Fundamentals of Litigation for Paralegals

Fundamentals of Litigation for Paralegals

Tenth Edition

MARLENE PONTRELLI MAEROWITZ

THOMAS A. MAUET

Wolters Kluwer

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

Cover image: iStock.com/Ron and Patty Thomas

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-5438-0167-5

Library of Congress Cataloging-in-Publication Data

Names: Maerowitz, Marlene A., author. | Mauet, Thomas A., author.
Title: Fundamentals of litigation for paralegals / Marlene Pontrelli Maerowitz, Thomas Mauet.
Description: Tenth edition. | New York : Wolters Kluwer, 2019. | Includes index. | Summary: "Paralegal textbook for basic course in litigation for paralegal students"—Provided by publisher.
Identifiers: LCCN 2019027619 | ISBN 9781543801675 (paperback) | ISBN 9781543815962 (ebook)
Subjects: LCSH: Civil procedure—United States. | Pre-trial procedure—United States. | Actions and defenses—United States. | Legal assistants—United States—Handbooks, manuals, etc. | LCGFT: Textbooks
Classification: LCC KF8841 .M37 2019 | DDC 347.73/5—dc23
LC record available at https://lccn.loc.gov/2019027619

About Wolters Kluwer Legal & Regulatory U.S.

Wolters Kluwer Legal & Regulatory U.S. delivers expert content and solutions in the areas of law, corporate compliance, health compliance, reimbursement, and legal education. Its practical solutions help customers successfully navigate the demands of a changing environment to drive their daily activities, enhance decision quality and inspire confident outcomes.

Serving customers worldwide, its legal and regulatory portfolio includes products under the Aspen Publishers, CCH Incorporated, Kluwer Law International, ftwilliam.com, and MediRegs names. They are regarded as exceptional and trusted resources for general legal and practice-specific knowledge, compliance and risk management, dynamic workflow solutions, and expert commentary.

To our students—
Past, Present, and Future

About the Authors

Marlene A. Pontrelli is an attorney with Dickinson Wright PLLC, in Phoenix, Arizona, and the Family Law Group Practice Chair. She is admitted to both the Arizona and California bars. Ms. Pontrelli is a judge pro tem for the Superior Court of Maricopa County in family law. She has extensive trial and appellate experience, including appearing before the Arizona Court of Appeals, Arizona Supreme Court, and Ninth Circuit Court of Appeals.

Ms. Pontrelli is an adjunct professor at Arizona State University School of Law where she teaches a class on family law.

Thomas A. Mauet is the former director of the Trial Advocacy Program at the University of Arizona and teaches Evidence, Pretrial Litigation, and Trial Advocacy.

For ten years, Professor Mauet practiced as a trial lawyer in Chicago. He was a prosecutor with the Cook County State's Attorney and the United States Attorney offices. He was a commercial litigator and specialized in medical negligence litigation with the firm of Hinshaw & Culbertson. During these years, he also was an adjunct faculty member at Loyola and Chicago-Kent law schools, teaching criminal law and trial advocacy.

Professor Mauet was an Arizona Superior Court Judge pro tem in 1987-1988 and in 1988-1989 taught at George Washington University as the Howrey Professor of Trial Advocacy. He has also served as a visiting faculty member at Harvard Law School's trial advocacy program and at Washington University. He is a co-founder of the Arizona College of Trial Advocacy. He is a former regional director of the National Institute for Trial Advocacy (NITA) and has taught in numerous NITA programs throughout the United States since 1976.

Professor Mauet's research interests center on the application of social science research, particularly in psychology and communications, to the jury trial process.

Summary of Contents

Contents

PART II: PRETRIAL LITIGATION

Preface

APPROACH

Very few books stand the test of time. We are pleased that the approach we took with this text over thirty years ago has indeed stood that test. Since the very first edition, our approach to a litigation textbook for paralegals has been to include information on all areas of civil litigation, even though, due to time constraints, not all areas are covered in a litigation course. The purpose for including this additional information is to allow you to use this book not only as a text for learning, but as a reference book once you are in practice.

We have found that civil litigation can often be oversimplified, which hinders the learning and understanding process; on the other hand, although civil litigation is very rule-oriented and can be complex, easy-to-follow steps can be given to help you learn the rules. Thus, we attempt to strike a balance between giving sufficient detail for you to learn and understand this area of law, and, at the same time, making the steps as clear as possible. You will find that the text breaks down each civil procedure rule into easy-to-follow steps. Each step explains the process so that you are not just following the rules, but understanding them as well. We believe that as you progress through your litigation course and through your career, you will come to appreciate even more the detailed approach taken.

ORGANIZATION

This book takes you through each stage of the litigation process, from the initial fact-gathering stage through post-judgment proceedings. Because there are alternative ways to resolve disputes through either arbitration or mediation, the book also covers these topics. Each chapter is designed

to give you a thorough understanding of the procedural rules governing the litigation process, as well as a system for transferring your knowledge of the procedural rules into the litigation skills necessary to draft litigation documents such as pleadings, discovery requests, and motions. Excerpts from case law are also provided in each chapter so that you can see how the concepts and rules discussed in each chapter are applied by the court to real situations.

Always remember that behind every litigation case, there are clients who are either suing or being sued and witnesses who have knowledge of the facts and events surrounding the dispute. Thus, important skills for collecting data, interviewing clients, and taking witness statements are not only discussed, but are also demonstrated throughout the text. Checklists for locating witnesses, including Internet resource sites, are also provided.

KEY FEATURES

You will note that many of the legal terms that are central to the discussion in any given chapter appear in boldface type. Each of these boldfaced terms is defined in the margin of the book where the word appears and also in the Glossary at the end of the book. The Glossary also provides definitions of the other legal terms that are used in the text; should you encounter any legal term that is unfamiliar, you can refer to the Glossary for an explanation.

At the beginning of each chapter, you will find two sections. The first section is an outline of the chapter. You may use this section to obtain a quick overview of the chapter and also to help you locate a particular area. The next section identifies the chapter's objectives. Keep these objectives in mind as you go through the chapter.

At the end of each chapter, you will find five important sections. The first section is a "Chapter Summary," which highlights the primary concepts in each chapter. The Summary, of course, should never be used as a substitute for reading the chapter. However, the Summary is useful when you wish to review the content of each chapter.

The "Chapter Checklist" section is meant to ensure that you have identified and understood the legal terms that were defined and explained in the chapter. The third section at the end of each chapter is a series of questions. The "Review Questions" may be used as a study guide to further test your understanding of the main concepts discussed in each chapter. You will also find sections on "Research Questions" and "Additional Resources." These sections are designed to help you integrate your legal research skills with the litigation concepts you are learning in the text. The sites and publications listed are

not necessarily endorsed by the authors, but are provided to you as a convenience.

An excerpt of a case that demonstrates the concepts in the chapter. After each case is a list of questions. The questions are designed to help understand the case and rules set forth in the chapter.

In addition to the review questions in this book, a workbook is available at the companion website that accompanies the book. The workbook gives you an opportunity to work thoroughly with the rules and concepts discussed in the text and contains additional questions and assignments. The tenth edition has been expanded and amended to complement the changes in the main text.

As technology has changed, so has the way we conduct litigation. You will find throughout this text sections that specifically address electronic information and the role it plays in a litigation practice. In addition, the chapter on social media in litigation has been updated for this edition. Interactive social networking sites are used not just for connecting with friends, but in many ways have changed the way we prepare a case for trial.

TEXTBOOK RESOURCES

Additional resources to accompany this text are available at the companion website. Students can download the electronic workbook that helps bridge the gap between knowledge and application. The workbook tests understanding of the concepts presented in the textbook and allows application of those concepts to a variety of litigation matters. In addition, the exercises in this workbook offer practice in drafting litigation documents, including pleadings, motions, and discovery requests. Instructor's resources include a comprehensive Instructor's Manual, Test Bank, and PowerPoint slides to help with classroom preparation.

ACKNOWLEDGMENTS

No textbook can be written without the help and guidance from numerous individuals. Elizabeth Kenny has worked with us since the very first edition twenty-six years ago, and we have been fortunate enough to work with her on every edition, including this one. Once more, she has provided us with a tremendous amount of guidance, suggestions, substantive comments, and support. Paul Sobel at The Froebe Group kept us all on track as he oversaw the editing and proofreading of the text. We appreciate his patience and gentle

prodding to see the text through to completion. Finally, we gratefully acknowledge the permission of West Publishing Company to reprint the federal judicial circuit map (Exhibit 1.1) and the permission of Wolters Kluwer to reprint Exhibits 1.2, 1.3, and 2.1.

Marlene Pontrelli Maerowitz
Thomas A. Mauet
July 2019

Fundamentals of Litigation for Paralegals

I

Investigating and Planning the Litigation

1

Introduction to Litigation

Chapter Objectives

In this introductory chapter to litigation you will learn

- What the differences are between civil litigation and other types of litigation
- Where to find the law applicable to litigation matters
- How the court system is structured
- How a case moves through the process
- What types of remedies an aggrieved party may seek from the court
- What the paralegal's role is in the litigation process
- What ethical standards paralegals must follow

A. INTRODUCTION

You have just been called into the office of an attorney in the firm that recently hired you. The attorney tells you that a prospective client will be coming to the office shortly who has a "problem" that might lead to litigation—a problem that appears to be just right for you to assist with and help manage. With a smile, the attorney hands you a note containing the prospective client's name and appointment time. Apprehensively, you walk out of the attorney's office, thinking: "What do I do now?"

What you do, when you do it, how you do it, and why you do it is what this book on litigation is all about. This first chapter provides an overview of the litigation process and your role in that process. Each step in the process will be discussed in detail in the following chapters.

B. THE LITIGATION PROCESS

Litigation
Resolution of disputes through the court system

Civil litigation
Resolution of disputes between private parties through the court system

Litigation is the resolution of disputes through the court system. This book is about the civil litigation process, as compared to criminal or administrative litigation. **Civil litigation** is the resolution of disputes between private parties through the court system.[1] Criminal litigation is not between private parties; rather, in criminal litigation the government prosecutes an action against individuals who have committed crimes

1. An alternative to the use of courts, arbitration is also a popular method by which civil disputes are resolved. See Chapter 14.

against society. If the crime also results in damages to the victim's person or property, the victim may bring a civil action to obtain recovery for the damages. This civil action is separate from the criminal action.

Administrative litigation is the process by which administrative agencies resolve disputes that concern their administrative rules and regulations. For example, if an employee is injured on the job and a worker's compensation claim is filed, the worker's compensation agency will determine the claim and hear any appeal or dispute the employee has regarding the determination of the claim. In general, if an administrative remedy exists, the claimant must first exhaust the administrative remedies before proceeding with a court action.

Civil litigation permits parties to settle their disputes in an orderly and nonviolent manner. The entire litigation process is governed by formal rules that specify the procedures the parties must follow from commencement of the litigation until the litigation terminates. Accordingly, once a dispute is submitted to the courts for resolution, all parties to the litigation must carefully follow the court's procedural rules.

Each state has its own rules of procedure. A party filing an action in a state court must follow the procedural rules of that particular state court. Actions filed in federal court are governed by the Federal Rules of Civil Procedure. Always consult the appropriate rules of procedure before handling any litigation matter.

The rules discussed in this book are the Federal Rules of Civil Procedure. However, most states have rules modeled, at least in part, after the Federal Rules. Accordingly, once you master the Federal Rules, you can easily apply that understanding to your particular state rules.

1. Sources of law

Where do you find the law applicable to the matter you are handling? There are three sources of law that you will need to consult for every litigation matter: statutes, court cases, and constitutions.

a. Statutes

Statutes are laws enacted by state or federal legislatures that govern substantive and legal rights and principles, as well as procedural rules. In some instances, statutes are referred to as codes. All laws enacted by Congress are found in the United States Code. The United States Code is divided into various titles, each of which deal with specific subject matters such as agriculture, banking, copyrights, education, and so on. State statutes are usually similarly divided. In these codes, you will also find the rules of civil procedure that exist at both the federal and state level.

In addition to the United States Code and state statutes or codes, individual municipalities, such as your town or city, may also enact their own laws, which apply only in their municipality. The municipal laws are often referred to as ordinances. These ordinances typically govern matters such as rent control, parking, and items of local interest. A municipality may not enact ordinances that conflict in any way with the law of the federal or state governments.

An individual court also may adopt procedural rules governing the cases filed in that particular court as long as the rules are not in conflict with state statutes. These rules are referred to as the local rules of court. The local rules govern everything from the type of paper on which a complaint must be filed to the dates on which motions may be heard.

All of these statutes, codes, ordinances, and rules help to determine the legal rights of parties and help to regulate the litigation process. Accordingly, they are all sources that must be referred to when handling any litigation matter.

RULE

Federal Rules of Civil Procedure Rule 1 Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and procedure.

b. Court cases

Cases are decisions of the courts interpreting the law. Once a decision has been made, the court will generally write an opinion. Certain opinions that address a unique or important legal issue are published in bound volumes and are used by other litigants to determine how the law may be interpreted with respect to their particular dispute. Familiarizing yourself with previous court cases that relate to the particular legal dispute you are assigned may be essential. This is because court cases often establish precedent for a particular dispute. In fact, throughout the course of our nation's history, thousands of opinions have been published and relied on as precedents to decide new controversies as they arise.

Common law
Body of law developed in England from custom and usage

Even prior to the published opinions of our courts, the early American colonists brought with them a body of law from England referred to as the **common law**. Common law developed in England from usage and custom, and was affirmed by the English judges and courts. Common law, to the extent it is not inconsistent with the constitutions or laws of

the United States or of the individual states, is generally still applicable in the United States.

c. Constitutions

The federal Constitution is the highest law of the land. In addition to the United States Constitution, each of the 50 states has its own constitution. No rule of law enacted by a state may violate the state's constitution. Moreover, no state constitution or state or federal law may violate the federal Constitution.

2. The court system

Litigation begins when the aggrieved party files a complaint in the appropriate court. The aggrieved party is called the **plaintiff**. The party whom the complaint is filed against is called the **defendant**. In the **complaint** the plaintiff must state the basis of the claim against the defendant so that the defendant will be apprised of the action giving rise to the claim. As discussed later in this chapter, the plaintiff must also request specific relief from the court. The complaint is served upon the defendant along with a **summons** commanding the defendant to appear before the court.

Complaint
Document filed by an aggrieved party to commence litigation

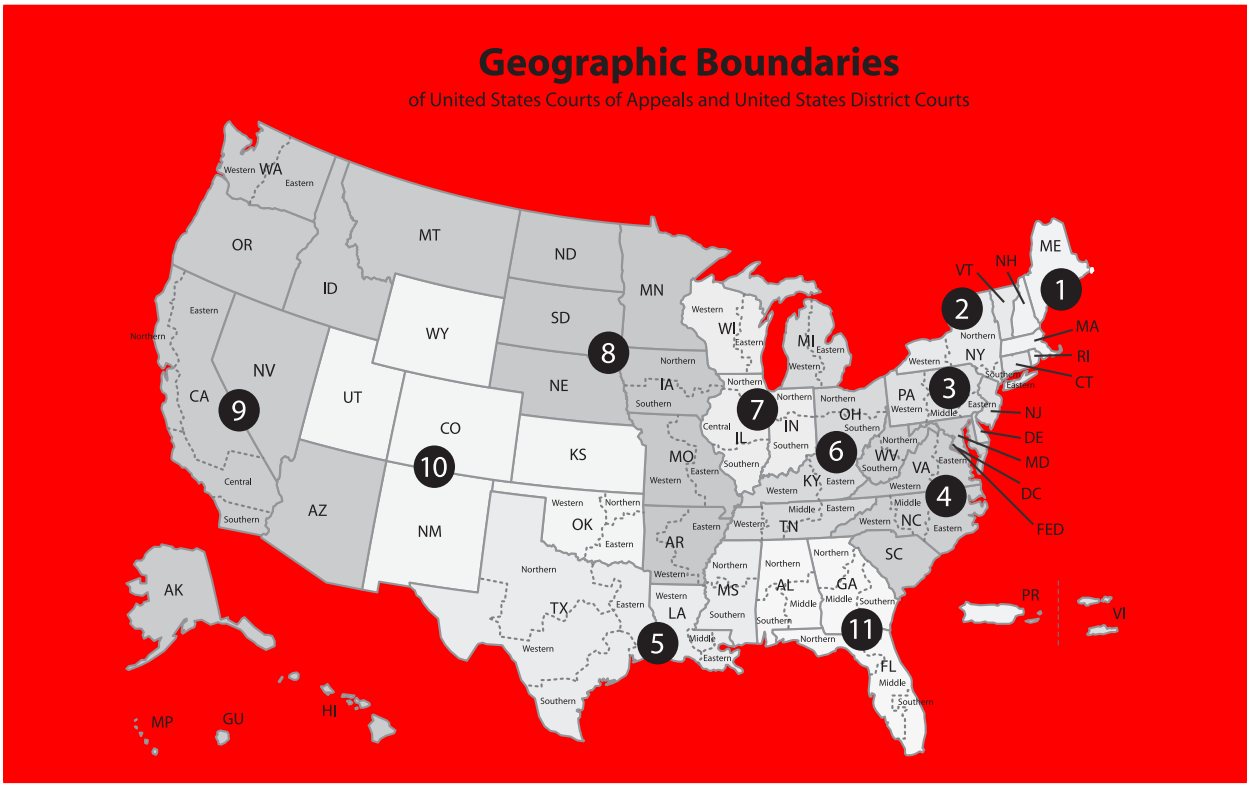
Summons
Notice accompanying the complaint that commands the defendant to appear and defend against the action within a certain period of time

The complaint is always filed in the **trial court**. Under the federal court system, this trial court is called the **United States District Court**. There are 89 district courts in the continental United States. However, district courts also exist in Puerto Rico, the Virgin Islands, Guam, the District of Columbia, and the Northern Mariana Islands. Accordingly, if including such courts, there are 94 total U.S. district courts. Each state has at least one district court, and several states have two or more, depending on the state's population.

In the state court system, the name of the trial court varies from state to state. In some states, the trial court is called the superior court or the court of common pleas. In all states, other, inferior courts exist to hear certain smaller and less complex matters. These inferior courts are sometimes referred to as municipal courts, justice courts, city and parish courts, and small claims courts. These inferior courts are an important part of the litigation process because they are designed to hear matters more quickly and less expensively than the general trial courts.

If a party loses in the trial court, that party has an automatic right to appeal to the next highest court. In the federal system, the party appeals to the **Court of Appeals** for the appropriate circuit in which the district court sits. The fifty states are divided into eleven circuits plus the District of Columbia, which is its own circuit. In addition, there is one Court of

Exhibit 1.1. *The Thirteen Federal Judicial Circuits*



Appeals for the Federal Circuit that hears appeals from special courts such as the United States Claims Court and the Court of International Trade. (See Exhibit 1.1.)

On appeal, the appellate court is limited to a review of the record of the court below. The court will not hear from any witnesses or take new evidence. The party appealing the decision of the trial court must demonstrate that there was an error in the court below that affected the outcome of the case. The appellate court will determine whether the law was incorrectly applied on the facts, or if the decision reached is not supported by the facts. Even though new evidence may not be presented to the court, all parties to the appeal will have an opportunity to submit a written brief on the issues before the appellate court. After the parties submit briefs, the court will hear oral argument. Oral argument is an opportunity for the lawyers to answer any questions the appellate judges may have and to explain their clients' positions more fully.

After oral argument, the court will render one of four decisions. The court will either **affirm, affirm with modification, reverse**, or **reverse and remand**. A decision is affirmed if the court rules the same way as the trial court. Sometimes, the court will rule the same way, but modify some element of the decision below. For example, assume that a trial court rules in

an action for unlawful detainer that the plaintiff is entitled to possession of property and back rent in the amount of $1,200. If the appellate court agrees that the plaintiff should be entitled to possession of the property, but believes the back rent owed is only $998, the appellate court will affirm the trial court's decision and modify the amount of back rent.

If the court disagrees with the trial court, the appellate court will reverse the decision. Sometimes, however, the appellate court is not certain, based on the record before it, whether it disagrees with the trial court. In this situation the court gives an opinion stating how it would rule assuming that certain facts are true. The appellate court will then reverse the decision and send it back (remand) to the trial court for a decision in accordance with the opinion expressed by the appellate court.

If a party loses in the appellate court, the losing party may petition the next highest court for review. In the federal court system this is the **United States Supreme Court**. The Supreme Court is the highest court in the federal system. In addition to hearing appeals from the Courts of Appeals, the Supreme Court also has discretion to hear appeals from a state's highest court if the decision in the state court involves a constitutional issue.

Appeal to the Supreme Court is not automatic, but rather is discretionary with the Court. The losing party must petition the Supreme Court to review the matter. If review is granted, the Court will affirm, affirm with modification, reverse, or reverse and remand the decision of the appellate court. If review is denied, the decision of the appellate court will become final.

An organizational chart for the federal court system is shown in Exhibit 1.2. You will note that special courts such as bankruptcy courts

Exhibit 1.2. The Federal Court System

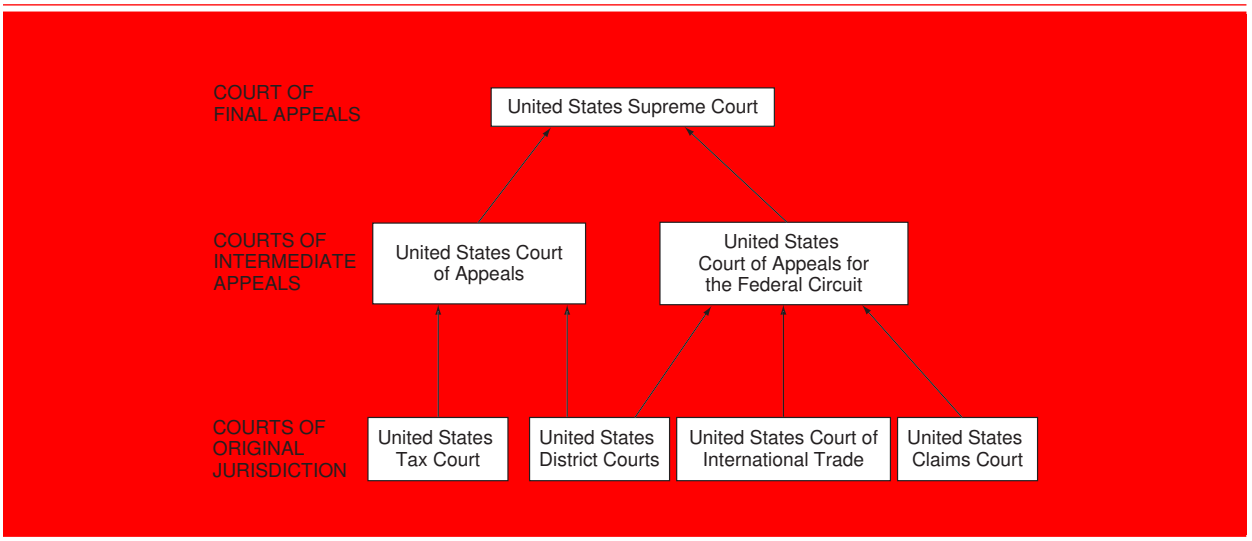
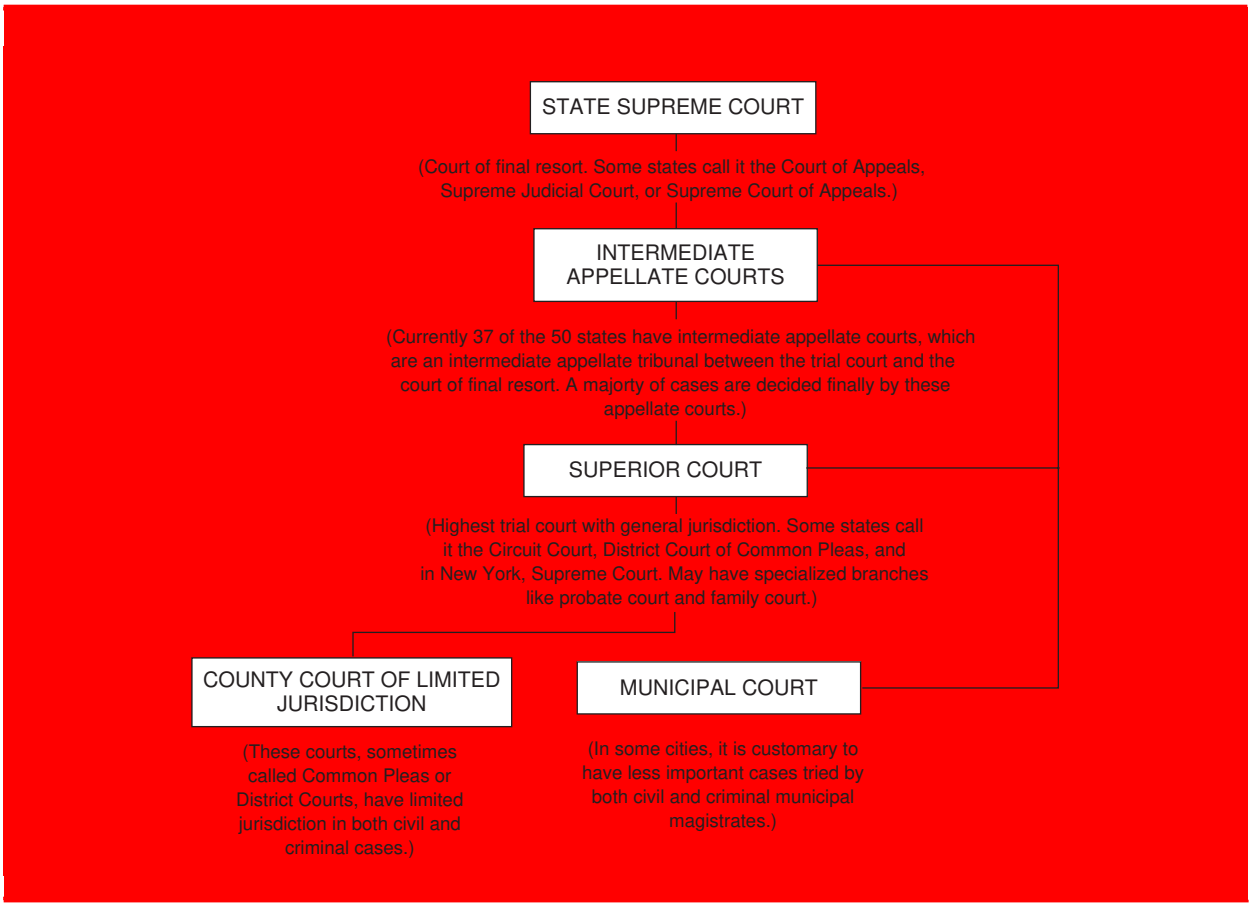


Exhibit 1.3. The State Court System



and the Court of International Trade exist to hear specific cases. The typical organization for a state court system is shown in Exhibit 1.3.

3. Overview for litigation cases

Litigation consists of four basic stages: (1) information gathering, (2) pleading, (3) discovery and motions, and (4) trial and post-trial proceedings. Each of these stages is discussed in detail in subsequent chapters. However, this section gives you a brief overview of the four stages and a sample path for a typical litigation case.

Prior to the filing of any lawsuit, you and the attorney will spend time gathering information and obtaining the facts necessary to support your client's case. This is the first stage of litigation. This stage will be engaged in by both sides since a potential defendant is often aware that

a lawsuit may be filed against him. After sufficient facts are gathered by the plaintiff to support a lawsuit, the lawsuit will begin by the filing of a complaint. The complaint, along with the summons, is served on the defendant.

Upon receipt of the summons and complaint, the defendant must file a response, or else the defendant will be in **default** and a judgment may be entered against the defendant. This is the second stage. The defendant has several choices with respect to the type of response that may be made. First, if the defendant believes that there is some defect in the complaint, either a procedural rule that is not followed or insufficient facts alleged against the defendant, the defendant may file a **motion**. A motion is a request to the court for an order or ruling. The types of motions that may be filed by the defendant are discussed in Chapter 5. If the defendant does not file a motion or if the motion is denied by the court, the defendant will answer the complaint. The **answer** is the defendant's response to the specific allegations in the complaint and states any defenses the defendant may have. Once an answer is filed, the pleading stage—that is, formal written documents by the parties to either start litigation or respond to litigation—is complete.

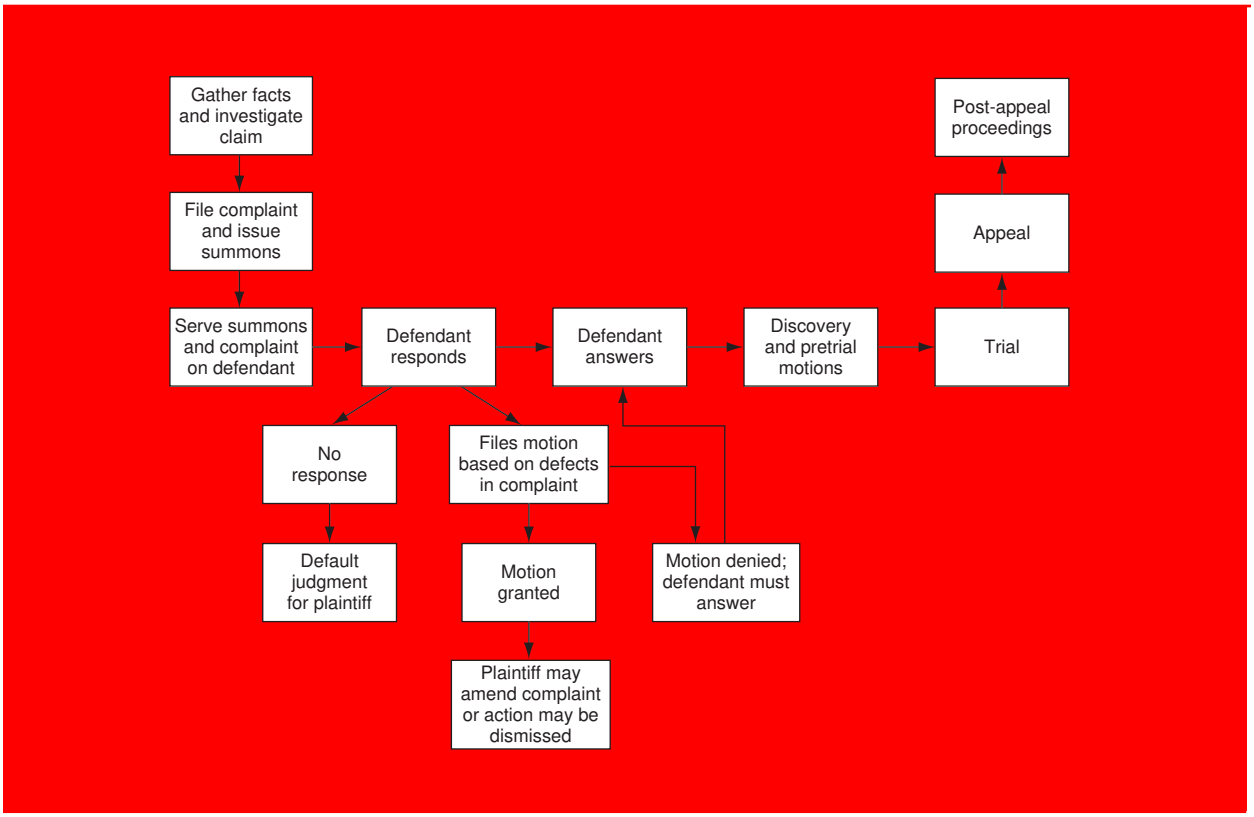
Default
Failure of a party to respond to the pleading of the opposing party

The third stage is the **discovery and motion stage**. At this point the parties will conduct formal factual investigation through written responses and oral testimony received from the other side. The parties may also obtain discovery formally from other individuals who are not parties but who may be witnesses or in possession of information that is helpful to the case. During this stage, there may also be a number of **pretrial motions**. These motions may include a request to the court to enter judgment without the necessity of trial if none of the facts are in dispute, or involve requests to obtain discovery from the other side if one side does not voluntarily provide the information. The bulk of litigation time is spent at this stage, and it is usually at this stage that cases will settle.

The final stage is the **trial and post-trial proceedings**. Both during trial and after trial, there are a number of different motions that either side can make. These motions include requests for judgments if one side has failed to prove its case, or requests to the court to enter a different judgment if the jury's verdict is not consistent with the evidence produced at trial. As discussed earlier, at this stage the losing party also has an automatic right to appeal the decision. An appellate court could reverse the judgment and require a new trial, which would start this stage over again. This explains why some cases go on for several years winding their way through the trial court, appellate courts, and back to the trial court again.

The chart in Exhibit 1.4 gives an example of how a litigation case may move through the several stages.

Exhibit 1.4. *Path of a Litigation Case*



4. Remedies

When a party brings a civil action, the party must request some relief or remedy from the court. Remedies may be divided into two categories: legal and equitable.

Damages
Monetary compensation requested by plaintiff from defendant

The most common **legal remedy** is money **damages**. For example, if a party suffers a personal injury or is the victim of a breach of contract, the party will request to be compensated by payment from the defendant. Money damages are further divided into two main categories: compensatory and punitive.

Compensatory damages are all those damages that "compensate" the injured party, including damages that directly flow from the injury or breach. Compensatory damages may be either general (e.g., compensation for pain and suffering) or specific (e.g., payment for medical expenses or loss of income from time missed at work).

In some types of action where the defendant's conduct is willful or malicious, the plaintiff may be entitled to **punitive damages**. Punitive damages, which are also referred to as exemplary damages, are meant to

"punish" the wrongdoer for his or her conduct. Such damages may be awarded in addition to the compensatory damages.

If the legal remedy is inadequate to compensate the plaintiff fully, the plaintiff may be able to obtain an **equitable remedy**. There are many kinds of equitable remedies. The two most commonly used in civil litigation are injunctions and declaratory relief. An **injunction** is used to stop certain conduct or actions. For example, if a plaintiff wants to stop the defendant from building a house that will impair the plaintiff's view, the plaintiff will seek an injunction from the court to stop the defendant from building the house.

Equitable remedy
Relief requested by plaintiff from defendant that is usually designed to prevent some future harm

Declaratory relief is used when a controversy arises over the rights and obligations of the parties and neither party has yet failed to live up to these obligations. The parties request a declaration from the court to settle the controversy so they may govern their future conduct accordingly.

C. THE PARALEGAL'S ROLE

Paralegals play a vital role in the efficient handling of litigation. Law firms are finding that paralegals can, and do, handle many tasks that were previously performed by attorneys. The use of paralegals not only frees the attorney to engage in other matters, but also helps reduce litigation expenses for the client.

As a paralegal, you will find that, aside from appearing in court, representing witnesses at depositions, and giving legal advice, there is virtually nothing a lawyer can do that, as a litigation paralegal, you cannot do under the supervision of an attorney. Thus, you have the opportunity to play a significant role in analyzing, planning, and executing the lawsuit.

The following is just a sampling of the numerous tasks you may be called on to undertake in litigation:

1. Preparing for litigation
   - □ Interview the client
   - □ Gather background facts
   - □ Locate witnesses
   - □ Interview witnesses
   - □ Obtain medical records, tax records, educational records, etc.
   - □ Research claims the client may have against other parties
   - □ Draft demand letters
   - □ Obtain and analyze documents from client
2. Conducting the litigation
   - □ Draft pleadings
   - □ Prepare summons
   - □ Prepare pretrial motions

- □ Prepare discovery to propound upon the opposing parties
- □ Prepare responses to discovery propounded by the opposing parties
- □ Review and organize documents produced by opposing parties
- □ Arrange for the taking of depositions
- □ Prepare witnesses for deposition
- □ Prepare deposition summaries
- □ Take notes on testimony given at depositions
- □ Calendar due dates for filing briefs, motions, pretrial orders, etc.
- □ Prepare discovery plan

3. Trial preparation
   - □ Prepare trial notebooks
   - □ Organize exhibits
   - □ Prepare witness files
   - □ Prepare demonstrative exhibits
   - □ Draft jury instructions
   - □ Subpoena witnesses
   - □ Draft trial brief
   - □ Coordinate scheduling of trial witnesses
   - □ Take notes at trial
   - □ Assist attorney with exhibits at trial
   - □ Coordinate electronic media during trial
4. Post-trial work
   - □ Assist with any post-trial motions
   - □ Prepare record for appeal
   - □ Enforce judgment
5. Settlement
   - □ Prepare settlement agreement
   - □ Prepare releases
   - □ Assist in closing file and obtaining necessary dismissals

Do not be alarmed by the breadth and complexity of these tasks. The purpose of this book and your litigation course is to familiarize and train you in each of them so that you may perform your job competently and confidently.

D. USE OF COMPUTERS IN LITIGATION

Computers are used during all stages of the litigation process. You will use computers to research basic fact information, assist in organizing your fact investigation, retrieve the information obtained, and present the information to a jury during trial. In addition, many courts allow, and some even require, electronic filings of motions and briefs in an effort to reduce the amount of paper filed with the court.

As discussed in Chapter 2, the use of the Internet for locating witnesses and gathering factual information about your case has become essential. For instance, you may be able to locate the home address or business address of possible parties and witnesses, without the necessity of hiring private detectives. Social media sites help you learn about the opposing party since oftentimes individuals do not keep their social media settings private. In addition, you have the ability to become an "expert" in virtually any field without the necessity of spending time and money in researching or retaining consultants. For example, assume you have a case involving the uniqueness of a particular name of a business for a possible claim of tradename infringement. Researching this information ahead of time allows you to find similar names of businesses that exist, or have existed, throughout the world so that even prior to meeting with a client, you may be able to provide the attorney with valuable insight.

In addition, litigation software packages are now available that allow you to manage the litigation data including the documents received from other parties, documents produced by your party, and transcripts of interviews and depositions. The nice feature about using litigation software is that once the information is stored in the computer, you can search for and retrieve the information by using word or name searches, making the management of information much easier. Furthermore, imaging software also exists, which permits you to both project the text of actual documents and to highlight important information for the jury on a screen during trial. There are many litigation software packages available, and your firm, if involved in extensive trial work, will probably already have such software installed on the office computers. Throughout the text, the main features that are common to many of the litigation software packages will be discussed.

E. ETHICAL CONSIDERATIONS

Any discussion of litigation must take into account the ethical considerations that underlie the practice of law. The conduct of lawyers is governed by the rules of professional conduct enacted in their particular states. The American Bar Association has recommended professional standards that have been adopted by many states. Although there are no rules specifically governing paralegals, certain ethical guidelines must be followed by all law office employees.[2]

2. Some state bar associations have published guidelines for attorneys who use paralegals. In addition, some paralegal associations, such as the National Association of Legal Assistants, have adopted a code of ethics to be followed by their members.

Privileges
Rules providing that certain communications are inadmissible because the communications are deemed confidential

One of the primary ethical guidelines involves confidentiality. The communication between an attorney and client is **privileged**. This means that the attorney cannot reveal any information received by the client to anyone else. The privileged nature of a client's communications extends to paralegals as well. Accordingly, any information you receive in the course of your employment from the client, or in connection with the client or the client's business, must be kept confidential and must not be disclosed to third parties. In addition, given the private nature of attorney-client communications, you must also be careful to avoid discussing a client's case in public places where eavesdroppers may be present.

Conflict of interest
When two or more parties with adverse interests are represented by the same counsel

Conflicts of interest should also be considered. A lawyer may never represent two or more parties who have adverse interests. Accordingly, as a paralegal charged with fact gathering, you should be cognizant of situations in which a conflict may arise. For example, your office may be representing two defendants who, at least initially, appear to have no conflict in their interests. Should a conflict develop, however, the lawyer has an ethical obligation to withdraw from representing one or both of the clients. Accordingly, as a paralegal, you should immediately notify the attorney if you discover any facts in your investigation of a case that clearly indicates a conflict may exist between two or more of your clients.

Another ethical consideration for paralegals is to avoid communicating directly with an adverse party who is represented by counsel. This is because a party represented by counsel is entitled to be free of any direct contact with the opposing party's counsel or that counsel's employees. Even if the adverse party contacts you directly, you must refuse to speak with the client without the presence of the party's attorney. In essence, a party who is represented by counsel may not represent himself until he formally relieves that counsel from representation.

Finally, you are not authorized to practice law and therefore must never give anyone the impression that you are a lawyer. When speaking with a client, an opposing counsel, or other parties, it is important to always identify yourself as a legal assistant. Similarly, when writing any letter on behalf of the law firm, place a notation of "Legal Assistant" or "Paralegal" directly below your signature to avoid any misunderstandings as to your position with the law firm.[3] In addition, remember that you may not represent a client in any legal proceeding, even though the client knows you are not a lawyer.

These ethical considerations are by no means exclusive. You, of course, must be guided by a sense of moral integrity. If something doesn't seem right to you, it probably isn't. If you are unsure if something is ethically correct, check with the lawyer in charge or contact your local paralegal association for information.

3. The terms "Legal Assistant" and "Paralegal" generally are used interchangeably by most legal professionals.

LITIGATION IN PRACTICE

Regulating the Paralegal Profession

Unlike attorneys who must abide by established codes of professional conduct or face disciplinary actions, the paralegal profession is largely self-regulating. However, some states provide for certification or registration as a paralegal to help regulate the profession. For example, Florida has a voluntary registration program that permits paralegals who meet certain minimum educational, certification, or work experience and who agree to abide by the established code of ethics to hold themselves out as "Florida Registered Paralegals."

CHAPTER SUMMARY

Civil litigation involves the resolution of disputes through the court system and starts with the plaintiff filing a complaint against the defendant in the trial court. In the complaint, the plaintiff will request either monetary or equitable relief (or both) from the court. The losing party in the trial court has an automatic right to appeal the decision to the next highest court.

As a paralegal, you will take on significant responsibility during all aspects of the litigation process from the initial fact gathering through trial preparation and post-trial proceedings. Throughout this entire process, it is essential that your conduct conform to the following ethical guidelines discussed in this chapter:

- Keep confidential all client communications
- Avoid all conflicts of interest
- Do not communicate directly with an adverse party who is represented by counsel
- Always identify yourself as a paralegal

CHAPTER CHECKLIST

After reading this chapter you should be able to explain each of the following concepts and define the key terms printed in bold:

- The three **sources of law** that need to be consulted in litigation matters
  - **Statutes**
  - **Court cases**
  - **Constitutions**

- The Court System
  - Litigation begins with the filing of a **complaint**
  - Identity of the parties
    - The **plaintiff**
    - The **defendant**
  - Filing and service of the **complaint**
  - Types of courts
    - **United States District Court**
    - **Court of Appeals**
    - **United States Supreme Court**

- Overview of **Civil Litigation**
  - Information gathering
  - **Pleading**
  - **Discovery and motion stage**
  - **Trial and post-trial proceedings**

- **Remedies**
  - **Legal remedy**
    - **Compensatory damages**
    - **Punitive damages**
  - **Equitable remedy**
    - An **injunction**
    - **Declaratory relief**

- **The Paralegal's Role**
  - The importance of a paralegal's work
  - How a paralegal analyzes, plans, and executes a lawsuit

- **Computers in Litigation**
  - The advantages of using computers in the litigation process

- Ethical Considerations
  - Privileged communication
  - How to handle a **conflict of interest**
  - When to avoid communication with an adverse party
  - The importance of identifying yourself as a "legal assistant"

REVIEW QUESTIONS

1. What is civil litigation, and how does it differ from other types of litigation?

2. What are the differences between equitable and legal remedies? Identify two types of equitable remedies.
3. Where do you find the sources of law applicable to litigation matters? Explain the differences between the various sources of law.

CASE FOR DISCUSSION

Case Issue and Factual Summary

The case of Hodge v. UFRA-Sexton, LP, involved a situation where a paralegal (Kristi Bussey) worked for a firm, Hanks Brooks LLC., that was retained to represent a client (Belinda Hodge) in a claim for the wrongful death of Hodge's sister. The court case alleged a claim against the management company of the apartment complex (UFRA-Sexton, LP) where Hodge's sister was shot and killed. Bussey and Hodge were friends prior to Hodge's retention of Hanks Brooks and during the retention regularly communicated with each other about the case. During the course of the litigation, Kristi Bussey changed law firms and went to work for the law firm of Insley & Race, which happened to be the firm representing the defendant in Hodge's case, UFRA-Sexton, LP. Insley & Race had obtained a reference from Hanks Brooks, but Hanks Brooks never indicated the involvement that Bussey had with the case brought by Belinda Hodge. The issue arose as to whether it was possible to effectively screen the paralegal, Kristi Bussey, from working on the case to avoid a conflict of interest of the Insley & Race firm that would have disqualified the entire firm from continuing to represent UFRA-Sexton, LP.

Hodge v. UFRA-Sexton, LP
758 S.E. 2d 314 (Ga., 2014)

We granted certiorari in this case to determine whether the court of Appeals correctly held that a conflict of interest involving a nonlawyer can be remedied by implementing proper screening measures in order to avoid disqualification of the entire law firm. For the reasons set forth below, we hold that a nonlawyer's conflict of interest can be remedied by implementing proper screening measures so as to avoid disqualification of an entire law firm. In this particular case, we find that the screening measures implemented by the nonlawyer's new law firm were effective and appropriate to protect against the nonlawyer's disclosure of confidential information.

***

Bussey states in her affidavit that she was unaware of Insely & Race's involvement in the [Hodge] case when she was hired on March 15, 2011, and Insley attests that the firm was unaware of any potential conflict in hiring Bussey. Bussey states that she did not learn of her new firm's involvement in the [Hodge] case until October 5, 2011. Upon discovering that Insley & Race was counsel for UFRA-Sexton, Bussey immediately informed her co-workers, Insley, and the firm administrator. Insley immediately instructed Bussey not to be involved in the [Hodge] case at Insley & Race in any way or to have any discussions with anyone about the case or her knowledge about it. [The firm also took measures to block Bussey's access to any computerized information, including calendar events, billing information, documents and contact information.]

Post-Case Summary

The Hodge case represents the view in the majority of states. Thus, it is possible to avoid a conflict of interest that would disqualify the new law firm from representing a client adverse to the paralegal's previous law firm assuming, among other things, effective screening mechanisms are implemented. However, you should be aware that some states will treat paralegals as they do lawyers and will disqualify the entire firm from representing a client that is adverse to a client at the firm where the paralegal previously worked.

Questions for Discussion

1. Assume that in the *Hodge* case, Kristen Bussey was assigned to assist with a landlord-tenant dispute in which UFRA-Sexton wished to bring an action against a tenant for nonpayment of rent. What, if anything, should Kristi Bussey do when assigned to assist with the case?
2. Kristi Bussey and Belinda Hodges were friends prior to the litigation. Assume the two are friends on Facebook and Kristi reads a post where Belinda talks about some information her lawyer is investigating regarding the case. What if anything should Kristi Bussey do with this information?

RESEARCH QUESTIONS

Research the following questions.

1. Determine which federal district court your home or school is in, and then use the Internet to determine whether the federal district court has a web site. What information is provided by the court? Does it identify the court locations? Does it provide information about case filings? Do the same thing for the state trial court in your county or

district. What information is included on the web site? Print the first page of the web site.

2. Locate the state bar web site for your state. What information is provided on the state bar web site? Are there research sites available on the state bar web site?
3. There are many national paralegal associations. Determine whether your state has its own paralegal association.
4. Review the web site at www.uscourts.gov. What information is provided about the Supreme Court? What is Constitution Day, and when is it held?

ADDITIONAL RESOURCES

aapipara.org (American Alliance of Paralegals, Inc.)
paralegaltoday.com (*Paralegal Today*)
nala.org (National Association of Legal Assistants)
nals.org (The Association for Legal Professionals)
paralegals.org (National Federation of Paralegal Associations)
uscourts.gov (Federal court system)
Cannon, Therese A., Aytch, Sybil Taylor, *Concise Guide to Paralegal Ethics* (Wolters Kluwer, 2019).