M. Maerowitz • T. Mauet

Fundamentals of California Litigation for Paralegals

SEVENTH EDITION

Wolters Kluwer

Maerowitz
Mauet

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Marlene P. Maerowitz • Thomas A. Mauet

Fundamentals of Litigation for California Paralegals offers a complete understanding of the litigation process from the time the client walks into the office through trial and post-judgment, including settlements and alternative forms of resolutions. Tailored to California practice, the authors' successful, balanced approach presents a complete overview of the litigation process, with clear explanations and examples of the rules and procedures. The text's flexible organization allows the instructor to easily pick and choose the areas to cover in the course.

Preparing future paralegals for practice in California, *Fundamentals of California Litigation for Paralegals* features:

- Coverage tailored to California law with California-specific Judicial Council forms and references to specific California statutes in each chapter
- A balanced and reader-friendly presentation
- A concise and well-written text—students will not get lost in the details of the rules
- A flexible organization that lends itself to a variety of teaching objectives
- Helpful pedagogy including boldface terms defined in the margins and in the glossary; numerous examples, charts, checklists, and sample documents; chapter overviews and summaries; and review questions
- A companion workbook, available as a download, with review questions and case scenarios that can be used as assignments and classroom activities

The revised Seventh Edition includes these important updates:

- Changes to Federal Rules of Civil Procedure, California Rules of Court, and Judicial Council forms
- New developments in e-discovery
- Updated review questions and research questions at the end of each chapter
- Revised sample letters, discovery, and motions

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MARLENE PONTRELLI MAEROWITZ

THOMAS A. MAUET

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Summary of Contents

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Preface

Approach

When I first started teaching litigation specialization for paralegal students at the University of West Los Angeles over 35 years ago, I struggled trying to find a textbook that was comprehensive enough to be useful to my students and, at the same time, conducive to learning. The result was always mixed. Either the text was too comprehensive and designed more for the practicing lawyer, or it was not comprehensive enough, so that I found myself supplementing large portions of the materials. Finally, I had the good fortune of being teamed with Professor Thomas Mauet to write a litigation textbook designed specifically for paralegal students. Our efforts culminated in *Fundamentals of Litigation for Paralegals,* first published in 1991 and now in its tenth edition. Though the text is comprehensive, it concentrates on federal law and procedure, so I still had to supplement the materials for my California students. In 2001, we were able to complete a text that I wish I had had when I started teaching: *Fundamentals of California Litigation for Paralegals.*

Our approach to this litigation textbook has been to include information on all areas of California civil litigation even though, because of 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 also 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, you can learn the rules if given easy-to-follow steps. Thus, we attempt to strike a balance between giving sufficient detail for you to learn and understand this area of law and making the steps as easy as possible to follow. 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 career, you will come to appreciate even more the detailed approach we have taken.

Organization

Over the past 20 years since this book was first published, technology has increased and influenced the way that we litigate cases. Accordingly, throughout the book are techniques, processes, and procedures for using technology in litigation and using the Internet. However, as with previous editions, this book takes you through each stage of the litigation process from initial fact-gathering 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 applying your knowledge of the procedural rules to draft litigation documents such as pleadings, discovery requests, and motions.

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 discussed and 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 each chapter appear in bold type. Most of these boldfaced terms are defined in the margin of the book where they appear in the text 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 can 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 there are five important sections. The first section is the Chapter Summary, which highlights the important 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 Key Terms sec-

tion acts as a checklist 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. The Research Questions will allow you the opportunity to feel comfortable using computerized research techniques to assist you in preparing a litigation case.

Textbook Resources

The companion web site for *Fundamentals of California Litigation for Paralegals* offers additional resources for students and instructors, including:

- Instructor resources to accompany the text, including a comprehensive Instructor's Manual, Test Bank, and PowerPoint slides.
- Links to helpful websites that can be used for downloading common forms or obtaining additional information to supplement the text.
- Student workbook with additional practice exercises.

Acknowledgments

No textbook can be written without help and guidance from numerous individuals. A special thank you goes to Elizabeth Kenny, who has worked with us for over 30 years since the first edition of *Fundamentals of Litigation for Paralegals.* Elizabeth continued to provide her guidance, suggestions, substantive comments, and support for this edition. Without her constantly keeping on top of us to meet deadlines, I am certain we would never be even close to on time. Our thank you to Sarah Hains at The Froebe Group, who kept us all on track as she oversaw the editing and proofreading of the text. We are grateful for her keen eye in catching many details that helped to update this edition.

We are thankful to the individuals who have adopted this text for their classes and who provided invaluable suggestions that were incorporated into this edition. Finally, we gratefully acknowledge the permission of Wolters Kluwer to reprint Exhibits 1.2 and 2.1.

Marlene Pontrelli Maerowitz

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.

PART I

Investigating and Planning the Litigation

CHAPTER 1

Introduction to Litigation

A. Introduction
B. The Litigation Process
C. The Paralegal's Role
D. Ethical Considerations

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 California 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 and 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 and asks you to prepare for the client meeting. 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 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.

1. An alternative to the use of courts, arbitration is becoming a popular method by which civil disputes are resolved. See Chapter 19.

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 for the California state courts. However, in many respects, the Federal Rules of Civil Procedure are similar. Accordingly, once you have mastered the procedural requirements for California, you will be able to easily understand and apply the federal rules if you have a litigation matter in federal court.

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. For example, all laws enacted by Congress are found in the United States Code. The United States Code is divided into various Titles, which deal with specific subject matters such as agriculture, banking, copyrights, education, and so on.

In California there are a number of statutes and rules that govern the litigation process. The primary statutes and rules you will consult are the Code of Civil Procedure (the "CCP"), the Civil Code (the "CC"), and the California Rules of Court. In addition, courts also have **local rules**

that need to be followed. Local rules apply to each court within a particular county. For example, the superior courts within Los Angeles County will be governed by the Rules of Court for the Los Angeles Superior Court. The local rules govern everything from the type of paper on which a complaint might be filed to the dates on which motions may be heard. Judges often have rules for their individual court as well. Before the trial of any case it is important to check with each individual judge to determine whether the judge has special rules that need to be followed.

In addition to state and local statutes and rules that govern a litigation matter, 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.

All of these statutes, codes, and ordinances 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.

b. Court cases

Court 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. 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 in section 4, 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 California court system, the superior court is the trial court. The superior court hears unlimited general matters and also limited civil cases. Limited civil cases means that the court only has the power to hear and decide limited types of cases. When acting as a limited civil court, the court can only hear cases that are for a money judgment in the amount of $25,000 or less. Accordingly, the superior court of limited jurisdiction typically cannot hear cases involving divorce, title to real property, or probate. The types of limited cases are listed in CCP §86.

California Code of Civil Procedure §86

86. (a) The following civil cases and proceedings are limited civil cases:

(1) A case at law in which the demand, exclusive of interest, or the value of the property in controversy amounts to twenty-five thousand dollars ($25,000) or less. . . .

(2) An action for dissolution of partnership where the total assets of the partnership do not exceed twenty-five thousand dollars ($25,000); an action of interpleader where the amount of money or the value of the property involved does not exceed twenty-five thousand dollars ($25,000).

(3) An action to cancel or rescind a contract when the relief is sought in connection with an action to recover money not exceeding twenty-five thousand dollars ($25,000) or property of a value not exceeding twenty-five thousand dollars ($25,000), paid or delivered under, or in consideration of, the contract; an action to revise a contract where the relief is sought in an action upon the contract if the action otherwise is a limited civil case.

(4) A proceeding in forcible entry or forcible or unlawful detainer where the whole amount of damages claimed is twenty-five thousand dollars ($25,000) or less.

(5) An action to enforce and foreclose a lien on personal property where the amount of the lien is twenty-five thousand dollars ($25,000) or less.

(6) An action to enforce and foreclose, or a petition to release, a lien . . . or to enforce and foreclose an assessment lien on a common interest development . . . where the amount of the liens is twenty-five thousand dollars ($25,000) or less. . . .

(7) An action for declaratory relief when brought pursuant to [specific circumstances.]

(8) An action to issue a temporary restraining order or preliminary injunction. . . .

(9) An action . . . for the recovery of an interest in personal property or to enforce the liability of the debtor of a judgment debtor where the interest claimed adversely is of a value not exceeding twenty-five thousand dollars ($25,000) or the debt denied does not exceed twenty-five thousand dollars ($25,000).

(10) An arbitration-related petition filed pursuant to [specific provisions].

***

(b) The following cases in equity are limited civil cases:

(1) A case to try title to personal property when the amount involved is not more than twenty-five thousand dollars ($25,000).

(2) A case when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case.

(3) A case to vacate a judgment or order of the court obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect.

A limited civil case may be brought in the **small claims division.** The small claims division hears matters involving less than $5,000 in dispute. CCP §116.200. The small claims division is often called the "people's court" because attorneys may not represent individual parties in a small claims matter. An unlimited jurisdiction case is everything else that is not limited; that is, all types of cases and matters seeking judgments greater than $25,000.

The federal court system also has trial courts. In the federal system this trial court is called the **United States District Court.** There are 90 district courts in the United States. Each state has at least one district court, and several states have two or more, depending on the state's population.

If a party loses in the trial court, that party has an automatic right to appeal to the next highest court. In California, the party appeals municipal court decisions to the appellate division of the Superior Court.

Appeals from Superior Courts go to the **Courts of Appeal** for the appropriate district in which the lower court sits.

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 more fully explain their clients' positions.

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 $3,000. If the appellate court agrees that the plaintiff should be entitled to possession of the property but believes the back rent owed is only $2,000, 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 **Supreme Court** for review. The Supreme Court is the highest court in the California court system. If a case before the California Supreme Court involves a question of federal or constitutional law, the losing party may be able to petition the United States Supreme Court for review.

Appeal to the California Supreme Court is not automatic, but rather is discretionary with the Court. The losing party must petition the California 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 California state court system is shown in Exhibit 1.1. The federal court system is shown in Exhibit 1.2. You will

Exhibit 1.1. California State Court System

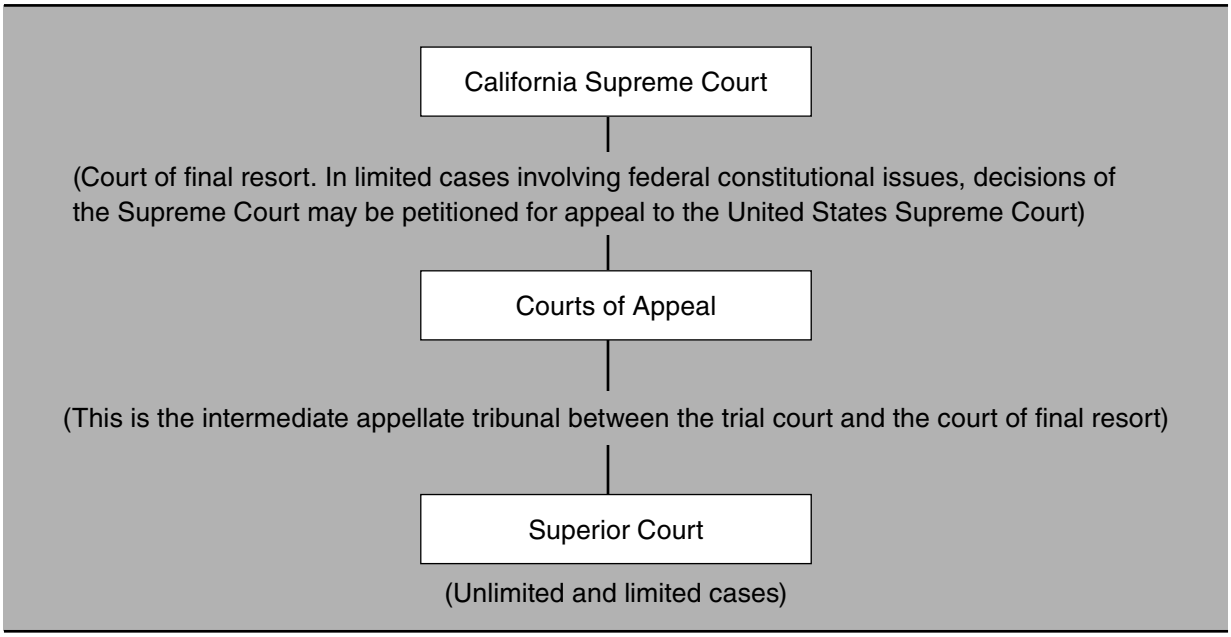
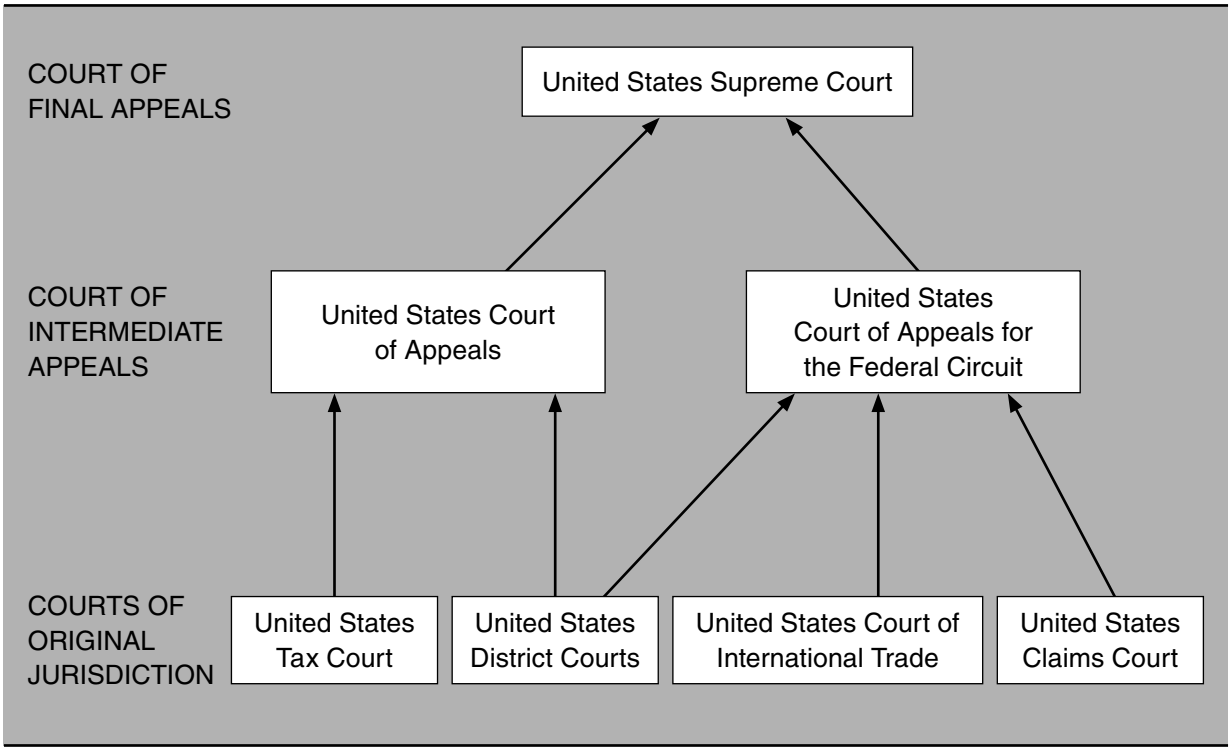


Exhibit 1.2. The Federal Court System



note that special courts such as bankruptcy courts and the Court of International Trade exist to hear specific cases in the federal court system.

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.

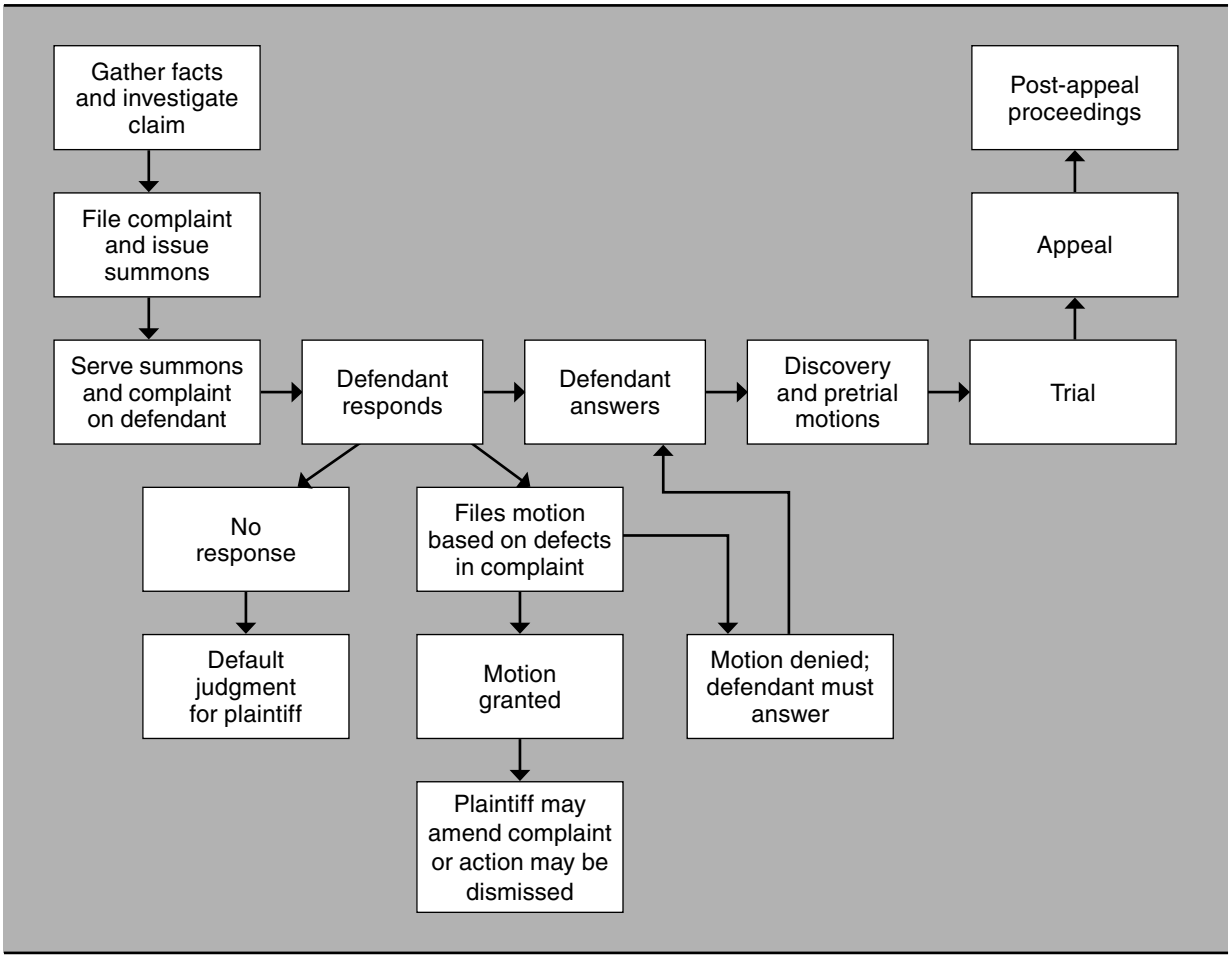
Prior to the filing of any lawsuit, you and the attorney will spend time gathering information and obtaining the facts necessary to support your client's case. This is the first stage of litigation. This stage will be engaged in by both sides since a potential defendant is often aware that a lawsuit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

Exhibit 1.3. *Litigation Case Moves Through the System*



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 1.3 gives an example of how a litigation case may move through the several stages.

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.

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.

Damages Monetary compensation requested by plaintiff from defendant

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 (i.e., compensation for pain and suffering) or specific (i.e., 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, also called 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 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. 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 deposition, 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
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 task so you perform your job competently and confidently.

D. ETHICAL CONSIDERATIONS

Ethical considerations underlie every aspect of the practice of law. Accordingly, while summarized here, throughout this text ethical considerations are identified and discussed.

1. Rules of Professional Conduct

The conduct of lawyers is governed by the rules of professional conduct enacted in their particular states. California Business and Professions Code §6450 governs the regulation of the paralegal profession.[2] Under the rules, a "paralegal" means a person who is qualified "by education, training or work experience" who contracts with or is employed by an attorney, law firm, corporation, governmental agency, or other entity, who performs substantial, specifically delegated legal work under the direction and supervision of an active member of the State Bar of California or an attorney practicing law in the California federal courts.

California Business and Professions Code §6450(c)

(c) A paralegal shall possess at least one of the following: (1) A certificate of completion of a paralegal program approved by the American Bar Association. (2) A certificate of completion of a paralegal program at, or a degree from, a postsecondary institution that requires the successful completion of a minimum of 24 semester, or equivalent, units in law-related courses and that has been accredited by a national or regional accrediting organization or approved by the Bureau for Private Postsecondary and Vocational Education. (3) A baccalaureate degree or an advanced degree

2. The rules are found in Business and Professions Code §6450 et seq.

in any subject, a minimum of one year of law-related experience under the supervision of an attorney who has been an active member of the State Bar of California for at least the preceding three years or who has practiced in the federal courts of this state for at least the preceding three years, and a written declaration from this attorney stating that the person is qualified to perform paralegal tasks. (4) A high school diploma or general equivalency diploma, a minimum of three years of law-related experience under the supervision of an attorney who has been an active member of the State Bar of California for at least the preceding three years or who has practiced in the federal courts of this state for at least the preceding three years, and a written declaration from this attorney stating that the person is qualified to perform paralegal tasks. This experience and training shall be completed no later than December 31, 2003.

California Business and Professions Code §6452

(a) It is unlawful for a person to identify himself or herself as a paralegal on any advertisement, letterhead, business card or sign, or elsewhere unless he or she has met the qualifications of subdivision (c) of Section 6450 and performs all services under the direction and supervision of an attorney who is an active member of the State Bar of California or an attorney practicing law in the federal courts of this state who is responsible for all of the services performed by the paralegal. The business card of a paralegal shall include the name of the law firm where he or she is employed or a statement that he or she is employed by or contracting with a licensed attorney. (b) An attorney who uses the services of a paralegal is liable for any harm caused as the result of the paralegal's negligence, misconduct, or violation of this chapter.

2. Ethical Considerations for Paralegals

Accordingly, a paralegal must work under supervision and not independently. In addition, unless you have met educational prerequisites, you may not call yourself a "paralegal." Also, under the rules, a paralegal may not provide legal advice or represent a client in court. However, a paralegal may represent clients before state or federal administrative agencies if permitted by statute, court rule, or administrative rule or regulation.

In addition to general continuing education requirements, one of the requirements of a paralegal is to certify completion every two years of a minimum of four hours of legal ethics mandatory continuing education.

To fully understand the ethical role of a paralegal, it is first important to understand the nature of the attorney-client relationship.

Litigation in Practice

The relationship between an attorney and client is one of trust. Clients seek the advice of an attorney to help counsel them with a potential legal problem. The situation is similar to advice you might seek from a doctor, counselor, or clergyperson. It is easy to understand in the context of these other professions. The trust that is necessary to establish a good early relationship then allows you to seek the consult of the professional. The same is true of an attorney. As an important part of the legal team, your trust is the same.

While it has always been important that paralegals keep client information confidential, the rules governing paralegals specifically provide that a paralegal has a duty to maintain the confidentiality of client information. 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. Thus, 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 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.

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

Other ethical considerations paralegals should keep in mind are **conflicts of interest** and communicating with adverse parties. 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, immediately notify the attorney if you discover any facts in your investigation of a case indicating that a conflict may exist between two or more of your clients.

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

In addition, paralegals must avoid communicating directly with an adverse party who is represented by counsel. 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, opposing counsel, or other parties, always identify yourself as a paralegal. 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]

3. Ethical Handling of Electronic Documents

Pursuant to Civil Code §1010.6 for a case filed on or after January 1, 2019, electronic service of documents may be authorized if the party or the party's representative has consented to electronic service or the Court has ordered service electronically. Given that many offices and staff are starting to work remotely from home, it is important to make sure your handling of documents and service of documents by electronic means follows all proper protocols for electronic transmissions. This may also include insuring the platform you are using at home is approved by the attorney and the information technology staff at the firm, as well as confirming any appropriate data-encryption requirements.

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.

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.

3. Pursuant to Business and Professions Code §6454, the terms "Legal Assistant" and "Paralegal" are synonymous.

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

KEY TERMS

Affirm
Affirm with modification
Answer
Civil litigation
Common law
Compensatory damages
Complaint
Conflict of interest
Constitution
Court cases
Courts of Appeal
Damages
Declaratory relief
Default
Defendant
Discovery and motion stage
Equitable remedy
Injunction
Legal remedy
Litigation
Local rule
Motion
Plaintiff
Pleading
Pretrial motions
Privileged
Punitive damages
Reverse
Reverse and remand
Statutes
Summons
Trial and post-trial proceedings
Trial court
United States District Court
United States Supreme Court

REVIEW QUESTIONS

1. What is civil litigation and how does it differ from other types of litigation?
2. How is the California court system structured?

3. What are the differences between equitable and legal remedies? Identify two types of equitable remedies.
4. Where do you find the sources of law applicable to litigation matters? Explain the differences between the various sources of law.
5. Once a litigation matter is appealed, what are the four types of decisions that an appellate court may make? Explain each type.
6. What are the four stages of the litigation process?
7. What is the role of a paralegal in the litigation process?
8. What ethical rules must be followed by paralegals? What are the goals of the ethical rules?

RESEARCH QUESTIONS

1. Review the California Supreme Court website. What information is provided by the court? Does it identify the court locations? Does it provide information about case filings?
2. Locate the state bar website for California. What information is provided there? Are there research sites available on the state bar website?
3. There are many national paralegal associations. Determine whether California has its own paralegal association.
4. Familiarize yourself with the California Code of Civil Procedure and the California Rules of Court at *www.courts.ca.gov/.*

CHAPTER 2

Informal Fact Gathering and Investigation

A. Introduction
B. Structuring Fact Investigations
C. Client Interviews
D. Exhibits Acquisition
E. Witness Interviews
F. Expert Reviews
G. Computerized Fact Gathering

CHAPTER OBJECTIVES

This chapter introduces you to several important aspects of the preliminary gathering and investigation of facts to support your client's position. You will learn:

- How to structure a factual investigation
- Where to obtain the necessary facts to prove your client's position
- How to interview clients
- When and how to gather documents that may be used as evidence
- Where to locate witnesses
- How to use the Internet to gather facts

A. INTRODUCTION

Successful litigation starts with the proper gathering of information. Litigation outcomes are usually decided not by legal interpretations but according to which party's version of disputed events the **factfinder**—that is, the judge or the jury—accepts as true. Hence, much time is spent identifying and acquiring evidence that supports your party's contentions and that refutes the other side's contentions. The party who is more successful in doing this will have a better chance of convincing the factfinder that its version of the facts is what "really happened."

Your role as a paralegal is to assist the lawyer in identifying and gathering the evidence. Many times the paralegal is responsible for this initial fact gathering, a responsibility that is critical to the lawyer's determination of whether to proceed with the case and how to properly advise the client. If the lawyer decides to proceed, these initial facts are necessary to draft the complaint and make the required factual allegations.

This chapter provides a step-by-step approach for you to use when you are asked to gather the initial facts of a case. Each step will assist you in developing a complete and accurate account of the facts.

B. STRUCTURING FACT INVESTIGATIONS

Facts are the collective pieces of information explaining your client's version of what happened. For example, facts may consist of what people said, did, or heard regarding the particular incident. There are two ways of "getting the facts." You can obtain facts informally before filing suit and you can get them through formal discovery (as discussed in Chapter 13) after suit is filed. A common mistake inexperienced paralegals

make is using the investigation, such as an initial client interview and the reviewing of an accident report, just to provide the lawyer with enough facts to decide whether to take the case, and using formal discovery methods as the principal fact-gathering method. This is a serious mistake. Consider the following advantages of informal discovery:

- First, information is power, and the party that has a better grasp of the favorable and unfavorable facts is in a stronger position to accurately evaluate the case.
- Second, information obtained early on, particularly from witnesses, is more likely to be accurate and complete.
- Third, information sought before the action is formalized is more likely to be obtained, since a lawsuit often makes people cautious or uncooperative.
- Fourth, information obtained before suit has been filed is less expensive to acquire. Formal discovery is the most expensive way to get information.
- Fifth, CCP §128.7(b) provides that by presenting to the court any pleading or similar paper, the attorney is certifying that, after "inquiry reasonable under the circumstances," the document is not being presented for an improper or frivolous purpose, and that the plaintiff's allegations or the defendant's denials are backed by evidentiary support.
- Finally, you can get information informally without the opposing parties participating, or even being aware that you are conducting an investigation.

For all these reasons, then, you should use informal discovery as much as possible.

If your firm represents the defendant, you may also be involved in informal fact gathering and investigation before a complaint is filed. Many times the defendant is aware of a potential lawsuit as a result of oral or written communication received from the plaintiff or because of direct involvement in an accident or other incident. In these situations, it is likely the potential defendant will consult with an attorney prior to receiving the summons and complaint. Your fact gathering and investigation will be similar regardless of which party your firm represents.

1. What facts do I need to get?

Your job as a litigation paralegal is to obtain enough admissible evidence to prove your client's claims and to disprove the other side's claims. If you are representing the plaintiff, enough facts must be gathered to state

Cause of action Theory of recovery that entitles the plaintiff to recover against the defendant

in the complaint a **cause of action,** sometimes called a claim for relief. A cause of action is a theory of recovery that entitles the plaintiff to recover against the defendant. If you represent the defendant, you will want to gather facts to support an affirmative defense. An **affirmative defense** is a defense pled by the defendant in the answer that, if proven, denies recovery to the plaintiff.

Identify in advance, with the assistance of the lawyer in charge, what you must prove or disprove. This is determined by the substantive law underlying the claims, relief, and defenses in the case. However, how do you research that law if you do not yet know what the pleadings will allege? What do you research first, the facts or the law?

There is no easy answer here. In litigation, the facts and law are intertwined. The investigation of one affects the investigation of the other. You will usually go back and forth periodically as the theory of the case develops.

Example

You have been asked to assist with what appears to be a routine personal injury case, involving an automobile accident between your client, George Andrews, and another driver, Mildred Jones. You conduct the initial interview with George, who appears to have a simple negligence case against the other driver—Ms. Jones clearly ran a stop sign. You do preliminary research on the negligence claim to see if the damages are sufficient to recommend litigation to the lawyer. You then continue your fact investigation and discover that Ms. Jones is uninsured. Since George may not be able to collect damages from an uninsured driver, you start wondering if there may be a claim against the municipality for not maintaining intersection markings and safe road conditions. Of course, you need to research the law here. If there is a legal theory supporting such a claim, you then need to go back and see if there are facts that support that theory. Back and forth you go between getting the facts and researching the law until you have identified those legal theories that have factual support.

2. How do I structure my fact investigation?

a. Use of a litigation chart

The easiest way to structure your investigation is to use a system of organizing the law and facts based on what the attorney will need to prove if the case goes to trial. In short, this is a good time to start a