CHAPTER 7

Civil Litigation

DIGITAL RESOURCES

Chapter 7 Digital Resources at www.pearsonhighered.com/goldman
- Video Case Studies:
  - Videotaped Deposition: Deposing an Expert Witness for Use at Trial
  - Trial: Direct and Cross-examination of a Witness
  - Preparing for Trial: Preparing a Fact Witness
- Chapter Summary • Web Links • Court Opinions • Glossary • Comprehension Quizzes
- Technology Resources
Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, and expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.”

_Abraham Lincoln,
Notes on the Practice of Law (1850)_

**Paralegals at Work**

Rowan, a middle school student, and his sister Isis, a high school student, were passengers on the last school bus of the day on their way home after Rowan’s basketball practice and his sister’s choir practice. The bus had made its regular stops and was on a public highway when it was struck by a large commercial truck. Rowan’s injuries were severe enough to prevent him from playing basketball for the rest of the season on his school team and local club team that was in the championship. Isis had been practicing and eagerly looking forward to traveling with the school choir on an invitational European tour.

Their parents have retained your law firm, on a contingent fee basis, to pursue a claim for their children’s injuries and their out-of-pocket expenses. A review of the medical bills shows expenses in excess of $75,000 for each child. Because of the nature of the accident it was investigated by the National Transportation Safety Board, which issued a report indicating the probable cause of the accident was the failure of the brakes on the truck. The truck driver in his initial police statement indicated that he had had no problems with the vehicle before the accident and that he relied upon the mechanics in the maintenance facility to maintain the vehicle, and especially the brakes. The trucking company has denied any liability. No initial reports or documentation were provided by the trucking company to the police because all of the truck and maintenance records were kept in electronic format at the company’s corporate headquarters in another state. The first decision is deciding in which court to commence suit.

Consider the issues involved in this scenario as you read the chapter.
INTRODUCTION FOR THE PARALEGAL

Paralegals often work for lawyers who specialize in civil litigation, seeking monetary damages or other remedies, or in the prosecution or defense of criminal cases. The bringing, maintaining, and defense of a lawsuit comprise the litigation process, or litigation.

Civil litigation is an area in which a paralegal’s talents can shine. The paralegal’s analytical ability, expertise in legal research, ability to draft pleadings and documents, and other skills are truly put to the test. Paralegals who choose to work in the litigation field must have excellent knowledge of the various facets of the litigation process, the rules of evidence, and court procedure.

A paralegal’s first introduction to a new lawsuit will be when a client employs the law firm for whom the paralegal works to represent the client in a civil lawsuit. The client may be either the plaintiff or the defendant. Many times the paralegal’s first work assignment is to sit in on conferences between the attorney and the client, and to take notes of pending issues.

Then the paralegal usually is notified to “start a file” for the lawsuit. This means obtaining available evidence, documents, and other items relevant to the case. Each attorney has his or her own system for preparing a case for trial (or settlement), and the paralegal has his or her own way of preparing the file as well.

The paralegal often is assigned to help draft the pleadings for the case. In addition, the paralegal may interview the client, contact the client for information, draft documents to obtain production of documents and other evidence, and assist in the preparation of depositions to be taken or attended by his or her supervising attorney.

At this stage, the paralegal is involved in the case as much as his or her supervising attorney. Because of their knowledge of a case, paralegals can be indispensable in the proper preparation for lawyer–client meetings, discovery, depositions, and settlement conferences.

If the case is to go to trial, the paralegal usually is called upon to help conduct the legal research that will be placed in the brief of the case to be submitted to the court. The paralegal’s responsibility is to help organize the case for trial, and to use all available technology to prepare the case for trial. At trial, the paralegal becomes indispensable in assisting the attorney to present his or her case on behalf of the client.

Civil Litigation

Civil litigation involves legal action to resolve disputes between parties, as contrasted with criminal litigation, which is brought by the government against a party accused of violating the law. The parties to civil litigation may be individuals, businesses, or in some cases, government agencies. Although the fundamental process is the same, the court and the procedure may vary.

Many lawyers specialize in civil litigation, in which a plaintiff sues a defendant to recover money damages or other remedy for the alleged harm the defendant causes the plaintiff. This may be an automobile accident case, a suit alleging a breach of a contract, a claim of patent infringement, or any of a myriad of other civil wrongs.

In a civil case, either party can appeal the trial court’s decision once a final judgment is entered. In a criminal case, only the defendant can appeal. The appeal is made to the appropriate appellate court. This chapter discusses civil litigation and the appellate process; the criminal process is covered in Chapter 8.

Pleadings

The paperwork that is filed with the court to initiate and respond to a lawsuit is referred to as the pleadings. The major pleadings are the complaint, or petition in some states, the answer, the cross-complaint, and the reply.
Advice from the Field

GETTING CASE ANALYSIS OFF TO A FAST START

by DecisionQuest

From your first conversation with a prospective client, you’re learning about the dispute that led the individual or corporation to seek counsel. There are many benefits to taking a systematic approach to analyzing this knowledge. Not least of these is the favorable impression you’ll make on those who retain you.

The following article presents a method for organizing and evaluating the facts about any case. And it illustrates how the early results of this dispute analysis process can be used to great effect in an initial case analysis session with your client.

When you take this approach to case analysis, you’ll gain a thorough understanding of the dispute and clarify your thinking about it. And, as you sort out what you do know about the case, you’ll find it easy to identify what you don’t know and need to find out.

The process focuses on creating four analysis reports: a Cast of Characters, a Chronology, an Issue List, and a Question List. These reports provide a framework for organizing and evaluating critical case knowledge. If multiple people are involved in the analysis process, the reports provide a way to divide responsibility and share results. Moreover, once you standardize the analysis work product, it’s easy to compare the findings in one matter to the analysis results from other similar disputes.

You should create your case analysis reports using database software, not a word-processor. Database software makes the knowledge you’re organizing far easier to explore and evaluate. For example, using database software, it’s easy to filter your Chronology so it displays only facts that have been evaluated as being particularly troublesome.

CAST OF CHARACTERS

Create a Cast of Characters that lists the individuals and organizations you know are involved in the dispute. This report should also catalog key documents and other important pieces of physical evidence. Capture each player’s name and a description of the role the person, organization, or document plays in the case.

Also include a column in which you can indicate your evaluation of cast members. Even if you don’t evaluate every player, it’s essential to note the people and documents that are particularly worrisome, as well as the basis for your concerns. If you follow my recommendation that you build your dispute analysis reports using database software, you will find it easy to filter the entire cast list down to the problem players you’ve identified.

CHRONOLOGY

A chronology of key facts is a critical tool for analyzing any dispute. As you create the chronology, important factual disputes and areas of strength and weakness become obvious.

Begin by listing the fact and the date on which it occurred. As you enter each fact, be sure to make the important details about the fact explicit. For example, rather than simply stating “Gayle phoned David,” write “Gayle phoned David, and asked him to shred the Fritz Memo.” Remember that your chronology should be a memory replacement, not a memory jogger.

Since you’re analyzing the case within weeks of being retained, there will be many facts for which you have only partial date information. For example, you may know that Gayle called David about the Fritz Memo sometime in June of 1993, but be unsure as to the day within June. When you run into this problem, a simple solution is to substitute a question mark for the portion of the date that’s undetermined, e.g., 6/??/99.

In addition to capturing the fact and the date, be sure to list a source or sources for each fact. Now, in the early days of a case, it’s likely that the sources of many of the facts you are entering in your chronology are not of a type that will pass muster come trial. However, by capturing a source such as “David Smith Interview Notes,” you know to whom or what you will need to turn to develop a court-acceptable source.

The mission in early dispute analysis is to take a broad look at the potential evidence. Therefore, your chronology should be more than a list of undisputed facts. Be sure to include disputed facts and even prospective facts (i.e., facts that you suspect may turn up as the case proceeds toward trial). You’ll want to distinguish the facts that are undisputed from those that are disputed or merely prospective. Include in your chronology a column that you use for this purpose.

Finally, include a column that you use to separate the critical facts from others of lesser importance. A simple solution is to have a column titled “Key” that you set up as a checkbox (checked means the fact is key, unchecked means its not). If you’re using database software, filtering the chronology down to the key items should take you about 2 seconds.

ISSUE LIST

Build a list of case issues including both legal claims and critical factual disputes. If the case has yet to be filed, list the claims and counter-claims or cross-claims you anticipate. Rather than listing just the top-level
issues, consider breaking each claim down to its component parts. For example, rather than listing Fraud, list Fraud: Intent, Fraud: Reliance, and so on as separate dimensions.

In addition to listing a name for each issue, create a more detailed description of it. The description might include a brief summary of each party’s position on the issue and, if it’s a legal issue, the potential language of the judge’s instruction.

As your case proceeds to trial, your Issue List will increase in importance. You’ll use the Issue List to return to the Cast of Characters and Chronology and establish relationships between each fact, each witness, each document, and the issue or issues to which it relates. Once you’ve made these links, it will be easy to focus on the evidence that’s being developed regarding each issue and to make decisions about case strategy based on this analysis.

**QUESTION LIST**

When you start case analysis early, your knowledge of the dispute is sure to be incomplete. But as you map out what is known about the case, what is unknown and must be determined becomes clear.

Each time you come up with a question about the case that you can’t readily answer, get it into your Question List. You’ll want your report to include a column for the question and another column where you can capture notes regarding the answer. Also include a column for evaluating the criticality of each question. Use a simple A (extremely critical), B, C, and D scale to make your assessment. Other columns to consider for your Question List are “Assigned To” and “Due Date.”

The analysis reports you’ve begun are “living” ones. As you head toward trial, keep working on your Cast of Characters, your Chronology, your Issue List, and your Question List. These analysis reports will do far more than help you think about your case. They’ll serve a myriad of concrete purposes. They’ll help you keep your client up-to-date, plan for discovery, prepare to take and defend depositions, create motions for summary judgment, and make your case at settlement conferences and at trial.

**Complaint**

The party who is suing—the plaintiff—must file a complaint, also called a plaintiff’s original petition or summons in some jurisdictions, with the proper court. The content and form of the complaint will vary depending on local courts’ procedural rules. Many courts follow the federal practice of “notice pleading.” Other state courts follow the traditional form requiring detailed allegations of the basis for the action.

A complaint must name the parties to the lawsuit, allege the ultimate facts and law violated, and state the remedy desired and the “prayer for relief” to be awarded by the court. The complaint can be as long as necessary, depending on the case’s complexity. Exhibit 7.1 is a sample state trial court complaint filed in Pennsylvania. Exhibit 7.2 is a federal complaint. Exhibit 7.3 is a bilingual notice to plead a complaint.

In some jurisdictions, after a complaint has been filed with the court, the court issues a summons, a court order directing the defendant to appear in court and answer the complaint. A fundamental requirement is that notice be given to the defendant. A sheriff, another government official, or a private process server may serve the complaint and, where required, the summons on the defendant. In some cases, the defendant may be served by other means, such as by publication when the defendant cannot otherwise be found to be served personally.

**Fact and Notice Pleading**

In the federal courts and in some state courts, the complaint need only provide a general allegation of the wrongful conduct alleged, this is called notice pleading. The sample complaint in Exhibit 7.2 is an example of a notice pleading in federal court. In other states, the plaintiff must plead specific facts alleged to have been committed that constitute the wrong complained of, this is known as fact pleading. The sample state complaint in Exhibit 7.1 is an example of a fact pleading.

Court rules require an attorney to sign the documents filed unless a person is filing on his or her own behalf, called a pro se filing. In federal court, Rule 11 governs the attorney’s obligations and the potential penalties, as discussed in the following case.
IN THE WORDS OF THE COURT

Notice Pleading

CONLEY V. GIBSON, 355 U.S. 41, 47-48 (1957) 78 S.CT. 99

. . . The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is “a short and plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified “notice pleading” is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that “all pleadings shall be so construed as to do substantial justice,” we have no doubt that petitioners’ complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chemical Co., 303 U.S. 197. . .

IN THE WORDS OF THE COURT

Federal Rule 11

LEAHY V. EDMONDS SCHOOL DISTRICT (W.D.WASH. 3-2-2009)

. . . C. Rule 11 Sanctions

Defendants also argue that Plaintiff’s counsel should personally be liable for attorney’s fees under Rule 11. Rule 11 generally provides guidelines for attorneys to follow when submitting a pleading to the court. The rule “imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and not interposed for any improper purpose.” Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990). “The central purpose of Rule 11 is to deter baseless filing in district court[.]” Id. (internal quotations omitted). Additionally, “[s]anctions must be imposed on the signer of a paper if the paper is ‘frivolous.’” In re Keegan Mgmt. Co., 78 F.3d 431, 434 (9th Cir. 1996). Although the word “frivolous” does not appear in the text of the rule, it is well-established that it denotes “a filing that is both baseless and made without a reasonable and competent inquiry.” Id. (citation omitted) (emphasis in original). The Ninth Circuit has explained that “there are basically three types of submitted papers which warrant sanctions: factually frivolous (not ‘well grounded in fact’); legally frivolous (not ‘warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law’); and papers ‘interposed for an improper purpose.’” Business Guides, Inc. v. Chromatic Commc’ns Enterprises, Inc., 892 F.2d 802, 808 (9th Cir. 1989) (quoting FRCP 11). . .
IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PA.
CIVIL ACTION-LAW

COUNTY LINE FENCE CO., INC. : NO.
2051 W. County Line Road
Warrington, PA 18976 :

V.

ATTORNEY I.D. #12204

WAYNE YARNELL :
5707 Dunbar Court
Bensalem, PA 19020 :

COMPLAINT

1. Plaintiff is County Line Fence Company, Inc., a Pennsylvania corporation duly authorized to do business in Pennsylvania, with a place of business at 2051 W. County Line Road, Warrington, Bucks County, Pennsylvania.

2. Defendant, WAYNE YARNELL, is an adult individual residing at 5707 Dunbar Court, Bensalem, Pennsylvania.

3. On or about April 30, 2002, Defendant entered into a contract with the Plaintiff for a 140 ft. Bufftech fence to be installed on Defendant’s property at 5707 Dunbar Court, Bensalem, PA 19020. (See Exhibit “A”)

4. Plaintiff properly and adequately installed the fencing per the contract.

5. Defendant agreed to pay a total of $5,300.00 for the fence.

6. Demand was made upon the Defendant by Plaintiff for payment of the amount due for fencing and installation.

7. In spite of the demand for payment, Defendant has failed and refused, and continues to fail and refuse to pay Plaintiff the balance due.

WHEREFORE, Plaintiff demands judgment in the amount of $5,300.00, together with attorneys fees, costs of suit and any additional amounts as the court deems proper.

THOMAS F. GOLDMAN & ASSOCIATES

Thomas F. Goldman, Esquire
Attorney for Plaintiff
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

CASE NUMBER 1:01CV01660
JUDGE: Ricardo M. Urbina
DECK TYPE: General Civil
DATE STAMP: 08/01/2002

v.

DEFENDANTS

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission (“FTC” or “Commission”), for its complaint alleges that:

1. Plaintiff brings this action under Sections 5(a)(1), 5(m)(1)(A), 9, 13(b), 16(a) and 19 of the Federal Trade Commission Act, 15 U.S.C. §§45(a)(1),

JURISDICTION AND VENUE

2. This court has jurisdiction over this matter under 28 U.S.C. §§ 1331, 1337(a), 1345 and 1355 and under 15 U.S.C. §§ 45(m)(1)(A), 49, 53(b), 56(a), 57b, 5721 and 5723. This action arises under 15 U.S.C. § 45(a)(1).

3. Venue in the District of Columbia is proper under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b) and (c) and 1395(a).

DEFENDANTS

4. Defendant Enhanced Services Billing, Inc. is a Delaware corporation with its principal place of business at 7411 John Smith Drive, Suite 200, San Antonio, Texas 78229. Enhanced Services Billing, Inc. provides or provided billing and collection services for vendors who market Internet Web sites, psychic memberships, voice mail and hospital telephone and television rental, and other enhanced services. Enhanced Services Billing, Inc. was incorporated on March 17, 1994. Enhanced Services Billing, Inc. transacts or has transacted business in this district.

5. Defendant Billing Concepts, Inc. is a Delaware corporation with its principal place of business at 7411 John Smith Drive, Suite 200, San Antonio, Texas 78229. Billing Concepts, Inc. provides or provided billing and collection services for vendors who market . . .
IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, PENNSYLVANIA
CIVIL ACTION LAW

KATHRYN KELSEY : NO.

vs. : ATTORNEY I.D. NO.

KATHRYN CARROLL : COMPLAINT IN EQUITY

COMPLAINT – CIVIL ACTION

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claims or relief requested by the plaintiff. You may lose money or property or other rights important to you.

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una compancia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomará medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademas, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Philadelphia Bar Association
Lawyer Referral and Information Service
One Reading Center
Philadelphia, Pennsylvania 19107
215-238-1701

Lea esta demanda a un abogado inmediatamente. Si no tiene abogado o si no tiene el dinero suficiente para pagar el servicio, vaya en persona o llame por teléfono a la oficina cuya direccion se encuentra escrita abajo para averiguar donde se puede conseguir asistencia legal.

Asociacion de Licenciados de Filadelfia
Servicio de Referencia e Informacion Legal
One Reading Center
Filadelfia, Pennsylvania 19107
215-238-1701
Pleading Deadlines

After filing the complaint and having the summons issued, the plaintiff must serve the defendant, in federal court within 120 days, state courts vary but typically 30 to 60 days after the initial filing. Failure to serve the complaint within the time limit can result in the complaint being dismissed. Alternatively, the plaintiff may file a motion seeking the court’s permission to reinstate the complaint and reissue the summons. The time for the defendant to file a responsive pleading begins to run when the complaint is served, not on the last day the complaint could have been served. If served with the traditional means—in federal cases by U.S. Marshall, or in state courts by the sheriff, private process server, or other authorized person—the defendant has a time limit within which to respond to the complaint, for example in federal court it is 20 days or if served by notice and waiver, 60 days. Failure to respond in a timely fashion permits the plaintiff to obtain a default judgment against the defendant. Default is not an automatic procedure but a right the plaintiff may enforce. Calculating for the due date is important for the plaintiff as well as the defendant. The defendant also must know the rule and properly calculate the due date to avoid a default judgment for nonaction. All pleadings after the initial complaint and answer have a response time. This includes the plaintiff’s response to counterclaims or affirmative defenses asserted by the defendant and the response to any motion.

Responsive Pleadings

Upon receipt of the complaint, petition, or summons, the defendant, the responding party, and counsel have some critical decisions to make. In many instances, defendants know that a lawsuit may be filed against them. Being served with a complaint may not be a surprise, but the quickly approaching deadlines can be intimidating for the legal defense team, if it is not promptly advised by the client. If served personally, the defendant has a limited time in which to file a responsive pleading, in federal court, if the defendant was personally served it is 20 days, which is probably insufficient time to thoroughly investigate and respond. Just as plaintiffs frequently wait until the last date before the statute of limitations is filed, defendants frequently wait to meet with an attorney until the date the response is due to be filed in court. The first step may be to request an extension of time to respond from opposing counsel. If that request is granted, the team, if in federal court and some state courts, must prepare and file a stipulation with the court, if refused, a motion to extend the time asks the court to grant an extension of time to respond.

Answer

The defendant is required to respond to the allegations contained in the plaintiff’s complaint. This is done by preparing, filing, and serving an answer to the complaint. Like a complaint, an answer is made up of the same sections, whether in federal or state court: caption, numbered paragraphs, prayer for relief, and alternative defenses.

When responding to the averments of the complaint, there are two basic choices:

1. **Admitted**—the facts of the averment in the complaint are true, or
2. **Denied**—the facts of the averment in the complaint are not true.

In some jurisdictions, simply denying averments of the complaint is not sufficient. In those jurisdictions, the word “Denied” with nothing more is a general denial and the averment of the complaint is treated as if it were “Admitted.” In those jurisdictions where the reason for the denial is crucial to any defense, the reasons for the denial must be listed and include:

1. Denied as the facts are not as stated and set forth specifically the alternate facts.
2. Denied as after reasonable investigation the defendant lacks adequate knowledge to determine whether the information is true.
3. Denied as the averment represents a conclusion of law to which no response is required.
In some instances, particularly when there are multiple defendants to whom the complaint is directed, there may be paragraphs to the complaint that do not require an answer. In that event, the appropriate response would be:

No answer is required as the averments are addressed to another defendant.

Cross-Complaint and Reply

A defendant who believes that he or she has been injured by the plaintiff can file a cross-complaint, or counter petition as it is called in some jurisdictions, against the plaintiff in addition to an answer. In the cross-complaint, the defendant (now the cross-complainant) sues the plaintiff (now the cross-defendant) for damages or some other remedy. The original plaintiff must file a reply, or answer to the cross-complaint. Exhibit 7.4 is a sample state answer. The reply—which can include affirmative defenses—must be filed with the court and served on the original defendant.

Exhibit 7.5 illustrates the pleadings process.

Intervention and Consolidation

If other persons have an interest in a lawsuit, they may step in and become parties to the lawsuit—called an intervention. For instance, a bank that has made a secured loan on a piece of real estate can intervene in a lawsuit between parties who are litigating ownership of the property.

If several plaintiffs have filed separate lawsuits stemming from the same fact situation against the same defendant, the court can initiate a consolidation of the cases into one case if it would not cause undue prejudice to the parties. Suppose, for example, that a commercial airplane crashes, killing and injuring many people. The court could consolidate all of the lawsuits against the defendant airplane company.

Statute of Limitations

Some crimes, such as murder, have no limitation on the time in which a defendant can be charged. In civil actions, however, the plaintiff must bring suit within a certain period of time after the action that gives rise to the complaint or lose the right to use the courts to enforce the civil right and remedy. This period is called the statute of limitations.

If a lawsuit is not filed in keeping with the statute of limitations, the plaintiff loses his or her right to sue. A statute of limitations usually begins to “run” at the time the plaintiff first has the right to sue the defendant (e.g., when the accident happens, or when the breach of contract occurs). Depending on state law, it also may begin to run when the plaintiff knows or should have known of the defendant’s wrongful action that gives rise to a cause of action. In the case of minors, the statute may not begin to run—regardless of the time of discovery of the accrual of the cause of action—until the minor reaches the age of majority.

Federal and state governments have established statutes of limitations for each type of lawsuit. Most are from one to four years, depending on the type of lawsuit. A one-year statute of limitations is common for some ordinary negligence actions. For example, if on July 1, 2010, Otis negligently causes an automobile accident in which Cha-Yen is injured, Cha-Yen has until July 1, 2012, to bring a negligence lawsuit against Otis. If she waits longer than that, she loses her right to sue him.

Procedural time limits in the rules of court are similar to the statute of limitations for filing a cause of action. Each court may establish the times within which actions must be taken, such as the number of days within which a plaintiff must serve the complaint and/or summons on the defendant, or the time limit for the defendant to file a responsive pleading, such as an answer. Software, such as AbacusLaw, use rules-based calendaring programs to calculate these deadlines. Deadlines on Demand™ is an internet based program that calculates the various time deadlines based on the different state and federal rules as shown in the sample for a school-bus accident case in Exhibit 7.6.
DATZ and GOLDBERG

BY: MARC C. BENDO, ESQUIRE
IDENTIFICATION NO. 80075 ATTORNEY FOR DEFENDANT
1311 SPRUCE STREET
PHILADELPHIA, PENNSYLVANIA 19107
(215) 545-7960

COUNTY LINE FENCE CO., INC.
2051 W. County Line Road
Warrington, PA 18976

vs.

WAYNE YARNALL
5707 Dunbar Court
Bensalem, PA 19020

COURT OF COMMON PLEAS
BUCKS COUNTY DIVISION
TERM
NO. 99004879-23-1

ANSWER OF DEFENDANT, WAYNE YARNALL, TO PLAINTIFF’S CIVIL ACTION WITH NEW MATTER

1. Denied. Plaintiff is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment. Accordingly, same is denied with strict proof demanded at time of Trial.

2. Admitted. By way of further answer, however, Plaintiff’s Civil Action has misspelled Defendant’s proper name, which is Wayne Yarnall.

3. Denied. These allegations constitute conclusions of law to which no response is required pursuant to the applicable Pennsylvania Rules of Civil Procedure . . .
Exhibit 7.5 Pleadings process

- Plaintiff
  - complaint
  - answer

- Defendant
  - cross-complaint
  - reply

- Plaintiff (cross-defendant)

- Defendant (cross-complainant)

Exhibit 7.6 Sample time deadlines using Deadlines On Demand™

These sample deadlines are provided as examples for instructional purposes only and are not to be relied upon in the practice of law. Any use other than that which is described herein is strictly prohibited. Neither CompuLaw nor Deadlines On Demand will be liable for any use or misuse of this information, regardless of the circumstances. Copyright © 2009 CompuLaw LLC. All Rights Reserved. CompuLaw is a Registered Trademark of CompuLaw LLC. Copyright © 2009 Deadlines On Demand™. All Rights Reserved. Deadlines On Demand is a Trademark of Deadlines On Demand LLC. U.S. Patents 7,171,416 and 7,302,433 and International Patent 2002330911. Other U.S. and foreign patents pending.
**E-Filings in Court**

When litigation ensues, the clients, lawyers, and judges involved in the case usually are buried in paper—pleadings, interrogatories, documents, motions to the court, briefs, and memoranda; the list goes on and on. By the time a case is over, reams of paper are stored in dozens, if not hundreds, of boxes. Further, court appearances, no matter how small the matter, must be made in person. For example, lawyers often wait hours for a 10-minute scheduling or other conference with the judge. Additional time is required to drive to and from court, which in an urban area may amount to hours.

Paralegals are at the forefront of e-litigation where many of the documents filed in court are done electronically. The technology currently is available for implementing electronic filing—e-filing—of pleadings, briefs, and other documents related to a lawsuit. E-filing would include using CD-ROMs for briefs, scanning evidence and documents into a computer for storage and retrieval, and emailing correspondence and documents to the court and the opposing counsel. Scheduling and other conferences with the judge or opposing counsel could be held via telephone conferences and email.

Some courts have instituted e-filing already. For example, in the Manhattan bankruptcy court, e-filing is now mandatory. Other courts around the world are doing the same. Companies such as Microsoft and LexisNexis have developed systems to manage e-filings of court documents. Some forward-thinking judges and lawyers envision a day when the paperwork and hassle are reduced or eliminated in a “virtual courthouse.”

**Discovery**

**Discovery** is a step in the litigation process where the plaintiff and the defendant share information relevant to their dispute. The discovery process can be a time-consuming and sometimes frustrating phase in litigation. Successful discovery requires familiarity with the rules of court that apply to discovery and an organized approach. Increasingly important are the rules relating to discovery of electronic files that may be the source of information needed in the litigation process. The methods used to locate, preserve, and produce these cyber documents require a new set of skills for the legal team and the paralegal. Paralegals on the litigation team are often charged with coordinating discovery requests and responses from clients and opposing parties and working with information technology experts.

Discovery serves a number of purposes: understanding and evaluating the client’s case, focusing the legal team on the strengths and weaknesses of its case; understanding and evaluating the strengths and weaknesses of the opponent’s case; preserving testimony; potentially facilitating settlement; and learning information that may be used to impeach a witness, such as showing inconsistencies in testimony.

**Case Evaluation**

By answering each other’s questions, the parties share information about the facts, documents, and statements of fact and expert witnesses related to the legal dispute. By openly sharing information that may be used at trial, each side is forced to evaluate its case and the opponent’s case and determine the ability to meet its burdens of proof. With each side fully aware of the potential evidence that can be presented, including potential damages, the legal team can, based on prior experience or reported similar cases, put a potential value on a trial outcome. In many cases the decision to try a case or settle a case is a business decision.

Is the cost of a trial outweighed by the potential recovery? With two well-prepared legal teams, the evaluation is surprisingly close and settlement is more likely than not.

**Preparing for Trial**

Properly completed discovery eliminates the potential for surprises in evidence presented at trial. In fact, many of the “surprises” one sees on television trial dramas are not possible under rules that are designed to prevent the introduction of surprise witnesses and evidence.
COULD THIS BE THE FIRST DAY OF EMPLOYMENT FOR A RECENT PARALEGAL PROGRAM GRADUATE?

Maria was up before the alarm went off, ready to begin her new job and her new career. The newest paralegal at one of California’s most prestigious law firms was ready to go to work. She still was amazed at how easily she had completed the interviews and had proceeded through the hiring process of the past few weeks. To be hired by such a prominent law firm was beyond her wildest dreams. She knew that her good grades, her excellent work samples and her technology skills would help her look for a position but never thought she would be so successful so quickly. The knowledge and sophisticated skill set she had acquired in her paralegal studies had paid immediate dividends.

Clutching a small portfolio embossed with her paralegal school’s logo, she took the elevator to the thirty-fifth floor, got off and went through the big glass doors. Maria’s legal degree and her newly acquired Certificate in Legal Information Management were about to be tested.

She knew that this potent combination of legal content and legal information management had been her key to success yet she was still very apprehensive about this new venture. Little did Maria know, but her new employers were as apprehensive as she was on her first day at the office. They had created the title of Paralegal Information Manager and that sign on the door was the first thing that caught Maria’s eyes as she was showed her new office.

Maria remembered the interview a few weeks ago when she was led through a large conference room full of file boxes that she thought contained the information on the major cases she would be working on at the firm. She had asked, “Is that the Magnate case materials?” And the answer was “No, they will be accessed through the computer workstation in your new office.” She remembered the senior partner telling her that the judge in the Magnate case had ordered the case to be handled electronically as much as possible. All of the documents had either been imaged or produced in native file format and a basic index of all documents had been created. The firm had chosen to optically character recognize the imaged documents for full text search capability. The trial exhibit list had to be filed electronically and the pre-trial order directed that the attorneys use all the technology available in the electronic courtroom to locate and display every document for the judge and jury.

Here she was, the Paralegal Information Manager, the gatekeeper of the management and the flow of information, the one who was primarily responsible for getting the information processed and presented. She felt overwhelmed but was ready to begin. Maria sat down and turned on the computer. She had taken the first step.

Preserving Oral Testimony

Discovery is also a method for preserving oral testimony. There are times when witnesses may not be available to attend trial to testify. Examples include witnesses who are gravely ill and not expected to live until trial, those who are elderly or incapacitated and physically unable to come to the courthouse, and those who are outside the geographical jurisdiction of the court. Under limited circumstances, the deposition testimony of these unavailable witnesses may be presented at trial. The deposition of witnesses is given the same treatment as if the witness was in court testifying in person.
II. The Discovery Disputes

This opinion addresses four distinct but related discovery disputes. Stockman served a document request pursuant to Rule 34, asking the SEC to “produce for inspection and copying the documents and things identified” in fifty-four separate categories. In response, the SEC produced 1.7 million documents (10.6 million pages) maintained in thirty-six separate Concordance databases-many of which use different metadata protocols. Stockman raises the following objections.

First, the SEC failed to identify documents responsive to requests for documents supporting particular factual allegations in the Complaint, preferring instead to “dump” 1.7 million potentially responsive documents on Stockman and then suggesting that he is capable of searching them to locate those that are relevant. Second, the SEC failed to perform a reasonable search for documents relating to accounting principles governing supplier rebates-both in general and with respect to the automobile industry. Instead, the SEC unilaterally limited its search to three of its divisions-and only if those divisions possessed “centralized compilations of non-privileged documents dealing specifically with rebates or accounting for rebates in the automobile industry.” Third, the SEC improperly asserted the deliberative process privilege with regard to certain documents. Fourth, the SEC failed to search its own e-mails, attachments thereto, and other records created and maintained solely in an electronic format that related to either (i) the investigation and litigation of this matter or (ii) the handling of several large cases unrelated to C & A and the Commission’s regulatory role in matters relating to rebates and rebate accounting.

The objections were raised in a series of letters rather than by formal motion.

1. Attorney Work Product Protection Applied to Selection and Compilation

The Second Circuit has recognized that the selection and compilation of documents may fall within the protection accorded to attorney work product, despite the general availability of documents from both parties and non-parties during discovery. However, it has labeled this protection a “narrow exception” aimed at preventing requests with “the precise goal of learning what the opposing attorney’s thinking or strategy may be.” Moreover, equity favors rejection of work product protection to a compilation of documents that are otherwise unavailable or “beyond reasonable access.” The Circuit has suggested that a court may permit ex parte communication of the strategy the withholding party wishes to conceal and in camera review of documents, so that the court may make an educated assessment whether production of the compilation will reveal a party’s litigation strategy.

C. Discussion

1. Work Product Protection

It is first necessary to determine the level of protection afforded to the selection of documents by an attorney to support factual allegations in a complaint. Such documents are not “core” work product. Core work product constitutes legal documents drafted by an attorney—her mental impressions, conclusions, opinions, and legal theories. This highest level of protection applies to a compilation only if it is organized by legal theory or strategy. The SEC’s theory—that every document or word reviewed by an attorney is “core” attorney work product—leaves nothing to surround the core. The first step in responding to any document request is an attorney’s assessment of relevance with regard to potentially responsive documents. It would make no sense to then claim that an attorney’s determination of relevance shields the selection of responsive documents from production.
With few exceptions, Rule 26(f) requires the parties to hold a conference and prepare a discovery plan. The Rule specifically requires that the discovery plan state the parties’ views and proposals with respect to “the subject on which discovery may be needed . . . and whether discovery should be conducted in phases or be limited to or focused on particular issues”FN66 and “any issues about disclosure or discovery of electronically stored information. . . .”FN67 Had this been accomplished, the Court might not now be required to intervene in this particular dispute. I also draw the parties’ attention to the recently issued Sedona Conference Cooperation Proclamation, which urges parties to work in a cooperative rather than an adversarial manner to resolve discovery issues in order to stem the “rising monetary costs” of discovery disputes. The Proclamation notes that courts see the discovery rules “as a mandate for counsel to act cooperatively.”FN68 Accordingly, counsel are directly to meet and confer forthwith and develop a workable search protocol that would reveal at least some of the information defendant seeks. If the parties cannot craft an agreement, the Court will consider the appointment of a Special Master to assist in this effort. . . . The logic of Rule 34 supports this limitation. When records do not result from “routine and repetitive” activity, there is no incentive to organize them in a predictable system. The purpose of the Rule is to facilitate production of records in a useful manner and to minimize discovery costs; thus it is reasonable to require litigants who do not create and/or maintain records in a “routine and repetitive” manner to organize the records in a usable fashion prior to producing them.

. . . By rough analogy to Rule 803(6), the option of producing documents “as they are kept in the usual course of business” under Rule 34 requires the producing party to meet either of two tests. First, this option is available to commercial enterprises or entities that function in the manner of commercial enterprises. Second, this option may also apply to records resulting from “regularly conducted activity.”FN53 Where a producing party’s activities are not “routine and repetitive” such as to require a well-organized record-keeping system—in other words when the records do not result from an “ordinary course of business”—the party must produce documents according to the sole remaining option under Rule 34: “organiz[ed] and label[ed] . . . to correspond to the categories in the request.”FN54

B. Applicable Law

“A district court has wide latitude to determine the scope of discovery.”FN62 The general scope of discovery in civil litigation is defined by Rule 26(b)(1).


Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense. . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

. . . A court must limit the “frequency or extent of discovery” if one of three conditions in Rule 26(b)(2)(C) is present. The third limits production when “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”FN63 The burden or expense may be defined in terms of time, expense, or even the “adverse consequences of the disclosure of sensitive, albeit unprivileged material.”FN64 . . .

VII. Conclusion

When a government agency initiates litigation, it must be prepared to follow the same discovery rules that govern private parties (albeit with the benefit of additional privileges such as deliberative process and state secrets). For the reasons set forth above, the SEC is ordered to produce or identify documents organized in response to Stockman’s requests; to negotiate an appropriate search protocol to locate documents responsive to requests described above in Part IV; to submit materials allegedly covered by the deliberative process privilege to the Court for in camera review, together with a supporting memorandum within twenty days of the date of this Order;
and to negotiate an appropriately limited search protocol with respect to agency
e-mail. While the SEC has raised legitimate concerns about the burdens imposed
by particular requests, it cannot unilaterally determine that those burdens outweigh
defendants’ need for discovery. At the very least, the SEC must engage in a good
faith effort to negotiate with its adversaries and craft a search protocol designed to
retrieve responsive information without incurring an unduly burdensome expense
disproportionate to the size and needs of the case. The parties are therefore directed
to engage in a cooperative effort to resolve the scope and design of a search with
respect to the rebate issues and a search of e-mail created and maintained by the
SEC. A conference is scheduled for February 13, at 5:00 pm, by which date the parties
should have completed the meet and confer process in the hope of establishing an
acceptable discovery program. If the parties remain at an impasse, the Court will be
prepared to resolve further disputes and will consider the appointment of a Special
Master to supervise the remaining discovery in this case.

SO ORDERED.

Federal Rules of Civil Procedure—Rule 26(a)
Disclosure Requirements

Rule 26(a) makes mandatory the disclosure of certain information that for years was
available only after a formal written discovery request was issued. For many cases, no
action was taken on a file until one side moved the case forward with a formal discov-
ery request. Under current rules, everything the legal team intends to rely upon to
prove its claims must be disclosed early in the litigation. Insufficient time to investigate
the claim is not a valid excuse for failure to comply. The benefits of mandatory disclo-
sure are twofold: 1. It provides for the early evaluation and settlement of claims; and 2.
reduces the amount, nature, and time necessary to conduct formal discovery. From
a practical standpoint, the plaintiff’s legal team must be prepared for disclosure at or
shortly after filing the complaint. While the new rules contemplate a specific time
frame for disclosure, they do permit the attorneys to agree to some other time frame
for the disclosure. Although the attorneys may agree to extend that time, the judge at
the scheduling conference may encourage them to conclude the disclosure at a faster
pace. The investigation that might have occurred under prior rules must now be com-
pleted before filing suit. For the defense team, the time to investigate and comply is
very short. There is no time for procrastination in investigating and establishing the
grounds to defend the claims.

Information Subject to Mandatory Disclosure

Almost anything relied upon in developing the claim, regardless of whether it is ad-
missible at trial, must be disclosed. This disclosure includes the identity of witnesses,
copies of documents, a computation of damages, and a copy of any insurance policy
that may be used to satisfy a judgment obtained in the litigation.

In the past, information used to compute damages represented the plaintiff at-
torney’s thought process and was typically not released as part of discovery under the
work–product privilege. Under the current rule, the attorney’s value on the case is
made known within months of the complaint being filed.

From the defense standpoint, the disclosure of insurance coverage, which is not
admissible at trial, is a significant change from traditional discovery. A key element in
settling most cases is the existence of and limitations on insurance coverage. With both
the plaintiff’s calculation of damages and the defendant’s ability to pay based upon dis-
closure of insurance coverage known within months of filing the lawsuit, the chances
for fruitful settlement discussions are enhanced.
Experts and Witnesses

Expert witnesses expected to be called at trial must also be identified, accompanied by a copy of the expert’s qualifications as an expert including a list of publications for which the witness has written from the preceding 10 years, a statement of compensation, and a list of other cases in which the expert has testified. The most critical element to be shared is the written report of the expert’s opinion. The report represents what the expert is expected to say at trial. The written report must include the opinion of the expert, the basis of that opinion including the information relied upon, and any assumptions made. The disclosure of the expert and his or her report must be made at least 90 days prior to trial. Some courts require the disclosure of the expert at the time of the initial disclosure or within 30 days of receipt of the expert’s report. Many lawsuits become a battle of the experts. The early disclosure of the expert and his or her opinion often leads to early resolution of the case.

Depositions

A deposition is the oral testimony given, under oath, by a party or witness prior to trial. The person giving the deposition is called the deponent. The parties to the lawsuit must give their depositions, if the other party calls them to do so. The deposition of a witness can be given voluntarily or pursuant to a subpoena (court order). The deponent can be required to bring documents to the deposition. Depositions are used to preserve evidence (e.g., if the deponent is deceased, ill, or otherwise not available at trial) and to impeach testimony given by witnesses at trial. Most depositions are taken at the office of one of the attorneys. The deponent is placed under oath and then asked oral questions by the attorneys for one or both parties to the lawsuit. The questions and answers are recorded in written form by a court reporter. Depositions also can be videotaped. The deponent is given an opportunity to correct his or her answers prior to signing the deposition, depending on local practice or rules.

Interrogatories

Interrogatories are written questions submitted by one party to a lawsuit to another party. The questions can be highly detailed, as illustrated by the sample interrogatory in Exhibit 7.7. In addition, in some jurisdictions certain documents have to be attached to the answers. A party is required to answer the interrogatories in writing within a specified time period (e.g., 60 to 90 days). An attorney usually helps with preparation of the answers. The answers are signed under oath.

Production of Documents

Often, particularly in complex business cases, a substantial portion of the lawsuit is based on information contained in documents (e.g., memoranda, correspondence, company records). One party to a lawsuit may request that the other party produce all documents that are relevant to the case prior to trial. This is called production of documents. If the documents sought are too voluminous to be moved or are in permanent storage, or if moving the documents would disrupt the ongoing business of the party who is to produce them, the requesting party may be required to examine the documents at the other party’s premises. Exhibit 7.8 is an example of a request for production of documents.

Physical and Mental Examination

Physical and mental examinations (in some jurisdictions called an Independent Medical Examination or IME) of the parties to the lawsuit are permitted where the physical or mental condition of one of the parties is an element of the cause of action. In a personal injury action, the physical injuries suffered and the damages that result from those injuries are elements of the cause of action for negligence. Thus, the defense
INTERROGATORIES ADDRESSED TO KATHRYN KELSEY

You are to answer the following interrogatories under oath or verification pursuant to the Pa. R.C.P. 4005 and 4006 within thirty days from the service hereof. The answering party is under a duty to supplement responses to any questions with information discovered after these answers were given.

Also, a party or expert witness must amend prior responses if he/she obtains information upon the basis of which:

(a) he/she knows the response was incorrect when made; or
(b) he/she knows that the response, though correct when made, is no longer true.

The words “your vehicle” as used in the following interrogatories are defined as the motor vehicle you were operating at the time of the accident.

When a Standard Interrogatory uses the word: “identify”, the party served with the Interrogatory must identify all documents, things and persons known to that party or to that party's attorney, and the address of all persons identified MUST be set forth.

Where a Standard Interrogatory is marked with an asterisk (*), a Request for Production may accompany the Interrogatory.

STANDARD INTERROGATORIES PURSUANT TO PHILADELPHIA RULE OF CIVIL PROCEDURE *4005

INJURIES AND DISEASES ALLEGED

1. State in detail the injuries or diseases that you allege that you suffered as a result of the accident referred to in the Complaint.

MEDICAL TREATMENT & REPORTS*

2. If you received medical treatment or examinations (including x-rays) because of injuries or diseases you suffered as a result of the accident, identify:

(a) Each hospital at which you were treated or examined;
(b) The dates on which each such treatment or examination at a hospital was rendered and the charges by the hospital for each;
(c) Each doctor or practitioner by whom you were treated or examined;
(d) The dates on which each such treatment or examination by a doctor or practitioner was rendered and the charges for each;
(e) All reports regarding any medical treatment or examinations, setting forth the author and date of such reports.

* This document can be viewed in its entirety on the companion website.
THOMAS F. GOLDMAN & ASSOCIATES
138 N. State Street
Newtown, PA 18940
(123) 555-1234

KATHRYN KELSEY : COURT OF COMMON PLEAS
: PHILADELPHIA COUNTY

vs. : APRIL TERM, 2011

KATHRYN CARROLL : NO. 1259

REQUEST TO PRODUCE UNDER PA R.C.P. 4033 and 4009
DIRECTED TO PLAINTIFFS

Within thirty (30) days of service, please produce for inspection and copying at the office of THOMAS F. GOLDMAN & ASSOCIATES, 138 North State Street, Newtown, Pennsylvania 18940, the following:

1. All photographs and/or diagrams of the area involved in this accident or occurrence, the locale or surrounding area of the site of this accident or occurrence, or any other matter or things involved in this accident or occurrence.
2. All property damage estimates rendered for any object belonging to the Plaintiffs which was involved in this accident or occurrence.
3. All property damage estimates rendered for any object belonging to the Defendant which was involved in this accident or occurrence.
4. All statements concerning this action or its subject matter previously made by any party or witness. The statements referred to here are defined by Pa. R.C.P. 4003.4.
5. All transcriptions and summaries of all interviews conducted by anyone acting on behalf of the Plaintiff or Plaintiff’s insurance carrier of any potential witness and/or person(s) who has any knowledge of the accident or its surrounding circumstances.
6. All inter-office memorandum between representative of Plaintiffs’ insurance carrier or memorandum to Plaintiffs’ insurance carrier’s file concerning the manner in which the accident occurred.
7. All inter-office memorandum between representative of Plaintiffs’ insurance carrier or memorandum to Plaintiffs’ insurance carrier’s file concerning the injuries sustained by the Plaintiffs.
8. A copy of any written accident report concerning this accident or occurrence signed by or prepared by Plaintiff for Plaintiffs’ insurance carrier or Plaintiff’s employers.
9. A copy of the face sheet of any policy of insurance providing coverage to Plaintiffs for the claim being asserted by Plaintiff in this action.
10. All bills, reports, and records from any and all physicians, hospitals, or other health care providers concerning the injuries sustained by the Defendants from this accident or occurrence.
11. All photographs and/or motion pictures of any and all surveillance of Defendant performed by anyone acting on behalf of Plaintiff, Plaintiff’s insurer and/or Plaintiff’s attorney.
12. All photographs taken of Plaintiffs’ motor vehicle which depict any damage to said vehicle which was sustained as a result of this accident.
13. All photographs taken of defendant’s motor vehicle which depict any damage to said vehicle which was sustained as a result of this accident.
14. Any and all reports, writings, memorandum, Xeroxed cards and/or other writings, lists or compilations of the Defendant and others with similar names as indexed by the Metropolitan Index Bureau, Central Index Bureau or other Index Bureau in possession of the Plaintiffs or the Plaintiffs’ insurance carrier.
team may obtain a physical examination of the plaintiff from a doctor of its choosing. In a guardianship proceeding, the plaintiff seeks to be appointed guardian over someone who lacks mental capacity to handle financial and other matters. The cause of action is dependent on the mental state of the individual. Therefore, a mental examination would be appropriate.

Requests for Admission

Requests for admission are written requests issued by one party to the lawsuit to the other asking that certain facts or legal issues be admitted as true. Properly used, requests for admission can narrow the focus of trial and streamline the testimony. Some facts are generally not in controversy, such as names, addresses, and other personal information.

Locations of accidents, time of day, and related facts may also be admitted without calling witnesses. Who was speeding, not observant, or otherwise negligent are facts rarely admitted because they represent an admission of liability. However, if liability is admitted the only issue left is damages. Where the damages are minimal, parties may admit to the facts of liability to avoid the time and cost of trial to obtain a finding of fact of something obvious.

The remaining issue of how much monetary value is assigned to the wrong may be agreed upon between the parties or determined by the trier of fact in very short order at little time or expense.

Example: If the defendant admits as true his liability for the automobile accident, then that issue is no longer in dispute. No evidence as to the cause of the accident will be required at trial. The trial will be limited to determining damages only, making a more focused and streamlined case.

E-Discovery

The use of email, electronic retention of records, establishment of websites, selling goods and services online, and other digital technologies has exploded in conducting business. This technology is used extensively in conducting personal affairs as well. Therefore, in many lawsuits, much of the evidence is in digital form. The winning or losing of lawsuits may lie in the ability of a party to conduct electronic discovery, or e-discovery.

Modern discovery practices permit the electronic discovery of evidence. Most federal and state courts have adopted rules that permit the e-discovery of emails, electronically stored data, e-contracts, and other electronic records. E-discovery is fast becoming a burgeoning part of the preparation of a case for trial or settlement.

The lawyer and the paralegal must have a sound understanding of permissible e-discovery. Courts have resoundingly permitted the discovery of emails and electronic databases where relevant to a court case. A party seeking e-discovery must prepare the proper requests for such discovery as required by court rules.

In addition to discovery of email and electronic information, courts permit the use of electronic interrogatories to be proffered to the other side, as well as the electronic response to such e-interrogatories. Some courts also permit the taking of depositions electronically. This requires that the questions by the lawyers and answers of the deponent be communicated electronically by email.

Federal and state courts have established rules of evidence that require the parties to a lawsuit not to destroy or delete documents or other evidence that is relevant to the pending lawsuit. This prohibition is particularly important when the documents and evidence are digital. The destruction or deletion of e-evidence may subject the violating party to civil and criminal penalties.

In the case where digital evidence has been destroyed or deleted from electronic files, it may be possible to reconstruct the evidence. The use of computer experts will be necessary to find the missing evidence and digitally reconstruct it.
Motion to dismiss

A motion that alleges that the plaintiff’s complaint fails to state a claim for which relief can be granted. Also called a demurrer.

Pretrial motion

A motion a party can make to try to dispose of all or part of a lawsuit prior to trial.

E-discovery will continue to increase as an important feature in many lawsuits. The recovery of emails, mining of electronic databases, and reconstructing thought-to-be destroyed electronic evidence will play an ever more important part of discovery in current and future lawsuits. E-discovery is clearly an important part of the digital law office and the virtual courtroom.

Pretrial Motions

Paralegals employed in the civil litigation field are often called upon to prepare pretrial motions to try to dispose of all or part of a lawsuit prior to trial. The three major pretrial motions are the motion to dismiss, the motion for judgment on the pleadings, and the motion for summary judgment.

Motion to Dismiss

A defendant can file a motion to dismiss the plaintiff’s complaint for failure to state a claim for which relief can be granted. A motion to dismiss is sometimes called a demurrer. A motion to dismiss a case alleges that even if the facts as presented in the plaintiff’s complaint are true, there is no reason to continue the lawsuit. For example, a motion to dismiss would be granted if the plaintiff alleges that the defendant was negligent but the facts as alleged do not support a claim of negligence.

A motion to dismiss can be filed with the court prior to the defendant’s having filed an answer in the case. If the motion to dismiss is denied, the defendant is given further time to answer. If the court grants the motion to dismiss, the defendant does not have to file an answer. The plaintiff usually is given time to file an amended complaint. If the plaintiff fails to file an amended complaint, judgment will be entered against the plaintiff. If the plaintiff files an amended complaint, the defendant must answer the complaint or file a new motion to dismiss.

Emily A. Ewald is a graduate of Xavier University with a Bachelor of Science degree. She also has a Paralegal Certificate from Davenport University.

Emily currently works in the area of civil/commercial and appellate litigation at the large law firm of Dickinson Wright in Grand Rapids, Michigan.

Although I have been a paralegal for six years, the first three were spent focused on one enormous case. During that period, I reviewed, organized, and managed over 450,000 documents, 1,650 deposition exhibits, a 98-page trial exhibit list, deposition designations from over 70 depositions, and other numerous assignments to assist attorneys preparing for discovery and trial. In this case, our client, the defendant, was being sued for $74 million. However, three weeks before the scheduled trial date, the case was settled for a much lower amount.

My current work duties include drafting interrogatories, interrogatory responses, motions and briefs, witness lists, juror questionnaires, and verdict forms. I also help prepare for and attend depositions, hearings, mediations, arbitrations, and trials. Additionally, I go to client meetings, expert witness meetings, and deposition preparation sessions.

More and more legal documents are being digitally produced and exchanged. For instance, we are required by all federal courts to file everything electronically through an online program called PACER (Public Access to Court Electronic Records). For e-discovery purposes, we use Summation®, a software program used to summarize case documents and search them for specific data. TrialDirector® software is used to load case exhibits, videos, and other documents onto a laptop computer, which can later be projected onto a courtroom screen for judge and jurors to see.

My main advice to new paralegals is to be flexible. You should expect to be asked to go back and forth between different case assignments, at a moment’s notice. You are also likely to get some assignments in which you have little or no interest. However, always do them to the best of your ability because you will gain from the experience.
Motion for Judgment on the Pleadings

Once the pleadings are complete, either party can make a motion for judgment on the pleadings. This motion alleges that if all of the facts presented in the pleadings are true, the party making the motion would win the lawsuit when the proper law is applied to these facts. In deciding this motion, the judge cannot consider any facts outside the pleadings.

Motion for Summary Judgment

The trier of the fact (i.e., the jury, or, if no jury, the judge) determines factual issues. A motion for summary judgment asserts that there are no factual disputes to be decided by the jury and that the judge should apply the relevant law to the undisputed facts to decide the case. Motions for summary judgment, which can be made by either party, are supported by evidence outside the pleadings. Affidavits from the parties and witnesses, documents (e.g., a written contract between the parties), depositions, and such are common forms of evidence.

If, after examining the evidence, the court finds no factual dispute, it can decide the issue or issues raised in the summary judgment motion. This may dispense with the entire case or with part of the case. If the judge finds that a factual dispute exists, the motion will be denied and the case will go to trial.

Settlement Conference

Federal court rules and most state court rules permit the court to direct the attorneys or parties to appear before the court for a pretrial hearing, or settlement conference. One of the major purposes of these hearings is to facilitate settlement of the case. Pretrial conferences often are held informally in the judge’s chambers. If no settlement is reached, the pretrial hearing is used to identify the major trial issues and other relevant factors.

More than 90 percent of all cases are settled before they go to trial. In cases that do proceed to trial, the trial judge may advise the attorneys of the rules or timetable of the individual judge. The judges also will advise the attorneys of any deadlines for discovery and the deadline for submitting any final motions with regard to what may be offered at the trial, called motions in limine.

In a number of jurisdictions, cases are referred to arbitration or other forms of alternative dispute resolution. Depending on the amount of money in controversy, some cases are required to be submitted before court-approved panels of attorneys sitting as arbitrators of the dispute. In other courts, the litigants may elect to have the case heard before an arbitration panel. Appeal rights from arbitration panel decisions vary, but cases typically may be appealed de novo to the trial court as if no arbitration had occurred, except possibly the payment of an appeal fee to cover part of the cost of the arbitration.

Exhibit 7.9 shows the sequence of key events before trial.

Trial

Pursuant to the Seventh Amendment to the U.S. Constitution, a party to an action at law is guaranteed the right to a jury trial in cases in federal court. Most state constitutions contain a similar guarantee for state court actions. If either party requests a jury, the trial will be by jury. If both parties waive their right to a jury, the trial will be without a jury. In non-jury trials, the judge sits as the trier of fact. These trials also are called waiver trials or bench trials. At the time of trial, the parties usually submit to the judge trial briefs containing legal support for their side of the case.

Trials usually are divided into the following phases:

- Jury selection
- Opening statements
- Plaintiff’s case
- Defendant’s case
- Rebuttal and rejoinder

Motion for judgment on the pleadings A motion that alleges that if all the facts presented in the pleadings are taken as true, the party making the motion would win the lawsuit when the proper law is applied to these asserted facts.

Motion for summary judgment A motion that asserts that there are no factual disputes to be decided by the jury and that the judge can apply the proper law to the undisputed facts and decide the case without a jury. These motions are supported by affidavits, documents, and deposition testimony.
Jury Selection

In jury selection, the pool of the potential jurors usually is selected from voter or automobile registration lists. Potential jurors are asked to fill out a questionnaire such as that shown in Exhibit 7.10. Individuals are selected to hear specific cases through the process called voir dire (“to speak the truth”). Lawyers for each party and the judge can ask questions of prospective jurors to determine if they would be biased in their decision. Jurors can be “stricken for cause” if the court believes that the potential juror is too biased to render a fair verdict. Lawyers may also use preemptory challenges to exclude a juror from sitting on a particular case without giving any reason for the dismissal.

Once the appropriate number of jurors is selected (usually six to twelve jurors), they are impaneled to hear the case and are sworn in. The trial is ready to begin. In cases in which the Court is concerned for the safety of the jury, such as a high-profile murder case, it can sequester, or separate it from the outside world. Jurors are paid minimum
## Sample jury questionnaire

### JURY QUESTIONNAIRE

(Please Print)

<table>
<thead>
<tr>
<th>NAME</th>
<th>JUROR NO.</th>
</tr>
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<tbody>
<tr>
<td>(Last)</td>
<td>(First)</td>
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<table>
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<table>
<thead>
<tr>
<th>Occupation of</th>
<th>Spouse (or deceased spouse)</th>
<th>Other</th>
</tr>
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</table>

| (Currently) | (Other occupations within past ten years) |

<table>
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<tr>
<th>No. of Male Children</th>
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</thead>
</table>

<table>
<thead>
<tr>
<th>No. of Female Children</th>
<th>Ages</th>
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</thead>
</table>

Your Level of Schooling Completed

<table>
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<tr>
<th>Race</th>
<th>White</th>
<th>Hispanic</th>
<th>Black</th>
<th>Other</th>
</tr>
</thead>
</table>

STOP HERE

Writing below this line is prohibited until the juror video is shown

QUESTIONS TO BE ANSWERED IN THE JURY ASSEMBLY ROOM

1. Do you have any physical or psychological disability or are you presently taking any medication?  
   - YES  
   - NO

2. (a) Have you ever been a juror before?  
   - YES  
   - NO

   (b) If so, were you ever on a hung jury?  
   - YES  
   - NO

Questions 3 through 15 apply to criminal cases only

3. Do you have any religious, moral or ethical beliefs that would prevent you from sitting in judgment in a criminal case and rendering a fair verdict?  
   - YES  
   - NO

4. Have you or anyone close to you ever been a victim of a crime?  
   - YES  
   - NO

5. Have you or anyone close to you ever been charged with or arrested for a crime, other than a traffic violation?  
   - YES  
   - NO

6. Have you or anyone close to you ever been an eyewitness to a crime, whether or not it ever came to Court?  
   - YES  
   - NO

(continued)
### Exhibit 7.10  
**Sample jury questionnaire (continued)**

<table>
<thead>
<tr>
<th>Question</th>
<th>YES</th>
<th>NO</th>
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<tr>
<td>7. Have you, or has anyone close to you, ever worked as a police officer or in other law enforcement jobs? This includes prosecutors, public defenders, private criminal defense lawyers, detectives, and security or prison guards.</td>
<td></td>
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<td>8. Would you be more likely to believe the testimony of a police officer or any other law enforcement officer just because of his job?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9. Would you be less likely to believe the testimony of a police officer or any other law enforcement officer just because of his job?</td>
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<tr>
<td>10. Would you have any problem following the Court's instruction that the defendant in a criminal case is presumed to be innocent until proven guilty beyond a reasonable doubt?</td>
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<tr>
<td>11. Would you have any problem following the Court's instruction that the defendant in a criminal case does not have to take the stand or present evidence, and it cannot be held against the defendant if he or she elects to remain silent?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>12. Would you have any problem following the Court's instruction in a criminal case that just because someone is arrested, it does not mean that the person is guilty of anything?</td>
<td></td>
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<tr>
<td>13. In general, would you have any problem following and applying the judge's instructions on the law?</td>
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<tr>
<td>14. Would you have any problem during jury deliberations in a criminal case discussing the case fully but still making up your own mind?</td>
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<td></td>
</tr>
<tr>
<td>15. Is there any other reason you could not be a fair juror in a criminal case?</td>
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<tr>
<td><strong>Questions 16 through 24 apply to civil cases only</strong></td>
<td></td>
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<tr>
<td>16. Have you or anyone close to you ever sued someone, been sued, or been a witness?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>17. Have you or anyone close to you been employed as a lawyer or in a law-related job?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>18. Have you or anyone close to you been employed as a doctor or nurse or in a medical-related job?</td>
<td></td>
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<tr>
<td>19. In a civil case, would you have any problem following the Court's instruction that the plaintiff has the burden of proof, but unlike in a criminal case, the test is not beyond a reasonable doubt but “more likely than not”?</td>
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<tr>
<td>20. In a civil case, would you have any problem putting aside sympathy for the plaintiff and deciding the case solely on the evidence?</td>
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<td></td>
</tr>
<tr>
<td>21. In a civil case, would you have any problem following the Court's instruction to award money for damages for things like pain and suffering, loss of life's pleasures, etc., although it is difficult to put a dollar figure on them?</td>
<td></td>
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<tr>
<td>22. Would you have any problem during jury deliberations in a civil case discussing the case fully but still making up your own mind?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>23. Is there any reason in a civil case that you cannot follow the Court's instructions on the law?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>24. Is there any reason in a civil case that you cannot otherwise be a fair juror?</td>
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</table>
fees for their service. Courts can hold people in contempt and fine or jail them for willful refusal to serve as a juror.

**Opening Statements**
Each party’s attorney is allowed to make an opening statement to the jury. In opening statements, attorneys usually summarize the main factual and legal issues of the case and describe why they believe their client’s position is valid. The information given in this statement is not considered as evidence. It is the attorney’s opportunity to tell the trier of fact what he or she intends to tell the jury through witnesses and evidence.

**Plaintiff’s Case**
Plaintiffs bear the burden of proof to persuade the trier of fact of the merits of their case. This is called the plaintiff’s case. The plaintiff’s attorney calls witnesses to give testimony. After a witness has been sworn in, the plaintiff’s attorney examines questions the witness. This is called direct examination. Documents and other evidence can be introduced through each witness.

After the plaintiff’s attorney has completed his or her questions, the defendant’s attorney can question the witness in cross-examination. The defendant’s attorney can ask questions only about the subjects that were brought up during the direct examination. After the defendant’s attorney completes his or her questions, the plaintiff’s attorney can ask questions of the witness in redirect examination. The defendant’s attorney then can ask questions of the witness again. This is called recross examination. Exhibit 7.11 illustrates this sequence for examining witnesses.

**Defendant’s Case**
After the plaintiff has concluded his or her case, the defendant’s case proceeds. The defendant’s case must

1. rebut the plaintiff’s evidence.
2. prove any affirmative defenses asserted by the defendant.
3. prove any allegations contained in the defendant’s cross-complaint.

The defendant’s witnesses are examined by the defendant’s attorney. The plaintiff’s attorney can cross-examine each witness. This is followed by redirect examination by the defendant and recross examination of witnesses by the plaintiff.

**Rebuttal and Rejoinder**
After the defendant’s attorney has completed calling witnesses, the plaintiff’s attorney can call witnesses and put forth evidence to rebut the defendant’s case. This is called a rebuttal. The defendant’s attorney can call additional witnesses and introduce other evidence to counter the rebuttal. This is called the rejoinder.

**Closing Arguments**
At the conclusion of the evidence, each party’s attorney is allowed to make a closing argument to the jury. Each attorney tries to convince the jury to render a verdict for his or her clients by pointing out the strengths in the client’s case and the weaknesses in the other side’s case.

Information given by the attorneys in their closing statements is not evidence. It is a chance for the attorneys to tell the jury what they said they would tell the jury through witnesses and evidence in the opening statements and how they had done that during the trial.

**Jury Instructions**
Once the closing arguments are completed, the judge reads jury instructions, or charges to the jury. These instructions inform the jury about what law to apply in deciding the case
**Appellee** The responding party in an appeal. Also known as respondent.

**Appellant** The appealing party in an appeal. Also known as petitioner.

**Appeal** The act of asking an appellate court to overturn a decision after the trial court’s final judgment has been entered.

**Appellant** The appealing party in an appeal. Also known as petitioner.

**Appellee** The responding party in an appeal. Also known as respondent.

**Briefs** Documents submitted by the parties’ attorneys to the judge that contain legal support for their side of the case.

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**Defendant’s case** Process by which the defendant calls witnesses and introduces evidence to (1) rebut the plaintiff’s evidence, (2) prove affirmative defenses, and (3) prove allegations made in a cross-complaint.

**Jury instructions (charges)** Instructions given by the judge to the jury that informs them of the law to be applied in the case.

**Verdict** Decision reached by the jury.

**Judgment** The official decision of the court.

(see Exhibit 7.12). For example, in a criminal trial the judge will read the jury the statutory definition of the crime charged. In an accident case, the judge will read the jury the legal definition of negligence.

**Jury Deliberation and Verdict**

The jury then goes into the jury room to deliberate its findings. Jury deliberation can take from a few minutes to many weeks. After deliberation, the jury announces its verdict. In civil cases, the jury also assesses damages. In criminal cases, the judge assesses penalties.

**Entry of Judgment**

After the jury has returned its verdict, in most cases the judge enters judgment to the successful party, based on the verdict. This is the official decision of the court. But the court may overturn the verdict if it finds bias or jury misconduct. This is called a judgment notwithstanding the verdict, or judgment n.o.v., or j.n.o.v., for the Latin judgment non obstante verdicto.

In a civil case, the judge may reduce the amount of monetary damages awarded by the jury if he or she finds the jury to have been biased, emotional, or inflamed. This is called remittitur: The trial court usually issues a written memorandum setting forth the reasons for the judgment. This memorandum, together with the trial transcript and evidence introduced at trial, constitutes the permanent record of the trial court proceeding.

**Appeal**

In a civil case, either party can appeal the trial court’s decision once a final judgment is entered. In a criminal case, only the defendant can appeal. The appeal is made to the appropriate appellate court (see Exhibit 7.13). A notice of appeal must be filed within a prescribed time after judgment is entered (usually within 60 or 90 days). The appealing party is called the appellant, or petitioner. The responding party is called the appellee, or respondent. The appellant often is required to post an appeal bond (e.g., one-and-one-half times the judgment) on appeal.

**Briefs and Oral Argument**

The parties may designate all or relevant portions of the trial record to be submitted to the appellate court for review. The appellant’s attorney may file an opening brief with the court, setting forth legal research and other information to support his or her
6.01J (Civ) PROPERTY DAMAGE

The plaintiff is entitled to be compensated for the harm done to his (her) property. If you find that the property was a total loss, damages are to be measured by either its market value or its special value to plaintiff, whichever is greater. If the property was not a total loss, damages are measured by (the difference in value before and after the harm) (the reasonable cost of repairs) and you may consider such evidence produced by defendant by way of defense to plaintiff's claim. In addition, plaintiff is entitled to be reimbursed for incidental costs or losses reasonably incurred because of the damage to the property, such as (rental of a replacement vehicle during repairs), (towing charges), (loss of use of the property), etc.

SUBCOMMITTEE NOTE

Damage to property is covered generally by Restatement of Torts, §§ 927 and 928. Section 927 provides for damages to be measured by the "market value" or "damages based upon its special value to plaintiff" if that is greater than its market value." Restatement of Torts, § 927, Comment c (1934). Section 928 provides, in the case of damages not amounting to total destruction, damages measured by "the difference between the value of the chattel before the harm and the value after the harm or, at plaintiff's election, the reasonable cost of repair or restoration." This accounts for the parenthesized phrases (the difference in value before and after the harm) and (the reasonable cost of repairs).

Incidental costs will depend on the nature of the property damage. Rental of a substitute vehicle has long been recognized as one such compensable item. Bauer v. Armour & Co., 84 Pa.Super. 174 (1924). Compensation for loss of use is specifically authorized by Restatement of Torts, § 928(b), in the case of less than total loss. The Subcommittee can see no logical reason why such damages should not be awarded under Section 927 in the case of total loss. Nelson v. Johnson, 55 D. & C. 2d 21 (Somerset C.P. 1970). Any further expense, proximately resulting from the loss or damage is recoverable under general provisions of tort law. Nelson v. Johnson, supra, at 33-34.

In the case of damage to automobiles, however, the appellate courts have adhered to the ancient rule requiring testimony of the one who supervised or made the repairs, prior to admission of damage estimates. Mackiw v. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co., 201 Pa.Super. 626, 193 A.2d 745 (1963). This rule has been criticized as time-consuming and "technical" by the very courts adhering to it. Mackiw, supra, 193 A.2d at 745. It further creates an intolerable burden on the courts, in a period when backlog has led to "compulsory" arbitration in many counties of cases valued below $10,000. E.g., Loughery v. Barnes, 181 Pa.Super. 352, 124 A.2d 120 (1956) (appeal after verdict of $341.30 for property damage); Wilk v. Borough of Mt. Oliver, 152 Pa.Super. 539, 33 A.2d 73 (1943) (new trial ordered after verdict of $175). The Subcommittee therefore adopts a rule requiring only the submission of a repair bill or estimate in proof of damages to automobiles (such bill being submitted prior to trial to defense counsel); should defendant wish to challenge such an estimate, he may do so through cross-examination and through the introduction of evidence in his own case. See Watsontown Brick Co. v. Hercules Powder Co., 265 F.Supp. 268, 275 (M.D.Pa.), aff’d, 387 F.2d 99 (3rd Cir. 1967) (after introduction of damage evidence, burden shifts to defendant to show reduction).

Absent stipulation, the issue of reasonable compensation remains a jury issue.

6.01F (Civ) FUTURE PAIN AND SUFFERING

The plaintiff is entitled to be fairly and adequately compensated for such physical pain, mental anguish, discomfort, inconvenience and distress as you believe he (she) will endure in the future as a result of his (her) injuries. [.]
contentions on appeal. The appellee can file a *responding brief* answering the appellant’s contentions.

In some appeals, the attorneys submit their case on “brief” only and ask the court to make a decision based upon the written submission. In other cases, the attorneys on their own or at the request of the court make oral arguments to support their position and clarify what they believe to be the appropriate law. Appellate courts usually permit a brief oral argument at which each party’s attorney is heard.

Not every appellate court permits or allows oral argument in every case. Many cases are decided on the brief submitted. In some courts, it is necessary, at the time of filing, to make any desired request for oral argument or indicate a willingness to have the matter decided on the briefs alone. In some cases, the oral argument is allowed automatically, and in other cases a reason for the desired oral argument must be stated.

In the federal court of appeals, oral argument is allowed unless a panel of three judges unanimously agrees, after reviewing the briefs, that the oral argument is unnecessary because the appeal is frivolous, the dispositive issues have been authoritatively decided, or the facts and argument are presented adequately in the briefs and record and the decisional process would not be aided by oral argument [F.R.A.P. 344].
Typically, oral arguments are made before the court without the presence of clients or witnesses. Because no additional fact-finding is permitted, it is merely a matter of making appropriate legal arguments to attempt to persuade the court to rule in favor of the legal position being argued. Many appellate courts establish a time limit for each side. In some courts, the time limit is enforced by a flashing light when the time has expired, and in other courts by a warning light when the time has almost been used. This is done to allow for final statements.

The judges may waive the time limits, particularly when they use up the attorneys’ allotted time by asking questions. Local practice, however, is what determines how the court will treat the time limit.

**Actions by the Appellate Courts**

After review of the briefs, the record in the form of the trial court transcript, and oral arguments by the attorneys, an appellate court may affirm, reverse, or remand the case to the lower court.

If the appellate court believes there had been no errors in application of the procedural law or the substantive law, it will **affirm** the decision of lower court and the lower court decision will stand. If the appellate court rules that the lower court has made a substantial error, either in the procedural law or the substantive law of the case, it may **reverse** the decision of lower court. In other cases when the court finds a reversible error, the court may **reverse and remand** the case. This means that the appellate court feels that based on the correction of the error of law that the case needs to be retried. The retrial will take place in front of a new judge and a new jury.

In the federal court of appeals, oral argument is allowed unless a panel of three judges unanimously agrees, after reviewing the briefs, that the oral argument is unnecessary because the appeal is frivolous, the dispositive issues have been authoritatively decided, or the facts and argument are presented adequately in the briefs and record and the decisional process would not be aided by oral argument [F.R.A.P. 344].

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The judges may waive the time limits, particularly when they use up the attorneys’ allotted time by asking questions. Local practice, however, is what determines how the court will treat the time limit.

The court also may find that the lower court has made an error that can be corrected, and **remand** the case to the lower court to take additional action or conduct further proceedings. This is called reverse and remand. For example, the lower court may be directed to hold further proceedings in which a jury hears testimony related to the issue of damages and makes an award of monetary damages.

An appellate court will reverse a lower court decision if it finds an **error of law** in the record. An error of law occurs if the jury was improperly instructed by the trial court judge, prejudicial evidence was admitted at trial when it should have been excluded, prejudicial evidence was obtained through an unconstitutional search and seizure, and the like. An appellate court will not reverse a finding of fact unless such finding is unsupported by the evidence or is contradicted by the evidence.
## Concept Review and Reinforcement

### LEGAL TERMINOLOGY

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### SUMMARY OF KEY CONCEPTS

#### Civil Litigation

**Description**

The legal process for resolving disputes between parties. In civil litigation, the plaintiff sues a defendant to recover monetary damages or other remedy for the alleged harm the defendant caused the plaintiff.

#### Pleadings

**Description**

Pleadings consist of paperwork that initiates and responds to a lawsuit.

**Complaint**

A complaint (petition) is filed by the plaintiff with the court and served, in some states, with a summons on the defendant. It sets forth the basis of the lawsuit.
Fact and Notice Pleading
Depending on the jurisdiction, the complaint must either provide a general allegation of the wrongful conduct alleged, called notice pleading; or plead specific facts alleged, called fact pleading.

Pleading Deadlines
Individual court rules provide a time within which the initial complaint or petition must be served, and responsive pleading must be filed to avoid dismissal of the action or a default judgment.

Responsive Pleadings
The responding party (defendant) must file a responsive pleading within the time limit allowed by rule of court, or request an extension of time to respond from the opposing attorney or from the court.

Answer
An answer is filed by the defendant with the court and served on the plaintiff. It usually denies most allegations of the complaint.

Cross-Complaint
A cross-complaint is filed and served by the defendant if he or she countersues the plaintiff. The defendant is the cross-complainant and the plaintiff is the cross-defendant. The cross-defendant must file and serve a reply (answer).

Intervention
In an intervention, a person who has an interest in a lawsuit becomes a party to the lawsuit.

Consolidation
Consolidation means that the court combines separate cases against the same defendant arising from the same incident into one case if it will not cause prejudice to the parties.

Statute of Limitations
A statute of limitations establishes the period during which a plaintiff must bring a lawsuit against a defendant. If a lawsuit is not filed within this time period, the plaintiff loses his or her right to sue.

Discovery
Description
Discovery is the pretrial litigation process for eliciting facts of the case from the other party and witnesses, for purposes of understanding and evaluating the client’s case, focusing the legal team on the strengths and weaknesses of its case; understanding and evaluating the strengths and weaknesses of the opponent’s case; preserving testimony; potentially facilitating settlement; and learning information that may be used to impeach a witness.

Depositions
Depositions are oral testimony given by deponents, either a party or witness, and transcribed.

Interrogatories
Interrogatories are written questions submitted by one party to the other party. These questions must be answered within a specified period of time.

Production of Documents
A party to a lawsuit may obtain copies of all relevant documents from the other party called a production of documents.

Physical and Mental Examination
Physical and mental examinations of a party are permitted upon order of the court where injuries are alleged that could be verified or disputed by such examination.

Requests for Admission
Written requests issued by one party to the lawsuit to the other asking that certain facts or legal issues be admitted as true.

E-Discovery
In many lawsuits, much of the evidence is in digital form. The winning or losing of lawsuits may lie in the ability of a party to conduct electronic discovery. The lawyer and the paralegal must have a sound understanding of permissible e-discovery.

Pretrial Motions
Motion to Dismiss
A motion to dismiss alleges that even if the facts as presented in the plaintiff’s complaint are true, there is no reason to continue the lawsuit. Also called a demurrer.
| **Motion for Judgment on the Pleadings** | A motion for judgment on the pleadings alleges that if all facts as pleaded are true, the moving party would win the lawsuit. No facts outside the pleadings may be considered. |
|**Motion for Summary Judgment** | A motion for summary judgment alleges that there are no factual disputes, so the judge may apply the law and decide the case without a jury. Evidence outside the pleadings, however, may be considered (e.g., affidavits, documents, depositions). |

**Settlement Conference**

| **Description** | A settlement conference is held prior to trial between the parties in front of the judge to facilitate settlement of the case. Also called pretrial bearing. If a settlement is not reached, the case proceeds to trial. |

**Trial**

| **Jury Selection** | Jury selection is done through a process called voir dire. Biased jurors are dismissed and replaced. |
| **Opening Statements** | The parties' lawyers make opening statements. These do not constitute evidence. |
| **Plaintiff's Case** | The plaintiff bears the burden of proof. The plaintiff calls witnesses and introduces evidence to try to prove his or her case. |
| **Defendant's Case** | The defendant calls witnesses and introduces evidence to rebut the plaintiff's case and to prove affirmative defenses and cross-complaints. |
| **Rebuttal and Rejoinder** | In rebuttal and rejoinder, the plaintiff and defendant may call additional witnesses and introduce additional evidence. |
| **Closing Arguments** | Closing arguments are made by the parties' lawyers. Their statements are not evidence. |
| **Jury Instructions** | The judge reads instructions to the jury as to what law the jurors are to apply to the case. |
| **Jury Deliberation** | The jury retires to the jury room and deliberates until it reaches a verdict. |
| **Entry of Judgment** | The judge may: |
| | a. enter the verdict reached by the jury as the court's judgment. |
| | b. grant a motion of judgment n.o.v. if the judge finds that the jury was biased. This means that the jury's verdict does not stand. |
| | c. order remittitur (reduction) of any damages awarded if the judge finds the jury to have been biased or emotional. |

**Appeal**

| **Appellate Court** | 1. Unlike the trial court, whose main function is to make findings of facts, the appellate court's main function is to make findings of law. |
| | 2. In a civil case, unlike a criminal case, either party can appeal the trial court's decision once a final judgment is entered. In a criminal case, only the defendant can appeal. The appeal is made to the appropriate appellate court. |
| **Briefs** | In some appeals, the attorneys submit their case on “brief” only, and ask the court to make a decision based upon the written submission. |
| **Oral Arguments** | In other cases, the attorneys, on their own or at the request of the court, make an oral argument to support their position and clarify what they believe to be the appropriate law. Not every appellate court permits or allows oral argument in every case. |
1. Locate the website for your local state trial court that serves your city, if that website is available. If the website is not available, visit the local state trial court. Locate the local rules for filing complaints, answers, and other documents with the court. Are these rules complicated? Explain.

2. Visit the website http://uscourts.gov/. Locate the U.S. District Court that serves the county or parish in which you live. Go to that court’s website. Does the court permit electronic filing of documents? If so, review the “user manual” on how to make electronic filings with the court.

3. Visit the website http://supremecourt.us.gov/. Click on “Paid Cases Brief Chart” and review the types of forms that can be filed with the U.S. Supreme Court. How much detail does a paralegal need to know when assisting an attorney to file documents with the U.S. Supreme Court? Explain.

4. Visit the website http://www.lexisone.com/. Click on the feature “Deadlines on Demand.” Read about the services available. Are these useful services?

5. Visit the website http://www.lexisone.com/. Click on “Register” and register for the free service to obtain court forms. Find a state form for the state court that serves the county or parish where you live. Find a federal form for the U.S. District Court that serves the county or parish where you live.

1. Define “plaintiff.” Define “defendant.”

2. What is civil litigation? What remedy or remedies are sought by the plaintiff in civil litigation?

3. What are pleadings? Describe the following pleadings: (a) complaint, (b) answer, (c) cross-complaint, and (d) reply.

4. What is a summons? Describe service of process.

5. What is intervention? What is consolidation?

6. Explain statutes of limitations. What purpose do they serve?

7. What is the process of discovery? What purposes does discovery serve? Explain.

8. Describe the following types of discovery: (a) deposition, (b) interrogatories, (c) production of documents, and (d) physical and mental examination.

9. Describe the differences between the following pretrial motions: (a) motion to dismiss, (b) motion for judgment on the pleadings, and (c) motion for summary judgment.

10. What is a settlement conference? What is its purpose?

11. How is a jury selected for a case? What is voir dire? What does trier of fact mean?

12. Describe the following phases of a trial: (a) opening statements, (b) plaintiff’s case, (c) defendant’s case, (d) rebuttal and rejoinder, and (e) closing arguments.

13. What are jury instructions? Explain. What is a verdict? What is a judgment?

14. What is an appeal? Define appellant (petitioner) and appellee (respondent).

15. Describe the following possible decisions by an appellate court: (a) affirm, (b) reverse, and (c) reverse and remand.
Building Paralegal Skills

VIDEO CASE STUDIES

Videotaped Deposition: Deposing an Expert Witness for Use at Trial

An expert witness whose testimony is critical to the issue of negligence may not be available at time of trial. The parties have agreed to the videotaping of the expert’s deposition using a real-time reporting system that provides standard word processing documents simultaneously for the parties.

After viewing the video case study at www.pearsonhighered.com/goldman answer the following:
1. What are the pros and cons to taking a video deposition of an expert witness?
2. Are there any special preparations that need to be made in taking videotaped depositions?
3. How much credibility would you as a juror give to videotaped deposition of an expert witness?

Trial: Direct and Cross-examination of a Witness

The attorneys in a trial ask questions of a fact witness in direct and then in cross-examination to develop the facts of a case.

After viewing the video case study at www.pearsonhighered.com/goldman answer the following:
1. What is the purpose of direct examination?
2. What is the purpose of cross-examination?
3. Why would the attorney ask if it was acceptable to approach the witness?

Preparing for Trial: Preparing a Fact Witness

A paralegal is preparing a witness for deposition and trial and attempts to put the witness at ease by answering the witness’s questions and explaining the procedures.

After viewing the video case study at www.pearsonhighered.com/goldman answer the following:
1. Why is it necessary to prepare a person for deposition or for trial?
2. What is the most important advice the paralegal gives the witness?
3. Is preparing a witness the unauthorized practice of law?

ETHICS ANALYSIS & DISCUSSION QUESTIONS

1. Is there an ethical obligation not to file certain lawsuits?
2. What is meant by frivolous lawsuit? Are there sanctions for filing frivolous lawsuits? Explain.
3. Should email between lawyers and paralegals be treated as confidential and not subject to use as evidence in a case? Why or why not?
4. A former client of the firm where you work sees you on the street at a local lunch stand and shows you a copy of a judgment rendered against him in a small-claims court. He tells you he is out of work and cannot afford to hire a lawyer. [Pennsylvania comments to Ethics Rule 5.5.] Can you help the client proceed pro se (on his own, acting as his own lawyer)? Can you help him prepare the paperwork to appeal the judgment? Does any of this constitute the unauthorized practice of law?
5. You have been advised in your orientation of the ethical rule prohibiting communication with an opponent who is represented by counsel. While surfing the Web, you decide to see if the opposing party has a website. You locate it and check it carefully for any information that might help the investigation of the case assigned to you. You send a request to the site and receive information related to the lawsuit. [Oregon State Bar Op2001–164.] Have you violated the ethical prohibition barring communications with a represented party?
DEVELOPING YOUR COLLABORATION SKILLS

With a group of other students, selected by you or as assigned by your instructor, review the Paralegals at Work at the beginning of the chapter. As a group, discuss the following questions.

1. Identify what document or documents your law firm should prepare on behalf of Rowan, Isis, and their parents to start the lawsuit. Identify what document the trucking company will file with the court to defend the lawsuit.

2. What are the time limits for filing and responding to a complaint? Are there any other local requirements to commence and respond to the lawsuit?

3. Why would the state or federal court be more preferable?

PARALEGAL & PORTFOLIO EXERCISE

Refer to the Paralegals at Work opening scenario. Find online if possible, or if not found online, find in the law library or the federal U.S. District Court, the proper form for filing a complaint for personal injuries in the federal U.S. district court that serves your city. Prepare as best as possible, from the facts of the Paralegals at Work, the complaint and answer in the case presented. If insufficient facts are provided to complete the complaint or answer, make up the missing information and complete these documents.

LEGAL ANALYSIS & WRITING CASES


In April 1989, Akos Swierkiewicz, a native of Hungary, began working for Sorema N.A., a reinsurance company headquartered in New York. Swierkiewicz initially was employed as senior vice president and chief underwriting officer. Nearly six years later, the chief executive officer of the company demoted Swierkiewicz to a marketing position, and he was removed from his underwriting responsibilities. Swierkiewicz’s underwriting responsibilities were transferred to a 32-year-old employee with less than 1 year of underwriting experience. Swierkiewicz, who was 53 years old at the time and had 26 years of experience in the insurance industry, was dismissed by Sorema.

Swierkiewicz sued Sorema to recover monetary damages for alleged age and national-origin discrimination in violation of federal antidiscrimination laws. Sorema moved to have Swierkiewicz’s complaint dismissed. The District Court dismissed Swierkiewicz’s complaint for not being specific enough, and the Court of Appeals affirmed. Swierkiewicz appealed to the U.S. Supreme Court.

Question
1. Under the notice pleading system, was plaintiff Swierkiewicz’s complaint sufficiently stated to permit the case to go to trial?

Norgart v. The Upjohn Company 21 Cal.4th 383, 87 Cal.Rptr.2nd 453 1999

Kristi Norgart McBride lived with her husband in Santa Rosa, California. Kristi suffered from manic-depressive mental illness (now called bipolar disorder). In this disease, the person cycles between manic (ultrahappy, expansive, extrovert) episodes to depressive episodes. The disease is often treated with prescription drugs. In April 1984, Kristi attempted suicide. A psychiatrist prescribed an antianxiety drug. In May 1985, Kristi attempted suicide again by overdosing on drugs. The doctor prescribed Halcion, a hypnotic drug, and added Darvocet-N, a mild narcotic analgesic. On October 16, 1985, after descending into a severe depression, Kristi committed suicide by overdosing on Halcion and Darvocet-N.

On October 16, 1991, exactly six years after Kristi’s death, Leo and Phyllis Norgart, Kristi’s parents, filed a lawsuit against the Upjohn Company, the maker of Halcion, for wrongful death based on Upjohn’s alleged failure to warn of the unreasonable dangers of taking Halcion. The trial court granted Upjohn’s motion for summary judgment based on the fact that the one-year statute of limitations for wrongful death actions had run. The Court of Appeals reversed, and Upjohn appealed to the Supreme Court of California.

Question
1. Is the plaintiff’s action for wrongful death barred by the one-year statute of limitations?
In early 1996, a disease called Mad Cow Disease was diagnosed in Britain. The disease triggers a deadly brain condition in cattle, which in turn causes degeneration and fatal brain disease in humans who eat beef from infected cattle. Oprah Winfrey hosts a popular television show in the United States, which is produced by Harpo Productions, Inc., a company wholly owned by Winfrey. Producers, editors, and other employees of the Oprah Winfrey Show researched the Mad Cow Disease topic as part of a “Dangerous Foods” episode of the Oprah Winfrey Show. Guests on the show included Dr. Gary Weber, who holds a Ph.D. in animal science and represented the National Cattlemen’s Beef Association; Dr. Will Hueston from the U.S. Department of Agriculture and a leading expert on Mad Cow Disease; Dr. James Miller, a physician with experience in treating individuals inflicted with the disease; and Howard Lyman, a former cattle rancher turned vegetarian and an activist for the Humane Society.

On the show, which was aired April 16, 1996, Lyman made several statements regarding the threat that Mad Cow Disease posed to people in the United States. The experts on the show countered that no case of Mad Cow Disease had been reported in the United States and explained the extensive animal testing and oversight employed by the U.S. Department of Agriculture and cattle producers to prevent Mad Cow Disease in the United States.

Following the broadcast of Oprah Winfrey’s “Dangerous Foods” show, the cattle market in Texas dropped drastically. The live cattle futures market on the Chicago Mercantile Exchange dropped within an hour of the airing of the Oprah Winfrey Show. The depressed market for finished cattle continued its slump for approximately three months after the show.

Plaintiffs Paul Engler and Cattle Feeders, Inc. filed a lawsuit against defendants Oprah Winfrey and Harpo Productions, Inc., alleging that the defendants had engaged in the intentional tort of business disparagement of the product cattle. After testimony was heard from both sides, the trial court judge submitted the following question to the jury: “Did a named defendant publish a false, disparaging statement that was of and concerning the cattle of a plaintiff?” The trial court jury returned the answer “no” to this question, and the trial court judge entered judgment in favor of the defendants Oprah Winfrey and Harpo Productions, Inc. The plaintiffs appealed this decision to the U.S. Court of Appeals, arguing that the trial court judge’s business disparagement instruction was in error.

Question
1. Was the trial court judge’s business disparagement instruction to the jury an error that requires the case to be reversed on this issue on appeal?

Susan and Frank Ferlito were invited to a Halloween party. They decided to attend as Mary (Mrs. Ferlito) and her little lamb (Mr. Ferlito). Mrs. Ferlito constructed a lamb costume for her husband by gluing cotton batting manufactured by Johnson & Johnson Products, Inc. (JJP), to a suit of long underwear. She used the same cotton batting to fashion a headpiece, complete with ears. The costume covered Mr. Ferlito from his head to his ankles, except for his face and hands, which were blackened with paint. At the party, Mr. Ferlito attempted to light a cigarette with a butane lighter. The flame passed close to his left arm, and the cotton batting ignited. He suffered burns over one-third of his body. The Ferlitos sued JJP to recover damages, alleging that JJP failed to warn them of the ignitability of cotton batting. The jury returned a verdict for Mr. Ferlito in the amount of $555,000 and for Mrs. Ferlito in the amount of $70,000. JJP filed a motion for judgment notwithstanding the verdict (j.n.o.v.).

Question
1. Should defendant JJP’s motion for j.n.o.v. be granted?

Pizza Hut, Inc., the largest pizza chain in the United States, operates more than 7,000 restaurants. Papa John’s International, Inc., is the third-largest pizza chain in the United States, with more than 2,050 locations. In May 1995, Papa John’s adopted a new slogan, “Better Ingredients. Better Pizza,” and applied for and received a federal trademark for this slogan. Papa John’s spent more than $300 million building customer recognition and goodwill for this slogan. The slogan has appeared on millions of signs, shirts, menus, pizza boxes, napkins, and other items and has regularly appeared
On November 9, 1965, Mr. Simblest was driving a car that collided with a fire engine at an intersection in Burlington, Vermont. The accident occurred on the night on which a power blackout left most of the state without lights. Mr. Simblest, who was injured in the accident, sued the driver of the fire truck for damages.

During the trial, Simblest testified that when he entered the intersection, the traffic light was green in his favor. All of the other witnesses testified that the traffic light had gone dark at least 10 minutes before the accident. Simblest testified that the accident was caused by the fire truck's failure to use any warning lights or sirens. Simblest's testimony was contradicted by four witnesses who testified that the fire truck had used both its lights and sirens. The jury found that the driver of the fire truck had been negligent and rendered a verdict for Simblest.

Question
1. Who wins?
On January 9, 2009, the court notified the parties that the appeal would be dismissed for want of prosecution unless arrangements were made for filing the record or the appellant explained why additional time was needed to file the record. It also notified the parties that the appeal would be dismissed unless the appellant remitted the filing fee for the appeal. The appellant, Blanca Carrillo, did not respond to the Court’s notices. The appellant did not file an affidavit of indigence and is not entitled to proceed without payment of costs. There was no satisfactory explanation for the failure to file the record, and no reasonable explanation for the failure to pay the filing fee for the appeal. The court dismissed the appeal for want of prosecution.

**Question**

1. Why would a court dismiss a case for failure to meet a time deadline?
2. Why would a court dismiss a case for not paying the filing fees?
3. Is justice served by the court enforcing these time limits and filing requirements?

**WORKING WITH THE LANGUAGE OF THE COURT CASE**

**Gnazzo v. G.D. Searle & Co.**

*973 F.2d 136 1992*

*U.S. App. Lexis 19453 United States Court of Appeals, Second Circuit*  

Read the following case, excerpted from the Court of Appeals opinion. Review and brief the case. In your brief, answer the following questions.

1. What is a statute of limitations? What purposes does such a statute serve?
2. What was the Connecticut statute of limitations for the injury alleged by the plaintiff?
3. What is summary judgment? When will it be granted?
4. What was the decision of the trial court? Of the Court of Appeals?

**Pierce, Circuit Judge**

On November 11, 1974, Gnazzo had a CU-7 intrauterine device (IUD) inserted in her uterus for contraceptive purposes. The IUD was developed, marketed, and sold by G.D. Searle & Co. (Searle). When Gnazzo’s deposition was taken, she stated that her doctor had informed her that “the insertion would hurt, but not for long,” and that she “would have uncomfortable and probably painful periods for the first three to four months.” On October 11, 1975, Gnazzo found it necessary to return to her physician due to excessive pain and cramping. During this visit she was informed by her doctor that she had pelvic inflammatory disease (PID). She recalled that he stated that the infection was possibly caused by venereal disease or the use of the IUD. The PID was treated with antibiotics and cleared up shortly thereafter. Less than one year later, Gnazzo was again treated for an IUD-associated infection. This infection was also treated with antibiotics. Gnazzo continued using the IUD until it was finally removed in December of 1977.

Following a laparoscopy in March of 1989, Gnazzo was informed by a fertility specialist that she was infertile because of PID-induced adhesions resulting from her prior IUD use. Subsequent to this determination, and at the request of her then-attorneys, Gnazzo completed a questionnaire dated May 11, 1989. In response to the following question, “When and why did you first suspect that your IUD had caused you any harm?” Gnazzo responded “sometime in 1981” and explained: “I was married in April 1981, so I stopped using birth control so I could get pregnant—nothing ever happened (of course), then I started hearing and reading about how damaging IUDs could be. I figured that was the problem; however, my marriage started to crumble, so I never pursued the issue.”

On May 4, 1990, Gnazzo initiated the underlying action against Searle. In an amended complaint, she alleged that she had suffered injuries as a result of her use of the IUD developed by Searle. Searle moved for summary judgment on the ground that Gnazzo’s claim was time-barred by Connecticut’s three-year statute of limitations for product liability actions. Searle argued,
inter alia, that Gnazzo knew in 1981 that she had suffered harm caused by her IUD. Gnazzo contended that her cause of action against Searle accrued only when she learned from the fertility specialist that the IUD had caused her PID and subsequent infertility.

In a ruling dated September 18, 1991, the district court granted Searle’s motion for summary judgment on the ground that Gnazzo’s claim was time-barred by the applicable statute of limitations. In reaching this result, the court determined that Connecticut law provided no support for Gnazzo’s contention that she should not have been expected to file her action until she was told of her infertility and the IUD’s causal connection. This appeal followed.

On appeal, Gnazzo contends that the district court improperly granted Searle’s motion for summary judgment because a genuine issue of material fact exists as to when she discovered, or reasonably should have discovered, her injuries and their causal connection to the defendant’s alleged wrongful conduct. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. We consider the record in the light most favorable to the non-movant. However, the non-movant “may not rest upon the mere allegations of denial of her pleading, but must set forth specific facts showing that there is a genuine issue for trial.”

Under Connecticut law, a product liability claim must be brought within “three years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered.” In Connecticut, a cause of action accrues when a plaintiff suffers actionable harm. Actionable harm occurs when the plaintiff discovers or should discover, through the exercise of reasonable care, that he or she has been injured and that the defendant’s conduct caused such injury.

Gnazzo contends that “the mere occurrence of a pelvic infection or difficulty in becoming pregnant does not necessarily result in notice to the plaintiff of a cause of action.” Thus, she maintains that her cause of action did not accrue until 1989 when the fertility specialist informed her both that she was infertile and that this condition resulted from her previous use of the IUD.

Under Connecticut law, however, “the statute of limitations begins to run when the plaintiff discovers some form of actionable harm, not the fullest manifestation thereof.” Therefore, as Gnazzo’s responses to the questionnaire indicate she suspected “sometime in 1981” that the IUD had caused her harm because she had been experiencing trouble becoming pregnant and had “started hearing and reading about how damaging IUDs could be and had figured that was the problem.”

Thus, by her own admission, Gnazzo had recognized, or should have recognized, the critical link between her injury and the defendant’s causal connection to it. In other words, she had “discovered, or should have discovered through the exercise of reasonable care, that she had been injured and that Searle’s conduct caused such injury.” Consequently, by the time she commenced her action in 1990, Gnazzo was time-barred by the Connecticut statute of limitations.

Since we have determined that Gnazzo’s cause of action commenced in 1981, we need not address Searle’s additional contention that Gnazzo’s awareness in 1975 of her PID and her purported knowledge of its causal connection to the IUD commenced the running of the Connecticut statute of limitations at that time.

We are sympathetic to Gnazzo’s situation and mindful that the unavoidable result we reach in this case is harsh. Nevertheless, we are equally aware that “it is within the Connecticut General Assembly’s constitutional authority to decide when claims for injury are to be brought. Where a plaintiff has failed to comply with this requirement, a court may not entertain the suit.” The judgment of the district court is affirmed.