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California Civil Litigation and Discovery

(Litigation By The Numbers®
Substantive Companion)

Ninth Edition (January 2018)

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Lawdable Press
Los Angeles, California

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CHAPTER 3

OUR COURT SYSTEMS AND SOURCES OF LAW

This chapter provides some background on various aspects of our court system, including the sources of law and the hierarchy of legal authority within that system. It outlines many of the differences between the civil law and the criminal law systems. A bullet point list at the end of the chapter describes small claims court and its many pros and cons.

Our Court Systems

In order to enforce the laws or rules governing conduct, people have to go to court. We have two court systems: (1) the federal court system, which deals with U.S. Constitutional issues, federal statutes, and regulations of federal agencies, and (2) the state court system, which deals with state statutes and local regulations. The California paralegal needs to know about the hierarchy of the system as well as the hierarchy of laws applied within the system, because this affects the organization of legal research, and determines whether heavier emphasis is placed on statutes or case law in a particular case.

FEDERAL COURT	CALIFORNIA STATE COURT
U.S. Supreme Court	California Supreme Court
Federal Circuit Court of Appeals 13 Federal Circuits (CA is 9 th Circuit)	California Appellate Court
Trial Courts: (1) Federal District Court (limited jurisdiction -- hears federal question and diversity cases); 4 courts within CA also (2) Tax Court; Federal Claims Court (limited jurisdiction courts -- Tax Court hears IRS tax deficiency disputes; Fed. Claims Court hears private claims against U.S.)	Trial courts: (1) Superior Court (general jurisdiction -- handles all kinds of cases, including civil, criminal felonies, and juvenile civil and criminal issues) (2) Municipal Court (formerly handled limited jurisdiction and lesser civil and criminal lawsuits like misdemeanors or civil cases under \$25,000; California abolished the municipal courts in 1998 and merged them into the Superior Court system.) (3) Small Claims Court (limited jurisdiction-- handles civil complaints up to \$10,000 for individuals (\$5,000 for corporations and governmental entities); certain auto accident cases limited to \$7,500; no criminal or family law

Federal Court System

The Federal Rules of Civil Procedure and local rules govern practice in the federal courts. Many of the federal procedural rules are similar to state rules, but there are some fundamentally different rules and time frames. The paralegal assigned to a federal case must review those rules specific to the federal court system.

The federal court's power and authority originates in the U.S. Constitution, laws passed by the people, and federal legislation. The federal courts have the authority to render and enforce judgments. The U.S. Constitution, Article III, grants judicial power of the U.S. in the U.S. Supreme Court, and authorizes Congress to establish the inferior courts of the District Courts and Appellate Courts.

The U.S. Supreme Court is the highest court in the U.S. and the final authority on federal law. It reviews decisions of the U.S. appellate courts and decisions of the state supreme courts involving federal questions. It has **exclusive jurisdiction** to hear federal issues involving patent, trademark, copyright issues, maritime law, and admiralty law. The U.S. Supreme Court also has **original jurisdiction** over cases with foreign diplomats, and where states are a party to the suit.^{2/}

The U.S. Court of Appeals has 13 circuit courts. California is in the Ninth Circuit, located in San Francisco. The decisions made by the district courts are appealed to the U.S. Court of Appeals, and then to the U.S. Supreme Court.

The U.S. District courts are the trial courts of the federal court system. There are more than 90 district courts throughout the U.S., four of which are located in California -- the Northern District is in San Francisco; the Eastern District is in Sacramento; the Central District is in Los Angeles; and the Southern District is in San Diego. District courts have jurisdiction over: civil actions that involve federal law (federal tax, bankruptcy, immigration, etc.), cases in which the U.S. is a party, and cases where there is complete diversity of citizenship and the amount in controversy is over \$75,000 ("diversity cases").

The Supreme Court, which consists of nine justices, exercises its discretion in deciding which cases to hear, i.e., the appeal is not automatic. The Supreme Court hears approximately 150 cases a year. Some cases reach the Supreme Court by **writ of certiorari** (a petition for review of an appellate court decision). If the writ is granted, the lower court is to verify that the case is complete, and send it up for review. The Supreme Court also hears cases on mandatory appeal, such as civil rights, or cases of original jurisdiction.

^{2/} Original jurisdiction refers to the power of a court to be the first to hear and resolve a case before it is reviewed by another court. It usually is the court that has jurisdiction to conduct the trial.

CHAPTER 4

OVERVIEW OF CIVIL LITIGATION AND THE PARALEGAL'S ROLE

There are various areas of law in which a paralegal may practice, including real estate, corporate, probate, family law, bankruptcy, civil litigation, and more. Our focus is on the paralegal's role in the civil litigation process. What's that?

Civil litigation involves lawsuits between individuals or entities, as opposed to criminal actions which involve the government against individuals or entities. There is a wide range of subjects that may be involved in civil litigation, e.g., breach of contract, personal injury (automobile accident, slip and fall), defamation, assault, medical malpractice, trespass, etc.

Below is a very brief overview of the various phases of litigation, and the different tasks which the paralegal might be asked to perform. These phases and tasks are discussed in more depth later on.

1. Plaintiff Performs Pre-Litigation Analysis

The pre-litigation stage of a civil lawsuit begins with the first contact with the client, and ends with drafting the **complaint**. During this stage, the attorney evaluates the **merits of the case** to decide whether to undertake the representation. If the attorney decides to take the case, the attorney and client enter into a **retainer agreement** which formally establishes the attorney-client relationship, setting forth, among other things, the scope of the representation and how the attorney will be compensated. The attorney gathers facts, and researches and analyzes the law to determine *whether* an action should be commenced, and if so:

- What claims should be alleged
- What relief should be sought
- When it should be commenced
- On whose behalf it should be filed
- Against whom it should be filed
- Where it should be filed

As you will see, in Chapter 5, a great deal of research, analysis, and strategy go into answering these questions.

The paralegal's role: The paralegal may be involved in interviewing the client and witnesses -- coordinating with doctors, insurance companies, repair shops, employers, etc., to verify losses that the plaintiff seeks to recover. The paralegal might be responsible for verifying the names and addresses of persons or entities to be named as co-plaintiffs or defendants in the lawsuit. The paralegal might also conduct research as to potential causes of action, statutes of limitations, jurisdiction and venue.

2. Plaintiff Commences the Lawsuit

The **plaintiff** commences the lawsuit by filing a **complaint** in the proper court.

The paralegal's role: The paralegal may research the viability of potential causes of action for the complaint, draft and/or proofread the complaint; assemble exhibits, prepare forms which must accompany the complaint, make sure the proper appearance fee is attached, and coordinate the filing or actually take the documents to the courthouse for filing.^{6/}

3. Plaintiff Serves the Defendant

The plaintiff serves the defendant with the complaint and a **summons** advising that he/she has been sued and that a response is due within 30 days of service. This is called **service of process**.

The paralegal's role: The paralegal may coordinate the service of the summons and complaint and prepare the **Proof of Service of Summons** form.^{7/}

4. Defendant Defaults/Responds to/or Attacks the Complaint

Once served with the summons and complaint, the defendant is to respond within 30 days of service. If the defendant fails to do so, the plaintiff may enter the defendant's **default** and obtain **judgment by default**.^{8/}

The paralegal's role: The paralegal might prepare the request to enter default form, and file it with the court. Where necessary, the paralegal might also compile the documentation and prepare the form required to obtain a default judgment against the defendant.

^{6/} For procedural information in this area, including the format of the complaint, preparation of mandatory accompanying documents, determining the filing fee, and filing the complaint, refer to LBTN, Chapter 1- "Appearance By Plaintiff" (from "Preparing the Complaint and Accompanying Forms" through "Filing Complaint/Issuing Summons").

^{7/} For procedural information in this area, including all methods of service of process, service deadlines, obtaining an extension, and completing and filing the required form of proof of service of summons, refer to LBTN, Chapter 1- "Appearance By Plaintiff" (from "Service and Proof of Service of Summons and Complaint" through "Extending Time for Service and Proof of Service of Summons and Complaint").

^{8/} For procedural information on entering default and obtaining default judgment, including mandatory forms, and filing and service deadlines, see LBTN, Chapter 3 - "Default By Defendant."

CHAPTER 5

THE PRE-LITIGATION STAGE OF THE CIVIL LAWSUIT

The pre-litigation stage of a civil lawsuit begins with the first contact with the client, and ends with drafting the complaint. At the outset, it is the attorney's responsibility to investigate the law and facts relevant to the client's claims, and to ensure that there is merit to the case, i.e., the case is not frivolous. Once the attorney decides to commence an action, the attorney must also determine:

- What causes of action to allege in the complaint
- When to file the complaint
- Whom to name in the complaint
- Where to file the complaint

The paralegal may play an important role in this stage of the case by interviewing the client and witnesses, identifying the elements of potential causes of action, conducting informal discovery, and researching issues related to jurisdiction and venue. In order to do so, the paralegal must have some background on the court system, how our laws work, and where to find them. If you have not done so already, review those topics in Chapters 1-3.

The paralegal will have developed a working knowledge of various aspects of the substantive law in paralegal courses, such as torts, contracts, and criminal law. But, it is in the initial contact with the client that the paralegal learns what the client's case is about, and identifies areas of law and other issues which must be more thoroughly researched.

Deciding Whether to Take The Case

For you, the pre-litigation process may begin when the potential client makes his/her first contact with your office. This is usually by way of a telephone call in which preliminary information is ascertained and an in-person meeting is scheduled. However, your first contact could also be an in-person meeting, either because the potential client simply walked into the office or a secretary set up the meeting. Whether your first contact is on the phone or in person, your job will be the same.

In accordance with B&P §§ 6450-6456, it is imperative that at the outset of this first contact, you:

- ✓ Identify yourself as a paralegal so that the potential client understands that they are not speaking with an attorney.
- ✓ Explain that you are not allowed to give legal advice, but you will discuss all information with the attorney.

- ✓ Explain that the protections of the attorney-client privilege will protect the confidentiality of the information you obtain from the potential client. (Be sure to review the applicable sections of the B&P.)

Your goals for the initial meeting with the potential client are several. You need to:

- ✓ Establish rapport, setting the atmosphere for a good working relationship.
- ✓ Determine why the client has contacted your office.
- ✓ Get the facts to help the attorney decide whether or not to accept the case.^{16/}
- ✓ Get the facts to begin informal discovery and to set up a formal discovery plan.

If the potential client has contacted you because they have been injured or damaged in some way (as opposed to having been sued), you need to find out:

- Who is involved in the dispute (the attorney will have to do a conflicts check before accepting the representation).
- The nature of the case (i.e., how the potential client was injured or damaged).
- What documents you need to initially evaluate the case (e.g., a police report, medical reports, a contract, a rental agreement).
- When the incident giving rise to the dispute occurred (this information is essential to determine the date the statute of limitations runs).
- Where the incident occurred (this information is essential to determine where the lawsuit may be brought).

If the potential client has contacted you because they have been sued, your information-gathering during the initial interview will be much the same as described above. However, instead of statute of limitations concerns, you'll need to find out when the potential client was served with the summons and complaint (to avoid entry of default), and you'll need to find out where the incident occurred (to determine whether there is an argument that the action was brought in the wrong place, and should be dismissed).

Often, the initial meeting with the two of you will be followed by a meeting between the attorney and the potential client, in which you may be included. The purposes of that meeting will be many, but, first and foremost, will be the attorney's decision about whether or not to undertake the representation. This will turn on the attorney's conclusions about the merits of the case, his/her

^{16/} On this note, always find out whether the potential client has talked to other attorneys who refused the case, and if so, the reason(s) representation was refused. (If other attorneys refused the case because they believed it had no merit, be sure to let the attorney know.)

Pre-Litigation Planning

Before the attorney actually files the complaint, facts must be investigated, research must be completed, and analysis must be performed on several levels. The attorney will need to determine whether the case has merit and whether the defendant has any defenses. If there is a basis for the lawsuit, then the attorney has to plan his/her strategy for preparing the complaint.

This “pre-litigation planning” involves determining:

- *What to allege* in the complaint This requires consideration of potential **causes of action**, their **elements**, and an analysis as to whether the facts support each of the elements.
- *When to file* the complaint This involves **statutes of limitations** and **pre-filing notices**.^{20/}
- *Whom to name* in the complaint. This requires an understanding of **standing**, **capacity**, **DOE defendants**, **joinder**.
- *Where to file* the complaint. This requires an understanding of **subject matter jurisdiction**, **personal jurisdiction**, **venue** and **forum non conveniens**.
- *What relief to seek* in the complaint. . . This requires an understanding of the types of remedies available for the various causes of action.

NOTE: These are not necessarily in order.^{21/}

^{20/} You may be required to notify the defendant of the claim before filing a lawsuit, or there may be some advantage to doing so.

^{21/} For example, a defendant can be identified first, and then various causes of action to be alleged against that defendant can be determined. There *is* some logic to the order, though -- you can't determine the court in which to bring the action until you know the causes of action being alleged (subject matter jurisdiction issue) and the identity of the defendant (personal jurisdiction issue); and you can't determine the applicable statute of limitations until you know the causes of action. The analysis is not linear -- you might have to go back and forth a bit. For example, you could conclude that you meet all of the elements of a particular cause of action, but then find that the cause of action is not available because the statute of limitations has expired. (Back to the drawing board . . .)

The concept of standing dates back to common law when only the legal owner had the right to bring an action for violation of his/her rights. The real party in interest rule requires that the person who is suing must use his/her name and have a legal right to enforce the claim in question. This goes to the existence of a cause of action and whether the plaintiff has a right to relief from the court. The purpose of the rule is to keep the plaintiff from suing again (or other claimants from suing the defendant for the same reason; they may have to be joined in the lawsuit.)

Parties to an action may be private individuals, partnerships, corporations, public bodies (agencies or legal entities). In estate or trust actions, the executor, administrator or trustee is considered the person with standing.

- Claims belonging to a decedent prior to the time of death may be maintained by a personal representative or the decedent's successor in interest.
- Beneficiaries may not sue on behalf of the trust, but may sue the trustee for breach of fiduciary duty.

Exceptions to Standing Requirements

There are certain actions that may be brought by a person other than the real party in interest:

- Injured minors -- when the injured party is a minor (lacking capacity to sue on their own behalf because they are not of legal age): (1) parents of a legitimate, unmarried child may sue unless a guardian has been appointed; some actions require that the parents sue as **guardian ad litem** (person appointed by the court to represent another person in a lawsuit); and (2) parents may also sue for wrongful death damages for their deceased child as long as their deceased child has no surviving children.^{24/}
- Class actions -- a representative of the class of injured persons may stand in for all of them.
- Environmental protection suits -- a private person is allowed to enforce environmental protection statutes.
- Child support -- the county may sue a "deadbeat parent" for unpaid child support.
- Defendant spouses -- either spouse may represent the other when they are both being sued.

^{24/} When dealing with parents suing for injury to their child, watch for potential conflict of interest issues if one or more parents were injured in the same accident as the child.

Naming DOE Defendants

A DOE defendant is a fictitiously-named defendant. DOE defendants are commonly named in complaints to substitute for defendants whose identity is not yet ascertained. By holding the place for a later-identified defendant, “DOE” designations are universally used in state court practice to permit filing an action before the expiration of the statute of limitations. Once the identity of a particular DOE defendant is ascertained, the plaintiff amends the complaint to refer to that particular DOE defendant under his/her real name. (See Chapter 10 - “Amending Pleadings”)

Naming DOE defendants serves other purposes as well.

- If the plaintiff misnames a defendant (e.g., by using a different middle name than the actual defendant), the judgment would be unenforceable. However, if the plaintiff named DOES in the complaint, the complaint could be amended by substituting the defendant’s correct name for one of the DOES, thus correcting the error.
- If the plaintiff does not know the true names of those who injured him/her, but only knows their nick names, the defendants may be initially named as DOE defendants.
- If the plaintiff knows the names of those who injured him/her, but has reason to believe they were not acting alone, the other unidentified defendants may be initially named as DOE defendants.
- If the plaintiff does not know all the facts upon which liability depends, the plaintiff may name DOE defendants under various theories of liability, and then amend the complaint to name the right DOE under the applicable cause of action.

The amended complaint will **relate back** to the date the original complaint was filed, thus satisfying the statute of limitations as to that later-identified DOE, if *all* of the following are satisfied:

- The plaintiff was ignorant of their true names at the time of the original filing, and the original complaint so stated.
- The original complaint alleged that the DOES were responsible for the injury claimed.
- The original complaint contained a valid cause of action against the DOES.
- The amendment inserting the names of the DOES is based on the same general facts as the original complaint.

Joinder Of Parties

Joinder of parties refers to bringing together different parties into one lawsuit. The plaintiff’s attorney must decide at the outset of the action which parties to join in the action. The attorney might be *required* to join certain parties, or might be *permitted* to join certain parties. **Compulsory**

Examples where a stakeholder might commence an interpleader action:

- Escrow companies receiving conflicting claims for the funds deposited in escrow between buyer and seller of a piece of property.
- Banks holding funds in which several people claim an interest, such as beneficiaries to an inheritance of the deceased account holder.
- Life insurance benefits held by an insurer to which conflicting claims are made by the named beneficiary and someone else.
- Credit card company where there is a dispute between the card holder and the retail company.

Where to Sue

Another part of litigation planning is determining *where* to sue, which requires an analysis of jurisdictional and venue issues, including:

- **Subject matter jurisdiction** (Are you filing in federal or state court?)
- **Venue** (After you determine which court has subject matter jurisdiction, you have to choose the proper court in which to file. In state court, you have to select the proper county, and, quite often, the proper branch or district within that county.)
- **Personal jurisdiction** (Does the court have authority over the parties?)

You also must consider the need for **pre-lawsuit notices**^{29/} or the desirability of pre-lawsuit notices, such as a demand letter saying that if payment is not made by a specific date, a civil lawsuit will be brought (threatening criminal action is improper), and putting the defendant on notice that it is required to preserve evidence.

^{29/} When suing governmental entities there is a very specific claim procedure which must be followed, e.g., a notice of claim must be filed within a specific period following the incident which gave rise to the claim. (WARNING: This date is different from the statute of limitations!) Litigation cannot be commenced until a specific period following the giving of notice. Failure to timely file the claim results in forfeiture of the right to sue, so be on alert if your defendant is a governmental entity!

So, if a defendant is physically in the state when served with process or lives or does business in the state, or submits to jurisdiction by making a general appearance in the case, or previously agreed by contract or other agreement to submit to the jurisdiction, the court has personal jurisdiction over the defendant. But there are additional circumstances where an out-of-state defendant may be subject to personal jurisdiction.

Long Arm Statutes

Long arm statutes authorize the assertion of personal jurisdiction over defendants outside the borders of the forum state when the party has “minimum contacts” with the forum state, as established by the case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).^{36/} Each state has the right to enact its own long arm statute in line with *International Shoe*. California has enacted the broadest long arm statute of all of the states. California’s long arm statute allows it to assert personal jurisdiction over an out-of-state defendant as long as California has a *sufficient relationship with the defendant and the litigation to make it reasonable to require the defendant to defend the action in the California courts*.

Personal jurisdiction over an out-of-state defendant can be *general* (applies to the defendant in general, no matter what the case or controversy involves) or *limited* (applies to the defendant only as regards a particular case):

- *General jurisdiction* results from *substantial activity*, e.g., doing business in California, which justifies jurisdiction over all of the defendant’s acts in the forum state. To justify general jurisdiction, the activity or contact must be “substantial, continuous, and systematic.”
- *Limited jurisdiction* results from *limited activity*, e.g., the defendant crossed the California border to purchase a beverage at a convenience store, and knocked over and broke a display case at the store, justifying jurisdiction only with respect to the incident which gave rise to the case. As is the case with our example, a single contact may justify personal jurisdiction if the facts of the case arose out of that contact.

As noted above, no matter what the basis for the assertion of personal jurisdiction over the defendant, the plaintiff must also satisfy the second prong of the two-prong test -- *notice* (met by service of process in a manner that meets constitutional due process and statutory requirements). That aspect of personal jurisdiction is discussed in Chapter 7 under “Service of the Summons and Complaint.”

^{36/} *International Shoe* held that it is not fair for a court to assert jurisdiction over an out-of-state party unless the party's contacts with the forum state are such that the party "could reasonably expect to be haled into court" in that state. This jurisdiction must "not offend traditional notions of fair play and substantial justice."

Now let's take a look at a breach of contract cause of action which does hit all of the elements.^{51/}

"1. On or about January 10, 2017, Plaintiff and Defendant entered into a written contract (the "Contract") where Plaintiff was to pay Defendant \$52,000 to install ten sliding glass doors and 30 windows (the "Work") in Plaintiff's apartment building. A true copy of the Contract is attached hereto as Exhibit A, and incorporated by this reference.

[This paragraph states facts establishing the existence of the contract -- the 1st element.]

2. Under the Contract, Plaintiff was to pay the Defendant a deposit of \$26,000, by May 1, 2017, and the balance of \$26,000 when Defendant finished the Work. On April 25, 2017, Plaintiff paid Defendant \$26,000.

[This paragraph states facts establishing that Plaintiff performed its duties as required -- the 2nd element.]

3. Under the Contract, Defendant was to complete the Work by May 15, 2017. Defendant did not do so by May 15, 2017, or at all. Defendant has refused to return Plaintiff's \$26,000 deposit.

[This paragraph states facts establishing that Defendant failed to perform its duties under the Contract -- the 3rd element.]

4. As a result of Defendant's refusal to comply with the terms of the Contract, Plaintiff has been damaged in the amount of \$26,000."

[This paragraph states facts establishing that Defendant's breach caused Plaintiff damage -- the 4th element.]

Hints for Drafting Causes of Action

- Before you start drafting, know the facts of the case -- who, what, when, how, and what types of damages are sought -- and know the parties and their relationships.
- Strive to draft pleadings that are clear and precise so as to avoid attacks by the opposition and eliminate the need to file amended pleadings to cure defects. In other words, DO IT RIGHT THE FIRST TIME.

^{51/} The basic elements of breach of contract are: (1) existence of a contract between the plaintiff and defendant, (2) Plaintiff performed or was excused from performing its duties under the contract, (3) Defendant failed to perform its duties under the contract or did something that was prohibited, and (4) Plaintiff suffered damages as a result of the defendant's action or inaction. Note how each element is presented in a separate paragraph.

- Understand when you may allege *inconsistent facts*, e.g., that the written contract *does* accurately reflect the parties' understanding of the deal; that the written contract *does not* accurately reflect the parties' understanding of the deal. Inconsistent facts are *only allowed if*:
 - The pleading is not verified, and
 - The inconsistencies appear in different causes of action. For example, in the cause of action for breach of contract, you may allege that the written contract accurately expresses the parties' intent, and in the cause of action for rescission, you may allege that it does not, but you cannot allege inconsistent facts within a cause of action.
- Some of the facts in a case may be relevant to, or give rise to, more than one cause of action. Rather than plead the same facts in the different causes of action, they should be "incorporated by reference" at the beginning of each cause of action. For example:

"Plaintiff realleges all of the allegations set forth in paragraphs 1–15, and incorporates them herein as though fully set forth."

Obviously, the specific paragraph numbers containing the factual allegations you need to incorporate will depend on your complaint. For example, let's say you have 25 general allegation paragraphs, and your first cause of action starts with paragraph 26. Paragraph 26 would reallege and incorporate paragraphs 1-25; new facts might be alleged in subsequent paragraphs, say 27-40. The first paragraph of the second cause of action (paragraph 41) might state:

"Plaintiff realleges all of the allegations set forth in paragraphs 1-25 and 27-40 and incorporates them herein as though fully set forth."

Note that paragraph 26 is not realleged in the second cause of action. This is because it does not contain any facts -- it simply incorporates prior facts. *Do not* reallege incorporation paragraphs.

Note also that incorporating by reference does not relieve you of the need to clearly state each cause of action and to allege the facts to support each element of that cause of action.

- Be sure to incorporate by reference all exhibits. For example, in a breach of written contract action, the plaintiff would attach a copy of the contract as an exhibit, and then incorporate that exhibit into the body of the complaint by stating:

"The plaintiff and defendant executed a written agreement, a true copy of which is attached hereto as Exhibit A, and incorporated herein by this reference."

CHAPTER 11

DISCOVERY IN GENERAL

The basic purpose of discovery is to enable the parties to obtain the evidence necessary to evaluate their case, possibly reaching a resolution or settlement before trial, or, in the alternative, to present their best possible case and their best defense at trial, without any surprises. Through discovery, the attorneys can identify the facts, evidence, and witnesses which lend to the strengths and weaknesses of their cases. This information will help them initially formulate, and perhaps later alter, their approach, strategy and tactics.^{89/} Discovery also serves to:

- Identify additional witnesses or a third party that needs to be *joined* in the lawsuit.
- Narrow and clarify the issues in dispute.

Dispositive motions such as motions for summary judgment and summary adjudication are often based on information obtained through discovery. When they are granted, they dispose of one or more issues in the case, thus narrowing the issues at trial.

- Preserve testimony and evidence for trial.

For example, when a witness gives testimony at a deposition, but dies before the matter comes to trial, the deposition testimony may be used as valid evidence at trial if the necessary procedures are followed and if the testimony was recorded on videotape or transcribed by a court reporter.

As a further example, if a car is totaled in an accident, and the car is sent to a junk yard or otherwise destroyed, valuable evidence as to the cause of the accident could be lost. To avoid this result, one of the parties may demand that the car or important parts of it be preserved.

- Promote early settlements, thus avoiding lengthy and expensive trials.
- Prepare parties for trial and eliminate surprises.

Discovery improves the presentation of trial evidence, allowing the trier of fact to decide the case based on the merits, not on unfounded accusations. Full disclosure of facts prior to trial allows the parties to be fully prepared. As a result, there are fewer continuances, and the court's time is used more efficiently.

As discussed more fully in Chapter 5, *informal* discovery begins immediately after the initial contact with the client. It involves gathering information to: determine whether to take the case; substantiate the client's claims [plaintiff's or defendant's]; decide which legal theories/causes of action apply, etc. Informal discovery involves gathering information from: the client, police records, the insurance

^{89/} For example, if the facts show that the plaintiff contributed to his/her own injury, the plaintiff may want to seriously pursue settlement or at least re-evaluate the range of recoverable damages.

Protective Orders

A party may ask the court to “*limit the scope of discovery on the ground that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.*” (C.C.P. §2017.020) Thus, to determine whether a protective order should be issued under the circumstances, the court compares: (a) the likelihood that the discovery will lead to the discovery of admissible evidence to (b) the burden, expense or intrusiveness of the discovery.

In that regard, the party seeking the protective order may seek to prevent inquiries into *particular subject matters* (e.g., privileged communications, trade secrets, or subject matter about which discovery was already propounded), or use of a *particular discovery device* to obtain information.

For example, the responding party might seek a protective order when:

- The propounding party is seeking production of documents covering very broad areas, e.g., by subject or by time period.
- The discovery is unreasonably cumulative or duplicative.
- The response will result in unwarranted annoyance, embarrassment, oppression, or undue burden and expense.
- The information sought is obtainable from another source that is more convenient, less burdensome, or less expensive, e.g., obtaining hospital records directly from the hospital as opposed to requiring the plaintiff to provide them.
- The selected method of discovery is unduly burdensome or expensive, considering the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation, e.g., taking the deposition of the CEO of a large corporation, when the information sought is obtainable through an inspection demand.
- The propounding party attempts to exceed discovery limits, e.g., propounds in excess of 35 special interrogatories or requests for admission on the basis that they are warranted.

As is the case with most discovery-related motions, the parties are required to make a good faith attempt to resolve the matter informally, and sanctions may be issued against the losing party.

The court has the power to fashion relief appropriate under the circumstances in a manner which balances one party’s right to information against the burden on the other party. Thus, the court may excuse a party from responding to certain parts of a discovery request; require a response, but extend the time in which to do so; require the use of a particular discovery tool in lieu of another; or protect information by ordering it to be sealed, and opened only upon court order, etc.

CHAPTER 12

INTERROGATORIES ^{105/}

Interrogatories are written questions propounded *by one party to another party*. There are two types of interrogatories, (1) Judicial Council Form Interrogatories, and (2) special interrogatories.^{106/} Interrogatories are one of the least expensive types of discovery, form interrogatories being by far the cheapest.

Form interrogatories are useful for obtaining basic facts such as names, addresses, phone numbers, and driver's license numbers of parties and witnesses, dates of events, and places where events occurred. They are also useful for obtaining facts supporting the other party's legal contentions, theories, and causes of action. Any number of relevant form interrogatories may be propounded so long as they do not harass the recipient. To prepare them, you need only complete the caption portion of the form and check off the questions you want to propound.

Special interrogatories are drafted in accordance with the particular case. Each party is only allowed to propound a *total of 35 special interrogatories* to another party, *unless* good cause exists to propound additional interrogatories; the parties stipulate to exceed the limit; the court allows the parties to exceed the limit; or the interrogatory is a "supplemental" interrogatory, discussed below.

Remember the rules on timing of discovery!

- The plaintiff must wait until 10 days after the defendant is served with the complaint or 10 days after the defendant appears in the action (whichever occurs first) before propounding discovery on the other side.
- The defendant may start propounding discovery as soon as it is served with the complaint.
- Absent agreement of the parties or court order, discovery not related to expert witnesses must be completed by the "discovery cut-off date" (on or before the 30th day prior to the *initial* trial date), and all motions concerning discovery must be heard on or before the 15th day prior to the *initial* trial date.

^{105/} C.C.P. § 2030.010, *et seq.*, set forth the procedures for propounding (asking) and responding to interrogatories.

^{106/} See the Judicial Council Form Interrogatories and sample special interrogatories in LBTN, Chapter 5 - "Discovery."

Advantages of Interrogatories

There are many advantages to propounding special interrogatories:

- They are inexpensive.
- Since they tend to focus on the evidence supporting the elements of the causes of action at-issue in the case, they may often be reused (and in fact should be reused) with minimal editing in future cases involving the same causes of action.^{107/} For example, the plaintiff in any battery case could ask “*Do you contend that the plaintiff consented to [insert the “touching” alleged in the case -- being pushed to the floor, being hit on the head]?*” and the plaintiff in any defamation case could ask “*Do you contend that the statement which is the subject of this action is true?*”
- They have the potential for eliciting a great deal of information, because the responding party must provide all information “*within the knowledge*” of the respondent and all information “*available*” to him/her. So, if information is within the knowledge of people associated with the respondent (i.e., employees, agents, attorneys, officers, directors, accountants, etc.), the information must be provided.
- The responses do not depend upon the respondent's spontaneous memory. The responding party must exert due diligence to obtain the information to respond.
- The 30-day response period provides plenty of time for the responding party to obtain detailed information, e.g., phone numbers, addresses, bank account numbers, etc., by consulting written records and making inquiries of associates.
- Interrogatories are one of the few methods of determining the legal contentions and opinions of the respondent.

Disadvantages of Interrogatories

There are a few disadvantages to interrogatories:

- They frequently result in objections to avoid answering. (Typical objections are that the interrogatories are overbroad, burdensome, harassing, not calculated to lead to the discovery of admissible evidence, and seek privileged information.)
- They allow for artful drafting of responses to avoid providing any real information.
- They do not help evaluate the responding party's credibility, because the responses are deliberate and not spontaneous.

^{107/} As you gain experience, you will develop a form file consisting of work you have done and work which others have provided you to use as examples.

CHAPTER 13

DEPOSITIONS ^{116/}

Depositions are oral question and answer sessions where an attorney (the “**deposing attorney**”) questions the “**deponent**” (who may be a party to the action or a third party), who answers the questions under oath.^{117/} Other attorneys may ask questions as well. The deposition is recorded stenographically by a certified court reporter and produced in the form of a booklet (the “**deposition transcript**”). The deposition transcript may be used as evidence at trial or arbitration, but is subject to evidentiary objections of the opposing party.

Remember the rules on timing of discovery!

- The plaintiff must wait until 20 days after the defendant is served with the complaint or 20 days after the defendant appears in the action (whichever occurs first) before noticing the defendant’s deposition. [Note that the rule on noticing the defendant’s deposition is different from the usual 10 day waiting period for propounding written discovery on the defendant.]
- The defendant may notice the plaintiff’s deposition as soon as it is served with the complaint.
- Absent agreement of the parties or court order, discovery not related to expert witnesses must be completed by the “discovery cut-off date” (on or before the 30th day prior to the *initial* trial date), and all motions concerning discovery must be heard on or before the 15th day prior to the *initial* trial date.
- Depositions of expert witnesses must be taken on or before the 15th day prior to the *initial* trial date, and motions concerning discovery relating to expert witnesses must be heard on or before the 10th day prior to the *initial* trial date.

^{116/} C.C.P. § 2025.010, *et seq.*, set forth the procedures for noticing and taking depositions.

^{117/} The answers have the same importance as sworn testimony at trial, and are subject to the same rules and objections as at trial.

Advantages of Depositions

- Anyone, even people and entities who are not parties to the lawsuit, may be deposed.^{118/}
- Depositions may be used to elicit information in the form of testimony and production of documents or tangible things.
- Depositions are the only method to obtain spontaneous testimony and to ask immediate follow-up questions. As a result, depositions are very efficient means of obtaining information.
- Depositions are the only method which allows the attorney to assess whether the deponent will make a good trial witness (e.g., is the deponent credible, knowledgeable, likeable?).
- Depositions can require the adverse deponent to commit him/herself to a particular story, and in detail. Later, inconsistent testimony may be introduced at trial to impeach the witness.
- Deposition questions may ask about the content of documents, not just their location and identity.
- Depositions preserve testimony, and when noticed properly, may be used at trial if the deponent is unavailable.
- Settlement may be encouraged if the deponent is intimidated by rigorous questioning at the deposition.

Disadvantages of Depositions

- Depositions can be very expensive. The deposing party has to pay for the court reporter's time at the deposition and for the attorney's time at the deposition. The deposing party also has to pay for the transcript, which is priced by the number of pages. The longer the deposition, the more expensive the transcript.^{119/} There is also substantial cost associated with preparing for the deposition.^{120/}

^{118/} As you will see, however, non-parties are not required to appear for a deposition voluntarily; they must be ordered by the court to appear by way of a *subpoena*. The issuance and service of the *subpoena* gives the court jurisdiction over those non-parties.

^{119/} C.C.P. § 2025.290, effective January 1, 2013, may help to control the length of a deposition. With certain exceptions, it limits deposition testimony to seven hours. See LBTN, § 5.3, "Depositions," for more detail on the statute and its exceptions.

^{120/} Because their billing rate is lower than the attorney's, paralegals often assist in the preparation by formulating questions to be asked at the deposition. It is very important to refer to your Discovery Plan when formulating questions so as not to waste time (i.e., money) at the deposition.

CHAPTER 19

ALTERNATIVE DISPUTE RESOLUTION AND SETTLEMENT

Most cases settle before trial. The litigation process includes procedures requiring the parties to attempt to settle. These procedures include alternative dispute resolution mechanisms as well as settlement conferences. In addition, the C.C.P. provides a mechanism for either of the parties to make a statutory offer to compromise. All of these are briefly discussed below.

Alternative Dispute Resolution

The huge number of civil case filings in California has resulted in an attempt to resolve cases by alternative means other than trial (“**alternative dispute resolution**” or “**ADR**”), to reduce court calendar congestion and backlog. (See C.R.C., Rules 3.810. *et seq.*) The two main alternative methods to resolve legal disputes are: (1) **arbitration**, and (2) **mediation**. These processes, which are very different from one another, are commonly confused by lay people.

In arbitration, an **arbitrator** renders an award which determines the parties’ rights and obligations. In mediation, a **mediator** works with the parties to arrive at a solution on their own; the mediator does not resolve legal issues, decide who is right or wrong, or render a decision on the case. Arbitration always ends up with an arbitrator’s award in favor of one party against the other; mediation only results in a settlement if both parties agree to settle.

Both arbitration and mediation can be voluntary or involuntary (or mandatory). The parties may stipulate to engage in the process (voluntary) or the court may order them to do so (involuntary). Sort of a hybrid between voluntary and involuntary is where, as part of a contract or other agreement, the parties have forfeited their right to litigate in the judicial system, instead agreeing to resolve any future disputes by mediation or arbitration. Thus, they voluntarily agreed in the past to ADR, but when the dispute actually arises, they have no choice but to do so. These latter cases are not supposed to be filed as lawsuits at all. They are to be handled outside the judicial system by a private arbitrator or mediator, as agreed.

When there is no prior agreement to handle the dispute outside of the judicial system, one of the parties commences a lawsuit. During the pendency of the lawsuit, the parties indicate to the court their preferences regarding ADR. They do this when they complete the “Case Management Statement,” a mandatory Judicial Council form which must be completed prior to the case management conference. The form allows them to indicate whether the case is subject to mandatory judicial arbitration (which applies to cases where the amount in controversy does not exceed \$50,000); whether they agree to judicial arbitration (which may be binding or non-binding); and, if non-binding, whether they agree to stay discovery while the arbitration is pending. The parties may also indicate on the form whether they are willing to participate in mediation or **neutral**

CHAPTER 20

TRIAL PREPARATION AND TRIAL

As mentioned previously, most cases settle at some point prior to trial. Many cases do so well in advance of trial; early enough so that the trial preparation phase of the case is never reached. However, the paralegal should be familiar with the terms and procedures involved in the trial process. A paralegal employed by an attorney who is often in trial will need to study these terms and procedures in more depth.

Trial preparation encompasses several types of tasks, from determining trial strategies to delivering boxes of documents to the courthouse. For example, all of the following would fall under the category of “trial preparation.”

- Selecting the witnesses to call to testify and identifying the documents and things to be offered into evidence. These determinations require an evaluation of the information and evidence gathered during the discovery process as they relate to the disputed issues in the case. Recall that the disputed issues are defined by the pleadings, discovery responses, and dispositive motions.
- Taking the steps necessary to command selected non-party witnesses to appear at trial, or, if applicable, to appear at trial and bring certain documents and things with them. The former (appearance only) requires preparing and personally serving the mandatory Judicial Council form “Civil Subpoena for Personal Appearance at Trial or Hearing.” The latter (appearance and production) requires preparing and personally serving the mandatory Judicial Council form “Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration.” Both of these forms are discussed in more detail in Chapter 7 of LBTN.
- Coordinating the appearance of witnesses as the trial schedule evolves, and preparing witnesses by refreshing their memory or calming them down prior to taking the stand.
- Preparing questions for direct and cross-examination.
- Organizing exhibits and files, preparing charts, power point presentations, and blow-ups of demonstrative evidence, and making sure they arrive at the courthouse when required.
- Calendaring deadlines, and making sure they are met. Several trial-related deadlines are listed in § 7.5 of LBTN.
- Drafting, filing, and serving **motions *in limine*** to prevent or limit specific evidence or testimony at trial. A motion *in limine* may be brought on many different grounds, but generally underlying it is that the evidence or testimony would do more harm than good, i.e., its relevance is outweighed by the prejudice it would cause the moving party or the time it would waste. These motions are dealt with before the trial begins in order to save time and to allow the trial to run smoothly. In addition, the alternative solution:

directing the jury to disregard evidence *after* they have seen and heard it, has obvious drawbacks.

- Drafting, filing, and serving **trial briefs**. The trial brief outlines for the court material issues, relevant facts and evidence, and the law that the party cites as support for its case and in opposition to the other party's position.
- Selecting and preparing **jury instructions** so that the jury understands how it is supposed to make fact determinations and apply the law to the case. Jury instructions are discussed in more detail below.
- Preparing trial notebooks containing the order of the lay and expert witnesses to be called to testify, direct examination questions, evidence to be introduced, as well as anticipated cross-examination questions of the opposing party's witnesses.

Depending upon his/her experience level, the paralegal may play an important role in many aspects of this preparation.

Jury Trial or Bench Trial

The trial itself may be either a **jury trial** or a **bench trial**. In a jury trial, the judge only makes legal rulings (e.g., whether evidence is admissible), and the jury is the trier of fact.^{167/} In a bench trial, the court sits without a jury; thus, the judge makes legal rulings *and* acts as the trier of fact.

There is also an "**expedited jury trial**" ("EJT"), a short jury trial before a reduced jury panel, which may be voluntary (C.C.P. §§ 630.01-630.11) or, in certain limited civil cases, mandatory (C.C.P. §§ 630.20-630.30). Any case that can be tried in one to two days may be a candidate for a voluntary EJT; there is no monetary limit. While many of the procedures are flexible in a voluntary EJT, there are several unbendable rules designed to ensure that the trial lasts no more than two days and is binding on the parties. Some of the key differences between regular jury trials and voluntary EJT's are noted in footnotes in the following sections. Additional procedural aspects of voluntary EJT's, including required Judicial Council forms and several deadlines, are discussed in § 7.6 of LBTN. Also see § 7.6 of LBTN for details relating to similarities and differences between voluntary and mandatory EJT's.

^{167/} The trier of fact decides disputed questions of fact (who ran the red light, is the plaintiff permanently unable to work) by weighing the evidence presented and determining the credibility of witnesses.

CHAPTER 21

APPEALS ^{174/}

Every party may, as a matter of right, appeal a trial court decision to an appellate court.^{175/} The winning plaintiff might file an appeal if they are dissatisfied with the amount of the judgment, or because the trial judge dismissed a cause of action before trial. The losing party might appeal if there is a chance of a reversal or modification of the judgment against them. Any party may file a cross-appeal as well. The parties do not get a new trial in appellate court, nor do they submit new evidence. Instead, the appellate court reviews the trial court proceedings for errors.

The party who initiates the appeal is called the “**appellant**.” The party opposing the appeal is called the “**respondent**” (“appellee” in federal court).

Notice of Appeal

The appellant commences the appeal by filing and serving a **notice of appeal** with the superior court where the trial was conducted. The notice of appeal notifies the court, parties, and appellate court that an appeal will be filed. It identifies the party making the appeal and the judgment or part of judgment that the party is appealing from.

The notice of appeal must be filed within 60 days after the date of service by the clerk of the notice of entry of judgment, however, this deadline is extended if one of the parties files a motion for new trial, motion to vacate judgment, JNOV, or a motion to reconsider an appealable order (see C.R.C., Rule 8.108(a) for the extensions). If the notice of appeal is not filed timely, the appellate court does not have jurisdiction to review the case, and there is no appeal.

Record on Appeal

One of the first things the parties must do is to designate the **record on appeal** -- the record which the appellate court will review for error. The record on appeal usually consists of the **reporter's transcript** of the oral portion of the trial proceedings and the **clerk's transcript** of the court files and tangible evidence submitted during the trial. Within 10 days after filing the notice of appeal, the appellant must file its designation of the items to include in the record. The respondent may file its own designation containing additional items within 10 days after the appellant's designation was served.

^{174/} The appellate rules are contained in Title 8 of the California Rules of Court.

^{175/} The parties to a voluntary EJT generally waive their rights to appeal or move for a new trial (only allowed grounds are misconduct of judicial officer or jury; or corruption, fraud, or undue means employed in the proceedings).

GLOSSARY/INDEX ^{178/}

Abstract of judgment - a document which, when recorded, places a lien on all real property owned by the judgment debtor in the county in which it is recorded. (Ch. 22, pp. 1, 2)

Abuse of discretion - standard of appellate court review used where the trial judge had discretion to make the particular decision; appellate court will defer to the trial court, overturning the lower court decision only when the trial court abused its discretion. (Ch. 21, p. 3)

ADR - abbreviation for **alternative dispute resolution**.

Affirm - declaration by a higher court that the lower court's judgment is valid. (Ch. 21, p. 3)

Affirmative defense - a defense which, if proven, denies recovery to the other party, e.g., the statute of limitations has run, and the action is therefore time-barred; the plaintiff assumed the risk of his/her own harm, and therefore the defendant is not liable; the plaintiff has no standing to sue, etc. (Ch. 9, pp. 4,7)

Alternative dispute resolution - resolution of cases by means other than trial to reduce court calendar congestion and backlog. The two main methods are arbitration, and mediation. (Ch. 19)

Amendment - a supplemental portion to be added to the original pleading, e.g., to insert a name for a DOE, or correct the spelling of a party's name; does not replace the original pleading. (Ch. 10)

Amended pleading - a pleading which replaces a previously filed pleading; may be

filed to add parties, causes of action, etc. (Ch. 10)

Amicus curiae brief - a "friend of the court" brief filed in an appellate case by a non-party on a legal point or aspect of the case that they believe the court should consider in deciding the case. (Ch. 21, p. 2)

Answer - responsive pleading in which a defendant or cross-defendant may admit or deny allegations in a complaint or cross-complaint, and assert affirmative defenses; it resists the opposing party's demand for relief. (Ch. 9, p. 2)

Appeal - asking a higher court to review or reconsider the decision of a lower court. (Ch. 21)

Appellant - party who initiates an appeal. (Ch. 21, p. 1)

Appellee - party who responds to a federal court appeal. **Respondent** in state court. (Ch. 21, p. 1)

Arbitrator - a neutral who hears a case and renders an award in an arbitration proceeding; often a retired judge. (Ch. 19, p. 1, 2)

Arbitration - a process whereby an arbitrator hears a case and renders an award which determines the parties' rights and obligations. (Ch. 19, p. 1, 2)

Attacking the complaint - asserting that the complaint is technically flawed; a demurrer asserts that the complaint does not state a cause of action; a motion to strike asks the court to strike offensive portions. (Ch. 9, p. 8)

Attorney-client privilege - protects from disclosure information conveyed by a client to

^{178/} We thought this rather unconventional Glossary/Index defining key terms and providing references to pages where the terms are meaningfully discussed would be more helpful than a Glossary and a separate Index. If you can't find what you're looking for here, check the Table of Contents.

an attorney rendering legal advice. (Ch. 1, p. 3, Ch. 11, p. 4)

Attorney work product privilege - protects from disclosure the attorney's mental processes, written work product, and all oral communications and reports for a client between members of the firm done in preparation for litigation. (Ch. 11, p. 4)

Bank levy - method of enforcing judgment which seizes funds in the judgment debtor's bank account. (Ch. 22, p. 3)

Bar - restriction or prevention of an action. (Ch. 9, pp. 4, 11)

Baseball arbitration - each party to an arbitration submits a figure to the arbitrator, and the arbitrator must select one of them. (Ch. 19, p. 4)

Bench trial - trial by a judge without a jury. (Ch. 20, pp. 2, 3, 6)

Beyond a reasonable doubt - the burden of proof in criminal trials. (Ch. 3, p. 6)

Billable hours - hours of legal services which may be billed to a client (Ch. 2, p. 1)

Body of the complaint - the part of the complaint which contains the jurisdictional, general and specific allegations (causes of action). (Ch. 7, p. 6)

Bracketed arbitration - where the parties agree on the lowest possible award and the highest possible award before the arbitration. (Ch. 19, p. 4)

Burden of proof - the standard used to prove the facts of one's claim, e.g., preponderance of the evidence, beyond a reasonable doubt (Ch. 3, pp. 6-7); the obligation to persuade the court on a point, e.g., defendant has burden of proof on affirmative defenses (Ch. 9, p. 5); requesting party has burden of proof on need to exceed limit of 35 discovery requests (Ch. 12, p. 7)

Capacity - of legal age and mental competency. (Ch. 5, p. 14)

Caption - first portion of a legal document which identifies the attorney filing the

complaint, the court and county where the complaint is being filed, the title of the action (names of parties), and the title of the document. (Ch. 7, p. 4)

Case in chief - the plaintiff's initial presentation of evidence and testimony necessary to establish a *prima facie* case and convince the jury that the plaintiff should prevail in the case. (Ch. 20, p. 3, 4)

Cause of action - legal theories entitling the plaintiff/cross-complainant to recover from any or all of the defendants/cross-defendants. (Ch. 5, p. 8, Ch. 6, Ch. 7)

C.C.P. - abbreviation for Code of Civil Procedure.

Challenge for cause - assertion, for a stated reason, that a prospective juror is not able to serve impartially. (Ch. 20, p. 3)

Chinese Wall - fictional wall which isolates one or more paralegals or attorneys who possess confidential information about a party or a case which could create a conflict of interest in another matter being handled by the firm. (Ch. 5, p. 4)

Civil litigation - lawsuit between individuals or entities. (Ch. 1, p. 1, Ch. 3, p. 7, Ch. 4, p. 1)

Clear and convincing - burden of proof requiring a reasonable certainty or high probability. (Ch. 3, p. 7)

Clerk's transcript - court files and tangible evidence submitted during the trial. (Ch. 21, p. 1)

Closing argument - part of trial when attorneys try to convince the jury to find in their client's favor. They remind the jury what they promised to prove, tell them that they did so, and that the evidence they presented compels the jury to reach a verdict in their favor. (Ch. 20, p. 6)

Code pleading - (same as fact pleading) method of pleading used in California; plaintiff's complaint must be in the form of a statement of facts constituting the cause of