The matter in controversy exceeds, exclusive of costs and interests, $75,000.00.
2. The plaintiff signed a lease to rent the premises at 110 Burnet Avenue, Austin, Texas, for five years, at a monthly rate of $7,600.00, as shown by the signed lease, which is attached as Exhibit A.
3. The plaintiff has failed and refused to pay the agreed rent for the past ten months. The plaintiff owes defendant Lee Smith $76,000.00 for unpaid rent.

SECOND COUNTERCLAIM

1. On February 23, 1990, plaintiff Joe Jones negligently carried up the stairs on the premises located at 110 Burnet Avenue a large box that obscured his vision.

FIGURE 6–7 (Continued)

2. As a result of his negligence, plaintiff Joe Jones fell on the stairs and dropped the box, which damaged the stairs, resulting in damage to the steps in the amount of $800.00.
3. The above-described property is owned by the defendant, who has at all times properly maintained the premises.

WHEREFORE, the defendant Lee Smith prays the court that:

1. Judgment be entered against the plaintiff for the sum of $76,000.00 for unpaid rent and $800.00 for damages to the stairs on the premises.
2. The costs of this action be taxed against the plaintiff.
3. The defendant Lee Smith be granted such other and proper relief as the court may deem just and proper.

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+ Certificate of Service

FIGURE 6–8 Reply to Counterclaim

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION
CIVIL NO.: C-96-5687-B

Joe Jones,
Plaintiff,

-vs-

Lee Smith,
Defendant,
and
Sue Green, d/b/a
Green Designs,
Defendant.

REPLY TO COUNTERCLAIM
OF DEFENDANT LEE SMITH

The plaintiff, replying to the defendant Lee Smith's counterclaim, alleges and says that:

FIRST DEFENSE

1. The counterclaim fails to state a claim upon which relief can be granted.

SECOND DEFENSE

2. Paragraphs 1 through 4 of the reply are admitted.
3. Paragraph 5 of the reply is denied.

WHEREFORE, the plaintiff prays that the defendant Joe Green's counterclaim be dismissed.

Franklin Russell
Texas Bar Code No. 40610
Attorney for the Plaintiff
Russell, Moore, and Aziz
1403 Fourth Street
Austin, TX 78701-1714
512-555-1824
512-555-1825 (FAX)

+ Certificate of Service

FIGURE 6–9 Third-Party Summons and Complaint

Form 22-A. Summons and Complaint Against Third-Party Defendant

United States District Court for the Southern District of New York

Civil Action, File Number _____

A.B., Plaintiff
v.
C.D., Defendant and Third-Party Plaintiff
v.
E.F., Third-Party Defendant

Summons

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon _____, plaintiff's attorney whose address is _____, and upon _____, who is attorney for C.D., defendant and third-party plaintiff, and whose address is _____, an answer to the third-party complaint which is herewith served upon you within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. There is also served upon you herewith a copy of the complaint of the plaintiff which you may but are not required to answer.

_____,
Clerk of Court.

[Seal of District Court]
Dated _____

United States District Court for the Southern District of New York

Civil Action, File Number _____

A.B., Plaintiff
v.
C.D., Defendant and Third-Party Plaintiff
v.
E.F., Third-Party Defendant

Third-Party Complaint

1. Plaintiff A.B. has filed against defendant C.D. a complaint, a copy of which is hereto attached as "Exhibit A."

2. (Here state the grounds upon which C.D. is entitled to recover from E.F., all or part of what A.B. may recover from C.D. The statement should be framed as in an original complaint.)

Wherefore C.D. demands judgment against third-party defendant E.F. for all sums[1] that may be adjudged against defendant C.D. in favor of plaintiff A.B.

Signed:_____

Attorney for C.D., Third-Party Plaintiff.
Address:_____

The third-party plaintiff must serve the third-party summons and third-party complaint on the third-party defendant just as with an original complaint, following the directives of FRCivP 4. See Figure 6–9 for a sample third-party summons.[3]

Court Permission to File a Third-Party Complaint. Under FRCivP 14(a), a third-party plaintiff must file a motion to obtain court permission to file a third-party complaint unless the third-party complaint is filed within ten days after serving the original answer. In other words, a third-party plaintiff can file the third-party complaint without court permission only if it is filed within ten days of service of the original answer. See Figure 6–10 (Form 22-B of Appendix to FRCivP) for a simple example of a motion to obtain permission to file a third-party complaint. The proposed third-party summons and complaint should be attached as an exhibit to the motion. The motion and notice of motion must be mailed to all parties to the action.

FIGURE 6–10 Motion to Bring in Third-Party Defendant

Form 22-B. Motion to Bring in Third-Party Defendant

Defendant moves for leave, as third-party plaintiff, to cause to be served upon E.F. a summons and third-party complaint, copies of which are hereto attached as Exhibit X.

Signed: _____,
Attorney for Defendant C.D.

Address: _____

Notice of Motion

(Contents the same as in Form 19. The notice should be addressed to all parties to the action.)

Contesting the Request for Impleader. Other parties may contest the request for impleader. FRCivP 14(a) provides that "[a]ny party at any time may move to strike the third-party claim, or for its severance or separate trial." This means that a party may object to impleader at the time the motion requesting permission to implead is made or at any time in the litigation. If the court has already granted permission to implead, any party may request that the court either strike the third-party claim completely or order that it be heard in a separate trial. The original plaintiff may object to inclusion of the third-party claim because it would make the litigation too complex or otherwise prejudice the plaintiff's claim. FRCivP 14(a) does not specify when to file a motion to strike or sever the third-party claim. However, it is best to file any motion in opposition to another motion as early as possible.

Service of Pleadings on Original Parties. Recall that FRCivP 5 requires that every pleading subsequent to the original complaint must be served on all parties to an action. Thus, the third-party plaintiff effects service of process on the third-party defendant, in accordance with FRCivP 4, in the same manner as for a "regular" complaint. In addition, the third-party plaintiff serves (mails or hand-delivers) a copy of the third-party complaint and summons to all the original plaintiffs and defendants, with a certificate of service, as required by FRCivP 5.

Summary of Procedure

The paralegal must be sure that all necessary documents related to the third-party complaint are filed and served properly. The procedure in summary is as follows: (1) If more than ten days have elapsed since the defendant's answer was served, prepare a motion for court permission to bring in a third-party defendant. Attach a copy of the proposed third-party complaint and summons as Exhibit A. If less than ten days have elapsed since the answer was filed, move directly to number 3. (2) File the motion with the clerk of court and serve a copy on all parties. Also serve a notice of motion. (3) When the court grants the motion to file the third-party complaint, serve the filed complaint and the summons on the third-party defendant in accordance with FRCivP 4. Be sure that the original complaint is attached as an exhibit to the third-party complaint. (4) Mark in your pleading response tracking system the date that the third-party defendant's answer is due.

SIDEBAR Check your local rules and/or call the clerk of court to find out whether a filing fee is required for a third-party complaint.

Defenses to a Third-Party Complaint

FRCivP 14(a) provides that a third-party defendant may assert any of the responses that a defendant served with a "regular" complaint may assert. That is, a third-party defendant may file an answer and/or rule 12 motions. A third-party defendant may include any defenses that the original defendant has against the original plaintiff. A third-party defendant also may assert a counterclaim against the original plaintiff or a cross-claim against another third-party defendant.

The possibilities may sound endless and confusing. For now, just be aware of the permissible pleadings and refer to FRCivP 14(a) for a listing of the third-party defendant's options. With litigation this complex, you will discuss the options with the attorneys on your team.

AMENDMENTS AND SUPPLEMENTAL PLEADINGS

Introduction

In the course of a lawsuit, a party may realize that an important fact or issue has been omitted from a pleading, or some new fact may come to light that

necessitates an addition to a pleading. When this occurs, parties need to change or add to the pleadings they have filed. Rule 15 of the Federal Rules of Civil Procedure allows parties to do this freely, as long as it does not cause substantial prejudice to another party. The goal of pleadings under the Federal Rules of Civil Procedure is to frame the dispute accurately and ensure that every party has fair notice and an opportunity to respond.

This same rationale applies to supplemental pleadings. Rule 15(d) provides that a party may ask the court for permission to serve a supplemental pleading and states that this is appropriate to set forth "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."

The distinction between an amended pleading and a supplemental pleading is not always evident. Technically, a supplemental pleading adds a new fact that has come to light, and an amended pleading changes a previously pleaded fact. As a practical matter, once a complaint and responsive pleading have been filed, if the plaintiff needs to alter the complaint, the plaintiff requests permission to amend and supplement the complaint. The revised complaint then bears the title "Amended and Supplemental Complaint."

Timing and Procedure

Rule 15(a) states the rules regarding when a party needs the court's permission to amend a pleading, A party may amend a pleading once as a matter of right when no responsive pleading has yet been filed. Therefore, a plaintiff may amend the complaint without court permission when the defendant has not yet filed an answer. If no responsive pleading is permitted and the action has not been placed on a trial calendar, a party may amend the pleading within twenty days after service. An example of a pleading to which no responsive pleading is permitted is a reply to a counterclaim.

In all other circumstances, a party must either request leave of the court or obtain the written consent of the adverse party in order to file an amendment. Rule 15(a) further directs that leave to amend "shall be freely given when justice so requires." While courts do generally grant leave to amend freely, the court is less likely to grant the motion to amend if the request is made far into the litigation. The rules encourage the court to be fair, and allowing a substantial amendment well into the discovery period or on the eve of trial may be too prejudicial to the adverse party.

How to File a Motion to Amend. Motions in general are discussed in Chapter 7. However, the basic procedure for filing a motion to amend a pleading is as follows. The necessary documents obviously include the actual motion asking the court's leave to amend. (See Figure 6–11 for an example.) State explicitly the facts that necessitate the amendment rather than a general statement that the plaintiff needs to amend the complaint. Many attorneys attach the proposed amended pleading as an exhibit to the motion.

FIGURE 6–11 Motion to Obtain Permission to File Amended Complaint

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

MOTION AND AFFIDAVIT FOR LEAVE TO FILE AMENDED COMPLAINT

NOW COMES the plaintiff, by and through Leigh J. Heyward, attorney of record, under the provisions of Rule 15 of the Federal Rules of Civil Procedure, and moves the Court for leave to file an Amendment to his Complaint, as set forth in "Exhibit A" attached hereto and incorporated herein by reference, and in support thereof, respectfully shows unto the Court that:

1. The electric blanket which is the subject of this action was almost completely destroyed in the fire which it caused; thus, there was and is little material by which the model number identifying the blanket can be identified,
2. In a meeting on December 30, 1995, between plaintiff attorney and Richard Olivarez, adjuster for ABC Insurance Company, carrier for the defendants, Mr. Olivarez identified the blanket as Woodall Shoals Model 6102. Since the defendant Woodall Shoals had previously had physical possession of the blanket remains and control for testing purposes, plaintiff's attorney relied upon Mr. Olivarez's identification in drafting the Complaint.
3. In April 1996, when the defendant Woodall Shoals Corporation filed "answers" to plaintiff's first set of interrogatories, said defendant asserted that it had never sold Woodall Shoals Model 6102 to defendant Second Ledge

FIGURE 6–11 (Continued)

Stores, Incorporated, implying and asserting that the blanket was probably not Model 6102.

4. Because Richard Olivarez may have erroneously identified said blanket, the only direct means of identification upon which plaintiff can rely is the name plate from the controller, which is attached to the proposed Amendment to Complaint ("Exhibit A-1").
5. The granting of plaintiff's motion will not surprise or prejudice the defendants, because the defendants' insurance carrier has previously had physical possession of the control and remains of the blanket, and the defendants' attorneys have had a photograph of the name plate for several months. Furthermore, only the defendants have the records, if any, to enable the parties to identify the model of the blanket, using the information on the name plate.
6. Denial of plaintiff's motion would result in substantial injustice and prejudice to plaintiff.
7. The ends of justice would best be served by granting plaintiff's motion.

WHEREFORE, plaintiff respectfully moves the Court for leave to amend the Complaint in this action in the manner and to the extent set forth in the "Amendment to Complaint" attached hereto and marked "Exhibit A."

Leigh J. Heyward
Attorney for the Plaintiff
Heyward and Wilson
401 East Trade Street
Charlotte, NC 28226-1114
704-555-3161
FAX: 704-555-3162
N.C. State Bar No. 12779

+ Certificate of Service

FIGURE 6–11 (Continued)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

AMENDMENT TO COMPLAINT

NOW COMES the plaintiff and, with leave of the Court, amends his Complaint in the above-entitled action, as follows:

1. By striking the language "Model 6102" in Paragraph 4 and adding the following sentence at the conclusion of that paragraph, "The electric blanket is further identified by data on the control unit thereof, a copy of a photograph of which is attached as 'Exhibit A-1.'"

Leigh J. Heyward
Attorney for the Plaintiff
Heyward and Wilson
401 East Trade Street
Charlotte, NC 28226-1114
704-555-3161
FAX: 704-555-3162
N.C. State Bar No. 12779

EXHIBIT "A"

Next, prepare a notice of motion (see Figure 6–12). This informs the adverse party when the motion will be heard before the court. Often the attorneys for adverse parties will confer beforehand to determine a mutually convenient date on the court calendar. Finally, prepare a proposed order granting leave to file an amended pleading. As noted in Chapter 7, it is best to submit a proposed order. This encourages the judge to incorporate the language you prefer. See Figure 6–13 for an example. As always, file the documents with the clerk of court, and serve all filed documents on all parties to the litigation. A memorandum of law is sometimes prepared to explain the reasons why leave to amend should be granted.

If the adverse party opposes the motion to amend, that party must submit a motion requesting the court not to grant the leave to amend. The adverse party must specifically state why the motion should not be granted, including an explanation why the amendment would be unduly prejudicial.

SIDEBAR Note that many local court rules deem a motion unopposed if the adverse party files no response to the motion. Never assume that the court will just know that you oppose a motion if you fail to file a response. Check the local rules to determine time limits for filing responses to motions.

Filing the Amended Pleading. Suppose that the court has just granted the plaintiff s motion to amend the complaint with the clerk of court, with service on all parties. When the amendment is very slight, the body of the amended pleading may simply state, for instance, that the plaintiff amends paragraph 5 of the complaint by deleting the words "Model 6102" and inserting the words "Model 7102." If the amendment is anything more complex or extensive, a party should file the entire amended pleading—that is, the original pleading with the amendments incorporated (typed in the appropriate place). A complete amended pleading also should be filed when prior amendments have been made, when the court file is particularly thick and finding the amended complaint for reference would be difficult, or if the particular judge in your case prefers this method.

After the clerk has file-stamped each copy of the amended pleading, serve a copy on each party. Recall that service of all documents after the initial complaint is made by one of the methods prescribed in FRCivP 5. Usually you will mail a copy of the amended pleading to each party's attorney. Note that service of process (FRCivP 4) is not required for amended complaints, just for the original complaint.

Responding to the Amended Pleading. Rule 15(a) governs the time for responding to the amended pleading. It states that a "party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." Obviously,

FIGURE 6–12 Notice of Motion

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,

-vs-
Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

NOTICE OF MOTION

To: David H. Benedict
Attorney for the Defendants
Benedict, Parker & Miller
100 Nolichucky Drive
Bristol, NC 28205-0890

YOU WILL TAKE NOTICE that the plaintiff in the above-entitled action will appear before His Honor, James C. Jefferson, or such other judge as may be presiding over the United States District Court for the Western District of North Carolina, on Monday, May 15, 1996, at 10:00 a.m., or as soon thereafter as counsel may be heard, for hearing upon plaintiff's Motion for Leave to File an Amended Complaint.

YOU WILL PLEASE TAKE NOTICE thereof and be present at said time and place if you care to be heard.

This the 2d day of May, 1996.

Leigh J. Heyward
Attorney for the Plaintiff
Heyward and Wilson
401 East Trade Street
Charlotte, NC 28226-1114
704-555-3161
FAX: 704-555-3162
N.C. State Bar No. 12779

+ Certificate of Service

FIGURE 6–13 Order

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

ORDER

THIS CAUSE, coming on to be heard and being heard before His Honor, James C. Jefferson, Judge Presiding at the May, 1996, Civil Session of the United States District Court for the Western District of North Carolina, upon motion of the plaintiffs under Rule 15(a) of the Federal Rules of Civil Procedure to amend their Complaint;

AND IT APPEARING TO THE COURT that the defendant Woodall Shoals Corporation's initial answers to Interrogatories raise a question as to the correct identity of the electric blanket, as given by their insurance adjuster, Richard Olivarez, and that the defendants would not be prejudiced by the proposed amendment.

IT IS, THEREFORE, ORDERED that:

1. Plaintiff's Complaint be and it is hereby amended to strike the language and term "Model 6102" from paragraph 5 thereof and to add the following sentence at the conclusion of paragraph 5:

   The electric blanket is further identified by data on the control unit thereof, a copy of a photograph of which is attached as Exhibit A-1.

2. Defendants Woodall Shoals and Second Ledge be and they are hereby granted thirty (30) days within which to file answer or otherwise plead to paragraph 5 of the Complaint as so amended.

Entered in open Court and signed this 30th day of May, 1996.

James C. Jefferson
United States District Judge

if the responding party needs more time to file a response, the party must seek additional time from the court.

REMOVAL

Introduction

The definition of removal is simple: *Removal* is the transfer of a case from a state court to a federal court. When a case is removed, the state court file is closed, and the federal court takes over jurisdiction of the lawsuit. A defendant seeks removal when there is a jurisdictional basis for hearing a case in federal court and the defendant feels it is advantageous for the case to be heard in federal court rather than state court. The federal court must have concurrent jurisdiction. If the lawsuit is a type over which federal courts do not have jurisdiction, it obviously would not be proper to remove the case to federal court.

Removal is for the benefit of defendants, and therefore, only defendants may seek it. When a plaintiff files a lawsuit, the plaintiff chooses the court in which the litigation will take place. Removal gives defendants an opportunity to try to litigate in a court that is more advantageous for them.

You may wonder why a party would want a case transferred from state court to federal court. This is a strategy decision, and there are many reasons why a defendant might want a case heard in federal rather than state court. For example, the case may be assigned to a state court judge whom the defendant's attorney considers unfavorable to this particular type of case. The defendant's attorney may feel that a more favorable jury can be picked in federal court, which draws jurors from a larger area.

The removal procedure is fairly simple. Determining whether removal is possible and advantageous, however, can be complex. The decision whether to seek removal will be made by the attorney on your team, but the paralegal needs to have an understanding of when removal is proper and the procedure for requesting it.

When Removal Is Proper

The removal of actions to federal court is governed by 28 *United States Code* sections 1441–1452. Recall that federal courts have limited jurisdiction; that is, they can hear only certain types of cases. For this reason, a case can be removed to federal court only if the federal court has original subject matter jurisdiction, that is, only if the claim is one that the court could have heard had the suit originally been filed in federal court.

The federal jurisdiction basis must exist at the time the notice of removal is filed. Suppose that a plaintiff files a complaint for breach of warranty based on state law only, and all the parties are residents of the same state, thereby precluding diversity jurisdiction. At this point, removal is not possible because there is no basis for federal jurisdiction. The plaintiff subsequently amends the complaint, adding a claim pursuant to the Magnuson-Moss Act, a federal statute concerning consumer protection. The defendant may now petition for removal

based on federal question jurisdiction. Note that the federal jurisdiction basis must be in the complaint. A defendant cannot base the removal petition on defenses in the answer or on counterclaims.

Another requirement is that every defendant must agree to the request for removal. Because the removal process aims to benefit defendants, every defendant must join in the notice of removal.

Timing and Procedure

The procedure for requesting removal is explained clearly in 28 *United States Code* section 1446(a):

> A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

SIDEBAR Note that the document requesting removal is called a "notice of removal." Formerly this document was termed a "petition for removal." You may encounter the old term is some form books or pleadings that predate the November 1988 amendments to 28 *United States Code* section 1446.

Content of Notice of Removal

The notice of removal must contain a "short and plain statement of the grounds for removal." Obviously, the notice of removal must contain the statement of federal jurisdiction, since this is the crucial factor in removal. Like other pleadings, the attorney must sign the notice of removal, verifying, pursuant to FRCivP 11, that there is a sound basis in law and in fact for the removal request.

There are three general bases for removal. You are already familiar with two of them—federal question jurisdiction and diversity jurisdiction. There are also federal statutes that allow removal in certain types of actions, including civil actions against foreign states, civil rights actions, foreclosures against the United States, and actions involving federal officers or members of the armed forces. The statutes providing for removal in these circumstances are 28 *United States Code* sections 1441, 1443, 1444, 1442, and 1442(a), respectively.

State the basis for removal clearly, citing specific statutory authority—for example, "federal question jurisdiction under 28 U.S.C. § 1332, based on a claim involving the Magnuson-Moss Act, 15 U.S.C. § 2301, *et seq.*"

Deadlines for Filing Notice of Removal

The deadlines for filing a notice of removal are set forth in 28 *United States Code* section 1446(b). It is crucial to understand the filing deadlines because the

effect of missing the deadline is that your client becomes barred from seeking removal and must remain in state court.

There are three rules to remember in regard to the filing deadlines. The first rule applies where the basis for removal is stated in the initial pleading stating the claim for relief. Usually the "initial pleading" means the complaint. When the complaint contains a basis for removal—for example, when the plaintiff has asserted a claim that raises a federal question—the defendant must file the notice of removal within thirty days of receiving the complaint, or within thirty days of receiving the summons when the summons is served without the complaint, whichever period is shorter.

The second rule applies when the basis for removal first appears in an amended pleading. Under 28 *United States Code* section 1446(b), "[i]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant . . . of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. . . ." As noted, the first mention of a federal statute may appear in an amended complaint. In this instance, the defendant must file the notice of removal within thirty days of receipt of the amended complaint.

The third rule applies only when the basis for federal jurisdiction is diversity of citizenship of the parties. When the basis for federal jurisdiction that arises after the initial pleading is diversity of citizenship, the notice of removal must be filed within one year after the commencement of the action in state court. Thus, suppose that in a state court action in Indiana there are two defendants. One defendant is a citizen of Illinois, and one defendant is a citizen of Indiana; the plaintiff is also a citizen of Indiana. Six months after commencement of the state court action, the defendant from Indiana is dismissed from the lawsuit. There is now complete diversity of citizenship. The Illinois defendant may file a notice of removal, because less than one year has elapsed since the commencement of the state court action. If the Indiana defendant had been dismissed fourteen months after commencement of the state court action, the Illinois defendant could not remove the case to federal court because more than one year would have elapsed.

SIDEBAR Remember that the one-year bar applies only when jurisdiction is based on diversity. If a federal question arose for the first time fourteen months after commencement of the state court action, the defendant could still file a notice of removal.

Procedure After Removal Is Complete

When the case is removed to federal court, the federal court takes full jurisdiction, and the state court has no more authority to enter orders. When a lawsuit is removed to federal court, it does not always stay in federal court for the remainder of the litigation. A party opposing removal may file a motion

to remand the action to state court. A motion to remand based on a defect in the removal procedure must be filed within thirty days after the filing of the notice of removal under section 1446(a). As provided by 28 *United States Code* section 1447(c), a case shall be remanded if "at any time before final judgment it appears that the district court lacks subject matter jurisdiction." This can occur, for example, when the plaintiff is permitted to add an additional defendant whose citizenship destroys diversity, and there is no federal question jurisdiction. Thus, even though a defendant succeeds in having a case removed to federal court, the case may still be sent back to the state court. When a case is remanded to state court, a certified copy of the order of remand is mailed by the federal court clerk to the clerk of the state court, and the state court may then proceed with the case.

Other Rules Regarding Removal

Not every rule related to removal is discussed here. Removal can be complex. When you face a complex removal situation, review the more intricate rules with the attorney. Recall that the rules for removal appear in 28 *United States Code* sections 1441–1450. Note that section 1445 cites certain types of actions that cannot be removed from state court. As long as you understand the basic rules and procedure for removal, you can deal with the more intricate aspects in conjunction with the attorney on your team.

ETHICS BLOCK

ABA Model Rule 3.1 provides that a lawyer shall not advance a claim or defense that is "frivolous." The definition of *frivolous* varies among jurisdictions. Paralegals must find the definition used in their own state. Generally, a lawsuit is not frivolous just because the position asserted is likely to fail. Lawsuits are, however, generally considered frivolous if the lawyer cannot make a good faith argument in support of the position or if the action is primarily for the purpose of harassing or maliciously injuring another person. DR 7-102(A)(1) of the ABA Model Code provides that a lawyer may not take an action that is designed merely to harass or maliciously injure another. FRCivP 11, together with the sanctions it authorizes, has done much to discourage frivolous claims and defenses.

SUMMARY

Chapter 6 explains the pleadings filed after the complaint—the answer, the counterclaim, the cross-claim, and the third-party complaint. FRCivP 7 also allows replies to counterclaims and answers to cross-claims. Not every one of these pleadings is filed in every lawsuit. However, you need to be familiar with all of them. Chapter 6 also explains motions to dismiss pursuant to FRCivP 12. Although technically denominated motions rather than pleadings, these motions are often filed as part of an answer so they must be addressed at this stage of the litigation.

The timing for filing responses to pleadings is critical, and keeping track of the deadlines is a task often assigned to paralegals. The first task is to determine how long applicable statutes allow for filing a response. FRCivP 6 states the rules for calculating response times. There is no substitute for reading FRCivP 6 carefully and applying the stated rules precisely. Note the differences in calculation, depending on whether the time allowed to respond is less than eleven days or more than eleven days. Note also that three extra days are allowed when the pleading to which you must respond was served by mail.

Sometimes it is not possible to file a responsive pleading within the allotted time, and the attorney-paralegal team must seek an extension of time. Often counsel for the opposing party will consent to an extension, and the parties file a stipulation or consent order stating their agreement. Otherwise, one must obtain court permission. If the prescribed period has already expired, one must establish "good cause" for an extension. If the prescribed period has already expired, one must establish that failure to file a timely response was the result of "excusable neglect."

FRCivP 12(b) provides seven grounds on which to seek dismissal of a lawsuit: lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, insufficiency of process, insufficiency of service of process, failure to state a claim upon which relief can be granted, and failure to join a party under FRCivP 19. These motions must be filed within the time allowed to file the answer and may be part of the answer or filed as separate motions. Certain of the 12(b) motions must be included with the answer or a motion to strike or else the right to assert the defenses is waived. Review the rules in FRCivP 12(g) and (h) and the discussion in this chapter.

Many of the defects attacked by rule 12 motions can be cured. This is true of the most commonly asserted motion—failure to state a claim upon which relief can be granted (FRCivP 12(b)(6)).

FRCivP 12(e) addresses the motion for a more definite statement. This motion is filed when the pleading to which you must respond is so vague that a party cannot reasonably be required to frame a responsive pleading. This motion is not appropriate every time you discern a fact you may need to know later, because that is the purpose of the discovery process. If the pleading is so vague, however, that you cannot formulate a response without risking an unwanted admission, a motion to strike is appropriate.

FRCivP 12(f) addresses the motion to strike. The purpose of this motion is to strike from a pleading material that is scandalous, unnecessary, and prejudicial.

A topic of paramount importance is the answer, the general rules for which are set forth in FRCivP 8. The general rules of pleading discussed in Chapter 5 apply to answers. The main purpose of the answer is to admit or deny the allegations in the complaint. FRCivP 8 requires that the defendant admit or deny every averment in the complaint. If a defendant is without sufficient knowledge or belief as to the truth of an averment, the defendant may so state, and this is deemed a denial. A failure to respond to an allegation is considered an admission, so it is imperative that the defendant respond to every allegation. A defendant may admit in part and deny in part an averment.

In addition, the answer may contain affirmative defenses, which go beyond a denial and introduce new material that may bar the plaintiff's claim. Common examples of affirmative defenses are statute of limitations, contributory negligence, and the others named in FRCivP 8(c). An answer also may include rule 12 motions to dismiss, counterclaims, and cross-claims.

The format is similar to complaints, with numbered paragraphs, headings, prayer for relief, and attorney signature and address. All defenses and motions should be clearly labeled. Filing the answer takes basically the same steps as the complaint, except that there is no summons. One must attach a certificate of service to the answer and mail a copy to all parties.

Under the Federal Rules of Civil Procedure, a defendant has twenty days from service of complaint and summons to file an answer. The prescribed period for filing an answer may be different in your state court, so check your state rules of procedure carefully.

When a defendant wants to assert a claim against the plaintiff, the defendant files a counterclaim. A counterclaim is essentially in the form of a complaint in which the defendant takes the role of plaintiff and the original plaintiff takes the role of defendant. The counterclaim must be filed within the time prescribed for filing the answer, subject to certain exceptions in FRCivP 13(e). The plaintiff then files a responsive pleading to the counterclaim, termed a reply.

There are two types of counterclaims—permissive and compulsory. A compulsory counterclaim must be asserted or else the defendant loses the right to assert the claim in a separate lawsuit. FRCivP 13(a) provides that a counterclaim is compulsory when the claim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and the claim does not require the presence of parties over whom the court cannot acquire jurisdiction. A permissive counterclaim involves a claim that need not be brought as part of the original lawsuit. It concerns claims that do not arise out of the same transaction or occurrence as the original claim. Study the *Jones v. Smith and Green* example in the text to apply these terms.

A cross-claim is a pleading that states a claim by one party against another party—for example, a claim by one defendant against another defendant. If a defendant files a counterclaim against two coplaintiffs, a plaintiff can file a cross-claim against the other coplaintiff. FRCivP 13(g) requires that the cross-claim either arise out of the same transaction or occurrence that is the subject matter of the original action or the counterclaim or relate to any property that is the subject matter of the original action. A cross-claim may be contingent; that is, a party may assert that if he or she is liable for all or part of the claim, the coparty is liable to him or her. Cross-claims must be filed within the time prescribed for filing an answer.

The format of counterclaims and cross-claims is similar to that of complaints. (See the examples in the text.) If the defendant requests a jury trial in a counterclaim, that request should be stated conspicuously.

Impleader or third-party practice involves bringing additional parties into the lawsuit and is governed by FRCivP 14(a). This is different from counterclaims

and cross-claims, which involve the original parties to the lawsuit. Study the *Jones v. Smith and Green* example, in which Robertson is brought in as a third-party defendant. When a defendant files a third-party complaint, the defendant is denominated the "defendant and third-party plaintiff." Unless the third-party complaint is filed within ten days after serving the original answer, court permission is required to file the third-party complaint.

The third-party complaint must be accompanied by a summons and served on the third-party defendant in accordance with the service-of-process requirements of FRCivP 4. Copies must be mailed to all other parties, together with a certificate of service, in the usual manner prescribed in FRCivP 5 for pleadings subsequent to the complaint. Other parties may contest impleader and move the court to strike the third-party claim or to sever it and hear it in a separate trial. FRCivP 14(a) allows a third-party defendant to assert defenses in an answer and/or rule 12 motions and to file a counterclaim.

FRCivP 15 allows parties to amend pleadings, and permission to amend is granted liberally. A party may amend a pleading once as a matter of right when no responsive pleading has yet been filed. If no responsive pleading is permitted (for example, a reply to a counterclaim), a party may amend the pleading within twenty days of service if the action has not been placed on a trial calendar. Otherwise, court permission is required unless opposing counsel consents to the amendment, in which case a stipulation or consent order may be filed.

When a motion to amend is required, the motion must state explicitly the reasons for the amendment and the proposed amended language. In fact, the amended pleading is usually attached as an exhibit to the motion to amend. The adverse party may file a motion opposing the motion to amend. Motions to amend are freely granted unless they would result in undue prejudice to the opposing party.

Removal is the transfer of a lawsuit from a state court to a federal court. Only a defendant may seek removal. A case is removable to federal court only if there is a basis for federal jurisdiction—federal question, diversity, or the like. The federal jurisdiction basis must exist at the time the notice of removal is filed. Thus, if a complaint states no claim on which federal jurisdiction may be based but the amended complaint adds information on which federal jurisdiction may be based, a notice of removal may be filed after the amended complaint. Every defendant must agree to removal.

The removal procedure is explained by 28 U.S.C. § 1446(a). The defendant seeking removal files a notice of removal in the United States district court for the district in which the state court action is pending. The notice of removal must state the grounds for removal, together with a copy of all process, pleadings, and orders served on the defendant in the action. As noted, the basis for removal may be federal question or diversity jurisdiction. There are also specific federal statutes allowing removal in certain types of lawsuits, such as civil rights actions. The text contains other examples.

The rules for deadlines for filing notice of removal require special attention and are set forth in 28 U.S.C. § 1446(b). There are three basic rules. First,

when the initial pleading (usually the complaint) contains a basis for removal, the defendant must file the notice of removal within thirty days of receiving the complaint, or within thirty days of receiving the summons when the summons is served without the complaint, whichever period is shorter. The second rule applies when the basis for removal first appears in an amended pleading. In this instance, the notice of removal may be filed within thirty days after receipt by the defendant of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one that is or has become removable. The third rule applies when the basis for federal jurisdiction is diversity of citizenship. When diversity arises after the initial pleading, the notice of removal must be filed within one year after the commencement of the action in state court.

When an action is removed to federal court, it does not necessarily stay there for the course of the litigation. The action may be remanded back to state court at any time before final judgment when it appears that the district court lacks subject matter jurisdiction. For instance, complete diversity may be destroyed if a defendant is added who is a citizen of the same state as the plaintiff.

Rules for removal appear in 28 U.S.C. §§ 1441–1450 and should be studied carefully when a complex removal question arises. Note that 28 U.S.C. § 1445 designates certain types of actions that cannot be removed from state court.

REVIEW QUESTIONS

1. When the defendant is the United States or an officer or agency of the United States government, the defendant is allowed how many days to file an answer or other responsive pleading?
   a. 20
   b. 30
   c. 10
   d. 60
2. A response to a counterclaim is called what?
   a. reply
   b. cross-claim
   c. affirmative defense
   d. answer
3. Which of the following constitutes an affirmative defense?
   a. fraud
   b. statute of limitations
   c. contributory negligence
   d. all of the above
   e. a and b only
4. When may a pleading be amended without court permission?
   a. when the amendment is filed before a responsive pleading is filed
   b. at any time before trial

c. when the attorneys consent to the amendment
d. a and c only
e. a and b only

5. T F State rules for deadlines for filing responses to pleadings are always the same as the Federal Rules of Civil Procedure.
6. T F A motion to dismiss under FRCivP 12(b)(6) may not be overcome by amending the complaint.
7. T F The general rule under the Federal Rules of Civil Procedure is that a defendant has thirty days from the date of service of the complaint to file an answer.
8. T F A compulsory counterclaim requires an assertion of a jurisdictional basis independent from the original complaint.
9. T F Court permission is never necessary to file a third-party complaint.
10. T F Once a lawsuit has been removed to federal court, it may be remanded to state court under some circumstances.

PRACTICAL APPLICATIONS

Refer to Figure 6–1, a motion for an extension of time to respond to defendant's motion to dismiss, and answer the following questions.

1. How much additional time did Ms. Heyward request for preparation of a response, including a memorandum of law, to the defendant's motion to dismiss?
2. Did Ms. Heyward consult the defendant's attorney before filing her motion for an extension of time? If so, what was Mr. Benedict's response to her request for additional time?
3. Is the court likely to grant the request for additional time?

CASE ANALYSIS

Read the excerpt from *Cohen v. Oasin*, 863 F. Supp. 225 (E.D. Pa. 1994), and answer the questions following the excerpt.

Mr. Cohen was denied a within-grade increase in 1988 and his employment was terminated by GSA in 1989. Following his termination, Mr. Cohen filed an unsuccessful administrative appeal with the United States Merit Systems Protection Board (MSPB), challenging the validity of both the within-grade increase denial and the termination of his employment.

Throughout the course of the MSPB proceedings, GSA was represented by the defendant, Mr. Oasin, who served as regional counsel for GSA in the mid-Atlantic region. Mr. Cohen has alleged that Mr. Oasin made intentional misrepresentations to the administrative tribunal regarding Mr. Cohen's professional fitness. Furthermore, Mr. Cohen has asserted that Mr. Oasin willfully withheld and destroyed evidence that would have shown Mr. Cohen to be the object of disparate treatment and the victim of religious discrimination. The gravamen of Mr. Cohen's complaint is that the MSPB ruled against Mr. Cohen on the issues of religious discrimination and disparate treatment as a result of Mr. Oasin's alleged misdeeds.

Mr. Oasin has moved to dismiss the complaint, arguing that he is absolutely immune from this lawsuit. Mr. Cohen counters that Mr. Oasin enjoys, at most, only a qualified immunity, and is therefore not immune from the lawsuit.

II. DISCUSSION

A. MOTION TO DISMISS

1. *Standards Applicable to a Rule 12(b)(6) Motion to Dismiss*

In considering a motion to dismiss pursuant to Rule 12(b)(6), the complaint's allegations must be construed favorably to the pleader. The court must accept as true all of the plaintiff's factual allegations and draw from them all reasonable inferences. *Schrob v. Catterson*, 948 F.2d 1402, 1405 (3d Cir.1991) (citations omitted). Thus, the court will grant a Rule 12(b)(6) motion only if there are no set of facts under which the nonmoving party can prevail. *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir.1990). Further, a complaint may be dismissed pursuant to Rule 12(b)(6) where the defendant contends that under the facts alleged he is entitled to immunity, even though immunity is generally characterized as an affirmative defense. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 787 F.Supp. 471, 480 (E.D.Pa.1992).

2. *Immunity*

The United States Supreme Court has recognized two types of immunity which serve to insulate public officials from civil liability for actions taken in their official capacity. The more prevalent of the two is qualified immunity, which operates to protect public officials from damages liability as long as their actions do not violate a plaintiff's constitutional or statutory rights. *Buckley v. Fitzsimmons*. ___ U.S. ___, ___, 113 S.Ct. 2606, 2613, 125 L.Ed.2d 209 (1993), *citing Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Accordingly, "[i]n most cases, qualified immunity is sufficient to 'protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" *Id., quoting Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 895 (1978).

The Supreme Court has recognized, however, that certain public functions are entitled to an absolute protection from civil damages in accordance with common-law tradition. *Id.* One such function is that of the agency attorney who arranges for the presentation of evidence before an administrative tribunal. *See Butz*, 438 U.S. at 512–14, 98 S.Ct. at 2913–15. In *Butz*, the Court concluded that an agency official who performed functions analogous to those performed by a prosecutor was entitled to claim an absolute immunity from civil liability. *Butz*, 438 U.S. at 515, 98 S.Ct. at 2915. The Court reasoned that an agency attorney, like a prosecutor, might be reluctant to present evidence "[i]f agency attorneys were held personally liable in damages as guarantors of their evidence." *Id.* at 517, 98 S.Ct. at 2916. Accordingly, the Court held that an agency attorney who presents evidence before an administrative tribunal is entitled to an absolute immunity from civil suit analogous to that enjoyed by a prosecutor. *Id.; see Schrob*, 948 F.2d at 1411 ("[A]bsolute immunity is extended to officials when their duties are functionally analogous to those of a prosecutor's [sic], regardless of whether those duties are preformed [sic] in the course of a civil or criminal action.").

The question of whether a public official is entitled to qualified or absolute immunity is determined by the application of a "functional approach," which

examines "'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley*, ___ U.S. at ___, 113 S.Ct. at 2613, *quoting Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988); *Schrob*, 948 F.2d at 1409 (citations omitted). By applying a functional analysis, therefore, a court may conclude that some prosecutorial functions are absolutely protected, while others carry only a qualified immunity. *Kulwicki v. Dawson*, 969 F.2d 1454, 1465 (3d Cir.1992). Accordingly, only those prosecutorial activities which may be characterized as "quasi-judicial" carry an absolute immunity. By contrast, the prosecutor enjoys only a qualified immunity with respect to those activities that are administrative or investigative in nature. *Id.*

Prior decisions help to more clearly delineate the distinction between the quasi-judicial and investigatory roles of the prosecutor. For example, the decisions make clear that the public official enjoys an absolute immunity for those activities associated with the preparation and presentation of the Government's case at an adjudicative proceeding. *Buckley*, ___ U.S. at ___, 113 S.Ct. at 2618; *see Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976) (holding prosecutor absolutely immune for conduct "intimately associated with the judicial phase of the criminal proceedings"); *Kulwicki*, 969 F.2d at 1464–65 (absolute immunity extends to initiation of prosecution, preparatory functions including obtaining and reviewing of evidence, and prosecutor's in-court advocacy). Indeed, absolute immunity applies even where professional misconduct is alleged. In *Schrob*, for example, the Third Circuit Court of Appeals held a prosecutor's false statements to a judge were absolutely immune. *Schrob*, 948 F.2d at 1417. And in *Imbler*, the Supreme Court held that a prosecutor was entitled to immunity even though the plaintiff had alleged that the prosecutor had knowingly elicited perjurious testimony, withheld exculpatory evidenced, and altered evidence to inculpate the plaintiff. *Imbler*, 424 U.S. at 416, 96 S.Ct. at 988. The *Imbler* Court specifically rejected the notion that a prosecutor should have only a qualified immunity if he fails to provide the defense with exculpatory evidence. *Id.* at 431 n. 34, 96 S.Ct. at 996 n. 34.

In the case before the Court, Mr. Cohen alleges that the defendant made false statements to the tribunal and withheld and destroyed other evidence helpful to the plaintiff. The complaint indicates that the alleged false statements were made during the course of the presentation of the Government's case and in the form of proposed findings of fact submitted to the tribunal. Similarly, the alleged withholding and destruction of evidence occurred during the course of Mr. Oasin's representation of the Government in the underlying administrative action. The holding in *Imbler* brings such conduct within the scope of absolute prosecutorial immunity. As a result, the alleged misdeeds for which Mr. Cohen seeks relief are quasi-judicial in nature and therefore afford Mr. Oasin with an absolute immunity from this lawsuit. . . .

Accordingly, for the reasons enumerated above, the Court concludes that the defendant enjoys an absolute immunity from this lawsuit. As a result, the defendant's motion to dismiss must be granted. However, since the plaintiff's conduct during the course of this litigation did not reach the level of willful bad faith, the defendant's motion for costs and attorneys' fees is denied.

1. The defendant, Mr. Oasin, filed a motion to dismiss the motion against him pursuant to FRCivP 12(b)(6). In considering a 12(b)(6) motion to dismiss, how must the court construe the complaint?
2. When will a court grant a 12(b)(6) motion?

3. The defendant contends that the lawsuit must be dismissed if he is entitled to absolute immunity for his actions on behalf of the Merit Systems Protection Board (MSPB). Do agency officials who perform functions analogous to a prosecutor enjoy absolute immunity? Why?
4. Did the United States District Court for the Eastern District of Pennsylvania conclude that the defendant enjoyed absolute immunity?
5. Did the court grant the defendant's motion to dismiss?

ENDNOTES

1 FRCivP 6(a).
2 Some judicial districts may have a filing fee for counterclaims. You must check your local rules and/or call the clerk's office.
3 Note that Form 22-A in the Appendix to the Federal Rules of Civil Procedure includes a Third-Party Summons *and* a Third-Party Complaint. They are clearly labeled as separate documents.

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Chapter 7

MOTION PRACTICE AND MOTIONS FOR ENTRY OF JUDGMENT WITHOUT TRIAL

You are looking through the morning mail and find the court's motion calendar, which includes oral arguments for motions in three of Ms. Heyward's cases. You bring this to her attention at your meeting that afternoon. You ask, "Is it unusual to have this many pretrial motions pending?"

"Not at all," Ms. Heyward replies. "The process of filing and arguing motions, known as motion practice, makes up a big part of most lawsuits. The motions filed can range from a motion seeking additional time to file a response to a motion requesting that the court enter judgment in favor of the moving party without having a trial, known as a dispositive motion."

"It looks as if your three motions scheduled for argument in two weeks are all dispositive," you note, handing the calendar to Ms. Heyward.

"You are right. LeMond v. Wheeler *is a motion for a default judgment,* Armstrong v. Post *is a motion for judgment on the pleadings, and* Indurain v. Hill, *is a motion for summary judgment. All the memoranda of law in support of our motions have been filed, and I have already prepared my oral arguments. Why don't you come to court with me on the fifteenth and listen to the arguments? It will be a full day, but you will learn a lot about motion practice."*

INTRODUCTION

This chapter focuses on three types of motions: ***motion for default judgment, motion for judgment on the pleadings***, and ***motion for summary judgment***. The purpose of all these motions is to terminate the litigation at an early stage so that a trial will not be necessary. This can result in great savings of time and money. Before a substantive discussion of these motions, it is necessary to understand the basic rules that apply to all motions.

MOTION PRACTICE

A ***motion*** is an application to a court for an order directing some act in favor of the applicant.[1] Motions regulate the course of a lawsuit. Numerous motions will be filed in most lawsuits, and the process is sometimes called

"motion practice." Some motions pertain primarily to procedural matters: a motion for extension of time to file a response to a pleading, for example, or a motion to amend a pleading.

Other motions ask the court to enter a judgment in favor of the moving party and thus terminate the lawsuit. These include motions for default judgment, for judgment on the pleadings, and for summary judgment. Because these motions dispose of the lawsuit, they are often referred to as ***dispositive motions***. A motion to dismiss an action for failure to state a claim upon which relief can be granted (FRCivP 12(b)(6)), discussed in Chapter 6, may also terminate a lawsuit and be a dispositive motion.

Still other motions are made orally during trial (for example, a motion for a directed verdict) or entered after trial (for example, a motion for a new trial). Motions made at trial are discussed in Chapter 11.

Most local rules provide that if a party opposes a motion, that party must file a response to the motion. Therefore, if a wide variety of motions can be made during the course of a lawsuit, an equally wide variety of responses may be filed asking the court to deny the other party's motion.

As an example of the variety of motions and responses, consider a situation where the defendant has successfully removed the case from state court to federal court. The plaintiff then files a "Motion to Remand" the case to state court. The defendant responds with a "Response in Opposition to Motion to Remand," asking the federal court to retain the case. The court grants the plaintiff's motion to remand and orders the case sent back to state court. The defendant files a "Motion to Reconsider Order Remanding Action to State Court." The plaintiff responds with a "Response to Motion to Reconsider Order Remanding Action to State Court," in which the plaintiff asks the court to deny the defendant's motion and affirm its earlier order to remand to state court. The court then enters an order denying the motion to reconsider, and this series of motions and responses is mercifully finished.

Form and Content of Motions

Rule 7(b) of the Federal Rules of Civil Procedure addresses the form of motions and states three requirements. First, a motion must be in writing unless the motion is made orally during a hearing or trial. Second, the motion must "state with particularity the grounds" on which the motion is based. Third, the motion must "set forth the relief or order sought."

The format for motions is the same as for the complaint and other pleadings, as you can see from the motions illustrated throughout this chapter. Like a complaint, the caption includes the name of the court, title of the action (names of parties in the lawsuit), and file number. The motion also has a caption that states the specific nature of the motion. For example, a motion for summary judgment is not captioned simply "Motion," but rather "Motion for Summary Judgment." A caption may be lengthy, as in the preceding sample motions related to removal. Most local rules of court require such specific titles, so spell out the nature of the motion in the caption even if it looks cumbersome.

FRCivP 7(b)(2) states that the rules applicable to matters of form for pleadings apply to all motions as well. In addition to the captions, motions also contain numbered paragraphs and the attorney's signature, name, address, and telephone number. As with pleadings, a certificate of service must be attached.

The actual content of the motion itself depends on the type of motion you are filing. Be sure to state specifically the relief you seek and the specific reasons why you seek the relief. For instance, in a motion to strike, specify the exact words in the pleading that you want struck and explain why these words are, for instance, scandalous and prejudicial. If you file a response to the plaintiff's motion to file an amended complaint, ask the court to deny the plaintiff's motion and explain why you oppose the plaintiff's motion.

Notice of Motion

Many motions require a hearing before the court to determine whether the motion should be granted. (See the subsection headed Hearings.) The moving party must inform the other parties of the time and place where the hearing will be held so that the other parties can prepare their arguments for the hearing. FRCivP 6(d) requires that the motion and notice of motion must be served on the other parties "not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court." FRCivP 56(c) requires that motions for summary judgment be served at least ten days before the date fixed for the hearing. Local court rules may require more than five days' notice. The motion, notice of motion, and supporting documentation should be served together.

The content of a notice of motion is short and simple. It specifies the date, time, and location of the hearing. The notice of motion also specifies the exact nature of the motion to be heard—motion for summary judgment, for example, or motion to dismiss pursuant to FRCivP 12(b)(6). (In Chapter 6, Figure 6–12 illustrates a notice of motion. See also Figure 7–1 for an example of a preprinted form that a court may use.

Affidavits, Memoranda of Law, and Other Supporting Documents

Supporting affidavits and memoranda of law (briefs) accompany many, if not most, motions. An ***affidavit*** is a written statement of facts and bears the notarized signature of the person stating the facts. The person making the statement is referred to as the ***affiant***. The significance of the notarized signature is twofold. First, the notary verifies the identification and signature of the affiant so that a person reading the affidavit knows that the statement was made by the person who signed it. A notary must actually witness the affiant signing the affidavit. Second, the affiant swears that the facts in the affidavit are true. Thus, affidavits are considered more reliable than simple signed statements.

Affidavits are often attached to motions as exhibits. The statements in the affidavits help to explain to the court why the motion should be granted. Examine the simple motion for summary judgment and the affidavit in support of motion for summary judgment illustrated in Figures 7–17 and 7–18. This is a

FIGURE 7–1 Form for Notice of Motion

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____X

Plaintiff,

-against

Defendant.

_____X

NOTICE OF MOTION

-CV- ( )

SIRS:

PLEASE TAKE NOTICE that upon the attached affidavit or affirmation of (Plaintiff's Name), sworn to or affirmed (Affidavit Date), 19__, and upon the complaint herein, plaintiff will move this Court, (Judge's Name), U.S.D.J., in Room____, United States Courthouse, (Courthouse Address), on the____ day of ____, 19____, at (Time of day) or as soon thereafter as counsel can be heard, for an order pursuant to Rule____ of the Federal Rules of Civil Procedure granting (State What You Want the Court to Order).

Dated: (County), New York
(Date) _____

(Sign Your Name)
(Print Your Name)
Plaintiff

Address: _____

To: (Put the Name and Address of Each Defendant's Attorney)

lawsuit by a hospital to recover an unpaid hospital bill. The information in the affidavit supports the claim stated in the complaint (which is not illustrated) that the hospital rendered services to the defendant, that the defendant agreed to pay for the services, and that the defendant has failed to pay.

With motions for summary judgment and other more complex motions, the motion itself is usually quite short, and the facts are explained in attached affidavits. Examine Figure 7–18, which is a motion for summary judgment in the Chattooga case. This motion for summary judgment refers the court to an attached affidavit, as well as to relevant parts of the pleadings and other attached exhibits. The other exhibits include the pertinent pages of depositions and documents produced during the discovery process. Do not worry about the

intricacies of discovery just now; these matters are discussed in Chapter 8. Just note the types of documents that can be used to support motions.

To support many motions, the attorney-paralegal team will prepare memoranda of law. This is not necessary for simple motions, such as the motion for summary judgment to recover money owed on a hospital bill or a motion to reschedule a hearing, particularly if all parties agree to the rescheduling. But for more complex motions, such as the motion for summary judgment in the Chattooga case, a memorandum of law is necessary. Some local court rules specify when a memorandum of law should accompany a motion. Be sure to check your local rules.

A ***memorandum of law***, sometimes called a ***brief***, is a written explanation of the facts, applicable statutes, and pertinent case law. Some judicial districts use the term *statement of points and authority* or *memorandum of points and authority*. This textbook uses all these terms interchangeably.

The purpose of the memorandum of law is to explain to the court why it should rule in favor of your client. Memoranda of law follow a general format that you may have already learned in your legal writing class. That format consists of cover page, table of contents, table of authorities, statement of the question(s) presented for review, procedural history, statement of the facts, argument (why the facts and law support a ruling in your favor), conclusion, signature and identification of counsel, proof of service, and any exhibits. Figure 7–19 illustrates some portions of a memorandum of law.

The length and content of the memorandum of law obviously depend on the nature of the motion. A motion based on a simple factual argument need not be lengthy. Motions pertaining to complex fact situations and novel questions of law, however, may be lengthy. For example, a brief in support of a motion to dismiss under rule 12(b)(6) may be quite long when the case involves a complex question of constitutional law that has not been litigated before. The lawyers in your firm will be familiar with the fine points and strategy involved in composing a brief, but you should remember that a good brief is thorough without being long-winded and presents your argument in a straightforward manner, explaining why the law and facts support your client.

Remember that you file memoranda of law in opposition to motions as well as in support of them. A memorandum of law in opposition to a motion follows basically the same format as one in support. You may have the option to delete the statement of facts, but it is usually advantageous to restate the facts to help set the stage for your own argument. Be aware that the local rules may not provide a great deal of time for filing the brief, so record your deadline and begin work immediately.

SIDEBAR This is just a general outline of the parts of a memorandum of law. Local rules may modify or amplify these basic parts. You *must* consult your local rules regarding format for briefs, page limits (if any), how many copies to file with the court, and

FIGURE 7–2 Portion of a Rule Regarding Briefs and Memoranda of Law

RULE 107
(Middle District of North Carolina)
BRIEFS AND MEMORANDA OF LAW

(a) Contents. All briefs filed with the court shall contain:
(1) A statement of the nature of the matter before the court.
(2) A concise statement of the facts. Each statement of fact should be supported by reference to a part of the official record in the case.
(3) A statement of the question or questions presented.
(4) The argument, which shall refer to all statutes, rules and authorities relied upon.

. . .

(e) **Additional Copies of Briefs for Court Use.** At the time the original of a brief is filed, a working copy of the brief for use by the judge shall be delivered to the clerk.

deadlines for filing and responding to briefs. See Figure 7–2, which reprints a portion of rule 107 of the United States District Court for the Middle District of North Carolina.

Filing and Service of Motions

FRCivP 6(d) requires that the motion, notice of motion, and supporting affidavits be served on all parties not later than five days before the hearing date. It also provides that opposing affidavits be served not less than one day before the hearing. These deadlines can be altered by local rules or by other federal rules of civil procedure. Some local rules set deadlines for filing dispositive motions so that any such motions can be heard well before trial. For example, a local rule may require that a motion for summary judgment be filed within sixty days following the close of the discovery period. As noted earlier, FRCivP 56 requires that a motion for summary judgment must be served at least ten days before the date set for hearing.

If at all possible, the motion and accompanying papers should be filed well ahead of these deadlines. With complex motions, you must allow the court plenty of time to examine the extensive supporting documents and consider the complicated questions of law involved. You may need an extension of time for filing a motion or response to a motion. It is imperative to request court permission for an extension of time. In many jurisdictions, if a response to a motion is not filed within the stated time, the motion is deemed unopposed. Never assume that the court knows that your client opposes a motion. File an opposing motion.

Every motion must have attached a certificate of service, signed by the attorney, verifying the date that the motion was served on the opposing parties. Recall that service can be accomplished by mail or by personal delivery to the office of the attorney for the other parties. FRCivP 5(c) states that service by mail is complete upon mailing.

FRCivP 5(c) provides that papers can be filed with the clerk either before service or "within a reasonable time thereafter." It is usually best to file documents with the clerk before service for the following reasons: doing so lessens the chance of forgetting to file the papers and the chance of missing a filing deadline, and the document will bear the clerk's stamp showing the date filed, so the other parties will know when the documents were filed.

As always, review your checklist to be sure that all documents are prepared before you mail anything or go to the clerk's office. Be sure that for the court and for each party you have assembled the entire package necessary to decide the motion. You need to assemble the motion with supporting affidavits and other exhibits (for example, excerpts from depositions or other discovery materials, excerpts from pleadings, applicable business records, and so on), the memorandum of law in support of the motion, and the notice of motion. Local rules may also require that you submit a proposed order for the judge. (See the following subsections on orders.) When you return to the office, check by the end of the day to be sure that all motions were served at the time and in the manner stated in the certificate of service.

Responses to Motions

When a party is served with a motion, the party must respond to the motion. As noted, if the party does not respond at all, the motion will be deemed unopposed in most jurisdictions.

There will be times when parties in fact do not oppose motions, particularly simple procedural motions such as an extension of time to file a pleading or a motion to reschedule a hearing because one attorney has a schedule conflict. If you do not oppose the motion, you should inform the court in writing. You may file a simple statement that the party you represent does not oppose the motion and does not wish to appear at the hearing. Sometimes the attorneys for all the parties involved file a ***consent order***. This is a proposed order signed by all the attorneys, stating that they have agreed to an extension of time or a rescheduled hearing date. (See Figure 7–3 for an example of a consent order.) The judge is not obliged to sign the consent order. However, if all parties have agreed and the consent order concerns only a simple procedural matter, the judge will likely sign it. It is best to submit the consent order as far ahead of the hearing as possible in case the judge has questions or chooses not to sign it.

A response in opposition to a motion is prepared and filed in the same way as a motion. The format follows the general rules for motions. The response in opposition is supported by affidavits, memoranda of law, and other exhibits. Service is made pursuant to FRCivP 5, as with all documents filed after the complaint.

FIGURE 7–3 A Consent Order

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,

and

Second Ledge Stores, Incorporated,
Defendant.

CONSENT ORDER

The defendant having moved the Court pursuant to Rule 6(b) of the Federal Rules of Civil Procedure for an extension of time within which to file answer;

AND IT APPEARING TO THE COURT that the defendant has shown good cause for the granting of said motion for an extension of time and that the parties have agreed to said extension of time;

IT IS, THEREFORE, ORDERED that the defendant shall have twenty (20) days from the date of the filing of this Order within which to file answer in this action.

This the _____ day of June, 1996.

_____
United States District Judge

CONSENT:

_____
Leigh J. Heyward

_____
David H. Benedict

The content of a response to a motion varies according to the type of motion. A motion to deny a defendant's motion to dismiss pursuant to rule 12(b)(6) is illustrated in Figure 7–4. The length of and detail in the memorandum of law supporting a response depends on the nature of the motion. As noted previously, a brief for a rule 12(b)(6) motion involving a complex issue that has not been litigated before may be quite lengthy. The same is true for the responsive brief.

FIGURE 7–4 Motion to Deny a Motion to Dismiss

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION NO.: C-96-2388-B

Equal Employment Opportunity Commission,
Plaintiff,

-vs-

Chattooga Corporation,
Defendant.

MOTION
(To deny Defendant's Motion to Dismiss)

Plaintiff, through Counsel, moves that the Court deny the Defendant's Motion to Dismiss, for the reasons set forth in Plaintiff's Memorandum of Points and Authorities. Plaintiff, through Counsel, further requests oral argument.

This the 25th day of April, 1996.

Nancy Reade Lee
Attorney for the Defendant
Gray and Lee, P.A.
380 South Washington Street
Philadelphia, PA 19601-1115
215-555-2500

+ Certificate of Service

Hearings

At a hearing on a motion, the attorneys present an oral argument to the judge, stating why their motion should be granted or why the other party's motion should be denied. Usually, the attorneys present the most important points emphasized in their memorandum of law, which has already been presented to the judge. As a paralegal, you may be present at the hearing, particularly when the motion is complex and involves many documents. Your job will be to keep the documents in order and hand them to the attorney at the appropriate time.

Scheduling Hearings. The method for scheduling varies among different courts. The first point to remember is that the court does not hold a hearing for every motion. A few types of motions are *ex parte* motions, which means that there is no hearing and only the moving party talks to the judge. An example of an *ex parte* motion is a motion for a temporary restraining order. *Ex parte* motions are not very common. With the more common motions, you must consult the clerk of court and/or the local court rules. Not all judges hold hearings on routine

motions and motions to which all parties consent, such as a motion for an extension of time to file a pleading. Some local rules provide that no oral argument will be held on any motion unless the moving party specifically requests in writing that an oral argument be held.

In many judicial districts, the court schedules the hearing date and sends notice to the parties' attorneys. There are many variations on the procedure for scheduling hearings. See Figure 7–1, which is a state court form for a notice of motion. Here the attorney designates the type of motion and requests that the motion be calendared for a hearing. The trial court administrator then schedules the hearing and notifies the attorneys of the hearing date.

When the attorneys participate in scheduling, as they do in some jurisdictions (especially in state court), there are several points to keep in mind. In selecting the date, you must consult the clerk of court and/or local court rules, because scheduling procedures can vary widely. The court may hear arguments on motions only on certain days or at certain times. It is not unusual for a court to hear motions at the beginning of the day's court calendar. The hearing should be scheduled far enough in advance to give the judge time to review the motion and supporting documents.

SIDEBAR Although it is not usually required, it is best to consult the attorney for the opposing party before scheduling a hearing. There is no guarantee that a litigator will be available at a time that you pick, so you need to agree on a mutually convenient hearing date. Checking with the other party's attorney beforehand helps ensure that the hearing will not have to be rescheduled and the notice of motion reissued. The court and its administrators will also be pleased when the hearing does not have to be rescheduled.

Orders and Proposed Orders

When the judge decides whether to grant or deny a motion, the judge enters an ***order***. An order is a written statement of the judge's decision. An important point of terminology is to distinguish an order from a ***judgment***. A judgment is also a written statement of a judge's decision; however, a judgment terminates the lawsuit, that is, it resolves the entire dispute. In contrast, an order resolves only a specific issue or issues. The lawsuit continues after entry of an order.

Content of Orders. The content of an order varies, depending on the nature of the motion it addresses. In issuing an order on one of the motions that the court regularly hears, the judge may just fill in the blanks on a preprinted form kept in the courtroom. See Figure 7–5 for an example. The order does not always state in great detail why the motion is granted or denied. If a detailed explanation is necessary, the judge will likely issue a very short order accompanied by an opinion containing the rationale.

FIGURE 7–5 Form for a Judge's Order

Order Substituting an Arbitrator (Arb-14)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____x

ORDER SUBSTITUTING
AN ARBITRATOR

_____x

_____is replaced as an arbitrator in the above-captioned civil action scheduled for hearing at _____, on _____.

_____is appointed to serve as arbitrator in the above-captioned civil action at the time, date and place previously set forth.

Dated:_____

_____
U.S.D.J.

SIDEBAR Opinions pertaining to some motions may be published. For example, an opinion explaining why a motion for summary judgment was denied may be lengthy and deal in depth with substantive issues of law. Such opinions may have precedential value and therefore will be published. Other opinions, which are shorter and less detailed, may be unpublished and are often called "memorandum opinions."

Proposed Orders. Along with the motion and supporting documents, it is common practice to submit to the court a proposed order. A proposed order is an order ready for the judge to sign, stating that the moving party should receive the relief requested and the reasons the moving party is entitled to that relief. Whether a proposed order is submitted may depend on local rules and the preferences of the judge. Even if a proposed order is not required, there are advantages in submitting one. If the judge is inclined to rule in your client's favor, the convenience of having an order there, requiring nothing more than a signature, may encourage the judge to enter an order in your favor. If the judge has difficulty deciding whether to grant or deny a motion, a proposed order is a vehicle for a logical presentation of the facts and law that support a ruling in your client's favor. A logical, well-organized proposed order may tip the scales in your favor.

Including a proposed order with the package of documents when you file a motion is especially important when there will be no oral argument. When there is an oral argument, the judge may direct both parties to submit proposed orders within a certain number of days. This is a good opportunity to present the argument again in written form. This practice is more common in state court where, unlike federal district court, the judge does not have law clerks to draft the orders. In state court, it is common for the judge to announce the decision

in open court and direct the attorney for the prevailing party to draft a proposed order. When this happens, the prevailing attorney drafts the order, sends it to opposing counsel for comments, and then submits the order to the judge for signature.

SIDEBAR In the discussion of motion practice, we have referred to the actions of judges. In federal court, however, it is common practice for magistrate judges to hear and rule on routine pretrial motions. The procedure is the same as when a judge hears the motion. Federal court magistrate judges are court officials who have the authority to perform some, but not all, judicial duties. Local court rules may give magistrate judges authority to perform additional duties. Duties frequently performed by magistrate judges include ruling on pretrial motions, such as motions concerning discovery. The role of magistrate judges has been expanded through many courts' Civil Justice Expense and Delay Reduction Plans.

DEFAULT JUDGMENT

FRCivP 55(a) provides that when the defendant does not "plead or otherwise defend" as provided by the Federal Rules of Civil Procedure, the defendant is in default. Thus, a defendant who has not filed an answer and/or motion to dismiss within twenty days of service of the complaint is in default.

The documents filed to obtain a default judgment against the defendant are fairly straightforward, and you may be asked to prepare the appropriate forms. If you work with a law firm involved in collections, you will be very likely to prepare documents to obtain default judgments.

Procedure

FRCivP 55 explains the procedure the plaintiff must follow to obtain a default judgment against the defendant. Figure 7–6 outlines the procedure. The example is a federal court action to collect a sum certain owed to the plaintiff on a promissory note. This simple example is used rather than our sample cases, because the sample cases do not lend themselves as readily to default judgment.

The first step is to file with the clerk of court a "Request to Enter Default." (See Figure 7–7.) Note that the request is supported by an affidavit signed by the plaintiff's attorney (Figure 7–8). It explains that service of process was accomplished and that twenty days have elapsed without the defendant's pleading or otherwise defending. When the clerk determines that the defendant is in default, the clerk signs and files an "Entry of Default." (See Figure 7–9.) It is best to include the proposed "Entry of Default" with the "Request for Default" and affidavit, just as one encloses a proposed order with a motion.

Entry of Judgment by the Clerk of Court. After the first step, the procedure differs, depending on whether the clerk or the judge must enter the default judgment. FRCivP 55(b)(1) provides that the clerk may enter the default

FIGURE 7–6 Obtaining Default Judgment

PROCEDURE FOR OBTAINING DEFAULT JUDGMENT

I. Entry of Default
Documents to file with the clerk of court:
Request for Entry of Default
Affidavit for Entry of Default
Proposed Entry of Default for Clerk's signature

II. Default Judgment
Documents to file:

A. If the amount of judgment requested is a sum certain
and
the defendant has not entered an appearance
and
the defendant is not a minor or incompetent:
1. Request for Default Judgment
(to be entered by the Clerk—FRCivP 55(b)(1))
2. Supporting affidavit (to show default judgment is proper and to prove amount owed)
3. Affidavit in compliance with Soldiers' and Sailors' Civil Relief Act

B. In all other cases
(when further proof of the amount of damages is necessary or the defendant has entered an appearance or the defendant is a minor or incompetent):
1. Request for Default Judgment
(to be entered by the Court—FRCivP 55(b)(2))
2. Supporting affidavit (to show that default judgment is proper and amount of damages plaintiff intends to prove)
3. Affidavit in compliance with Soldiers' and Sailors' Civil Relief Act
4. Notice of Motion for hearing on application for default judgment (must be served at least 3 days prior to hearing)

judgment "[w]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain . . . if the defendant has been defaulted for failure to appear and is not an infant or incompetent person."

If all the requirements of FRCivP 55(b)(1) are met, the clerk may enter the default judgment without having a hearing because the amount of damages is easily ascertainable. In the hypothetical *Blue Mountain National Bank v. Kevin Sanders* example in this chapter, the amount of damages is determined by the terms of the promissory note and, therefore, is easy to ascertain. In instances where the parties have agreed beforehand what the amount of the damages will be or the amount can be ascertained directly from the terms of the parties' agreement, the damages are called ***liquidated damages***.

FIGURE 7–7 Request to Enter Default

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____x

Blue Mountain National Bank,
Plaintiff,

-against-

Kevin Sanders,
Defendant.

TO: ROBERT C. HEINEMANN, CLERK
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Please enter the default of the defendant, Kevin Sanders, pursuant to Rule 55(a) of the Federal Rules of Civil Procedure for failure to plead or otherwise defend the above-captioned action as fully appears from the court file herein and from the attached affidavit of Marion Edozian.

Dated; Brooklyn, New York 1996

By:_____
Marion Edozian
Attorney for the Plaintiff
Edozian and Stratakos, P.C.
1290 Cadman Ave.
Brooklyn, NY 11201-5612
718-555-4477

The forms submitted to the clerk in the example include a "Request for Entry of Default Judgment" (Figure 7–10) and an affidavit to prove the amount to which the plaintiff is entitled (Figure 7–11). The attorney also signs and submits an affidavit in compliance with the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (Figure 7–12). This certifies that an investigation has been made to ensure that the defendants are not in the military service of the United States. The purpose is to prevent entry of judgment against a person in military service because the person may well not receive notices sent to the last known address. Depending on local custom, you also may submit to the clerk a proposed judgment. Because the form of the default judgment is fairly uniform in cases that the clerk handles, the clerk may use preprinted forms and fill in the blanks for the parties' names and the amount of the judgment. In other judicial districts, the attorney submits a proposed order, which when signed by the clerk of court looks like Figure 7–13.

FIGURE 7–8 Affidavit Supporting Request for Default

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CIVIL NO.: C-96-1250-M

Blue Mountain National Bank,
Plaintiff,

-vs-

Kevin Sanders,
Defendant.

AFFIDAVIT FOR ENTRY OF DEFAULT

STATE OF NEW YORK)
)
COUNTY OF RICHMOND)

Marion Edozian, being duly sworn, deposes and says that she is the attorney for plaintiff in the above-entitled action; that the Summons and Complaint in this action were served on defendant Kevin Sanders on February 4, 1996, as appears from the return of service of said Summons by Frank Santagata, who is not a party and is not less than eighteen (18) years of age; that the time within which the defendant may answer or otherwise move as to the Complaint has expired; that the time for defendant to answer or otherwise move was extended to August 26, 1996, but not beyond said date; and that defendant has not answered or otherwise moved.

Marion Edozian

Subscribed and sworn to before me
this the 27th day of August 1996.

Barbara M. Pressley
Notary Public
My Commission expires: 6-25-98

Entry of Judgment by the Court. When application must be made to the court for default judgment, file a "Request for Entry of Default Judgment by the Court." This form is like the one addressed to the clerk (Figure 7–10), except that it is addressed to the court. Also submit the affidavit in compliance with the Soldiers' and Sailors' Civil Relief Act (Figure 7–12).

The important difference when the request for default judgment is before the court is that the court holds a hearing if "it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter," as provided by FRCivP 55(b)(2). When the amount of damages cannot be determined by the parties' stipulation or by simple mathematical calculation from the available information,

FIGURE 7–9 Entry of Default

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CIVIL NO.: C-96-1250-M

Blue Mountain National Bank
Plaintiff,

-vs-

Kevin Sanders,
Defendant.

ENTRY OF DEFAULT

IT APPEARING TO THE COURT that the defendants are in default for failure to plead or otherwise defend as required by law;

NOW, THEREFORE, DEFAULT is hereby entered against the defendant Kevin Sanders.

This the 11th day of September, 1996.

Robert C. Heinemann
Clerk of the United States
District Court for the Eastern
District of New York

such as the terms of a promissory note, the damages are called ***unliquidated damages.***

If the court deems it necessary and proper, the court can order a trial by jury to determine the amount due to the plaintiff. When a hearing is held, FRCivP 55(b)(2) requires that the plaintiff serve the defendant with written notice of the application for judgment at least three days before the hearing. FRCivP 55(b)(2) requires notice of motion only if the defaulting party has entered an appearance. It is prudent, however, to serve a notice on the defaulting party even if no appearance has been entered.

Other General Rules Established by FRCivP 55

The discussion thus far has assumed that the defaulting party is the defendant. However, FRCivP 55(d) provides that the party entitled to the judgment by default may be, in addition to the plaintiff, a third-party plaintiff or a party who has pleaded a cross-claim or counterclaim. Thus, the defaulting party may be, in addition to a defendant, a third-party defendant, a codefendant in the case of a cross-claim, or a plaintiff in the case of a counterclaim.

Motion to Set Aside Default

FRCivP 55(c) provides that for "good cause," the court may set aside an entry of default or a judgment of default, if judgment has been entered.

FIGURE 7–10 Request for Entry of Default Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CIVIL NO.: C-96-1250-M

Blue Mountain National Bank,
Plaintiff,

-vs-

Kevin Sanders,
Defendant.

REQUEST FOR ENTRY OF DEFAULT JUDGMENT

To: Honorable Robert C. Heinemann
Clerk of the United States District Court
Eastern District of New York

Upon the Affidavit attached hereto, the plaintiff requests that you enter judgment by default against the defendant in the sum of Seventy-Six Thousand Twenty-Six Dollars Thirty-One Cents ($76,026.31), plus interest at the rate of Fifteen Dollars Eighty-Six Cents ($15.86) per day from the 5th day of July, 1996, and attorney's fees of Fourteen Thousand Four Hundred Forty-Four Dollars Ninety-Nine Cents ($14,444.99).

This request is submitted on the ground that default has been entered against the defendant for failure to answer or otherwise defend as to the Complaint of the plaintiff, and the Affidavits of Jeffrey Hopkins and Marion Edozian, attached hereto.

Marion Edozian
Attorney for the Plaintiff
Edozian and Stratakos, RC.
1290 Cadman St.
Brooklyn, NY 11201-5612

+ Certificate of Service

Grounds for Setting Aside Default. FRCivP 55(c) provides that the bases for setting aside default are those enumerated in FRCivP 60(b). Rule 60 is the general rule for relief from judgments under the Federal Rules of Civil Procedure.

"Excusable neglect" is the most common ground cited as good cause for setting aside default. The court exercises a great deal of discretion in determining what constitutes excusable neglect. Different judges have different views. You can get a general idea of how courts view excusable neglect by reviewing case law. Obviously a statement from the attorney saying "I forgot" or "I was busy" is insufficient. In contrast, good cause may be found when the attorney who was supposed to file the answer was seriously ill or when the client failed to supply

FIGURE 7–11 Affidavit for Default Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CIVIL NO.: C-96-1250-M

Blue Mountain National Bank,
Plaintiff,

-vs-

Kevin Sanders,
Defendant.

AFFIDAVIT FOR DEFAULT JUDGMENT

JEFFREY E. HOPKINS, being duly sworn, says that:

1. He is a Vice President of the plaintiff in the above-entitled action and is familiar with and has control of the books and records of the plaintiff with regard to this claim.

2. According to the Note of the defendant and books and records of plaintiff, the defendant is indebted to the plaintiff in the sum of Seventy-Six Thousand Twenty-Six Dollars Thirty-One Cents ($76,026.31), plus interest at the rate of Fifteen Dollars Eighty-Six Cents ($15.86) per day from the 5th day of July, 1996, and attorney's fees of Fourteen Thousand Four Hundred Forty-Four Dollars Ninety-Nine Cents ($14,444.99); that the amounts stated above are justly due and owing and that no part thereof has been paid.

Jeffrey E. Hopkins

Subscribed and sworn to before me

this the 4th day of September 1996.

Barbara M. Pressley
Notary Public

My commission expires: 6-25-98

the information on which the answer was to be based. Courts do not favor default and generally prefer to allow the case to be heard on the merits.

Deadlines for Filing. The time limit for filing a motion to set aside a default judgment is governed by FRCivP 60(b), which provides that the motion must be made within a reasonable time, but never more than one year from the date judgment is entered.[2] The one-year limitation applies to a default judgment as well as to other judgments under the Federal Rules of Civil Procedure.

Entry of default is not a judgment; it is an order, and the one-year rule does not apply absolutely to an order. The more general limitation of filing "within a

FIGURE 7-12 Affidavit in Compliance with Soldiers' and Sailors' Civil Relief Act

UNITED STATES DISTRICT COURT
EASTER DISTRICT OF NEW YORK
CIVIL NO.: C-96-1250-M

Blue Mountain National Bank
Plaintiff,

-vs-

Kevin Sanders,
Defendant.

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF RICHMOND

Marion Edozian, being duly sworn, deposes and says that:

1. She is the attorney for the plaintiff in the above-entitled action and makes this Affidavit pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act.

2. She has caused careful investigation to be made to ascertain whether Kevin Sanders is in the military service of the United States, in that private investigations reveal that Kevin Sanders is not in the military service of the United States and is a civilian resident of the state in which he was served.

3. From the facts as above set forth, she is informed and verily believes that the said defendant is not in the military service of the United States.

4. The default of the defendant has been entered for failure to appear in this action.

Marion Edozian

Subscribed and sworn to before me

this the 4th day of September, 1996.

Barbara M. Pressley
Notary Public

My commission expires: 6-25-98

reasonable time" is applied to the motion to set aside entry of default.[3] Nevertheless, it is a bad idea to wait more than a year to file the motion. In fact, you should file the motion to set aside default judgment or entry of default promptly. Not only do you avoid worry about the filing deadline, but you prevent the court from considering your firm to be dragging its feet, a habit almost universally despised by judges.

FIGURE 7–13 Default Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CIVIL NO.: C-96-1250-M

Blue Mountain National Bank
Plaintiff,

-vs-

Kevin Sanders,
Defendant.

JUDGMENT

The defendant, having failed to plead or otherwise defend in this action and his default having been entered;

Now, upon application of the plaintiff and upon Affidavit that the defendant Kevin Sanders is indebted to the plaintiff in the sum of Seventy-Six Thousand Twenty-Six Dollars Thirty-One Cents ($76,026.31), plus interest at the rate of Fifteen Dollars Eighty-Six Cents ($15.86) per day from the 5th day of July, 1996, and attorney's fees of Fourteen Thousand Four Hundred Forty-Four Dollars Ninety-Nine Cents ($14,444.99); and that the above-named defendant is not an infant or incompetent person or in the military service of the United States, it is hereby ORDERED, ADJUDGED and DECREED that Blue Mountain National Bank recover of and from the defendant the sum of Seventy-Six Thousand Twenty-Six Dollars Thirty-One Cents ($76,026.31), plus interest at the rate of Fifteen Dollars Eighty-Six Cents ($15.86) per day from the 5th day of July, 1996, and costs, including attorney's fees of Fourteen Thousand Four Hundred Forty-Four Dollars Ninety-Nine Cents ($14,444.99).

This the 24th day of September, 1996.

Robert C. Heinemann
Clerk of the United States
District Court for the Eastern
District of New York

As more time elapses after entry of default, the chances of establishing good cause for setting aside the default entry grow ever slimmer. Although the court may allow the motion to be filed, the chances of the court granting the motion to set aside entry of default are not good. A court is most likely to set aside default on a set of facts as in *Johnson v. Harper*, 66 F.R.D. 103 (E.D. Tenn. 1975). Here the court found good cause where the defendant filed an answer one day after the prescribed period ended and promptly filed a motion to set aside default. In addition, the aggregate damages sought exceeded $6 million, the plaintiffs showed no prejudice from the delay, and a question as to the computation of the deadline for filing a response was resolved in favor of the defendant.

SIDEBAR Note that *Johnson v Harper* is found in *Federal Rules Decisions* (F.R.D.). F.R.D. includes federal court decisions dealing with the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. The cases reported in F.R.D. address various procedural issues, ranging from complex issues concerning class actions to the simpler question of the time limit for filing motions to set aside entry of default.

Procedure. The party seeking to set aside entry of default or default judgment files a motion that explains to the court why good cause exists. This is basically an explanation of why an answer or other defensive pleading was not filed within the prescribed time. The motion should also state that the defendant has a meritorious defense and explain the factual basis for the defense. In the Chattooga case, for instance, the defendant would state the defenses of poor work performance and false statements on the employment application and explain that these are meritorious defenses. If the motion to set aside is filed within a few days of entry of default, you should note the very brief time that has elapsed.

SIDEBAR You file a motion for extension of time to file an answer at the same time you file the motion to set aside default. Obviously, the prescribed time for filing the answer has elapsed, since this is the reason that default was entered in the first place.

For filing and serving the motions, follow the motion practice described previously. Be sure to serve a notice of both the motion to set aside default and the motion for extension of time to file an answer. See Figure 7–14 for an illustration of a motion to set aside default judgment.

JUDGMENT ON THE PLEADINGS

Rule 12(c) of the Federal Rules of Civil Procedure provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." As the name of the motion shows, the court may look only at the allegations in the pleadings to determine whether on the face of the pleadings one party is entitled to judgment. A motion for judgment on the pleadings can be granted only in limited circumstances. In fact, the motion for judgment on the pleadings is not a frequently asserted motion. Nevertheless, it is important to understand when the motion may be granted. Even if you do not request judgment on the pleadings, the other party may make the motion, and you will have to defend against it.

How the Court Must View the Pleadings

In determining whether to grant a motion for judgment on the pleadings, the court must consider the pleadings in the light most favorable to the nonmoving party. That is, it must, for purposes of deciding the motion, resolve any

FIGURE 7–14 Motion to Set Aside Default Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CIVIL NO.: C-96-1250-M

Blue Mountain National Bank
Plaintiff,

-vs-

Kevin Sanders,
Defendant.

MOTION TO SET ASIDE DEFAULT JUDGMENT

NOW COMES the defendant, through its undersigned attorney, pursuant to Rule 55(c) of the Federal Rules of Civil Procedure, and shows unto the Court:

1. The defendant has filed simultaneously herewith a Motion Requesting Extension of Time to File Answer wherein the posture of this civil action is set forth. The statements in the accompanying motion are incorporated herein by reference and the Court is requested to read the accompanying motion to obtain information necessary in the determination of both motions filed by the defendant.
2. The defendant contends that good cause exists to deny the plaintiff's request for entry of default, in that:

   (a)
   (b) (State the reasons that constitute good cause.)

WHEREFORE, the defendant moves the Court that entry of default and default judgment be denied, and that the defendant be allowed to present its defense to the claims of the plaintiff.

Allison MacKethan
Attorney for the Defendant
Hall, MacKethan & Haggard, P.C.
300 Fourth St.
Brooklyn, NY 11201
718-555-1612

+ Certificate of Service

FIGURE 7–14 (Continued)

STATE OF NEW YORK

COUNTY OF RICHMOND

ALLISON MACKETHAN, being duly sworn, deposes and says that she is the attorney for the defendant in this action; that she has read the foregoing Motion and knows the contents thereof; that the same is true to her own knowledge except as to those matters and things therein stated on information and belief and as to those she believes it to be true.

_____
Allison MacKethan

Subscribed and sworn to before me,
this day _____ of May, 1996.

_____
Notary Public
My commission expires: _____

disputed fact in favor of the nonmoving party.[4] As a practical matter, this means that the court bases its decision on the undisputed facts.

The undisputed facts occasionally show that one party is entitled to judgment. Suppose that in the Chattooga case, there was no charge of employment discrimination, but rather the entire controversy concerned Ford's employment contract. Assume that Ford asserted that she did not breach the employment contract by failing to disclose her felony conviction; however, the contract clearly stated that lack of felony convictions was a condition of employment. A question on the employment application asked whether Ford had any felony convictions, and in the employment interview Ford was informed that a job requirement was that she have no felony convictions. Looking at the undisputed facts and resolving all matters in favor of Ford, it is clear that she did breach the employment contract and terms of her employment. Judgment on the pleadings in favor of Chattooga Corporation would be appropriate on the question of breach of contract.

When the Court May Grant Judgment on the Pleadings

In order to prevail on a motion for judgment on the pleadings, a plaintiff must show that, if all the allegations are deemed true, the defendant's answer raises no valid defense to the plaintiff's claim. For a defendant to prevail on a motion for judgment on the pleadings, the defendant must show that the allegations in the plaintiff's complaint, if true, would not allow recovery.

A motion for judgment on the pleadings is usually granted when there is no disputed ***question of fact*** but only a ***question of law***. A question of fact simply means that a factual dispute exists. A question of law involves applying a rule of law to the facts of the case.

In the Wesser case, for example, it is an undisputed fact that Wesser bought the defective blanket on January 16, 1994. The fire resulting from the blanket occurred in January 1995. The applicable statute of limitations is three years from the date Wesser bought the blanket. Suppose that Wesser did not file the complaint until March 15, 1997, two months after the statute of limitations expired. The application of the statute of limitations is a matter of law. There would be no dispute regarding the date that the blanket was purchased or the date that the lawsuit was commenced. If the lawsuit was commenced after the statute of limitations ran, as a matter of law, Wesser would be barred by the statute of limitations from recovering any damages.

Consider the actual fact situation, in which the lawsuit was commenced within the three-year statute of limitations. Assume that there is no other question of law that could bar recovery. Now we must consider whether there are material facts in dispute that could bar recovery. A fact is considered "material" if it can affect the outcome of the case. For instance, the color of the electric blanket does not affect the outcome of the Wesser case and, therefore, is not a material fact. Review the complaint and answer in the Wesser case. Factual disputes exist as to whether the blanket was negligently designed, manufactured, packaged, or handled; whether the blanket contained defects that resulted in breach of express and implied warranties and proximately caused the plaintiffs' injuries; and the amount of damages to which the plaintiffs may be entitled. These are disputes on material factual issues, which means that judgment on the pleadings would not be appropriate for either the plaintiff or the defendants.

Procedure and Timing

FRCivP 12(c) specifies that any party may move for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial. . . ." Pleadings are considered closed after the complaint and answer are filed. If a counterclaim is filed, the pleadings are closed after a reply to the counterclaim is filed.

Note the difference in timing between the motion for judgment on the pleadings and motion to dismiss under rule 12(b)(6). A 12(b)(6) motion is filed after the complaint is filed. In contrast, a motion for judgment on the pleadings cannot be filed until all the pleadings are filed—complaint, answer, and reply if a counterclaim is filed.

The procedure for filing a motion for judgment on the pleadings follows the general procedure for motions discussed in preceding sections of this chapter. Remember to serve the motion and notice of motion on all parties and to calendar the time for response to the motion. Figure 7–15 illustrates how a motion for judgment on the pleadings in the Wesser case might have appeared had Wesser filed the lawsuit after the expiration of the statute of limitations.

FIGURE 7–15 Motion for Judgment on the Pleadings

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff
-vs-
Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant

MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure defendant Woodall Shoals Corporation moves the Court to enter judgment on the pleadings in favor of the defendant. On the undisputed facts in the pleadings, defendant Woodall Shoals Corporation is entitled to judgment as a matter of law.

In support of its motion, defendant states that:

1. The plaintiff filed the complaint in this action on March 15, 1997.
2. The plaintiff purchased the electric blanket which is the subject of this action on January 3, 1994.
3. The applicable statute of limitations requires that the action be commenced within three years of purchase of the allegedly defective product. The plaintiff filed the complaint more than one month after the statute of limitations expired and, therefore, is barred from any recovery.

WHEREFORE, defendant Woodall Shoals Corporation requests that the Court enter judgment on the pleadings in favor of the defendant.

David H. Benedict
Attorney for the Defendants
Benedict, Parker & Miller
100 Nolichucky Drive
Bristol, NC 28205-0890
704-555-8810

+ Certificate of Service

Why Motions for Judgment on the Pleadings Are Infrequently Granted

Very few lawsuits are without a factual dispute that can affect the outcome of the case. Seldom can a defendant show that a plaintiff has alleged no set of facts that might justify recovery, and seldom can a plaintiff show that no reading of the defendant's pleadings shows a possible defense. There is a strong policy of

allowing a party the opportunity to prove the facts alleged at trial. As the District of Columbia Court of Appeals has stated, judgment on the pleadings and summary judgment are properly invoked to eliminate a useless trial, but they should not cut a litigant off from the right to have a jury resolve significant factual issues.[5]

Another reason why motions for judgment on the pleadings are not commonly made or granted is that the Federal Rules of Civil Procedure allow liberal amendment of pleadings. Recall our discussion of FRCivP 15. A party can easily remedy a factual omission by amending the pleading. However, a legal bar, such as a statute of limitations, cannot be cured by an amendment.

Conversion to Summary Judgment

A motion for judgment on the pleadings can be based only on the pleadings themselves. The court cannot consider any allegations outside the pleadings. FRCivP 12(c) states that if matters outside the pleadings are presented and not excluded by the court, the motion for judgment on the pleadings is then treated as a motion for summary judgment. Once a motion for judgment on the pleadings is converted into a motion for summary judgment, all parties are given the opportunity to submit documents outside the pleadings, and the court makes a ruling applying the standard of FRCivP 56, which governs summary judgment.

SUMMARY JUDGMENT

Summary judgment is a dispositive motion asking the court to rule in favor of a party on the basis that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law (FRCivP 56). When a court grants a party's motion for summary judgment on all issues in the case, a judgment is entered in that party's favor without the necessity for trial. Unlike motions for judgment on the pleadings, which you will not encounter frequently, motions for summary judgment are common. Even if a motion for summary judgment is unsuccessful, preparation for the motions seeking and opposing summary judgment helps you analyze the issues and the evidence and greatly aids your preparation for trial.

How the Court Determines Whether to Grant a Motion for Summary Judgment

FRCivP 56(c) states the standard the court must use to determine if the moving party is entitled to summary judgment. Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." If you are thinking that the standard is similar to that for judgment on the pleadings, you are correct. However, with a motion for summary judgment, the court may look beyond the pleadings. FRCivP 56(c) provides that the court may consider the pleadings, depositions,

answers to interrogatories, admissions on file, and any affidavits that the parties submit.

As FRCivP 56(c) states, the court does not determine which facts are true and which are not true. The court bases its decision only on the *undisputed, material* facts. Based on the undisputed facts, the court determines whether the law supports a conclusion that the moving party is entitled to judgment in its favor. For example, consider the case on which Figures 7–16 and 7–17 are based. Here, a person entered a hospital and signed an agreement to pay for the services rendered during the hospitalization. The amount due for the services is not in dispute. The defendants' answer is not illustrated, but assume that the defendants admitted that they owe the money but said that they cannot pay it back yet. The issue is simply whether the defendants owe the hospital the amount stated in the complaint. Since the defendants admit that they owe the stated amount, there is no issue as to any material fact.

FIGURE 7–16 Simple Motion for Summary Judgment

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

FLORIDA
GLADES COUNTY

FILE NO.: 96 CVD 100

New Memorial Hospital,
Plaintiff,
-vs-
Richard C. Baker and
Juanita Atkins Baker,
Defendants.

MOTION FOR SUMMARY JUDGMENT

Now Comes the plaintiff, New Memorial Hospital, and moves the Court for Summary Judgment against the defendants, Richard C. Baker and wife, Juanita Atkins Baker, pursuant to Rule 1,510 of the Florida Rules of Civil Procedure on the grounds that there is no genuine issue as to any material fact and that the plaintiff is entitled to Judgment for the relief requested in the Complaint as a matter of law.

This the 7th day of April, 1996.

Marshall D. Sabat
Florida Bar Id. No. 12777
Colliers & Atkinson, P. C.
4300 Fifth St.
Fort Myers, FL 3390
813-555-7200
813-555-7201 (FAX)

+ Certificate of Service

FIGURE 7–17 Affidavit in Support of Motion for Summary Judgment

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

FLORIDA
GLADES COUNTY

FILE NO.: 96 CVD 100

New Memorial Hospital,
Plaintiff,

-vs-

Richard C. Baker and
Juanita Atkins Baker,
Defendants.

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Charles M. Garfinkel, being duly sworn, deposes and says that:

1. He is an officer of the plaintiff corporation, to-wit, its Collections Manager, and as such is familiar with the records of New Memorial Hospital.
2. That the plaintiff is a public corporation duly organized and existing under and by virtue of the laws of the State of Florida, with its principal place of business in Fort Myers, Glades County, Florida.
3. That the defendants are natural persons and are citizens and residents of the State of Florida and are not in the Armed Forces of the United States.
4. That on or about the 26th day of April, 1995, and on various dates thereafter, to and including the 5th day of May, 1995, the plaintiff, under an express contract with the defendants, furnished room, board and certain reasonable and necessary hospital care and professional services for and on behalf of and at the request of the defendants as prescribed by the attending physician or physicians for which services the defendants did contract and agree to pay to the plaintiff in the amount and for the agreed price set out in the itemized statement hereto attached marked "Exhibit A" and asked to be considered as a part hereof as if fully set out herein; that the balance due on the contract price amounts to the sum of $300.30, with interest at the rate of eight percent (8%) per annum from the 31st day of May, 1995 all as shown by attached Exhibit "A." The undersigned has examined the records of New Memorial Hospital attached hereto as Exhibit "A," and attests that they are true and accurate copies thereof.
5. That the plaintiff has demanded payment of the defendants of the amount due aforesaid, but the defendants have refused to pay said indebtedness.

This the 27th day of March, 1996.

_____
Charles M. Garfinkel
Collections Manager
New Memorial Hospital

Subscribed and sworn to before me,
this _____ day of May, 1996.

_____
Notary Public
My commission expires: _____

In simple contract cases, summary judgment is frequently granted. Consider the Blue Mountain National Bank example, which was examined in connection with default judgment. This example involves money due pursuant to a promissory note. Here the amount owed to the plaintiff is clear because it is controlled by the terms of the promissory note. If the defendants were to file an answer admitting that they are liable on the promissory note but stating that they cannot pay the money, summary judgment would be proper.

Courts are less likely to allow summary judgment in more complex cases. Consider the Chattooga case. Figures 7–18 and 7–19 show a motion for summary judgment and small portions of a memorandum of law in support of the motion. Although the defendant's entire argument is not set out, you can see that there are two issues. The first is whether the defendant violated Title VII. The second is whether, even if the defendant did violate Title VII, Ford is barred from recovery because she falsified her employment application. There is some factual dispute surrounding Ford's departure. Ford contends that she was terminated because she helped another employee file a claim with the EEOC. The defendant contends that Ford was terminated solely because she made false statements on the employment application regarding whether she had a felony conviction. In such a case, a court is likely to conclude that both parties should have the opportunity to present testimony to determine which version of events is more likely true. As a result, a summary judgment motion would be denied.

Partial Summary Judgment

FRCivP 56 allows a court to enter summary judgment "upon all or any part" of a party's claim. The most common context in which partial summary judgment is granted is when a party admits liability but the amount of damages is in dispute. Suppose that in the Wesser case, Woodall Shoals Corporation admitted that it was liable for the electric blanket fire but did not admit that Wesser was entitled to as much as he claimed in damages. Wesser would be entitled to summary judgment on the issue of liability. A trial would still be necessary, however, to determine the amount of damages to which Wesser is entitled.

FRCivP 56(d) explains the procedure after it is determined that summary judgment is proper on some but not all of the issues. It states the following:

> If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are

FIGURE 7–18 Motion for Summary Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
CIVIL NO.: C-96-2388-B

Equal Employment Opportunity Commission,
Plaintiff,
-vs-
Chattooga Corporation,
Defendant.

MOTION FOR SUMMARY JUDGMENT

NOW COMES the defendant, Chattooga Corporation, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and moves the Court for summary judgment on the grounds that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law. The defendant relies upon the pleadings in this action, and the attached exhibits, which include the pertinent pages of the deposition of Sandy Ford, marked as Exhibit "A"; Sandy Ford's application for employment with the defendant, marked as Exhibit "B"; the pertinent pages of the depositions of Lori Dehler, Forrest Pawlyk, and Ronnie Taylor, marked as Exhibits "C," "D," and "E," respectively; and the affidavit of Forrest Pawlyk, marked as Exhibit "F," in support of its motion.

This the_____ day of February, 1996.

Nancy Reade Lee
Attorney for the Defendant
Gray and Lee, P.A.
380 South Washington Street
Philadelphia, PA 19601
215-555-2500

+ Certificate of Service

just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Thus, summary judgment narrows the issues so that a trial is necessary only on the issues that the court determines to be in dispute.

The subsequent trial follows usual trial procedures. The right to jury trial is not abrogated by entry of an order granting partial summary judgment.

Timing

You should note at the outset that any party may move for summary judgment and that summary judgment may be entered on a counterclaim or cross-

FIGURE 7-19 Some Portions of a Memorandum of Law

INTRODUCTION

This is an action for an alleged violation of sections 703 and 704(a) of Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e-2 and § 2000e-3(a)). Pursuant to rule 56 of the Federal Rules of Civil Procedure, the defendant moves for summary judgment dismissing the action on the grounds that there is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law.

STATEMENT OF FACTS

The pleadings, depositions, and affidavits show the following facts.

. . .

QUESTION PRESENTED

Is the defendant entitled to summary judgment on the grounds that there is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law?

ARGUMENT

The granting of summary judgment in favor of the defendant is entirely proper in the case *sub judice*. Summary judgment is a procedural device designed to dispose of cases precisely like the instant case. Summary judgment is a device to dispose of actions in which there is no genuine issue as to any material fact, even though the formal pleadings may have raised such issue. *Mintz v. Mathers Fund, Inc.*, 463 F.2d 495, 498 (7th Cir. 1972). The primary purpose of a motion for summary judgment is to avoid a useless trial. *Id.* In this action, based upon the uncontroverted facts, it is clear that the defendant has not violated any section of Title VII. Further, even if the defendant had violated Title VII, Sandy Ford, on whose behalf plaintiff filed this action, would be barred from recovering any damages whatsoever.

. . .

claim as well as on the initial claim. The time at which the motion for summary judgment may be filed depends on which party makes the motion. FRCivP 56(a) provides that a party seeking to recover upon a claim cannot file a motion for summary judgment until twenty days have elapsed from the commencement of the action. FRCivP 56(b) states that a party against whom a claim is asserted may move for summary judgment at any time.

Often both a plaintiff and a defendant will move for summary judgment. These motions are called *cross-motions* for summary judgment. If a defendant is the first to file for summary judgment, the plaintiff may file its cross-motion for summary judgment anytime thereafter.

As a practical matter, a motion for summary judgment is rarely filed by either side until well into the discovery period. Only then can one determine, in

a relatively complex case, which issues are undisputed. In a simple case, a motion for summary judgment could be filed fairly early in the litigation because there are no complex issues.

Procedure and Supporting Documents

The procedure for summary judgment is straightforward. The motion itself is usually quite short, stating little more than that the moving party moves for summary judgment on the grounds that there is no dispute as to any material fact and the moving party is entitled to judgment as a matter of law. See the motions illustrated in Figures 7–16 and 7-18. Follow the usual procedure for filing the motion and supporting documents with the clerk of court and serving all the papers on all the parties in the litigation.

Affidavits in Support of Motion for Summary Judgment. As noted, the court may consider the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits submitted by the parties. FRCivP 56 does not require the parties to submit affidavits, but parties almost always submit affidavits both in support of and in opposition to motions for summary judgment. Review the general discussion of affidavits near the beginning of this chapter. Figure 7–17 shows a simple affidavit in support of summary judgment.

FRCivP 56(e)–(g) gives some specific directives concerning affidavits supporting or opposing a summary judgment motion. First, FRCivP 56(e) states that the affidavit must be based on personal knowledge. Second, the affidavit must show affirmatively that the "affiant is competent to testify to the matters stated therein." The affidavit should state at the outset who the affiant is, how the affiant has personal knowledge, and why the affiant is competent to make the statements. Note the affidavit in Figure 7–17. It states in the beginning that the affiant is the collections manager for the hospital and that he is familiar with the records of the hospital. This establishes who the affiant is, how he has knowledge of the hospital records, and why he is competent to make the statement as to how much the defendants owe.

FRCivP 56(e) further provides that the facts set forth in the affidavits must be admissible in evidence. This calls for consideration of the Federal Rules of Evidence. Take, for example, the hospital bill affidavit. Recall from Chapter 4 the "business records" exception to the hearsay rule. The hospital records were kept in the regular course of the hospital's business, and the collections manager is sufficiently familiar with the hospital records to testify about them.

FRCivP 56(e) also requires that when the moving party sets forth the supporting affidavits and other supporting documents, the party opposing the motion for summary judgment cannot simply rest on its pleadings. Rather, the "adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." As a practical matter, a party will always respond to the motion and state in a memorandum of law and affidavits the reasons for its opposition. Sometimes, however, a party cannot present by affidavit facts necessary to justify its opposition. In

such a case, FRCivP 56(f) provides that the court may refuse the motion for summary judgment or enter an order allowing more time to gather facts for affidavits, and may order that depositions or other forms of discovery take place.

Finally, FRCivP 56(g) addresses affidavits made in bad faith. It states that when an affidavit is presented "in bad faith or solely for the purpose of delay," the court shall order that party to pay to the other party the costs incurred in filing its affidavits (*i.e.*, the affidavits made in good faith), and that this amount may include attorneys' fees. It is clear from FRCivP 56 that the paralegal-attorney team must take great care in preparing affidavits in support of a motion for summary judgment.

Memoranda of Law. The text has already discussed broadly the filing of memoranda of law in support of motions. With summary judgment, perhaps more than with any other motion, memoranda of law are very important. It is difficult, if not impossible, to convince a court that your party is entitled to summary judgment without submitting a memorandum of law. Obviously you must present the facts in a way that convinces the judge that there are no material facts in dispute. This must be followed by a discussion of the applicable law, and you must relate the facts to the applicable law in a manner to convince the court that your party is entitled to judgment as a matter of law. Figure 7–19 illustrates some of the basic components of a memorandum of law in support of a motion for summary judgment. While memoranda of law will tend to follow a common format, the content of each one must be carefully tailored to the particular facts of the case and to applicable law.

Oral Argument. Whether oral argument is held depends on the local rules and customs of your judicial district and the preferences of the presiding judge. Be aware that in some judicial districts, a hearing on a motion is waived unless a party requests oral argument in writing.

If the moving party does request a hearing, FRCivP 56(c) requires that the motion for summary judgment be served at least ten days before the time fixed for the hearing. It further states that the adverse party may serve opposing affidavits prior to the day of the hearing. FRCivP 56(c) states the minimum time requirements. In practice, it is best to allow far more time than the minimum stated. Motions for summary judgment are often complex, and it is best to have time to prepare thoroughly and to allow the court ample time to consider the motion prior to oral argument.

Responses to Motions for Summary Judgment

The general rules of motion practice concerning responses apply to responses to summary judgment motions. One should file a response to the motion itself, file a responsive memorandum of law, and be certain that oral argument is requested. The need to respond is in some respects even greater with summary judgment motions than with other motions. As noted, FRCivP 56(e) specifically states that a party opposing the motion must file affidavits and cannot just rely on the pleadings. The chances of prevailing on some motions,

such as a motion for judgment on the pleadings, are not as great as the chances of prevailing on a motion for summary judgment. By the stage in the litigation where an intelligent argument for summary judgment can be made, the case may well be developed enough to grant the motion. There is much to be lost—or gained—by a motion for summary judgment. As noted earlier, even if the motion for summary judgment is not granted, a great deal of trial preparation can be accomplished in preparing an argument for or against summary judgment.

ETHICS BLOCK

Both the ABA Model Rules and the Model Code require candor toward the tribunal. Model Rule 3.3 specifies that a lawyer shall not knowingly make a false statement of material fact to the court; fail to disclose a material fact, the disclosure of which is necessary to avoid assisting a criminal or fraudulent act by the client; or offer evidence that the lawyer knows to be false. The Model Code (DR 7-102) states basically the same requirements.

Both the ABA Model Rules and the Model Code require attorneys to disclose to the court "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposed counsel." (Model Rule 3.3.) Once attorneys have disclosed the adverse law, they may challenge the soundness of the law. Paralegals must be careful in their legal research to report both the favorable and unfavorable law related to any case. The best approach is to bring the adverse authority to the attention of your supervising attorney and then help find ways to distinguish your own case or attack the soundness of the law.

SUMMARY

The first major topic in this chapter is motion practice. A motion is an application to a court for an order directing an act in favor of the applicant. Numerous motions are made throughout the course of a lawsuit, ranging from requests for an extension of time to file a response to requests for summary judgment, *i.e.*, asking the court to enter judgment without the necessity of a trial.

FRCivP 7(b) sets forth three requirements for the form of motions. First, a motion must be in writing unless made orally during a hearing or trial. Second, the motion must "state with particularity the grounds" on which it is based. Third, the motion must "set forth the relief or order sought."

The format for motions is the same as for pleadings. A motion has a caption that includes the name of the court, names of the parties, and file number. The title of the motion itself should be stated specifically—for example, "Motion for Judgment on the Pleadings." As with a pleading, the body of the motion is arranged in numbered paragraphs, and the motion is signed by the attorney and contains the attorney's address and phone number. In accordance with FRCivP 7(b), the grounds that justify granting the motion must be stated specifically.

A notice of motion accompanies the motion itself, stating the time and location of the hearing on the motion. FRCivP 6(d) requires that the motion, all supporting documents, and notice of motion must be served on all parties to the litigation not later than five days before the date set for the hearing.

Supporting documents accompany many motions, particularly the more complex motions such as a motion for summary judgment. Affidavits, statements signed under oath explaining the pertinent facts, are often attached. Documents on which the litigation is based (*e.g.*, contracts) also may be attached as exhibits.

Often a memorandum of law is submitted, explaining the pertinent law and applying the law to the facts of the case to justify why the motion should be granted. Local court rules may address such specifics as page limitations and format.

The motion, notice of motion, and all supporting documents must be served on all the parties. The general rule is that these be served at least five days before the hearing, but there are exceptions; motions for summary judgment, for example, must be filed at least ten days before the hearing.

It is crucial to respond to all motions. Many courts deem a motion unopposed if no response is filed. A memorandum of law should be submitted in response to the other party's memorandum. If the parties agree that a motion should be granted, they may submit a consent order, which states the parties' consent to the relief requested. Judges are not required to sign consent orders, but they usually do. All responsive motions, with supporting documents, must be served on all parties.

Hearings on motions are often held to allow the attorneys to argue to the judge why their motion should be granted or why they oppose the other party's motion. The hearings are sometimes scheduled by the court and sometimes by the attorneys. Paralegals who assist in scheduling the hearing should, if possible, check with opposing counsel to see if they are available for the chosen time. Oral argument is not held for some simple motions, and it may be waived by counsel even for a complex motion. Where the issues are complex and many documents must be considered, however, a hearing is usually held.

After judges decide whether to grant or deny a motion, they enter an order stating their decision. The order may simply state whether the motion is granted or denied, or the court may publish a lengthy explanation, depending upon the nature of the motion. Some courts require the attorneys to submit a proposed order when filing a motion. A proposed order is the order that the moving party would like the judge to sign, granting the relief requested. Even if a proposed order is not required, it is wise to submit one to express why your client should receive the relief requested. This is an opportunity to influence the judge with a clear argument.

The next major topic is default judgment. When a party fails to plead a defense to a claim within the allotted time, the party asserting the claim may move for default judgment. This is a fairly simple procedure that begins with the filing of a "Request to Enter Default." "Entry of Default" is signed by the clerk of

court and indicates that the party, usually the defendant, has not responded within the allotted time. If the amount in controversy is a sum certain or a sum that can readily be ascertained, the moving party files a motion for the clerk of court to enter a default judgment. If the amount in controversy is not a sum certain or cannot be readily ascertained, only a judge can enter the default judgment, and a hearing may be necessary to determine the amount. After entry of default, it is possible for the defending party to move to set aside the entry of default and avoid the default judgment. Even after a default judgment has been entered, a party can move to set aside the actual judgement. The moving party must establish "good cause" for setting aside the default judgment, and the motion must be filed within one year from the date of judgment.

Default judgment is not limited to defendants that fail to respond but also may be entered against a third-party defendant, a codefendant in the case of a cross-claim, or a plaintiff in the case of a counterclaim. Study Figures 7–6 and 7–7 through 7–13 in the text to understand the procedure for obtaining and attacking a default judgment. Remember that entry of default and default judgment are not the same thing.

The next major section addresses judgment on the pleadings, which is governed by FRCivP 12(c). This motion may be filed after the pleadings are closed but not so late in the litigation as to interfere with the trial. The court must look only at the pleadings in making a determination of whether judgment on the pleadings should be granted. The court must consider the pleadings in the light most favorable to the nonmoving party. To prevail on a motion for judgment on the pleadings, the plaintiff must establish that the defendant's pleadings raise no valid defense to the plaintiff's claim. The defendant must show that the allegations in the plaintiff's complaint would not allow any recovery. This determination usually turns on questions of law, not factual disputes. A common example is when a plaintiff files a complaint after the statute of limitations has expired. If material fact are in dispute, judgment on the pleadings usually is not proper. A material fact is one that affects the outcome of the case.

Because pleadings rarely show that one party has no chance of prevailing, motions for judgment on the pleadings are rarely granted. There is a strong policy of allowing parties the opportunity to prove their case at trial. If the court looks beyond the face of the pleadings, a motion for judgment on the pleadings is automatically converted to a motion for summary judgment.

Motions for summary judgment are commonly filed dispositive motions. FRCivP 56(c) provides the standard the court must apply in deciding a motion for summary judgment. It states that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. The court considers the pleadings, discovery materials such as answers to interrogatories and depositions, admissions on file, and affidavits submitted by the parties. The determination is based on the undisputed, material facts. Parties also file memoranda of law explaining why summary judgment should be granted.

A party may also move for partial summary judgment when the party claims to be entitled to summary judgment on some, but not all, issues. This is common where a party admits liability but does not agree on the amount of damages.

Motions for summary judgment may be filed for counterclaims and cross-claims, as well as for claims asserted in the complaint. As to timing, a party against whom a claim is asserted may move for summary judgment at any time. A party asserting a claim (*i.e.*, a plaintiff) cannot file for summary judgment until twenty days have elapsed from the commencement of the action. Both parties may move for summary judgment, resulting in what is known as cross-motions for summary judgment.

The actual motion for summary judgment is usually quite brief. (Revisit Figures 7–16 and 7–17 in the text.) The supporting documents, however, may be voluminous; among them may be affidavits explaining the facts that justify summary judgment. Pursuant to FRCivP 56(e)–(g), the affidavits must be based on personal knowledge and must show that the affiant is competent to testify to the matters stated. In addition, the facts stated in the affidavit must be admissible in evidence. A party that asserts a motion for summary judgment in bad faith may be ordered to pay to the other party the costs involved in responding to the motion, including attorneys' fees. A party opposing summary judgment must establish specific facts showing that there is a genuine issue for trial.

The memoranda of law supporting motions for summary judgment may be lengthy; they set forth the facts that are undisputed and document how the law supports the party's position. As with other motions, the opposing party must respond and file a reply memorandum of law explaining why the motion should not be granted. Oral argument is often held, and notice of the hearing must be served on the opposing parties at least ten days before the hearing. Even if a motion for summary judgment is denied, the extensive preparation in connection with the motion helps the parties prepare for trial.

REVIEW QUESTIONS

1. Which of these statements is true about *ex parte* motions?
   a. They are usually entered without a hearing.
   b. They are appropriate for many types of motions.
   c. They are appropriate for motions for temporary restraining orders.
   d. all of the above
   e. a and c only
2. To set aside a default judgment, the moving party must establish which of the following?
   a. good cause for not responding within the time limit
   b. a meritorious defense
   c. a defect in service of process
   d. all of the above
   e. a and b only

3. If the court looks beyond the pleadings in a motion for judgment on the pleadings, the
   a. nonmoving party automatically prevails.
   b moving party automatically prevails.
   c. motion is converted to default judgment.
   d. motion is converted to summary judgment.
4. Which of the following are requirements for motions under the Federal Rules of Civil Procedure?
   a. The motion must set forth the relief sought.
   b. The motion must be in writing unless made orally at trial.
   c. A hearing must be held on the motion.
   d. all of the above
   e. a and b only
5. T F A certificate of service must be attached to every motion.
6. T F Oral argument is mandatory for motions filed in federal court.
7. T F A default judgment may be appropriate even when the amount of the damages may not be readily ascertained.
8. T F Unlike pleadings, motions need not be signed by the attorney of record.
9. T F Local rules of court may require that a proposed order be submitted with a motion.
10. T F Judicial opinions explaining why a motion was granted are always published.

PRACTICAL APPLICATIONS

Mitchell Hospital sued Ken and Carol Vernon because they had not paid their hospital bill. In its complaint, filed in state court, the hospital alleged that the Vernons owe $6,000. The complaint and summons were properly served on the Vernons, and under state law, they had thirty days to respond. Sixty days passed, and the Vernons did not file an answer or motion to dismiss. Your law firm represents the hospital.

1. What type of motion should be filed to end this lawsuit without the necessity of a trial?
2. Assume that the Vernons filed an answer two weeks after they received the complaint and summons. They admitted that they owed money to the hospital but alleged that the amount owed was only $3,000. The hospital has asked your law firm to file a motion for summary judgment. Is this motion likely to be granted? Why or why not?
3. Assume that the hospital asked your law firm to file a motion for summary judgment, solely on the issue of whether the Vernons owe money to the hospital, and not on the issue of the amount. Is this motion likely to be granted? Why or why not?

CASE ANALYSIS

Read the excerpt from *Siegal v. Ashkinazy*, 855 F. Supp. 47 (E.D.N.Y. 1994) and answer the questions following the excerpt.

ORDER

JOHNSON, District Judge:

INTRODUCTION

Before this Court is a motion by the United States of America (the "government") for summary judgment which was joined by Plaintiffs. This motion is joined by Defendant Arlene Lois Ashkinazy.

BACKGROUND

On March 31, 1990, Plaintiff Zachary Siegal was a passenger in a vehicle driven by Jacob "Jack" Ashkinazy which was registered in the name of Defendant Arlene Lois Ashkinazy. Mr. Siegal and Mr. Ashkinazy were members of the Army Reserve and were returning from weekend duty when they were involved in an accident in Maryland.

. . .

The United States has now made a motion for summary judgment on the grounds that this removal was improper and that this action should be remanded to the state court. Plaintiffs have joined this motion. Defendant Ashkinazy has opposed this motion alleging that the United States is not a party and therefore cannot make a motion for summary judgment. Defendant also asserts that she was acting as an employee, agent, or instrumentality of the United States Government thereby making removal under these provisions proper.

DISCUSSION

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court's function is not to resolve disputed issues of fact, but only to determine whether there is a genuine issue to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Here, all of the parties have explicitly adopted the facts as set forth by the movant, the United States of America. Therefore, the only dispute is over the correct interpretation of the law.

A. Removal Pursuant to 28 U.S.C. § 1442

Removal pursuant to 28 U.S.C. § 1442(a)(1) can only be requested by persons specified in the statute:

> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of congress for the apprehension or punishment of criminals or the collection of the revenue.

Defendant asserts that because the United States Army authorized travel to and from active duty training by "privately owned conveyance," she was placed in the unique position of being an instrumentality of the United States government and can thus utilize the statutory provision permitting removal by those acting on behalf of the

United States in an official capacity. This court disagrees with this characterization; Ms. Ashkinazy is not an officer or employee of the United States and therefore cannot take advantage of this provision. Moreover, the simple act of permitting her husband to use her car to transport himself and a friend does not make the Defendant an instrumentality of the United States government. *See Reilly v. Peterson*, 435 F.Supp. 862 (S.D.N.Y.1977) (holding that the owner of a car being driven by a federal employee is not a federal employee, nor do his acts give rise to a claim under the federal statue); *Padlo v. Spoor,* 90 Misc.2d 1002, 396 N.Y.S.2d 798 (1977) (holding that the non-federal employee of a car driven by a federal employee was not derivatively immune from suit). Accordingly, removal under this provision was improper.

B. Removal Pursuant to 28 U.S.C. § 2679(d)(2)

Plaintiff asserts that 28 U.S.C. § 2679(d)(2) provides a basis for removal:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

This provision specifies steps to be taken when an action is commenced against a government employee which Defendant is not; and this provision specifically states that removal shall be by the Attorney General which Defendant also is not. Accordingly, removal was improper under this provision.

C. Removal Pursuant to 28 U.S.C. § 1441

The only possibly applicable provisions of this statute permit removal when parties are diverse or when the action involves a federal question or federal right. Here, complete diversity does not exist as the Plaintiffs and Defendant are all from New York. Furthermore, Judge Nickerson has earlier decided that Plaintiff's failed to file administrative claims. *Siegal v. United States of America,* No. 91-cv-105 (E.D.N.Y. Sept. 9, 1992) (order dismissing case for lack of subject matter jurisdiction). This failure means that there is no jurisdiction in federal court and only a state law issue remains. Therefore, this court lacks subject matter jurisdiction over this action and remand to the state courts is appropriate. . . .

CONCLUSION

For the reasons stated above, Plaintiffs motion for summary judgment is GRANTED and this action is remanded to the New York State Court for the County of Rockland for further proceedings.

SO ORDERED.

1. The plaintiff sought damages for injuries in a motor vehicle accident. Who was the driver of the car in which the plaintiff was a passenger?
2. Were both the plaintiff and the defendant members of the Army Reserve?
3. The lawsuit was filed in state court and removed to federal court. The United States government was joined as a defendant on the ground that the defendant was performing duties of a federal employee when the accident occurred. The United States filed a motion for summary judgment on the ground that removal was improper and that the action should be remanded to state court. Who joined the United States government in the motion for summary judgment?
4. When is summary judgment proper?
5. What is the court's function in deciding a motion for summary judgment?
6. In this case, the only issue is the interpretation of the removal statutes. Did the court find that removal was proper under any of the removal statutes?
7. Was the motion for summary judgment granted?

ENDNOTES

1 *Black's Law Dictionary* 913 (5th ed. 1979).

2 FRCivP 60(b) states that the one-year limitation applies only to the first three reasons listed in FRCivP 60(b) for relief from a judgment, *i.e.*, "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

3 *Stuski v. United States Lines*, 31 F.R.D. 188 (D.C. Pa. 1962); see also *Consolidated Masonry & Fireproofing, Inc. v. Wagman Construction Corporation*, 383 F.2d 249 (4th Cir. 1967).

4 Wright & Miller, *Federal Practice and Procedure: Civil* 2d § 1368 (1990).

5 *Wager v. Pro*, 575 F.2d 882, 885 (D.C. Cir. 1976).

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Chapter 8

DISCOVERY

You and Ms. Heyward are reviewing the discovery plan in the Wesser case. You inquire: "We have taken three of the five depositions permitted in this case. Whom else do you plan to depose?"

Ms. Heyward replies, "We need to review our answers to interrogatories before we decide. We do not want to waste our limited number of depositions if we already have the information through interrogatories or another discovery device."

"Do you want me to review and summarize the interrogatories?"

"Yes," Ms. Heyward answers. "Then we will meet tomorrow to plan our remaining depositions."

INTRODUCTION TO DISCOVERY

The term *discovery* refers to the series of activities through which litigants obtain from one another information that enables them to prepare for trial. Although information gathering is its primary function, discovery serves several additional purposes. Discovery helps to clarify the factual and legal issues and preserve witnesses' testimony, especially when a witness might not be available for trial. Testimony obtained through discovery can be used to impeach a witness who gives contradictory testimony at trial. Another important function of discovery is that it guards against surprises at trial. Discovery has virtually eliminated the courtroom ambush, thus making the trial process more efficient.

Methods of Discovery

FRCivP 26(a)(5) sets forth the five methods of discovery. The methods do not have to be used in the order they are listed in FRCivP 26(a)(5). As noted later in the chapter, there is great flexibility in the order in which discovery takes place, and methods may be used more than once.

The first method listed in FRCivP 26(a)(5) is the ***deposition***, which consists of the oral responses of a witness to questions asked by the attorney representing another party. A deposition is taken under oath, without a judge present, and the setting is outside the courtroom. Depositions are governed by rules 27 through 32 of the Federal Rules of Civil Procedure.

Second is the use of ***interrogatories,*** which are written questions submitted to another party. The party responds in writing to each question, and the answers are given under oath. FRCivP 33 governs the use of interrogatories.

The third method of discovery is through ***requests for production*** of documents and things and for entry upon land for inspection. This method of discovery is governed by FRCivP 34. As a paralegal, you may encounter frequent requests for the production of documents, which may be inspected and copied by the requesting party. You may also request or answer requests for the production of tangible things, such as the electric blanket in the Wesser case, for inspection and testing. Requests for entry upon land enable one party to a lawsuit to inspect, measure, survey, photograph, test, or sample the property of the opposing party.

The fourth method of discovery is ***physical and mental examination of a person,*** the request that a person undergo a physical or mental examination when that person's condition is at issue. FRCivP 35 governs physical and mental examination and requires a court order for the examination if the person will not voluntarily submit to it. This method of discovery is not applicable to every type of lawsuit; it is most common in personal injury litigation.

The fifth method of discovery is through ***requests for admission,*** written requests asking the opposing party to admit to the truth of facts, the genuineness of documents, and the application of law to fact. Requests for admission are not appropriate for all issues related to the litigation. For instance, it would be fruitless to request that a party admit to the fact that the party is liable and should pay one million dollars to the other party. Requests for admission are useful, however, for parties to state in writing their agreement on certain uncontroverted facts so that they will not have to waste time at trial. This is particularly true for admissions that documents are authentic. FRCivP 36 governs requests for admission.

Rules That Govern the Discovery Process

The rules that govern the discovery process are the same ones that control the entire litigation process: the Federal Rules of Civil Procedure, state rules of civil procedure in state courts, and local rules.

Federal Rules of Civil Procedure and Local Federal Court Rules. Due to amendments to the Federal Rules of Civil Procedure in 1993, federal courts' local rules have taken on far more importance in the discovery process. FRCivP 26(a)(1) now requires parties to disclose certain information without awaiting a discovery request; however, the rule also permits each federal court by local rule or order to opt out of the requirements of FRCivP 26(a)(1), reprinted in Figure 8–1. Thus, a federal court may choose to exempt from the requirements of FRCivP 26(a)(1) all cases or certain categories of cases.[1] As a result, the discovery disclosure requirements can differ even in federal courts in the same state. For instance, the United States District Court for the Northern District of Florida has put into effect the initial disclosure requirements of FRCivP 26(a)(1), but the United States District Court for the Southern District of Florida has chosen to opt out of FRCivP 26(a)(1), except as ordered by the judge in the specific case or stipulated by the parties and approved by the judge.

FIGURE 8–1 FRCivP 26(a)(1)

Rule 26. General Provisions Governing Discovery; Duty of Disclosure
(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

Other sections of FRCivP 26 do not have opt-out provisions. Throughout the discussion of FRCivP 26, the text cites the choices that some of the federal courts have made in regard to the opt-out provisions, but it is crucial that attorney-paralegal teams consult the local court rules in the specific districts in which they litigate to ensure that they follow the requirements of that particular court.

SIDEBAR It is important to note at the outset that the 1993 amendments do not alter the basic methods of discovery, such as depositions and interrogatories. Rather, the revised rules affect the timing of discovery and types of information that must be automatically disclosed in the federal district courts in which the revised rules are implemented.

State Rules of Civil Procedure. The 1993 amendments to the Federal Rules of Civil Procedure regarding discovery have influenced some state courts. As with federal courts, there can be great variation among state courts; therefore, it is imperative that you consult the state rules in state court actions.

SIDEBAR It is important to understand that a discovery method may be used more than once during a lawsuit. A party may take the depositions of several witnesses. A party may submit multiple sets of interrogatories. However, parties must not abuse the discovery process by requesting unnecessary or repetitious information.

Although the rules do not specify a sequence for using the various methods of discovery, common sense does. This will become clearer as we explore the types of questions generally asked in interrogatories and depositions. The first set of interrogatories usually requests the identification of witnesses and documents. Once the documents are identified, the attorney-paralegal team can request production of the documents. After the attorney and paralegal review the documents, they may submit more interrogatories and/or take depositions to develop the evidence further. After a series of interrogatories and depositions has narrowed the issues and delineated the disputed and undisputed facts, a party may submit requests for admission to nail down the undisputed facts and issues. Mental and physical examinations may follow in personal injury cases.

This sequence is not set in stone. In fact, it is important to remain flexible because the facts develop in different ways in different lawsuits. In addition, different types of lawsuits require different discovery methods. A physical examination may be necessary in the Wesser case because of Mr. Wesser's physical injuries from the fire, but no physical examination would be needed in the Chattooga case, where the dispute centers around the reason for Sandy Ford's discharge, not her physical condition.

TIMING AND SEQUENCE OF DISCOVERY

The timing of discovery depends upon the local rules of the federal courts. FRCivP 26(d) addresses the timing and sequence of discovery and must be read in conjunction with FRCivP 26(f). Both are reprinted in Figure 8–2.

Note that both sections begin by stating that they can be altered by a local court rule or a court order. Thus, the timing and sequence will be determined by whether a particular federal court has adopted the provisions of FRCivP 26(d) and (f) or has another local rule in place.

In federal courts that implement the provisions of FRCivP 26(d) and (f), the parties must meet and develop a proposed discovery plan before any party may seek discovery. At the meeting, frequently called a 26(f) meeting, the parties must discuss the nature and basis of their claims and defenses and discuss the possibility of settlement. Further, they must make or arrange to make the

FIGURE 8–2 FRCivP 26(d) and (f)

(d) Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

. . .

(f) Meeting of Parties; Planning for Discovery. Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

disclosures required by FRCivP 26(a)(1). The 26(f) meeting must be held at least fourteen days before a scheduling conference is held or a scheduling order is due; therefore, the attorney-paralegal team must plan for discovery from the outset of the litigation in order to comply with these time restraints.

Over two-thirds of the federal district courts have implemented FRCivP 26(f), requiring the parties to meet and prepare a discovery plan. More than half of the federal district courts have implemented FRCivP 27(d), which requires parties to postpone discovery until they have held the 26(f) meeting.[2]

In courts that have opted out of some of the provisions of FRCivP 26, there still may be local rules that set limits on the timing and sequence of discovery. For instance, the United States District Court for the Eastern District of New York has adopted, as part of its Civil Justice Expense and Delay Reduction Plan, detailed provisions for discovery practice, some of which have more stringent disclosure requirements than FRCivP 26. Other courts, such as the Middle District of Tennessee, have opted out of the 26(f) meeting requirement but give the individual judge the discretion to order such a meeting in a specific case.

Sequence of Discovery After Filing of the Discovery Plan

The sequence of discovery may vary, according to whether a particular federal district court has implemented the initial disclosure requirements of FRCivP 26(a)(1). Only half the federal district courts have implemented FRCivP 26(a)(1), and half have opted out.[3] In the federal courts that have opted out, four require initial disclosure, at least in certain types of cases, through local rules. Seventeen federal courts give individual judges the authority to require initial disclosure, and twenty-six courts routinely require no initial disclosure, either through local rules or through FRCivP 26(a)(1).[4] The text discusses the sequence of disclosure required under FRCivP 26; however, paralegals must be mindful that local rules may require a different sequence.

Initial Disclosures

In courts that follow FRCivP 26(a)(1), the parties must, without awaiting a discovery request, disclose certain information within ten days after the 26(f) discovery planning meeting. These categories are set forth in detail in Figure 8–1. To summarize, the parties have a duty to disclose:

- the name, address, and telephone number of each person likely to have "discoverable information" relevant to disputed facts;
- a copy or a description by category and location of all documents and tangible things, in the custody of the party, relevant to disputed things;
- a computation of damages claimed by the disclosing party, including materials concerning the nature and extent of injuries suffered. These materials must be made available for inspection and copying; and
- copies of insurance policies that may be used to satisfy all or part of the judgment that may be entered in the lawsuit.

Thus, initial disclosures made by the plaintiff in the Wesser case would include, among other things, the name, address, and telephone number of Mr. Wesser and the fire inspector; the warranties covering the electric blanket and the electric blanket itself; a computation of Mr. Wesser's damages; and copies of insurance policies. This is not a comprehensive list but gives you an idea of the physical evidence that the attorney-paralegal team must have assembled and ready to disclose near the beginning of the lawsuit.

Disclosure of Expert Testimony

FRCivP 26(a)(2) does not include a provision for opting out, yet some twenty percent of the federal courts have interpreted it that way.[5] The text discusses only the requirements of FRCivP 26(a)(2), but again paralegals must be alert for variations implemented by local rules.

Under FRCivP 26(a)(2), each party must disclose to the other parties the identity of any expert witness who may testify at trial. Further, the expert witness must prepare and sign a report disclosing certain facts, ranging from a complete statement of all opinions to be expressed and the basis and reasons therefor to a list of all the cases in which the witness has testified as an expert within the preceding four years. For a complete list of the facts that must be disclosed, see Figure 8–3, which reprints FRCivP 26(a)(2).

FIGURE 8–3 FRCivP 26(a)(2)

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

Pretrial Disclosures

FRCivP 26(a)(3) requires further pretrial disclosures. There is no opt-out provision in this section, but roughly twenty percent of the federal courts have declined to implement this section or have varied the requirements.[6]

Under the provisions of FRCivP 26(a)(3), a party must provide to the other parties specific information regarding the evidence that will be presented at trial. The required disclosure includes the name, address, and telephone number of witnesses, with a designation whether the witness "will be called" or "may be called." Parties must also designate witnesses whose testimony is expected to be presented at trial through depositions. Further, the parties must identify the exhibits to be presented and designate whether they "expect to offer" or "may offer" the exhibit at trial.

The disclosure requirements of rule 26 are detailed, and the attorney-paralegal team must work together closely and quickly to be prepared to meet the disclosure deadlines. Even after the detailed disclosure requirements have been met, further discovery will follow. Additional information will be gathered by the attorney-paralegal team through various discovery devices—interrogatories, depositions, and others. Before discussing the details of the various discovery methods, it is necessary to consider the scope of discovery, that is, the limits of the information that can be gained.

SCOPE OF DISCOVERY

The Federal Rules of Civil Procedure allow a wide range of information to be discovered. There are some limitations, however, particularly regarding privileged information. It is crucial for paralegals to understand the scope of discovery so that the attorney-paralegal team does not accidentally turn over protected information. Before information is released to the other parties, the attorney reviews it. Paralegals, however, are integrally involved in the screening and review of information.

The General Rule for Scope of Discovery

FRCivP 26(b)(1) states the general scope of discovery. It provides that

> [p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

It is important to remember that the information requested does not itself have to be admissible evidence, but only "reasonably calculated" to lead to admissible evidence. Recall the discussion of hearsay in Chapter 3. Suppose that two weeks after the fire, Mr. Wesser and his neighbor were discussing the cause of the fire. Their conversation is hearsay and most likely fits into no hearsay exception; however, it is reasonably calculated to lead to discoverable evidence, such as further information about what Mr. Wesser's neighbor observed at the time of the

fire. The content of their conversation, therefore, could be obtained through discovery.

FRCivP 26 further states that information about the claims or defenses of any party are subject to discovery. The rule specifies that this includes "the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter."

Limitations on Discovery

Although the scope of discovery is broad, there are limitations. That is, some information is protected from disclosure. It is crucial that paralegals be alert for privileged material so that it will not be inadvertently disclosed.

FRCivP 26(b)(2) gives the court the discretion to alter the limitations on discovery, such as the limit on the number of depositions and interrogatories and the length of depositions under FRCivP 30. These limitations are discussed in the following sections that address the various discovery methods; however, paralegals should be aware of the broad discretion given to the court in FRCivP 26(b)(2), which is reprinted in Figure 8–4. FRCivP 26(b)(4) sets forth limitations on depositions and interrogatories for expert witnesses, and the limitations are greater for an expert who is not expected to be called as a witness at trial. These issues can become somewhat complex, and paralegals should consult with their supervising attorneys.

FIGURE 8–4 FRCivP 26(b)(2)

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

. . .

(2) Limitations. By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

Privileged Information. Recall the discussion of privileges in Chapter 3. If information is privileged, it is protected from disclosure, even during discovery. A privilege you will frequently encounter is the attorney-client privilege. It would obviously be unreasonable to expect parties to turn over communications with their attorneys, such as letters from attorneys explaining the strategy for the lawsuit.

Another privilege that surfaces often in the discovery process is the work product privilege, set forth in FRCivP 26(b)(3). Work product is often called "trial preparation materials." Remember that this privilege precludes disclosure of the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Other trial preparation materials, however, may be discoverable. A party may be able to obtain documents and tangible things prepared in anticipation of trial if the party can establish that "he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Suppose, for example, that the fire inspector gave Ms. Heyward a statement explaining his opinion about the cause of the fire. If Mr. Benedict wants the statement, he may not be able to obtain it through a request for the document because Mr. Benedict could easily contact the fire inspector and get a statement. This situation would not constitute "undue hardship."

FRCivP 26(b)(5) specifies that when parties withhold information on the ground that it is privileged, they must make the claim of privilege expressly and describe the nature of the material not produced, without revealing the information that is privileged or protected. This enables other parties "to assess the applicability to the privilege or protection."

Protective Orders. Parties may file motions asking the court to enter protective orders—that is, orders to protect information that is not privileged, but the disclosure of which would cause "annoyance, embarrassment, oppression, or undue burden or expense" (FRCivP 26(c)). FRCivP 26(c) enumerates a number of ways that the court may protect the information, ranging from sealing the information and filing it with the court to allowing only certain persons to be present at a deposition.

Suppose that Woodall Shoals possesses a lengthy research paper that discusses the results of their development of advanced safety features for electric blankets. The document may mention the model of the blanket that Mr. Wesser had. Ms. Heyward requests production of the research paper. Woodall Shoals does not want to release the research paper because the paper discusses some advanced features that are not yet protected by patents. Mr. Benedict can file a motion for a protective order to prevent disclosure of this confidential research. The court may then order that Woodall Shoals produce those parts of the paper that do not discuss the confidential research, or the court may deny the motion for a protective order and instead order Woodall Shoals to produce the entire document.

Duty to Supplement Responses

FRCivP 26(e) requires parties to update and supplement their responses when a prior response is no longer accurate. For instance, if Mr. Wesser answers an interrogatory stating that the blanket model number was 6102 but later finds out that the model number was 6100, he has a duty to supplement the answers. FRCivP 26(e) also requires parties to supplement their responses regarding their witnesses, including expert witnesses. Parties frequently change or add witnesses as the case develops.

The duty to supplement applies both to the disclosures required by FRCivP (a)(1)–(3) and to responses subsequently given in answers to interrogatories, requests for admission, and requests for production. The duty to correct and update information applies whether the information is learned by the attorney or the client.

DISCOVERY PLANNING

The attorney-paralegal team must plan the discovery process carefully to make it effective. The strategy will be different in different types of lawsuits.

It is helpful to consult the chart of the essential elements to prove the claim, as discussed in Chapter 4. Review the essential elements that the client must establish. Most discovery takes place after the complaint and answer are filed, so next the text examines the pleadings to review the contentions of the defendants and the facts that are disputed.

Next the attorney-paralegal team must determine the likely sources for the facts needed to prove the claim and defeat the defendants' assertions. Some possible sources are listed on the essential elements chart in Chapter 4. Paralegals may find that much information was already obtained through the informal investigation and that formal discovery will not be needed for certain facts. Formal discovery, however, may still be necessary to develop those facts more fully or to pin down a witness's statement. Consider, too, whether some witnesses may be unavailable for trial. If they may disappear, it is best to pin down their statements in depositions.

Next consider the most effective method for obtaining the information needed. Discovery generally moves from the general to the specific. For instance, in the first set of interrogatories, the defendants are asked to identify the witnesses. The next step may be to take those witnesses' depositions. Or the first step may be a request for the production of documents and, after examining the documents, more interrogatories may be submitted or more depositions may be taken to develop some facts found in the documents.

Time and money are considerations in discovery planning. It is best to start discovery early so that you do not get close to the trial date and find that discovery is not complete. Also, prompt initiation of discovery sends the message to the other parties that you plan to litigate aggressively.

Remember, not every discovery method is necessary in every lawsuit. Discovery can be very expensive. If you plan several depositions, this will be costly

considering the amount of time the attorney and paralegal must devote. There may be additional costs such as court reporters, conference rooms at an airport, and the like. Therefore, it is important to consider how much discovery your client's litigation budget can afford.

Effect of Local Rules on Discovery Planning

The attorney-paralegal team must pay close attention to local court rules when planning discovery. As the text has already discussed, the timing and sequence of discovery varies substantially, depending upon whether the particular federal court has implemented all the provisions of FRCivP 26 or has opted out. Local rules also may place restrictions on deadlines for the completion of discovery. Most courts require some type of scheduling conference to set discovery deadlines; however, the attorney-paralegal team can be best prepared by determining, prior to any type of pretrial conferences, the deadlines that a particular federal court applies to all lawsuits. For instance, the United States District Court for the Western District of Texas requires completion of discovery in not more than six months, except for cases assigned to the Expedited Docket.

Consider the Restrictions on Discovery Imposed by Local Rules. The Federal Rules of Civil Procedure state some restrictions on discovery, such as limitations on the number of interrogatories and depositions. For instance, FRCivP 33(a) limits each party to twenty-five interrogatories, without leave of court or stipulation by the other party. Some federal courts, however, have opted out of these limitations and have imposed their own restrictions. For instance, the United States District Court for the Southern District of Ohio allows each party forty interrogatories. The restrictions on individual types of discovery are discussed in the following text under each particular method. From the outset, however, the attorney-paralegal team must consider the restrictions in order to avoid using up the allotted number of interrogatories or depositions before all the information needed can be obtained.

Consider the Information That Will Be Obtained Through Initial Disclosure Requirements. As already noted, half the federal courts have implemented the initial disclosure requirements of FRCivP 26(a)(1). In courts that have opted out of this provision, local court rules may nevertheless require similar mandatory disclosure near the outset of the litigation process. Paralegals must study the local federal court rules carefully in planning the questions to ask during the discovery process, particularly when drafting interrogatories. For instance, if copies of pertinent insurance policies have already been obtained through the mandatory disclosure requirements, it would be a great waste to request this information in interrogatories.

The purpose of the 1993 revisions to the Federal Rules of Civil Procedure was to reduce the frequency and expense of discovery, especially the use of interrogatories. With careful discovery planning, the attorney-paralegal team not only complies with the spirit of the rules but also delivers efficient legal services.

INTERROGATORIES

Now that you have an overview of discovery, the text addresses the procedures for the various discovery methods and the important duties that paralegals perform in discovery. The first step in the discovery process is usually interrogatories.

Procedures

FRCivP 33 explains the procedures for using interrogatories. Interrogatories may be served on any other party. It is important to remember that you can serve interrogatories only on the parties to the litigation. For instance, in the Wesser case, the fire inspector is a likely witness, but he is not a party. Therefore, you can take his deposition, but you cannot submit interrogatories to him.

If the party is a business organization, such as a corporation, or a governmental agency, the interrogatories are served on an officer or agent of the organization or agency. When we speak of "serving" interrogatories, this is not the same as service of a lawsuit. Attorneys generally mail the interrogatories to the attorney who represents the party. If the party is unrepresented, the attorney mails the interrogatories to the party.

In federal courts that implement all sections of FRCivP 26, interrogatories may not be served on another party prior to the meeting of the parties under rule 26(f), except by leave of court. Paralegals must consult local court rules for further information on the timing of serving interrogatories.

The party on whom the interrogatories are served must answer within thirty days, although FRCivP 33(b)(3) gives the court discretion to allow a longer time for responses. The parties also may stipulate in writing to a longer response time. Refer to Figure 8–5, which illustrates a stipulation for an extension of the time for responding.

SIDEBAR Remember that parties often need more than thirty days to prepare answers, especially answers to long, detailed interrogatories. Parties frequently seek an extension of time to answer, and the attorneys often can agree on an extension, unless the party has been dragging its feet.

FRCivP 33 requires that each interrogatory be answered "separately and fully in writing under oath, unless it is objected to." If a party objects to an interrogatory, the party must state the reason for the objection. When the answer to an interrogatory can be found in a party's business records, FRCivP 33(d) allows the party to answer the interrogatory by specifying the records in which the answer can be found. The party must then let the requesting party inspect and copy the records. For examples, see the Responses to Interrogatories in the Appendix.

FIGURE 8–5 Stipulation

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,

Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,

and

Second Ledge Stores, Incorporated,
Defendant.

STIPULATION

NOW COME THE PLAINTIFF and the defendants Woodall Shoals Corporation and Second Ledge Stores, Incorporated, and hereby stipulate and agree that the time for responding to "Plaintiff's First Set of Interrogatories" shall be extended through and including the 25th day of April, 1996.

Leigh J. Heyward
Attorney for Plaintiff

David H. Benedict
Attorney for Defendants Woodall Shoals Corporation and Second Ledge Stores, Incorporated

Drafting Interrogatories

Paralegals sometimes prepare the first draft of the interrogatories. The attorney reviews the draft and may make revisions, just as with pleadings. When you are asked to draft a set of interrogatories, there are many sources you may consult. First, you may look at other files in your office dealing with similar issues. Other attorneys and paralegals usually can point you in the right direction. Form books are available showing sample interrogatories for different types of lawsuits. As with pleadings, forms are a good starting point, but you cannot follow them slavishly. In some law libraries, you can find the records on appeal for cases that were appealed in the state's appellate courts and for some cases appealed to the United States Supreme Court. The record on appeal often contains some or all of the discovery materials from the trial of the case.

Topics to Include in Interrogatories. To make an initial list of the topics to include, keep in mind the facts you must establish to prove your client's claim. It may help to review once again the chart of the essential elements of the claim. Also review the pleadings and all other pertinent documents to see the facts that you already know. The documents may also give you ideas for questions you need to ask. In addition, the attorney may give you specific topics to include.

Parties may serve several sets of interrogatories on each other during the course of a lawsuit. The topics covered in the first set of interrogatories are usually more general than those in subsequent sets of interrogatories. The topics, especially in the first set, will vary, depending upon the mandatory disclosure requirements of the federal district court in which the case is being litigated. If the local court rules require disclosure of certain information, the attorney-paralegal team does not want to waste an interrogatory on that information. Below are some of the topics generally covered in interrogatories.

1. The identity of the person answering the interrogatories

Note that when interrogatories are addressed to a corporation, as in the Wesser case, your question should require persons to specify their position in the company and to identify other persons in the company who provided information.

2. Whether corporate defendants have been correctly designated in the pleadings

You may not be aware that a company is a subsidiary or division of another corporation. This can be important for purposes of jurisdiction and venue.

3. The identity of witnesses

FRCivP 26(a)(1) requires disclosure of individuals "likely to have discoverable information" as part of the initial disclosures in a lawsuit. Later in the discovery process, parties must identify expert witnesses (FRCivP 26(a)(2)). As the trial date approaches, the parties must identify the witnesses they will call at trial (FRCivP 26 (a)(3)). The timing of these disclosures may be altered by local rules, which in turn will affect the questions to include in the various sets of interrogatories. It is important to identify potential witnesses as early as possible in case you choose to take their depositions. Standard interrogatories request phone numbers and addresses to aid further discovery.

4. Information about expert witnesses

The content of the interrogatories about expert witnesses is also influenced by the requirements of FRCivP 26(a). As noted earlier, about eighty percent of the federal courts follow FRCivP 26(a)(2), which requires disclosure of specific information about expert witnesses. Thus, interrogatories need not request the information about expert witnesses that must be disclosed pursuant to the court rules. In federal courts that do not implement FRCivP 26(a)(2), however, more detailed interrogatories will be necessary.

5. Information about pertinent documents

The degree of detail in the interrogatories depends upon whether the particular federal district court has implemented FRCivP 26(a)(1), which requires disclosure of all documents relevant to the disputed facts. Assume that the Wesser case is being litigated in a district that does not require these mandatory disclosures. Interrogatories would then be necessary to identify documents.

There are many ways of requesting information about documents, including business records. Refer to the sample Wesser case interrogatories in the Appendix. Here many types of documents are pertinent, from the warranty that came with the blanket to quality control records to documents about the design procedures for the blanket. As you cover the topics about which you need information, it usually will be clear what the related documents are.

6. Details of the other parties' version of the events

Parties frequently request that other parties detail their version of the events in issue. For example, where contributory negligence is an issue, the defendant may ask the plaintiff to describe the events leading up to the accident in the hope that the plaintiff did something negligent. In cases like the Chattooga case, the sequence of events is crucial. For instance, it is important to know when Sandy Ford helped her friend file a complaint with the Equal Employment Opportunity Commission.

7. Specific information about damages

Recall that the Wesser complaint requests damages "in excess of $50,000." Interrogatories can address the plaintiff 's specific injuries and property damage, and the amount of damages attributed to each. In districts that implement FRCivP 26(a)(1), parties are required to disclose a computation of damages and must make available for inspection related documents that are not protected by an evidentiary privilege.

8. Insurance coverage

If you do not already know the details of the defendants' insurance coverage, be sure to include a question about their insurance policies—the name of the provider, amount of coverage, and so on. You need to know right away if a defendant does not have sufficient coverage to pay a judgment. In districts that implement FRCivP 26(a)(1), the disclosure of pertinent insurance agreements is mandatory, even without a discovery request.

These general topics are applicable to many types of litigation. There are many other topics that you may include, depending upon the subject matter of the lawsuit.

Guidelines for Drafting the Questions. There are several general guidelines to bear in mind when you draft interrogatories. First, make the questions clear and uncomplicated. If it is not clear what information you seek, you will not get the information that you need. If a question is too complex, it may be ambiguous, or it may prompt an objection. Second, try to avoid questions that call for yes/no

answers. Such questions do not draw out the details that you need from the other party. Third, ask the person answering the interrogatories to identify who is the source of the information for any answer that is not based on personal knowledge.

Format for Interrogatories. Paralegals should check the local court rules before drafting interrogatories. Some courts have both general and specific requirements not only for interrogatories but also for other discovery documents. Refer to Figure 8–6, which reprints a local rule from the United States District Court for the Southern District of Ohio. Note that this federal court requires that each interrogatory be numbered sequentially, regardless of the number of sets of interrogatories throughout the entire course of the action. Another requirement is that one inch must be left after each question for the party to insert an answer.

FIGURE 8–6 Local Rule Regarding Format of Discovery Documents

Rule 26.1. Form of discovery documents

The party serving interrogatories, pursuant to Rule 33, FRCP, requests for production of documents or things, pursuant to Rule 34, FRCP, or requests for admission pursuant to Rule 36, FRCP, shall provide sufficient space, of not less than one inch, after each such interrogatory or request for the answer, response, or objection thereto. Parties answering, responding, or objecting thereto shall either set forth their answer, response, or objection in the space provided, or shall quote each such interrogatory or request in full immediately preceding the statement of any answer, response, or objection thereto. The parties shall also number each interrogatory, request, answer, response, or objection sequentially, regardless of the number of sets of interrogatories or requests throughout the entire course of any action.

Other federal courts have more general rules for interrogatories. For instance, the United States District Court for the Eastern District of New York requires that interrogatories must be "drafted reasonably, clearly and concisely" and must not be "duplicative or repetitious." Taking into account the fact that many attorneys use forms to draft their interrogatories, the Eastern District of New York also requires attorneys to review the forms and ensure that "they are applicable to the facts and contentions of the particular case."

Refer to the Plaintiff's First Set of Interrogatories to Defendant Woodall Shoals in the Appendix. Interrogatories have captions like those of pleadings. It is important to indicate to which defendant interrogatories are directed. It is also important to specify which set of interrogatories you are submitting—first, second, and so forth.

Definitions comprise a section of most interrogatories, certainly for lengthier or more complex sets of interrogatories. Some federal court rules address the subject of definitions. Refer to Figure 8–7, which reprints the local rule regarding definitions from the United States District Court for the Eastern District of New

FIGURE 8–7 Local Rule Regarding Discovery Definitions

Rule 47. Uniform Definitions in Discovery Requests

(a) The full text of the definitions and rules of construction set forth in paragraphs (c) and (d) is deemed incorporated by reference into all discovery requests, but shall not preclude (i) the definition of other terms specific to the particular litigation, (ii) the use of abbreviations, or (iii) a more narrow definition of a term defined in paragraph (c).

(b) This rule is not intended to broaden or narrow the scope of discovery permitted by the Federal Rules of Civil Procedure for the United States District Courts.

(c) The following definitions apply to all discovery requests:

(1) *Communication.* The term 'communication' means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

(2) *Document.* The term 'document' is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a). A draft or non-identical copy is a separate document within the meaning of this term.

(3) *Identify (with respect to persons).* When referring to a person, 'to identify' means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(4) *Identify (with respect to documents).* When referring to documents, 'to identify' means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

(5) *Parties.* The terms 'plaintiff' and 'defendant' as well as a party's full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

(6) *Person.* The term 'person' is defined as any natural person or any business, legal or governmental entity or association.

(7) *Concerning.* The term 'concerning' means relating to, referring to, describing, evidencing or constituting.

(d) The following rules of construction apply to all discovery requests:

(1) *All/Each.* The terms 'all' and 'each' shall be construed as all and each.

(2) *And/Or.* The connectives 'and' and 'or' shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

(3) *Number.* The use of the singular form of any word includes the plural and vice versa.

York. This local rule provides definitions that are deemed incorporated by reference into all discovery requests. Note some of the terms that are defined, such as *document* and *identify*. This local rule acknowledges that definitions more specific to the particular litigation may be necessary. If the Wesser case were litigated in the Eastern District of New York, the definition for the term *the subject blanket* would need to be included. Refer to the interrogatories in the Appendix, which include that definition.

Read through the remainder of the interrogatories in the Appendix, noting the format of consecutively numbered questions. Because of space limitations, the sample interrogatories do not include the space for answers. At the end is the attorney's signature, with address and phone number. Finally, there is a certificate of service.

Answering Interrogatories

Paralegals often obtain information from clients and draft answers to interrogatories. The attorney reviews the draft, but you want the draft to be as accurate as possible. Remember that there are two options with each interrogatory—an answer or an objection. Answers are discussed first.

The first step is to send a copy of the interrogatories to the client so that the client can gather the information you need. This should be done immediately so that you will have time to prepare the answers, clarify information, and obtain any further information that you need.

Before drafting the answers, compare the information received with other information you already have from the client. If there are any inconsistencies, clarify them immediately. Remember that the opposing party will be looking for inconsistencies and anything else that can damage your case.

There are several general guidelines for drafting answers. First, do not volunteer any more information than is necessary to answer the question. You do not want to disclose any more material than you have to. Second, make the answers clear and unambiguous. Third, be consistent; do not give contradictory answers. Fourth, ask the attorney any questions that you have. Above all, discuss any material that may be privileged. Finally, remember that FRCivP 33(d) provides the option to produce business records for the opposing party to inspect and copy. You must strike a balance between not volunteering information unnecessarily and disclosing information as required by the Federal Rules of Civil Procedure and local court rules

Objections to Interrogatories. There are several grounds for objections to interrogatories. If a question seeks privileged information, this is a ground for objection. Be especially alert for information protected by the attorney-client privilege and work product privilege (trial preparation materials). An answer may call for disclosure of trade secrets, and the responding party will request a protective order. For an example, see the response to interrogatory 6 in the Appendix. A question may be irrelevant, and this is a ground for objection. See the response to interrogatory 8 in the Appendix. Remember, however, that the

scope of discovery is broad, so it may be difficult to assert that the information sought is irrelevant.

Particularly after the first set of interrogatories, a party may not seek information that is unreasonably cumulative or duplicative. This is one of the grounds for objection set forth in FRCivP 26(b)(2). Another ground for objection in FRCivP 26(b)(2) is that the discovery is unduly burdensome or expensive. The grounds in FRCivP 26(b)(2) apply to all discovery methods but may be particularly applicable to interrogatories, especially when the parties exchange multiple sets of questions.

FRCivP 33(b) gives some specific requirements for stating objections to interrogatories. It provides that all grounds for objection must be stated "with specificity." Thus, when paralegals draft objections, they must ensure that the objections and the grounds for them are stated clearly. Under FRCivP 33(b), any ground that is not "stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown."

Procedure After Answering Interrogatories. Be sure that the attorney signs the interrogatories. The format for signature is the same as in pleadings. (See the responses in the Appendix for an example.) The person who provides the answers should sign the interrogatories. This is your client or the authorized agent when your client is a business organization. The person signs a verification, the wording of which may differ depending on whether your client is an individual who has personal knowledge of the facts or an organizational agent who does not necessarily have personal knowledge. Refer to the sample verification signed by Mr. Wesser (Figure 8–8), and compare the verification signed by the designated employee of Woodall Shoals in the Appendix. The person's notarized signature follows the verification.

FIGURE 8–8 Bryson Wesser's Verification

STATE OF NORTH CAROLINA
COUNTY OF WATAUGA

BRYSON WESSER, being duly sworn, deposes and says that he is the plaintiff in this action; that he has read the foregoing Answers to Defendants' First Set of Interrogatories and knows the contents thereof; that the same is true to his own knowledge except as to those matters and things therein stated on information and belief and as to those he believes it to be true.

_____
Bryson Wesser

Subscribed and sworn to before me
this the _____ day of June, 1996.

_____
Notary Public
My commission expires: _____

For each set of interrogatories or answers, mail a copy to each party, with a certificate of service attached. Remember to check the state and local rules to determine whether the interrogatories and answers should be filed with the clerk of court or retained by the law firm until trial.

One important task for paralegals is to ensure that service of the answers to interrogatories is made in a timely manner. A copy of the answers and objections must be served within thirty days after service of the interrogatories. FRCivP 33(b)(3) gives courts the discretion to shorten or lengthen the amount of time allowed to serve answers. Further, the parties may agree in writing to an extension.

SIDEBAR Always enter in the docket control system the date on which answers to interrogatories are due. Also arrange for reminders well ahead of the deadline so you can be sure to obtain information from the client in time.

REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

FRCivP 34 provides that a party may request other parties to produce designated documents for inspection and copying. Documents include more than just papers such as contracts or warranties. FRCivP 34 defines documents to include "drawings, graphs, charts, photographs, phonorecords, and other data compilations. . . ."

FRCivP 34 also provides that a party may request tangible things for inspection and testing, including physical evidence such as the electric blanket in the Wesser case. The third category in FRCivP 34 is the request to enter property under another party's control in order to inspect, measure, survey, photograph, test, or sample the property. If two parties have a dispute over land ownership, for example, one party may want permission to enter the property to survey it and perhaps take photographs.

For all three categories—documents, tangible objects, and land—the item requested must be "in the possession, custody or control of the party upon whom the request is served." Assume that you request accounting records from an officer of a corporation, who replies, "Sorry, our accountant has those papers." This response is unacceptable. FRCivP 34 requires that the corporate officer get the records from the accountant and produce them, because these records are under the corporation's control. This prevents parties from giving documents to other persons to avoid having to produce them.

This discussion focuses on document production because this is the most frequent request, but remember that the general rules discussed apply also to requests for tangible things and to entry and inspection of property.

Procedure

As with interrogatories, requests for production cannot be made prior to a discovery planning meeting in federal court districts that implement all

provisions of FRCivP 26(a). In districts that do not implement all of FRCivP 26(a), paralegals must consult the local court rules regarding timing of requests for production. As with all methods of discovery, requests for production must comply with the terms of the discovery plan.

The party has thirty days to serve a written response to the requests. If the requests are served on a defendant along with the summons and complaint, however, the defendant has forty-five days to serve a response. The response must state for each separate request either that the party will produce the document or that the party objects to production of the particular document, or part of it.

Format and Content of Requests to Produce

Like interrogatories, requests to produce have the case caption at the top, specifying the court, parties, and file number. (See Figure 8–9.) The requests must be specifically labeled; that is, they must specify to which party the requests are directed and whether this is the first, second, or some subsequent set of requests to produce. For example, the request for production in Figure 8–9 is an excerpt from the Plaintiff's First Request for Production of Documents to Defendant Woodall Shoals Corporation.

The request to produce begins with a simple statement that the defendant is requested to produce the documents in accordance with rule 34 of the Federal Rules of Civil Procedure. This is sometimes followed by definitions. If definitions are necessary, be sure that they are consistent with the definitions in the interrogatories.

As with interrogatories, check for any local court rules that require specific definitions. For instance, the definitions required by the United States District Court for the Eastern District of New York, illustrated in Figure 8–7, apply also to requests for production and, in fact, to all forms of discovery requests.

Next is the numbered list of the documents requested. There are several ways to describe the documents. The general guideline in FRCivP 34 is that the documents be described "with reasonable particularity." That is, the party from whom the documents are requested must be able to understand which documents the other party wants. It is not sufficient to request "all your business records," as this is too vague.

Detailed requests for production are often the second step in the discovery process. One purpose of interrogatories is to identify the documents that you need to request. Therefore, the best start for formulating the description of documents is a review of the interrogatories and answers to them. For instance, in interrogatory number 11 (see Appendix), the plaintiff asked the defendant Woodall Shoals to describe warnings to consumers that electric blankets might overheat. Woodall Shoals replied that copies of recent examples were attached and that copies of all other instructions, warnings, and labels were available for inspection in their New York office. In a request for production, you might ask for instructions, warnings, and labels used by Woodall Shoals at the time the subject blanket was manufactured and for the two years before and the two years after its manufacture.

FIGURE 8–9 Request for Production of Documents

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595 MU

Bryson Wesser,
Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT WOODALL SHOALS CORPORATION

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, the defendant Woodall Shoals is requested to produce for inspection and copying at the office of Heyward and Wilson, 401 East Trade Street, Charlotte, NC, within thirty (30) days of receipt of this request, or at a time and location to be mutually agreed upon by the parties, the documents requested herein.

DEFINITIONS

(same as in interrogatories in Appendix)

REQUESTS

1. In the defendant's response to interrogatory No. 6 in the Plaintiff's First Set of Interrogatories, the defendant referred to reports on specific design/quality control tolerances for specific components of the defendant's electric blankets. Please produce reports for tolerances for the control unit for Model 6102 for the period from two years before the manufacture of the subject blanket to two years after the manufacture of the subject blanket. Note that the court entered a protective order on April 24, 1996, and that the production of documents must comply with the protective order.

This the _____ day of May, 1996.

Leigh J. Heyward
Attorney for the Plaintiff
Heyward and Wilson
401 East Trade Street
Charlotte, NC 28226-1114
704-555-3161

The description of documents differs, depending on the nature of the lawsuit. For instance, in personal injury litigation, interrogatories typically ask the plaintiffs to describe their injuries and the medical treatment they received as a result of their injuries. A request for documents related to the medical treatment may describe the documents as follows:

1. All reports, photographs, charts, diagrams, and any other documents regarding the plaintiff's medical treatment as a result of the events described in the plaintiff's complaint, including but not limited to medical records and reports of the plaintiff's treating physicians; hospital and emergency room records, including the reports of x-rays and other laboratory tests; and the bills for the medical treatment obtained.

You may draft requests for production with much more detailed descriptions. For instance, in a lawsuit involving complex financial transactions, you may need very specific descriptions because so many documents were generated by the transactions. For instance, the defendant in a lawsuit involving allegations of fraud in the sale of securities may request from the plaintiff "documents relating to purchases by defendants in private placement transactions of unrated securities for which mortgage loans served as collateral."

FRCivP 34 requires that the request for production "specify a reasonable time, place, and manner of making the inspection and performing the related acts." This means that the parties must agree to a reasonable method for inspection and copying of the documents requested. In lawsuits that do not involve a great number of documents, a simple statement that the documents are to be produced at the office of the requesting attorney on a certain date and at a certain time will suffice (see Figure 8–9). In more complex lawsuits that involve hundreds or thousands of documents, the procedure is more involved. These methods for production are discussed in the next section.

Both the requests for production and the responses to the requests are signed by the attorneys and mailed to all parties, as with interrogatories. Remember to attach a certificate of service. Remember also to check local rules for additional requirements. In North Carolina, for instance, some courts require that a representative of the client other than the attorney attest to the accuracy of responses to interrogatories.

Production of Documents

One of the most important duties paralegals may perform is the production of documents. You may think initially that this is simple—you just put the papers in a box and take them to the other party to copy. Actually document production is much more involved than this, especially in lawsuits that involve reams of documents. Your assignment as a paralegal may be to screen the documents to help determine which ones should be produced; you may be in charge of a clerical team that helps with the copying and numbering of the documents. FRCivP 34(b) provides only a general guideline for the production of documents. It states that a party shall produce the documents "as they are kept in the usual course of business or shall organize and label them to correspond with the

categories in the request." The purpose of this rule is to prevent the producing party from scrambling the documents to make discovery more difficult for the requesting party.

There are special considerations in gathering, screening, organizing, and copying the documents. The text examines each step individually.

Gathering the Documents. Sometimes you already have at the law office all the documents that you need to produce. You may have a simple personal injury claim, and the client may have already brought all the documents you need.

However, with complex litigation involving many documents, your first task may be to gather the documents. This often requires a search of the client's business records, which may be in files at the corporate office or even in a warehouse. When your client is a large company, the documents may be in several locations throughout the United States and even in offices overseas. In such a case, the attorney-paralegal team needs to meet with the client to discuss the nature of the documents requested and where the documents are located. There are many issues you may need to discuss, such as whether any of the older documents have been destroyed through the company's regular retention and disposal system.

Other questions may concern how to gain access to computer records. The attorney should explain to the client the attorney's interpretation of the description of the documents requested. For instance, the attorney may have already decided that certain documents are not covered by the request for production. He or she may have already objected to certain portions of the request for production and even obtained a protective order to prevent disclosure of those documents. This also must be explained to the client.

The client and the attorney-paralegal team must decide who will search the client's files—the law firm personnel or the client's employees. The search may be faster if the client's employees perform it. On the other hand, the law firm personnel may be better able to determine which documents need to be produced. Whatever the decision, the person performing the search must have detailed instructions from the attorney. Paralegals may find that they are in charge of the persons performing the search. In this case, be sure you have reviewed the instructions with the attorney and clarified any questions you have about the scope of the document search.

Screening the Documents. It is imperative that you screen the documents to ensure that no protected information is released to the other party. The documents are also reviewed to be sure that no more information than necessary is released. Both the paralegal and the attorney should review the documents. Sometimes the paralegal performs the initial screening, and sometimes the attorney does it. It may be more efficient for paralegals to perform the initial screening so that they can flag issues that the attorney needs to consider.

Your screening should focus on four categories of information. First, look for information that is irrelevant—that is, unrelated to the subject matter of the lawsuit. Second, screen out documents that are unresponsive. These are

documents that are related to the subject matter of the lawsuit but do not fall within the description in the request for production. You may set these documents aside and even go ahead and return them to the client.

The third category is confidential documents. These documents generally are already covered by a protective order. Remember that the court may enter orders to prevent the discovery of all or part of certain documents or to limit the discovery in other ways specified in FRCivP 26(c). Be sure to review all protective orders before producing documents. If the court has allowed the discovery of confidential documents, stamp "confidential" on them before they are copied.

The fourth category is privileged information. Recall our discussions of the attorney-client privilege and work product privilege. The attorneys make the ultimate decision whether the information is protected from disclosure by privilege. The paralegal should pull potentially privileged documents from the file and put them in a separate file for the attorney's review.

Organizing and Numbering the Documents. The first decision to make is whether to produce the original documents or to make copies. The parties generally reach an agreement on which of these to produce, and if they cannot agree, the court can decide. Parties generally produce copies but sometimes produce originals. An advantage of producing originals is saving copying costs. There are disadvantages to producing originals, however, such as the risk that they will be altered. In addition, the documents may get out of order and become confusing.

Production of large numbers of documents is unmanageable without a system to organize and identify the documents. There are a number of ways to organize documents, and the methods are often combined. For instance, all documents in a certain group may concern a common subject, and within the group they may be arranged in chronological order.

Once the attorney-paralegal team decides how to organize the documents, paralegals can put the documents in order and assign a number to each. These numbers are generally known as production numbers. There are many different systems for assigning production numbers. Some law firms begin each production number with a letter to designate which party produced the document. For instance, the plaintiff's documents may all start with "A," and the defendant's documents may start with "B."

The production number is then stamped on each document. Some law firms place a number on the front page of the document, and others number each page of the document. For instance, the third page of one of the plaintiff's documents may be "A-503-3."

Production numbers serve several purposes. First, they form the basis for an index to the documents so that you can find them easily in a sea of papers. Second, they ensure that documents are still complete when they are submitted at trial. Paralegals keep records of the number assigned to a document and the numbers of the first and last pages. Thus, if at trial the opposing party submits the document as evidence, you can make sure that the document still has all its

original pages. Production numbers ensure ready access to documents, which is crucial during discovery and at trial.

The numbers may be handwritten on the documents, but some law firms use a "Bates stamp" when large numbers of documents are involved. A "Bates stamp" is a hand-held stamp that automatically advances to the next highest number each time you stamp a document. If you use a Bates stamp, watch carefully to be sure that it does not skip any numbers. If it does skip a number, insert a blank sheet of paper to mark the gap.

Copying the Documents. As paralegals organize and number the documents, they generally place them in heavy cardboard boxes to move them to the copying room. It is best to label the outside of the box with the range of numbers contained in each box.

Before copying the documents, check to be sure that confidential documents are marked "confidential." Some law firms also stamp documents with a stamp that says "Produced by _____." For instance, the documents produced by Leigh Heyward for Mr. Wesser would be stamped "Produced by Heyward and Wilson." This is helpful when there are multiple parties.

Paralegals should be sure that they have adequate clerical help for making the copies. It helps to have people to remove staples, place the documents in the copy machine, and restaple the documents. It also helps to have a person to put the documents back in the box to ensure that the documents are kept in proper order.

Some oversized documents can be reduced to standard size paper on your copy machine. However, you may have to rely on an outside copying center to handle very large documents such as blueprints.

Finally, paralegals ensure that the documents are properly indexed. There are several methods for indexing, as discussed in Chapter 9.

DEPOSITIONS

Depositions are a commonly used discovery method. The Federal Rules of Civil Procedure allow two types of depositions—written and oral. Oral depositions are far more common than written depositions. In an oral deposition, an attorney asks the deponent (the person whose deposition is taken) questions in much the same way that an attorney questions a witness in a trial. The deponent is under oath, and a court reporter records all the questions and answers. The court reporter then prepares a transcript of the deposition and sends a copy to the attorneys for all the parties.

Written depositions are governed by FRCivP 31, which provides that written questions may be submitted to a deponent. The deponent answers the questions under oath, and the court reporter records the answers and prepares a transcript, as with oral depositions. However, with written depositions, attorneys are not present. The deponent simply answers the written questions, and the attorney is not present to follow up with additional questions to develop the deponent's testimony. Oral depositions are more common because the attorney

can develop the testimony, observe the deponent's demeanor, and get a better idea of what the deponent knows and what type of witness the deponent would be at trial. The remainder of the discussion focuses solely on oral depositions because they are so much more commonly used.

Who May Be Deposed

Depositions are the only discovery device that can be used to get information from both parties and nonparties to a lawsuit. For instance, you cannot force a witness who is not a party to answer interrogatories, but you can force a nonparty witness to answer questions at a deposition, by serving a subpoena in accordance with FRCivP 45.

Attorneys generally do not depose their own witnesses. That is, Ms. Heyward would not take Mr. Wasser's deposition. Attorneys may choose to depose their own witnesses, however, if there is a strong possibility that a witness will not be available at trial. For instance, a key witness may be terminally ill. It is wise to take that witness's deposition to preserve his or her testimony for trial. FRCivP 32(a)(3) permits this use of a deposition at trial, and rule 804(b)(1) of the Federal Rules of Evidence allows admission of the deposition as an exception to the hearsay rule.

Limitations on Number of Depositions and on Timing

The 1993 amendments to the Federal Rules of Civil Procedure place limitations on the number of depositions that each side can take and on the timing of depositions. Refer to Figure 8–10, which reprints FRCivP 30(a). By now, it comes as no surprise that depositions may not be taken prior to the 26(f) discovery conference. There is one exception, which is when the deponent is about to leave the country and become unavailable for a deposition. In this situation, however, the court's permission or agreement of the parties must be obtained.

There are two additional situations in which it is necessary either to get the court's permission or for the parties to stipulate to a deposition. First, permission is necessary to take the same person's deposition more than once. Second, each side is limited to ten depositions. FRCivP 30(a)(2) states that the plaintiffs as a group, the defendants as a group, and third-party defendants as a group, are each limited to ten depositions. This includes both oral and written depositions. Assume that in the Wesser case, Second Ledge wants to schedule eight depositions and Chattooga Corporation wants to schedule five depositions. The defendants would have to get the court's permission to take three more depositions, unless Mr. Wesser stipulated in writing that he agreed to three depositions beyond the presumptive limit of ten.

The limitation on the number of depositions is yet another means to ensure that the parties confer and develop a cost-effective discovery plan. If a party sees the need for more than ten depositions, this should be brought up at the discovery conference and scheduling conference. This way, the parties can agree to additional depositions, if they agree that they are necessary, saving the time and expense of court intervention later. Further, the parties on each side of

FIGURE 8–10 FRCivP 30(a)

Rule 30. Depositions Upon Oral Examination
(a) When Depositions May Be Taken; When Leave Required.

(1) A Party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties.

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 81 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

the litigation must work together closely to choose the depositions that are most beneficial and cost-effective for them.

Local Court Rules. Paralegals must remember that local court rules may vary from the Federal Rules of Civil Procedure in regard to the number of depositions allowed. For instance, the local rule for the United States District Court for the Eastern District of New York provides that a limitation on the number of depositions must be established by agreement of the parties or by court order. In the absence of an agreement or order, the number of depositions is limited to ten per side. In contrast, there are no presumptive limits in the United States District Court for the Eastern District of California, only a provision that parties may seek a protective order if proposed discovery is "burdensome, oppressive or otherwise improper."

Methods of Recording Oral Depositions

The traditional method for taking depositions is for a court reporter to record the deponent's answers and prepare a transcript. In recent years, parties have increasingly used *nonstenographic means* to record depositions, that is, means other than the traditional court reporter/transcript method. Videotapes are an increasingly popular method because of the ability to capture the deponent's demeanor.

FRCivP 30(b) authorizes the use of nonstenographic means without first having to obtain permission of the court or the other parties. Thus, parties may record depositions by either videotape or audiotape. They must, however,

understand that a transcript is required by FRCivP 26(a)(3)(B) and 32(c) if the deposition is to be offered later at trial or in support of a motion for summary judgment. The party that takes the deposition chooses the means of recording it. Other parties may designate another method of recording the deposition at their own expense.

Paralegals should note that rule 30 provides safeguards in the use of nonstenographic recording methods. Refer to Figure 8–11, which reprints FRCivP 30(b)(4). Note especially the provision that the "appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques." This affords protection should a person's voice "mysteriously" take on the impure tones of a questionable informant rather than the tone of the deponent's true voice, which is clear and rings with veracity.

FIGURE 8–11 FRCivP 30(b)(4)

Rule 30. Depositions Upon Oral Examination

. . .

(b) Notice of Examination; General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

. . .

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

FRCivP 30 also allows the taking of depositions by telephone or satellite television. This method, however, requires leave of court or agreement by the parties.

Procedure

FRCivP 30 gives some general rules for notices of depositions and other procedural matters. Some variations may arise, however, from local rules.

Notice of Deposition. FRCivP 30(b) requires that attorneys give "reasonable notice" of their intent to take a deposition. FRCivP 30 does not define the term

reasonable notice. Some local court rules, however, do define that term. For instance, the United States District Court for the Southern District of Florida requires at least five working days' notice for depositions taken within the state of Florida and ten working days' notice for depositions outside Florida. The local rule correctly notes that FRCivP 32(a)(3) requires eleven days' notice if the deposition is to be used against a party. Thus, if the deposition is to be used to impeach the party, perhaps in light of earlier answers to interrogatories, eleven days' notice is required.

SIDEBAR Paralegals must be ever mindful of the interplay of local rules and the Federal Rules of Civil Procedure. Even when local rules deviate in some permissible way, there may nevertheless be other sections of the Federal Rules of Civil Procedure that pertain.

Written notice must be given not only to the deponent but also to all parties to the lawsuit. As a practical matter, most parties will be represented by counsel, so you send the notice to the parties' attorneys.

The notice states the name of the person to be deposed and the date, time, and location of the deposition. The attorney should include a request for production of documents if the attorney wants the deponent to bring pertinent documents. See Figure 8–12 for an illustration of a notice, combined with a request for production. A certificate of service is attached, and the notice and request are served on all parties.

The procedure is different when the deponent is not a party. You send a notice of the deposition to the deponent and all parties, but you must also prepare a subpoena to compel the appearance of the nonparty deponent. See Figure 8–13 for an illustration of a subpoena. Note that you must include in the subpoena the documents that you want the nonparty deponent to produce at the deposition. Review FRCivP 45, and be sure that the subpoena complies with its requirements.

The subpoena must be personally served on the deponent. FRCivP 45(b) provides that a subpoena may be served by a person over eighteen years of age who is not a party to the lawsuit. In fact, paralegals sometimes serve the subpoenas. FRCivP 45(b) also requires that a check for witness fees and mileage costs accompany the subpoena unless the subpoena is issued on behalf of a United States agency. Attach a copy of the subpoena to the notice of deposition that you send to all the parties.

When the Deponent Is a Corporation or Agency. When the deponent is a corporation or government agency, FRCivP 30(b)(6) requires that the notice or subpoena "describe with reasonable particularity the matters on which examination is requested." The corporation or agency then designates one or more persons to testify at the deposition. For instance, in the Wesser case, Ms. Heyward may want to depose an employee of Woodall Shoals about its procedures for

FIGURE 8–12 Combined Notice of Deposition and Request for Production

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
Civil Action No.: C-96-2388-B

Equal Employment Opportunity Commission,
Plaintiff,

-vs-

Chattooga Corporation,
Defendant.

NOTICE TO TAKE DEPOSITION AND REQUEST FOR PRODUCTION OF DOCUMENTS

To: Edward R. Cheng, attorney of record for the plaintiff:

YOU ARE HEREBY notified, pursuant to Rule 30(b)(1) of the Federal Rules of Civil Procedure that the deposition of Sandy Ford will be taken in the offices of Gray and Lee, P.A., attorneys for the defendant, at 380 South Washington Street, Philadelphia, Pennsylvania, before a certified reporter, at 10:00 a.m. on Tuesday, April 25, 1996, and may continue from hour to hour and day to day until completed. You are requested to produce the person above identified at said time and place. You are invited to attend and participate in the examination of said witness.

Pursuant to Rule 30(b)(5) and Rule 34(a) of the Federal Rules of Civil Procedure, the defendant requests production for copying by the defendant's attorney and for use during the deposition the documents described in the attached addendum to this notice.

This the _____ day of _____, 1996.

Nancy Reade Lee
Attorney for the Defendant
Gray and Lee, P.A.
280 South Washington Street
Philadelphia, PA 19601
215-555-2500

(Addendum not shown)

+ Certificate of Service

FIGURE 8–13 Deposition Subpoena

DC 9 (Rev. 10/82)

DEPOSITION SUBPOENA

United States District Court

DISTRICT: WESTERN DISTRICT OF NORTH CAROLINA

Bryson Wesser, Plaintiff

V.

Woodall Shoals Corporation and Second Ledge Stores, Incorporated, Defendants

DOCKET NO.: C-89-1293-B

TYPE OF CASE: ☒ CIVIL ☐ CRIMINAL

SUBPOENA FOR: ☒ PERSON ☒ DOCUMENT(S) or OBJECT(S)

TO: John Nisenheimer
Charlotte Fire Dept.
809 Savannah Street
Charlotte, North Carolina 28226-5431

YOU ARE HEREBY COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above-entitled case.

PLACE	DATE AND TIME
The offices of Benedict, Parker & Miller 100 Nolichucky Drive Bristol, North Carolina	May 11, 1998 10:00 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):[1]

Fire inspection report and all other documents concerning your investigation of the fire at the home of Bryson Wesser, 115 Pipestem Drive, Charlotte, North Carolina, on January 3, 1998.

☐ *Please see additional information on reverse*

Any subpoenaed organization not a party to this suit is hereby admonished pursuant to Rule 30 (b) (6), Federal Rules of Civil Procedure, to file a designation with the court specifying one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which he will testify or produce documents or things. The persons so designated shall testify as to matters known or reasonably available to the organization.

U.S. MAGISTRATE (2) OR CLERK OF COURT	DATE
J.P. McGraw	April 11, 1998
(BY) DEPUTY CLERK: Glenda G. Bradford	

This subpoena is issued upon application of the:

☐ Plaintiff ☒ Defendant ☐ U.S. Attorney

ATTORNEY'S NAME AND ADDRESS
David H. Benedict
100 Nolichucky Dr.
Bristol, North Carolina 28205-0890
704-555-8810

(1) If not applicable, enter "none."

(2) A subpoena shall be issued by a magistrate in a proceeding before him, but need not be under the seal of the court. (Rule 17(a), Federal Rules of Criminal Procedure.)

inspecting blankets, but she may not know the name of the person qualified to give this testimony. She may address the notice to Woodall Shoals, who will designate a person such as its quality control manager to appear and testify.

Procedure During and After a Deposition. Depositions are usually held in a conference room in the office of the lawyer who instigates the deposition. The persons present may vary but usually include the deponent, the attorneys for all parties and for the deponent, and a court reporter to record the testimony. A court reporter is also a notary public and, therefore, authorized to swear in the witness. After any preliminary statements, the attorney begins to question the deponent. The other attorneys may cross-examine, and the rules of evidence generally apply. The attorney representing the deponent may voice objections to questions. The attorneys often stipulate in advance which grounds may be asserted as the basis for objection at the time of the deposition, and which grounds may be reserved and asserted at trial if the other party seeks to use the deposition at that point. In accordance with FRCivP 30(c), witnesses must still answer the questions to which the attorneys object unless the attorneys instruct otherwise. The court reporter notes the objection in the transcript. If a party seeks to use the transcript at trial, the judge can rule on the objection at that time. Refer to Figure 8–14, which illustrates excerpts of a deposition in the Chattooga case.

During the deposition, the examining attorney frequently enters documents as exhibits. The court reporter marks the documents—that is, assigns numbers or letters to them and labels them. The court reporter notes in the transcript when documents are entered as exhibits.

Objections. Depositions have often been interrupted and prolonged by lengthy objections by attorneys. FRCivP 30(d)(1) seeks to diminish improper objections, providing that objections to "evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner." Depositions also have been disrupted by attorneys' instructions to deponents not to answer questions. FRCivP 30(d)(1) seeks to prevent this as well, providing that a deponent may be instructed not to answer a question only in three circumstances:

- to preserve a privilege;
- to enforce a limitation on evidence directed by the court; or
- to present a motion that "the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party. . . ."

The person who voices the objection may demand that the deposition be suspended for the time necessary to make a motion for a protective order. The attorney-paralegal team should be able, in most instances, to avoid such disruptions with careful planning in the discovery conference but should seek a protective order when necessary.

Reviewing, Signing, and Filing Depositions. Deponents are not required to review the transcripts of their depositions. The deponent or a party to the litigation, however, may request, prior to completion of the deposition, that he

FIGURE 8–14 Excerpts from a Deposition

This is the deposition of Sandy Ford being taken by notice and in accordance with the Federal Rules of Civil Procedure before Romelia Sanchez, Notary Public, in the offices of Gray and Lee, P.A., 380 South Washington Street, Philadelphia, PA, before a certified reporter, on the 3rd day of April, 1996, beginning at 10:00 a.m.

IT IS STIPULATED AND AGREED by and between counsel for the parties that all objections, including those as to the form of the question, and all motions to strike are reserved and may be interposed at the time of trial.

FIGURE 8–14 (Continued)

EXAMINATION (by Ms. Lee)

Q. State your name, please.

A. Sandy Ford.

Q. Do you understand what a deposition is about?

A. Yes.

Q. You understand that a court reporter is present taking down everything that is said and that you are under oath?

A. Yes.

Q. Where were you employed in June 1995?

A. With Chattooga Corporation.

Q. Did you fill out an employment application on June 10, 1995?

A. Yes.

MS. HEYWARD: Let's get this marked as Exhibit 1.

(Whereupon, the Reporter marked the document referred to as Defendant's Exhibit Number 1 for identification.)

Q. I'll hand you a document identified as Defendant's Deposition Exhibit 1 consisting of two pages and ask you to state whether you can identify that document. Can you identify it?

(Whereupon, Ms. Lee hands the document to the witness for her review.)

A. Yes.

Q. What is that?

A. That is the employment application I filled out for Chattooga Corporation.

Q. Is that your signature on page 2?

A. Yes, it is.

or she be allowed to review the deposition and make changes if necessary. If such a request is made, the deponent must review the deposition within thirty days of notification that the transcript or recording is available. If any changes are made, they are appended.

The person who recorded the deposition, usually a court reporter, certifies in writing that the witness was duly sworn and that the deposition is a true record of the testimony given by the witness. The deposition and the documents produced during the deposition are sealed by the court reporter and either filed with the court or given to the attorney who arranged for the deposition. The attorney in turn must, under the provisions of FRCivP 30(f), store these sealed records under conditions that will "protect [them] against loss, destruction, tampering, or deterioration."

The requirements of FRCivP 30(f) for filing deposition recordings and transcripts may be altered by court order. In fact, most federal courts have local court rules addressing the filing and safekeeping of the recordings and transcripts. Generally, the party who took the deposition retains the transcript. If, however, there is a dispute and a motion is filed with the court, either the transcript itself must be filed or else the relevant parts set forth in the moving papers or in responding memoranda.

Paralegal Tasks to Prepare for Depositions

Paralegals often prepare the notices and subpoenas for depositions. Paralegals also assist with the logistics of setting up depositions. Your first consideration is where the deposition will be held. You may need to reserve a conference room in your law office. Depositions can be lengthy, so you may need to arrange for delivery of breakfast or lunch. If the deposition is to be held at another law office, find out the contact person there and make sure that the person has arranged for a room and for the court reporter.

Making the arrangements with the court reporter is simple if the deposition is held in your town. Your firm probably has one or two court reporter agencies that it uses frequently. Arrange for the court reporter to be present, and send a copy of the notice of deposition. You also may arrange the manner in which the reporter delivers the transcript. The text has discussed transcripts prepared when the entire deposition is over, but with a lengthy deposition, the lawyer may want a daily transcript. Sometimes depositions are videotaped. If the deposition is to be videotaped, check with the court reporting firm to see whether it can arrange for technicians. Otherwise, make the arrangement yourself.

There are other considerations when the deposition is to be held somewhere outside your law office, for example, you must make sure that copy machines and fax machines are available, and if huge numbers of documents must be copied, you may need to arrange for an outside copying service. These logistics are not so complex when the deposition is held at another law firm, but sometimes depositions are taken in conference rooms at hotels or airports.

An important task is to prepare the proper number of copies of the exhibits the attorney will use at the deposition. You will need one copy for the court reporter to stamp and show the witness, one copy for each of the attorneys on your team, one copy for yourself, one copy for each of the other attorneys present, and a few extra copies in case there are extra persons in attendance.

Although the attorney asks the questions at the deposition, you may help the attorney prepare an outline of the questions. If you help to prepare questions, review with the attorney the general areas he or she wishes to cover. Review the pleadings and discovery documents already in the file for additional issues. Keep your eyes open for statements the witness has already made. The witness may make contradictory statements at the deposition, which may help to impeach the witness's credibility at trial.

Paralegals sometimes help to prepare a client or other witness for the deposition testimony. Paralegals' duties can take many forms, depending on the law firm's procedures. Often paralegals keep the deponent informed of the schedule for the deposition, explain the general procedure for a deposition, and help coordinate meetings with the attorney. Paralegals may be present when the attorney meets with the deponent to prepare for the deposition. This generally involves reviewing questions that the deponent is likely to be asked. The attorney-paralegal team may even have the deponent go through a mock deposition. Paralegals can make suggestions to the deponent on how to be a more effective witness, such as suggesting that the deponent not pause for a long time before answering each question.

Paralegal Tasks During Depositions

Paralegals do not always attend depositions, but when they do, they can perform useful duties. For instance, if there are many documents to be entered as exhibits, paralegals can keep the documents in order, hand them to the examining attorney, and keep track of the number or letter assigned to each document. Paralegals also can take notes that are useful for reference before the transcript is prepared. For instance, if a deposition lasts two days, you and the examining attorney may meet after the first day to discuss the testimony and refine the questions for the next day. In addition, paralegals can observe the demeanor of deponents and help assess their credibility as witnesses. Attorneys may be so busy thinking about the next question that they do not have the opportunity to observe a witness sufficiently.

Preparing Digests of Depositions

After the attorney-paralegal team receives the transcript of the deposition, the paralegal often prepares a digest—that is, a summary of the deposition. After you have attended depositions and read some transcripts, you will see that the meat of the deponent's testimony is not always readily apparent. Interruptions to introduce exhibits may obscure the testimony, or the attorney may have to reword a question several times, forcing you to sort through the interchange to find the real answer.

There are several reasons why it is important to summarize, or digest, depositions. The digest pulls out the deponent's actual testimony so that it is clear what the answers actually were. Inconsistent or incomplete answers then become apparent. You may find that further discovery is necessary to complete

the information sought from that particular deponent. It is important to note inconsistencies because they can be used to impeach the witness at trial.

Before you prepare a digest of a deposition, talk with the attorney to determine the format to use. The attorney may want a digest set up in paragraphs, summarizing the testimony in the order it was given. This is sometimes called a witness digest. (See Figure 8–15 for an example.[7])This type of digest is most useful for short depositions. It should be a very succinct narrative of the deposition, relating the deponent's testimony in an abbreviated, clear form.

FIGURE 8–15 Excerpt from a Witness Digest

Digest of Deposition of Sandy Ford (SF)
March 31, 1996
Pages 1–53

By Ms. Lee:

SF is a 29-year-old engineer. She has lived at 314 Linville Drive, Philadelphia, PA, since February 1993. She is married and has one daughter, age three. (pp. 1–3)

SF graduated from Greenbrier State University in December 1992, with a B.S. degree in mechanical engineering. Immediately after graduation from college, she was hired by Watauga Plastics, a company that manufactures kayaks. SF worked as a mechanical engineer for Watauga Plastics continuously until she was hired by Chattooga Corporation.

On June 15, 1995, SF filled out an employment application to work as a consulting engineer for Chattooga Corporation. Three days later she had an interview with the human resources manager for Chattooga Corporation, Leslie Gordon. She was also interviewed by Carla Fernandez, supervisor of the consulting engineers. . . .

Another format is the subject matter digest. Here, instead of paragraphs summarizing the testimony in the order it was given, the paragraphs are arranged by subject matter. Your first task is to make a list of the subjects to include. For instance, if you are preparing a digest of the deposition of Sandy Ford's supervisor, your subjects may include personal background, job experience, review of Sandy Ford's employment application, employment interview, events leading to discovery of Ford's felony conviction, events after discovery of Ford's felony conviction, and knowledge of Ford's assisting another employee with an EEOC claim. There may be other useful topics, but this gives you some indication of the types of subjects you may have.

Next, each subject is placed in a column on the left-hand side of the page, and the paragraphs digesting the testimony about that subject are in a column on the right-hand side of the page. (See Figure 8–16 for an example.) Be sure to include after each sentence or paragraph the page number of the transcript where this testimony is found. It is also helpful to cite exhibit numbers.

A third type of digest is the chronological digest. This type of digest is set up like a subject matter index, except that your topics on the left-hand side of the page are dates on which events occurred. The purpose is to construct a chronological history of the important events.

FIGURE 8–16 Excerpt from a Subject Matter Digest

Digest of Deposition of Sandy Ford
March 31, 1996
Pages 1–53

SUBJECT	DIGEST
Personal background	SF is 29 years old. She has lived at 314 Linville Drive, Philadelphia, PA, since February 1993. SF earned a B.S. in mechanical engineering from Greenbrier State University and then worked for three years for Watauga Plastics, a company that manufactures kayaks.
Application and employment interview	On June 15, 1995, SF filled out an employment application as a consulting engineer at Chattooga Corporation. On June 18, 1995, she had an employment interview with Leslie Gordon, human resources manager, and with Carla Fernandez, supervisor of consulting engineers. . . .

PHYSICAL AND MENTAL EXAMINATIONS

FRCivP 35 provides for the examination of a party's mental or physical condition when that person's condition is at issue in the litigation. FRCivP 35 requires a court order for the examination unless the parties stipulate to the examination. If a party files a motion for an examination, FRCIVP 35 requires that the motion include the details of the examination—time, place, manner, conditions, and scope of the examination—as well as the persons who will conduct the examination. The parties may agree on all these details and include them in their stipulation. For instance, Leigh Heyward and David Benedict can file a stipulation reflecting their agreement that Mr. Wesser will undergo a physical examination by a physician they have agreed on, to evaluate the residual effects of his burns.

FRCivP 35 also provides that if the party who is examined requests the results of the examination, the party who requested the exam must forward the results. FRCivP 35 requires "a detailed written report of the examining physician or

psychologist, setting out the physician's findings, including results of all tests made, diagnoses and conclusions, together with like report of all earlier examinations of the same condition."

Physical and mental examinations are most common in personal injury lawsuits. Paralegals may assist in preparing the motion or stipulation. See Figure 8–17 for a sample motion. If you prepare a motion, remember to include a proposed order for the judge to sign.

REQUESTS FOR ADMISSION

FRCivP 36 governs requests for admission. It provides that a party can serve on another party requests that the other party admit the truth of any matters within the general scope of discovery as defined in FRCivP 26. Thus, requests for admission can cover a broad range of matters, but not matters that are privileged or irrelevant.

FRCivP 26 sets forth three categories of requests for admission: (1) the truth of facts, (2) the application of law to facts, and (3) the genuineness of documents. These three categories are illustrated in the sample response to requests for admission in Figure 8–18. The first request is to admit that the employment application that Sandy Ford signed is authentic. This is the third category—genuineness of documents. The second request is to admit that Sandy Ford completed and signed the application on June 15, 1995. This is the first category—the truth of facts. The third request is to admit that Sandy Ford knowingly falsified her application when she stated that she had no felony convictions. This is the second category—the application of law to facts. Ford could contend that she did not "knowingly" make a misstatement.

FRCivP 36 provides that if a matter is admitted, it is admitted only for the purposes of the pending action. Thus, an admission cannot be used against the party in a different lawsuit.

The purpose of requests for admission is to eliminate the need to prove at trial those matters that are not in dispute. This discovery device is particularly helpful for the parties to acknowledge their agreement on the authenticity of documents. This can save a great deal of time at trial. Requests for admission can also give a party a preview of the issues that the other party will contest at trial.

Responses to requests for admission must be precise, and the attorney-paralegal team must be absolutely certain that the fact should be admitted. Once a matter is admitted, the admission of truth is conclusive.

Procedure

As with other forms of discovery, requests for admission cannot be served until after the discovery conference in federal courts that implement all provisions of FRCivP 26(a)(1). As a practical matter, requests for admission usually come later in the discovery process. They are more helpful after you have explored the other parties' positions and the facts of the case through the use of interrogatories and depositions.

FIGURE 8–17 Motion for a Physical Examination

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

MOTION FOR PHYSICAL EXAMINATION

Defendant Woodall Shoals, pursuant to Rule 35 of the Federal Rules of Civil Procedure, moves the court for an order requiring the plaintiff to submit, at defendant's expense, to a physical examination, including, if necessary, X-rays, by a physician to be appointed by the court, to identify injuries allegedly sustained by the plaintiff, which are the subject of plaintiff's complaint.

The physical condition of the plaintiff is in controversy and the defendant has no means of ascertaining other than by independent medical examination, the actual nature and extent of the injuries complained of, and such examination is necessary to enable the defendant to prepare for trial.

Defendant has no reason to believe that the requested physical examination will be painful or dangerous to the plaintiff.

This the _____ day of _____, 19__.

David H. Benedict
Attorney for the Defendants
Benedict, Parker & Miller
100 Nolichucky Drive
Bristol, NC 28205-0890
704-555-8810

A party must serve a response within thirty days of receipt of the requests for admission unless the court allows additional time or the parties agree to additional time in writing. If the party does not respond within thirty days, the matters are deemed admitted. Obviously, the consequences of letting this deadline slip are disastrous. Paralegals must enter this deadline in the docket control system as soon as the requests for admission are received and follow up to ensure that the responses are made on time.

Format of Requests for Admission

Figure 8–18 illustrates the format of requests for admission. Requests for admission have the case caption at the top, specifying the court, parties, and file number. As with other discovery requests, the requests for admission must be specifically labeled, specifying the party to whom the requests are directed and whether this is the first, second, or some subsequent request for admission. The requests begin with a simple statement such as "Plaintiff EEOC requests defendant Chattooga Corporation to make the following admissions within thirty (30) days after service of this request."

Next follow the requests, individually numbered. The requests should be short and specific. A request that is too vague or complicated invites an objection from the party to whom it is directed.

Both the requests for admission and responses to the requests are signed by the attorneys and mailed to all parties. Remember to attach a certificate of service.

Drafting Requests for Admission

Requests for admission require careful planning because the consequences of a party admitting the truth of a request are extremely significant. If a party states a fact in a deposition or interrogatory, it is still possible at trial for the party to present contradictory evidence. For instance, a party may say something damaging at a deposition and at trial may state that he or she was confused and that something else really happened. In contrast, an admission of truth in response to a request for admission is conclusive.

SIDEBAR Another reason for careful planning is that some local court rules place a limit on the number of requests for admission that a party may submit. FRCivP 36 states no limitation. In contrast, the United States District Court for the Southern District of Ohio limits parties to forty requests for admission, and the Western District of Texas imposes a limit of thirty.

When the attorney-paralegal team drafts requests for admission, they should review the pleadings and the discovery already completed. Your goal is to pick out the facts that have been admitted. Be alert for documents that will be exhibits at trial and try to establish their authenticity. By this point in the litigation process, you will be familiar with the pleadings, discovery materials including

FIGURE 8–18 Excerpts from Requests for Admission

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
Civil Action No.: C-96-2388-B

Equal Employment Opportunity Commission,
Plaintiff,

-vs-

Chattooga Corporation,
Defendant.

PLAINTIFF'S FIRST REQUESTS FOR ADMISSION

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, the defendant Chattooga Corporation requests the plaintiff, Equal Employment Opportunity Commission, to make the following admissions, within 30 days of service of this request, for purposes of this action only:

1. That each of the following documents, exhibited with this request, is genuine:

   a. The employment contract, attached as Exhibit A, is a true and accurate copy of the employment contract signed by Sandy Ford on June 15, 1995.

*

2. That each of the following statements is true:

   a. The employment contract, a copy of which is attached as Exhibit A, was completed by Sandy Ford on June 15, 1995, and the signature on the original is Sandy Ford's signature.

   b. Sandy Ford knew on June 15, 1995, that she had a felony conviction and knowingly falsified the employment contract when she stated that she had no felony convictions.

*

This the _____ day of October, 1996.

*These are merely excerpts from a Request for Admission. A Request for Admission in the Chattooga case would include more references to documents and facts.

transcripts of depositions, and the documents that are potential exhibits. A paralegal's familiarity with all these materials is helpful to the attorney who is drafting and answering the requests for admission.

Again, the requests for admission *must* be simple and clear. A party is unlikely to admit to a vague request or a request that contains too many facts. You should try to limit each request for admission to one fact—for example, the authenticity of one document.

Responding to Requests for Admission

FRCivP 36 provides four possible responses to a request for admission. First, the party may admit the request. See Figure 8–19, an illustration from the Chattooga case. Here the EEOC admitted the authenticity of Sandy Ford's employment application and admitted that she completed and signed the application on the date stated.

Second, the party may deny the request. In Figure 8–19, the EEOC denied that Ford "knowingly" falsified the application. The party may admit part of a request and deny the other part, just as in an answer to a complaint. For instance, if Woodall Shoals asked Wesser to admit that he used the blanket regularly in a manner contrary to the instructions, Wesser may admit that he used the blanket regularly but deny that he used it in a manner contrary to the instructions.

A third response is to object to a request, usually on the basis that the information is privileged or that the request is irrelevant. FRCivP 36 does not allow a party to object to a request simply by stating that it is a genuine issue for trial. Rather, the party must deny the request or explain why it cannot admit or deny the request.

A statement of the reasons why the party cannot admit or deny the request is the fourth response. A party may cite lack of information as a reason for failure to admit or deny, but not unless the party has made "reasonable inquiry" and still is not able to respond.

A paralegal's familiarity with the contents of a litigation file is even more helpful in responding to requests for admission than in drafting them. Paralegals are often more familiar than the attorney with the detailed contents of the file in the pretrial stage. Therefore, paralegals can easily locate the documents the attorney needs to review when preparing responses. When you make copies of documents for the attorney to review, be sure to label them accurately—for example, "page 3 of deposition of Sandy Ford."

MOTIONS FOR CONTROLLING THE DISCOVERY PROCESS

From the overview of the discovery process, you can see that the parties usually can conduct discovery without the court's intervention. Sometimes, however, parties reach an impasse and must file motions with the court to regulate some aspects of discovery. For instance, a party may refuse to attend a deposition or to answer some interrogatories.

FIGURE 8–19 Response to Requests for Admission

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
Civil Action No.: C-96-2388-B

Equal Employment Opportunity Commission,

Plaintiff,

-vs-

Chattooga Corporation,
Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S FIRST REQUESTS FOR ADMISSION

The plaintiff EEOC, responding to the defendant Chattooga Corporation's Requests for Admission served on the 15th day of October, 1996, states as follows:

Request No. 1.a.: The employment contract, attached as Exhibit A, is a true and accurate copy of the employment contract signed by Sandy Ford on June 15, 1995.

Response: Admitted.

Request No. 2.a.: The employment contract, a copy of which is attached as Exhibit A, was completed by Sandy Ford on June 15, 1995, and the signature on the original is Sandy Ford's signature.

Response: Admitted.

Request No.2.b.: Sandy Ford knowingly faisified the above-described employment contract.

Response: Denied.

This the _____ day of November, 1996.

Kathy M. Mitchell
Regional Attorney

Edward R. Cheng
Senior Trial Attorney

Equal Employment Opportunity Commission
1301 North Union Street
Philadelphia, PA 19601
215-555-3000

Judicial Intervention in the Discovery Process

The Federal Rules of Civil Procedure give judges the power to control discovery in several ways. FRCivP 26 allows judges to limit the frequency or extent of use of all discovery methods when the discovery sought is "unreasonably cumulative or duplicative" and when the burden or expense outweighs its likely benefit. In scheduling orders entered pursuant to FRCivP 16, judges influence the control and scheduling of discovery. Judges may enter a wide range of sanctions under FRCivP 37, discussed in the following.

Attorneys are encouraged, however, to try first to resolve their discovery disputes without court intervention. Cooperation in the discovery process is encouraged, if not mandated, in local court rules. Most local court rules require the attorneys to certify that they have made reasonable efforts to resolve discovery disputes before filing motions for court intervention. Refer, for example, to the local rule from the Eastern District of Pennsylvania, which is reprinted in Figure 8–20.

FIGURE 8–20 Local Rule Regarding Efforts to Resolve Discovery Dispute

Rule 26.1

. . .

(f) No motion or other application pursuant to the Federal Rules of Civil Procedure governing discovery or pursuant to this rule shall be made unless it contains a certification of counsel that the parties, after reasonable effort, are unable to resolve the dispute.

Local court rules also provide for methods of obtaining the court's intervention, short of motions with lengthy accompanying legal memoranda. For instance, in the United States District Court for the Eastern District of New York, attorneys may notify the court of an unresolved discovery dispute either by telephone or by a letter not to exceed three pages in length outlining the nature of the dispute and attaching relevant materials. The judge may then schedule a telephone conference or other conference and has the option to require more papers. The local rules allow the judge to enter a written order by informal means as well. Refer to Figure 8–21, which reprints this section of the rule.

Paralegals should be mindful that one purpose of the Civil Justice Reform Act was to expedite litigation through cooperation among the parties. Attorney-paralegal teams that earnestly endeavor to cooperate will have more credibility with judges when they encounter a discovery dispute that cannot be resolved and requires the filing of formal motions.

FIGURE 8–21 Local Rule Regarding Court Intervention in Discovery

6. Mode of Raising Discovery and Other Procedural Disputes with the Court.

(a) *Premotion Conference.* Prior to seeking judicial resolution of a discovery or procedural dispute, the attorneys for the affected parties or nonparty witness shall attempt to confer in good faith in person or by telephone in an effort to resolve the dispute.

(b) *Resort to the Court.*

(i) Depositions. Where the attorneys for the affected parties or nonparty witness cannot agree on a resolution of a discovery dispute that arises during the taking of a deposition, they shall notify the court by telephone and request a telephone conference with the court to resolve such dispute. If such dispute is not resolved during the course of the telephone conference, the court shall take other appropriate action, including scheduling a further conference without the submission of papers, directing the submission of papers, or such other action as the court deems just and proper. Except where a ruling which was made exclusively as a result of a telephone conference is the subject of de novo review pursuant to (iii) hereof, papers shall not be submitted with respect to such a dispute unless the court has so directed.

(ii) Other Discovery. Where the attorneys for the affected parties or non-party witness cannot agree on a resolution of any other discovery dispute, they shall notify the court, at the option of the attorney for any affected party or non-party witness, either by telephone or by a letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials. Any opposing affected party or non-party witness may submit a responsive letter not exceeding three pages in length attaching relevant materials. Any affected party or non-party witness may request a hearing or the opportunity to submit additional written materials, or to make any other appropriate presentation to the court. If the dispute is not resolved during the course of the telephone conference or if the letter option is exercised, the court shall take appropriate action to resolve the dispute, including scheduling a telephone or other conference without the submission of papers, directing the submission of papers, or such other action as the court deems just and proper. Except for the letters and attachments authorized herein or where a ruling which was made exclusively as a result of a telephone conference is the subject of de novo review pursuant to (iii) hereof, papers shall not be submitted with respect to such a dispute unless the court has so directed.

(iii) Where a ruling is made exclusively as a result of a telephone conference it may be the subject of de novo reconsideration by a letter not exceeding five pages in length attaching relevant materials submitted by any affected party or non-party witness. Any other affected party or

FIGURE 8–21 (Continued)

non-party witness may submit a responsive letter not exceeding five pages in length attaching relevant materials.
(iv) Where papers are filed or a letter submitted, the attorneys shall set forth in appropriate detail the efforts they have made to resolve the dispute prior to raising it with the court.

(c) *Decision of the Court.* The Court shall record or arrange for the recording of the Court's decision in writing. Such written order may take the form of an oral order read into the record of a deposition or other proceeding, a hand-written memorandum, a hand-written marginal notation on a letter or other document, or any other form the Court deems appropriate.

Procedure to Compel Discovery

The primary rule addressing discovery disputes is FRCivP 37. It is important to understand the context in which discovery disputes usually arise. Often one party objects to a discovery request, such as an interrogatory, stating that it is irrelevant or unduly burdensome. Sometimes a party gives an answer, but it is incomplete or evasive. Either way, the party has failed to respond to the discovery request. FRCivP 37(a) provides that an incomplete or evasive answer constitutes failure to respond. Thus a party cannot get off the hook by giving a vague answer that begs the question. Motions to compel discovery also arise when the parties do not make initial disclosures required by FRCivP 26.

FRCivP 37 specifies that before filing a motion for an order to compel discovery, the litigants must try to resolve the dispute by informal means. The moving party must attach to its motion "a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." The certification and motion should detail the efforts that the moving party made to secure the requested information. This includes the type of discovery sought and all follow-up methods used to try to secure the information, such as phone calls and letters. For instance, a motion to compel answers to interrogatories should set forth the dates that the interrogatories were mailed and the dates of follow-up letters, as well as a statement that the unresponsive party did not tender any response and did not file a motion for an extension of time.

The motions are generally filed in the judicial district where the lawsuit is pending. In the case of depositions, however, the motion is filed in the district where the deposition is held.

As with all motions, the attorney signs the motion, and a notice of motion informs all parties of the date, time, and location of the hearing on the motion. The motion and notice of motion are then served on all parties in accordance with FRCivP 5.

Discovery Sanctions

FRCivP 37 gives courts the authority to impose sanctions on parties who do not comply with reasonable discovery requests. Assume that Woodall Shoals refused to answer the first set of interrogatories sent by Ms. Heyward. Instead of giving the answers shown in the responses in the Appendix, suppose Mr. Carlton gave this response to questions 2 through 11: Woodall Shoals does not manufacture an electric blanket with the model number 6102; therefore, these questions cannot be answered. Although Mr. Carlton gave a response of sorts, Ms. Heyward asserts that the response is incomplete and evasive. Therefore, she files a motion asking the court for an order compelling the defendant Woodall Shoals Corporation to answer completely interrogatories 2 through 11. The court orders Woodall Shoals to answer the interrogatories within two weeks. Three weeks pass, and Ms. Heyward has not received a response. She writes to Woodall Shoals's attorney, who has not returned her phone calls, and ten days later still has no response. Ms. Heyward now files a motion pursuant to FRCivP 37(b), asking the court to impose sanctions on Woodall Shoals for its failure to respond to the interrogatories. The court has the authority to impose a wide range of sanctions on the disobedient party. (See Figure 8–22.)

When a party refuses to answer questions about certain facts, the court can order that those facts are established for purposes of the lawsuit. Assume that Woodall Shoals had refused only to answer interrogatories about its inspection procedures. The court could order that it is deemed admitted that Woodall Shoals' inspection procedures are insufficient to detect defects in the manufacture of the blanket.

The court also can order that the disobedient party not be allowed to present evidence to support or oppose claims or defenses. FRCivP 37(b) also allows the court to stay—that is, to postpone—the proceeding until the party obeys the order compelling discovery. In extreme cases, where the party has been persistently and blatantly disobedient, the court has the power to dismiss the disobedient party's claim or to enter a default judgment against the disobedient party. Thus, if Mr. Wesser refuses to attend depositions and answer interrogatories even after the court orders him to comply, the court can dismiss his claim against Woodall Shoals and Second Ledge. If Woodall Shoals and Second Ledge refuse to comply with the court's orders compelling discovery, the court can enter a default judgment against them.

FRCivP 37(b) also allows the court to find the disobedient party in contempt. An important sanction is the court's authority to order the disobedient party to pay the other party's reasonable expenses, including attorneys' fees, caused by the party's failure to cooperate.

FRCivP 37(c) provides that when a party fails to admit the genuineness of a document or the truth of any other matter in a request for admission, and the other party then proves the truth of the matter or genuineness of the document, the court can order the uncooperative party to pay the expenses of proving these matters, including attorneys' fees. Of course, if the party had a good reason for

FIGURE 8–22 Provisions of FRCivP 37(b)

(b) Failure to comply with order.

(1) Sanctions by Court in District Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

failure to admit, the court will not order the refusing party to pay the other party's expenses. Note that the expenses of proof can be great. They can include attorneys' fees, lodging for witnesses, and travel expenses.

FRCivP 37(d) addresses disobedient persons who are designated to appear on behalf of a party under FRCivP 30(b)(6) or 31(a). Remember that when the defendant is a corporation, the corporation must designate an officer of the company or other agent to answer questions. The court has authority to impose all the preceding sanctions except for contempt.

Thus, the court can fashion a variety of sanctions in response to motions to compel discovery and to impose sanctions, when a party refuses to respond to a discovery request. The court may also impose sanctions if a party fails to make a disclosure required by FRCivP 26(a), for which no discovery request is needed. This is authorized by FRCivP 37(a)(2)(A), which requires the party moving for sanctions to attach a certification that the movant has in good faith attempted to confer with the uncooperative party and to secure the information without court intervention.

In conclusion, it is best for the parties to cooperate. When the parties resort to the court to referee their discovery, the consequences can be grave. Paralegals help to obtain information from clients in a timely manner and help the attorneys so that the discovery process can run smoothly.

ETHICS BLOCK

Both the ABA Model Rules and Model Code dictate truthfulness in statements made to the court and to other persons, including the opposing party. In general, lawyers must not make a false statement of material fact or law and must not conceal information that they are required by law to disclose. In addition, lawyers must not use evidence that they know to be false, including testimony that the lawyer knows is perjured. Paralegals can help ensure that their supervising attorneys are aware of evidence, such as witnesses' statements, that seem suspicious. Often paralegals have a firm grasp of all the evidence and thus are able to spot inconsistencies.

SUMMARY

Discovery is an important topic for paralegals because much of your work is done in the discovery phase of litigation. Discovery refers to the pretrial methods used by the parties to obtain information from one another. Discovery has several purposes, including clarification of facts and preservation of testimony for later use. One of the primary purposes of discovery is to avoid surprise at trial.

Methods of Discovery

There are five principal methods of discovery. One is the deposition, where an attorney orally questions a witness, who responds under oath. A court reporter records the testimony and prepares a transcript. A second method is the use of the interrogatories, written questions submitted by one party to another and answered "separately and fully in writing under oath," unless a valid objection is raised. A third method is requested for production of documents and things and for entry upon land for inspection. Requests for production of documents are the most common. Parties may also request things—that is, tangible objects—for inspection, and they may request entry upon land to inspect, survey, or otherwise investigate the property. A fourth method is requests for admission. These are written requests asking other parties to admit that certain things are

true. If a party admits the truth of a fact, that fact is deemed to be true throughout the entire lawsuit. The fifth method of discovery is through physical or mental examination of a person whose condition is at issue in the lawsuit.

Rules That Govern the Discovery Process

The rules that govern the discovery process derive from the same sources as other rules for civil litigation—Federal Rules of Civil Procedure, state rules of civil procedure in state court, and local court rules. State rules tend to follow federal rules, but there can be important differences. FRCivP 26–37 govern discovery, and you should know all of these rules. Consult local court rules regularly, as they often contain important requirements. The disclosure requirements and discovery conference requirements of FRCivP 26 require early disclosure before formal discovery requests are made. Some federal courts have opted out of these provisions.

An example of how rules can vary is seen in rules regarding whether to file discovery materials with the court. FRCivP 5(d) gives the court the option, whereas some state rules specifically direct parties not to file discovery documents, and other state and/or local rules leave the filing to the judge's discretion.

Timing and Sequence of Discovery

FRCivP 26 allows parties to use discovery methods in any sequence unless the judge directs otherwise. One common sequence is to use interrogatories first, followed by depositions when you have identified the other party's witnesses through interrogatories. Requests for admission follow, after the facts and issues have been sufficiently narrowed. Physical and mental examinations may follow in personal injury cases. Different types of lawsuits may require different sequences.

The timing depends upon which, if any, of the provisions of FRCivP 26 the local court rules have adopted. If a court has adopted all the rule 26 provisions, early disclosure of witnesses, damages computations, and other information will be required. There are deadlines for responding to interrogatories and other requests, and the consequences of missing a deadline can be severe. Local rules may impose deadlines for completion of all discovery. Judges also may set deadlines, especially if the parties abuse discovery.

Scope of Discovery

The general rule for scope of discovery is in FRCivP 26(b)(1), which allows discovery of any matter that is relevant, is not privileged, and is reasonably calculated to lead to admissible evidence. Note that the evidence itself does not have to be admissible. For example, hearsay evidence that fits no exception to the hearsay rule can lead to admissible evidence. FRCivP 26 specifically allows the discovery of insurance agreements that may serve to pay the judgment.

Duty to Supplement Responses

Parties must update and supplement their answers when a prior response is no longer accurate. The duty to supplement continues throughout the litigation.

Discovery Planning

Both the Federal Rules of Civil Procedure and local court rules place limits on the number of interrogatories and depositions that each party may have. This, and other provisions of local court rules, necessitates careful planning. Planning is important. First review all the facts you have to establish. Then list the possible sources of information. Next, consider the method that is best for obtaining that information. It is important to consider your client's budget because discovery can be expensive.

Limitations on Discovery

Some information is protected from discovery, and paralegals must remain alert for privileged material so that it will not be inadvertently disclosed. Two common privileges to watch for are attorney-client privilege and work product privilege. While attorney-client privilege is self-explanatory, work product privilege (which refers to certain trial preparation materials) demands careful scrutiny. The work product privilege protects the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation according to FRCivP 26(b)(3). Other trial preparation materials may be discoverable if the other party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Parties may obtain protective orders from the court to protect confidential information, such as trade secrets. Parties also can seek protective orders when disclosure would cause annoyance, embarrassment, oppression, or undue burden or expense. FRCivP 26(c) enumerates a number of means of protections from sealing documents and filing them with the court to limiting the attendance of persons at depositions.

Interrogatories

FRCivP 33 addresses the procedure for interrogatories. Only parties to the lawsuit can be required to answer interrogatories. If a party is a corporation, the corporation must appoint an officer or agent to provide answers. Interrogatories may be served on the plaintiff at any time and on the other parties at any time after service of the summons and complaint. A party has thirty days to answer, unless the interrogatories were served concurrently with the summons and complaint, in which case forty-five days are allowed. A party must either answer or object to each interrogatory. In federal court districts that adopt the early disclosure requirement of FRCivP 26, you will have much information before you draft interrogatories.

Paralegals often draft interrogatories. Sources of questions to include are other files in your office, form books, and records on appeal from similar cases. You must always be careful, however, to tailor the questions to your case. This is especially important because most courts limit the number of interrogatories a party can send. Frequent topics include the following: identity of the person answering the interrogatories, whether a corporate defendant has been correctly named in the pleadings, identity of witnesses, information about expert witnesses, information about pertinent documents, details of the other parties' version of the facts, further specification of the amount and type of damages, and insurance coverage. General guidelines in composing interrogatories include making the questions clear, trying to avoid questions that require yes/no answers, and asking the respondent to specify the source of each reply so that you can tell whether that person has firsthand or secondhand knowledge of the information given. The format for interrogatories includes a caption, introduction with definitions, numbered paragraphs with subparts, attorney signature and address, and certificate of service.

To draft answers to interrogatories, you begin by obtaining the basic information from the client. Send the client a copy of the interrogatories, answer any of the client's questions, and follow up to be sure the client returns the information in time to prepare the answers. Remember to answer or object to each question. Be especially careful not to disclose confidential information. Besides privilege, grounds for objection may be that the information sought is unreasonably cumulative or duplicative, or the discovery is unduly burdensome and expensive. These are the general grounds for objections to discovery.

The final draft of the answers must be reviewed by the attorney and signed by the attorney and/or client, depending largely on local rules. When the client is a business organization, the company designates someone with sufficient knowledge to answer the interrogatories, and that person signs the responses. The client may be required to sign a statement verifying that the answers are true.

Requests for Production of Documents and Things

Parties can request that tangible objects be handed over for inspection. A good example is the electric blanket in the Wesser case. Parties may request to enter a person's land to inspect, measure, or survey the property. Documents, the most frequently requested items, include drawings, charts, photographs, and other items specified in FRCivP 34. When items are requested, it is not a valid excuse to say that they are in someone else's possession. The items must be obtained and produced unless there is a valid reason to object.

The text discussion centers on requests for production of documents because paralegals frequently play a major role in producing documents. Requests may be served on the plaintiff at any time and on other parties with service of the summons and complaint or at any time afterward. Parties have thirty days to

serve answers unless the requests were served with the summons and complaint, in which case they are allowed forty-five days.

The format of a request consists of caption, introductory paragraph with definitions if necessary, numbered list of documents requested, attorney signature, and certificate of service. The request should specify the date, time, and location for inspecting or copying the documents. The request must be clear enough for parties to determine which documents you seek. A request that is unjustifiably broad can be too burdensome or otherwise objectionable.

In large lawsuits, production of documents is a massive undertaking. Paralegals may supervise a team of clerical assistants who help to gather and copy the documents. You may have to go through clients' files at their offices or warehouse. Sometimes the clients' own employees search their files for the pertinent information, but you are more likely to get all the needed information if you and your team do the search.

It is important for the attorney-paralegal team to screen the documents to ensure that protected information is not released to the other party. You should focus your review on four categories of information: irrelevant documents, unresponsive documents, confidential documents, and privileged information.

The next big step is to organize the documents for copying. Arrange the documents in a logical order—for example, by subject matter. Assign a number to each document to identify it. These so-called production numbers serve several purposes, including forming the basis for an index. The numbers also help you ensure that all documents are accounted for before trial. You are ready to copy the documents. Put them in boxes, labeled on the outside, and make sure that you have enough clerical help for copying and putting the documents back in order.

Depositions

There are two types of depositions, written and oral. The most common by far is oral, where an attorney asks the deponent questions, and a court reporter records the questions and answers. After the deposition is over, the court reporter prepares a transcript, which the deponent reviews and corrects, if necessary. Usually the attorney for each party gets a copy of the transcript. Attorneys may use exhibits as part of the questioning, asking a deponent to identify documents and verify signatures. The exhibits are numbered and attached to the transcript.

Both parties and nonparties may be deposed. Deponents may be forced to attend by service of a subpoena. Attorneys generally depose other parties' witnesses rather than their own, because they know what their witnesses are going to say. However, if the attorneys fear that a witness may be unavailable for trial, they may depose the witness to preserve the testimony and introduce it at trial.

A written notice of the deposition is sent to the deponent and the attorneys for all parties. FRCivP 30(b) requires only "reasonable notice," but local rules may require a specific time. (Examine the notice in Figure 8–12 in the text.) The notice states the place, date, and time for the deposition. For a nonparty witness, prepare a subpoena (illustrated in the text in Figure 8–13). The subpoena must

be personally served on the witness. When the deponent is a corporation or agency, the notice or subpoena must describe "with reasonable particularity" the matters on which examination is sought. The agency or corporation then designates one or more persons to testify.

Depositions are usually held in conference rooms in law offices. The persons present include the deponent, the attorneys for all parties, the court reporter, and often paralegals on the attorneys' teams. The attorney who scheduled the deposition examines the deponent; then there is an opportunity for cross-examination. An attorney may object to a question, but the deponent has to go ahead and answer. Questions of admissibility of the testimony are determined at trial.

After the transcript is reviewed and signed, local rules differ as to the procedure. Some rules direct that the transcript be filed with the court, and others direct that the transcript be delivered to the attorney who took the deposition. Copies go to all attorneys.

Paralegals help arrange depositions by helping to arrange the time and place, making reservations for conference rooms when necessary, arranging for the court reporter, and arranging exhibits to be used in the deposition. During the deposition, paralegals may help the attorneys keep track of exhibits, take notes about the testimony, and observe the deponent's demeanor. Be alert for any contradictory statements that the deponent makes.

After a transcript is received, the paralegal often prepares a digest (summary) of the testimony. There are three principal types of digests. One is the witness digest, a simple summary of the testimony in the order it was given. Another is the subject matter index, where a subject appears in the left-hand column and each reference to that subject appears in the right-hand column, with the page number on which the statement appears. The third type of digest is chronological, set up like the subject matter digest with pertinent dates instead of subjects in the left-hand column.

Physical and Mental Examinations

Physical or mental examinations are appropriate in lawsuits where a person's condition is a matter of controversy, such as in personal injury litigation. FRCivP 35 requires a court order for an examination. The motion requesting the examination must specify the time, place, and scope of the exam, and name the persons who will conduct it. The results of the exam must be detailed in a written report, which is distributed to the attorneys for all parties.

Requests for Admission

FRCivP 36 sets out three categories of requests for admission: the truth of facts, the application of law to facts, and the genuineness of documents. Once a matter is admitted, it is deemed true for the purposes of the pending lawsuit and parties cannot change their minds and try to retract the admission. The purpose of requests for admission is to eliminate the need to prove at trial those matters

that are not in dispute. Parties frequently admit the genuineness of documents to make the admission of evidence at trial less time-consuming. It is obviously important to answer requests for admission precisely, because the consequences of an incorrect admission can be severe.

Requests for admission may be served on the plaintiff at any time after the commencement of the lawsuit. They may be served on other parties with the summons and complaint or at any time thereafter. As a practical matter, requests for admission usually come fairly late in the discovery process, when the facts and issues have been narrowed and clarified.

Parties must serve responses within thirty days of receipt of the requests for admission, except that a defendant is allowed forty-five days when the requests are served with the summons and complaint. It is imperative that paralegals enter the response deadlines in the docket control system. If a party does not respond in a timely manner, the requests for admission are deemed admitted.

The format includes a caption, introductory paragraph, numbered paragraphs for each request, attorney signature, and certificate of service. It is important to state the requests precisely and word them so that the party is likely to admit their truth. Responses to requests for admission must be drafted with care. Be careful not to overlook any request or part of a request. Remember that failure to respond is deemed a conclusive admission of truth. The responses are to admit, deny, or object to the requests. A fourth response is to state why the party is unable to respond, and lack of knowledge is a suitable response only after the party has made reasonable inquiry but is still unable to respond. Paralegals help with responses by locating documents that refer to the information in the requests and by reviewing those documents.

Motions for Controlling the Discovery Process

Usually the discovery process can be regulated by the attorneys without court intervention. In some cases, the attorneys and the judge call a discovery conference early in the litigation to set the ground rules and basic schedule.

Occasionally, opposing attorneys reach an impasse over certain subjects. For instance, one party may refuse to answer interrogatories or may give only vague, evasive answers. An incomplete or evasive answer constitutes failure to respond. FRCivP 37 provides the procedure for enforcing discovery. Most federal courts require attorneys to certify that they tried to resolve their dispute before seeking judicial intervention. If a party refuses to disclose information upon the court's request, the court may impose sanctions. FRCivP 37(b) provides for a wide range of sanctions, which can be quite strong. The court even has the power to strike the uncooperative party's defenses and enter default judgment against that party. The court also can award attorneys' fees for the amount generated by the party's failure to cooperate. Review the sanctions in FRCivP 37(b) and take note of their severity. The sanctions are ample incentive to cooperate in the discovery process.

REVIEW QUESTIONS

1. Which of the following statements are true about the discovery requirements of FRCivP 26(a)(1)?
   a. Local federal court rules may exempt certain types of cases from the discovery requirements.
   b. Local federal court rules may exempt all cases from the discovery requirements.
   c. It is permissible for one federal district court in a state to opt out of the requirements while another federal district court in the same state follows the requirements.
   d. all of the above
   e. a and c only
2. Which of the following statements are true about rule 26(f) discovery meetings?
   a. The parties discuss settlement.
   b. The parties discuss their claims and defenses.
   c. The parties arrange to make disclosures required by FRCivP 26(a)(1).
   d. all of the above
   e. b and c only
3. In which of the following circumstances is an attorney allowed to instruct a deponent not to answer a question during a deposition?
   a. to preserve a privilege
   b. to enforce a limitation on evidence directed by the court
   c. to harass the other parties
   d. all of the above
   e. a and b only
4. Requests for admission can include requests to admit which of the following?
   a. the genuineness of documents
   b. the truth of facts
   c. the application of law to facts
   d. all of the above
   e. a and b only
5. Which of the following are purposes for preparing digests of depositions?
   a. to plan future discovery
   b. to note inconsistencies in a person's statements
   c. to make a person's answers readily apparent
   d. all of the above
   e. a and c only
6. T F FRCivP 26 gives the court discretion to alter limitations on discovery stated in other Federal Rules of Civil Procedure.
7. T F Objections to interrogatories must be stated with specificity.
8. T F Testimony at depositions is given under oath.
9. T F Potential witnesses can be required to bring documents to depositions.

10. T F One purpose of discovery is to avoid surprises at trial.

PRACTICAL APPLICATIONS

Assume that the Wesser case is being litigated in the United States District Court for the Eastern District of New York. The defendants have repeatedly refused to answer interrogatories or have given vague or incomplete responses. Refer to Figure 8–21, which reprints the local rule for raising discovery disputes with the court.

1. Before asking the judge to resolve the discovery dispute, must Ms. Heyward first talk with Mr. Benedict, the defendants' attorney?

2. Must Ms. Heyward and Mr. Benedict meet in the judge's chambers to discuss their discovery dispute?

3. If Ms. Heyward decides to write a letter to the judge to explain the discovery dispute, what is the maximum length allowed for her letter?

CASE ANALYSIS

Read the excerpt from *Sanders v. Alabama State Bar,* 161 F.R.D. 470 (M.D. Ala. 1995), and answer the questions following the excerpt.

ORDER

CARROLL, United States Magistrate Judge.

I. FACTS

According to the evidence before the court, many complaints have been lodged with the Alabama State Bar against Rose M. Sanders, the plaintiff in this case. The Alabama State Bar, through its counsel, has investigated each complaint and made a ruling as to what action, if any, should be taken. Six of these complaints were made between 1989 and 1993. The subject of one of these complaints is Ms. Sanders' engagement in protests against the treatment of African-American children and poor Caucasian children by the Selma public school system, against the holding of secret meetings by the Selma City Board of Education, and against the refusal of the School Board to extend the contract of Norward Roussell, the first black superintendent. The issue before the court is whether the memoranda and investigative reports filed by Bar counsel for these complaints are discoverable.

II. PROCEDURAL HISTORY

On February 9, 1994, Rose Sanders filed this action against the Alabama State Bar, Gilbert Kendrick, Assistant General Counsel of the Alabama State Bar, and John Yung, a licensed attorney in Alabama, and the former Assistant General Counsel of the Alabama State Bar (from 1980–1991). She alleged that her First, Fifth, and Fourteenth Amendment rights were violated because the defendants subjected her to a public censure without due process of law, and because she was denied equal protection of the law based on her race and political activity. She also alleged that the defendants invaded her privacy rights by taking unfair disciplinary action against her and by releasing confidential proceedings to the press; that they intentionally inflicted emotional distress upon her; and that they were negligent. . . .

During the course of discovery in this case, Sanders moved to compel defendants Kendrick and the Alabama State Bar to produce, among other things, copies of all notes, tapes and documents relative to their investigation, involvement, and processing of all complaints against her from 1989 to the present. Ms. Sanders contends that she needs these documents to prove that she was treated more fairly by the Bar before she engaged in the above-referenced protests. This, she believes, will help her establish her claim that she was denied equal protection of the law based on her race and political activity. The defendants produced all such information except the investigative reports and memoranda created by counsel for each complaint. The defendants objected to the production of these documents on the ground that they are protected from disclosure under the attorney work product doctrine. . . .

III. DISCUSSION

The issue before the court is whether the memoranda and investigative reports filed by Bar counsel in the complaints against Rose Sanders are discoverable. Information is only discoverable if it falls within the scope of discovery outlined in Federal Rule of Civil Procedure 26(b)(1). According to this rule, "[P]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). As a result of this rule, the threshold issue in a discovery dispute is relevancy. *See* 8 Charles A. Wright & Arthur R. Miller and Richard L. Marcus, *Federal Practice and Procedure: Civil 2d* § 2008 (1994) ("Perhaps the single most important word in Rule 26(b)(1) is 'relevant' for it is only relevant matter that may be the subject of discovery").

Ms. Sanders contends that the investigative reports and memoranda generated by Bar counsel are relevant because they will reveal that she was treated differently by the Bar after she engaged in political protests. The court has reviewed these documents *in camera* and concludes that the investigative reports and memoranda of defendants Kendrick and Yung are relevant. Both defendants have issued investigative reports and memoranda regarding possible claims against Ms. Sanders both before and after her protests took place. Thus, the reports are relevant in assessing whether the defendants treated Ms. Sanders differently after she engaged in the protests.

Although these investigative reports and memoranda are relevant, they still may not be discoverable. According to Rule 26(b)(1), relevant information is not discoverable if it is privileged. . . .

A. THE WORK PRODUCT DOCTRINE

The work produce doctrine was established by the Supreme Court in *Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) ("[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."). The doctrine is now codified in Fed.R.Civ.Pro. 26(b)(3). This rule states, in part, that*

> a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent

> of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Id. According to this rule, a party may invoke the protection of the work product privilege if the materials sought to be protected were prepared in anticipation of litigation.

Defense counsel explained at the January 25, 1995, hearing and in his brief how these documents are generated. He stated that when a complaint is received, a copy of the complaint is forwarded to an attorney within the Office of General Counsel. When appropriate, a thorough investigation is conducted. For example, witnesses may be contacted or documents obtained. Once the matter has been factually exhausted, the attorney prepares an investigatory report and recommendation (the documents at issue in this case) for the Disciplinary Commission; this commission makes the final decision. This procedure is followed pursuant to Rule 12 of the Alabama Rules of Disciplinary Procedure.

It appears to the court that these procedures are not followed because of pending or potential future litigation; instead, they are followed as an ordinary course of business whenever a complaint is filed. Indeed, "in the majority of investigations conducted by the Office of General Counsel of the Alabama State Bar, the process generally follows the same format." (Def. Brief at p. 2)

Documents prepared in the regular course of business rather than for purposes of litigation, even if litigation is already a prospect, are not protected as privileged work product. 8 Charles A. Wright, Arthur R. Miller and Richard L. Marcus, *Federal Practice and Procedure: Civil 2d* § 2024 (1994). In amplifying the phrase "in anticipation of litigation," the 1970 Advisory Committee to Rule 26(b)(3) noted that "materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other non-litigation purposes are not under the qualified immunity provided by this subdivision." Fed.R.Civ. Pro. 26(b)(3) advisory committee note. Based on the defendant's rendition of how these documents are generated, the court finds that these documents were made in the ordinary course of business, and not in anticipation of litigation. . . .

In this case, however, the defendants were not anticipating litigation when they performed their routine tasks of preparing investigatory reports and memoranda in response to complaints filed against attorney Sanders. For these reasons, the court finds that these documents are not privileged under the work product doctrine. . . .

IV. CONCLUSION

For the reasons stated above, the court finds that the investigative reports and memoranda at issue in this case are discoverable. In so holding, however, the court recognizes the importance of defendants' objections to disclosing these documents. The court further understands the defendants' concern that the possibility of disclosure could chill an attorney's willingness to provide frank opinions and recommendations. As such, the court is limiting its holding to the narrow and specific facts of this case only. In addition, the court will issue a protective order limiting disclosure of this information to counsel for the purposes of this case only.

For the foregoing reasons it is hereby ORDERED that the Plaintiff's Motion to Compel is GRANTED. The Alabama State Bar shall provide the withheld documents

to counsel for the plaintiff on or before February 10, 1995. The documents shall be furnished under the terms of a separate protective order issued by the court.

1. What is the name of the court deciding this case?
2. What is the issue before the court?
3. Did the court find that the requested materials were relevant?
4. On what basis did the defendants seek to withhold from discovery the documents in question?
5. In which of the Federal Rules of Civil Procedure is the work product privilege codified?
6. Did the court find that the documents in question were covered by the work product privilege? Why or why not?

ENDNOTES

1 Donna Steinstra, "Implementation of Disclosure in United States District Courts, with Specific Attention to Courts' Responses to Selected Amendments to Federal Rules of Civil Procedure 26," 64 F.R.D. LXXXV (April 1996).
2 *Id.*
3 *Id.*
4 *Id.* at LXXXIII, ff.
5 *Id.* at LXXXVI.
6 *Id.* at LXXXVI, ff.
7 The formats for digests illustrated here are similar to those in Brunner, Hamre, and McCaffrey, *The Legal Assistant's Handbook* (1982). There are many variations on format, so check with attorneys in your firm for the format they prefer.

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Chapter 9

DOCUMENT CONTROL AND TRIAL PREPARATION

In reviewing the week's calendar with Ms. Heyward, you note: "We have discovery planning conferences coming up in two different lawsuits. They are in different federal court districts. How can I find the rules that apply?"

Ms. Heyward replies, "I am glad that you are getting this information together. Often the discovery planning requirements differ among various federal courts. The local rules of one district court may be different from the local rules of another."

Ms. Heyward explains where to find the rules and asks, "Can you sit down at 4:00 P.M. to prepare for the discovery conferences? Just bring the files and rules to my office then, and we will get started."

INTRODUCTION

Discovery has been completed, most motions have been made and ruled on, and it is time for final pretrial preparation. There is still a chance that the lawsuit will be settled. For effective settlement discussions or for trial, however, the file must be well organized. Throughout the litigation process, the task of keeping an orderly file often is delegated to paralegals. Paralegals become just as familiar with the documents in the case as do the lawyers. In fact, paralegals often are the first to review the documents received from clients and other parties to the litigation.

TRIAL SCHEDULES

Before we discuss how to organize the file for trial, it is useful to understand how trials are scheduled by the court. This is crucial so that the attorney-paralegal team allows plenty of time for trial preparation, including file organization.

Different courts have different methods for scheduling trials. In federal court, the judge may discuss with the attorneys at the final pretrial conference when they will be ready for trial. Some courts assume that a case is ready for trial a certain number of days after the complaint is filed. Other courts require the attorneys to complete a certificate of readiness for trial, and then the case is scheduled. A sample state court certificate of readiness is shown in Figure 9–1.

FIGURE 9–1 Sample State Court Certificate of Readiness

CERTIFICATE OF READINESS FOR TRIAL

		COMPLETED	NOT WAIVED	REQUIRED
1.	All pleadings served	X		
2.	Bill of Particulars served		X	
3	Physical examination completed		X	
4.	Medical reports exchanged		X	
5.	Appraisal reports exchanged		X	
6.	Compliance with rules in matrimonial actions (22 NYCRR 202.16)	X		
7.	Discovery proceedings now known to be necessary completed	X		
8.	There are no outstanding requests for discovery.			
9.	There has been a reasonable opportunity to complete the foregoing proceedings.			
10.	There has been compliance with any order issued pursuant to Precalendar Rules (22 NYCRR 202.12).			
11.	If a medical malpractice action, compliance with any order issued pursuant to 22 NYCRR 202.56			
12.	The case is ready for trial.			

Dated: New York, New York
December 1, 1996

_____
, Esq.
Attorney for Plaintiff
Address
Telephone

In some courts, a specific date and time are assigned for the trial to commence. This is more common in federal court than in state court. In state court, the case may be assigned to a particular session of the court, and the case will be heard during that session if time allows. A judge may travel throughout the state and stay in one judicial district for perhaps two weeks at a time to preside over trials, usually hearing only civil cases or only criminal cases during this two-week period. The period is called the ***session*** or ***term*** of court. The words *session* and *term* are often used interchangeably.

As discussed in the section on docket control in Chapter 4, fifty cases may be assigned to a particular session of court. Even if your case is number thirty on the list, you must be ready for trial at the beginning of the session. Three cases ahead of you may be tried and the rest may be settled, taking number thirty to the top of the list. This uncertainty of date and time can be troublesome for witnesses, especially those who have to take time off from work or travel long distances. Most courts have a system for a ***peremptory setting***—that is, a provision for setting a certain date and time due to extraordinary circumstances. For instance, some courts allow a peremptory setting if a witness has to travel more than two hundred miles to attend the trial.

Once the court's schedule is established for a particular day or a particular session, the court publishes the schedule, which is called the *court calendar*. The calendar is sometimes called a ***docket*** or *trial list*. Different courts publish their calendars in different ways. In some cities, the calendars are published in periodicals to which attorneys subscribe. Other courts mail their calendars directly to the attorneys involved and/or post the calendars on bulletin boards in the courthouse. Other courts may require the attorneys to pick up the calendars at the office of the clerk of court. It is important that you learn the procedures used in the courts in which your attorney-paralegal team has cases pending. Often the duty of reviewing the court calendars is assigned to paralegals.

Sometimes the trial date is set by the judge to whom the case has been assigned all along. This is common in federal court, where a case is usually assigned early to a judge who hears all motions and makes all rulings throughout the litigation. This leaves the judge discretion concerning the time that the case will be scheduled and the manner in which the attorneys are informed of the date. Figure

FIGURE 9–2 The Scheduling Rule of a District Court

RULE 111 SCHEDULING AND CONTINUANCES

(a) Scheduling. All hearings, conferences and trials shall be scheduled by the judge to whom the case is assigned, except that matters referred to a magistrate shall be scheduled by the magistrate.

(b) Continuances. No application for a continuance of a hearing, conference or trial shall be made unless notice of the application has been given to all other parties. An application for a continuance shall be ruled upon by the judge or magistrate before whom the hearing, conference or trial is to be held.

(c) Notice. The Clerk shall give notice to counsel of every matter set by the court, unless the matter is scheduled orally in open court in the presence of counsel for all parties, in which case further notice is not required. All scheduling orders pursuant to Rule 16(b), Federal Rules of Civil Procedure, must be in writing.

9–2 shows rule 111 of the United States District Court for the District of Columbia, which addresses scheduling by the judge to whom the case is assigned.

In some courts, the trial dates are set by the trial court administrator or clerk of court. This is common in state court, where cases are not always assigned to one judge who rules on all motions and presides throughout the litigation. Often in state court the case is set for a certain time, and the judge is whichever one is assigned for that date or court session.

Continuances

The attorney-paralegal team should make every effort to be ready for trial at the scheduled time. Sometimes, however, circumstances beyond the team's control preclude trying a case at its appointed time. The postponement of a trial to a later date is called a ***continuance.*** Rules for granting continuances vary from court to court and even from judge to judge. You must know the inclinations of the various judges before whom the cases are scheduled. Some judges are lenient in granting continuances. Other judges will grant a continuance for nothing short of death of counsel.

Aside from judges' inclinations, there are some commonsense guidelines for determining whether a continuance might be granted. A case that appears on the court calendar for the first time is more likely to be continued than one that previously has been continued three times. Courts like to rid their dockets of old cases. The reason for seeking a continuance is also important. If the attorney who was going to try the case broke her leg two days before the trial date, a continuance will likely be granted, but if the attorney seeks a continuance because she decided to go to Bermuda for three days just before trial, the chances of a continuance are slim.

Often trial attorneys have more than one case scheduled for trial at the same time. This frequently happens in state court, when the attorney has cases in both criminal and civil court on the same day. If the cases are the type that can be heard quickly, it is possible for the attorney to move between courtrooms and try the cases all in the same day. For instance, an attorney may have a child-custody hearing and two uncontested divorce actions scheduled for the same day. Divorces are frequently heard at the beginning of the court session, because they take little time if they are uncontested. The attorney can have the two divorce hearings finished by 10 A.M. and conduct the child-custody hearing afterward.

Sometimes, however, the attorney would have to be cloned to dispose of all cases scheduled on a particular day. Many courts have local rules that establish which cases take precedence over which others. For instance, if an attorney has one case in state superior court and one in state district court at the same time, the case in superior court takes precedence, and the district court case has to be continued. Likewise, a case in federal court usually takes precedence over a state court case. The attorney-paralegal team must learn the local court rules thoroughly.

ORGANIZING CASES FOR TRIAL

Organizing a case for trial can be a massive undertaking, especially in a complex case that has been in litigation for several months or even years. Effective organization requires intimate familiarity with all the documents in the file. Because as a paralegal you will have read all the documents and helped to prepare many of them, you will be indispensable for trial preparation.

There is no magic formula for organizing cases for trial. The organization depends on the subject matter of the litigation and the size of the case file. Mr. Wesser's case, which involves product liability, will be organized differently from the Chattooga case, which involves employment discrimination. A case involving collection on a promissory note is smaller and less complex than an antitrust lawsuit and thus will require a different type of organization. Different lawyers prefer different methods of organization. There are many variables that determine the organizational scheme for preparing a case for trial.

Your goal, however, is always the same—to develop a logical and effective system for organizing documents and retrieving them quickly and accurately. Regardless of the details of your system, the basic organization for trial generally involves preparing an outline of the case, organizing the documents in subfiles, and developing an effective method to retrieve the documents. You begin by outlining the case, but your three projects are so intertwined that you usually end up performing all three simultaneously. As you outline, the topics for which you need subfiles become evident. Your subfile topics become topics in your indices, and you also detect more refined subcategories that need to be indexed.

Organizing the Facts and Outlining the Case

At trial, the plaintiff's objective is to present the proof to establish the essential elements of the claims asserted in the complaint. The defendant's objective is to establish that the plaintiff has not proved the essential elements of the claims. Therefore, you need to pull your chart that lists the essential elements of the claims and the proof you plan to use for each element.

Beneath each element you have already listed the evidence you plan to use to establish that element. Review the chart and determine whether you have gathered additional evidence. If you have, insert it in the chart. If you find any deficiencies in the evidence, consult with the attorneys on your team immediately.

Include in your outline of the case the names of the witnesses who will testify and the exhibits that will be introduced, including documents and photographs. In preparing the outline, it is also helpful to note exhibits and witnesses that other parties may introduce to try to refute each element of the claims.

The chart of proof of the essential elements for breach of express warranty in the Wesser case (from Chapter 4) is reprinted in Figure 9–3. In working through the chart and developing part of the outline in the Wesser case, the first element to establish is that Woodall Shoals made an express warranty that the blanket would be free of defects for two years from date of purchase. Proving this

FIGURE 9–3 Chart of Facts to Prove

Woodall Shoals: Express Warranty

Elements of Claim	Sources of Information	Method of Obtaining Information
1. Woodall Shoals made express warranty that blanket would be free of defects for two years from date of purchase	Written warranty that came with blanket	Obtain from Mr. Wesser
2. Electric blanket had defects, which constitutes breach of warranty	Fire inspector Fire inspector's report Remains of blanket and control Inspection of scene Testing and testimony of expert witnesses	Interview Request by letter Obtain from Mr. Wesser Go to scene Retain expert witnesses
3. Defects caused Mr. Wesser's damages	Same as #2	

element is fairly straightforward. Ms. Heyward will present the warranty that came with the blanket, so list that on the outline.

The next consideration is how to present that exhibit. Remember that documents must be authenticated. Most likely Woodall Shoals has stipulated to the authenticity of the warranty. If not, when Mr. Wesser is testifying, Ms. Heyward presents the warranty for him to examine and asks him whether this is the warranty that came with the electric blanket that he purchased. In listing the sources of proof, a review of Woodall Shoals's answer shows that Woodall Shoals admitted in the answer that it warranted the blanket to be free of defects for two years from date of purchase. Examine the partial outline in Figure 9–4 that lists this element and how Ms. Heyward will prove it.

Ms. Heyward will use several witnesses and many exhibits to establish the other two elements. First, she lists the witnesses. The list includes Mr. Wesser, the fire inspector, and expert witnesses. Some of the exhibits will be the fire inspector's report and reports prepared by the expert witnesses. Physical evidence will include the remains of the blanket and its control. Ms. Heyward also will introduce photographs. The defendants will present their own expert witnesses and reports to try to refute the assertion that the blanket had defects that caused the fire. As you review the exhibits, determine which witnesses will be used to identify and discuss the documents. Also note references to discovery documents—interrogatories, transcripts of depositions, and requests for admission—that address the elements you must establish. Review the documents

FIGURE 9–4 Partial Outline of the Wesser Case

I. Breach of Express Warranty by Woodall Shoals

A. Essential Elements of the Claim

1. Woodall Shoals made express warranty that blanket would be free of defects for two years from date of purchase	Sources of proof: 1. Written warranty (WS stipulated to authenticity) 2. Answer WS admitted in answer that it gave express warranty for two years

your opponents produced during discovery and identity pertinent information. Enter these references on your outline.

By now you will have consulted with the attorneys on your team to determine the type of outline they prefer to use and whether they have any special instructions. Some attorneys want more detailed outlines than others. You will have questions as you prepare the outline. Discuss your questions promptly with the attorneys on your team. The eve of trial is no time to make assumptions that may prove erroneous.

Summarizing Facts. The outline is a very short summary of proof. As noted earlier, to prepare it you must review many lengthy documents for pertinent facts. Reports from experts may be many pages long. You may even have to read books the experts published so that you can spot inconsistencies in their reports and testimony. You must also review lengthy discovery documents and flag the pages that pertain to the subject you are preparing for the outline.

Review the discussion of deposition digests in Chapter 8. If you have not already prepared digests of all depositions, now is the appropriate time to prepare them. You also may prepare digests or summaries of other important documents—the fire inspector's report, for example. You may assemble a large number of related documents and summarize their collective contents. For instance, you may review all Mr. Wesser's medical records and prepare a summary of his injuries, treatment received, prognosis, and total cost of treatment.

The summaries serve many purposes. You review the entire file and extract the most important facts. This helps you to prepare the outline for trial. As you prepare the summaries, the factual issues crystallize. The broad issues and the subissues emerge. You see which witnesses and documents prove which facts. Your outline falls into place, and you arrange the entire file for trial as you go. You can determine the subfiles into which the entire file needs to be divided for use at trial.

Organizing Files for Trial

For final pretrial preparation, you may need to rearrange the documents in the working files. The attorney-paralegal team must have subfiles that are arranged in a manner that will be useful at trial. At a moment's notice you must be able to locate documents pertaining to certain witnesses, issues, or specific subjects such as electrical design. You may need to create a subfile for each witness if you have not done so already. You may take the reports written by the fire inspector, for instance, and place them with the fire inspector's deposition and even interrogatories that address his knowledge and opinions. You may create subfiles for expert witnesses containing the same information, plus information on the expert's qualifications. If the expert is a witness for the other party, include any documents that will be used to impeach the expert or question the expert's qualifications.

Assume that it has been your responsibility in the Wesser case to arrange and keep in order the file. Recall the discussion of files and subfiles in Chapter 4. As the documents have arrived, you have reviewed them and ensured that they were placed in the appropriate subfiles for ready access. You have maintained both the central file, where the originals are kept, and the working file, where the copies used daily are kept. If you have kept the documents in their proper subfiles and maintained an index, the file should be in good working order for final pretrial preparation. However, there is a chance that someone on the attorney-paralegal team at some point in the litigation process has been in a hurry and failed to replace a few documents in their proper subfile, especially in the working file. Therefore, your first step should be to go through the file, find any loose papers, and place them in the proper subfile.

It is important that paralegals arrange the case files so that the attorney-paralegal team has ready access to all documents. The specific arrangement for documents will differ, depending on the subject matter and complexity of the lawsuit. One method to determine the best arrangement for document retrieval is to review the documents in the entire file and list important words, names, topics, and so on. As noted, you can do this while preparing a case outline.

Next, try to fit the documents into your tentative scheme to determine whether it will work. Further refinements may be necessary. You may need to put a document in more than one group. For instance, the fire inspector's deposition may be useful in your group of documents arranged by subject matter: cause of fire. You may also place it in the group of documents concerning this particular witness: fire inspector. Your goal is to develop a system that allows quick retrieval by arranging the documents in logical groups so that you do not have to spend time trying to recall in which group a particular document may be found.

The law firm's computer programs may permit a search of the documents for certain words or names. This can help you find the most effective method to arrange the documents for quick retrieval. You can enter names of witnesses or certain subjects, such as "cause of fire," and the computer will locate

all documents that contain the words you have entered. The computer search can help you in preparing the case outline and indexing documents as well.

Indices and Document Retrieval

Once you define the categories you will use to organize the file for trial, you need to prepare an index. You may already have an index of document numbers and other subfile indices. These may still be useful, particularly the document number index, but the aim now is to prepare the documents for trial, so you need subindices that indicate how you have arranged the documents for retrieval at trial. A computer search program can create subindices by listing all documents that contain specific categories of information.

You also need to formulate the method to use for document retrieval. Document retrieval means locating documents so that you can pull them and use them. Documents may be retrieved either manually by looking at indices or by a computer search. The retrieval methods are numerous and depend on the size of the case file, the method preferred by the attorneys on your team, and the capacity of the law firm's computer system. The text does not discuss specific indexing and retrieval systems in great detail because the systems can vary widely from law firm to law firm, but some general guidelines that will help you adapt to whatever system your law firm uses are covered.

Individual Document Identification. Some law firms index documents by assigning a number to each document. There are different schemes for assigning the numbers. For instance, Mr. Wesser's documents could be designated by numbers ranging from 1000 to 1999. Defendant Woodall Shoals's documents could be designated by numbers ranging from 2000 to 2999, and defendant Second Ledge's documents could be assigned numbers from 3000 to 3999. Another method is to prefix the numbers with different letters. For instance, Mr. Wasser's documents would have the prefix "A," defendant Woodall Shoals's documents "B," and defendant Second Ledge's "C."

The numbers are generally assigned to documents in chronological order—that is, by the date they are received. The assigned number gives a sure identification to a document. The documents are sometimes kept in strict numerical order in a central file. The numbers alone typically provide few clues about the content of the document.

Indices Used for Trial Organization. The documents are not useful for a working file unless they are indexed according to subject matter, issue, or the party from whom the document was received. Therefore, it is important to arrange and index the documents so that they can be readily located and used for trial preparation. Actually, you have been preparing some type o f useful index as you created subfiles throughout the litigation. By this stage of the litigation, you have an index in front of every subfile—court papers, correspondence, depositions, and so on. Consider an index for a subfile containing correspondence with Mr. Wesser, as illustrated in Figure 9–5. For each document in the subfile, you entered the information for each of the index headings. At a glance

FIGURE 9–5 Subfile Index

Doc. #	Description	Date	Author	Confidential Info.
A-1001	Letter *re* date of purchase of blanket	3-8-96	Mr. Wesser	no
A-1002	Letter transmitting medical bills	5-20-96	Mr. Wesser	no

you know who wrote the letter, the date it was written, a summary of the content, and whether it contains confidential information.

The information in the subfile indices you have already prepared can help you to formulate the indices for final trial preparation. The short descriptions will help you flag important issues and facts. Your outline will also help. As noted previously, a computer search for names or key words also helps to formulate index topics.

Once you have identified index headings, you need to prepare the written index. There are different methods for reducing the indices to writing, but there are two primary approaches—a manual index card system and computer programs.

The manual index card system works best when you have a relatively small number of documents. The key to a good index card system is division of documents into useful subject categories. Your outline will be helpful for picking the categories. To be sure that the categories are useful and inclusive, you should discuss the categories with the lawyers who will actually try the case. Once you have selected the categories, assign a number or key word to each.

The next step is to prepare for each document an index card that includes a document locator number, a short description of the content of the document, date of the document, and author of the document. You should be able to lift this information from the subfile indices that you prepared as the litigation progressed. The document locator number may be either the original number assigned to it (*e.g.*, A-101) or the exhibit number you plan to use at trial. At the top of each card, write the key word or category number assigned to the document. If the document is important in more than one category, write all the numbers and make copies of the card. For instance, the fire inspector's report may fall into four categories. Make four cards, and include a card in each category.

You may also index the documents by witness, date, or author, in addition to the categories arranged by topics. Arrange the cards by categories and any other chosen designations, and you can then pick out the cards you need to pursue a particular issue or fact.

Computers are helpful, and often essential, for indexing and document retrieval in lawsuits with numerous documents. The methods for setting up the

computer document retrieval system differ according to the complexity of the lawsuit and capabilities of the firm's computers. As with the manual system, first you must review the documents to determine the topics by which they need to be indexed. The topics are assigned subject codes, which are entered into the computer. Other basic information about the documents is also entered, such as date, document number, and author.

The attorney-paralegal team, together with computer personnel, must work to establish the format for entering information into the computer. Once the format is established, paralegals can enlist the aid of data-entry personnel. A well-designed computer program can create a quick and effective document retrieval system.

Trial Notebook

So far the text has discussed organizing documents into subfiles for use at trial. Many attorneys like to use a trial notebook when they try a case. A ***trial notebook*** is a three-ring binder with tabbed dividers, and in each tabbed section are the documents needed for that portion of the trial. For instance, in a simple lawsuit concerning failure to pay a promissory note, the defense attorney's trial notebook may have the following sections: jury selection, opening statement, cross-examination of plaintiff 's witnesses, motion for directed verdict, direct examination of defendant's witnesses, jury instructions, and closing argument.[2] The attorney may include in the appropriate section such items as copies of case law needed to support arguments over the admission of evidence or other issues that will arise at trial. If space allows, attorneys may include in separate sections the pleadings, discovery materials, motions and orders granting or denying the motions, memoranda submitted for trial or in support of motions, and research memos.

Different attorneys arrange and use trial notebooks in different ways. Trial notebooks can be used either as a supplement to the subfiles you have created or as an alternative to them. If the documents in the lawsuit are too voluminous to place in the trial notebook, the notebook is best used as a supplement to the subfiles. Actually, the notebook is a way to organize presentation of the evidence, and the documents can be taken from the appropriate subfiles as they are needed for introduction as exhibits or for reference. This use of the trial notebook and subfiles is effective when the trial notebook outlines the use for the documents and the point at which they will be used. The subfiles are arranged so that the documents can be easily found at the time they are to be used.

When used this way, the notebook must contain an outline of the trial. It should also contain an outline of the questions to be asked of each witness on direct and cross-examination. The outline can be annotated with notes regarding arguments that will be made at trial. For instance, you may anticipate that opposing counsel will object to the admission of an important piece of evidence. The attorney-paralegal team can research case law and prepare an argument to support admission of the evidence. An annotation in the outline directs the attorney to the place in the trial notebook where the legal argument is set out or

to the appropriate subfile that contains the legal argument and copies of supporting cases.

The trial notebook is a versatile tool that can make the trial go more smoothly. Paralegals who help to prepare the trial notebook need to work closely with the attorney who will try the case to determine how to make the notebook most useful for that attorney.

Review the File to Ensure That Specific Documents Are Ready

Certain documents must be ready before the attorney-paralegal team can complete preparation for trial. It is best to ensure that these documents are complete well before trial because their completion may take a substantial amount of time.

The Trial Brief. The trial brief presents legal issues that the court will consider during the trial and an argument explaining why the judge should rule in favor of your client on these issues. The trial brief is sometimes called a ***memorandum of law*** or ***trial memorandum***. Different attorneys prefer different formats for trial briefs, but the general format includes the following sections: cover or title sheet, statement of facts, questions presented, argument, and conclusion. The argument cites the statutes, rules, and authorities relied on. The trial brief may have a separate section that sets out the statutes and cases relied on and the page numbers on which there are references to each of the statutes and cases.

The format and length of the trial brief can differ, depending on local court rules, judges' preferences, and the nature and complexity of the lawsuit. Be sure to check local court rules because there may be specific requirements for the contents of briefs and the citations of cases. Rule 7.2 of the United States District Court for the Southern District of Ohio sets forth such requirements and appears as an example in Figure 9–6.

Usually the attorneys write the trial brief, at least the legal argument section. Paralegals, however, often contribute to the trial brief in important ways. Paralegals may prepare first drafts of the statement of facts, check case citations, and shepardize cases. Paralegals ensure that the required number of trial briefs are ready and that the brief is served on opposing counsel, complete with certificate of service.

Forms Required by Local Court Rules. Local court rules require that in certain types of lawsuits the parties must file specific forms for use at trial. For instance, in a lawsuit to divide marital property at the time of divorce, local court rules may require that each party file an affidavit stating the value they assign to each piece of property, the date the item was purchased, and so forth. An excerpt from this type of affidavit is illustrated in Figure 9–7.

Another example is a state court action for child support. The party seeking child support files an affidavit of income and expenses, which itemizes monthly income and lists expenses for shelter, food, clothing, and so on. Most of these forms are filed long before the trial date approaches, but it is best to check the file in the pretrial stage to ensure that no required forms were overlooked.

FIGURE 9–6 Local Court Rule Regarding Specific Requirements for the Contents of Briefs

Rule 7.2

. . .

(3) *Limitation upon length of memoranda.* Memoranda in support of or in opposition to any Motion or application to the Court should not exceed twenty (20) pages. In all cases in which memoranda exceed twenty (20) pages, counsel must include an abbreviated introductory summary of all points raised and of the primary authorities relied upon in the memorandum. No such summary may exceed fifteen (15) pages.

(b) Citation of legal authorities. (1) *Statutes and regulations.* All pleadings, briefs and memoranda containing references to statutes or regulations shall specifically cite the applicable statutes or regulations. United States Statutes should be cited by the United States Code Title and Section number, e.g., 1 U.S.C. Section 1. Citations such as "Section so and so of the Act" are discouraged, even cumulatively.

(2) *Preferential authorities.* In citing authorities, the Court prefers that counsel rely upon cases decided by the Supreme Court of the United States, the United States Court of Appeals for the Sixth Circuit (or in appropriate cases the Federal Circuit,) the Supreme Court of Ohio, and this Court.

(3) *Supreme Court citations.* Citation to United States Supreme Court decisions should be to the official U.S. Reports if published. Supreme Court Reporter and Lawyer's Edition shall be used where the official U.S. Reports are not yet published. For more recent decisions, United States Law Week, Lexis, or Westlaw citations are acceptable.

(4) *Unreported opinions.* If unreported or unofficially published opinions are cited, copies of the opinion shall be attached to the memorandum and shall be furnished to opposing counsel.

. . .

(f) Attachments to memoranda. Evidence ordinarily shall be presented, in support of or in opposition to any Motion, using affidavits, declarations pursuant to 28 U.S.C. § 1746, deposition excerpts, admissions, verified interrogatory answers, and other documentary exhibits. Unless already of record, such evidence shall be attached to the memorandum or included in an appendix thereto, and shall be submitted within the time limit set forth above.

Evidence submitted, including discovery documents, shall be limited to that necessary for decision and shall include only essential portions of transcripts or exhibits referenced in the memorandum.

When a substantial number of pages of deposition transcripts or exhibits must be referenced for the full and fair presentation of a matter, counsel shall simply reference in their memoranda the specific pages at which key testimony is found, and assure that a copy of the entire transcript or exhibit is timely filed with the Clerk. Counsel shall assure that all transcripts relied upon include all corrections made by the witness pursuant to Rule 30(e), FRCP.

FIGURE 9–7 Excerpt from Marital Property Affidavit

IV. ASSETS (If any asset is held jointly with spouse or another, so state, and set forth your respective shares. Attach additional sheets if needed)

A. Cash Accounts

Cash

1.1 a. Location: _____
b. Source of funds: _____
c. Other information: _____
d. Amount: _____

Checking

2.1 a. Financial institution: _____
b. Account number: _____
c. Title holder: _____
d. Date opened: _____
e. Source of funds: _____
f. Other information: _____
g. Balance: _____

2.2 a. Financial institution: _____
b. Account number: _____
c. Title holder: _____
d. Date opened: _____
e. Source of funds: _____
f. Other information: _____
g. Balance: _____

2.3 a. Financial institution: _____
b. Account number: _____
c. Title holder: _____
d. Date opened: _____
e. Source of funds: _____
f. Other information: _____
g. Balance: _____

Savings

(Individual, joint, totten trusts, CDs, treasury notes)

3.1 a. Financial institution: _____
b. Account number: _____
c. Title holder: _____
d. Type of account _____
e. Date opened: _____
f. Source of funds: _____
g. Other information: _____
h. Balance: _____

STATEMENT OF NET WORTH

YOUR FIRM NAME
Street Address
City, State, Zip
Telephone Number

Pretrial Order. Pretrial orders set forth guidelines for the trial and list the witnesses and exhibits the parties will present. Pretrial orders are discussed in detail in Chapter 10. The procedure for preparation of the pretrial order can differ. Particularly in state court the attorneys often prepare the pretrial order before their final pretrial conference with the judge. In federal court, the pretrial order is formulated largely at the final pretrial conference. Paralegals should check court rules for deadlines pertaining to pretrial orders and ensure that the orders are prepared on time. Some rules require that the attorneys meet and exchange information before they meet with the judge and make the final determinations that are written in the pretrial order. This is another deadline of which paralegals must remain aware.

PREPARATION OF WITNESSES

Witnesses need as much advance notice of the trial date as possible. They often have to arrange to be absent from work. They may have to make transportation arrangements.

Paralegals generally perform several tasks to ensure that witnesses have proper notice and are present for trial at the proper time. For instance, you may be responsible for making reservations for lodging if the witnesses have to stay for several days. Whatever your tasks, your goal is to ensure that all witnesses are present at the proper time and place to testify. Therefore, there are several tasks you must perform in advance of trial.

Inform Witnesses of the Trial Date

As soon as possible, contact all witnesses, inform them of the trial date, and make sure that they will be available. It is best to subpoena all witnesses, so explain to them that they will be served with subpoenas closer to trial. Confirm the witnesses' addresses and phone numbers. Especially be sure to confirm the phone number at which the witnesses can be reached during the trial. Explain that it is not always possible to know the exact hour and minute that they will testify, but that you will call them and give them as accurate a time estimate as possible.

Subpoena Witnesses

All witnesses should be served with a subpoena before trial. The subpoena commands the witness to be present. The subpoena gives the judge the authority to order the witness's attendance. If the witness falls to attend after being properly subpoenaed, the witness can be held in contempt.

It is important to serve a subpoena on every witness, whether the witness is friendly or hostile. Even if the witness is your client's mother, subpoena her. Many persons have been known to promise to appear and testify, but when the trial date comes, they never appear. You cannot take this risk. Judges are reluctant to grant a continuance simply because a witness does not appear, and the attorney-paralegal team can be forced to proceed without

important witnesses. Paralegals should contact all witnesses and explain that they will receive a subpoena.

In federal court actions, refer to FRCivP 45 for issuance and service of subpoenas. The clerk of court issues the subpoena. The subpoena must be personally served on the witness. Review FRCivP 45 to ensure that your subpoena is correctly issued and served. If you require the witness to bring any documents, list them on the subpoena. See Figure 9–8 for a sample subpoena.

Procedures may differ in state court actions. For instance, in some states the attorney can issue the subpoena. The form of the subpoena is likely to be the same as that of the federal court subpoena. Be sure to check state rules of civil procedure and local court rules for issuance and service of subpoenas.

After the subpoenas are served, file copies with the clerk of court. The subpoenas will become part of the court file, and the judge can readily see when witnesses have been subpoenaed.

Prepare Witnesses to Testify at Trial

Generally the attorneys meet with the witnesses to prepare them to testify at trial. Paralegals, however, may help in several ways. Paralegals may help to prepare the questions to be asked at trial. They also may set up the appointments for the witnesses to come to the office to meet with the attorneys. It is a good idea to take a witness to the courtroom to see what it looks like, especially if the witness has never been to court before. You can take the witnesses to the courthouse and show them around. This will help them to be more relaxed at trial.

Paralegals may be present when the attorneys meet with the witnesses. If you are present, you can help by sharing your observations about the witness with the attorneys. For instance, you may notice that the witness pauses too long before answering a question. This makes witnesses less credible because they appear either to have insufficient knowledge or to be planning their answer too thoroughly, as persons sometimes do when they are not telling the truth.

There are some practical guidelines that the attorney-paralegal team should share with witnesses before they testify. Witnesses should always tell the truth. If they do not know the answer to a question, they should say that they do not know rather than hazard a guess. Witnesses should answer the question and then be quiet; they should not ramble and volunteer extra information. This is not an effort to hide information. Rather, a clear, concise answer is more effective than chatter and provides less ammunition for cross-examination. Instruct witnesses to stop talking as soon as the attorney objects to a question. They can resume their testimony after the judge has ruled on the objection. Advise witnesses to review their depositions carefully before trial. This will minimize contradictions, which are damaging. These are just a few guidelines. The attorneys on your team can provide even more guidelines for effective testimony in a particular case.

It is important to talk to witnesses about appropriate dress for the courtroom. Witnesses' attire should be neat and formal, but not too formal. Tuxedos and cocktail dresses are not appropriate. Nor are shorts appropriate. Judges

FIGURE 9–8 A Sample Subpoena

AO 89 (Rev. 5/85) Subpoena

United States District Court

Western DISTRICT OF North Carolina

Bryson Wesser, Plaintiff

V.

SUBPOENA

Woodall Shoals Corporation and
Second Ledge Stores, Incorporated, Defendants

CASE NUMBER: 3:96CV896-MU

TYPE OF CASE: [X] CIVIL [ ] CRIMINAL

SUBPOENA FOR: [X] PERSON [X] DOCUMENT(S) or OBJECT(S)

TO:

John Misenheimer
Charlotte Fire Dept.
509 Savannah Street
Charlotte, North Carolina 28226-5451

YOU ARE HEREBY COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE	COURTROOM
Federal Courthouse 1018 East Trade Street Charlotte, North Carolina 28226-1201	Courtroom No. 4
	DATE AND TIME June 10, 1996 10:00 A.M.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): *

June 10

Fire inspection report and all other documents concerning your investigation of the fire at the home of Bryson Wesser, 115 Pipestem Drive, Charlotte, North Carolina, on January 3, 1996.

[ ] *See additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

U.S. MAGISTRATE OR CLERK OF COURT	DATE
J. P. McGraw	May 20, 1996
(BY) DEPUTY CLERK Barbara J. Montgomery	

This subpoena is issued upon application of the:

[X] Plaintiff [ ] Defendant [ ] U.S. Attorney

QUESTIONS MAY BE ADDRESSED TO:
Leigh J. Heyward
Heyward and Wilson
401 East Trade St.
Charlotte, North Carolina 28226-1114
ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER

*If not applicable, enter "none".

have been known to eject people because their attire does not reflect proper respect for the courtroom. Witnesses' clothes affect the way they are perceived by the jury, another important consideration.

PREPARATION OF EXHIBITS

As you organized the documents for trial preparation using the chart of essential elements, you listed the exhibits that the attorney-paralegal team will use at trial. Go back through the documents and complete the organization of the exhibits. Be sure that you have not overlooked any exhibits. You may need to expand the chart to show which exhibits will be used to establish which points at trial. Your goal is to compose a complete list of exhibits. After you have a tentative list, review it with the attorneys on your team to ensure that the list is complete.

By now the attorney-paralegal team has probably decided on the numbering scheme to use to keep track of the documents. As discussed previously, the exhibits are assigned a number in the document retrieval system that the team develops.

Assemble all the exhibits in the order that they will be introduced at trial. The next step is to make sure that sufficient numbers of copies of each exhibit are made. Generally, you need one copy for the attorneys on your team, one copy for each attorney representing the other parties, one copy for the judge, and often one copy for the judge's law clerk. Check local court rules for any special rules regarding the number of copies needed. The court may require one copy for the judge and one working copy that may be used by the judge's law clerk.

SIDEBAR Preparing the copies for trial can be a massive undertaking. Paralegals should arrange for sufficient clerical support to get all the copies made. After the copies are made, double-check to ensure that all exhibits are put back in their proper order.

PREPARATION OF DEMONSTRATIVE EVIDENCE

As discussed in Chapter 3, demonstrative evidence consists of charts and other visual aids to explain the facts and assist in the presentation of evidence. For instance, a chart of Mr. Wesser's house may show the location of his bedroom and the areas affected by the fire. Suppose that one of the expert witnesses has prepared drawings of electrical design that would be useful for the jury to understand the alleged defects in the wiring of the electric blanket. You may enlarge the drawings so that the jury can look at them while the expert witness points to areas in the design that were defective. This will make the expert's testimony much more comprehensible to the jury.

Paralegals may be responsible for preparation of demonstrative evidence. This can involve preparing simple charts yourself, or employing graphic artists

for more complex drawings. You also may need to make arrangements with a graphics company to enlarge certain drawings if the copy machines at your office do not have the capacity. Start well ahead of time so that you do not have to spend the day before the trial on the telephone trying to locate a graphic artist who does not mind staying up all night to complete the charts you need.

SIDEBAR Before trial, it may be helpful for the attorneys to present the demonstrative evidence to persons not involved in the lawsuit in order to test its effectiveness.

JURY INVESTIGATION

As discussed more fully in Chapter 11, on the first day of trial, the attorneys pick a jury from the pool of jurors selected at random for that session of court. From the jury pool, the attorneys want to select the persons whom they think will view their clients' version of the facts most favorably.

The more you know about the persons in the jury pool, the more accurately you can gauge how they will react to your client's version of the facts. This is the purpose of jury investigation—to gather information about the potential jurors in order to analyze them and try to determine which persons you want to sit on the jury in your client's case. Useful information may include where the persons live, where they work, clubs to which they belong, religious beliefs, and so forth.

Many factors determine how much jury investigation the attorney-paralegal team is able to conduct. One factor is whether the clerk of court releases a list of the jury pool before the court session begins. If the list is released several weeks in advance, the attorney-paralegal team has the opportunity to conduct a thorough investigation. There is, however, another important factor that can limit the scope of the jury investigation: your client's budget. Detailed jury investigation can be expensive. Firms are available that will gather facts on the members of the jury pool, and some consultants can even arrange a mock jury—that is, a jury composed of persons similar to those in the jury pool. The attorneys then can conduct a mock trial to see how the jury decides the case and why, which may suggest what arguments are likely to be most effective at trial.

Some law firms hire psychologists to help them determine the best characteristics for a potential juror for a particular trial, a procedure known as developing a jury profile. This, too, can be expensive.

Unfortunately, many clients cannot afford such an elaborate approach. There are many other, less expensive ways to gather information about jurors that paralegals may use. You may check public records such as tax listings to find out general information about the potential jurors' property holdings. Some courts use juror questionnaires, which are available to the attorneys before trial. These generally contain basic information about the potential juror, such as occupation, marital status, and so on. See Figure 9–9, which illustrates a juror questionnaire used in the Western District of Texas.

FIGURE 9–9 D-1. Juror Questionnaire

D-1. Juror Questionnaire

JUROR QUALIFICATION QUESTIONNAIRE
(Please answer Each Question in BLACK Ink)

NAME: _____
LAST NAME FIRST NAME MIDDLE INITIAL

PLACE OF BIRTH: _____ AGE ____ HOW LONG HAVE YOU LIVED IN THIS STATE? _____ NAME OF THE COUNTY IN WHICH YOU RESIDE: _____

MARITAL STATUS (Check [/] One): SINGLE [ ] MARRIED [ ] WIDOWED [ ] SEPARATED [ ] DIVORCED [ ]

NUMBER OF CHILDREN: _____ AGES _____

EMPLOYMENT INFORMATION:

If employed, your occupation or business: _____

If retired, occupation before retirement: _____

Spouse's occupation: _____

Are you a salaried employee of the U.S. Government? YES[ ] NO[ ] The following are exemptions (if you qualify, please check one of the following) (a) Members on active duty in the armed forces of the United States [ ] (b) Members of Fire or Police Department of any state [ ] (c) Public officers in the Executive, Legislative, or Judicial Branches of the Government of the United States or any state who are actively engaged in the performance of official duty [ ]. 28 U.S.C. § 1863(6).	Have you or your spouse ever been employed by a law enforcement agency? YES [ ] NO [ ] If your answer is yes, give agency and dates of employment: _____ _____ If, under 28 U.S.C. § 1863 (5)(B), you are volunteer safety personnel, upon individual request you may be excused from jury service. Do you wish to claim this as an excuse? YES [ ] NO [ ]

PERSONAL INFORMATION: (Information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual's qualifications for jury service [28 U.S.C. § 1862])

SEX: MALE [ ] FEMALE [ ] RACE: WHITE [ ] BLACK [ ] ASIAN [ ] NATIVE AMERICAN [ ] OTHER [ ]
ARE YOU HISPANIC? YES [ ] NO [ ]

EDUCATION: GRADE SCHOOL [ ] HIGH SCHOOL [ ] COLLEGE [ ] POST COLLEGE [ ]

Do you have any physical or mental infirmity which would impair your capacity to serve as juror?

YES [ ] NO [ ] If yes, please give nature of infirmity. _____
_____
_____

FIGURE 9–9 (Continued)

Have you or any member of your immediate family, to the best of your knowledge, been the subject of any audit or other tax investigation by the Internal Revenue Service? YES [ ] NO [ ]
If yes, please describe:_____

_____

Have you ever been charged with any criminal offense other than a traffic ticket?

YES [ ] NO [ ]

If yes is checked,, indicate the type of case:_____

Are any charges now pending against you for a state or federal crime punishable by imprisonment for more than one year?

YES [ ] NO [ ]

Have you been convicted of a state or federal crime punishable by imprisonment for more than one year?

YES [ ] NO [ ]

If yes is checked, were your civil rights restored? YES [ ] NO [ ]

CIVIL SUITS:

Have you ever filed or been filed against for discrimination? YES [ ] NO [ ]

If yes, give the date and nature of claim:_____

Have you ever been a plaintiff for defendant in a lawsuit? YES [ ] NO [ ]

If yes, give the type of case:_____

Have you ever been a witness in court? YES [ ] NO [ ]

If yes, give the type of case:_____

Have you ever served on a jury? YES [ ] NO [ ]

Please check all of the following which apply:

Grand Jury [ ] Petit Jury [ ] Criminal Case [ ] Civil Case [ ]

Have you ever had any specialized training in any of the following?

Check all that apply: Legal [ ] Paralegal[ ] Medical[ ] Banking [ ] Finance[ ] Engineering[ ]

QUALIFICATIONS FOR JURY SERVICE Please check [/] whether or not you:	YES	NO
Are a citizen of the United States		
Are 18 years of age or older		
Have resided for a period of one (1)year within this Judicial District (Counties in this district are: Atascosa, Bandera, Bexar, Comal, Dimmit, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Medina, Real, & Wilson) Are able to read, write, and understand the English language		
Are able to speak the English language		

Although jury investigation can prove helpful, it must be done discreetly. If a potential juror finds out that your law firm is compiling information and feels that this is intrusive, this can hurt your client at trial.

ETHICS BLOCK

As trial preparation continues, paralegals must talk to many people involved with the case. There are important rules regarding communications with both persons represented by counsel and persons who are unrepresented. Model Rule 4.2 and Model Code DR 7-104 provide that a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to represented by another lawyer in the matter, unless the lawyer has the consent of the other party's lawyer or is authorized by law to communicate with the other party. A lawyer is not prohibited from discussing with an opposing party a matter unrelated to the matter in controversy between the parties.

When you work as a paralegal, you may receive a phone call from the opposing party to a lawsuit. If you know that the party is represented by counsel, you must advise the party that you cannot talk without the prior consent of that party's attorney. If you are uncertain whether the party has an attorney, check with your supervising attorney before you talk with the party.

Model Rule 4.3 and Model Code DR 7-104 provide that if the interests of unrepresented persons have a "reasonable possibility of being in conflict with the interest" of the attorney's client, the attorney can give no advice to the unrepresented persons except to advise them to secure their own attorney. The lawyer has a duty to inform these unrepresented persons that the lawyer is not disinterested in the matter.

SUMMARY

In order to ensure that everything is ready for trial, a paralegal needs to know when the trial will be held. Sometimes the trial is scheduled for a particular date and time, but sometimes you know only the session or term of court in which the case will be heard. For instance, a judge may have thirty cases on the court calendar for a two-week session of civil (noncriminal) court. The judge will hear as many cases as possible during this period. Even if your case number is near the end of the list, you must be ready when the session opens; cases tend to settle quickly when they appear on a trial calendar.

A trial calendar is the court's schedule for cases to be tried. It is sometimes called the docket or trial list. The court may publish the calendar in publications to which attorneys in the area subscribe or may mail copies of the calendar to attorneys. Sometimes attorneys pick up the calendar in the office of the clerk of court. Sometimes, particularly in federal court where one judge is assigned to the case throughout the litigation process, the judge sets a trial date during a pretrial conference.

When a case is not scheduled for a date certain, the attorney may request that the case be given a specific date for trial. This is called a peremptory setting.

A peremptory setting is appropriate when important witnesses have to travel long distances to attend the trial or when other extraordinary circumstances exist.

The attorney-paralegal team should make every effort to be ready to try the case when it is scheduled. If this is impossible, the attorney may request a continuance—that is, a postponement. Of course, opposing counsel may contest the continuance. Whether the continuance is granted depends on many factors, such as the judge involved, how many times the case has been continued before, and the reason for the request.

Often trial attorneys have more than one case scheduled for trial at a given time. It is possible for attorneys to try more than one case in a day if at least one involves a simple matter, such as an uncontested divorce. Otherwise, one of the cases will have to be continued. Local and state court rules usually provide a scheme for deciding which types of cases take precedence. For example, a trial in federal court usually takes precedence over a trial in state court.

Paralegals are often given the task of organizing the file for trial. Depending on the complexity of the case and the preferences of the attorneys who will try it, there are variations in how the file may be arranged. Organizing the file generally involves preparing an outline of the case, organizing the documents into subfiles, and developing an effective method to retrieve the documents.

In outlining the case, remember that the plaintiff 's objective is to prove the essential elements of every claim asserted. The defendant's objective is to show that the plaintiff has not established all the essential elements. A good guide for outlining is your chart of essential elements. The chart should have beneath each element a list of the evidence that will be used to prove that element. A review of the chart will reveal any weaknesses in the evidence and alert the attorney-paralegal team to try to gather more. As you review the file, you can add to the list other evidence that has accumulated. For each exhibit to be used at trial, note which witness will be called on to authenticate it. Add references in discovery materials that address each of the essential elements.

An important part of preparing the file for trial is summarizing lengthy documents so that the important parts are obvious. You may already have prepared digests of depositions. Summarize other lengthy documents such as expert witness reports and discovery materials other than depositions. As you summarize documents, the headings and subheadings for your outline become clear.

It is generally necessary to divide large files into subfiles to make the documents accessible at trial. You may already have some subfiles, but you may need to rearrange some of them. You may have subfiles for particular subjects, time periods, or witnesses. Try to fit every document into an appropriate subfile. A computer search of key terms can aid you.

The next step is to prepare indices and document retrieval systems so that you can find the documents readily. Be sure that every document has been assigned a number. This is usually done as the documents are received throughout the

litigation. A number gives ready identification. Numbers, however, do not tell you a document's content. This is why indices are necessary.

Begin developing an index by identifying index headings. Look at your outline to determine the important headings. There are two primary methods for preparing written indices. One is the manual index card system. Here you prepare an index card for each document, citing the document locator number, short description of the content, date of the document, and author. At the top of each card, write the key word or category number assigned to the document. If the document is important for more than one category, assign more than one number to it. Arrange the cards by categories, and index the documents according to topics on the cards.

A computer document retrieval system also requires assignment of subject codes, which are entered in the computer. Other basic information about the documents is also entered, such as date, document number, and author. After the pertinent information is entered in the computer, a computer search can identify all the documents under a particular topic, and you can prepare the index.

Some attorneys like to use trial notebooks to organize information for trial. A trial notebook is a binder with tabbed dividers, and in each tabbed section are the documents needed for that portion of the trial—from jury selection to closing argument. Some attorneys prefer to put all the documents to be used at trial in the notebook if there is space. An alternative is to keep the documents in subfiles for ready access and to use the trial notebook as an outline of the trial. The notebook will have, among other things, outlines of questions to ask witnesses, pertinent legal research, and outlines of opening and closing arguments.

An important pretrial task is to review the file to ensure that all documents required at trial are ready. One important document is the trial brief, sometimes called a trial memorandum or memorandum of law. The format and length of the trial brief may differ, depending on local rules and dictates of the presiding judge. A commonly used format, however, includes the following sections: cover or title sheet, statement of facts, questions presented, argument, and conclusion. The attorneys usually write the legal argument, but paralegals may help prepare drafts of other parts of the brief, such as the statement of facts. Paralegal tasks also may include shepardizing cases and checking case citations.

In certain types of cases, the court may require the submission of standard court forms to relate financial or other information. In a child-support case, for instance, the parties may be required to submit affidavits of income and expenses. Check state and local rules to see what forms are required.

Paralegals help to prepare witnesses for trial. First inform the witnesses of the trial date and let them know that they will be subpoenaed. Paralegals can prepare the subpoenas for attorney review, make sure that the subpoenas are properly served, and then file the subpoenas with the court. All witnesses should be subpoenaed so that the court can compel their attendance, if necessary.

Paralegals may help attorneys prepare lists of questions to ask witnesses at trial. The attorneys review the questions with the witnesses before trial, and paralegals may arrange the meetings. Paralegals may sit in on the meetings to

observe the witnesses and offer suggestions on how the witnesses can give more effective testimony.

There are some general guidelines for all witnesses to follow. Witnesses should always tell the truth, never answer a question until they understand the question, give no more information than is necessary, quit talking as soon as the attorney objects to a question and not resume talking until the judge rules on the objection, and review their depositions before trial.

Paralegals help prepare the exhibits for trial by arranging the exhibits in the order they will be presented and numbering them and by ensuring that sufficient copies are available for trial. Paralegals also should prepare a list of all the exhibits.

Paralegals help prepare demonstrative evidence for trial. Paralegals may prepare some charts themselves and arrange for graphic artists to prepare others. Paralegals also may need to arrange for enlargements of some charts.

Paralegals also aid in jury investigation. The purpose of jury investigation is to find out background information about the potential jurors so that the attorneys can select jurors most sympathetic to their clients' versions of the facts. The scope of jury investigation depends upon when the list of potential jurors is available. If the list is not available until the day before trial, little investigation can be done.

The client's litigation budget may determine the extent of investigation. Consultants are available to gather information, prepare jury profiles, and even stage mock jury trials to see how the jurors will react to the evidence presented. This is expensive. If the client cannot afford this, paralegals may perform simple investigation such as checking public records to get a general idea of the jurors' background. Jury investigation should be discreet because jurors may be offended.

REVIEW QUESTIONS

1. Which of the following statements are true?
   a. Subpoenas should be served only on the most important witnesses.
   b. Subpoenas are filed with the clerk of court after they are served.
   c. Some state courts allow the attorney, rather than the clerk of court, to issue subpoenas.
   d. all of the above
   e. b and c only
2. Which of the following aids in document retrieval?
   a. computer search for key terms
   b. indices of subfiles
   c. review of discovery materials
   d. all of the above
   e. a and b only
3. Trial notebooks may contain which of the following?
   a. copies of pleadings
   b. outlines of questions to ask witnesses

c. research memos
d. all of the above
e. a and b only

4. Which of the following are other names for court calendars?
   a. docket
   b. pretrial conferences
   c. trial list
   d. all of the above
   e. a and c only
5. Which of the following are factors that influence how much jury investigation the attorney-paralegal team is able to conduct?
   a. the client's budget
   b. how long before the trial the clerk of court releases the jury list
   c. whether juror questionnaires are available before trial
   d. all of the above
   e. b and c only
6. T F A trial brief is sometimes called a trial memorandum.
7. T F One goal of case review is to detect any weaknesses in proof.
8. T F Trial briefs follow a rigid format that may not be altered even by local court rules.
9. T F A paralegal task related to trial briefs may be to check case citations.
10. T F A consideration in preparing for trial is how to authenticate documents to be introduced.

PRACTICAL APPLICATIONS

1. The Wesser case is on the court's calendar for the session that begins two weeks from now. There are thirty cases on the calendar that are scheduled to be reached before the Wesser case. This session of court lasts two weeks. Should you go ahead and inform the witnesses of the tentative trial date?
2. Ms. Heyward checks her personal calendar and sees that she has reserved a beach cottage for the vacation she scheduled which, unfortunately, is for the same two weeks as the upcoming court session. Is the court likely to grant a continuance so that she can take her vacation?
3. What should you do to ensure that the witnesses will come to the trial as requested?

CASE ANALYSIS

Read the excerpt from *Getter v. Wal-Mart Stores, Inc.*, 829 F. Supp. 1237 (D. Kan. 1993) and answer the questions following the excerpt.

MEMORANDUM AND ORDER

VRATIL, District Judge.

Plaintiff brought this diversity action alleging personal injuries due to a slip and fall at defendant's store in Atchison, Kansas. A jury trial from February 2 to

February 4, 1993, resulted in a verdict for defendant. Plaintiff seeks a new trial, asserting that the court erred in (1) admitting the opinion testimony of Emma Jean Bramble and Cynthia Gee; (2) submitting Jury Instruction No. 11; (3) allowing defendant's counsel to inquire into whether plaintiff had taken measures to prevent pregnancy; (4) not striking juror John Agin for cause; and (5) excluding plaintiff's expert witness Keith Vidal. Plaintiff also contends that the jury's verdict is against the weight of the evidence, and that the cumulative effect of the foregoing errors resulted in unfair prejudice to plaintiff.

Motions for new trial are committed to the sound discretion of the trial court. *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984); *Brownlow v. Aman,* 740 F.2d 1476, 1491 (10th Cir.1984). Moreover, the court should "exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *McDonough,* 464 U.S. at 553, 103 S.Ct. at 848. . . .

Plaintiff also argues that the court erred in refusing to strike prospective juror John Agin for cause. During voir dire Mr. Agin disclosed that his wife was an employee of defendant and that he and his wife owned stock in defendant Wal-Mart Stores, Inc. Plaintiff moved to strike Mr. Agin for cause. The court thoroughly questioned Mr. Agin whether he could be a fair and impartial juror in the case, and the court was more than satisfied—by virtue of his demeanor, his responses, and the emphatic, clear tone of his statements—that Mr. Agin could and would serve as an unbiased juror. The determination of a challenge for cause is within the sound discretion of the trial court. *Hopkins v. County of Laramie,* 730 F.2d 603, 605 (10th Cir.1984). The court does not believe that it abused its discretion in refusing to strike Mr. Agin for cause.

The remaining arguments raised by plaintiff were addressed by the court in its prior written rulings or at trial. The court finds nothing that would warrant a new trial. The court believes that its rulings were not erroneous and that it did not prejudice plaintiff's substantial rights at trial. The court also finds that the jury's verdict was supported by overwhelming evidence. As a result, even if the trial court erred in the foregoing respects, such error did not materially prejudice plaintiff's right to a fair trial and plaintiff's motion should therefore be denied.

IT IS THEREFORE ORDERED that *Plaintiff's Motion for New Trial* (Doc. # 93) should be and hereby is overruled.

1. This was a tort action filed in federal court. For what type of injury did the plaintiff seek to recover damages?
2. In whose favor did the jury return a verdict?
3. What type of motion was before the court in this decision?
4. One ground for the motion for a new trial was the court's refusal to strike a prospective juror. In this case, it appears that there was no investigation of the jury prior to trial. Why did the plaintiff contend that juror John Agin could not be an unbiased juror?
5. Why did the judge find that John Agin could serve as an unbiased juror?
6. Although this question is not addressed in the court's decision, do you think that the judge would have allowed Mr. Agin to be a juror if a pretrial investigation had disclosed his connections with Wal-Mart?

ENDNOTES

1 This form is used in New York. Forms vary among different states.
2 If you do not fully understand these terms, refer to Chapter 11, in which they are explained.

Chapter 10

PRETRIAL CONFERENCES, ALTERNATIVE DISPUTE RESOLUTION, AND SETTLEMENT

You and Ms. Heyward are reviewing your list of pending cases. Ms. Heyward asks, "When is the final pretrial conference in the Wesser case scheduled?"

"It is in two weeks," you answer. "What do we need to do before then?"

Ms. Heyward replies, "For today, organize the file and review all the facts to which we have stipulated. Review the stipulations on the admissibility of evidence also. For all the remaining issues, draft a statement of issues, and we will review that tomorrow."

"Does Judge Haynes have any specific orders or instructions for final pretrial conferences?" you inquire.

"No, he follows the local rules exactly. You may want to review those for tomorrow also."

Glancing at your watch, you get up to go to your office. You tell Ms. Heyward, "I'll get started now, so I can be finished tomorrow."

PRETRIAL CONFERENCES

The text has saved the discussion of pretrial conferences until now, just before our discussion of trial, because just before trial is when the final pretrial conference takes place. Usually, however, at least one pretrial conference precedes the final conference, and there may be several pretrial conferences before the final pretrial conference.

Rule 16 of the Federal Rules of Civil Procedure addresses pretrial conferences. Refer to Figure 10–1, which shows FRCivP 16. Note that FRCivP 16 grants the judge a great deal of discretion in conducting pretrial conferences.

In part because FRCivP 16 provides so much flexibility, many judicial districts have local rules that delineate more specifically their procedure for pretrial conferences. Most local rules operate within the broad guidelines of FRCivP 16 but state with greater particularity the exact procedure and deadlines. In addition, judges have personal preferences concerning the conduct of pretrial conferences, whether published or not, and the attorney-paralegal team must be familiar with any special procedures that a particular judge requires.

FIGURE 10–1 FRCivP 16

RULE 16. Pretrial Conferences; Scheduling; Management

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating the settlement of the case.

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

(c) Subjects to be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

FIGURE 10–1 (Continued)

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 87(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

One pretrial task for paralegals is to ensure that the attorneys have all local rules and special judicial requirements before them and prepare for the pretrial conferences in accordance with those rules and requirements.

SIDEBAR In federal court actions, paralegals may need to check with the judge's law clerks for special procedures. In state courts, after you check local rules of practice, you may need to check with the clerk of court and/or with attorneys in your firm who have appeared before the judge to whom the case is assigned.

There have always been variations in procedures regarding pretrial conferences among the federal courts. Since the courts formulated Civil Justice Expense and Delay Reduction Plans, however, the individual courts' procedures have become increasingly detailed and, in some instances, divergent.

Types of Pretrial Conferences

Paralegals may initially become confused when looking at various local federal court rules because they have different requirements and may even use different names for the pretrial conferences. For instance, some courts term the first pretrial conference the *initial pretrial conference*, and some use the term *scheduling conference*. The subjects addressed will most likely be the same, regardless of the term used. The only way to sort out the names and procedures for pretrial conferences is to read the local rules.

Generally, federal courts require two pretrial conferences. The first is called the ***initial pretrial conference***, or ***scheduling conference***, which is held early in the litigation for the purpose of setting guidelines and deadlines to control the remainder of the litigation process. The second is the *final pretrial conference*, which is usually held a few weeks before trial. At the final pretrial conference, the judge rules on all pending motions and discusses trial procedures such as the filing of requests for jury instructions. The attorneys and judge discuss settlement possibilities and other matters.

An important part of pretrial procedure is the ***pretrial order***, an order setting out matters decided at the pretrial conference. FRCivP 16(e) requires that after any pretrial conference, an order be entered reciting the action taken. FRCivP 16(e) states that the pretrial order controls the "subsequent course of the action unless modified by a subsequent order." The text discusses the content of pretrial orders as the conferences themselves are examined.

The Initial Pretrial Conference

Under this heading, the text discusses all pretrial conferences except the final one. A judge may hold multiple conferences if they become necessary. Frequently only one pretrial conference is necessary before the final pretrial conference.

The precise procedure for the initial pretrial conference may differ according to local court rules and the judge's special instructions. The aim of the initial pretrial conference, however, is the same regardless of the procedure. FRCivP 16(a) sets forth the general purposes: to expedite the disposition of the action, to establish early control so that the case will not be protracted because of lack of management, to discourage wasteful pretrial activities, to improve the quality of trial preparation, and to facilitate settlement.

The goal of the first pretrial conference is to decide the contents of a scheduling order, which will govern the course of the remainder of the litigation. FRCivP 16(b) requires federal judges or magistrate judges to enter a scheduling order that limits the time to join other parties and to amend the pleadings, to file motions, and to complete discovery. These provisions are mandatory. Optional

subjects that may be addressed in the scheduling order are modifications in the times for mandatory disclosures under FRCivP 26, the dates for additional pretrial conferences and for trial, and "any other matters appropriate in the circumstances of the case."

Timing of Scheduling Conferences. There is a connection between the scheduling conference and the discovery planning meeting under FRCivP 26(f). Rule 16 provides that the scheduling conference is to take place after the 26(f) discovery planning meeting. This makes sense because any agreements that the attorneys can reach on discovery will aid the court in setting the discovery deadlines that FRCivP 16 requires.

SIDEBAR Remember that not every federal court requires a 26(f) meeting. In addition, some local rules set a time frame for pretrial conferences that differs somewhat from FRCivP 16. The attorney-paralegal team must be aware of these variations.

FRCivP 16 also sets the deadline by which the scheduling order must be issued. That deadline is "as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant." Permission of the court is necessary to extend this deadline. Thus, the scheduling conference takes place early in the litigation, as it must in order to achieve its goal of governing the remainder of the litigation.

SIDEBAR Some local court rules provide earlier deadlines for holding scheduling conferences but remain within the outside deadlines stated in FRCivP 16.

Other Subjects for Consideration at Pretrial Conferences. FRCivP 16(c) specifies a number of subjects that may be considered at pretrial conferences. The goal of covering these suggested subjects is to expedite the litigation and promote cooperation among the parties. These subjects anticipate problems that can bog down a lawsuit, such as multiple amendments to the pleadings. Rule 16 encourages the parties to consider early in the litigation ways to settle their dispute. Thus, FRCivP 16(c)(9) specifies that pretrial conferences may include discussion of various methods of alternative dispute resolution, which is discussed in detail later in this chapter.

Variations in Pretrial Conferences as a Result of Differentiated Case Management Systems. Recall from Chapter 5 that many federal courts divide cases into categories in order to manage them more precisely. Some courts have different requirements for pretrial procedures, including pretrial conferences, depending upon the category to which a case is assigned. Further, some types of cases are

exempt from assignment to case management tracks and may be exempt from scheduling orders. Again, the local rules must be studied in detail.

Often the same types of cases that are exempt from the mandatory disclosure of FRCivP 26(a)(1) and the discovery conference of FRCivP 26(f) are likewise exempt from scheduling orders. This is true in the United States District Court for the Northern District of Florida, which exempts from these three requirements a number of types of cases, such as deportation actions, freedom of information actions, and government collection actions.

Local court rules may impose more stringent pretrial conference requirements for cases that are considered complex and are assigned to a special management track. For instance, the United States District Court for the Eastern District of Pennsylvania requires two pretrial conferences for cases on the special management track. At the initial pretrial conferences, subjects not even suggested in FRCivP 16 must be discussed and included in scheduling orders. Refer to Figure 10–2, which reprints a portion of that local rule. At the second pretrial conference, the parties must discuss a wide array of topics aimed at determining whether the case will settle.

SIDEBAR The initial pretrial conference procedures may take place with a United States magistrate judge, rather than with the judge assigned to the case. The Federal Rules of Civil Procedure allow magistrates to preside over a wide range of pretrial activities, and this includes pretrial conferences.

When the attorneys meet with the judge or magistrate, the manner in which the meeting is held can vary considerably. Some judges have informal meetings in chambers with no court reporter in attendance. Other judges hold more formal conferences in the courtroom, with a court reporter present. The attorney-paralegal team should know the method the judge or magistrate uses so that it can prepare properly.

The Final Pretrial Conference

FRCivP 16(d) states the primary purpose for the final pretrial conference: to "formulate a plan for trial, including a program for facilitating the admission of evidence." Another general purpose of the final pretrial conference is to discuss any possibilities for settlement before trial.

The final pretrial conference is usually held several weeks before the scheduled trial date. By this time, the attorneys have completed sufficient trial preparation to know each party's position and whether settlement may still be possible. Chances are that the attorneys will have discussed settlement already, but the final pretrial conference is a time when many cases are settled. Sometimes the attorneys have frank discussions with the judge about the merits of each party's contentions, and this can facilitate settlement.

FIGURE 10–2 Local Rule for Cases on Special Management Track

Section 3:01. Initial pretrial conference

In all such cases a scheduling conference shall be scheduled by the assigned judge or magistrate within 30–60 days after the filing of the complaint. Prior to such conference, the parties shall confer and provide the court with a proposed case management plan. The proposed plan should address the following items:

(1) designation of lead and liaison counsel and the roles and responsibilities of each;
(2) deposition guidelines;
(3) protective orders;
(4) if the case is a class action, a proposal for class discovery and a timetable for briefing together with a hearing date;
(5) identification of any summary discovery and its timing;
(6) possible Federal Rule of Civil Procedure 12 or summary judgment motions and a proposed timetable for briefing and hearing; and
(7) the possibility of bifurcation.

During the initial pretrial conference, counsel shall be prepared to discuss with the court procedures for resolving discovery disputes. The court shall determine the procedure for resolving discovery disputes—for example, by attempting to resolve among the parties, by making a conference call to the judge's chambers, by bringing a motion to compel, or by imposing sanctions where one party has taken an unreasonable position.

Where it appears that cases are pending in several districts and a motion for consolidation has been filed before the Judicial Panel on Multi District Litigation, the court shall determine what discovery is pending in the other cases and require the parties to coordinate with such discovery.

At the conclusion of the first or initial pretrial conference, the court shall issue a case management order, set the date for the second pretrial conference and establish the due date for the next preconference statement. The second pretrial conference shall be held three to four months after the initial conference.

The procedure for the final pretrial conference may differ among judicial districts. Just as they do with initial pretrial conferences, judges may conduct formal hearings in open court or hold informal discussions in chambers.

Local court rules often require opposing attorneys to meet prior to the final pretrial conference in order to prepare for it. One purpose of the final pretrial conference is for the attorneys to state the matters on which the parties stipulate agreement. When the attorneys meet before the conference, they can determine the matters to which they can stipulate. In particular, they can determine the documents for which they are willing to stipulate authenticity. Bear in mind that the purpose of the final pretrial conference and preparations for it is to make the trial itself go smoothly by narrowing the issues and exchanging information. The resolution of evidentiary questions before trial can eliminate

the need for lengthy arguments regarding evidence during trial, resulting in a happier jury and judge.

Some local court rules specify in detail the subjects that must be addressed at the final pretrial conference and included in the pretrial order. Refer to Figure 10–3, which reprints rule 24.03 of the United States District Court for the Eastern District of North Carolina. Rule 24.05 sets forth a sample pretrial order, illustrating the form that is sufficient to comply with the local court rules. Refer to Figure 10–4, which reprints rule 24.05.

FIGURE 10–3 Local Rule for Pretrial Conferences

24.03 Form of Pre-trial Order. The pre-trial order shall be prepared in one sequential document without reference to attached exhibits or schedules and shall contain the following in five separate sections, numbered by roman numerals, as indicated:

(a) *I. Stipulations.* Stipulations covering jurisdiction, joinder, capacity of the parties, all relevant and material facts, legal issues and factual issues.

(b) *II. Contentions.* Contentions covering matters on which the parties have been unable to stipulate, including jurisdiction, misjoinder, capacity of the parties, relevant and material facts, legal issues and factual issues. Claims and defenses as to which no contentions are listed in the pre-trial order are deemed abandoned.

(c) *III. Exhibits.* A list of exhibits that each party may offer at trial, including any map or diagram, numbered sequentially, which numbers shall remain the same throughout all further proceedings. Copies of all exhibits shall be provided to opposing counsel not later than the attorney conference provided for in Rule 24.02. The court may excuse the copying of large maps or other exhibits. Except as otherwise indicated in the pre-trial order, it will be deemed that all parties stipulate that all exhibits are authentic and may be admitted into evidence without further identification or proof. Grounds for objection as to authenticity or admissibility must be set forth in the pre-trial order. When practicable, trial exhibits should carry the same number as in the depositions and references to exhibits in depositions should be changed to refer to the trial exhibit number.

(d) *IV. Designation of Pleadings and Discovery Materials.* The designation of all portions of pleadings and discovery materials, including depositions, interrogatories and requests for admission that each party may offer at trial by reference to document volume, page number, and line. Objection by opposing counsel shall be noted by document volume, page number and line, and reasons for such objections shall be stated. It is not necessary to designate a deposition, or any portion of a deposition, that is to be used solely for cross-examination.

(e) *V. Witnesses.* A list of the names and addresses of all witnesses each party may offer at trial, together with a brief statement of what counsel proposes to establish by their testimony.

FIGURE 10–4 Sample Pretrial Order

24.05 Sample Pre-trial Order. A pre-trial order in the following form shall be sufficient to comply with these rules:

JOHN DOE, by his guardian ad litem, JANE DOE, Plaintiff	)	No. 5:94-CV-125-F
vs.	)	PRE-TRIAL ORDER
XYZ CORPORATION, Defendant	)	

Date of Conference: August 12, 1990

Appearances: John Y. Lawyer, Raleigh, North Carolina for plaintiff; Sam X. Attorney, Fayetteville, North Carolina for defendant.

I. STIPULATIONS.

A. all parties are properly before the court;

B. the court has jurisdiction of the parties and of the subject matter;

C. all parties have been correctly designated;

D. there is no question as to misjoinder or nonjoinder of parties;

E. plaintiff, a minor, appears through his guardian;

F. Facts:

1. Plaintiff is a citizen of Wake County, North Carolina.

2. Defendant is a New York corporation, licensed to do business and doing business in the State of North Carolina.

G. Legal Issues:

May a nine-year-old minor be guilty of contributory negligence?

H. Factual Issues:

1. Was plaintiff injured and damaged by the negligence of the defendant?

2. What amount, if any, is plaintiff entitled to receive of defendant as compensatory damages?

II. CONTENTIONS.

A. Plaintiff

1. Facts:

(a) That Richard Roe was driving defendant's truck as defendant's agent.

(b) That Richard Roe was negligent in that he drove at an excessive speed and while under the influence of intoxicating liquor.

2. Factual Issues:

FIGURE 10–4 (Continued)

What amount, if any, is plaintiff entitled to recover of defendant as punitive damages?

B. Defendant

1. Facts:

That Richard Roe, a former employee, took defendant's truck without authorization and, at the time of the accident, was not the agent or employee of defendant.

2. Factual Issues:

Did plaintiff, by his own negligence, contribute to his injury and damage?

III. EXHIBITS.

A. Plaintiff

Number	Title	Objection
1	Patrol Report	Hearsay
2	Photo of Plaintiff	

B. Defendant

Number	Title	Objection
1	Photo of Scene	
2	Scale Model	

IV. DESIGNATION OF PLEADINGS AND DISCOVERY MATERIALS

A. Plaintiff

Documents	Portion	Objection	Reason
Plaintiff's first set of interrogatories	Nos. 1, 8 and 9	No. 8	Privilege
Deposition of Richard Roe	Vol. 1 line 6, p. 1 thru line 5, p. 6	Line 6, p. 1 thru line 2, p. 7	Hearsay

B. Defendant

None

V. WITNESSES

A. Plaintiff

Name	Address	Proposed Testimony
John Jones	615 Rains Street Raleigh, N.C.	Facts surrounding accident, extent of
Frank Flake	Selma, N.C.	Speed of defendant's vehicle, intoxication of driver
Joe Rock	Temple, AR	

FIGURE 10–4 (Continued)

B. Defendant

All witnesses listed by plaintiff.

Name	Address	Proposed Testimony
Sam Smith	4 Appian Way Rome, Italy	Facts surrounding the theft by driver of the vehicle

TRIAL TIME ESTIMATE: _____ days

_____
JOHN Y. LAWYER
Counsel for Plaintiff

_____
SAM X. ATTORNEY
Counsel for Defendant

APPROVED BY:

_____
WALLACE W. DIXON
U.S. MAGISTRATE JUDGE
_____, 1994

Once the final pretrial order is approved by the judge, it governs the procedure for the trial. The judge also may inform the attorneys of certain procedures for the trial, such as the number of copies of exhibits the attorneys must have available, the manner of marking exhibits, and the procedure for giving the judge proposed jury instructions. The judge sets a tentative or actual trial date. Finally, the judge rules on pending motions, such as motions on the admission of evidence.

This discussion has referred to the presence of attorneys at pretrial conferences. In cases where parties are not represented by counsel, the parties themselves must perform the attorney tasks described. Even when parties are represented by counsel, those parties should be available, either in person or by telephone, to discuss settlement possibilities.

Pretrial Conferences in State Court Actions

Pretrial conferences in state court actions vary according to the state rules of civil procedure and local court rules. The goals are the same as those at the federal level: to facilitate a smooth trial and a possible settlement of the case. The content of the final pretrial order is likely to be substantially similar to the order shown in Figure 10–4.

The procedures for the attorneys and the judge in state court, however, may be different from those in federal court. In state court, there may be only one

pretrial conference—the final conference. Attorneys in a state court action may meet and prepare a final pretrial order without ever actually meeting with the judge. State rules usually provide that the final pretrial order must be filed a certain number of days before the first day of the session in which the case is scheduled to be tried. Final pretrial conferences may be brief and may be held the morning that trial begins. Local rules often require the attorneys to inform the trial court administrator well ahead of trial if they anticipate a lengthy final pretrial conference so that the conference can be scheduled before the court session begins. This minimizes disruption and prevents the judge from being tied up with pretrial conferences when he or she could be in the court hearing the cases.

Some state courts implement status reports in addition to pretrial conferences. The purpose of status reports is to inform the court of the status of the lawsuit and ensure that the litigation is proceeding in a timely manner. Instead of appearing before the judge to report their progress, the attorneys may submit a written status report to the judge's clerk.

The Paralegal's Pretrial Conference Duties

Tasks performed by paralegals for initial and final pretrial conferences depend mainly on the procedures used by the court. Paralegals may prepare drafts of the lists of witnesses and exhibits, together with summaries of the witnesses' testimony. Paralegals may gather exhibits and organize and number them for use at the pretrial conference. Paralegals may gather and present to the attorney all motions on which the judge needs to rule. As part of their docket control systems, paralegals also keep track of the dates that pretrial conferences will be held and deadlines for exchanging information or submitting proposed orders. Paralegals can ensure that the attorneys know the exact procedures used in a particular court and by a particular judge. They should ensure that files are in order and that all needed documents can be located easily. As they do throughout litigation, paralegals keep clients informed of developments in their cases and make sure clients are present when needed.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

Litigation flourishes in the United States. Historian Jerold Auerbach has contemplated the view that future historians will form as they sift through our chronicles of litigation. He wrote:

> Five hundred years from now, when historians sift through twentieth-century artifacts, they doubtless will have as little comprehension of American legal piety as most Americans now display toward medieval religious zeal. The analogy is illuminating: the court room is our cathedral, where contemporary passion plays are enacted.[1]

Statistics support Auerbach's 1983 observation. The number and complexity of disputes have increased.[2] Complex lawsuits, such as liability for environmental clean-up or antitrust cases, may absorb years of the time and energy of

attorneys, paralegals, and the courts. Because of the sheer volume of the court's case loads, a simple case may take years to come to trial.

A clear call for faster, less expensive resolution of disputes has emerged. The Civil Justice Reform Act of 1990 mandated every federal district court to study and recommend measures to terminate litigation short of trial and even short of pretrial motions such as summary judgment.

Without prompting from Congress, the private sector had already begun to seek faster, less expensive, and more flexible means of dispute resolution. New methods of settling disputes have emerged both inside and outside the courts. These methods have been labeled collectively ***alternative dispute resolution (ADR),*** "a broad range of mechanisms and processes to assist parties in resolving differences."[3] Alternative dispute resolution is intended to supplement court adjudication, not replace it.[4] Attorney-paralegal teams have for years pursued settlement of cases, and indeed most disputes are settled before trial. As increasing numbers of state and federal courts require participation in ADR procedures, however, paralegals must be increasingly aware of the general characteristics of ADR methods as well as the specific methods that are encouraged or even required.

ADR Methods

There are many forms of alternative dispute resolution, but they share a number of common characteristics. One commentator has described the common elements as follows:

> They exist somewhere between the polar alternatives of doing nothing or escalating conflict.
>
> They are less formal and generally more private than ritualized court battles.
>
> They permit people with disputes to have more active participation and more control over the processes for solving their own problems than do traditional methods of dealing with conflict.
>
> Almost all of the new methods have been developed in the private sector, although courts and administrative agencies have begun to borrow and adapt some of the more successful techniques.[5]

Many terms related to ADR are used loosely, even interchangeably. Yet there are distinct variations among ADR methods, particularly with regard to the degree of involvement of a neutral third party and the degree of formality.

Negotiation. The least formal method of ADR is ***negotiation***, an informal discussion of a mutually acceptable agreement by the disputants themselves.[6] The discussion is usually voluntary, informal, and unstructured.[7] There is no third-party facilitator.

Mediation. At a more formal level is ***mediation***, an ADR method in which the disputants select a neutral third party to assist them in reaching a mutually acceptable agreement.[8] Mediation is usually private, involuntary, and informal. Many state courts suggest or require mediation in certain types of lawsuits, such

as child custody, before the lawsuits can proceed to trial. The neutral third party may be called a ***mediator*** or a ***neutral*** and does not have the power to make a binding decision for the disputants.

Arbitration. Even more formal is ***arbitration***, a method of settling disputes by submitting the disagreement to a person (an ***arbitrator***) or a group of individuals (an ***arbitration panel***) for decision.[9] The most notable difference between arbitration and the less formal methods of ADR is that the arbitrator makes the actual decision for the disputants. This stands in contrast to mediation and negotiation, in which the neutral third party helps the disputants to reach their own agreement. The arbitrator is not always a lawyer but must be a person who is neutral and is familiar with the type of dispute in question.

There are different types of arbitration, and it is important for paralegals to understand some basic definitions.

Types of Arbitration. *Binding arbitration* means that the parties agree to abide by the decision of the arbitrator. The parties agree before arbitration begins that they will be bound by the arbitrator's decision and that they will not bring the dispute to trial even if they are unhappy with the outcome.

Nonbinding arbitration means that the parties will not be bound by the arbitrator's decision. If they do not accept the arbitrator's decision, they may proceed with a regular trial before a judge or jury. You may wonder why parties participate in arbitration if they may not accept the arbitrator's resolution of their dispute. The reason is that at the very least it is worth a try to resolve the dispute through arbitration and thus avoid the time and expense that a trial requires. Through arbitration the parties can test their respective strengths and weaknesses, but they should enter arbitration with the sincere intent of resolving the dispute rather than using the arbitration process as a means of discovery.

Arbitration may be either mandatory or voluntary. *Mandatory arbitration* means that the parties must try to resolve their dispute through arbitration before they are granted a full-blown trial. *Voluntary arbitration* is when the parties agree to try arbitration even though it is not required.

Arbitration may be court-annexed or private. In *court-annexed arbitration*, the arbitration procedure is governed by local court rules that set forth that court's arbitration process. Parties generally file with the clerk of court a statement that they wish to enter arbitration, and the court maintains a list of approved arbitrators from whom the parties may choose. *Private arbitration* is often administered through centers such as the Private Adjudication Center at Duke University. Private arbitration centers maintain a list of approved arbitrators from whom the parties may choose. The centers establish some procedural guidelines, such as rules governing the advancement of the costs for arbitration and the filing of prehearing briefs.

Parties also may set up their own private arbitration procedure—for example, by signing a settlement contract that provides that they will dismiss their lawsuits and settle their dispute by binding arbitration. The parties' attorneys then choose an arbitrator or panel of arbitrators and present their evidence in a

manner agreed on by the parties, their attorneys, and the arbitrator. If the parties agree on binding arbitration and one party falls to comply with the arbitrator's decision, the other party can file a lawsuit for specific performance of the settlement contract.

With both private and court-annexed arbitration, the rules often are flexible, giving the parties some choices about the manner in which their arbitration will proceed. For instance, the parties may have some flexibility in the manner in which they present their evidence to the arbitrator. They may have a formal hearing like a trial, or they may submit their written evidence and then meet to allow the arbitrator to ask questions in a fairly informal setting. Other arbitration programs allow only the submission of written evidence and briefs, and no hearing.

Procedure in Court-Annexed Arbitration. Arbitration procedures may vary tremendously among various federal district courts. The attorney-paralegal team must carefully follow the local rules for each particular federal district court. Most courts have significantly expanded their rules for arbitration in recent years, and some courts have very detailed rules, together with particular forms that must be used.

SIDEBAR This is equally true for state courts, which are also increasingly implementing both voluntary and mandatory participation in court-annexed ADR.

Paralegals who look up the local court rules for alternative dispute resolution may find a section or several sections devoted to detailed rules addressing topics such as certification of neutrals, procedure for arbitration hearings, and procedures for summary jury trials. In contrast, some federal courts have few rules for ADR. They may just have inserted general statements in their Civil Justice Expense and Delay Reduction Plan and referred the court-annexed mediation or arbitration to a committee for further study and recommendations. After an overview of additional types of ADR, the text examines local rules for court-annexed arbitration in three federal district courts in order to illustrate the variety of procedures and details found in local court rules.

"Hybrid" Types of ADR. One of the advantages of ADR is flexibility. When parties are involved in litigation, they are tied to the courts' rules. In ADR, the parties often combine various ADR methods to produce a "hybrid process."[10] One hybrid method is termed ***private judging***. Here, a case is referred by a judge or by agreement of the parties to a mutually agreeable neutral decision maker. The parties present their evidence and arguments to the private judge, and there is generally flexibility in the form of the presentation. The private judge reaches a binding decision that is entered by the trial court. The judgment may be appealed through the regular appeals process.[11]

Another hybrid ADR method is ***neutral fact-finding***. Here, a neutral expert selected by the court or the parties resolves disputes that involve technical

questions. This is essentially the informal use of expert witnesses and is quicker, less formal, and less expensive than presentation of expert testimony at trial. The neutral expert addresses complex issues such as liability for environmental clean-up or technical issues involved in patent infringement. The neutral expert can narrow the issues, clarify the facts, explain industry standards, and indicate which party is at fault.[12]

An ***ombudsman*** (also called *ombuds* or *ombudspeople*) is a special type of neutral who investigates complaints and issues a nonbinding recommendation when an institution such as a university is involved in a dispute. Other types of institutions that may use ombudspeople include hospitals and government agencies. This is a voluntary, private, and nonbinding ADR procedure that uses a neutral with particular expertise to reach a faster, less expensive resolution of a dispute.[13]

A more elaborate hybrid is the ***mini-trial***, which has been described as "a private, consensual proceeding where counsel for each party to a dispute makes a truncated presentation of his or her best case before the top official with settlement authority for each side and usually, also, a neutral third-party advisor."[14] At the conclusion, if the parties are unable to settle their dispute, the advisor delivers a nonbinding opinion addressing specific issues and the likely outcome of an actual trial. The parties may then pursue further settlement discussions.[15]

A variant of the mini-trial uses an actual jury and is called a ***summary jury trial***. The jurors are chosen from the regular jury pool. The summary jury trial is held in the courtroom, a judge or magistrate presides, and the attorneys for each side present a shortened version of their evidence, limited to evidence admissible at trial. The jury issues an advisory verdict and may explain how they reached their conclusions. The summary jury trial is used for complex cases, and its purpose is to help the parties reach a settlement without a protracted trial.

Arbitration Rules in Specific Federal District Courts

Examining in more detail the arbitration rules in particular federal district courts will provide some illustrations of rules dealing with arbitration. The United States District Court for the Eastern District of Pennsylvania has detailed ADR rules. The United States District Court for the Eastern District of New York has not only detailed rules but also standard forms, ranging from the order to refer a case to arbitration to entry of judgment when the parties choose not to appeal the arbitration award. Other federal district courts, such as the Western District of Texas, do not have many rules for arbitration but do contain details addressing matters such as selection of neutrals. The following sections illustrate court rules for determining what types of cases must go to arbitration, rules for selecting a neutral, rules that set forth procedures for arbitration hearings, arbitration awards, and rules for requesting a trial *de novo* when the parties are dissatisfied with the arbitration award.

Cases Eligible for Arbitration. Many federal district courts allow or even require arbitration in civil cases in which only monetary damages are being sought and the amount of damages is below a certain dollar amount, such as $50,000 or

$100,000. Refer to Figure 10–5, which reprints the rule from the Eastern District of New York for cases eligible for arbitration. Here, the court requires arbitration when "monetary damages only are being sought in an amount not in excess of $50,000, exclusive of interest and costs." Counsel must certify the amount of recoverable damages, using the court's form illustrated in Figure 10–6. As in many other district courts, certain types of cases are exempt from the arbitration requirement. These include appeals of the denial of Social Security disability benefits and prisoners' civil rights cases. Further, when the requested monetary damages exceed the designated dollar amount, the parties may nevertheless agree to submit to arbitration.

FIGURE 10–5 Local Rule Regarding Cases Eligible for Arbitration

2. Cases eligible for arbitration

The following cases are eligible for compulsory arbitration:

A. As of January 1, 1986, all civil cases (with the exception of social security cases and prisoners' civil rights cases) shall be designated and processed for arbitration in which monetary damages only are being sought in an amount not in excess of $50,000, exclusive of interest and costs.

B. The parties may, by written stipulation, agree to submit any civil case to arbitration in which monetary damages only are being sought in an amount in excess of $50,000, exclusive of interest and costs.

FIGURE 10–6 Form for Certifying the Amount in Controversy

Certification of Counsel Re: Recoverable Damages (Arb-1)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____ x

CERTIFICATION
OF COUNSEL
RE: RECOVERABLE DAMAGES

_____ x

I _____, counsel for _____ do hereby certify pursuant to the Local Arbitration Rule, Section 3(C), that to the best of my knowledge and belief the damages recoverable in the above-captioned civil action exceed the sum of $50,000 exclusive of interest and costs.

Dated: _____

_____
Counsel for

_____

cc: Arbitration Clerk

FIGURE 10–7 Local Rule for Cases Eligible for Compulsory Arbitration

> **3. Cases Eligible for Compulsory Arbitration.** A. The Clerk of Court shall, as to all cases filed on or after May 18, 1989, designate and process for compulsory arbitration all civil cases (including adversary proceedings in bankruptcy by excluding, however, (1) social security cases, (2) cases in which a prisoner is a party, (3) cases alleging a violation of a right secured by the United States Constitution, and (4) actions in which jurisdiction is based in whole or in part on 28 U.S.C. § 1343) wherein money damages only are being sought in an amount not in excess of $100,000, exclusive of interest and costs. All cases filed prior to May 18, 1989, which were designated by the Clerk of Court for compulsory arbitration shall continue to be processed pursuant to this Rule.

The United States District Court for the Eastern District of Pennsylvania has an even more detailed rule for determining which cases are eligible for compulsory arbitration, reprinted in Figure 10–7. This rule designates for arbitration cases in which the damages sought do not exceed $100,000. Like the New York rule, the Pennsylvania rule exempts several types of cases from compulsory arbitration and allows the parties to agree to submit to arbitration when the damages sought exceed the dollar limit. The Pennsylvania rule gives more detail than the New York rule for figuring the damages sought, including the amount requested in any counterclaim.

In contrast, the United States District Court for the Western District of Texas gives far less detail for selection of cases for arbitration. Refer to Figure 10–8. Arbitration is not mandatory or binding, and the rule specifies no dollar amount or type of case. Rather, the rule allows the court, on its own motion or that of the parties, to order participation in a wide range of alternative dispute methods.

FIGURE 10–8 Local Rule for Selection of Cases for Arbitration

> **(b) Referral to ADR.** The Court on its own motion or upon the motion of either party may order the parties to participate in a nonbinding alternative dispute resolution proceeding, including nonbinding arbitration, early neutral evaluation, mediation, minitrial, or moderated settlement conference. The order may further direct the parties to bear all expenses relating to alternative dispute resolution proceedings in such amounts and such proportions as the Court finds appropriate, but in no event should apportioning of costs constitute a penalty for failing to arrive at a settlement. The alternative dispute resolution proceeding shall begin at a date and time selected by the neutral or neutrals, but in no event later than 45 days after the entry of the order compelling participation in the proceeding.

Selection and Certification of Neutrals. In the three district courts used for examples, all have rules that set the minimum requirements for a lawyer to be certified as a neutral or arbitrator. All require that lawyers must, at a minimum, be admitted to practice in that particular district and must have been a member of the bar of the highest court of any state or the District of Columbia for at least five years. Further, the chief judge for the district court must certify that the lawyer is competent to perform the duties of an arbitrator or neutral.

Refer to Figure 10–9, which reprints the rule for selection of arbitrators in the United States District Court for the Eastern District of New York. The rule sets forth not only the minimum requirements for certification but also the procedure for selecting the arbitrators and the amount of compensation the arbitrators receive.

FIGURE 10–9 Local Rule for Selection of Arbitrators

6. Selection of arbitrators

The Chief Judge or a judge or judges authorized by Chief Judge to act certifies the attorneys who may serve as arbitrators. In order to qualify for certification as an arbitrator, an attorney must file his application for certification with the court attesting to the fact that he has been admitted to practice before our court and has been a member of the Bar for at least five years. (Exhibit B) In addition, the attorney is asked to describe the nature of his practice of law since admission to the Bar and the nature of his current area of practice. A list of attorneys so certified, with a copy of the certification order signed by the certifying judge attached, is maintained by the clerk's office. (Arb-16) The arbitration hearing shall be held before a panel of three arbitrators, one of whom shall be designated randomly as chairperson of the panel. One arbitrator from each of three separate wheels divided by nature of practice—plaintiff, defendant, or neither predominating—shall be chosen through a random selection process from among the attorneys certified as arbitrators by the Court. The parties may also agree to have the hearing before a single arbitrator. (Arb-15)

To accomplish a random selection of arbitrators, numbered cards corresponding to numbers on the master list of attorneys certified are placed in three separate wheels. For each case referred to arbitration one card will be selected at random from each wheel. The three cards will then be placed in a box and the first person randomly drawn will be designated chairperson of the arbitration panel. In the event one of the arbitrators becomes unavailable for the hearing date, a substitute arbitrator will be randomly selected from a list of arbitrators who have volunteered to serve on a "short-notice" basis. (Arb-14)

Arbitrators selected by the court receive $75 for each case assigned to them for arbitration. Where the parties have agreed to arbitration before a single arbitrator chosen at random, that arbitrator shall be compensated $225 for services.

Procedure for Arbitration Hearings. The local rules for arbitration hearings in the Eastern District of New York and the Eastern District of Pennsylvania are quite similar. The New York rule is reprinted in Figure 10–10 for reference. It specifies that hearings are held in the courthouse and includes requirements for scheduling the hearings. The rule requires counsel to report settlements that may occur prior to the hearing and gives the court power to impose sanctions on parties who do not cooperate meaningfully in the arbitration hearing. Testimony is taken under oath. The local court rule specifies the Federal Rules of Civil Procedure that apply, such as FRCivP 45, regarding subpoenas. The Federal Rules of Evidence are not imposed but do serve as guidelines for the admissibility of evidence. Local rules for different federal district courts vary, and the attorney-paralegal team must read closely the rules that govern hearings in the districts in which they litigate.

FIGURE 10–10 Local Rule for Arbitration Hearings

Section 5. Arbitration hearing

(a) The arbitration hearing shall take place in the United States Courthouse in a courtroom assigned by the arbitration clerk on the date and at the time set forth in the order of the Court. The arbitrators are authorized to change the date and time of the hearing provided the hearing is commenced within 30 days of the hearing date set forth in the order of the Court. Any continuance beyond this 30-day period must be approved by the judge to whom the case has been assigned. The arbitration clerk must be notified immediately of any continuance.

(b) Counsel for the parties shall report settlement of the case to the arbitration clerk and all members of the arbitration panel assigned to the case.

(c) The arbitration hearing may proceed in the absence of any party who, after notice, fails to be present. In the event, however, that a party fails to participate in the arbitration process in a meaningful manner, the Court may impose appropriate sanctions, including, but not limited to, the striking of any demand for a trial de novo filed by that party.

(d) Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing under this Rule. Testimony at an arbitration hearing shall be under oath or affirmation.

(e) The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. Copies or photographs of all exhibits, except those intended solely for impeachment, must be marked for identification and delivered to adverse parties at least ten (10 days prior to the hearing. The arbitrators shall receive exhibits in evidence without formal proof unless counsel has been notified at least five (5) days prior to the hearing that the adverse party intends to raise an issue concerning the authenticity of the exhibit. The arbitrators may refuse to receive in evidence any exhibit a copy or photograph of which has not been delivered to the adverse party as provided herein.

(f) A party may have a recording and transcript made of the arbitration hearing, but that party shall make all necessary arrangements and bear all expenses thereof.

Arbitration Awards and Requests for Trial *de Novo*. The United States District Courts for the Eastern District of Pennsylvania and the Eastern District of New York have similar rules for entry of arbitration awards. They require that the arbitration award be filed with the court promptly after the arbitration hearing. Unless one of the parties requests a trial *de novo* within thirty days after the arbitration award is entered on the docket, the arbitration award is entered as the judgment of the court. The judgment has the same effect as a judgment of the court in a civil action except that it cannot be appealed.

As noted, any party can request a trial *de novo* within thirty days after the arbitration award is entered on the docket. The moving party must file the demand and serve it on all parties. The action is then placed on the court's trial calendar and treated as if it had never been referred to arbitration. The right to trial by jury is preserved. At the trial *de novo*, the court may not admit evidence that there has been an arbitration proceeding, including the nature or amount of the proposed arbitration award.

The United States District Court for the Eastern District of New York requires that the party that demands the trial *de novo* deposit with the clerk of court an amount equal to the arbitration fees. This amount is refunded if the final judgment resulting from the trial, exclusive of interest and costs, is more favorable than the arbitration award. Refer to Figure 10–11, which reprints the standard form for demanding a trial *de novo*.

Thus, the party that moves for trial *de novo* takes risks similar to those taken by a party who refuses a settlement offer at any stage of the litigation. When the case goes to trial, the resulting judgment may be less than the amount that the party could have received without the expense of a full-blown trial. Alternative dispute resolution is faster and less expensive than a full-blown trial, but not every case can be resolved short of trial.

Paralegal Tasks in Arbitration

Paralegal duties in lawsuits submitted to arbitration are basically the same as pretrial duties in ordinary litigation. Paralegals may assist with discovery and draft pleadings. As the attorney-paralegal team prepares for the actual arbitration procedure, however, the paralegal duties may differ. This will depend primarily on the rules governing your arbitration. If the rules call for submission of written evidence, paralegals will not spend time preparing witnesses for testimony. If prehearing briefs are limited to five pages, paralegals may assist the attorneys in reviewing the evidence so as to identify the most essential information to argue in the brief.

During a hearing, paralegal duties will vary, depending upon the nature of the hearing. Paralegals may simply be present and take notes. If the hearing allows the parties to present numerous witnesses, paralegals may be responsible for scheduling the witnesses. If the hearing allows the submission of numerous exhibits, paralegals may help to keep track of the exhibits during the hearing. If all the exhibits must be prepared and submitted before the hearing, however,

FIGURE 10–11 Local Rule for Demanding a Trial *de Novo*

Demand for Trial De Novo (Arb-17)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
_____ x

DEMAND FOR
TRIAL DE NOVO

_____ x

I _____, counsel for _____ hereby demand a trial de novo in the above captioned matter wherein an arbitration award was filed with the Clerk on _____

I have deposited with the Clerk of Court an amount equal to the arbitration fees of the arbitrators as provided in Section 2 of the Local Arbitration Rule. I understand that this sum so deposited will be returned in the event my client obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award. If my client does not obtain a more favorable result after trial, the sum so deposited shall be paid by the Clerk to the Treasury of the United States.

Dated: _____ _____
Counsel for

cc: All counsel
Financial clerk

paralegals will help arrange the exhibits in a logical order and label the exhibits so that the arbitrator can follow them easily.

SETTLEMENT

A ***settlement*** is the resolution of a dispute by negotiation between the parties rather than by a judge or jury. The attorneys representing the parties negotiate the settlement with the permission of their clients. If a party is unrepresented by counsel, that party negotiates directly with the other party's attorney or the other unrepresented party. Once a settlement is reached and the settlement documents are signed, the parties dismiss their lawsuit.

Your clients must expressly approve the terms of the settlement. Often the attorneys exchange several settlement proposals, and it is crucial that the attorney-paralegal team inform the client promptly of each offer of settlement. Remember the ethical duty to keep the client informed of all developments.

Paralegals perform many tasks in the settlement process, such as compiling information so that the attorney-paralegal team can determine a suitable figure to request in settlement negotiations. Paralegals also help to prepare the settlement

documents. Often paralegals inform the client of settlement offers. Remember the ethical obligation to refrain from giving legal advice. Any opinions about whether the client should accept a settlement offer should clearly be those of the lawyer, not the paralegal.

More than three-fourths of all civil lawsuits are settled. A lawsuit may be settled at any time, even during the trial. Many lawsuits, however, are settled around the time of the pretrial conference, when discovery is complete and the attorney-paralegal team has compiled all the information needed to formulate a figure for settlement. At the pretrial conference, many judges actively encourage settlement. If a large number of cases were not settled, the court system would be overwhelmed.

Determination of a Settlement Value

Before the commencement of serious settlement discussions, the attorney-paralegal team must determine the settlement value, that is, the dollar amount for which your client will agree to settle the case. This is the amount the plaintiff is willing to accept or the amount the defendant is willing to pay, depending on which party you represent. There is no precise formula for determining the settlement value of a lawsuit. The text discusses general guidelines, with emphasis on evaluation of a personal injury claim, such as that of Mr. Wesser.

Damages Evaluation

To the extent possible, the attorney-paralegal team needs to calculate the dollar value of a party's claim. Both tangible factors and intangible factors must be considered in performing the calculation. We will use a personal injury lawsuit as an example in analyzing the types of damages that may be claimed. It is helpful to start with the more concrete type of damages—special damages.

Special Damages. Recall from the discussion of special damages in Chapter 4 that special damages are awarded for items of loss that are specific to the particular plaintiff. Special damages may include items such as lost wages. If the party is a salaried employee, for instance, you may take the party's average monthly salary and multiply it by the number of months you expect the party to be unable to work on account of the injuries that gave rise to the litigation. If a party does not receive a steady salary, such as a self-employed professional, the calculation of lost wages is more difficult. Generally you calculate an average of the party's past earnings and try to project the future profits the party would have made during the time that injuries prevented work. Bear in mind that some persons are so badly injured that they may not be able to return to their past work. If a party will have to take a lower-paying job because of the injuries in dispute, compensation should be paid for the reduction in earnings. This involves trying to calculate the loss of earnings over the remainder of the party's working life.

Another type of special damages is medical expenses. This includes doctor and hospital bills, as well as medications and assistive devices such as wheelchairs and braces. This category also may include travel expenses to distant treatment

facilities. If future medical expenses are anticipated, the attorney-paralegal team obtains a written description of the anticipated services and an estimate of the cost from the party's doctors. Assigning a dollar value to medical expenses is fairly straightforward because the actual bills are available.

General Damages. It is more difficult to assign a dollar value to general damages because they include less tangible concepts, such as disability (impairment of normal physical and/or mental function), disfigurement, and pain and suffering. There is no formula for calculating the amount of compensation due to a person for pain and suffering. No two persons suffer exactly the same injury and feel exactly the same amount of pain.

Often doctors give patients a disability rating. For instance, the doctor may write that a person's limitation of function resulting from a back injury constitutes a ten percent permanent impairment of the function of the person's entire body. As for disfigurement, the scars from a burn or limp from a severe fracture are obvious. It is still difficult, however, to assign a dollar value to the compensation due to a person for the disfigurement. The surest approach for paralegals is to discuss the amount with the experienced trial attorneys on your team.

Other Types of Lawsuits. The text has discussed only personal injury actions, but you as a paralegal will assist with lawsuits covering a wide range of subjects—from breach of contract to consumer fraud. If you review the discussion of remedies in Chapters 1 and 4, you will see that some types of damages are easily calculated, as in actions for failure to pay a promissory note or suits for damage to an automobile. Consider Mr. Wesser's claim for fire damage to his home. He can produce the repair bills and prove the amount of damages that he suffered. Other types of damages, such as loss of future profits, are not so easy to evaluate. As with personal injury cases, discuss the potential value with the attorneys on your team.

Punitive Damages. Recall that punitive damages are sometimes awarded for particularly egregious behavior. In determining whether to include punitive damages in your calculations, review the file to see whether a statute may provide for punitive damages. If there is an applicable statute, it should be mentioned in your pleadings. For instance, some consumer protection statutes provide for punitive damages in cases of consumer fraud.

Punitive damages usually amount to three to five times the award of compensatory damages. Be sure to add punitive damages into your final calculations when you have a lawsuit in which punitive damages could be awarded.

Trial Expenses

For purposes of determining a settlement value, you should subtract from the amount of damages sought the amount of your anticipated trial expenses. The biggest trial expense will probably be expert witness fees. When doctors take a day off to testify, their fee is likely to equal the amount of money they would

have earned at their office that day. Other experts, such as real estate appraisers, are likely to charge a substantial hourly fee.

Other trial expenses include travel and lodging expenses for the experts and other witnesses. If the attorney is being paid an hourly rate, the estimated time for the trial should be multiplied by the hourly rate and included in trial expenses. Many plaintiffs' attorneys are paid a contingent fee, but attorneys for the defendants are often compensated on an hourly rate. Other expenses include copies of exhibits, and this can add up when there are numerous parties and numerous exhibits. Finally, include the court costs.

Evaluate the Likelihood of Prevailing at Trial

After the attorney-paralegal team has calculated the amount necessary to compensate the plaintiff and has subtracted the trial expenses, the team must consider the likelihood of prevailing at trial. If your client has a claim where the defendant's liability is practically unquestionable, the settlement value is greater than a claim where liability is unclear. Therefore, the first question to consider is the likelihood that your client can establish that the defendant is liable for damages. For instance, if the attorney-paralegal team determines that there is a seventy-five percent chance that they can establish liability, they subtract twenty-five percent from their settlement calculation to account for their twenty-five percent chance of losing.

Many factors go into determining the likelihood of establishing liability at trial. This is a good time to review your chart of the essential elements of the claims. Review the evidence you have accumulated for establishing the essential elements of each claim. Consider how *credible* your witnesses are. Remember that honesty and sincerity do not necessarily ensure credibility. The most truthful, sincere person may be terrified of the courtroom and pause for a long time before answering each question. If that witness does not seem credible, your chance of prevailing at trial is diminished.

Consider whether any of the parties engaged in any outrageous behavior. For instance, if the defendant was drunk at the time of an automobile accident, this will make the plaintiff more sympathetic to a jury. Consider other factors that may make the plaintiff sympathetic. Very young and very old persons usually evoke sympathy. Consider the defendant also. If the defendant is a large corporation, a jury may award higher damages than it will if the defendant is an individual.

Another consideration for the plaintiff 's counsel is whether the plaintiff was partially at fault. In a jurisdiction that retains contributory negligence as a defense, the plaintiff 's negligence can bar recovery entirely. In a jurisdiction with comparative negligence, if thirty percent of the fault is attributed to the plaintiff, the plaintiff 's recovery is reduced by thirty percent. This is an important factor that may necessitate lowering the amount you request in a settlement.

Evaluate the Likelihood of Collecting the Judgment

Remember that entry of a judgment against a defendant does not guarantee payment. If the defendant has no assets and no insurance, you are unlikely to

be able to collect the judgment. One important factor is the defendant's insurance coverage. This fact is usually disclosed early in the discovery process. Review the file and determine the amount of the defendant's insurance coverage. You may need to research the defendant's assets, particularly if the defendant has little or no insurance. See the discussion of asset investigation in Chapter 12.

Miscellaneous Factors

Many other factors differ from case to case. One important factor may be the amount of the judgments that have been awarded in cases similar to yours. Damages awards can differ significantly in various regions. For instance, a jury in a large metropolitan area may award much larger verdicts than a jury in a rural area where the cost of living and wages are lower. In some areas, you may find reporter services that publish verdicts entered in that area. However, no two lawsuits are alike; you cannot assume that the verdict in your case will be the same. If no publications are available, you can get an idea of the range of verdicts from lawyers who have tried many lawsuits in a certain geographical area.

Presentation of Settlement Offers

There are many approaches to settlement negotiations. Each party may make multiple settlement offers throughout the litigation process. Negotiations may range from amicable discussions to terse "take it or leave it" letters. The tone of the negotiations depends on the personalities and negotiation styles of the lawyers.

There are several methods for the parties to communicate their settlement offers through their lawyers. At any stage, the lawyers can discuss the offers on the telephone. Sometimes the lawyers and parties meet at one lawyer's office and discuss the case. Discussions frequently take place just before trial, even the day the trial is scheduled to start. While the parties' highly charged emotions may make them unwilling to discuss settlement at the beginning of the litigation, their attitudes may change as the trial approaches. That is when parties realize the costs of litigation. The very fact that they are in the courthouse can have an effect on their willingness to discuss settlement. Many parties who display amazing bravado in the early stages of litigation lose some wind from their sails when they enter the courthouse and view the imposing setting of the courtroom. At this point, some parties begin to understand that they may not prevail at trial. Thus, many cases are settled "on the courthouse steps."

Particularly in state court cases that have not been pending long, the parties may suddenly want to discuss settlement as they sit in the courtroom, waiting for their case to be called. In state court, the pretrial conference may not take place until the day of trial. Recall that during pretrial conferences, some judges actively encourage settlement. This, too, can affect the willingness to negotiate. As for the procedure for negotiating at the courthouse, often the lawyers put their clients in separate conference rooms, and the lawyers shuttle between the rooms, informing their clients whether the other party accepted the

offer or informing them of a counteroffer. If the parties reach an agreement, the lawyers immediately get the terms in writing and have the parties sign an agreement.

The parties' attorneys also exchange formal written presentations of their settlement offers prior to trial. The attorneys may exchange letters outlining their proposals for settlement. Sometimes a party presents a more formal and elaborate presentation of an offer in the form of a settlement brochure.

Settlement Brochures. In large personal injury cases, the plaintiff's attorney may present a settlement brochure. Because the preparation of the brochure itself may be fairly expensive, the settlement brochure is not so often used in lawsuits requesting smaller damages.

There is no set format for settlement brochures. The brochure typically contains an opening statement outlining the accident and the plaintiff's injuries, information on the plaintiff's background (marital status, education, employment history, and so on), a summary of the evidence on liability, and a summary of the evidence on damages. The summaries are amply supplemented with photographs, such as pictures of the plaintiff's injuries and scars and pictures of damaged property. Other supplemental documents include copies of the plaintiff's medical expenses, doctors' reports on the plaintiff's injuries and prognosis for recovery, and employers' statements on lost wages. Other documents and reports may be included, with the goal of presenting a comprehensive presentation of the plaintiff's damages and convincing proof of the defendant's liability.

Settlement brochures should be a convincing presentation of the defendant's liability and the plaintiff's damages. An effective brochure illustrates the case's jury appeal and can encourage settlement.

Offer of Judgment. FRCivP 68 provides that a defending party may serve upon the adverse party an offer for judgment to be entered against the defending party. The defending party specifies the amount of the judgment that he or she is willing to have entered against him or her. See Figure 10–12 for an illustration of an offer of judgment.

The offer of judgment must be served on the plaintiff at least ten days before trial. The plaintiff may accept or reject the offer of judgment. If the plaintiff accepts the offer of judgment, the plaintiff notifies the defendant in writing, and the parties file with the clerk of court the offer and the notice of acceptance, together with proof of service. The clerk of court enters judgment in the amount the defendant offered, plus costs accrued.

If the plaintiff fails to accept the offer of judgment, the offer is withdrawn. However, if the plaintiff prevails at trial but the judgment obtained is less than the offer of judgment, the plaintiff must pay to the defendant the costs incurred after the offer of judgment. In the offer of judgment in Figure 10–12, defendants Woodall Shoals and Second Ledge offered Mr. Wesser $50,000. Suppose that Mr. Wesser rejected the offer and the case went to trial, resulting in entry of judgment in favor of Mr. Wesser, but only in the amount of $30,000. According to FRCivP 68, Mr. Wesser must now pay the costs incurred after the offer of judgment was made.

FIGURE 10–12 An Offer of Judgment

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,
-vs-
Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

OFFER OF JUDGMENT

Now come the defendants, Woodall Shoals Corporation and Second Ledge Stores, Incorporated, through counsel, and pursuant to Rule 68 of the Federal Rules of Civil Procedure, do offer to allow the plaintiff to take judgment against them, jointly and severally, in the sum of $ 50,000, together with costs accrued at the time this offer is filed.

Pursuant to Rule 68, the plaintiff shall have ten days after service hereof to accept this offer by serving written notice that the offer is accepted. If the plaintiff does not accept this offer within ten days after the service hereof, the offer shall be deemed withdrawn and evidence of the offer shall not be admissible except in a proceeding to determine costs.

This the _____ day of _____, 1996.

David H. Benedict
Attorney for the Defendants
Benedict, Parker & Miller
100 Nolichucky Drive
Bristol, NC 28205-0890

+ Certificate of Service

The costs may be fairly minimal if they include only the usual court costs—filing fees, court reporter fees, and witness fees. Sometimes, however, "costs" may be defined as including attorney's fees. When costs include attorneys' fees, the amount can be formidable. Attorneys' fees for a long trial can amount to many thousands of dollars.

FRCivP 68 has an important application in lawsuits based on statutes that allow a victorious plaintiff to recover attorneys' fees from the defendant as part of "costs." Certain civil rights statutes define "costs" to include attorneys' fees. If the plaintiff in such a civil rights case rejects an offer of judgment and as a result of the trial receives a judgment smaller than the defendant's offer, the plaintiff cannot recover attorneys' fees incurred after the offer of judgment was rejected.

The United States Supreme Court addressed this issue in *Marek v. Chesny*, a civil rights case in which the plaintiff rejected the defendant's offer of judgment and then received a judgment smaller than the defendant's offer. The civil rights statute provided that a plaintiff could recover "costs," which included attorneys' fees. The Court held that the plaintiff, who had rejected the offer of judgment, could not recover from the defendant the plaintiff's attorneys' fees incurred subsequent to the offer of judgment. This included the attorneys' fees for the entire trial, a significant amount.[16]

However, courts have generally held that in cases where statutes provide that costs include recovery of attorneys' fees, the plaintiff does not have to pay the defendant's attorneys' fees incurred after the offer of judgment.[17] Although offers of judgment are intended to encourage settlement, to require a plaintiff who prevails in a civil rights lawsuit to pay the attorneys' fees for the defendant who violated the plaintiff's civil rights would seriously undermine the purpose of the civil rights statutes.

Defendants usually present offers of judgment when settlement negotiations have broken down and trial is approaching. Where the potential costs are great, an offer of judgment can be an effective tool to get the plaintiff to reconsider settlement negotiations.

Settlement Documents

Once the parties reach an agreement to settle a lawsuit, it is important that their agreement be put in writing. If the parties change their minds after reaching an oral agreement but before signing the settlement documents, the entire settlement may fall apart and everyone returns to square one. There are several ways to memorialize the parties' settlement agreement. Regardless of what type documents are used, their purpose is to state the terms of the settlement and terminate the lawsuit. The wording of the documents must be precise so that the settlement is given the effect that the parties desire. Applicable statutes may impose certain requirements for the settlement documents, such as those that address contribution among joint tortfeasors—that is, determination of how much money each of multiple defendants must pay to the plaintiff. Be sure to consult with the attorneys on your team to determine whether statutes impose any special requirements.

SIDEBAR Most local rules require that the parties notify the clerk of court of any settlement immediately, and there may be additional rules. Local rules of court may also impose specific requirements for the content or format of settlement documents.

Consent Judgments

When all claims against all parties have been settled, the parties may file a ***consent judgment*** with the court. This is a document that sets out briefly the terms of the agreement and states the amount of the judgment to be entered. A consent judgment has the same effect as a judgment entered by a judge after a trial—namely, it is the final decision resolving the dispute and determining the rights and obligations of the parties.

Examine Figure 10–13, which illustrates a consent judgment that might be entered in the Wesser case. The consent judgment is a concise document that states three main points. First, it states that the parties have resolved the dispute and agreed that one party shall pay the other party a certain amount of money. Here the defendants have agreed to pay Mr. Wesser $70,000. Second, the consent judgment states that a judgment in the amount of $70,000 shall be entered against the defendants. Third, the consent judgment states which party pays the costs of the action. Here the defendants have agreed to pay the costs. Note that the parties can split the costs if they so agree.

The consent judgment is filed with the court, so the parties' settlement is a matter of public record. If the defendants fail to carry out the terms of the agreement stated in the consent judgment, Mr. Wesser can file a motion to enforce the judgment. This and other posttrial motions will be discussed in Chapter 12.

Note that the plaintiff and all the attorneys sign the consent judgment. Finally, the judge signs the consent judgment to make it effective. Judges do not have to approve consent judgments if, for instance, they find the terms unreasonable. Most judges, however, sign their approval unless a particular consent judgment is really outrageous.

A variation of the consent judgment is the ***consent decree***. The force of the consent decree is the same as the consent judgment. It is a statement of the parties' agreement and terminates the lawsuit. The distinction is that a consent decree states that the defendant will refrain from certain activities that the government has deemed illegal.[18] Examine the sample consent decree in the Chattooga case, illustrated in the Appendix.

Stipulation of Dismissal and Release or Settlement Agreement

A second method for memorializing the parties' agreement involves two documents. First is the stipulation of dismissal, illustrated in Figure 10–14. This is a simple statement that the parties have settled all matters in controversy and that the plaintiff dismisses the action. Because the parties have settled all the issues in dispute, the dismissal is usually *with prejudice*, which means that the plaintiff is barred from filing a subsequent action based on these same claims.

FIGURE 10–13 A Consent Judgment

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

CONSENT JUDGMENT

THIS CAUSE coming on to be heard and being heard before the undersigned Judge presiding, and it appearing to the Court that all matters in controversy between the parties have been compromised and settled, and that the plaintiff has agreed to accept and the defendants have agreed to pay the sum of $70,000 in settlement of the plaintiff's claims;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff shall have and recover judgment against the defendants in the amount of $ 70,000 and that the payment of said amount by the defendants shall constitute a full and final settlement and discharge of any and all claims which the plaintiff may have against the defendants arising out of the facts alleged in the Complaint or which might have been alleged therein to the same extent as if the issues in this action had been tried before a jury and the judgment had been entered upon the verdict of the jury in the amount provided herein.

It is further ordered that the defendants shall pay the costs of this action.

This the _____ day of _____, 1997.

_____
United States District Judge

FIGURE 10–14 A Stipulation of Dismissal

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, Bryson Wesser, plaintiff, and Woodall Shoals Corporation and Second Ledge Stores, Incorporated, defendants, hereby stipulate and agree that this civil action is hereby dismissed, *with prejudice.*

This the _____ day of _____, 1997.

Leigh J. Heyward
Attorney for Plaintiff
Heyward and Wilson
401 East Trade Street
Charlotte, NC 28226-1114

David H. Benedict
Attorneys for Defendants
Benedict, Parker & Miller
100 Nolichucky Drive
Bristol, NC 28205-0890

CONSENTED TO:

Bryson Wesser, Plaintiff

As you see, the stipulation of dismissal does not reveal the terms of settlement. The terms of the settlement are usually written in either a release or a settlement agreement. Releases and settlement agreements serve the same purpose. They state that the parties have settled all their claims in the lawsuit, state the amount that the defendant agrees to pay the plaintiff, and state that the

defendant is released from all future liability for the claims that are the subject of the lawsuit. Both releases and settlement agreements are basically contracts between the parties, providing that if the defendant pays a certain amount of money to the plaintiff, the plaintiff will dismiss the lawsuit and release the defendant from any future liability for the claims asserted.

Examine the sample release in Figure 10–15 and the sample settlement agreement in Figure 10–16. The release is a shorter document and basically recites the parties' agreement releasing the defendant from future liability on the claims in the lawsuit and setting forth the damages to be paid. The settlement agreement is a longer document, different from the release in that it recites in detail the exact arrangement for payment of money to the plaintiff. Here the defendant will pay the plaintiff specified amounts of money at specified times instead of one lump sum. Settlement agreements are often used in *structured settlements*, where the plaintiff receives periodic payments instead of a lump sum. Frequently, the first payment is large, so that the plaintiff can pay expenses that accrued prior to the settlement, such as large medical payments. The plaintiff then receives periodic payments until the entire amount of the settlement is received.

Final Remarks on Settlement Documents

As noted, statutes in different jurisdictions, as well as local court rules, may impose specific requirements for the content of documents that state the terms of the parties' settlement. The illustrations in the text are only examples; as with any examples, you must take care to adapt them to the facts of your case and the requirements of your jurisdiction. This is especially important when there are multiple defendants who might seek contribution from one another—that is, reimbursement from other defendants who are also liable to the plaintiff. Be sure to discuss with the attorneys on your team the content of the documents you use.

ETHICS BLOCK

The ABA Model Rules (rule 3.2) and the Model Code (DR7-102) impose a duty on lawyers not to delay litigation. An attorney may seek extensions for answering discovery and rescheduling of hearings when more time is needed to gather facts for the client's case or for some other legitimate reason that is in the best interest of the client. There must, however, be some substantial purpose other than delay. A lawyer who seeks numerous delays in litigation will soon see the patience of the judge wear thin. Paralegals can help avoid delays by making sure that documents are ready well ahead of the deadline and by giving witnesses ample notice when they must appear for a deposition or trial.

SUMMARY

Chapter 10 covers three areas in which paralegals are involved before trial: pretrial conferences, alternative dispute resolution, and settlement.

FIGURE 10–15 A Release

RELEASE OF ALL CLAIMS

For and in consideration of the sum of Seventy Thousand and no/100 Dollars ($ 70,000), to the undersigned paid, and other good and valuable consideration, receipt whereof is hereby acknowledged, Plaintiff agrees to release Defendants Woodall Shoals Corporation and Second Ledge Stores, Incorporated, from all claims, actions, or suits that have been brought or in the future might be known, arising from the fire at 115 Pipestem Drive, Charlotte, North Carolina, on January 3, 1995.

It is understood and agreed that this settlement is the compromise of a disputed claim and that the Defendants have denied liability and the extent of damages claimed by the Plaintiff.

This agreement is a release and shall operate as a discharge of any claims Plaintiff has or may have in the future arising out of the fire on January 3, 1995.

Plaintiff and Defendants agree to file, within ten (10) days of the signing of this Release, a Stipulation of Dismissal, with prejudice, in Civil Action 3:96 CV 595-MU, now pending in the United States District Court for the Western District of North Carolina.

This Release contains the entire agreement between the parties hereto, and the terms of this Release are contractual and not a mere recital.

Witness our hands and seals this _____ day of _____, 1997.

_____LS
Bryson Wesser, Plaintiff

Woodall Shoals Corporation
_____LS
by: William H. Cameron, President

Second Ledge Stores, Incorporated
_____LS
by: Marcia Stuart, President

STATE OF NORTH CAROLINA
COUNTY OF WATAUGA

I, _____, a Notary Public, do hereby certify that BRYSON WESSER, WILLIAM H. CAMERON, and MARCIA STUART, appeared before me this day and executed the foregoing Release.

This the _____ day of _____, 1997.

_____
Diane M. Miller

My commission expires: _____

FIGURE 10–16 A Settlement Agreement

SETTLEMENT AGREEMENT

This action is presently calendared for trial in the United States District Court for the Western District of North Carolina on April 2, 1997. The plaintiff, Bryson Wesser, is represented by Leigh J. Heyward. The defendants, Woodall Shoals Corporation and Second Ledge Stores, Incorporated, are represented by David H. Benedict.

The parties agree that this is an action instituted by the plaintiff when the plaintiff was burned in a fire in his home, allegedly caused by an electric blanket malfunction, said blanket having been allegedly manufactured by the defendant Woodall Shoals Corporation, and that the defendants deny all liability for said injuries.

The parties further agree that the plaintiff and defendants have agreed to compromise and settle all matters in controversy between them for and in consideration of the following payments, terms and conditions:

1. That the plaintiff agrees to accept the sum of $70,000 in full satisfaction of all claims in Civil Action 3:96 CV 595-MU, now pending in the United States District Court for the Western District of North Carolina.

2. That the defendants shall pay the sum of $70,000 to the plaintiff at the rate of $5,000 a month, beginning March 10, 1997, and on the 10th day of every month thereafter until the sum of $70,000 is paid in full.

3. That the plaintiff shall execute any and all releases prepared by the defendants' attorney which are not inconsistent with the provisions of this agreement, including the execution and filing of an appropriate dismissal with prejudice of any and all claims as the plaintiff has against the defendants in Civil Action 3:96 CV 595-MU filed in the United States District Court for the Western District of North Carolina.

4. That the defendants shall pay the sum of $17,000 to Leigh J. Heyward of Heyward and Wilson, as compensation for her fees and expenses in representing the plaintiff.

5. That the defendants shall pay the costs of this action.

This the _____ day of _____, 1997.

_____ Witness

_____ Witness

_____ Witness

_____ Bryson Wesser, Plaintiff

_____ Leigh J. Heyward, Attorney for the Plaintiff

WOODALL SHOALS CORPORATION and SECOND LEDGE STORES, INCORPORATED

by: _____ David H. Benedict, Attorney for the Defendants

Pretrial Conferences

In federal court, FRCivP 16 addresses pretrial conferences. The procedure for pretrial conferences differs, depending on whether a case is to be heard in federal or state court and according to local court rules and the preferences of particular judges.

In federal court, an initial pretrial conference, or scheduling conference, is commonly held early in the litigation process. The timing is influenced by FRCivP 26, which requires that discovery conferences (if required) must precede scheduling conferences. FRCivP 16 describes the general purposes of initial pretrial conferences: to expedite the disposition of the action, to establish early control so that the case will not be protracted, to discourage wasteful pretrial activities, to improve the quality of trial preparation, and to facilitate settlement. In the initial pretrial conference, the judge sets guidelines to control the remainder of the litigation. This includes setting deadlines for completion of discovery, filing certain motions, and similar matters.

There may be multiple pretrial conferences, particularly if the parties cannot cooperate throughout the discovery process. FRCivP 16 gives judges flexibility in this and in virtually all aspects of pretrial conferences. Thus, procedures vary, depending upon the judge and local court rules. Some judges hold informal meetings with the attorneys in chambers, while others hold formal hearings in the courtroom, with a court reporter present.

The results of the pretrial conference are written in the pretrial order. This order sets forth deadlines established by the judge and contains stipulations between the parties. By stipulating to matters on which they agree, parties expedite litigation. Stipulated matters may include, for example, proper jurisdiction and proper joinder of all parties. Note that while the discussion centers on pretrial conferences with the presiding judge, federal magistrates often handle pretrial matters such as pretrial conferences.

The final pretrial conference in a federal case generally takes place several weeks before the date that the trial is scheduled. FRCivP 16 explains that the primary purpose of the final pretrial conference is to formulate a plan for trial, including a program for facilitating the admission of evidence. Settlement discussions often occur at final pretrial conferences, and some judges actively encourage settlement at the conference. Often attorneys are required to exchange information such as lists of exhibits and witnesses before the conference.

The attorneys may each prepare a proposed final pretrial order for presentation to the judge. After the conference, the judge enters a final pretrial order that includes such items as lists of contested issues, stipulations, witnesses, and exhibits. The judge also sets forth rules for the conduct of the trial, such as how many copies of exhibits to have available and the procedure for submitting proposed jury instructions. The judge also may rule on pretrial motions such as the admissibility of certain pieces of evidence.

Pretrial conferences in state court tend to cover the same topics as conferences in federal court but often take place much closer to the time of trial. The

attorneys and judge may even meet for the first and only pretrial conference on the day before trial. Pretrial conferences may range from informal discussions in chambers to formal hearings in the courtroom.

Paralegals' duties in connection with pretrial conferences may include helping to prepare lists of witnesses and exhibits and reviewing the file for any motions on which the judge still needs to rule. Paralegals also enter in the docket control system any deadlines set in the conferences. Another helpful task is to ensure that the attorneys are aware of all applicable local rules and required forms.

Alternative Dispute Resolution (ADR)

The goal of ADR is to resolve disputes more quickly and inexpensively. Alternative dispute resolution methods are being used increasingly both in the private sector and in court-annexed attempts to resolve disputes without trial. The most common methods of ADR, on a spectrum ranging from the least formal to the most formal, are: negotiation, mediation, and arbitration. Refer to the text to review how each of these methods works.

Arbitration is common, and paralegals must understand some basic definitions and procedures in connection with arbitration. Procedures vary substantially among various federal courts, and paralegals must be very familiar with the local court rules.

Arbitration may be binding or nonbinding. In binding arbitration, the parties agree at the outset that they will accept the arbitrator's decision and will not seek a trial. In nonbinding arbitration, the parties are free to request a trial *de novo* if one of the parties is unhappy with the arbitrator's decision.

Arbitration may be mandatory or voluntary. Some courts have adopted an arbitration system in which certain types of lawsuits must be submitted to arbitration. This is mandatory arbitration. Voluntary arbitration takes place when parties choose arbitration over other options.

Arbitration may be court-annexed or private. In court-annexed arbitration, the parties follow the rules that the court has set up and are assigned an arbitrator from a list of approved arbitrators kept by the clerk of court. Private arbitration is often administered through centers that establish their own procedural guidelines and rules. Parties are also free to set up their own arbitration. For example, they may choose a panel of three experienced attorneys to hear their evidence and enter a decision.

The procedure for arbitration varies widely, depending on local rules in court-annexed arbitration and rules used by private arbitration centers. Such differences may include whether to use an arbitrator or a panel of arbitrators, whether the parties choose their own arbitrator, the level of formality at hearings, and deadlines for filing documents.

The types of cases most suitable for arbitration are civil actions in which the damages requested are not especially large. Some courts require arbitration when the damages are $150,000 or less. But like many factors related to arbitration,

this can vary. Some courts require arbitration only when the damages are $50,000 or less. Remember that some courts do not require arbitration at all.

Lawsuits involving very complex or novel legal issues are not generally suitable for arbitration. In contrast, a case that deals with voluminous exhibits that a jury would have difficulty following may be a good candidate for arbitration.

Parties may submit some, but not all, issues to arbitration if they choose. For instance, the parties may submit to arbitration on the issue of liability, but not damages.

Parties often combine various ADR methods to produce a "hybrid process." These ADR methods include private judging, neutral fact-finding, use of ombudspeople, mini-trials, and summary jury trials. Refer to the text for details of these procedures.

Paralegals may perform many tasks in connection with alternative dispute resolution. When a case is in arbitration, paralegals still have the usual pretrial duties of helping with discovery and with drafting pleadings and motions. Paralegal tasks during arbitration can vary according to the rules that apply to the arbitration. For example, if the rules allow only the submission of written evidence, paralegals help with written evidence but do not prepare witnesses to testify. General duties include organizing the file, helping to arrange exhibits for submission, and helping to prepare trial briefs where the rules permit them. Paralegal duties during a hearing vary according to the nature of the hearing. Some hearings are very similar to trials, and your tasks will be similar to those described in Chapter 11. Other hearings are quite simple, and you may simply take notes.

Settlement

A settlement is the resolution of a dispute by negotiation between the parties rather than by a judge or jury. The attorneys negotiate the settlement. If a party is unrepresented, the attorney deals directly with the party. Attorneys must have the clients' consent to accept a settlement offer, and the client makes the final decision. It is important to inform clients of all settlement offers. Paralegals often relate the offers to the clients, either orally or in writing. Paralegals must be careful not to advise clients whether they should accept offers, because this constitutes rendering legal advice.

Settlement is an important topic, because more than seventy-five percent of all civil lawsuits are settled. Lawsuits may be settled at any time during the litigation process, including during trial.

The attorney-paralegal team must determine the settlement value of a case before entering serious settlement discussions. The settlement value is the amount the plaintiff is willing to accept and the amount the defendant is willing to pay. There is no precise formula to apply in every case. The first step is to calculate the plaintiff's damages. This can be done with some certainty for special damages, such as doctors' bills, home repairs, and lost wages. Lost wages are more difficult to determine for self-employed persons than for salaried

persons, but a reasonable estimate usually can be made. General damages are more difficult to calculate because they involve less concrete concepts, such as disfigurement and pain and suffering.

The sample in the discussion in the text centers on personal injury litigation. Damages can be determined in other types of lawsuits, such as breach of contract when a party fails to repay a promissory note.

Pursuant to statute, punitive damages may be available when fraudulent or particularly egregious behavior has occurred. Punitive damages are generally three to five times the amount of compensatory damages and are awarded in addition to compensatory damages. If there is an applicable statute, it will be mentioned in your pleadings.

After calculating the amount of damages, the attorney-paralegal team subtracts the estimated amount of trial expenses. Trial expenses include fees for expert witnesses to appear, lodging and travel expenses for experts and other witnesses, copying costs, court reporter fees, and so on. If the attorneys are paid on an hourly basis, attorneys' fees should be included.

The next step is to evaluate the likelihood of prevailing at trial. The less likely a plaintiff is to prevail at trial, the less is the value of the plaintiff's case. Factors to review include the strength of the evidence to prove the essential elements of all claims, the credibility of witnesses, and any outrageous conduct of the parties. Also consider any particularly sympathetic attributes of the plaintiff, such as a very young or very old plaintiff.

Finally, evaluate the likelihood of collecting the judgment. A judgment is no good unless you collect it. Examine the defendants' insurance coverage. If the insurance coverage is insufficient, investigate the defendants' assets to determine whether you can collect the judgment.

Another factor to consider is the amount of verdicts given in similar cases in the geographical area where your case is filed. Juries in large cities may award higher verdicts than juries in rural areas, where prices are less inflated. In metropolitan areas, verdicts are sometimes published. When they are not published, consult attorneys on your team or attorneys who have frequently litigated cases in the region.

Attorneys negotiate settlements in several ways. They may simply discuss the case by telephone. They may exchange offers through letters. Attorneys often conduct settlement negotiations during pretrial conferences. Clients should be available at least by telephone to give authorization for accepting offers. Negotiations often take place at the courthouse just before trial. The attorneys may shuttle between conference rooms, relaying offers to their clients.

One method of presenting a plaintiff's case for settlement discussions in a major lawsuit is a settlement brochure. The brochure gives general background on the cause of action, information on the plaintiff's background (education, employment, and so on), and summaries of the evidence on liability and damages. Some brochures are illustrated to give a more vivid picture of the damages.

FRCivP 68 addresses the offer of judgment, a formal way for defendants to make a settlement offer. In an offer of judgment, the defendant states in writing

the amount of the judgment that he or she is willing to have entered against him or her. If the plaintiff accepts the offer, the parties file the offer and notice of acceptance with the clerk of court, and judgment is entered. If the plaintiff rejects the offer and the judgment entered after trial is less than the amount that the defendant offered, the plaintiff must pay the costs of trial incurred after the offer of judgment. Costs generally include court reporter fees, filing fees, and witness fees. Occasionally costs include attorneys' fees, and then costs can become quite large. The risk of having to pay the costs encourages settlement.

Once the parties reach an agreement, it is important to reduce the terms to writing quickly. The parties may change their minds before signing an agreement, and then all the hard work of negotiating is for naught. One form of recording the settlement is a consent judgment. This states the amount of damages and/or other terms and looks like a regular judgment, except that the parties and attorneys sign it, indicating their consent to the terms. Then the consent judgment is presented to the judge for approval. Judges are not required to accept the terms, but they usually do unless the terms are outrageous. The judge signs the consent judgment, the clerk enters it, and the lawsuit is over.

A variation of the consent judgment is the consent decree. A consent decree is generally used when one party is the government and the parties agree that the defendant has engaged in illegal conduct. The consent judgment states that the party will refrain from the illegal conduct and also states any damages the defendant will pay.

Other documents for recording agreements are a stipulation of dismissal and a release or settlement agreement. The stipulation of dismissal is a simple document stating that the plaintiff dismisses the lawsuit against the defendant. The dismissal may be with prejudice, which means that the plaintiff may not later file another lawsuit concerning the same claims, or it may be without prejudice, which does not bar a later lawsuit. Usually when the parties settle all their controversies, they file a stipulation of dismissal with prejudice.

Releases and settlement agreements state that the plaintiff will dismiss the lawsuit and state the amount of damages the defendant will pay the plaintiff. The documents release the defendant from future liability arising from the claims that the parties have settled. The release commonly states only the amount of damages, while the settlement agreement details the manner in which the damages will be paid. For instance, when the payments are made in installments, the settlement agreement will state the terms for repayment. Settlement agreements are often used for structured settlements—that is, where the plaintiff receives periodic payments instead of a lump sum.

In preparing drafts of settlement documents, paralegals must know any special requirements of the applicable jurisdiction. Often there are state laws that require that certain matters be included. Be sure to check local rules as well.

REVIEW QUESTIONS

1. Which of the following are characteristics of methods of alternative dispute resolution?
   a. They are less formal than court battles.
   b. The people with disputes participate more actively than in traditional methods of dispute resolution.
   c. Most of the methods were developed in the private sector but are being used increasingly by courts.
   d. all of the above
   e. a and b only
2. Which of the following are true about the ADR method called *negotiation*?
   a. There is no third-party facilitator.
   b. Negotiation is an informal discussion of a mutually acceptable agreement.
   c. The discussion is usually voluntary and unstructured.
   d. all of the above
   e. a and b only
3. Which of the following are true about the ADR method called *arbitration*?
   a. The arbitrator must be a lawyer.
   b. The arbitrator, not the parties, makes the actual decision.
   c. Arbitration is one of the formal types of ADR.
   d. all of the above
   e. b and c only
4. Which of the following are used to facilitate the smooth presentation of evidence at trial?
   a. stipulations as to the authenticity of documents
   b. motions *in limine*
   c. stipulations as to the admissibility of evidence at pretrial conferences
   d. all of the above
   e. a and c only
5. Which of the following are generally included in a settlement agreement?
   a. the plaintiff's agreement to dismiss the lawsuit
   b. the amount of damages the defendant will pay the plaintiff
   c. the manner in which the damages will be paid
   d. all of the above
   e. a and b only
6. T F In a summary jury trial, the jury issues an advisory verdict.
7. T F Local court rules may differ on the specifics of which types of cases are eligible for arbitration.
8. T F An offer of judgment may be served on the plaintiff before or during the trial.
9. T F A purpose of pretrial conferences is to narrow the issues to be tried.
10. T F The Federal Rules of Civil Procedure do not allow judges to rule on admissibility prior to trial.

PRACTICAL APPLICATIONS

Assume that the Wesser case is being litigated in the United States District Court for the Eastern District of New York.

1. Refer to Figure 10–5, the rule for cases eligible for arbitration in the Eastern District of New York. Is the Wesser case eligible for arbitration?
2. Refer to Figure 10–9, the rule for selection of arbitrators in the Eastern District of New York. How many arbitrators will be chosen for the Wesser case?
3. Refer to Figure 10–10, the rule for arbitration hearings in the Eastern District of New York. Ms. Heyward wishes to contest the authenticity of a document that the defendants plan to submit. How many days prior to the hearing must she inform Mr. Benedict that she intends to contest the authenticity of the document?

CASE ANALYSIS

Read the excerpt from *Francis v. Women's Obstetrics and Gynecology Group, P.C.*, 144 F.R.D. 646 (W.D.N.Y. 1992), and answer the questions following the excerpt.

DECISION AND ORDER

LARIMER, District Judge.

This medical malpractice action is currently before the Court on plaintiffs' motion for sanctions under Rule 16(f), Fed. R.Civ.P. Plaintiffs seek to recover travel costs and legal fees for their two attorneys, which were incurred in connection with a court-ordered settlement conference held on May 4, 1992. This Court ordered the parties to attend the conference as part of Settlement Week, a program orchestrated by the Monroe County Bar Association to facilitate settlement negotiations in both State and Federal Courts.

Plaintiffs contend that defendant's attorneys should be sanctioned because they acted in bad faith and were substantially unprepared to participate in settlement negotiations at the conference. Specifically, they contend that defendant's attorneys waited until the settlement conference to notify them that defendant's insurance carrier had not yet authorized coverage, and also that they did not submit to the mediator, as the Court had ordered, a brief statement of the facts and legal issues relevant to the action.

For the reasons discussed below, plaintiffs' motion is granted, and costs and attorney's fees are awarded in the sum of $1140 against defendant's attorney.

DISCUSSION

The central issue raised by this motion is not whether defendant was required to settle the case—no court order could impose such a requirement on either party—but whether its attorneys came to the conference prepared to negotiate and whether they acted in good faith. It is, of course, well-established that a district court cannot coerce parties to settle. *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir.1985). However, a court may direct a party or a party's attorney to attend a settlement conference. *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 653 (7th Cir.1989) (in banc). That authority is specifically provided for in Rule 16(a), Fed.R.Civ.P., which provides in relevant part:

> In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as . . .
>
> (5) facilitating the settlement of the case.

To ensure compliance, the court may also sanction a party or a party's attorney for not complying with the pretrial order. This authority is specifically provided for in Rule 16(f), Fed.R.Civ.P., which provides:

> If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is *substantially unprepared to participate* in the conference, or if a party or party's attorney *fails to participate in good faith,* the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances made an award of expenses unjust. (emphasis added).

But the authority to direct parties to attend a settlement conference would be meaningless if parties were under no obligation to be prepared to participate in the conference, for "[t]he success of pretrial settlement conferences depends primarily upon the preparedness of the participants. If the participants are unprepared, these conferences, rather than assisting in the resolution and management of the case, are simply cathartic exercises . . . " *In re Novak,* 932 F.2d 1397, 1404 (11th Cir.1991). Rule 16(f) specifically authorizes the court to sanction a party or its attorney if they attend a pretrial conference substantially unprepared. "Thus, parties or their attorneys must evaluate discovered facts and intelligently analyze legal issues before the start of pretrial conferences." *Id.* at 1405.

Parties and their counsel are also under an obligation to participate in good faith at pretrial conferences. Absent the requirement of good-faith participation, recalcitrant litigants and attorneys could frustrate the purpose of the conference. Consequently, Rule 16(f) expressly provides the court with the authority to sanction a party or a party's attorney who does not participate in good faith at the conference.

Turning to the present case, I find that defendant's attorneys were substantially unprepared to participate in the court-ordered settlement conference on May 4, 1992, and that they acted in bad faith by not informing plaintiffs before the conference that defendant's insurance carrier had not yet authorized coverage. Furthermore, I do not find that counsel's noncompliance with the pretrial order was substantially justified or that other circumstances make an award of sanctions unjust. . . .

Furthermore, at the conference itself, defense counsel raised the issue of coverage for the first time and used that as a basis for not being in a position to make an offer. The settlement order required that representatives of insurance carriers either be present or be available by telephone. There is no reason, on the facts of this case, why this coverage issue should have been raised at that late date and why the carrier could not have been in a position to negotiate the case. If coverage was truly an issue, plaintiffs' counsel, one of whom had to travel from Washington, D.C. to attend the conference, the mediator, and the Court should have

been notified before the day of the conference so that the matter could have been rescheduled without inconveniencing and causing expense to both the mediator and plaintiffs.

Such a cavalier attitude about the settlement conference and its requirements cannot be countenanced. The facts demonstrate to me that defendant's counsel was not prepared to participate in the conference and that his actions indicated a failure to participate in good faith. These actions caused the mediator and the plaintiffs' counsel to waste time and effort and caused plaintiffs to incur needless expense.

Mere physical presence at the conference by defendant's attorney is not sufficient compliance with the order to attend the settlement conference. Such an interpretation of the order would easily defeat its purpose. *See Novak,* 932 F.2d at 1404–05. It was for that reason that the Order to Mediation contained specific requirements of the parties. In my view, counsel's failure to prepare for the conference, his failure to confirm coverage and obtain authority from the carrier, and his failure to advise his opponent until the conference of coverage problems demonstrate counsel's lack of preparation and his lack of good faith in the process. Sanctions therefore are appropriate. *See Dvorak v. Shibata,* 123 F.R.D. 608 (D.Neb. 1988).

Plaintiffs seek costs involved in their counsel's travel to Rochester and attorneys' fees for both Washington counsel and local counsel. Under the circumstances, I believe that sanctions are appropriate in the sum of $1,140. This includes $750 in attorneys' fees, to be divided between plaintiffs' attorneys, and $390 in costs and expenses and plaintiffs shall have judgment against the law firm of Martin, Ganotis, Brown, Mould & Currie unless this sum is paid within thirty (30) days of entry of this decision.

IT IS SO ORDERED.

1. The plaintiffs requested that the court impose sanctions on the defendant's attorneys under FRCivP 16(f) for failure to participate in settlement negotiations at a court-ordered settlement conference. Describe the sanctions that the plaintiffs sought.
2. Can a court require the parties to settle a case?
3. Does FRCivP 16(f) allow a court to sanction an attorney for attending a pretrial conference unprepared?
4. Why did the court in this case impose sanctions on the defendant's attorneys?
5. What sanctions did the court find appropriate?

ENDNOTES

1 Linda Singer, *Settling Disputes* (Boulder: Westview Press, 1990), p. 2, quoting Jerold Auerbach, *Justice Without Law?* (1983).
2 *Id.* at 2.
3 American Bar Association Standing Committee on Dispute Resolution (hereinafter "ABA"), *Alternative Dispute Resolution: An ADR Primer* (Washington, DC, 3d ed. 1989), p. 1.
4 *Id.*
5 Singer, *supra* note 1, p. 4.
6 *Id.* at 17.

7 ABA, *supra* note 3, p. 2.
8 *Id.*
9 *Ballentine's Legal Dictionary and Thesaurus* (Albany, NY: Delmar Publishers, Inc. 1995), p. 41.
10 ABA, *supra* note 3, p. 3.
11 *Id.*
12 *Id.* at 2.
13 *Id.* at 3.
14 *Id.* at 4.
15 *Id.*
16 *Marek v. Chesny*, 473 U.S. 1 (1985).
17 See, e.g., *Crossman v. Marciocco*, 806 F.2d 329 (1st Cir. 1986).
18 The term *consent decree* also may refer to agreements between the parties resolving lawsuits involving equitable remedies.

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Chapter 11

TRIAL

You feel a little nervous because the Wesser trial begins next week. You and Ms. Heyward are focusing exclusively on the Wesser case for a few days. "What would be most helpful for me to do before trial?" you ask.

Ms. Heyward replies, "Check to be sure that all the witnesses have received their subpoenas. Call our witnesses and remind them that you will phone them and let them know what time to come to the courthouse."

"Good idea," you note. "Ms. Green called yesterday and said she wanted to miss as little work as possible."

"Let her know that trial schedules are not entirely predictable. For instance, you do not know how long it will take to pick a jury."

You reply, "I'll let her know. She seems cooperative, but all witnesses seem to get nervous right before trial."

"That's right," Ms. Heyward agrees. "That is one reason we review all the questions with them before trial."

INTRODUCTION

Trial is the culmination of all the attorney-paralegal team's preparation of the case. You have prepared your witnesses and exhibits, and now it is time to present your evidence to the finder of fact. Remember that the purpose of the trial is to determine which version of the facts is true. In a jury trial, the jury is the finder of fact; in a nonjury trial, the judge performs this function.

The atmosphere of a trial can be fast-paced, and paralegals may find themselves performing many tasks simultaneously. Trials, however, sometimes bog down. For instance, one party may have thousands of documents to introduce into evidence. This can be slow and laborious. While paralegals will remain busy keeping track of the thousands of exhibits, do not be surprised to look into the jury box around 2:30 in the afternoon and see some jurors fading into an afternoon nap.

Although the purpose of the trial is for the judge or jury to determine the outcome of the case, the parties may still settle the case during the trial itself. Suppose that a trial is in its third day, and the plaintiff's attorney is fairly certain that the jury is dead set against the plaintiff. The plaintiff's attorney may approach the defendant's attorney during a recess to discuss settlement. Lawsuits may even be settled while the jury is out deliberating, after all the evidence has been presented.

Paralegals perform many duties during trial. Some duties are performed only at certain stages, and others are performed throughout the trial. After the stages of the trial are discussed, the duties that paralegals typically perform during trial will be discussed more specifically.

THE COURTROOM

Before examining procedure, take a minute to picture the courtroom scene. The trial is ready to begin. All the parties, attorneys, and paralegals are in their seats in the courtroom. The judge is seated at the front of the courtroom and probably looks quite imposing in a black judicial robe. The large, raised desk-like structure behind which the judge sits is called the *bench*. Throughout the trial you will hear lawyers ask if they may "approach the bench." What they are asking is permission to approach the judge to present something, often a copy of an exhibit. Sometimes both lawyers will request or be asked to approach the bench for a *bench conference*. Both attorneys will go up to the judge and, in lowered voices, discuss some matter with the judge. For instance, the judge may tell the attorneys that their courtroom demeanor is unacceptable and that they should quit shouting at one another. If the discussion is going to be lengthy, the judge will usually excuse the jury until after the discussion is over.

Most courtrooms are set up with a table for each party, and the attorneys and paralegals sit behind the tables with their clients. Some state and federal local rules require that the attorneys stay behind the tables at all times unless they approach the bench or they are making opening statements or closing arguments. Other court rules allow the attorneys to stand almost anywhere in the courtroom, and you may see the attorneys get close to persons on the witness stand during questioning. The amount of dramatic embellishment is influenced by the tolerance or intolerance of the local court rules and the attitude of the judge. You may also observe some dramatic poses near the jury box at critical times. During a jury trial, the jurors sit in the jury box, which is usually located on one side of the courtroom. The jury box consists of two rows of seats, surrounded by waist-high wooden panels.

TRIAL PROCEDURE

As noted, trials typically follow a set procedure—that is, the stages usually occur in the same order. Local rules of practice may alter some parts of the standard procedure, but the order of presentation of evidence is generally uniform. The text discusses the stages from beginning to end.

Conference with the Trial Judge

This first step in the trial may vary, depending on whether the case is tried in federal court or state court, and depending on local rules of practice. In many federal district courts, the trial judge and attorneys have already held their final pretrial conference and entered a pretrial order, as discussed in Chapter 10. If a final pretrial conference has been held, the attorneys may meet only briefly with

the judge to discuss whether further settlement possibilities have arisen since that time. Parties may have added or lost witnesses, and this may be a subject of discussion. The content of the conference just before the trial begins depends in large part on the trial judge's personal preferences, as does the manner in which the conference is conducted. The attorneys may simply have a casual conversation with the judge in chambers. In other cases, a judge may have the court reporter record the conference and make it a part of the trial transcript.

There may be even more variation in the content and procedure for the conference just before trial when the lawsuit is tried in state court, depending on state and local rules of practice and on the personal preferences of state court judges. In fairly routine lawsuits tried in state courts, there may be no formal pretrial conference of the sort discussed in Chapter 10. State and local rules sometimes give the judge the authority to dispense with the pretrial conference. Some state and local rules provide that the attorneys meet and prepare a pretrial order and submit it, without necessarily meeting with the judge before trial.

If no formal pretrial conference has been held, the attorneys may discuss for the first time with the judge the possibility of settlement. The parties may discuss with the judge the evidence they will present. The attorneys also may ask the judge to rule before the trial on the admission of evidence, when the attorneys contend that certain evidence would be prejudicial or otherwise inadmissible. These motions before trial on the admission of evidence are called *motions in limine*. As in formal pretrial conferences, the objective is to establish any issues or facts that are not in dispute and to rule on appropriate motions to make the trial smoother.

Jury Selection (Voir Dire)

Seated in the courtroom is a group of perhaps forty persons, who constitute the *jury panel*: the pool of prospective jurors. These are adults residing in the jurisdiction, and their names have been chosen at random for jury duty. From them the attorneys pick the persons to serve as the jury. This process of selecting jurors is called ***voir dire.***

The number of jurors may vary, depending on whether the trial is in state court or federal court and on the local rules of practice. For instance, each district of a federal court in a state is usually given the choice of how many jurors to require in a civil trial. In some states, the districts have different requirements. Twelve jurors is the number traditionally required, but many districts require only six jurors now. One or two alternate jurors are usually picked in case jury members become ill or have to leave the trial for some other important reason.

The procedure for voir dire also differs according to whether the trial is in state court or federal court, and according to the local rules of practice. Some judges even have their own particular method for conducting voir dire. Regardless of the exact procedure used, the purpose of voir dire is the same—to select a jury that the attorneys (often with the aid of paralegals) think will be most receptive to their client's version of the facts.

To begin voir dire, the clerk assisting the judge calls out twelve names, and these persons take a seat in the jury box. Then each prospective juror in the jury box is asked a series of questions designed to elicit basic information about the juror and often his or her views on certain pertinent subjects. Recall from the discussion of jury investigation in Chapter 9 that at this point, you may know a great deal about the jurors or you may know nothing at all, depending largely upon what local court rules allow. Recall that some local rules do not allow the clerk of court even to release the names of the persons on jury duty until the beginning of that session of court.

In voir dire, the questions may be asked by either the judge or the attorneys, again depending on local rules. Some federal court local rules specifically state that the judge asks the questions. When the judge asks the questions, the attorneys submit to the judge before trial the questions they would like asked. Another method for voir dire is that the judge asks some preliminary questions and then the attorneys are allowed to ask follow-up questions. In some courts, the attorneys ask all the questions, and the judge takes very little part in voir dire. It is important to know the local rules so that the attorney-paralegal team can prepare its questions well in advance.

Questions include general background questions such as how long persons have lived at their present address; whether they have children and, if so, some general questions about the children; what a person's occupation is and how long the person has worked at a particular place; whether the persons know any of the parties or attorneys; and perhaps whether a person has hobbies or belongs to any organizations. The questions may be much more specific, depending on the nature of the case and the questions the judge allows. For instance, in the Wesser case, it would be important to know whether any prospective juror has ever been injured in a fire. A person injured in a fire may be very sympathetic to Mr. Wesser and prejudiced against the defendants.

After the questions are asked to the twelve persons in the jury box, each party's attorney has the opportunity to request that particular persons not serve on the jury. This is known as exercising a ***challenge***. There are two types of challenges. First is the *peremptory challenge*, which gives the attorney the right to excuse a juror without stating the reason. The second type of challenge is the *challenge for cause*, where the attorney must state the reason for not wanting the person on the jury. Common bases for challenges for cause are that a person is related to one of the parties, is a friend of one of the attorneys, or has stated a prejudice against one of the parties. The judge must approve the dismissal of a prospective juror for cause. If one attorney challenges a person for cause and the other attorney opposes the challenge, the judge decides whether the person should be excused for cause. If the judge rules against the challenge for cause, the moving attorney may still exercise a peremptory challenge.

Each party, may exercise only a certain number of peremptory challenges. The number of peremptory challenges allowed differs among courts, but usually in federal court each party is allowed three peremptory challenges in civil cases.[1] The number of challenges for cause is generally unlimited. Most attorneys,

however, do not challenge for cause unless absolutely necessary because of the risk of antagonizing other members of the jury.

Assume that the attorneys are selecting twelve jurors, and five persons are excused from the first twelve seated in the jury box. Five more names are called, and the process is repeated for these five persons. If two of these five are excused, then two more names are called, and the process is repeated for these two. Eventually twelve persons and one or two alternates are selected. The jury is then sworn in, and the trial proceeds.

During voir dire the attorney and paralegal keep a chart of the persons in the jury box. See Figure 11–1 for a sample chart. When a person is excused, they strike that person's name and insert the name of the next person called who sits in that chair. Paralegals help attorneys keep track of the prospective jurors and offer suggestions when they think a juror should be excused. For instance, an attorney may be busy asking questions and fail to notice antagonistic conduct by a prospective juror, such as icy stares at the attorney or other body language that shows that the prospective juror does not like the attorney.

When a trial receives a great deal of media coverage, the judge will take steps to shield the jury from media exposure. If a trial is particularly sensational or for some reason the judge feels that someone might try to tamper with (unduly influence) the jury, the judge will likewise take steps to shield the jury. The judge may *sequester* the jury—that is, require that they stay at a hotel during the trial rather than returning home at night. This protects members of the jury from hearing views about the ongoing trial on the news or having persons talk to them about the case. Even if a jury is not sequestered, the judge will admonish members not to discuss the case outside the courtroom. The jury should consider only what it hears at trial and should ignore what persons outside the courtroom think about the case.

Opening Statements

Throughout the remainder of the discussion of trial, assume that there are only two parties—plaintiff and defendant. Although many lawsuits involve more than two parties, the focus here is on understanding the usual trial procedure.

After the jury is sworn in, the attorney for the plaintiff makes an opening statement. The defendant's attorney then makes an opening statement, although the defendant is usually given the option of reserving the opening statement until just before the defendant presents evidence. In ***opening statements,*** the attorneys talk to the jury, explaining what the case is about. The general purpose of the opening statement for both the plaintiff and defendant is the same, but the discussion will focus on the plaintiff for simplicity's sake. The purpose of the opening statement is to give a comprehensive but succinct account of the evidence that the plaintiff will present. The attorney interweaves a preview of the evidence with an explanation of the points the plaintiff will prove. The attorney seeks to implant in the jurors' minds the plaintiff's version of the facts.

FIGURE 11–1 Sample Chart of Jurors

Bryson Wesser

vs

Woodall Shoals Corporation and Second Ledge Stores, Incorporated

File No. 3:96 CV 595-MU

JURY

BACK ROW

1	2		4	5	6
Carla Handshaw	~~James~~ Bieksha	Jim Chen	Greg Hardie	~~Rachel Fowler~~ Steve Geer	Anita Every
7	**8**	**9**	**10**	**11**	**12**
Teresa Garcia	~~Cedra Flanigan~~ Elsa Mittleman	Carol Barbee	Florence Angelo	Kevin O'Neill	Angela Blaze

FRONT ROW

CHALLENGES

For Cause 0
Plaintiff 2
Defendant 1

The first impression made by opening statements is crucial. If jurors believe the plaintiff's version of the facts and find the defendant's attorney's opening statement unconvincing, the jurors are likely to filter their view of the evidence during the trial in favor of the plaintiff. Note that opening statements are not arguments. Arguments are reserved for closing. Most attorneys use a straightforward, sincere presentation, without the bombastic flourishes of raising their voices and waving their fists. In general, attorneys strive to state the facts clearly and forcefully, explain who the parties are, try to make their client sympathetic, and develop the theory of the case. Most attorneys avoid overstating their case. If they promise evidence but then fail to deliver, the jury remembers the failure and probably will conclude that the attorney failed to prove the client's case.

Presentation of the Plaintiff's Case

Now it is time to present the evidence that you and the attorneys on your team worked so hard to gather. The text includes an overview of the procedure for presenting evidence in the discussion of the plaintiff's case, but the procedure is the same for defendants. A rundown on the duties of paralegals throughout the trial concludes this chapter.

The Plaintiff's Burden of Proof. Throughout their trial preparation, the attorney-paralegal team has gathered evidence to prove the essential elements of each claim for relief. This is precisely what the plaintiff must now do at trial. The plaintiff has the ***burden of proof***. In a civil lawsuit, the plaintiff's burden of proof is to present evidence sufficient to prove by the "preponderance of the evidence" the facts necessary to support the essential elements of the plaintiff's claims for relief.[2] For instance, in the Wesser case, one claim for relief is breach of express warranty by the defendant Woodall Shoals. Leigh Heyward must present evidence to convince the jury by the "preponderance of the evidence" that Woodall Shoals made an express warranty that the electric blanket would remain free of electrical and mechanical defects for a certain period of time and that the fire occurred within the warranted period; that the blanket contained electrical and mechanical defects that caused it to ignite; and that this breach of express warranty caused the injuries and property damage sustained by Mr. Wesser.

Note that proving the facts by the preponderance of the evidence does not require that there be no doubt whatsoever in the jurors' minds that Mr. Wesser has established the essential elements of his claims. It means that Mr. Wesser must establish that it is more probable than not that Woodall Shoals breached the express warranty and that this breach caused Mr. Wesser's injuries and property damage. Mr. Wesser's evidence must outweigh Woodall Shoals' evidence that there was no breach of express warranty that caused Mr. Wesser's injuries and property damage.

Presentation of Evidence. The two primary means of presenting evidence are the testimony of witnesses and the submission of exhibits, that is, documentary evidence. Remember from the discussion of discovery that the parties may admit to certain

facts that are not in dispute. If the parties have stipulated to uncontested facts, these facts must be recited to the jury. The attorney usually does this. The facts may be read into the record at the beginning of the presentation of evidence or later, if the facts fit in better later in the trial. The bulk of the evidence, however, is presented by witness testimony or the presentation of documentary evidence.

Presentation of Witnesses. Leigh Heyward has called Mr. Wesser to the stand as her first witness. Mr. Wesser is sworn in. Ms. Heyward asks Mr. Wesser questions. This is known as *direct examination*—that is, examination of the witness by the attorney who called the witness. Ms. Heyward asks Mr. Wesser a series of questions designed to show what happened. These address basic facts such as where and when he bought the electric blanket, who manufactured the blanket, and how Mr. Wesser took care of the blanket.

Ms. Heyward will use a series of open-ended questions, such as "What happened after you went to bed on January 3, 1995?" On direct examination, attorneys are not supposed to use *leading questions*—that is, questions that suggest that there is only one true answer to the question. For instance, the question "You never read the instructions for operating the blanket, did you?" is leading, because it seems to ask the witness simply to confirm what the attorney has said. Rule 611 of the Federal Rules of Evidence provides that attorneys should ask leading questions only when the witness is hostile. This occurs when attorneys call the other party's witnesses to the stand.

SIDEBAR The Federal Rules of Evidence do not set out an exact pattern to follow for presentation of evidence. Rather, FRE 611(a) states that the court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Thus, presentation of evidence commonly follows an accepted pattern, but the court can intervene if an attorney presents an endless string of witnesses who all say the same thing or if the attorney harasses a witness. Think of the judge's role as that of the director of a Shakespearean play, giving instructions not about the *order* in which lines are delivered, but about the *manner* in which they are delivered.

During Mr. Wesser's testimony, Ms. Heyward will also introduce exhibits such as the written warranty, medical bills, and home repair bills. The method for entering these documents as exhibits is discussed below.

After Mr. Wesser has answered all Ms. Heyward's questions, Mr. Benedict is given the opportunity to ask questions. This is *cross-examination*, when the defendant's attorney asks questions of the witnesses called by the plaintiff. Of course, the plaintiff 's attorney also gets to cross-examine the defendant's witnesses.

The purpose of cross-examination is to undermine the witness's testimony. The defense attorney will try to show that Mr. Wesser really is not so sure of the

facts he stated on direct examination. Cross-examination is the time for impeachment. If Mr. Wesser has made prior statements inconsistent with his testimony, Mr. Benedict will bring out these inconsistencies. This is also the time for impeachment by showing bias, if appropriate.

On cross-examination, the attorney does ask leading questions. In fact, the attorney tries to fashion the questions in such a way that the witness has to give a yes or no answer without the opportunity to explain or qualify the answer. Generally attorneys do not ask on cross-examination any questions to which they do not already know the answer. Taking the chance with the unknown may result in damaging testimony that hurts their case.

After Mr. Benedict has completed cross-examination, Ms. Heyward may ask additional questions if she wishes. This is known as *redirect examination*. Redirect examination is generally limited to matters raised during cross-examination. The purpose of redirect is to allow Mr. Wesser to explain certain points so as to "rehabilitate" his testimony—that is, counteract any negative impressions that may have been created during cross-examination.

The same procedure of direct examination, cross-examination, and redirect examination is used for the remainder of Ms. Heyward's witnesses, including expert witnesses. Recall from the discussion of discovery that when a witness is unavailable, the witness's deposition may be presented at trial. The general procedure is for a person to take the witness stand and read the answers given in the deposition, in response to the attorney's questions. Paralegals sometimes perform this task.

Presentation of Documentary Evidence. Most trials involve the presentation of numerous documents, and some trials involve as many as hundreds or thousands. One important task of paralegals at trial is to keep the documents in order so that the proper document will be ready when the attorney is ready to introduce it into evidence. The last thing the attorney-paralegal team wants to do at trial is sift through a pile of papers to find the next exhibit, while the jury stares in amazement at their disheveled table.

There is a generally accepted procedure for introducing documents into evidence, but before discussing this procedure, note that every document presented by every party has to be identified. For example, the plaintiff's first exhibit may be labeled P-1 and the defendant's third exhibit may be labeled D-3. Sometimes a party's exhibits may be identified by letters; for instance, the plaintiff's first exhibit may be labeled Exhibit A. When more than twenty-six exhibits are involved, however, the use of letters may get confusing.

Sometimes all the exhibits are labeled before the trial begins. For example, the attorneys may have the exhibits labeled during the pretrial conference. This can make presentation of numerous documents proceed more smoothly.

Turning now to the procedure for introducing exhibits, the attorneys first lay the foundation for relevance. For instance, Ms. Heyward asks Mr. Wesser when and where he purchased the electric blanket. If the parties have already stipulated that the receipt is authentic, Ms. Heyward is ready to introduce the

receipt into evidence. Assume that this is the first exhibit she introduces and that the exhibits were not labeled before trial. Ms. Heyward says that she would like to have the receipt marked as Exhibit P-1. She then walks to the clerk who marks the exhibit as P-1. Ms. Heyward gives a copy of the exhibit to Mr. Benedict and, after asking for permission to approach the bench, gives a copy to the judge.

At this point, if authenticity has not been stipulated, Ms. Heyward shows Mr. Wesser the receipt and asks him to identify it. Assume that at the end of the presentation of all the plaintiff's evidence, Ms. Heyward has presented forty-five exhibits. She requests that the judge enter Exhibits P-1 through P-45 into evidence. If there are no objections to entry of the exhibits, the judge states that Exhibits P-1 through P-45 are entered into evidence, and the jury takes the exhibits with it for its deliberations at the conclusion of the presentation of all the evidence.

Objections to Evidence. Before discussing the next step in the trial, it will be useful to examine how the court handles objections to the introduction of evidence. An attorney may object to testimony that a witness is going to give or to the entry of certain exhibits into evidence.

In regard to testimony, assume that Ms. Heyward has asked Mr. Wesser what, in his opinion, was the cause of the fire. Before Mr. Wesser answers the question, Mr. Benedict says, "I object." The judge then allows Mr. Benedict to state why he objects. Assume that he says that Ms. Heyward has not laid a sufficient foundation to show that Mr. Wesser had personal knowledge of the cause of the fire. After Mr. Benedict explains the basis for his objection, Ms. Heyward is given the opportunity to explain how she has laid a proper foundation. The judge then decides whether Mr. Wesser may answer the question.

In regard to exhibits, assume that Mr. Benedict objects to the entry of Exhibits 10 and 26 into evidence. Mr. Benedict explains the grounds for his objections, and Ms. Heyward explains why the exhibits should be entered into evidence. For instance, Ms. Heyward may argue that the evidence fits an exception to the hearsay rule. The judge then rules on whether the exhibits may be entered into evidence. Assume that the judge allows both exhibits to be entered. Mr. Benedict has to accept the judge's ruling for now and proceed with the trial. If he thinks the judge erred in allowing the exhibits into evidence, he may identify this as a ground for appeal.

Sometimes the debate over the admissibility of evidence can be lengthy. If the debate promises to be lengthy or will contain statements that should not be heard by the jury, the judge will send the jury out of the courtroom while the attorneys present their arguments.

Motion for Directed Verdict. Ms. Heyward has presented all the plaintiff's evidence. She states that the plaintiff rests. This means that the plaintiff rests his case, having presented all his evidence.

At this point, Mr. Benedict makes a motion for a *directed verdict*, also called a judgment as a matter of law. A directed verdict is granted when a party has not presented sufficient evidence to establish a ***prima facie case***. Mr. Wesser has

established a *prima facie* case if he has presented sufficient evidence to allow the jury to rule in his favor. Assume that because he had lost the receipt and had no other evidence to establish the place of purchase, Mr. Wesser did not establish that he bought the blanket at Second Ledge Stores. A directed verdict in favor of Second Ledge might be appropriate, since there may be insufficient evidence for the jury to find that the blanket was purchased at Second Ledge.

The effect of a directed verdict is to take the decision away from the jury. If the judge decides that there is not sufficient evidence for the jury to find that Mr. Wesser bought the blanket at Second Ledge, then the judge enters a verdict in favor of Second Ledge. If the judge denies the motion for a directed verdict, the trial proceeds.

FRCivP 50(a) allows either the plaintiff or defendant to move for a directed verdict at the close of the other party's evidence. FRCivP 50(a) requires that the moving party specifically state the grounds for the motion. Attorneys usually make a motion for a directed verdict even when they are relatively sure that the judge will deny the motion. This is because they want to preserve the denial as a possible ground for appeal.[3]

Presentation of Defendant's Case

The procedure for presenting the defendant's evidence is the same as the procedure for the plaintiff. The defendant presents witnesses, who undergo direct examination, cross-examination, and redirect examination. The defendant's attorney presents documents and introduces them as exhibits, following the same procedure described for the plaintiff.

Although the defendant uses the same procedure as the plaintiff, the defendant has some different considerations in presenting evidence. In the Wesser case, Mr. Benedict's goal is to show that the defendants' version of the facts is true. Although he seeks to point out the weaknesses in the plaintiff 's case, Mr. Benedict must primarily emphasize the strengths of the defendants' case. If Mr. Benedict appears too defensive, the jury may assume that he has a weak case.

A defendant who has asserted a counterclaim has different concerns. Remember that a counterclaim is like a complaint, only it is directed against the plaintiff. Because the defendant seeks to establish a claim against the plaintiff, the defendant has the burden to present a *prima facie* case against the plaintiff. Thus, the defendant's requirements in a counterclaim are like those discussed earlier for plaintiffs.

After Mr. Benedict has presented all his witnesses and introduced all his exhibits, he makes a motion that his exhibits be entered into evidence, just as Ms. Heyward did. Mr. Benedict then rests the defendants' case.

Rebuttal Evidence

After the defense has rested, the plaintiff is allowed to present rebuttal evidence. Rebuttal evidence should be carefully planned so that it specifically rebuts points raised by the defendant. This is not an opportunity for the plaintiff to present additional general evidence. The testimony should be tailored to

rebut specific points and is generally not lengthy. Unduly lengthy rebuttal evidence may aggravate the jury or the judge because by this point they are likely to be getting restless.

Motions at the Close of the Evidence

After all the evidence is presented, either or both parties may move for a directed verdict. Mr. Benedict renews the defendants' previous motion for a directed verdict. Ms. Heyward moves for a directed verdict in favor of the plaintiff. As noted earlier, the judge decides whether there is sufficient evidence for the case to go to the jury.

Closing Arguments

Closing argument is a summary of the evidence presented in a manner that persuades the jury that your client's version of the facts is true. In closing arguments, the attorneys try to persuade the jury to rule in their client's favor. Different attorneys have different styles of delivery for their closing arguments. Some attorneys give a casual, forthright presentation, as if they were conversing with friends. Other attorneys try to wax eloquent, giving vent to their best dramatic qualities. Often the style of the presentation depends on the nature of the case. An attorney may be dramatic and display more emotion in talking about the severe injuries a small child suffered than in recounting three witnesses' statements about whether a stoplight was red or green.

Attorneys are not allowed to go beyond the evidence presented at trial in making their closing arguments. Rather, they recap the evidence, summarizing what the witnesses said and what the exhibits show. The attorneys weave their summary in with their theory of the case. Even as the trial winds down, the attorneys are still trying to show that their clients have established the essential elements of their claims.

The plaintiff's attorney generally gives the first closing argument. The defendant's attorney then presents a closing argument, followed by a brief opportunity for rebuttal. The length of the closing argument varies from case to case, but the judge usually tells the attorneys beforehand if there is a limit on the amount of time allowed for closing arguments.

Jury Instructions

The jury is ready to perform its duty to determine the facts. First it must resolve the disputes concerning the facts, and then it must apply the applicable law.

The purpose of jury instructions is for the judge to explain what law the jury must apply. The judge gives the instructions after the completion of closing arguments. However, the judge and attorneys discuss the jury instructions before closing arguments. In fact, some judges require that attorneys submit in writing before trial any special instructions they wish the judge to give. FRCivP 51 provides that the attorneys may submit their written requests for instructions at the close of evidence or at an earlier time during the trial, as the judge directs.

An attorney may object to some instructions that the other attorney submits. The judge listens to the arguments of the attorneys, and then decides whether to include the requested information. This process is completed before closing arguments and generally takes place in the judge's chambers, outside the hearing of the jury.

Generally judges have written instructions, which they read to the jury. Judges often base their instructions largely on pattern jury instructions. Because the failure to instruct the jury properly is ground for appeal, states have developed standard pattern jury instructions for judges to use. These instructions explain the applicable law and reduce the chance that the judge will omit anything essential. Attorneys may submit refinements of the pattern instructions, tailoring the instructions to their client's favor, without altering the substance of the law.

The judge's instructions cover procedural and substantive matters. The procedural matters include an explanation of burden of proof, including the meaning of preponderance of the evidence. The judge also explains the effect of impeachment evidence and addresses other procedural issues. The explanation of substantive matters is an explanation of the law that applies. Here the judge explains the essential elements that the plaintiff must establish. The judge also instructs the jury on the effect of affirmative defenses, such as contributory negligence and the effect of comparative negligence.

Jury Deliberation and Verdict

The jury retires to the jury room to begin its deliberations. During deliberations, the jury may have additional questions to submit to the court, usually to clarify the explanation of a point of law. The jury sends out the written questions to the judge, who considers the questions with the attorneys and returns answers to the jury.

When the jury has reached its conclusions, the verdict is delivered in writing to the judge, who reads it aloud in open court. There are two types of verdicts—general verdicts and special verdicts. In a ***general verdict***, the jury reports only which party wins and the amount of damages to which the prevailing party is entitled. In a ***special verdict***, the jury must answer specific written questions for each issue of fact. The judge submits the written questions in whatever form the judge deems appropriate, in accordance with FRCivP 49.

FRCivP 49 also permits general verdicts accompanied by answers to interrogatories. The jury returns a general verdict and answers the interrogatories, which require it to state its conclusions about certain issues of fact. If the answers to the interrogatories are not consistent with the verdict, the judge may order the jury to return to the jury room and deliberate further, or the judge may order a new trial.

Entry of Judgment

Assume that the jury in the Wesser case returned a verdict in favor of Mr. Wesser, directing that Woodall Shoals and Second Ledge pay damages in the

amount of $175,000. The judge states in open court that judgment is entered in favor of the plaintiff in the amount of $175,000. The next step is the preparation and filing of a written judgment, discussed in detail in Chapter 12. For now, note that the attorney for the prevailing party usually prepares a judgment and then submits it to opposing counsel to review. The judgment is then given to the judge to sign, and it becomes part of the written record, along with the pleadings and the other documents in the court file.

The judgment must be legally sufficient, as discussed in Chapter 12. Otherwise, parts of the judgment may be grounds for appeal. Therefore, judgments may be many pages long.

Although the trial is over, the litigation process may go on for some time. The prevailing party is ready to go home and relax. The losing party, however, may file several types of posttrial motions and may take the case up on appeal. The posttrial motions and appeal procedure are discussed in Chapter 12.

Differences Between Jury and Nonjury Trials

In nonjury trials, the judge is the finder of facts. Most of the differences between jury and nonjury trials are obvious. For instance, in a nonjury trial, certain steps in the trial process such as voir dire and jury instructions are not necessary.

The logistics of nonjury trials are less complicated in some respects. For instance, the jury does not have to be removed from the courtroom while the attorneys make lengthy arguments about the admission of evidence. The procedure for presenting evidence, however, is the same as in jury trials, and the attorneys give opening and closing statements in order to persuade the judge of their client's version of the facts.

There are some procedural differences. For instance, at the close of the plaintiff's evidence, the defendant's attorney does not move for a directed verdict. In nonjury trials, the defendant's attorney moves for an involuntary dismissal, pursuant to FRCivP 41(b). To prevail on a motion for involuntary dismissal, the defendant must show that the plaintiff "has shown no right to relief" (FRCivP 41(b)). If the judge grants the motion for involuntary dismissal, judgment is entered against the plaintiff. If the motion is denied, the trial continues with the presentation of the defendant's evidence.

PARALEGAL DUTIES AT TRIAL

The text has discussed some of the tasks that paralegals perform at specific stages of the trial, such as voir dire. There are certain duties, however, that paralegals perform throughout trial.

Paralegals are invaluable at trial. Often paralegals are at least as familiar with the case as the attorneys are. In fact, you may be more familiar with the content of documents, such as depositions, because you recently reviewed

the documents and summarized them. The aim of paralegals throughout the trial is to assist the attorneys to give a smooth presentation of evidence and keep track of the evidence presented at trial.

Witnesses

Paralegals should keep a running log of the witnesses who testify for each party. You must pay particular attention to the order of witnesses that your side is going to present. As a paralegal, you may even be responsible for ensuring that the witnesses are present in the courtroom when they are needed.

In pretrial preparation, paralegals give the witnesses a general indication of what time they will need to be present at trial. During the trial, paralegals monitor the progress of the trial and inform witnesses of the exact time they must be present at the courtroom. Of course, you cannot calculate this to the minute, but you need to give the witness a definite time to arrive. Allow some lead time for the witness to find a parking place and get to the courtroom. It never hurts to give witnesses an arrival time that is thirty minutes before you expect to need them.

Paralegals take notes of the questions that the attorneys ask and the answers that witnesses give. You may keep an outline of the questions that the attorney plans to ask each witness, and let the attorney know if any questions are skipped. Paralegals can help pinpoint the inconsistencies on which witnesses may be impeached. For instance, a witness may testify about an incident, and you recall that the account of the incident was different in the witness's deposition. You can locate the page in the deposition and bring it to the attorney's attention so that the witness can be impeached.

In some trials, the court reporter prepares a daily transcript of the trial testimony. This is expensive, however, so it is not always done. When there is no daily transcript, paralegals may prepare digests of the day's testimony for the attorney-paralegal team to review before the next day's testimony. Follow the same guidelines you used for digesting depositions, especially keeping the digest limited to the most important points. You may find inconsistencies in a witness's testimony as you prepare the digest, and you can bring these to the attorney's attention.

Exhibits

Paralegals can render invaluable help with document control during the trial. As noted, it looks bad for an attorney to refer authoritatively to a document and then take five minutes plowing through a pile of papers to find it. Paralegals can keep the exhibits in order for the attorneys and be prepared to hand the exhibits to the attorneys when they need them. For instance, when Ms. Heyward is ready to present the written warranty that came with the blanket, a paralegal will have the copies ready for her, so she can present a copy to Mr. Benedict and to the judge.

SIDEBAR As noted in the discussion of pretrial preparation, be sure that you bring enough copies of each exhibit, and perhaps one or two extra copies. Check well before trial to ensure that you have sufficient copies.

Paralegals should keep a list of the exhibits that the parties have introduced. List the number assigned to the exhibit and a short description of the document. It is important to check off each document as it is received into evidence. When the judge says that Exhibits 1–20 are admitted into evidence, mark it on your list of exhibits. At the end of your party's presentation of evidence, double-check your list to be sure that all your exhibits have been admitted into evidence. If some exhibits were not admitted, bring this to the attorney's attention so that the attorney can move that the exhibits be admitted.

At the end of each day, paralegals should be sure that they have a complete set of exhibits—both their own and their opponent's. Be sure that all the exhibits are identified by the number assigned.

Trial Notes

Paralegals keep notes of the questions asked and answers given by witnesses. Some persons take notes by drawing a vertical line down the middle of a legal pad and writing the questions on the left half and the answers on the right half. There are other ways to take notes; just be sure that your notes are legible. Check with the attorneys on your team to see if there is a certain method they prefer.

Observations

Often at the end of each trial day, the attorney-paralegal team meets to discuss the events of the day. Paralegals share their observations about the trial. This may include observations about testimony or about jurors' reactions to certain evidence. Did a juror sleep for an hour? Did any jurors exhibit facial expressions that let you know what they were thinking? Did jurors roll their eyes and sigh when the other side's witnesses gave boring, repetitive testimony? Did the judge turn beet red when one of the attorneys repeatedly objected to certain evidence? The attorneys may not observe these things because they are busy thinking of the next question to ask. Paralegals' observations can be extremely helpful.

Trials can be tense, but they can also be fun. After months of preparation, it is rewarding to pull together your hard work. Remember that trials are usually fast-paced and are often full of surprises. Be ready to respond quickly to the surprise turns that the trial takes.

Finally, here are a few practical tips. Take extra supplies to the courtroom: paper clips, staples, pens, and legal pads. Observe how the attorneys on your team react to trials. Some are very tense, but others are very relaxed and would rather try a case than take a vacation. Be ready to deal with these different types of personalities. Trials can make for very long days. At lunch time, you may have to run to the office or meet with witnesses. You may find that you have no time

to eat, so you may want to put some fruit or other snacks in your briefcase. Some attorneys never leave home without granola bars in their briefcases. Just remember to take out the bananas you have not eaten by the end of trial!

ETHICS BLOCK

Several of the ABA Model Rules and portions of the Model Code specifically address lawyers' trial conduct. Lawyers are required to obey the rules of the court. This means that a lawyer must follow the court's local rules. Lawyers also are required to follow the court's rulings, such as rulings regarding the admission of evidence and on various motions throughout the trial. For instance, if your firm represents the defendant, when the plaintiff has presented all her evidence, your supervising attorney may make a motion to dismiss the plaintiff's case for failure to show a right to relief. If the judge denies the defendant's motion to dismiss, the trial must continue, and the attorney must abide by the judge's ruling.

Attorneys are precluded from asserting personal knowledge about facts in issue unless they are witnesses. Further, attorneys may not give a personal opinion about a person's credibility or about the justness of a person's cause. In addition, lawyers are not allowed to allude to any matter that they do not reasonably believe to be relevant or that is not supported by admissible evidence. Lawyers are prohibited from communicating with jurors before or during a trial, except when formally addressing them as a group in the courtroom.

Although as a paralegal you will not actually try any cases yourself, it is essential that you understand the ethical obligations that govern conduct in the courtroom. Your understanding will make you better able to help the attorney prepare for trial.

SUMMARY

Introduction

Trial is the culmination of all the months of pretrial preparation performed by the attorney-paralegal team. Each party is ready to convince the finder of fact that its version of the facts is true. The finder of fact in jury trials is the jury, and in nonjury trials is the judge.

The litigation may still be settled even during the trial. Therefore, there is still a chance that more negotiations will take place.

The Courtroom

The general layout of courtrooms is for the judge to sit behind a raised desk-like structure called the bench. The bench is at the front, and the jury box is on the side of the courtroom. Tables for the attorneys for each party are in front of the bench, though some distance back. Sometimes attorneys ask to approach the bench to talk to the judge. When both attorneys advance to discuss something with the judge, this is a bench conference.

Some courts require the attorneys to stay behind their tables at all times, except for opening and closing arguments. Other courts allow the attorneys to move about the courtroom at will.

Trial Procedure

Trials tend to follow an established procedure; that is, the stages of the trial occur in a set pattern.

The first step is the final pretrial conference with the judge. If the trial is in federal court, this has probably already been done before the trial begins. In state court, however, the final pretrial conference is often held on the first day of trial. The purpose of this last conference is to discuss settlement possibilities, to have the judge rule on motions such as admissibility of certain evidence, and to let the judge give special instructions to the attorneys, if necessary. Some judges have casual conferences in their chambers, while others have formal hearings in a courtroom. The motions decided before trial are called motions *in limine*—that is, on the threshold of trial.

Jury Selection. The group of persons from whom the jury will be chosen is called the jury pool. It consists of adults residing in the jurisdiction who are chosen at random. The attorneys must choose a jury, and this process is called voir dire.

Some courts require juries to be comprised of twelve persons, and other courts allow juries of as few as six persons. The purpose of void dire is to get basic information about the potential jurors—education, occupation, family status, and so on. Sometimes jurors are asked their opinions about certain pertinent issues. The attorneys for each party want to pick the jurors that they feel are most likely to find in favor of their client. Sometimes the judge asks the questions, and sometimes the attorneys do. This varies according to local court rules and judges' preferences.

Attorneys excuse a potential juror when they feel that the person would not favor their client. An attorney excuses a potential juror by exercising a challenge—that is, stating a request that the person be excused from the jury. There are two types of challenges. In a peremptory challenge, the attorney simply excuses the juror and does not have to explain why. The number of peremptory challenges is limited, sometimes to three. In a challenge for cause, the attorney states why the potential juror should be excused—for example, because the person exhibited some type of prejudice. There is no limitation on the number of challenges for cause.

During void dire, paralegals keep a chart of the jury seats and strike persons' names as they are excused. The final chart shows the jury that has been selected.

Opening Statements. The plaintiff's attorney usually gives the first opening statement. An opening statement is a forecast of the evidence that the plaintiff will present. The purpose is to show the jury from the outset that

your client's version of the facts is correct. The defendant's attorney's opening statement follows. Unlike closing arguments, opening statements are not argumentative.

Presentation of Plaintiff's Case. The plaintiff has the burden of proof—that is, the plaintiff must prove the essential elements of each claim asserted by the "preponderance of the evidence." This means that the jury finds the plaintiff's version of the facts more probable than not.

The two primary ways to present evidence are by testimony of witnesses and introduction of documentary evidence. The plaintiff's attorney calls the witness and conducts direct examination, asking open-ended questions and allowing the witness to tell the story. Attorneys are not supposed to use leading questions on direct examination. Leading questions are questions that imply that there is only one correct answer to the question, generally either yes or no. Leading questions are used on cross-examination. This is when the defense attorney examines the plaintiff's witnesses and tries to undermine their testimony and question their credibility. After cross-examination, the plaintiff's attorney is allowed to conduct redirect examination. This is generally a series of short questions to explain answers given on cross-examination and to try to rehabilitate the witness—that is, to undo any damage done on cross.

All documents to be presented are labeled. They may be labeled before trial if the attorneys have agreed, or they may be numbered by the clerk assisting the judge during trial. The general procedure is the same for all parties. First the attorney lays a foundation—that is, establishes the document's relevance by questioning a witness about it. The attorney then hands a copy to opposing counsel, has the clerk affix the official court label, and hands a copy to the judge. The attorney must also establish the document's authenticity. Frequently the attorneys agree before trial to stipulate to the genuineness of certain documents. At the end of the presentation of documentary evidence, the attorney requests the judge to enter the documents into evidence. This means that the jury can review the documents and take them during deliberations. The opposing counsel can object to the entry of the documents, for instance, if there is a question of authenticity.

Attorneys object to the admission of testimony and documentary evidence throughout the trial. They must state their reason for objection—for example, that the evidence is hearsay and fits no hearsay exception. The presenting attorney states why the evidence is admissible, and the judge rules on whether the evidence may be admitted. It is important for witnesses to stop talking as soon as an attorney objects and not to start again until the judge has ruled. Attorneys who think the judge erred in admitting evidence must save this, along with any other grounds for appeal, until the conclusion of the entire trial.

A motion for directed verdict is granted when the plaintiff has not presented a *prima facie* case—that is, sufficient facts for the jury to find in favor of the plaintiff. If the plaintiff has not presented enough evidence to be the basis of a favorable verdict, the judge can take the case away from the jury, enter a verdict

in favor of the defendant, and send the jury home. The plaintiff also moves for a directed verdict at the close of the defendant's evidence.

Presentation of Defendant's Case. The procedure for presenting the defendant's case is the same as for the plaintiff—direct examination, cross-examination, and redirect examination. The defense attorney strives to show weaknesses in the plaintiff 's case without appearing too defensive. A defendant who has asserted a counterclaim must establish a *prima facie* case for the claim. At the end of presenting evidence, defense counsel moves to enter the defendant's exhibits into evidence.

Rebuttal Evidence, Closing Motions, and Closing Arguments. After the defendant has rested its case, the plaintiff may present rebuttal evidence. This evidence is usually short, and its aim is to rebut specific points made by the defendant.

At the close of the rebuttal evidence, the plaintiff moves for a directed verdict. The defendant renews the motion for a directed verdict.

Attorneys for both sides now deliver their closing arguments. A closing argument is a summary of the evidence presented, given in a manner that persuades the jury that your client's version of the facts is true. Closing arguments can be dramatic if an attorney has a flair for drama and a case with some emotional appeal. The plaintiff 's attorney usually goes first.

Jury Instructions, Deliberation, and Verdict. The jury's responsibility is to determine which facts it believes are true and then apply the law to those facts. The judge instructs the jury by explaining the law that must be applied. Judges usually read a fairly standard set of written instructions, depending on the subject matter of the case. Attorneys may submit special instructions and request that the judge use them. If the judge gives erroneous or incomplete instructions, this can be a ground for appeal.

While the jury is deliberating, it may have more questions for the judge. The written questions are sent out of the jury room for the judge's answer.

The jury returns to the courtroom for announcement of the verdict, which may be one of two principal types. In a special verdict, the jury must answer specific written questions for each issue of fact. In a general verdict, the jury reports only the party who wins and the amount of the award. A hybrid of the two is a general verdict with answers to interrogatories that ask the jury to state its conclusions about certain issues of fact.

Entry of Judgment. The judge announces the judgment in open court. Then a written judgment is prepared and filed so that the clerk of court can enter the judgment. There are various procedures for preparing the written judgment; sometimes the judge's law clerk prepares it, and sometimes the prevailing party's attorney does. At the conclusion of the trial, attorneys may make posttrial motions.

Differences Between Jury and Nonjury Trials. Nonjury trials are simpler because there are fewer steps. The procedure is basically the same for introduction of evidence. One important procedural difference is that at the end of the plaintiff's evidence, the defendant moves not for a directed verdict but for an involuntary dismissal, pursuant to FRCivP 41(b).

Paralegal Duties at Trial

Paralegals have many important tasks to perform throughout the trial. Paralegals are invaluable at trial because they are often at least as familiar with the case as the attorneys are. Their knowledge of the documents is sometimes greater than the attorney's.

Paralegals are often responsible for ensuring that witnesses are present and on time. You inform witnesses of the time to arrive at the courtroom and keep a log of witnesses presented.

One important task is taking notes of questions asked and answers given. You may also keep an outline of the questions that the attorney plans to ask and alert the attorney if any questions are skipped. While attorneys are busy questioning, paralegals can spot inconsistencies in a witness's testimony and point out where the contradictory testimony appeared—for example, in a deposition.

Paralegals help attorneys keep exhibits in the order in which they will be introduced at trial. Paralegals also keep lists of exhibits presented and entered into evidence. If some exhibits have not been entered into evidence, the paralegal brings this to the attorney's attention. At the end of each trial day, the paralegal ensures that the attorney-paralegal team has a complete set of all exhibits entered by both sides.

Legible notes are essential. When there is no daily transcript prepared by a court reporter, the paralegal must keep accurate notes of every significant question, answer, and event that happens at trial.

Paralegals should observe the jurors to detect adverse reactions to the attorney or to certain witnesses. Paralegals can also note the judge's reactions. Attorneys may be so busy thinking about the next question to ask that they are unable to make these observations.

Practical tips: Take extra office supplies to the courtroom. Be prepared for long days, surprises, and missed lunches!

REVIEW QUESTIONS

1. A motion asking the judge to take the case away from the jury and decide it is called a motion for which of the following?
   a. involuntary dismissal
   b. directed verdict
   c. default judgment
   d. a special verdict

2. Which of the following must attorneys do in presenting exhibits at trial?
   a. establish the authenticity of the document
   b. give a copy of the exhibit to the judge
   c. lay a foundation to show that the exhibit is relevant
   d. all of the above
   e. b and c only
3. Which of the following are tasks performed by paralegals during trial?
   a. making the opening statement
   b. keeping exhibits in the order that they will be introduced
   c. taking notes on answers given by witnesses
   d. all of the above
   e. b and c only
4. Which of the following describes the burden of proof in most civil cases?
   a. by clear and convincing evidence
   b. beyond a reasonable doubt
   c. by the preponderance of the evidence
   d. none of the above
5. T F Attorneys are not allowed to ask leading questions on cross-examination.
6. T F Attorneys may exercise only a limited number of peremptory challenges.
7. T F Defendants who file counterclaims have the same burden of proof as do plaintiffs.
8. T F Opening statements are generally argumentative.
9. T F After a verdict is returned, no more motions are allowed.
10. T F In most civil cases, plaintiffs must prove their claims by the preponderance of the evidence.

PRACTICAL APPLICATIONS

The Wesser trial is underway, and you are sitting at the table with Ms. Heyward, assisting her throughout the trial.

1. During voir dire, you notice that a certain potential juror is not giving any answers that appear unsympathetic to Mr. Wesser. Every time Ms. Heyward asks this potential juror a question, however, he frowns and stares at the ceiling. Every time Mr. Benedict asks him a question, he smiles and engages in direct eye contact. Should you bring this to Ms. Heyward's attention?
2. Ms. Heyward is introducing many documents into evidence. What can you do to help her?
3. The jury returns from deliberations, and the judge announces that they have found for Mr. Wesser, awarding him damages in the amount of $175,000. They have answered no other specific questions. Is this a general verdict or a special verdict?

CASE ANALYSIS

Read the excerpt from *King v. Jones*, 824 F.2d 324 (4th Cir. 1987), and answer the questions following the excerpt.

United States Court of Appeals, Fourth Circuit.

. . .

King brought this action pursuant to 42 U.S.C.A. § 1983 charging violations of his constitutional rights. In general, King alleged that his rights had been violated because he was unlawfully seized and mistreated, arrested without probable cause, his leg was broken as a result of police brutality, and he was incarcerated by the magistrate without a proper probable cause determination, and that he was entitled to immediate release.

Before trial, the parties were requested to submit proposed questions for *voir dire* of the jury. King's counsel, apparently believing that she would have the right to personally conduct *voir dire,* had prepared four pages containing 90 proposed questions. These questions were argumentative in nature and because they were prepared for use by the attorney, their syntax was not of use to the court without substantial revision. The district judge refused to propound these questions to the jury venire and referred to them as "California questions." The record indicates that King's attorney had the opportunity to object to the district court's ruling on these questions, but she did not do so.

At the conclusion of the evidence, the court directed a verdict against King on his claims that his right to an appearance before a magistrate had been denied and that he was entitled to immediate release. The trial court then charged the jury, which returned a verdict for defendants on all claims. This appeal followed.

II

"The essential function of *voir dire* is to allow for the impaneling of a fair and impartial jury through questions which permit the intelligent exercise of challenges by counsel." *U.S. v. Brown,* 799 F2d 134 (4th Cir. 1986). While the district court has broad discretion in conducting *voir dire,* an abuse of that discretion occurs where the court's restriction hinders a defendant's opportunity to make reasonable use of his challenges. In *United States v. Brown,* supra, we reemphasized the importance of *voir dire,* and found that the district court abused its discretion in refusing to ask prospective jurors if they knew any of the witnesses, and in failing to read the list of witnesses to the jury. 799 F2d at 136. In suits alleging violations of § 1983 by police officers, the district court should ask questions similar to some of those suggested by King's attorney regarding the attitudes of the prospective jurors on the issues of police credibility and charges of police misconduct. *See United States v. Baldwin,* 607 F.2d 1295 (9th Cir. 1979).

The case at hand is, however, unique. King's counsel did not present the district judge with a list of objective questions for the judge to ask the jury venire. Rather, King's counsel submitted four pages of argumentative questions which she had intended to use in conducting *voir dire* herself. In oral argument, King's counsel stated that she was not familiar with the federal court rule that all *voir dire* is handled by the district judge. While these four pages of potential questions contained the questions King now contends the trial court improperly refused, they also contained many questions which were simply not necessary to a proper *voir dire.* Appellant's attorney did not advise the trial judge as to which of the 90 proposed questions were necessary to her exercise of jury challenges.

Under Fed. R. Civ. P. 46, a party must make known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefore. If there are particular *voir dire* questions which counsel deems essential, and that refusal to ask them may be reversible error, counsel must so advise the court, and state his reasons before the court's *voir dire* of the prospective jurors is completed. Otherwise, counsel's long lists of questions may be a trap for an unwary judge, particularly when counsel has not given the judge a fair chance to avoid error by calling attention to the essential questions that must be asked. *See United States v. Blosvern,* 514 F.2d 387, 389 (9th Cir. 1975) (court declined to consider claims of error when defendants' counsel offered a list of eighteen questions to the trial court, but failed to object when the questions were not all read.) Because King's counsel failed to make a timely objection when the judge did not ask the questions she did not preserve this issue, and the appeal on this issue must fail.

. . .

We have reviewed the appellant's other contentions and find them to be equally without merit. The decision of the district court is

AFFIRMED.

1. The defendant based his appeal in part on a contention that the district court erred in conducting voir dire during the jury selection at trial. Why did the trial court refuse to use the questions for voir dire prepared by the defendant's attorney?
2. How did the Fourth Circuit Court of Appeals describe the essential function of voir dire?
3. How much discretion is given to trial judges in selecting questions for voir dire?
4. Did the judge or the attorneys ask the voir dire questions in this trial?
5. If an attorney feels that certain voir dire questions are essential, at what point in the trial must the attorney advise the court and state objections?

ENDNOTES

1 28 U.S.C. § 1870.

2 Preponderance of the evidence is not the only standard of proof that is used in civil litigation, but it is the most common. Another standard of proof sometimes used is "clear and convincing evidence." This is a higher standard to prove, but not as demanding as the standard used in criminal trials—proof beyond a reasonable doubt.

3 In addition, making a motion for a directed verdict is a prerequisite for making a motion for a judgment notwithstanding the verdict, which is discussed in Chapter 12.

Chapter 12

POSTTRIAL PROCEDURES AND APPEALS

You and Ms. Heyward are drinking coffee the day after the Wesser trial ended. "I am really pleased with the verdict," says Ms. Heyward. "I felt we would win, but the size of the award was a pleasant surprise."

You note, "Mr. Benedict did not seem so pleased. Do you think he will file an appeal?"

Ms. Heyward replies, "He orally entered notice of appeal at trial, but I don't know whether he will actually perfect the appeal. Appeals are very time-consuming and expensive. I cannot think of any reversible errors on which he could base a strong appeal."

"We will just have to wait and see," you reply. "For now, I am just pleased that we won the first trial with which I assisted."

Ms. Heyward says, "You were a great help. Thank you for your hard work. None of our cases require much attention today. It's Friday. Why don't you take the afternoon off?"

POSTVERDICT MOTIONS

The two postverdict motions most commonly filed are the motion for judgment notwithstanding the verdict (JNOV) and motion for a new trial. You may file either or both motions. Many attorneys file both motions, so that if the motion for JNOV is denied, all is not lost. The moving party may still prevail on the motion for a new trial.

SIDEBAR Most postverdict motions are filed by the party against whom judgment is entered at trial. If your client prevails at trial, you will likely file postverdict motions only if your client is extremely unhappy with the amount of the verdict.

Motion for Judgment Notwithstanding the Verdict

You may wonder what the letters JNOV stand for. The term "notwithstanding the verdict" translates to *non obstante veredicto* in Latin. Thus, judgment *non obstante veredicto* is shortened to JNOV.

FRCivP 50(b) addresses motions for judgment notwithstanding the verdict. As a prerequisite to making a motion for JNOV, a party must move for a directed verdict at the close of all evidence, as discussed in Chapter 11. FRCivP 50(b) requires that a motion for JNOV be filed within ten days after entry of judgment. The motion for JNOV asks the judge to set aside the jury's verdict on the ground that there was insufficient evidence for the jury to reach its verdict.

Judges do not grant a motion for JNOV simply because they disagree with the jury's interpretation of the facts presented at trial or its evaluation of a witness's credibility. Rather, the judge determines whether there is sufficient evidence to support the jury's verdict. The judge considers the evidence in the light most favorable to the party against whom the motion is made. It is difficult to state an exact formula that judges use to determine when there is sufficient evidence to support the jury's verdict. The attorney-paralegal team needs to research case law in the appropriate state or circuit for an explanation of the exact standard that judges have used.

Motion for a New Trial

Motions for new trials are made and granted more frequently than are motions for JNOV. This is because the grounds to support a motion for a new trial are much broader. FRCivP 59 does not enumerate specific grounds for granting a motion for a new trial. Rather, it provides that new trials may be granted for the reasons that courts have used before to grant new trials. This broad statement gives judges much latitude.

The concept behind FRCivP 59 is that a judge should grant a new trial when necessary to prevent injustice. A few examples of grounds for granting new trials will help you understand this concept. One ground for granting a new trial is that damages awarded are too large or too small. Suppose that Mr. Wesser had not been home at the time of the fire and therefore had not been injured. Suppose, too, that at trial he established that the repairs to his home cost $40,000. If the jury found the defendants liable but returned a verdict for only $5,000, the judge might find the verdict excessively low and grant a new trial on the issue of damages. Judges are allowed to grant new trials on certain limited issues, such as damages, if they deem it appropriate.

Other grounds for granting new trials include misconduct by the attorneys during trial, obvious failure of the jury to follow the judge's instructions, and newly discovered evidence—that is, important evidence that was not known at the time of trial. With such a wide range of grounds available, it is important to research the case law in the appropriate jurisdiction to identify the instances in which new trials have been held to be justified.

Harmless Error. One important concept is that even if an error was made at trial, it may not be ground for a new trial. Many errors may occur at trial, such as the admission of hearsay that does not fit into an exception to the hearsay rule. If the error is not serious, however, it is not ground for a new trial. This is the important concept known as ***harmless error***. FRCivP 61 addresses harmless error

and provides that an error is not a ground for a new trial or for otherwise disturbing the verdict "unless refusal to take such action appears to the court inconsistent with substantial justice." FRCivP 61 further states that at every stage of the proceeding the court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The terms used in FRCivP 61 are subject to interpretation, so again it is important to research the case law in the appropriate jurisdiction. Even if a similar error in a similar case was found to be prejudicial error, it may be harmless error in your case when it is considered in the context of everything that transpired at trial. Although case law is helpful, experience in trying cases before a particular judge is probably a better indicator of what the judge might consider harmless error. Thus, the attorney-paralegal team must rely on experience in addition to research.

Procedure for Motion for a New Trial. A motion for a new trial must be filed no later than ten days after entry of judgment. FRCivP 59(c) sets strict time limits for the submission of affidavits in support of the motion; you should review that section.

FRCivP 59(d) allows the court on its own initiative to order a new trial. Thus, the judge may decide to order a new trial even if none of the parties requested it. The grounds for the court granting a new trial on its own initiative include any grounds for which the court could grant a new trial when a party files a motion for a new trial.

Finally, it is important to understand that a motion for a new trial is not the same as appealing the case. If a party wins an appeal, the party gets a new trial, and thus, the outcome is the same as a FRCivP 59 motion for a new trial. As discussed in the following material, however, an appeal is taken to a higher court—that is, an appellate court—to decide whether prejudicial errors occurred at trial. In contrast, the motion for a new trial under FRCivP 59 requests that the trial judge make such a determination. This distinction is significant because an appellate court is often required to grant considerable deference to a decision at trial.

JUDGMENTS

A judgment is the court's final decision that resolves all matters in dispute among the parties to the litigation. The judgment states the parties' rights and liabilities—for example, that the defendants in the Wesser case are liable to Mr. Wesser in the amount of $100,000. The text addresses three broad topics about judgments: how a judgment is drafted, how a judgment becomes effective, and how a judgment is enforced. The general guidelines are set forth in FRCivP 58, which is shown in Figure 12–1.

Drafting the Judgment

At the conclusion of a trial, the judge announces the judgment to be entered in the lawsuit. In a nonjury trial, judges announce their decisions. In a

FIGURE 12–1 Guidelines for Entry of Judgment

Rule 58. ENTRY OF JUDGMENT

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

jury trial, the judge repeats the jury's verdict. The judgment is then reduced to writing and signed by the judge.

The method for drafting the judgment differs from court to court and judge to judge. In federal court, for instance, it is usually the judge's law clerk who drafts the judgment, and the judge reviews and signs it. The judge, however, may request that the attorney for the prevailing party draft the judgment. FRCivP 58 states that the judge may direct the attorneys to submit forms of judgment but that the judge should not direct this as a matter of course, presumably reflecting a fear that the attorneys may not submit their proposed judgments in a timely manner. In practice, when the judge requests that an attorney submit a proposed judgment, the judge often imposes a deadline for submission.

The practice of having the attorneys draft the judgments is more prevalent in state court, where judges rarely have law clerks to do the job. When state court judges hear several cases in one day, they have insufficient time to prepare the judgments, which can be quite long. Regardless of who drafts the judgment, the judge has to review it, approve it, and sign it.

Content of Judgments. Judgments range in length from one or two paragraphs to numerous pages, depending on the number of issues and general complexity of the lawsuit. Some lawsuits require that only a few facts be determined and perhaps one rule of law applied. Refer to Figure 12–2, which illustrates a judgment in a divorce action. Here the only issues were whether the plaintiff and

FIGURE 12–2 Judgment in a Divorce Action

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

NORTH CAROLINA
MITCHELL COUNTY

FILE NO.: 96 CVD 3504

Vivian Jones Atlas,
Plaintiff,

-vs-

Charles T. Atlas,
Defendant.

JUDGMENT

THIS CAUSE OF ACTION for absolute divorce on the grounds of one (1) year's separation under G.S. 50-6, coming on to be heard, and being heard before the undersigned Judge Presiding at the May 21, 1996, Session of District Court for Mitchell County, NC;

AND IT APPEARING TO THE COURT that service of Summons and verified Complaint was accepted by the defendant, Charles T. Atlas, on the 28th day of February, 1996;

AND IT FURTHER APPEARING TO THE COURT and the court finding as a fact that Answer was filed by the defendant on March 26, 1996; that no request for a jury trial has been filed with the Clerk of this court or with this court prior to the call of this action for trial, so that under the provisions of G.S. 50-10, and G.S. 1A-1, Rules 38 and 39, the parties have waived the right to have the facts determined by a jury, and the court is authorized to determine the issues of fact;

And the court, after hearing testimony of the witnesses for the plaintiff, the defendant having offered no evidence, finds from the evidence and by the greater weight thereof, that the plaintiff Vivian Jones Atlas has been a bona fide resident of the State of North Carolina for at least six (6) months next preceding the commencement of this action; that the plaintiff, Vivian Jones Atlas, and the defendant, Charles T. Atlas, were lawfully married in Mitchell County, North Carolina, on the 2nd day of April, 1977; that the plaintiff and the defendant separated on the 25th day of January, 1995, and have lived continuously separate and apart from each other at all times since said date;

BASED ON THE FOREGOING FINDINGS OF FACT, the Court concludes as a matter of law that the plaintiff, Vivian Jones Atlas, is entitled to an absolute divorce from the defendant, Charles T Atlas.

FIGURE 12-2 (Continued)

IT IS NOW, upon motion of Connie McFayden, Esq., attorney for the plaintiff, CONSIDERED, ORDERED, ADJUDGED, and DECREED by the Court that the plaintiff, Vivian Jones Atlas, be and she is hereby granted an absolute divorce from the defendant, Charles T. Atlas, and the marriage heretofore existing between the plaintiff and the defendant be and the same is hereby dissolved.

IT IS FURTHER ORDERED that the costs of this action be and the same are hereby taxed against the plaintiff, Vivian Jones Atlas.

This the 21st day of May, 1996.

William C. Horton
Judge Presiding

defendant had been married and whether they had lived completely separate and apart for one year from the date of their separation. This is a short, straightforward judgment because of the simple nature of the lawsuit. A judgment entered in a lawsuit involving many complex legal issues would be many pages long. Because a mistake in a judgment can be a valid ground for appeal, it is essential that judgments be complete and accurate.

Judgments commonly open with a short paragraph stating the name of the judge and the designation of the session in which the trial was held. This is followed by the *Findings of Fact*, in which the court states the pertinent facts that were found to be true. In the Wesser case, for instance, the Findings of Fact would state that Mr. Wesser bought a Woodall Shoals blanket on January 3, 1994, and continue with a statement of the facts as to how long he used it, when the fire occurred, and so forth. The Findings of Fact would also state that defendant Woodall Shoals manufactured the blanket, specify how Woodall Shoals failed to design and/or manufacture the blanket properly, indicate what Second Ledge did improperly, and set forth the facts that showed that Mr. Wesser was not contributorily negligent.

The Findings of Fact must state all the facts necessary to support the Conclusions of Law. The *Conclusions of Law* constitute the second major part of the judgment. They state the judge's conclusions on the legal issues that form the basis of the plaintiff's complaint. For instance, the conclusions of law in the Wesser case would state that the defendants breached their express and implied warranties and were negligent and that their actions caused the fire. If liability were found solely on the basis of breach of express warranty, the Conclusions of Law would state this as the only basis of liability.

Finally, the judgment states the exact relief to which the plaintiff is entitled. For instance, the divorce judgment states that the plaintiff is granted an absolute divorce from the defendant and that their marriage is dissolved. The final section also states which party bears the costs of the action.

Paralegals may sometimes prepare drafts of judgments. The best guideline is usually a judgment prepared by your law firm for a similar case. Remember to take great care to include all necessary Findings of Fact and Conclusions of Law. Rarely is the trial transcript available at this time, so the attorney-paralegal team has to rely heavily on notes taken at trial.

How the Judgment Becomes Effective

After the judge signs the judgment, it is filed with the clerk of court, just as pleadings are filed. The judgment becomes effective only when it is entered as provided in FRCivP 79. FRCivP 79 directs the clerk of court to keep a book called the civil docket and to record in the book the substance of the judgments rendered in that county or judicial district. The docket book is actually a series of books, dating back many years. The judgments are entered in the civil docket in chronological order. The entry consists of the court file number, names of the parties, the date the entry is made, and the substance of the judgment. See Figure 12–3 for an illustration of how the Wesser judgment would be entered in the civil docket. The judgment is now effective because it has been entered in the civil docket in accordance with FRCivP 79.

Note that the clerk of court keeps an index to the civil docket, which is necessary because thousands of judgments are entered. The judgments are usually indexed both by the plaintiffs' and the defendants' names. The index itself usually consists of multiple volumes, with different sets covering certain spans of years. Thus, if in the year 2000 someone wanted to find the entry of judgment in the Wesser case, they would locate the civil index for 1996 and look for Wesser, Woodall Shoals, or Second Ledge.

FIGURE 12–3 Entry of the Wesser Judgment in the Civil Docket

Date	File No.	Parties	Judgment
June 30, 1996	3:96 CV 595-MU	Bryson Wesser -vs- Woodall Shoals Corporation and Second Ledge Stores, Incorporated	$100,000 Jury

Bill of Costs

The judgment states which party pays the costs of the lawsuit. FRCivP 54(d) provides that the nonprevailing party pays the costs unless a statute or another rule of civil procedure provides otherwise.

The prevailing party tallies up the costs, using the *Bill of Costs*. A preprinted court form for calculating the costs is illustrated in Figure 12–4. The task of preparing the Bill of Costs sometimes falls to paralegals. The costs generally include filing fees, witness fees, fees for service of pleadings, fees for court reporters, and the other fees shown on the Bill of Costs. Check to see whether the clerk of court has a standard fee for each applicable cost. If there is not a standard fee, the general guideline is that the amount must be reasonable.

Enforcement of Judgments

Judgments become effective when they are entered by the clerk of court in the civil docket. Entry of the judgment, however, does not automatically mean that the nonprevailing party is willing or able to pay the judgment. The attorney-paralegal team may need to take the necessary steps to enforce the judgment.

Before you examine the procedure for enforcing judgments, it is necessary to understand the meaning of some terms used in the enforcement process. The first term is ***judgment creditor***, which refers to the prevailing party—that is, the party to whom the judgment is to be paid. The ***judgment debtor*** is the nonprevailing party, the party who is supposed to pay the judgment. The process for enforcing a judgment is generally called ***execution*** on the judgment.

Taking the steps to execute on the judgment is not always necessary. Some judgments are ***self-executing***. This means that the action the court directs in the judgment is accomplished when the judgment is entered. An example is the divorce judgment. The divorce is official when the judgment is entered, and the plaintiff needs to take no further action. Often execution is not necessary because the nonprevailing party makes immediate arrangements to pay the judgment. For instance, in the Wesser case, the insurance company of the defendants is expected to pay the judgment promptly and without further action by the plaintiff.

Way to Prevent Defendants from Disposing of Assets Before Execution

The purpose of execution is to seize the judgment debtor's property and use its value to satisfy the judgment. The judgment debtor, however, may try to dispose of property prior to entry of judgment, to prevent the property from being seized and sold later. FRCivP 64 provides that at the commencement of the lawsuit or at any time during the lawsuit, a party may pursue remedies to keep the defendants from disposing of property. FRCivP 64 allows the plaintiffs to use the remedies available under state law or any

FIGURE 12–4 A Bill of Costs

AO 133 (Rev. 9/89) Bill of Costs

United States District Court

_____ DISTRICT OF _____

BILL OF COSTS

V.

Case Number:

_____

Judgment having been entered in the above entitled action on _____ against _____,
Date

the Clerk is requested to tax the following as costs:

Fees of the Clerk	$ _____
Fees for service of summons and subpoena	_____
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	_____
Fees and disbursements for printing	_____
Fees for witnesses (itemize on reverse side)	_____
Fees for exemplification and copies of papers necessarily obtained for use in the case	_____
Docket fees under 28 U.S.C. 1923	_____
Costs as shown on Mandate of Court of Appeals	_____
Compensation of court-appointed experts	_____
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828	_____
Other costs (please itemize)	_____
TOTAL	$ _____

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

DECLARATION

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill was mailed today with postage prepaid to:

_____

Signature of Attorney: _____

Name of Attorney: _____

For: _____ Date: _____
Name of Claiming Party

Costs are taxed in the amount of _____ and included in the judgment.

_____ _____ _____
Clerk of Court *Deputy Clerk* *Date*

FIGURE 12–4 (Continued)

WITNESS FEES (computation, cf. 28 U. S. C. 1821 for statutory fees)

NAME AND RESIDENCE	ATTENDANCE Days	ATTENDANCE Total Cost	SUBSISTENCE Days	SUBSISTENCE Total Cost	MILEAGE Miles	MILEAGE Total Cost	Total Cost Each Witness
					TOTAL		

Notice

Section 1924, Title 28, U.S. Code (effective September 1, 1948) provides:
"Sec. 1924. Verification of bill of costs."

"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarlily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

See also Section 1920 or Title 28 which reads in part as follows:

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:

Rule 54 (d)

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

Rule 6(e)

"Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

Rule 58 (In Part)

" Entry of the judgment shall not be delayed for the taxing of costs."

applicable federal statute. Thus, the attorney-paralegal team generally uses the remedies available under the law of the state in which the federal court sits. In a state court action, you use the laws of the state in which your lawsuit is

filed. FRCivP 64 mentions some of the remedies for preserving defendants' assets.

The purpose of all these remedies is to prevent the defendants from disposing of their property. For instance, attachment is a remedy that allows the sheriff to seize personal property physically and keep it, pending the outcome of the litigation. Measures this drastic are not always used. When the defendant owns real property that is the subject of the litigation, the plaintiff can file a *notice of lis pendens.* This is a simple form filed with the clerk of court, stating that the property is currently the subject of litigation. The clerk enters the notice of lis pendens in the public records so that potential buyers will have warning that the property is the subject of litigation. If a person purchased the real property and the lawsuit resulted in a judgment against the defendant who owned the property, the buyer would be bound by the adverse judgment. No buyer wants to take this risk, so the notice of lis pendens serves to prevent the defendant from selling the real property. If the defendant prevails at trial, the notice of lis pendens is canceled.

Procedure for Execution on a Judgment

FRCivP 64 (Figure 12–5) states that the procedure for execution on a judgment is the procedure of the state in which the district court is held. If a federal statute is applicable, the federal statute governs to the extent that it is applicable, but generally the attorney-paralegal team follows the state procedure. Therefore, you must be familiar with the state's procedures. It is necessary to read the state statutes and consult with the clerk of court for any special procedures or forms that must be used.

FIGURE 12–5 General Rule for Procedure for Execution

Rule 64. SEIZURE OF PERSON OR PROPERTY

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

An Example of Procedure

Although procedures differ from state to state, it is instructive to go through an example to get an idea of how the execution process works. The text discusses the procedure used to execute on judgments entered in the United States District Court for the Western District of North Carolina, including forms commonly used by the clerk of court for the Western District. It is important to note at the outset that the procedure for execution against an individual is different from that for execution against a corporation because the North Carolina constitution and statutes allow certain property of individuals to be exempt from execution. Corporations are not afforded this protection.

Execution on a Judgment Against an Individual. After ten days from entry of judgment, the judgment creditor may file a preexecution demand. The preexecution demand consists of three documents that are served on the judgment debtor. First is the notice of petition (or motion) to set off debtor's exempt property, which is illustrated in Figure 12–6. This notice tells the judgment debtor in straightforward language that the judgment creditor is taking action to collect the judgment and that the North Carolina constitution and statutes allow the judgment debtor to designate certain property to be exempt from execution.

The notice of petition to set off property alerts the judgment debtor to the forms that are attached. One of the forms is the motion to give notice of right to have exemptions designated. This form is signed by the judgment creditor's attorney and is illustrated in Figure 12–7. Read the form, and note that it states certain information about the judgment entered and requests that the form for the judgment debtor to use to claim exempt property be served on the judgment debtor. This form is the schedule of debtor's property and request to set aside exempt property, excerpts of which are shown in Figure 12–8.

These three forms are served on the judgment debtor, together with a copy of the judgment itself. The judgment debtor has twenty days to file the schedule of debtor's property. If the judgment debtor fails to file the schedule within twenty days, the attorney for the judgment creditor files a motion for final execution and order to preclude exempt property rights, illustrated in Figure 12–9. The attorney also submits a proposed order for final execution and preclusion of exempt property, shown in Figure 12–10.

The judgment creditor may now proceed with the writ of execution. This includes two certified copies of the judgment, two certified copies of the order for final execution and preclusion of exempt property, the original and one copy of the writ of execution issued by the clerk, and the United States marshal's form 285. The writ of execution form is shown in Figure 12–11.

If the judgment debtor does file the schedule of debtor's property and request to set aside exempt property, a United States magistrate must determine what property is actually exempt. The judgment creditor may contest the question whether certain property is exempt, and the magistrate can hold a hearing. After the magistrate designates the exempt property, the United

FIGURE 12–6 Notice of Petition to Set Off Exempt Property

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION
CIVIL NO.: _____

Plaintiff—Judgment Creditor,

v.

Defendant—Judgment Debtor.

NOTICE OF PETITION (OR MOTION) TO SET OFF DEBTOR'S EXEMPT PROPERTY

GREETINGS:

The Judgment Creditor is now seeking to collect the Judgment against you in the above entitled action and has asked that this Notice from the Court be served upon you advising you of your rights under the Constitution and laws of North Carolina to have property designated which is exempt from execution. A "judgment debtor" is a person who, a court has declared, owes money to another, a "judgment creditor."

It is important that you respond to this Notice no later than twenty (20) days after you receive it because you may lose valuable rights if you do nothing. You may wish to consider hiring an attorney, at your own expense, to help you with this proceeding to make certain that you receive all the protections to which you are entitled under the Constitution and laws of North Carolina.

The procedure in this Court concerning execution of a Judgment for the payment of money and in proceedings on and in aid of execution is in accordance with the practices and procedure of the State of North Carolina. Therefore, the Court will honor your right to have certain property set off as exempt from execution pursuant to Article X of the Constitution of North Carolina and Article 16 of Chapter 1C of the General Statutes of North Carolina, if you proceed to have your exempt property designated.

Accordingly, under North Carolina law, you are required to complete and file a Schedule of Debtor's Property and Request to Set Aside Exempt Property within twenty (20) days after service of this Notice and appear at any requested hearing, or make a written request within twenty (20) days after service of this Notice for a hearing before the Court to complete the form; otherwise, the Court may determine that you have waived your exemptions provided under the Constitution and the laws of the State of North Carolina. There are attached to this Notice a copy of the Judgment in this action, and a copy of the Motion to Give Notice of Right to have Exemptions Designated, as well as the form for you to complete and file of your Schedule of Debtor's Property and Request to Set Aside Exempt Property.

This _____ day of _____, 19__.

_____
Clerk, United States District Court

FIGURE 12–7 Motion to Give Notice of Right to Have Exemptions Designated

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION
CIVIL NO.: _____

Plaintiff,

v.

Defendant.

MOTION TO GIVE NOTICE OF RIGHT TO HAVE EXEMPTIONS DESIGNATED

COMES NOW the Judgment Creditor and Plaintiff herein, by and through its Attorney, and moves the Court for an order to issue giving the Defendant Debtor herein Notice of Right to Have Exemptions Designated, together with Schedule of Debtor's Property and Request to Set Aside Exempt Property, on the following grounds:

1. Judgment was entered on _____ in favor of the Judgment Creditor against the Defendant Debtor for recovery of the sum of $_____, plus interest and costs.
2. The Judgment Debtor resides within the jurisdiction of this Court.
3. The Judgment in favor of the Judgment Creditor has not been satisfied, vacated, or reversed and is one on which execution may properly be issued.
4. The Judgment Creditor is the only judgment creditor of the Judgment Debtor known to the Judgment Creditor.
5. The Judgment Creditor is entitled to have its Motion granted pursuant to Rule 69, Federal Rules of Civil Procedure, and Articles 28 and 31, Subchapter X, Chapter 1, as modified by Article 16 of Chapter 1C, General Statutes of North Carolina.

WHEREFORE, Judgment Creditor prays that the Notice of Right to Have Exemptions Designated, together with Schedule of Debtor's Property and Request to Set Aside Exempt Property, be issued by this Court and served upon the Judgment Debtor as provided by law.

This _____ day of _____, 19__.

_____
Attorney for Judgment Creditor

States marshal serves on the judgment debtor two certified copies of the judgment, two certified copies of the order designating exemptions, the original and one copy of writ of execution issued by the clerk, and the United States marshal's form 285.

FIGURE 12–8 Excerpts from Schedule of Debtor's Property and Request to Set Aside Exempt Property

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION
CIVIL NO.: _____

Plaintiff,

v.

Defendant.

SCHEDULE OF DEBTOR'S PROPERTY AND REQUEST TO SET ASIDE EXEMPT PROPERTY

I,_____, being the Judgment Debtor in the above-captioned matter, submit the following information and Schedule of Debtor's Property and Request to Set Aside Exempt Property pursuant to G.S. 1C-1603 and do hereby declare under the penalties of perjury that the following is true and correct.

1. I am a citizen and resident of _____County, North Carolina.
2. I was born on _____(date of birth).
3. I am married to _____ (spouse's name) or (not married).
4. The following persons live in my household and are in substantial need of my support:

Name	Relationship to Debtor	Age

(Attach an additional sheet, if necessary.)

5. I (own) (am purchasing) (rent) (choose one; mark out the other choices) a (house) (trailer) (apartment) (choose one; mark out the other choices) located at

_____

_____

(address, city, state, zip code), which is my residence.

6. I (do) (do not) own any other real property. If other real property is owned, list that property on the following lines; if no other real property is owned, mark "not applicable" on the first line.

_____

_____

(Attach an additional sheet, if necessary.)

7. The following persons are, so far as I am able to tell, all of the persons or companies to whom I owe money:

_____

_____

_____

FIGURE 12–8 (Continued)

(Attach an additional sheet, if necessary.)

8. I wish to claim my interest in the following real or personal property that I use as a residence or my dependent uses as a residence. I also wish to claim my interest in the following burial plots for myself or my dependents. I understand that my total interest claimed in the residence and burial plots may not exceed $7,500. I understand that I am not entitled to this exemption if I take the homestead exemption provided by the Constitution of North Carolina in other property.

Address_____
Names of Owners of Record _____
Estimated Value _____
Amount of Liens _____
Amount of Debtor's Interest _____

9. I wish to claim the following life insurance policies whose sole beneficiaries are (my spouse) (my dependents) to work or sustain health:

Name of Insurer	Policy No.	Face Value	Beneficiary(ies)

10. I wish to claim the following items of health care aid necessary for (myself) (my dependents) to work or sustain health:

Item	Purpose	Person Using Item

The actual execution involves seizing and selling the judgment debtor's nonexempt property to satisfy the judgment. For instance, the marshal can seize the judgment debtor's car or freeze the assets in the judgment debtor's bank account.

Execution on a Judgment Against a Corporation. The procedure for execution against a corporation is less complicated. Ten days after judgment is entered, the judgment creditor's attorney arranges for execution. The necessary forms are two certified copies of the judgment, an original and one copy of the writ of execution issued by the clerk, and the United States marshal's form 285.

FIGURE 12–9 Motion for Final Execution and Order to Preclude Exempt Property Rights

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION
CIVIL NO.:_____

Plaintiff—Judgment Creditor,

v.

Defendant—Judgment Debtor.

MOTION FOR FINAL EXECUTION AND ORDER TO PRECLUDE EXEMPT PROPERTY RIGHTS

NOW COMES the Plaintiff who is the Judgment Creditor herein, by and through the undersigned attorney, and moves the Court for an Order of Final Execution to be issued against the Judgment Debtor and that none of the Judgment Debtor's property be set aside as exempt from execution and, in support of this Motion, shows unto the Court upon oath the following:

1. That Judgment was entered on _____ in favor of the Judgment Creditor against the Judgment Debtor for recovery of the sum of $_____ plus interest and costs.
2. That Judgment in favor of the Judgment Creditor has not been satisfied, vacated, or reversed.
3. That Judgment Creditor is the only judgment creditor of the Judgment Debtor known to the Judgment Creditor.
4. That Notice of Right to Have Exemptions Designated was duly issued by this Court on _____ and that a copy of said Notice together with Schedule of Debtor's Property and Request to Set Aside Exempt Property were served upon the Judgment Debtor according to law.
5. That Judgment Debtor has failed to respond within the time allowed and that his failure to respond should be considered a waiver of his right to have property set aside as exempt from execution of Judgment.

WHEREFORE, the Judgment Creditor respectfully requests that an Order of Final Execution be issued for the collection of the Judgment entered herein and that none of the Judgment Debtor's property be set aside as exempt from the execution of said Judgment.

This _____ day of _____, 19__.

_____
Attorney for Judgment Creditor

SWORN TO AND SUBSCRIBED before me, this _____ day of _____, 19__.

_____
Notary Public

My commission expires: _____.

FIGURE 12–10 Order for Final Exemption and Preclusion of Exempt Property

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION
CIVIL NO.: _____

Plaintiff—Judgment Creditor,

v.

Defendant—Judgment Debtor.

ORDER FOR FINAL EXECUTION AND PRECLUSION OF EXEMPT PROPERTY

THIS MATTER coming on to be heard and being heard before the undersigned Judge or Magistrate of the United States District Court for the Western District of North Carolina upon Judgment Creditor's Motion for an Order of Final Execution in this matter; and

IT APPEARING to the Court that Judgment Debtor has been duly served with copy of the Judgment together with copy of Notice of Right to Have Exemptions Designated and Schedule of Debtor's Property and Request to Set Aside Exempt Property and that the Judgment Debtor has failed to file a Schedule of Debtor's Property and Request to Set Aside Exempt Property and has failed to request a hearing to set aside exempt property or otherwise respond within the time allowed. The Court, therefore, finds that the Judgment Debtor has had a reasonable opportunity to assert the exemptions provided by law and that the Judgment Debtor's failure to respond should be considered a waiver of his right to have property set aside as exempt from the execution of the Judgment in this case.

IT IS, THEREFORE, ORDERED that Judgment Debtor is precluded from having any of his property set aside as exempt from Judgment in this case.

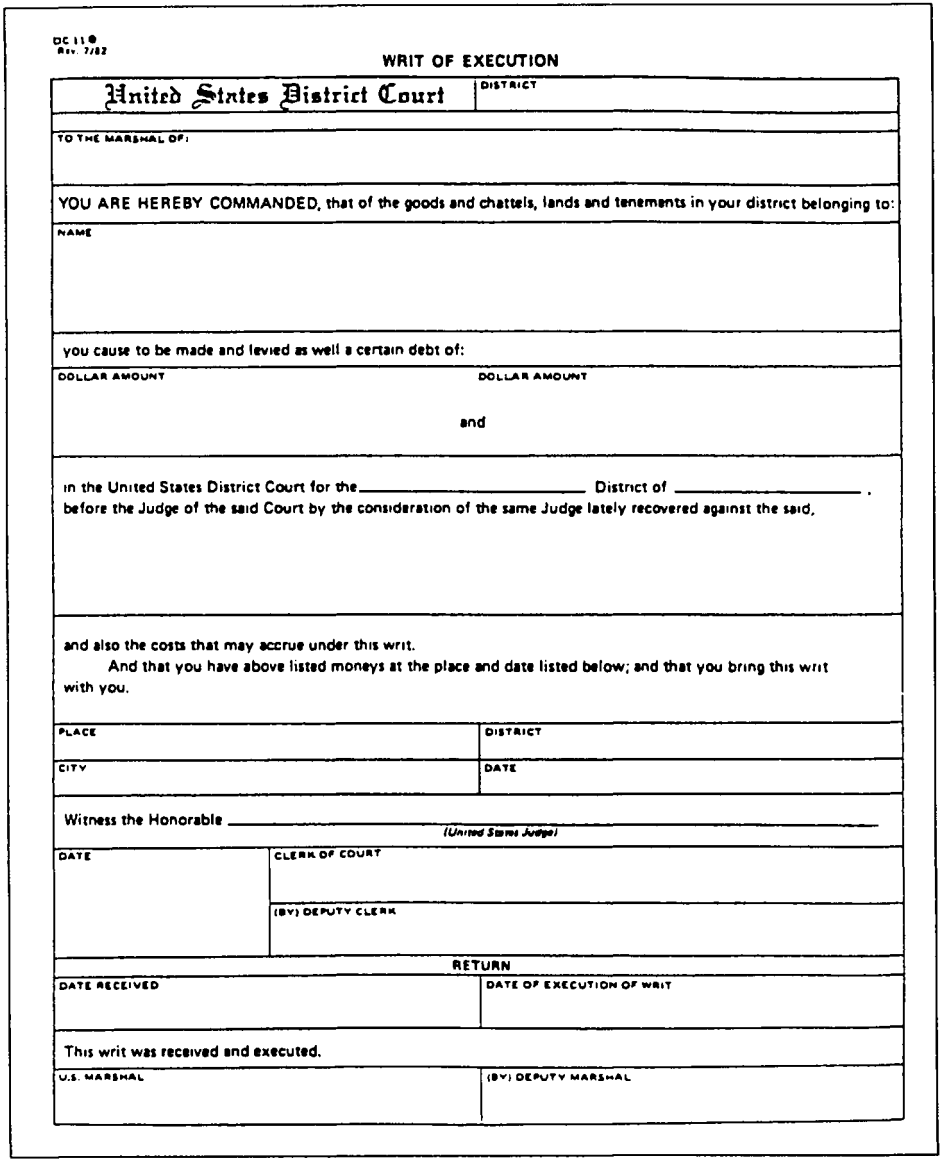
IT IS FURTHER ORDERED that a final execution be issued by the Clerk of this Court for the collection of the Judgment in this case.

This_____ day of_____, 19____.

_____
____, United States District Court

Identifying Assets. Even if the judgment debtor files a schedule of property, disputes may arise about the property that the judgment debtor actually owns. The judgment creditor may believe that the judgment debtor has failed to disclose assets or is actually hiding assets. FRCivP 69 allows the judgment creditor to conduct posttrial discovery to gain information about the judgment debtor's assets. This generally involves submitting interrogatories to the judgment debtor, just as is done in pretrial discovery.

FIGURE 12–11 The Writ of Execution Form



DC 11.0
Rev. 7/82

WRITTEN OF EXECUTION

United States District Court | DISTRICT

TO THE MARSHAL OF:

YOU ARE HEREBY COMMANDED, that of the goods and chattels, lands and tenements in your district belonging to:

NAME

you cause to be made and levied as well a certain debt of:

DOLLAR AMOUNT | DOLLAR AMOUNT

and

in the United States District Court for the _____ District of _____ .
before the Judge of the said Court by the consideration of the same Judge lately recovered against the said,

and also the costs that may accrue under this writ.
And that you have above listed moneys at the place and date listed below; and that you bring this writ with you.

PLACE | DISTRICT

CITY | DATE

Witness the Honorable _____
(United States Judge)

DATE | CLERK OF COURT

(BY) DEPUTY CLERK

RETURN

DATE RECEIVED | DATE OF EXECUTION OF WRIT

This writ was received and executed.

U.S. MARSHAL | (BY) DEPUTY MARSHAL

Paralegals may conduct some research to try to locate assets of the judgment debtor. This may involve a search of public records, such as tax listings. If the judgment debtor files a schedule of property, this may indicate some additional avenues of investigation.

One final concept is the *judgment-proof* judgment debtor. Persons are judgment proof when they own no property that is subject to execution. Usually this means that all their property is exempt. For this reason, it is best to investigate defendants' assets at the beginning of the litigation, if possible. Think of all the work that has gone into obtaining the judgment. It would be a waste of time and money if the judgment debtor is judgment proof.

SIDEBAR One clue that persons may be judgment proof is to review the clerk's civil docket. If you find many judgments entered against a person, that person may well be judgment proof. Note that if a judgment was entered and subsequently paid, the clerk of court cancels the judgment. This means that the clerk writes in the entry that the judgment has been paid and the date that it was paid.

APPEALS

If your client is unhappy with the judgment of the trial court, he or she may wish to appeal. In an ***appeal***, the party who is unhappy with the judgment tries to convince the appellate court that the trial court committed ***reversible error***, which entitles the party to a new trial. Reversible error is the opposite of harmless error, which was discussed earlier. Harmless error is a mistake, but not a mistake that deprived any of the parties of substantial rights or a fair trial. In contrast, reversible error is a mistake of law that has deprived a party of a fair trial. For instance, the judge may have made a mistake in giving the jury instructions, that caused the jury to misapply the law. This is reversible error.

An appeal is not appropriate in every lawsuit where a party is unhappy with the outcome of the trial. There may not have been sufficient error made at trial to warrant an appeal. Prevailing on appeal is not easy, because trial judges are generally vested with great discretion. Appellate courts are frequently hesitant to overturn the decision of a trial judge who was there, who heard the testimony and legal arguments, and who had the opportunity to assess the credibility of the witnesses.

Clients should think hard about filing an appeal for another important reason: Appeals are time-consuming and expensive. If a judgment is rendered against a defendant in the amount of $1,000, an appeal can scarcely be justified; the attorneys' fees alone will exceed the judgment many times over.

Applicable Court Rules

Once a case goes up on appeal, the trial court no longer has jurisdiction. The appellate court has jurisdiction. Therefore, it is imperative that the attorney-paralegal team follow the rules of procedure for the court in which the appeal is taken. In federal court, the Federal Rules of Appellate Procedure control. They are supplemented by internal operating procedures of the various circuit courts of appeals. The internal operating procedures are analogous to

local court rules in the trial courts. All these rules are published in 28 *United States Code* and in commercial publications.

In state court, the state rules of appellate procedure apply. These are published in the state statutes and in commercial publications. The rules are generally the same for the lower appellate court and the higher appellate court, but there may be differences, so check the rules carefully.

SIDEBAR Some state rules provide for an accelerated docket to speed up the appellate process. Such procedures may allow the filing of shorter briefs in a shorter period of time, as well as less time for oral argument.

Definitions

In connection with appeals, there are many terms paralegals must understand. The ***appellant*** is the party that files the appeal and seeks to overturn the judgment of the trial court. The party who asserts that the judgment should be affirmed is the ***appellee***.

The ***final decision rule*** is an important concept. The appellate courts generally do not have jurisdiction over a case until the final decision or judgment is entered. After entry of the final judgment, the appellant may appeal the judgment on the basis of all the errors committed at trial. It would be a colossal waste of time and energy to allow an appeal at each point in the trial where a party objects to an action of the court and asserts that the court has committed an error. Thus, the final decision rule, stated in 28 *United States Code* section 1291, provides that no appeal can be taken until the court's final decision. Courts enter many orders during the course of litigation, from ruling on the right to a jury trial to ruling on the admissibility of evidence.

Orders that are not final orders are called ***interlocutory orders***; these orders do not dispose of the entire controversy. The appeal of an interlocutory order under certain narrow circumstances is permitted under 28 *United States Code* section 1292(b). The district judge (trial judge) must "be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." If the district judge feels that an interlocutory order meets this criterion, the judge states this in an order and asks the court of appeals to permit an appeal to be taken. Note that the application for an appeal under 28 *United States Code* section 1291(b) does not stay proceedings in the trial court unless either the district judge or the court of appeals orders a stay.

The Function of Appellate Courts

As discussed in Chapters 1 and 2, appellate courts do not rehear testimony and retry the lawsuit. Rather, they examine the record of the trial to determine whether the trial court committed reversible error. Appellate courts review the

record of appeal, which is defined in rule 10 of the Federal Rules of Appellate Procedure as "the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court."

SIDEBAR Under the Federal Rules of Appellate Procedure, the clerk of court prepares the record on appeal. In state court, the attorneys are often required to prepare the record on appeal, and paralegals may assist. Consult carefully the state rules of appellate procedure that govern the record on appeal. The content of the record and the deadline for filing the record are usually quite specific.

Thus, appellate courts review the record of the proceedings in the trial court to determine whether reversible errors were made. The appellate court either affirms (upholds) the lower court's decision or reverses (overturns) the decision and remands the case for correction of the errors. This can require a new trial.

Appellate Procedure

There are two constant guidelines for paralegals assisting with appeals, no matter which appellate court is hearing the appeal. First, you must maintain a precise docket control system. As discussed, the time allowed for filing documents in an appeal can be short, and extensions are not readily granted. Second, you must follow the applicable rules of appellate procedure to the letter. Ensure that forms and briefs follow the format prescribed by the appellate rules and that they are timely filed.

The text discusses the general procedure followed for appeals. There may be differences in procedure, depending on the rules of the state appellate court or circuit court of appeals. The text does not discuss every step, but rather the major steps, in which paralegals are most likely to participate. The discussion focuses on appeals in federal court—that is, to the circuit courts of appeal. The Federal Rules of Appellate Procedure (FRAP) and rules for internal operating procedures for the individual circuits guide the procedure. These rules are published in 28 *United States Code*.

Notice of Appeal. In an appeal as of right—that is, where no permission to appeal is required—the first step is to file a notice of appeal. This is a short document that is filed with the clerk of court for the trial court in which the final judgment was entered. The notice of appeal basically states that the appellant is filing an appeal with the appropriate appellate court.

Paralegals may draft the notice of appeal, which follows a standard format. Requirements for the notice of appeal are set forth in FRAP 3, and a sample notice of appeal is set forth in the appendix of the Federal Rules of Appellate Procedure. The sample notice of appeal is reprinted here in Figure 12–12.

FIGURE 12–12 A Sample Notice of Appeal

Form 1.
Notice of Appeal to a Court of Appeals
From a Judgment or Order of a District Court

United States District Court for the
_____ District of _____
File Number _____

A.B., Plaintiff,

-v-

C.D., Defendant.

NOTICE OF APPEAL

Notice is hereby given that (here name all parties taking the appeal), (plaintiffs) (defendants) in the above-named case, hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from the order (describing it)) entered in this action on the _____ day of _____, 19___.

(S)_____
Attorney for:_____
Address:_____

It is imperative that the notice of appeal be timely filed. FRAP 4 requires that the notice of appeal be filed with the clerk of court for the trial court within thirty days of the entry of the judgment or order appealed from. If the United States or one of its officers or agencies is the appellant, sixty days are allowed for filing the notice of appeal. FRAP 4 states some variations on the deadline—for example, when a motion for a new trial pursuant to FRCivP 59 is pending. Read FRAP 4 carefully, and always discuss with the attorneys on your team any questions you have about deadlines.

Variation in Procedure for Appeals for Which Permission Is Required Under 28 *United States Code* Section 1292(b). FRAP 5 varies the procedure for appeals of interlocutory orders, for which permission is required under 28 *United States Code* section 1292(b). The appellant files a petition for permission to appeal with the clerk of the court of appeals within ten days after the entry of the order from which the appeal is taken. FRAP 5 states requirements about the form of the petition and number of copies to file, as well as some other rules. FRAP 5 specifically provides that a notice of appeal need not be filed. This is because the petition for permission to appeal gives notice to the trial court and all parties.

Docketing Requirements. When the notice of appeal is filed with the clerk of court for the trial court, the clerk sends a copy of the notice to the clerk of court for the circuit court of appeals (FRAP 3(d)). The clerk of the court of appeals enters the appeal upon the docket (FRAP 12). The appellant pays a docket fee, as required by FRAP 3(e).

Some circuit courts of appeals have internal operating procedures that require further action by the appellant at the time the appeal is docketed. For instance, the Fourth Circuit Court of Appeals requires the appellant to file a docketing statement within ten days of filing the notice of appeal. The Fourth Circuit's docketing statement is shown in Figure 12–13. It provides basic information about the appeal and helps the court ascertain the nature of the appeal at the outset.

Costs and Cost Bonds. Appellate costs are different from the costs at the trial level. Appellate costs include the cost of the court reporter's transcript, the fee for filing the notice of appeal, the fee for preparing and transmitting the record, the docketing fee, the cost of duplicating briefs and appendices, and fees paid for appeal bonds. FRAP 7 allows the trial court to require an appellant to file a bond or provide other security to ensure payment of costs on appeal in civil cases. The appellant usually bears the costs if the trial court's judgment is affirmed. The appellee usually pays the costs if the trial court's judgment is reversed (FRAP 39).

Transcripts. An important part of the record on appeal is the transcript of the trial. FRAP 10 requires the appellant to order all or the pertinent parts of the transcript from the court reporter within ten days of filing the notice of appeal. Consult FRAP 10 for more detailed procedures when the appellant deems only part of the transcript to be necessary to understand the issues on appeal. FRAP 11 requires the court reporter to submit the transcript within thirty days of receipt of the order unless the reporter seeks an extension. Internal operating procedures of the individual circuits may alter this deadline. For instance, IOP 11.1 of the Fourth Circuit Court of Appeals allows sixty days, with some exceptions.

Preparation and Filing of Briefs. Paralegals frequently help with the preparation of briefs. The brief is of critical importance because it is the primary tool for persuading the appellate court that the trial court committed reversible error. The Federal Rules of Appellate Procedure, internal operating procedures of the circuit courts, and state appellate rules give definite guidelines for the contents and format of briefs. It is imperative that paralegals know these rules and ensure that they are followed.

Examine FRAP 28(a)–(g), shown in Figure 12–14. This very important rule sets forth the requirements for the content of briefs and limitations. Appellate courts do not merely encourage short briefs; they require them. Note that FRAP 28(a) and (b) explain the format that the appellant's and appellee's briefs must follow. FRAP 28(e) deserves special attention because it instructs you how to refer to the record in the brief.

FIGURE 12–13 A Docketing Statement

United States Court of Appeals

for the Fourth Circuit

Tenth & Main Streets
Richmond, Virginia 23219

DOCKETING STATEMENT

Re:

Type of Action
____ Civil
____ Criminal/Prisoner
____ Cross Appeal

District_____Judge _____
District Court Docket Number_____
Statute or other authority establishing jurisdiction in the:
District Court_____
Court of Appeals_____

A. Timeliness of Appeal
1. Date of entry of judgment or order appealed from_____
2. Date this notice of appeal filed_____
If cross appeal, date first notice of appeal filed_____
3. Filing date of any postjudgment motion filed by any party which tolls time under FRAP 4(a)(4) or 4(b)_____
4. Date of entry of order deciding above postjudgment motion_____
5. Filing date of any motion to extend time under FRAP 4(a)(5) or 4(b
_____
Time extended to_____

B. Finality of Order or Judgment
1. Is the order or judgment appealed from a final decision on the merits? yes ( ) no ( )
2. If no, a) Did the district court order entry of judgment as to less than all claims or all parties pursuant to FRCP 54(b)? yes ( ) no ( )
b) Is the order appealed from a collateral or interlocutory order reviewable under any exception to the finality rule? yes ( ) no ( )

(Criminal only)
3. Has the defendant been convicted? yes ( ) no ( )
4. Has a sentence been imposed? yes ( ) no ( )
Term _____
5. Is the defendant incarcerated? yes ( ) no ( )

C. Has this case previously been appealed? yes ( ) no ( ) If yes, give the case name, docket number, and disposition of each prior appeal on a separate sheet.

D. Are any related cases or cases raising related issues pending in this court, any district court of this circuit, or the Supreme Court? yes ( ) no ( ) If yes, cite the case and the manner in which it is related on a separate sheet.

FIGURE 12–13 (Continued)

E. State the nature of the suit, the relief sought, and the outcome below.
F. Issues to be raised on appeal. Attach one additional page if necessary.
G. Is settlement being discussed? yes ( ) no ( )
H. Is disposition on motions, memoranda, or an abbreviated briefing schedule appropriate? yes ( ) no ( ) If yes, explain on a separate sheet. Is oral argument necessary? yes ( ) no ( )
1. Were there any in-court proceedings below? yes ( ) no ( ) Is a transcript necessary for this appeal? yes (no ( ) If yes, is transcript already on file with the district court? yes ( ) no ( ) If transcript is not already on file, attach copy 1 of transcript order.
J. List each adverse party to the appeal. Attach additional sheets if necessary. If no attorney, give address and telephone number of the adverse party.
   1. Adverse party_____
      Attorney_____
      Address_____
      Telephone_____
   2. Adverse party_____
      Attorney_____
      Address_____
      Telephone_____
K. Appellant(s) Name_____
   If incarcerated, give identification number_____
   Address (If incarcerated, give institution address)
   _____
   _____Telephone_____
L. Attorney or pro se litigant filing Docketing Statement. Will you be handling the appeal? (In criminal cases, counsel below will handle the appeal unless relieved by this court.) yes ( ) no ( )
   Name_____Attorney ( ) Pro se ( )
   Firm_____
   Address_____
   _____Telephone_____

The format and content of the appellate brief is not altogether alien; it bears some similarity to the trial briefs that you have already helped to prepare. Paralegals perform many of the same tasks as with trial briefs—drafting a statement of facts, conducting legal research, shepardizing cases, checking citations, and proofreading.

FRAP 30 requires the appellant to prepare an appendix to the brief. The appendix contains the relevant docket entries from the proceeding from which you are appealing; relevant portions of the pleadings, charge, findings, or opin-

FIGURE 12–14 Requirements for the Content of Appellate Briefs

FRAP 28. BRIEFS

(a) Appellant's Brief. The brief of the appellant must contain, under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of subject matter and appellate jurisdiction. The statement shall include: (i) a statement of the basis for subject matter jurisdiction in the district court or agency, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; (ii) a statement of the basis for jurisdiction in the court of appeals, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; the statement shall include relevant filing dates establishing the timeliness of the appeal or petition for review and (a) shall state that the appeal is from a final order or a final judgment that disposes of all claims with respect to all parties or, if not, (b) shall include information establishing that the court of appeals has jurisdiction on some other basis.

(3) A statement of the issues presented for review.

(4) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(5) A summary of argument. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings.

(6) An argument. The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

(7) A short conclusion stating the precise relief sought.

(b) Appellee's Brief. The brief of the appellee must conform to the requirements of paragraphs (a)(1)–(6), except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the standard of review.

(c) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief

FIGURE 12–14 (Continued)

in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the reply brief where they are cited.

(d) References in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore," etc.

(e) References in Briefs to the Record. References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule 39(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 39(c). If the record is reproduced in accordance with the provisions of Rule 30(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved: e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) Reproduction of Statutes, Rules, Regulations, etc. If determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.

(g) Length of Briefs. Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs must not exceed 50 pages, and reply briefs must not exceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, tables of citations, proof of service, and any addendum containing statutes, rules, regulations, etc.

ion; the judgment or order in question; and any other parts of the record to which the parties wish to direct the court's attention.

Note that there are three briefs filed in an appeal. First is the appellant's brief, which explains why the trial court committed reversible error. The appellee's brief is a response that tries to convince the appellate court that the trial court did not commit reversible error. The appellant is then allowed to file a reply brief, which responds to the appellee's brief.

SIDEBAR You may have heard of another type of brief, the brief of an *amicus curiae* ("friend of the court"). These are briefs filed by persons or organizations who are not appellants or appellees but who have a strong interest in the outcome of the litigation. Amicus curiae briefs are often filed in cases of far-reaching consequences, such as civil rights actions. FRAP 29 controls the filing of amicus curiae briefs and provides that amicus briefs may be filed only with the consent of all parties or at the request of the court.

FRAP 31 is a very important rule. It states the deadlines for serving and filing briefs. The appellant's brief must be served and filed within forty days after the date on which the record is filed. The appellee then has thirty days from service to file and serve a brief. If the appellant files a reply brief, it must be served and filed within fourteen days after service of the appellee's brief. Paralegals also must be familiar with FRAP 32, which states the form that must be used for the briefs and appendix.

Oral Argument. Oral argument is the attorneys' opportunity to appear before the appellate court and argue why the judgment should be either reversed or affirmed. Oral argument generally is not lengthy, perhaps thirty minutes at most. Thus, the attorneys should not repeat their entire argument on appeal but, rather, should emphasize their strongest points.

As FRAP 34 provides, oral argument may be waived by the appellate court. State rules of appellate procedure usually contain provisions for waiver of oral argument.

Oral argument in the circuit courts of appeal is before three judges. The number of judges or justices before whom oral arguments are presented in state appellate courts may differ, depending on the rules of appellate procedure and the level of the appellate court. For instance, oral argument in the lower appellate court may be before three judges, while oral argument in the state's highest appellate court may be before all the justices.

Entry of Judgment. After oral arguments, the judges who heard the arguments hold conferences to determine how they will rule. One judge is designated to write the opinion. The written opinion may not issue for several months, depending upon the complexity of the issues and the case load of the court.

FRAP 36 provides that the clerk of court for the appellate court shall prepare and enter a judgment after the clerk receives the court's decision. The court does not always issue a lengthy written explanation of its rationale. If the court does issue a written decision, however, the clerk mails a copy to each party. If there is no written decision, the clerk mails a copy of the judgment and notice of the date it was entered.

Petition for Rehearing. The party that fails to prevail on appeal may file a petition for rehearing. FRAP 40 provides that the petition "shall state with particularity the points of law or fact which in the opinion of the petitioner the

court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present." FRAP 40 does not permit oral argument. The petitioner also may request that the rehearing be *en banc*—that is, that the entire panel of judges on the appellate court participate in the decision, not just the three judges who originally heard the appeal. Petitions for rehearing are not frequently granted. The petition should be filed if there is a compelling argument to show that the appellate court erred, but it should never be filed for the purpose of delay.

ETHICS BLOCK

You now understand the importance of meeting deadlines for filing pleadings and appeals, and all documents in all stages of litigation, in a timely manner. Diligence is more than a good idea; it is an ethical obligation. ABA Model Rule 1.3 requires lawyers to "act with reasonable diligence and promptness in representing a client." This rule sounds almost simplistic, but it encompasses many of the lawyer's duties, including the duties to be competent, prompt, and diligent. These duties apply equally to paralegals, and many times the burden will be on you to ensure that a case moves along properly. This is particularly true in the litigation context, where lawyers are in court often and have little control over their own schedule because of the unpredictability of court scheduling. Paralegals' work is crucial in ensuring that deadlines are met and that clients are promptly informed of developments in their cases.

SUMMARY

Postverdict Motions

The trial is over, but this does not mean you are ready to close your file. Inevitably one party will be unhappy with the trial outcome. The unhappy party can file postverdict motions, the most common of which are motion for a judgment notwithstanding the verdict and motion for a new trial. A party may file either or both motions.

The motion for judgment notwithstanding the verdict (JNOV) is governed by FRCivP 50(b). A prerequisite for filing a motion for JNOV is that the party moved for a directed verdict during the trial. The motion for JNOV must be filed within ten days of entry of judgment. The motion asks the judge to set aside the jury's verdict on the premise that it is not supported by sufficient evidence. The judge must determine whether there is sufficient evidence to support the jury's verdict and, in making this determination, considers the evidence in the light most favorable to the party against whom the motion is made.

A dissatisfied party may also file a motion for a new trial, which is governed by FRCivP 59. FRCivP 59 does not state specific grounds that justify a new trial; rather, it states that a new trial may be granted for the reasons that courts have used before to grant new trials. Thus, the attorney-paralegal team must research the grounds that have been used before as the basis for a new trial. Examples of

grounds for granting new trials include excessively high or low damages, misconduct by the attorneys during trial, obvious failure of the jury to follow the judge's instructions, and newly discovered evidence. A motion for a new trial must be filed no later than ten days after entry of judgment.

It is important to understand that a motion for a new trial is not the same as filing an appeal. In an appeal, the appellate court reviews what happened at trial and determines whether prejudicial errors occurred. In a motion for a new trial, the trial judge is asked to review the trial to determine whether prejudicial errors occurred that are sufficient to warrant a new trial.

An important concept in motions for a new trial and in appeals is harmless error. Not every error made at trial warrants a new trial. FRCivP 61 provides that the court must disregard any procedural error that does not affect the substantial rights of the parties. Whether an error is harmless is open to interpretation, so legal research is in order.

Judgments

A judgment is the court's final decision; it resolves all matters in dispute among the parties to the litigation. At the conclusion of a trial, the judge announces the judgment to be entered. The judgment must then be reduced to writing and signed by the judge. In a federal court action, it is often the judge's law clerk who drafts the judgment. Sometimes the judge asks the attorneys to draft the judgment. In that case the attorney for the prevailing party usually drafts the judgment, gives it to the other attorney to review, and then presents it to the judge for signature. The practice of having the attorneys draft the judgment is common in state courts, where most judges do not have law clerks.

Judgments vary in length, depending on the complexity of the case. It is important that judgments be accurate and complete, because a mistake or omission is a ground for appeal. The format for judgments is uniform: an opening paragraph stating the name of the judge and the session of court in which the trial was conducted; Findings of Fact, which state the facts that the court finds to be true; Conclusions of Law, which state the applicable law upon which the judgment is based; and finally the statement of the relief granted to the parties—for example, how much money the defendant must pay to the plaintiff. The final section also states which party bears the costs. Often the trial transcript is not ready when the judgment is drafted, so the attorney-paralegal team must rely heavily on the paralegal's notes taken at trial.

The judgment becomes effective only when it is entered as provided in FRCivP 79. The judge signs the judgment and the judgment is filed with the clerk of court. The clerk of court then enters the judgment in the judgment book, called the civil docket. The entry is a short statement of the parties, court file number, date the entry is made, and the substance of the judgment. The civil docket is a multivolume series of books, usually divided into judgments entered in a certain time period, for example, 1980–1990. The civil docket contains a

multivolume index for each time period; judgments are indexed there under both plaintiffs' and defendants' names.

Completed at the end of trial is a form known as the bill of costs. This is generally a standard, preprinted form available from the clerk. The prevailing party tallies the court costs, which generally include filing fees, witness fees, fees for service of pleadings, and fees for court reporters. If there is not a standard fee, then the costs must be reasonable. Check with the clerk of court to see whether there are standard fees.

Enforcement of judgments is an important topic because a judgment is not always paid just because it has been entered in the civil docket. Often the nonprevailing party pays the judgment in a timely manner, especially when there is sufficient insurance coverage. Sometimes, however, it is necessary to go through the formal process of collecting the judgment, known as execution. Other important terms are judgment creditor, the party to whom the judgment is paid, and judgment debtor, the party who is supposed to pay the judgment.

Execution cannot be successful, however, if the judgment debtor has disposed of or transferred all assets to avoid paying the judgment. The attorney-paralegal team can take steps at the beginning of the litigation to prevent disposal of assets. FRCivP 64 allows a party to use the remedies available under state law or any applicable federal statute. Common remedies include attachment, when the sheriff seizes the defendant's personal property and keeps it, pending the outcome of the litigation. Another remedy is to file a notice of lis pendens, which is a short statement that real property is the subject of litigation. The notice of lis pendens is put in the civil docket and warns potential buyers that the real property is the subject of litigation. After the judgment is paid, the notice of lis pendens is canceled.

FRCivP 64 provides that the procedure for execution on a judgment is the procedure of the state in which the district court is held. If a federal statute applies, the federal statute is followed to the extent that it is applicable. Most often, the state procedures apply. The text walks you through an example of the procedure for execution. The procedures may differ among states.

The procedure for execution differs also according to whether the judgment debtor is an individual or a corporation. Individual judgment debtors are allowed at the beginning of the execution process to claim certain property as exempt from execution. In the example in the text, the judgment debtor is first served with notice that the judgment has been entered and that the judgment debtor is allowed to file a schedule of exempt property. If the judgment debtor fails to file a schedule of exempt property within the allotted time, execution can take place without a further hearing. If the judgment debtor files a schedule of exempt property and request for exemption, a hearing is held to determine what property is in fact exempt under the applicable law. Magistrates often preside at these hearings.

The actual execution involves seizing and selling the judgment debtor's nonexempt property to satisfy the judgment. For example, a car owned by the

judgment debtor may be seized and sold, with the proceeds applied to pay the judgment.

Sometimes the attorney-paralegal team feels that judgment debtors have not disclosed all their property. FRCivP 69 allows the judgment creditor to conduct posttrial discovery to gain information about a judgment debtor's assets. Interrogatories are the primary means for securing information. Paralegals may review public records such as tax listings to search for the judgment debtor's assets.

A final important concept is the judgment-proof defendant. If the defendant does not have sufficient insurance coverage and does not have property to execute against, the judgment cannot be collected. This is a judgment-proof defendant. It is wise to investigate the defendant's assets before filing a lawsuit. If a review of the civil docket reveals numerous unpaid judgments entered against the potential defendant, you may go through the time and expense of litigation for naught.

Appeals

When a party is unhappy with the judgment entered, the party may appeal—that is, have an appellate court review the proceedings to determine whether there were reversible errors. Reversible errors are errors made by the trial court that deprive a party of a fair trial.

Before filing, the attorney-paralegal team must assess whether an appeal is worthwhile. Appeals are time-consuming and expensive, so the team must assess its likelihood of winning an appeal. This depends in large part on the seriousness of the errors committed during the trial. The client makes the final decision to appeal, but the attorney-paralegal team must analyze whether an appeal is worthwhile and advise the client wisely.

Once a case is appealed, the appellate court has jurisdiction, and the rules of appellate procedure for that court apply. In federal appellate courts, the Federal Rules of Appellate Procedure apply. They are supplemented by internal operating procedures of the circuit courts of appeal, which are analogous to local court rules. In state court, the state's rules of appellate procedure apply.

The party who appeals the case is the appellant. The party who asserts that the trial court's actions were correct is the appellee.

An important concept for appeals is the final decision rule. Numerous errors may be committed at trial, but the trial cannot stop for every alleged error so that an appeal can be taken. Rather, the appellant must wait until after the trial court's final judgment is entered and then take up one appeal that addresses all the alleged reversible errors. The final decision rule requires the appellant to wait until entry of the court's final decision before filing an appeal. The court's orders entered before the final decision are called interlocutory orders. Interlocutory orders can be appealed only in certain narrow circumstances. Basically, the trial judge has to certify that an immediate appeal is

necessary. Otherwise, no issues can go up on appeal until after entry of the court's final decision.

The function of appellate courts is not to retry the case. Rather, the appellate courts examine the record on appeal to determine whether any reversible errors occurred at trial. The record of appeal contains the original papers and exhibits filed in the trial court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court. The appellate court may either affirm (uphold) the trial court's decision or reverse (overturn) it, remanding the case for correction of the errors.

It is important to follow the applicable rules of appellate procedure to the letter. It is also important to maintain an accurate docket control system because the rules of appellate procedure impose strict filing deadlines.

An overview of the Federal Rules of Appellate Procedure is helpful. First the appellant files a notice of appeal, a short statement that the appellant is filing an appeal with the appropriate appellate court. The notice of appeal must be filed within thirty days of entry of the judgment from which the appeal is taken. If the United States government is the appellant, sixty days are allowed. When an appellant seeks permission to appeal an interlocutory order, the appellant must file a request for permission to appeal within ten days of entry of the order from which the appeal arises.

The notice of appeal is filed with the clerk of the trial court, who sends a copy to the clerk of the appellate court. The appellate court clerk enters the appeal on the docket. Some circuit courts of appeal have internal operating procedures that require filing of a docketing statement that gives general information about the nature of the case on appeal.

There are costs assessed for appeals, including the cost of duplicating briefs and docketing fees. The appellant may be required to post a bond to cover these costs. If the decision of the lower court is affirmed, the appellant generally has to pay the costs. If the decision of the lower court is reversed, the appellee generally has to pay the costs.

An important part of the record on appeal is the transcript of the trial court proceedings. FRAP 10 requires the appellant to obtain a copy of all or pertinent parts of the transcript from the court reporter, and the transcript is made part of the record on appeal. The FRAP impose deadlines for ordering the transcript from the court reporter and deadlines for the court reporter to submit the transcript to the appellate court.

Appellate briefs are of critical importance because they are the primary tool for convincing the appellate court to either reverse or affirm the trial court's decision. The Federal Rules of Appellate Procedure and internal operating procedures impose precise requirements for format and length. These requirements must be followed to the letter. In preparing appellate briefs, paralegals perform many of the same tasks as with trial briefs—drafting a statement of facts, conducting legal research, shepardizing cases, checking citations, and proofreading.

FRAP 30 requires preparation of an appendix to the brief. The appendix must include the relevant docket entries from the proceeding from which you are

appealing; relevant portions of the pleadings, charge, findings, or opinion; the judgment or order in question; and any other parts of the record to which the parties wish to direct the court's attention.

There are three briefs filed in an appeal. The appellant's brief explains why the trial court committed reversible error. The appellee's brief responds, explaining why the trial court's decision should be affirmed. Then the appellant is allowed to file a reply brief, responding to the appellee's brief. The FRAP impose deadlines for filing each of the briefs and the deadlines must be entered in the docket control system.

Oral argument is when the attorneys appear before the appellate court and argue the strongest points in favor of their position. Oral argument is usually short, and lawyers have time only to emphasize the most important points. The appellate court may waive oral argument. Oral argument in the circuit courts of appeal is addressed to a three-judge panel. The number of judges or justices before whom attorneys argue differs in state courts.

After oral argument, the judges who heard the arguments hold conferences to determine how they will rule, and the case is assigned to one judge to write the opinion. When the opinion is out, the clerk of the appellate court enters the court's judgment and sends a copy of the judgment to the parties. The court does not always issue a written decision.

The party that fails to prevail may file a petition for rehearing. The party may also request a rehearing en banc—that is, before all the judges on the court, not just the three-judge panel that heard the first oral argument. These petitions are not frequently granted and should be filed only when there is a compelling argument.

REVIEW QUESTIONS

1. What is the process for enforcing payment of a judgment called?
   a. attachment
   b. entry of judgment
   c. execution
   d. writ of coram nobis
2. What is the sheriff 's seizure and retention of personal property pending the outcome of the trial called?
   a. writ of execution
   b. attachment
   c. lis pendens
   d. bad manners
3. The Federal Rules of Appellate Procedure state deadlines within which appellants must do which of the following?
   a. order the trial transcript
   b. file a reply brief
   c. file the notice of appeal
   d. all of the above
   e. b and c only

4. What is the appeal of one issue before the conclusion of trial called?
   a. an interlocutory appeal
   b. a motion for a new trial
   c. a motion for JNOV
   d. none of the above
5. T F The appellee always pays the costs of an appeal.
6. T F A judgment with insufficient Findings of Facts may be overturned on appeal.
7. T F Interlocutory orders can never be appealed until after the court's final decision is entered.
8. T F The civil docket is generally indexed both by names of plaintiffs and names of defendants.
9. T F Once a case has been appealed, the trial court no longer has jurisdiction over it.
10. T F A judge may set aside a verdict whenever the judge disagrees with the jury's verdict.

PRACTICAL APPLICATIONS

Assume that the Wesser case is being appealed to the Fourth Circuit Court of Appeals.

1. What is the deadline for Mr. Benedict to file the notice of appeal?
2. Within how many days of filing the notice of appeal must he file a docketing statement?
3. Woodall Shoals Corporation and Second Ledge Stores, Incorporated, were the defendants in the trial. What are they termed on appeal?

CASE ANALYSIS

Read the excerpt from *Maxwell v. Baker,* 160 F.R.D. 580 (D. Minn. 1995), and answer the questions following the excerpt.

ORDER

DOTY, District Judge.

This matter is before the court on the motion of defendant J. Baker, Inc. ("J. Baker") for a new trial pursuant to Rules 50(b) and 59(a) of the Federal Rules of Civil Procedure. J. Baker contends that the jury's verdict is contrary to the weight of the evidence. J. Baker also seeks a new trial on the issue of patent validity based on newly discovered evidence. Based on a review of the file, record and proceedings herein, and for the reasons stated below, the court denies J. Baker's motion for a new trial.

The grant of a new trial is committed to the discretion of the district court. A new trial may be ordered when the verdict is against the clear weight of the evidence, is the result of passion or prejudice or is clearly excessive. While the standard for granting a new trial is less stringent than for judgment as a matter of law, a new trial shall be granted only to prevent injustice or when the verdict strongly conflicts with the great weight of evidence. The court is not free to set aside a verdict merely

because it would have ruled differently, or believes that the jury should have drawn different inferences and conclusions from the conflicting testimony.

The true standard for granting a new trial on the basis of the weight of the evidence is simply one which measures the result in terms of whether a miscarriage of justice has occurred. J. Baker contends that justice requires a new trial in this case. In a separate order denying J. Baker's motion for judgment as a matter of law, the court concluded that the verdict reached by the jury in this case is supported by substantial evidence. Of course, J. Baker or other reasonable persons could differ about the correct outcome, but the verdict does not work an injustice or fall against the great weight of the evidence. It is irrelevant that the evidence could also support a contrary verdict when a reasonable jury could have reached the verdict reached in this case.

Citing *Mendenhall v. Barber-Greene Co.*, 26 F.3d 1573 (Fed. Cir. 1994), and what it characterizes as powerful new evidence of invalidity, J. Baker seeks a new trial on the issue of patent validity. At trial, J. Baker challenged the validity of the '060 patent and asserted that Maxwell was not the original inventor of the claimed invention. The jury rejected J. Baker's defense and expressly confirmed the validity of the '060 patent. After the jury's verdict and award of damages, other shoe retailers being sued for infringement of the '060 patent in *Maxwell v. K mart, et al.*, Civ. No. 4-93-525 (D. Minn.), obtained deposition testimony in the Orient which they argue conclusively establishes invalidity. Based on this testimony, J. Baker seeks a new trial on the validity of the '060 patent. J. Baker also fears it will be unfairly prejudiced if a final decision is rendered in this case before a final decision is made concerning the validity of the '060 patent in the *K mart* case.

Two of the defendants in the *K mart* case, Melville Corporation and Morse Shoe Co., the parent company of J. Baker, have asserted that the '060 patent is invalid due to derivation and have sought summary judgment on that issue. Those motions are currently pending before the court. Maxwell has testified that she directed Richard Shapiro at Regent Shoes to construct a prototype of her invention. Like J. Baker, Melville and Morse dispute Maxwell's claim of inventorship and argue that she learned of the shoe connection system described in the patent from Regent Shoes. In addition to the evidence offered by J. Baker at trial, Melville and Morse have demonstrated that the prototype was produced in Taiwan by a shoe factory known as Stepping Ahead. Melville and Morse also offer the deposition testimony of Warren Yeh who in 1982 was the general manager of Stepping Ahead. Yeh testified that in late 1982 he and his factory manager, Mr. Liu, devised a shoe connection system identical to the one claimed in the '060 patent. According to Yeh, a vendor affiliated with Regent Shoes learned of the shoe connection system during a factory tour of Stepping Ahead in late 1982. Based on this evidence, Melville and Morse assert that the system claimed in the '060 patent was not invented by Maxwell but was derived from Yeh's invention.

Although the evidence concerning Stepping Ahead appears to have been discovered after trial in *Maxwell v. J. Baker,* there is no reason to believe that J. Baker exercised due diligence to discover the evidence before the end of trial. The burden of proving patent invalidity by clear and convincing evidence rests on the alleged infringer. While the evidence relied on by J. Baker appears to be material to the issue of patent validity, the court cannot say at this time that a new trial considering the evidence would probably produce a different result. Even if J. Baker had satisfied the court that the preconditions for a new trial were met here, its motion is

premature. No final judgment has been entered rendering the '060 patent invalid. To the contrary, the court has sustained a jury verdict upholding the validity of the '060 patent.

The court concludes that the evidence presented by J. Baker does not justify a new trial. Based on the foregoing, **IT IS HEREBY ORDERED** that defendant J. Baker's motion for a new trial is denied. **IT IS FURTHER ORDERED** that the denial of J. Baker's motion is without prejudice to its ability to bring a Fed.R.Civ.P. 60(b) motion after a final judgment has been entered on the validity of the '060 patent in *Maxwell v. K mart,* Civ. No. 4-93-525 (D. Minn.).

1. What motion did the defendant request the court to grant?
2. Does the court have discretion in ruling on motions for a new trial?
3. Is a judge free to set aside a jury verdict because the judge would have ruled differently?
4. On what new evidence did the defendant base the motion for a new trial on the validity of the '060 patent?
5. Did the court find that the defendant had exercised due diligence to discover this evidence before the end of trial?
6. Why did the court deny the motion for a new trial?

APPENDIX

WESSER CASE

Complaint
Defendants' Answer
Plaintiff 's First Set of Interrogatories
Responses to Plaintiff 's First Set of Interrogatories

CHATTOOGA CORPORATION CASE

Complaint
Consent Decree

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,

and

Second Ledge Stores, Incorporated,
Defendant.

COMPLAINT
(Jury Trial Requested)

The plaintiff, complaining of the defendant, alleges and says that:

1. The plaintiff is a citizen and resident of Watauga County, North Carolina.

2. The defendant Woodall Shoals Corporation (hereinafter "Woodall Shoals") is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in a state other than the State of North Carolina, and is licensed to do business and is doing business in the State of North Carolina.

3. The defendant Second Ledge Stores, Incorporated (hereinafter "Second Ledge") is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in a state other than the State of North Carolina, and is licensed to do business and is doing business in the State of North Carolina.

4. The matter in controversy exceeds, exclusive of interest and costs, the sum of $50,000 (Fifty Thousand Dollars).

5. On or about January 16, 1994, the plaintiff purchased from the defendant Second Ledge, Store No. 289 in Charlotte, North Carolina, an electric blanket, Model 6102 (hereinafter "the electric blanket") manufactured by defendant Woodall Shoals.

6. On or about January 3, 1995, at approximately 11:30 pm., the plaintiff used the electric blanket to cover himself when he went to bed in his residence at 115 Pipestem Drive, Charlotte, NC. In so doing and prior thereto, the plaintiff carefully followed all instructions as to the proper use of the electric blanket. The plaintiff turned the blanket on and went to sleep.

7. Shortly thereafter a defect in the blanket or its control caused the blanket to overheat and ignite. The plaintiff kicked the blanket off his body but nonetheless was severely burned.

8. The flaming blanket caused the area around the plaintiff's bed to catch fire. The plaintiff ran from his bedroom, receiving burns on his body in the process. By the time the fire was extinguished, the walls and ceiling of the plaintiff's bedroom were burned beyond reuse and the entire living area of the plaintiff's house was damaged by smoke.

9. As a consequence of the fire, the plaintiff suffered severe third-degree burns over twenty percent (20%) of his body, requiring his hospitalization for one month for treatment of his wound, resulting in extensive medical expenses for his care and lost wages. The plaintiff has suffered severe emotional distress as a result of the fire and his injuries.

I.
COUNT ONE—BREACH OF EXPRESS WARRANTY BY THE DEFENDANT WOODALL SHOALS

10. The plaintiff incorporates by reference and realleges paragraphs 1–9 of the Complaint and, in addition, alleges as follows:

11. At the time of the sale of the electric blanket, Woodall Shoals made certain express warranties to the plaintiff including an express warranty that, for two years from the date of purchase, the blanket would be free of electrical and mechanical defects in material and workmanship.

12. The electric blanket in fact contained numerous electrical and mechanical defects that caused the blanket to overheat and ignite, causing the plaintiff's injuries and damages.

13. Because of the defects, Woodall Shoals breached the express warranties made to the plaintiff.

14. Woodall Shoals' breach of the aforementioned express warranties directly and proximately caused the injuries and damages sustained by the plaintiff.

15. The plaintiff gave Woodall Shoals timely notice of the aforementioned breach of warranties.

16. By reason of the injuries directly and proximately caused by the breach of express warranties by Woodall Shoals, as their interests appear, the plaintiff is entitled to recover from this defendant for medical and hospital expenses, past and future; pain, suffering, humiliation, embarrassment, and mental anguish, past and future; loss of life's pleasures and loss of well-being, past and future, through physical handicap; extensive property damage to his home, loss of income, and other damages, all in an amount greatly in excess of Seventy-five Thousand Dollars ($75,000).

II.
COUNT TWO—BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY BY THE DEFENDANT WOODALL SHOALS

17. The plaintiff incorporates by reference and realleges paragraphs 1–9 of the Complaint and, in addition, alleges as follows:

18. Woodall Shoals regularly engages in the sale of electric blankets of the type that injured and damaged the plaintiff.

19. At the time of sale, Woodall Shoals impliedly warranted to the plaintiff that the electric blanket was "merchantable" within the meaning of North Carolina General Statutes § 25-2-314.

20. Woodall Shoals breached this warranty by selling an electric blanket that was not merchantable.

21. The electric blanket at the time of sale was not merchantable in that the numerous defects in material and workmanship, which existed in the blanket and caused it to ignite, made the blanket unfit for the ordinary purpose for which electric blankets are used.

22. As a direct and proximate result of Woodall Shoals' breach of its implied warranty of merchantability to the plaintiff, the blanket ignited and caused serious injuries to the plaintiff.

23. The plaintiff gave timely notice of the breach of the implied warranty of merchantability to the defendant Woodall Shoals.

24. By reason of the injuries directly and proximately caused by Woodall Shoals' breach of the implied warranty of merchantability, the plaintiff is entitled to recover from this defendant for medical and hospital expenses, past and future; pain, suffering, humiliation, embarrassment, and mental anguish, past and future; loss of life's pleasures and loss of well-being, past and future, through physical handicap; extensive property damage to his home, loss of income, and other damages all in an amount greatly in excess of Seventy-five Thousand Dollars ($75,000).

III.
COUNT THREE—NEGLIGENCE IN DESIGN AND MANUFACTURE BY THE DEFENDANT WOODALL SHOALS

25. The plaintiff incorporates by reference and realleges paragraphs 1–9 of the Complaint and, in addition, alleges as follows:

26. Woodall Shoals designed, manufactured, and assembled the Model 6102 electric blanket that injured the plaintiff.

27. Woodall Shoals owed a duty to foreseeable users of the electric blanket, including the plaintiff, to exercise reasonable care in the design, manufacture, and assembly of the blanket.

28. Due to Woodall Shoals' failure to exercise reasonable care in the design of the electric blanket, when it left Woodall Shoals' possession and control the electric blanket posed an unreasonable risk of harm to users because of its propensity to overheat and ignite.

29. Woodall Shoals knew or should have known that the electric blanket as designed posed an unreasonable risk of harm to foreseeable users like the plaintiff.

30. Owing to Woodall Shoals' failure to exercise reasonable care in the manufacture and assembly of the electric blanket, at the time it left Woodall Shoals' possession and control, the electric blanket posed an unreasonable risk of harm to users because of its propensity to overheat and ignite.

31. Woodall Shoals knew or should have known that the electric blanket as manufactured and assembled posed an unreasonable risk of harm to foreseeable users like the plaintiff.

32. Woodall Shoals' failure to exercise reasonable care in the design, manufacture, and assembly of the electric blanket proximately caused the plaintiff's injuries and damages.

33. By reason of the injuries proximately caused by Woodall Shoals' failure to exercise reasonable care in the design, manufacture, and assembly of the electric blanket, the plaintiff is entitled to recover from Woodall Shoals for medical and hospital expenses, past and future; pain, suffering, humiliation, embarrassment, and mental anguish, past and future; loss of life's pleasures and loss of well-being, past and future, through physical handicap; extensive property damage to his home, loss of income, and other damages, all in an amount greatly in excess of Seventy-five Thousand Dollars ($75,000).

IV.
COUNT FOUR—BREACH OF EXPRESS WARRANTY BY THE DEFENDANT SECOND LEDGE

34. The plaintiff incorporates by reference and realleges paragraphs 1–9 of the Complaint and, in addition, alleges as follows:

35. At the time of the blanket's sale to the plaintiff, Second Ledge made certain express warranties to the plaintiff, including an express warranty that, for two years from the date of purchase, the blanket would be free of electrical and mechanical defects in material and workmanship.

36. At the time of sale, the electric blanket in fact contained numerous electrical and mechanical defects that caused the blanket to overheat and ignite, causing the plaintiff's injuries and damages.

37. By reason of these defects, Second Ledge breached the express warranties made to the plaintiff.

38. Second Ledge's breach of the aforementioned express warranties directly and proximately caused the injuries and damages sustained by the plaintiff.

39. The plaintiff gave Second Ledge timely notice of the aforementioned breach of warranties.

40. By reason of the injuries directly and proximately caused by the breach of express warranties by Second Ledge, the plaintiff is entitled to recover from this defendant for medical and hospital expenses, past and future; pain, suffering, humiliation, embarrassment, and mental anguish, past and future; loss of life's pleasures and loss of well-being, past and future, through physical handicap; extensive property damage to his home, loss of income, and other damages, all in an amount greatly in excess of Seventy-five Thousand Dollars ($75,000).

V.
COUNT FIVE—BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY BY THE DEFENDANT SECOND LEDGE

41. The plaintiff incorporates by reference and realleges paragraphs 1–9 of the Complaint and, in addition, alleges as follows:

42. Second Ledge regularly engages in the retail sale of electric blankets of the type that injured and damaged the plaintiff.

43. At the time of the electric blanket's sale, Second Ledge impliedly warranted to the plaintiff that the electric blanket was "merchantable" within the meaning of North Carolina General Statutes § 25-2-314.

44. Second Ledge breached this warranty by selling an electric blanket that was not merchantable.

45. At the time of sale, the electric blanket was not merchantable in that the numerous defects in material and workmanship that existed in the blanket and caused it to ignite made the blanket unfit for the ordinary purpose for which electric blankets are used.

46. Second Ledge had a reasonable opportunity to inspect the blanket prior to sale.

47. A reasonable inspection of the blanket would have revealed its defective condition.

48. As a direct and proximate result of Second Ledge's breach of its implied warranty of merchantability to the plaintiff, the blanket ignited and caused serious injuries to the plaintiff.

49. The plaintiff gave timely notice of the breach of the implied warranty of merchantability to Second Ledge.

50. By reason of the injuries directly and proximately caused by Second Ledge's breach of the implied warranty of merchantability, the plaintiff is entitled to recover from this defendant for medical and hospital expenses, past and future; pain, suffering, humiliation, embarrassment, and mental anguish, past and future; loss of life's pleasures and loss of well-being, past and future, through physical handicap; extensive property damage to his home, loss of income, and other damages, all in an amount greatly in excess of Seventy-five Thousand Dollars ($75,000).

VI.
COUNT SIX—NEGLIGENCE OF THE DEFENDANT SECOND LEDGE

51. The plaintiff incorporates by reference and realleges the allegations contained in paragraphs 1–9 of the Complaint and, in addition, alleges as follows:

52. At the time the electric blanket left Second Ledge's possession and control, the blanket was in a defective condition and posed an unreasonable risk of harm to users in that:

(a) the blanket had a propensity to overheat and ignite; and

(b) the blanket lacked adequate warnings and instructions.

53. Second Ledge owed a duty to foreseeable users of the electric blanket, including the plaintiff, to exercise reasonable care in inspecting the blanket for defects.

54. Second Ledge had a reasonable opportunity to inspect the electric blanket for defects.

55. A reasonable inspection of the electric blanket would have revealed its defective conditioner and that it posed an unreasonable risk of harm to users.

56. Because Second Ledge failed to exercise reasonable care in inspecting the electric blanket, the plaintiff is entitled to recover from this defendant for medical and hospital expenses, past and future; pain, suffering humiliation, embarrassment, and mental anguish, past and future; loss of life's pleasures and loss of well-being, past and future, through physical handicap; extensive property damage to his home, loss of income, and other damages, all in an amount greatly in excess of Seventy-five Thousand Dollars ($75,000).

WHEREFORE, the plaintiff prays the Court as follows:

1. The plaintiff have and recover of the defendants, jointly and severally, damages substantially in excess of Seventy-five Thousand Dollars ($75,000) for personal injury, medical expenses, lost wages, pain and suffering, emotional distress, and property damage.

2. The costs of this action be taxed to the defendants.

3. The plaintiff be granted a trial by jury on all issues of fact.

4. The plaintiff be granted such other and further relief as the court may deem just and proper.

This the 2d day of January, 1996.

Leigh J. Heyward
Attorney for the Plaintiff
Heyward and Wilson
401 East Trade Street
Charlotte, NC 28226-1114
704-555-3161
FAX: 704-555-3162
N.C. State Bar No. 12779

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,

and

Second Ledge Stores, Incorporated,
Defendant.

DEFENDANTS' ANSWER

FIRST DEFENSE

The defendants respectfully move that the plaintiffs' Complaint be dismissed pursuant to Rule 12(b)(6) for failure to state a cause of action upon which relief can be granted.

SECOND DEFENSE

The defendants, for answer to plaintiff's Complaint, state as follows:

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.

4, 5, and 6. The defendants deny the allegations contained in Paragraphs 4, 5, and 6 for lack of sufficient information or knowledge to form a belief as to the truth thereof.

7. Paragraph 7 is denied.
8. Paragraph 8 is denied.
9. The defendants, upon present information and belief, admit that the plaintiff suffered first, second, and third-degree burns over approximately 20% of his body, requiring hospitalization and medical treatment. The defendants deny the remaining allegations contained in Paragraph 9 for lack of sufficient information or knowledge to form a belief as to the truth thereof.

1. COUNT ONE—BREACH OF EXPRESS WARRANTY BY DEFENDANT WOODALL SHOALS CORPORATION

10. The defendants repeat, reallege, and incorporate by reference their answers to Paragraph 1 through 9 of the Complaint, as if repeated herein, word for word, paragraph by paragraph.

11. Defendants admit that Woodall Shoals expressly warranted to the purchaser of the electric blanket that, for two years from the date of purchase, the blanket would be free of electrical and mechanical defects in material and workmanship.

Except as specifically admitted, the allegations contained in Paragraph 11 are denied.

12, 13, 14, 15, and 16. Paragraphs 12, 13, 14, 15, and 16 are denied.

II. COUNT TWO—BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY BY DEFENDANT WOODALL SHOALS

17. The defendants repeat, reallege, and incorporate by reference their answers to Paragraphs 1 through 9 and Paragraphs 10 through 16 of Count One of the Complaint, as if repeated herein, word for word, paragraph by paragraph.

18. The defendants admit that Woodall Shoals regularly engages in the manufacture and wholesale sales and distribution of electric blankets. Except as specifically admitted, the allegations contained in Paragraph 18 are denied.

19. The defendants admit that certain warranties may be implied to exist regarding the electric blanket as a matter of law, by operation of statute or otherwise. Except as specifically admitted, the allegations contained in Paragraph 19 are denied.

20, 21, 22, 23, and 24. Paragraphs 20, 21, 22, 23, and 24 are denied.

III. COUNT THREE—NEGLIGENCE IN DESIGN AND MANUFACTURE BY THE DEFENDANT WOODALL SHOALS

25. The defendants repeat, reallege, and incorporate by reference their answers to Paragraphs 1 through 9, Paragraphs 10 through 16 of Count One, and Paragraphs 17 through 24 of Count Two of the Complaint, as if repeated herein, word for word, paragraph by paragraph.

26. Defendants admit, upon present information and belief, that Woodall Shoals designed, manufactured, and assembled an electric blanket designated as Model 6102. Except as specifically admitted, the allegations contained in Paragraph 26 are denied.

27. The defendants deny the allegations contained in Paragraph 27 for the reason that the same set forth nothing more than conclusions of law and are therefore improper. The defendants further state that they met and exceeded any and all duties or obligations imposed upon them by operation of law or otherwise in the manufacture and sale of electric blankets.

28, 29, 30, 31, 32, and 33. Paragraphs 28, 29, 30, 31, 32, and 33 are denied.

IV. COUNT FOUR—BREACH OF EXPRESS WARRANTY BY THE DEFENDANT SECOND LEDGE

34. The defendants repeat, reallege, and incorporate by reference their answers to Paragraphs 1 through 9, Paragraphs 10 through 16 of Count One, Paragraphs 17 through 24 of Count Two, and Paragraphs 25 through 33 of Count Three, as if repeated herein, word for word, paragraph by paragraph.

35. The defendants deny that Second Ledge sold any electric blanket, in particular an electric blanket manufactured by Woodall Shoals designated as Model No. 6102, to the plaintiff for lack of sufficient information or knowledge to form a belief as to the truth thereof. The defendants deny the remaining allegations contained in Paragraph 35.

36, 37, 38, 39, and 40. Paragraphs 36, 37, 38, 39, and 40 are denied.

V. COUNT FIVE—BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY BY THE DEFENDANT SECOND LEDGE

41. The defendants repeat, reallege, and incorporate by reference their answer to Paragraphs 1 through 9, Paragraphs 10 through 16 of Count One, Paragraphs 17 through 24 of Count Two, Paragraphs 25 through 33 of Count Three, and Paragraphs 34 through 40 of Count Four of the Complaint as if repeated herein, word for word, paragraph by paragraph.

42. The defendants admit that Second Ledge regularly engages in the retail sale of electric blankets. Except as specifically admitted, the defendants deny the remaining allegations of Paragraph 42.

43. The defendants admit that certain warranties may be implied to exist relative to the sale of electric blankets as a matter of law, by operation of statute or otherwise. Except as specifically admitted, the defendants deny the allegations contained in Paragraph 43 for the reason that the same set forth nothing more than conclusions of law and are therefore improper.

44 and 45. Paragraphs 44 and 45 are denied.

46. The defendants deny the allegations contained in Paragraph 46 for the reason that those allegations are so vague and unclear in the manner and form alleged that the defendants are precluded from properly formulating an answer thereto. Defendants further allege that defendant Second Ledge met and exceeded any and all duties or allegations imposed by operation of law or otherwise relative to the sale of electric blankets.

47, 48, 49, and 50. Paragraphs 47, 48, 49, and 50 are denied.

VI. COUNT SIX—NEGLIGENCE OF THE DEFENDANT SECOND LEDGE

51. The defendants repeat, reallege, and incorporate by reference their answers to Paragraphs 1 through 9, Paragraphs 10 through 16 of Count One,

Paragraphs 17 through 24 of Count Two, Paragraphs 25 through 33 of Count Three, Paragraphs 34 through 40 of Count Four, and Paragraphs 41 through 50 of Count Five, as if repeated herein, word for word, paragraph by paragraph.

52. The defendants deny the allegations contained in Paragraph 52 and subparagraphs (a) and (b) contained therein.

53. The defendants deny the allegations contained in Paragraph 53 for the reason that the same set forth nothing more than conclusions of law and are therefore improper. The defendants further allege that defendant Second Ledge met and exceeded any and all duties or obligations imposed by operation of law or otherwise relative to the sale of electric blankets,

54. The defendants deny the allegations contained in Paragraph 54 for the reason that those allegations are so vague and unclear in the manner and form alleged that the defendants are precluded from properly formulating an answer thereto. The defendants further allege that defendant Second Ledge met and exceeded any and all duties and obligations imposed by operation of law or otherwise relative to the retail sale of electric blankets.

55 and 56. Paragraphs 55 and 56 are denied.

THIRD DEFENSE

57. The defendants affirmatively plead that the plaintiff was careless and negligent in the matters set forth in the Complaint. To the extent that any product manufactured, distributed, and/or sold by the defendants, or either of them, in particular an electric blanket, was involved in any accident relating to the plaintiff, knowledge of which is presently lacking and which has been and is again specifically denied, then said electric blanket was abused and/or misused in that, on present information and belief, the electric blanket was or may have been folded, tucked under mattresses, used underneath other bed coverings, or otherwise misused, and that such abuse and/or misuse was the sole proximate cause of any and all injuries sustained by the plaintiff, and the defendants affirmatively plead such abuse and/or misuse as a complete bar to recovery by the plaintiff.

58. The defendants affirmatively plead the contributory negligence of plaintiff as a complete bar to recovery by plaintiff.

59. The defendants affirmatively plead that the contributory negligence of plaintiff superseded any and all alleged negligence or breach of warranties by the defendants, which negligence and breach of warranties has been and is again specifically denied; and that the negligence of the plaintiff was the sole, superseding and/or intervening proximate cause of any and all damages sustained by the plaintiff and acts as a complete bar to recovery by the plaintiff.

WHEREFORE, the defendants, having moved to dismiss plaintiff's Complaint, having fully and completely answered the allegations contained in plaintiff's Complaint, and having asserted their further affirmative defense, respectfully pray unto this honorable Court that:

1. Plaintiff's Complaint be dismissed with prejudice;
2. The plaintiff has and recovers nothing of the defendants;
3. All costs and the defendants' attorneys' fees in this action be taxed against the plaintiff;
4. The defendants be afforded such other relief as may appear to the Court to be just and proper.

Submitted this 20th day of January, 1996.

David H. Benedict
Attorney for the Defendants
Benedict, Parker & Miller
100 Nolichucky Drive
Bristol, NC 28205-0890
704-555-8810

+ Certificate of Service

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,
-vs-
Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT WOODALL SHOALS CORPORATION

The plaintiff requests that the defendant Woodall Shoals Corporation answer under oath, in accordance with Rules 33 and 34 of the Federal Rules of Civil Procedure, the following Interrogatories. Since said defendant is a corporation, the defendant is required to select such officer or agent of said corporation as can best furnish information and answers to each interrogatory. The defendant is required to have these interrogatories answered separately and fully in writing under oath and to serve a copy of its answers on counsel for the plaintiffs within the time provided in said Rules.

DEFINITIONS

(a) "The subject blanket" means the electric blanket, Model 6102, manufactured by the defendant Woodall Shoals Corporation and purchased by Bryson Wesser on or about January 16, 1994, from the defendant Second Ledge Stores, Incorporated, Store No. 289, in Charlotte, North Carolina.

(b) As used herein, "representatives" means counsel, agents, investigators, legal assistants, and all persons acting on behalf of the defendant.

INTERROGATORIES

1. Please give the names, titles, and addresses of the persons answering these interrogatories.

2. Does the defendant manufacture, distribute, provide component parts for, or sell Woodall Shoals Model 6102 electric blankets? Please designate specifically each of these activities in which the defendant participates.

3. Please state the year and place of manufacture of the subject blanket.

4. Please state the date and place at which the subject blanket was assembled as a finished product by the defendant, immediately before the subject blanket was placed in the path of distribution.

5. Please identify the person(s) who actually designed the subject blanket or had the overall responsibility for the design of said product.

6. Please state the design objectives for the subject blanket and describe in detail how the design criteria were established.

7. Please state the name, address, and relationship to the defendant of the person(s) who defined or described the design criteria for the subject blanket.

8. Does the defendant subscribe to or purport to follow standards established by the American National Standards Institute or any other governmental or nongovernmental group or association? If so, please identify and describe each such set of standards, with specific reference to the title of the standards, the date, author, and present location of the standards.

9. Did the defendant consult any outside individual, partnership, corporation, or other entity in the design or manufacture of the subject blanket? If so, please state the name and address of the entity and the phase of design or manufacture in which the entity was involved.

10. Please list every purchase made by the defendant from a named supplier for use in manufacturing the subject blanket, and for each item purchased, please state the address of the named supplier and describe the material purchased.

11. Was any warning given to any purchaser, including private individuals, distributors, or retailers selling such model of electric blanket, to inform them that the electric blanket might overheat or malfunction in any other manner so as to cause a fire? If so, state the contents of the warnings and instructions and how they were communicated to the individual purchasers, distributors, or retail stores.

These Interrogatories shall be deemed continuing in nature so as to require seasonal, supplemental answers as information becomes available to defendant.

This 26th day of February, 1996.

Leigh J. Heyward
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Heyward and Wilson
401 East Trade Street
Charlotte, NC 28226-1114
704-555-3161
FAX: 704-555-3162

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Note: These interrogatories are designed to give an overview of a set of interrogatories. A full set of interrogatories would have additional definitions and questions. This overview does not contain all the basic questions that a first set of interrogatories should include.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,
-vs-
Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT WOODALL SHOALS CORPORATION

Defendant Woodall Shoals Corporation, for its responses to Plaintiff's interrogatories, states as follows:

1. Robert W. Carlton
Manager of Consumer Relations
Woodall Shoals Corporation
300 West Blvd.
New York, NY 10019-0987

Victoria McGee, Counsel
Woodall Shoals Corporation

Leslie Miller
Woodall Shoals Corporation
Youghigheny, North Carolina

2. Yes. Woodall Shoals Corporation manufactures all components of Model 6102 blankets and sells such blankets.

3. Model 6102 blanket was manufactured in Youghigheny, North Carolina.

4. Model 6102 blanket was assembled and manufactured in Youghigheny, North Carolina.

5. Electric blankets manufactured by Woodall Shoals Corporation consist of a number of components that have been designed and developed separately, and the designs have changed and improved over the years. For each model, a single individual has final "signoff" responsibility for the overall design; the identity of this individual changes over time. The individual who currently has signoff responsibility for Woodall Shoals Corporation's thermostat blankets is Joel Marcus, Designer Engineer—Comfort Products Manager.

6. Essentially the "design criteria" for Woodall Shoals Corporation's electric blankets are those described in response to interrogatory 15. There are a number of design/quality-control tolerances that are applicable to each of the various components and assemblies. To list each of these tolerances would require numerous pages and would require information that is proprietary in nature and which Woodall Shoals Corporation considers to constitute trade secrets. Woodall Shoals Corporation will provide information on specific design/quality-control tolerances for specific components upon a specific request, and subject to the provisions of an appropriate protective order. A reasonable number of requested documents can be photocopied and provided through the mail. Otherwise, Woodall Shoals Corporation will produce such documents for examination and photocopying at plaintiff's expense at its offices in New York, New York, or at its facilities in Youghigheny, North Carolina, depending upon the documents requested,

7. The design objectives and design/quality-control tolerances for all electric blankets manufactured by Woodall Shoals Corporation have been established by employees of Woodall Shoals Corporation. It is impossible to identify individual employees without reference to specific component(s), model(s), and period(s) of manufacture.

8. Objection. The information sought is irrelevant and immaterial and not likely to lead to admissible information.

9. Electric blankets that are manufactured for and sold to specific customers are manufactured in compliance with that specific customer/retailer's specifications as to size, color, labeling, packaging, and number of controls.

10. Woodall Shoals Corporation manufactures every component of every electric blanket it manufactures. A list of every supplier of every raw material (i.e., yarn, thread, wire, plastic (raw), plastic tubing, bi-metal, fasteners, etc.) would require numerous pages. Upon receipt of a specific request identifying the component(s), model(s), and period(s) of manufacture, Woodall Shoals Corporation will make such specific information available.

11. Instructions are designed to prevent and/or minimize, and warnings specifically address, the risk of overheating and/or "hot spots" and/or burn injuries that can occur due to improper use or maintenance of electric blankets. Instructions and warnings, are not provided in contemplation of "malfunction" of the electric blanket. Copies of recent examples of instructions and warnings are attached. All instructions, warnings and labels provided with or attached to Woodall Shoals Corporation electric blankets are available for inspection by plaintiff's counsel at Woodall Shoals Corporation offices.

Verification

Robert W. Carlton, having been first duly sworn, states that he is Manager of Consumer Relations for Woodall Shoals Corporation and verifies these supplemental responses to interrogatories and request for production in that capacity and is authorized to do so. The information contained in these responses is not within the personal knowledge of the verifying officer.

_____
Robert W. Carlton

Sworn to and subscribed before me this _____ day of April, 1996.

_____
Notary Public

My commission expires: _____

(SEAL)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
CIVIL NO.: C-96-2388-B

Equal Employment Opportunity Commission,
Plaintiff,

-vs-

Chattooga Corporation,
Defendant.

COMPLAINT

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451, 1343, and 1345. This is an action authorized and instituted pursuant to Section 706(f)(1) and (3) and (g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (hereinafter, "Title VII").

2. The unlawful employment practices alleged below were and are now being committed within the State of Pennsylvania and the Eastern Judicial District.

PARTIES

3. Plaintiff, Equal Employment Opportunity Commission (hereinafter, the "Commission") is an agency of the United States of America charged with the administration, interpretation, and enforcement of Title VII and is expressly authorized to bring this action by Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

4. Since at least June 23, 1995, Chattooga Corporation (hereinafter the "Corporation") has continuously been a private corporation licensed to do business and doing business in the State of Pennsylvania and city of Philadelphia. The Defendant Corporation is an engineering consulting firm and has continuously employed more than fifteen (15) employees.

5. Since at least June 23, 1995, the Corporation has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Section 701(b), (g), and (h) of Title VII, 42 U.S.C. § 2000e-(b), (g) and (h).

STATEMENT OF CLAIM

6. More than thirty (30) days prior to the institution of this lawsuit, Sandy Ford filed a charge with the Equal Employment Opportunity Commission alleging violations of Title VII by the Defendant Corporation. All conditions precedent to the institution of this lawsuit have been fulfilled.

7. Since June 23, 1995, and continuously up until the present time, the Defendant has intentionally engaged in unlawful employment practices at its Philadelphia, Pennsylvania, facility, in violation of Sections 703 and 704(a) of Title VII. These policies and practices include but are not limited to retaliating

against Sandy Ford by discharging her because she had accompanied another employee of the Defendant Corporation to the Commission's local office to assist the employee in filing a charge with the Equal Employment Opportunity Commission, alleging employment discrimination in violation of Title VII.

8. The effect of the policies and practices complained of in Paragraph 7 above has been to deprive Ms. Ford of equal employment opportunities and otherwise adversely affect her status as an employee because she opposed a practice made unlawful under Title VII or because she participated in a proceeding under Title VII.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully prays that this Court:

1. Grant a permanent injunction enjoining Defendant, its officers, agents, employees, successors, assigns, and all persons in active concert or participation with them, from retaliation against employees who complain of acts believed to be unlawful under Title VII.
2. Order Defendant to make whole Sandy Ford, by providing appropriate back pay, with interest, in an amount to be proved at trial and other affirmative relief necessary to eradicate the effects of its unlawful employment practices.
3. Grant such further relief as the Court deems necessary and proper.
4. Award the Commission its costs in this action.

Kathy M. Mitchell
Regional Attorney

Edward R. Cheng
Senior Trial Attorney

Equal Employment
Opportunity Commission
1301 North Union Street
Philadelphia, PA 19601
215-555-3000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
CIVIL NO.: C-96-2388-B

Equal Employment Opportunity Commission,
Plaintiff,

-vs-

Chattooga Corporation,
Defendant.

CONSENT DECREE

The Equal Employment Opportunity Commission (hereinafter "Commission") instituted this action against the Defendant, Chattooga Corporation (hereinafter "Chattooga"), pursuant to Sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.* (hereinafter "Title VII") to remedy alleged unlawful employment practices as set forth in the Complaint filed in this action.

The Court has jurisdiction of the subject matter of this action and of the parties to this action.

It is understood that this Consent Decree does not constitute an admission by Chattooga of the allegations in the Complaint.

The Commission and Chattooga desire to resolve this action and all issues raised by the Complaint without the time and expense of contested litigation, and have formulated a plan to be embodied in a Consent Decree that promotes and effectuates the purposes of Title VII.

The Court approves the Consent Decree as one that will promote and effectuate the purposes of Title VII.

NOW, THEREFORE, this Court being fully advised in the premises, it is hereby ORDERED, ADJUDGED, AND DECREED:

1. DISCLAIMER OF VIOLATION

It is understood and agreed that the negotiation, execution, and entry of this Consent Decree, and the undertakings made by Chattooga hereunder, are in settlement and compromise of disputed claims of alleged retaliation in employment, the validity of which is expressly denied by Chattooga. Neither the negotiation, execution, nor entry of this Consent Decree shall constitute an acknowledgment or admission of any kind by Chattooga that their officers, agents, or employees have violated or have not been in compliance with Title VII or any rules and regulations issued under or pursuant to Title VII or any other applicable law, regulations, or order.

II. TERM OF DECREE

This Consent Decree shall continue to be effective and binding upon the parties to this action for the period of 18 months immediately following the entry of the Decree. Each party to this Consent Decree shall have a right, within the period of 19 calendar months from the date of the entry of this Decree, to move the Court to reopen this case for the purpose of clarifying and enforcing this Decree.

III. OTHER GENERAL PROVISIONS

A. By and with the consent of the Defendant, Chattooga and its officers, agents, employees, successors, and assigns are enjoined and restrained for the term of this Decree from harassing, intimidating, or otherwise retaliating against any person who has participated in any fashion in the investigation or litigation of this action, or who has or may file a charge of discrimination or participate in any fashion in the investigation of any charge filed with the Equal Employment Opportunity Commission.

B. Chattooga shall maintain at its facility in Philadelphia, Pennsylvania, the notice attached to this Decree as Exhibit 1.

C. The Commission shall have a right to visit Chattooga's facility for the purpose of ensuring that Chattooga is in compliance with Section 5 of this Decree.

IV. NOTICE REQUIREMENT

The Defendant shall post notices directed to its employees in conspicuous places throughout its facility advising its employees that the Defendant supports and will comply with Title VII and that it will not take any action against any employee because they have exercised their rights under the law.

V. COMPENSATION PROCEDURE

Chattooga has agreed to pay Sandy Ford $ 3,000 minus legal deductions, with such payment to be considered as full, complete, and final satisfaction of the disputed claim that the EEOC now has against Chattooga on account of any alleged failure of Chattooga to comply with Title VII, which arose or may have arisen from the subject matter of Civil Action No. C-96-2388-B. Chattooga shall make said check payable to Sandy Ford and shall mail said check to the address contained in Section VII of this Decree.

VI. MAILING AND NOTICE REQUIREMENTS

Chattooga shall furnish the Commission with a report within 30 days following the date of entry of this Decree, stating the dates on which the notices

are placed and their locations. The report shall be sent via certified mail to the following address:

Equal Employment Opportunity Commission
1301 North Union Street
Philadelphia, PA 19601

VII. FULL SETTLEMENT

This Decree shall be a full settlement of all issues raised between the parties to Civil Action No. C-96-2388-B. Entry of this Decree shall constitute dismissal with prejudice of Civil Action C-96-2388-B, subject to the provisions of Section III of the Decree.

This the _____ day of _____, 1996.

Counsel for Defendant:

_____

Nancy Reade Lee
Gray and Lee, P.A.
380 South Washington St.
Philadelphia, PA 19601

Counsel for Plaintiff:

_____

Kathy N. Mitchell
Regional Attorney

_____

Edward R. Cheng
Senior Trial Attorney

Equal Employment Opportunity Commission
1301 North Union Street
Philadelphia, PA 19601

GLOSSARY

ABA Model Code of Professional Responsibility Guidelines for the ethical conduct of attorneys, promulgated by the American Bar Association in 1969.

ABA Model Rules of Professional Conduct Revised rules to guide the ethical conduct of attorneys, adopted by the American Bar Association in 1983.

admissible evidence Evidence that may be introduced at trial and considered by the finder of fact.

affiant A person who makes statements in an affidavit and signs the affidavit.

affidavit A written statement of facts, with the notarized signature of the person stating the facts.

affirmative defense A defense raised in an answer that goes beyond a denial of allegations in a complaint, bringing out a new matter that serves as a defense even if the matters alleged in the complaint are true.

alternative dispute resolution (ADR) A broad range of processes to assist parties in resolving differences.

answer The formal written allegations of a defendant, stating defenses to matters raised in a complaint.

appeal The process of requesting a higher court to review the unfavorable decision of a trial court or lower appellate court.

appellant The party that files an appeal and seeks to overturn the judgment of a trial court or lower appellate court.

appellate court A court that reviews the decision of a trial court or lower appellate court.

appellee The party that opposes an appeal, asserting that the judgment of a trial court or lower appellate court should be affirmed.

arbitration An ADR method of settling disputes by submitting the disagreement to an arbitrator or arbitration panel.

arbitration panel A group of neutral decision makers to whom parties submit disputes for resolution.

arbitrator A neutral third party who reaches a decision during the arbitration proceedings; if more than one person, called an *arbitration panel.*

attorney-client privilege The evidentiary privilege that protects from disclosure confidential communications between clients and attorneys.

authentication The methods in the rules of evidence for establishing that a document is what it purports to be.

breach of contract Where one party fails to honor an obligation under a contract, often giving rise to litigation.

brief A written explanation of the facts, applicable statutes, and pertinent case law, with an argument to convince the judge to rule in favor of the party submitting the brief, sometimes called a *memorandum of law* or *statement of points and authorities*.

burden of proof The requirement that a party present evidence sufficient to prove the facts in dispute.

calendar The court's schedule of cases to be heard during a certain session of court; also called *docket* or *trial list*.

canons In the ABA Code of Professional Responsibility, the broad statements of the standard of conduct expected of lawyers.

cause of action The event or state of facts that gives rise to a claim for which a party seeks relief from a court.

certiorari The process in which an appellant petitions the appellate court to exercise its discretion to hear an appeal of the lower court's decision.

chain of custody The preservation of physical evidence and associated recordkeeping to establish that evidence has not been altered.

challenge In picking a jury, a request that a particular person not serve on the jury.

circuit courts of appeals In the federal court system, the courts that hear appeals from the federal district courts, divided into geographical regions termed *circuits*.

class action A lawsuit in which a large group of persons with similar grievances brings one lawsuit on behalf of themselves and others with similar grievances.

closing argument After all the evidence has been presented at trial, an attorney's oral summary of the evidence and argument why his or her client should prevail at trial.

compensatory damages Money paid as compensation to the injured party for the harm caused by another party.

complaint The initial pleading filed by the plaintiff, setting forth the reasons that the plaintiff is entitled to relief and the damages requested.

concurrent jurisdiction When jurisdiction is not limited to one court, *i.e.*, when both state and federal courts have jurisdiction.

consent order An order in which the attorneys for the parties state the terms to which they agree. The judge approves and signs the order. When the parties state their agreement on all matters in issue, the document is a *consent judgment.*

contingent fee A fee arrangement in which the attorney receives an agreed percentage of the recovery if and when the plaintiff prevails.

continuance The postponement of a hearing or trial to a later date.

contract An agreement between parties that one party is obliged to perform an act in exchange for something from the other party.

counterclaim A pleading in which a defendant asserts a claim against a plaintiff.

court of record A court in which all transactions and arguments that take place in the courtroom are recorded by a court reporter.

cross-claim A pleading in which one party states a claim against another party—*e.g.*, codefendant against codefendant.

damages Monetary compensation to a party for losses or injuries.

default judgment A judgment entered against a defendant who fails to respond to a complaint within the allotted time.

defendant The party from whom recovery is sought in a lawsuit.

deposition A form of discovery that consists of the oral testimony of a witness, taken under oath, in response to questions asked by the attorney representing another party, and transcribed by a court reporter.

disciplinary rules In the ABA Code of Professional Responsibility, the statements of mandatory conduct.

discovery The stage of litigation in which the parties gather facts from each other to prepare for trial, using the discovery methods of interrogatories, depositions, requests for admission, mental and physical examinations, and requests for production of documents and things and for entry upon land for inspection.

dispositive motions Motions that, when granted, terminate the lawsuit before trial, including motions for summary judgment, judgment on the pleadings, and default judgment.

diversity of citizenship One of the two major categories of federal subject matter jurisdiction, allowing jurisdiction where the plaintiffs and defendants are citizens of different states and the claim involves more than $50,000.

docket A court's schedule for hearing motions and trials; also called the *court calendar* or *trial list.*

docket control The procedure in law offices for maintaining a system for keeping track of deadlines and the status of cases.

domicile The place where a person has his or her permanent home and intends for the permanent home to remain, used to determine the state of which a person is a citizen.

due process of law The constitutional protection providing that persons may not be deprived of life, liberty, or property without proper notice and the opportunity to defend themselves.

equitable remedies Remedies available to parties whom monetary damages cannot make whole—*e.g.*, specific performance.

essential elements The facts that the law requires to exist in order to establish a particular cause of action.

ethical considerations In the ABA Code of Professional Responsibility, the sections that explain in more detail the statements in the canons, giving guidance for specific situations.

evidence The testimony of witnesses, documents, and physical objects that a party presents at trial to prove facts.

ex parte An *ex parte* hearing is one at which only one party is present, and that party seeks relief from the court without notice to the other party—*e.g.*, when a party seeks a temporary restraining order.

exclusive jurisdiction When only one court has jurisdiction—*e.g.*, the federal court has jurisdiction to hear a matter and the state court does not.

execution The process for enforcing a judgment.

exemplary damages Another term for punitive damages.

expert witness A witness who has scientific, technical, or other specialized knowledge and who explains technical matters and gives opinions to help the jury understand matters outside the general knowledge of laypersons.

extraterritorial service Service of process on a defendant outside the state in which the court sits.

federal question A category of federal court jurisdiction that includes cases that involve federal laws, treaties, or the United States Constitution.

final decision rule The rule that a party may not take an appeal until the court has entered a final decision.

finders of fact The persons who consider the evidence and determine which party is entitled to a favorable judgment; juries in jury trials and judges in nonjury trials.

forum state The state in which the lawsuit is commenced.

foundation The evidentiary requirement that before presenting witnesses' testimony, an attorney must ask preliminary questions to establish the witnesses' personal knowledge of the facts.

general damages In contrast to special damages, general damages compensate a party for less tangible losses that are presumed to result from the injury, such as pain and suffering.

general jurisdiction Refers to courts with jurisdiction not limited to certain matters provided by statute; the opposite of limited jurisdiction.

general verdict A verdict in which the jury reports only the party that wins and the amount of damages awarded to that party.

harmless error A trial court error not serious enough to constitute reversible error.

impeachment evidence Evidence introduced to impeach the credibility of a witness.

impleader *See* **third-party practice.**

inferior courts Courts below the higher appellate level; *e.g.*, trial courts are inferior courts.

initial pretrial conference A conference the purpose of which is to set guidelines and deadlines to control the remainder of the lawsuit; sometimes called a *scheduling conference.*

injunction A court order directing a person to refrain from doing an act.

interlocutory orders Orders that are issued before final judgment and do not dispose of the entire controversy.

interrogatories A discovery method in which one party submits written questions to another party, who answers the questions under oath.

judgment The court's final decision that resolves all matters in dispute among the parties to the litigation.

judgment creditor The party to whom the judgment is to be paid.

judgment debtor The party who is supposed to pay the judgment.

judgment notwithstanding the verdict (JNOV) A postverdict motion in which the nonprevailing party asks the judge to set aside the jury's verdict on the ground that there was insufficient evidence for the jury to reach its verdict.

judgment on the pleadings A pretrial motion in which a party asks the court to determine that on the face of the pleadings the moving party is entitled to judgment.

jurisdiction The authority of a court to preside over claims and enter judgment in a judicial proceeding.

jurisdictional amount The requirement that the amount in controversy be in excess of a certain figure before a court has jurisdiction to hear a case, as in federal diversity jurisdiction.

limited jurisdiction Refers to courts that can hear only the specific types of cases allowed by statute.

liquidated damages A type of damages in which the parties agree beforehand what the amount of damages will be in the case of a breach of their agreement, or where the amount can be ascertained directly from the terms of the parties' agreement.

lis pendens A notice filed with the clerk of court and entered in the public records stating that real property is the subject of pending litigation.

long-arm statute A law authorizing jurisdiction over an out-of-state defendant because the defendant has been involved in certain transactions in the forum state.

mediation An ADR method in which the disputants select a neutral third party to assist them in reaching a mutually acceptable agreement.

mediator A neutral third party who helps the disputants reach an agreement during mediation; sometimes termed a *neutral.*

memorandum of law *See* **brief.**

mini-trial An ADR method in which counsel for each party makes a shortened presentation to an official with settlement authority.

money damages Monetary compensation paid by one party to another party for the losses and injuries the party has suffered.

motion An application to a court for an order directing some act in favor of the applicant.

motions in limine Motions usually made at the beginning of a jury trial for ruling on the admission of evidence that could be prejudicial or otherwise inadmissible.

negligence One party's failure to exercise due care in conduct toward others, resulting in injury to others.

negotiation A form of ADR that involves an informal discussion of a mutually acceptable agreement by the disputants.

neutral *See* **mediator.**

neutral fact-finding An ADR method in which a neutral expert selected by the court or the parties resolves disputes that involve technical questions.

notice pleading The concept on which the Federal Rules of Civil Procedure are based, requiring a short and plain statement of the claim instead of a detailed account of every act giving rise to the claim.

offer of judgment A judgment in which the defending party has agreed to allow entry of judgment against him or her in a certain amount.

ombudsman A special type of neutral who investigates complaints and issues a nonbinding recommendation.

opening statement A presentation to the jury at the beginning of the trial, designed to give an overview of the evidence to be presented and an explanation of the points a party will prove during the trial.

order A written statement of the judge's decision to grant or deny a motion.

original jurisdiction The court that has jurisdiction to hear a lawsuit initially; the trial court as opposed to the appellate court.

peremptory setting Scheduling a trial for a specific date and time due to extraordinary circumstances, rather than scheduling for a certain week or session only.

personal jurisdiction The power of a court to bring a party before it and enter a judgment against that party.

plaintiff The party who files a complaint seeking relief from the court.

pleadings The formal documents in which parties allege their claims and defenses (complaint, answer, and so on).

pleadings record A written record of every pleading filed and received and the response dates, usually kept in the front of the office file.

preliminary injunction A court order directing a party to refrain from certain action and maintaining the status quo until the issues can be resolved at trial.

pretrial conference A conference between the judge and the parties' attorneys to resolve certain pretrial procedures. *Initial pretrial conferences* usually cover procedural matters such as stipulations of matters not in dispute and agreements on discovery issues. *Final pretrial conferences* usually cover matters such as requests for jury instructions and other matters concerning the actual trial.

pretrial order An order setting out matters decided at pretrial conferences.

***prima facie* case** A *prima facie* case has been established when a party has presented enough evidence to allow the jury to rule in the party's favor.

private judging An ADR method in which the parties submit their dispute to a mutually agreeable neutral decision maker, who reaches a decision that is entered by the trial court.

protective order An order to protect information that is not privileged but the disclosure of which would cause "annoyance, embarrassment, oppression, or undue burden or expense" (FRCivP 26(c)).

punitive damages Damages in addition to compensatory damages; punitive damages are designed to punish a party for malicious or fraudulent behavior.

question of fact An issue that requires resolving the facts in dispute; determined by the jury in a jury trial.

question of law An issue that requires applying the law to a set of facts; determined by the judge in a jury trial.

record on appeal The testimony at trial, pleadings, and other documents from the litigation at the trial level, all of which the appellate court reviews to determine whether to uphold or overturn the judgment of the trial court.

rehearing *en banc* In appellate procedure, a request for a hearing or rehearing before the entire panel of judges of the appellate court rather than the more usual practice of hearings before a panel of only some of the judges.

requests for admission A method of discovery in which one party submits written requests that another party admit to the truth of facts, the genuineness of documents, and/or the application of law to fact.

requests for production A method of discovery in which a party requests another party to make available for copying and inspection a document or other item, such as a photograph.

reversible error An error by the trial court of sufficient significance to entitle a party to a new trial.

scheduling conference *See* **initial pretrial conference.**

service of process The delivery of the summons and complaint in accordance with FRCivP 4 so that defendants have proper notice of the lawsuit filed against them.

session A period of time during which a certain court transacts business—*i.e.*, hears motions and holds trials. Court calendars are generally issued for a particular session, during which the cases on that calendar will be heard, time permitting. Sometimes referred to as the *term of court*.

settlement An agreement between the parties to resolve a lawsuit without having a trial.

special damages Damages awarded for items of loss that are specific to the particular plaintiff, such as lost wages.

special verdict A jury verdict in which the jurors are required to answer specific written questions for each issue of fact.

specific performance A form of equitable relief in which the court orders a party to comply with the terms of a contract.

statute of limitations The time within which a lawsuit must be commenced or else the plaintiff may never bring suit.

stipulation A statement that the parties agree on a certain issue and will not contest it.

subject matter jurisdiction A court's authority to hear a particular type of case, such as a case arising from a federal statute.

subpoena A document issued by the clerk of court directing persons to appear, in a certain place at a certain time, to testify or to produce documentary or physical evidence in their possession.

substantive evidence Evidence introduced to prove a fact in issue.

summary judgment A dispositive motion asking the court to rule in favor of a party on the basis that there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law.

summary jury trial An ADR method that uses jurors chosen from the regular jury pool, who hear a shortened version of the evidence and issue an advisory verdict.

summons A form that accompanies the complaint and explains in simple terms to the defendants that they have been sued and must file an answer with the clerk of court.

temporary restraining order (TRO) A court order directing a party to refrain from certain action temporarily, usually for ten days, after which the moving party seeks an extension of the TRO in the form of a preliminary injunction.

term of court *See* **session**.

testimonial evidence Testimony by witnesses concerning the facts in issue, as opposed to written, or documentary, evidence.

third-party practice (impleader) The procedure by which a defendant brings in a new party to the lawsuit, asserting that the new party is liable for all or part of the plaintiff's claim against the defendant.

torts Injuries to a person or property, usually the result of a person's negligent conduct.

trial court The court in which a lawsuit is commenced and the actual trial is held.

trial *de novo* A new trial granted as the result of an appeal.

trial memorandum (trial brief) A written presentation of the legal issues that the court will consider during the trial and an argument explaining why the judge should rule in favor of the party presenting the memorandum.

trial notebook A method of organizing materials for trial, in which pertinent documents and notes are put in a binder under the appropriate tabbed section.

unliquidated damages Damages that cannot be determined by the parties' stipulation or by simple mathematical calculation from the available information.

venue The particular county or court district in which a court with jurisdiction may hear a lawsuit.

voir dire The process of selecting a jury from the jury pool.

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