

## **Chapter 12**

### Civil Litigation—Before the Trial

#### **Chapter Outline**

1. Introduction
2. Civil Litigation—A Bird's Eye View
3. The Preliminaries
4. The Pleadings
5. Pretrial Motions
6. Traditional Discovery Tools
7. The Duty to Disclose under FRCP 26
8. Discovery of Electronic Evidence

#### **Chapter Objectives**

After completing this chapter, you will know:

- The basic steps involved in the civil litigation process and the types of tasks that may be required of paralegals during each step of the pretrial phase.
- What a litigation file is, what it contains, and how it is organized, maintained, and reviewed.
- How a lawsuit is initiated and what documents are filed during the pleadings stage of the civil litigation process.
- What a motion is and how certain pretrial motions, if granted by the court, will end the litigation before the trial begins.
- What discovery is and what kind of information attorneys and their paralegals obtain from parties to the lawsuit and from witnesses when preparing for trial.

## Chapter 12 Civil Litigation—Before the Trial

### Chapter Outline

- I. INTRODUCTION
  - A. The paralegal plays an important role in helping the trial attorney prepare for and conduct a civil trial.
  - B. Many paralegals assist the attorney at trial, in the courtroom.
  
- II. CIVIL LITIGATION—A BIRD’S EYE VIEW
  - A. Pretrial Settlements
    - i. In most cases, the parties reach a settlement before the case goes to trial.
    - ii. Since lawsuits are costly in terms of time and money, it is usually in the interest of both parties to settle the case out of court.
    - iii. To be prepared for trial, both the attorney and paralegal must assume that the case *will* go to trial while, at the same time, attempting to reach a settlement.
  - B. Procedural Requirements
    - i. The procedural rules of the court in which the lawsuit is brought must be followed.
    - ii. All federal civil trials are governed by the Federal Rules of Civil Procedure (FRCP).
  
- III. THE PRELIMINARIES
  - A. The Initial Client Interview
    - i. Only an attorney can accept a case, set a fee, and give legal advice. Therefore, the initial client interview should be conducted by the attorney.
    - ii. Because the paralegal will be working with the attorney on the case, the paralegal should attend the initial client interview.
  - B. Creating the Litigation File
    - i. All documents and records pertaining to the lawsuit are kept in the litigation file.
    - ii. The litigation file is a comprehensive record of the case. The file is important so others in the firm can quickly acquaint themselves with the progress of the case.

#### **Living the Litigation**

Litigation has a common pattern. Study that pattern; make a checklist, mental or in writing, to use in following and managing your case. Retain copies of pleadings you draft. That language may be valuable to your next case.

## IV. THE PLEADINGS

### A. Drafting the Complaint

- i. The *complaint* is a document that states the claims the plaintiff is making against the defendant.
- ii. The complaint and the defendant's answer are *pleadings*. The pleadings inform each party of the claims of the other and specify the disputed issues.
- iii. The complaint includes the following sections:
  1. The Caption
  2. Jurisdictional Allegations
  3. General Allegations (the body of the complaint)
  4. Prayer for Relief
  5. Signature
  6. Demand for a Jury Trial

### B. Filing the Complaint

- i. Traditional Method of Filing
  1. Traditionally, a person filing a complaint personally delivers the complaint to the clerk of the appropriate court.
- ii. Electronic Filing Methods
  1. The FRCP provides that federal courts *may* permit filing by fax or "other electronic means."
  2. Today, many courts at the federal and state levels are experimenting with various methods of electronic filing—faxes, e-mail transmissions, and on CD-ROM.

### C. Service of Process

- i. The Summons
  1. The *summons* is a legal document that identifies the parties to the lawsuit and the court in which the case will be heard, and directs the defendant to respond to the complaint within a specified time period.
- ii. Serving the Complaint and Summons
  1. How service occurs depends upon the rules of the court or jurisdiction in which the lawsuit is brought.
  2. Many law firms contract with independent companies that provide process service.
  3. Alternative Service Methods
    - a. *Substituted service* is any method of service allowed by law in place of personal service.
  4. Proof of Service
    - a. A *return-of-service form* is submitted to the court as evidence that service has been made.
  5. Jurisdictions May Vary
    - a. A paralegal must be careful to comply with the service requirements of the court in which the lawsuit is brought.

- iii. Serving Corporate Defendants
  - 1. The summons and complaint are served on an officer or a *registered agent (representative)* of the corporation.
  - 2. The name of the corporation's registered agent can be obtained from the secretary of state's office.
- iv. Finding the Defendant
  - 1. Paralegals may have to investigate and attempt to locate a defendant so process can be served.
  - 2. Various online sources may be helpful when trying to locate parties or witnesses.
- v. The Defendant Can Waive Service
  - 1. If the defendant is aware the lawsuit is being filed, she may *waive (give up)* her right to be formally served with a summons.
  - 2. Defendants who agree to waive formal service of process receive additional time to respond to the complaint under the FRCP.

#### D. The Defendant's Response

- 1. If the defendant fails to respond to the complaint within the appropriate time period, a *default judgment* is entered by the court against the defendant.
- 2. The Answer
  - a. A defendant's *answer* must respond to each allegation set out in plaintiff's complaint.
  - b. Any allegations that are not denied by the defendant are deemed to have been admitted.
  - c. Answer and Affirmative Defenses
    - 1) An *affirmative defense* is when the defendant, in the answer, indicates why he should not be held liable for the plaintiff's injuries (even where the facts, as alleged by the plaintiff, are true).
  - d. Answer and Counterclaim
    - 1) A *counterclaim* asserts a claim against the plaintiff for injuries that the defendant suffered from the same incident.
  - e. Answer and Cross-Claim
    - 1) A *cross-claim* alleges that another party named as a defendant in the suit should bear some or all of the liability for plaintiff's injury. (Note that a cross-claim can also be filed by one plaintiff against another.)
- 3. Motion to Dismiss

- a. A *motion* is a procedural request submitted to the court.
- b. A *notice of motion* must also be served on the opposing party.
- c. The *motion to dismiss* requests the court to dismiss the case for reasons provided in the motion.
- d. *Supporting affidavits (sworn statements)* can be attached to the motion in its support.
- e. A *memorandum of law (sometimes called a "brief")* may also be submitted along with the motion to dismiss.

E. The Scheduling Conference

- i. After the complaint and answer are filed, the court will typically schedule a conference to consult with the attorneys for both sides.
- ii. At this conference, the judge will enter a *scheduling order* that sets out time limits for the case.
- iii. Rule FRCP 16(b) governs the scheduling order.

F. Amending the Pleadings

- i. Because no attorney can anticipate how a case will evolve, the complaint or answer may have to be amended.

V. PRETRIAL MOTIONS

A. Motion for Judgment on the Pleadings

- i. A *motion for judgment on the pleadings* indicates that no facts are in dispute, and the only question is how the law applies to a set of undisputed facts.

B. Motion for Summary Judgment

- i. A *motion for summary judgment* asks the court to grant a judgment (without a trial) on behalf of the party filing the motion.
- ii. The court will only grant this motion if it determines that no facts are in dispute and the only question is how the law applies to a set of facts agreed on by both parties.
- iii. When the court considers this motion, it can take into account *evidence outside the pleadings*.

VI. TRADITIONAL DISCOVERY TOOLS

A. *Discovery* is the process of obtaining information from the opposing party or from other witnesses.

B. The discovery rules are designed to make sure that a witness or a party is not unduly harassed, that *privileged information* (communications that ordinarily may not be disclosed in court) is safeguarded, and that only relevant matters are discoverable.

C. Interrogatories

- i. *Interrogatories* are written questions that must be answered in writing.
- ii. Interrogatories may only be served on a party to the lawsuit.
- iii. Drafting interrogatories
  - 1. FRCP 33 limits the number of interrogatories in federal court cases to twenty-five.
- iv. Answering interrogatories
  - 1. The party receiving the interrogatories must answer them within a specified time period (thirty days under FRCP 33), in writing, and under oath.

#### D. Depositions

- i. *Depositions* are oral questions, given under oath.
- ii. Depositions may be taken of witnesses as well as parties.
- iii. The person being deposed is the *deponent*.
- iv. Procedure for Taking Depositions
  - 1. The attorney wishing to depose a party or witness must give reasonable notice in writing to all other parties in the case.
  - 2. Generally, a *subpoena for deposition* (an order issued by the court clerk directing a person to appear) is used to order the deponent to appear at a deposition.
  - 3. A *subpoena duces tecum* is used if an attorney wants the deponent to bring certain documents or tangible things to the deposition.
  - 4. FRCP 30 specifies how and when depositions may be taken.
  - 5. Drafting Deposition Questions
    - a. Depositions are conducted by attorneys.
    - b. Paralegals may draft deposition questions and attend the deposition, but they do not ask the questions at the deposition.
  - 6. Preparing the Client for a Deposition
    - a. Paralegals and lawyers will normally formulate mock answers to anticipated questions.
    - b. This does not mean that the lawyer tells the deponent what to say, only how the answer might be phrased.
  - 7. The Role of the Deponent's Attorney
    - a. Under FRCP 30, the deponent's attorney's role is limited at the deposition.
    - b. In general, the attorney may instruct a deponent not to answer a question only when it is necessary to preserve a privilege.
  - 8. The Deposition Transcript

- a. A court reporter will usually record the deposition proceedings and create an official *deposition transcript*.
  - b. The deposition transcript may be used by either party during the trial to prove or *impeach* (call into question) the credibility of a witness.
- 9. Summarizing and Indexing the Deposition Transcript
  - a. Typically, the paralegal will *summarize* the deposition transcript.
  - b. The summary becomes part of the litigation file and allows the litigation team to review quickly the information obtained from the deposition.
- 10. Requests for Production and Physical Examination
  - a. FRCP 34 authorizes each party to request documents and other forms of evidence from any other party.
  - b. If the mental or physical condition of a party is in controversy, the court (upon request) may order the party to submit to a physical or mental examination by a licensed examiner.
- 11. Requests for Admission
  - a. FRCP 36 permits one party to request that the opposing party admit the truth of matters relating to the case.
  - b. Any matter admitted under this request is conclusively established as true for the trial.

## VII. THE DUTY TO DISCLOSE UNDER FRCP 26

- A. Under the FRCP, each party to a lawsuit has a duty to disclose to the other party specified types of information prior to the discovery stage of litigation.
- B. These rules do not replace traditional discovery methods. Rather, the rules impose a duty on attorneys to disclose specified information early on, so that attorneys can craft an appropriate discovery plan.
- C. Initial Disclosures
  - i. Under FRCP 26(a)(1), each party must disclose specified information at the initial meeting or within ten days following the meeting.
- D. Failure to Disclose
  - i. FRCP 37c sets out serious sanctions for failure to disclose.
  - ii. If a party fails to disclose certain relevant information, that party will not be able to use the information as evidence at trial.
- E. Discovery Plan

- i. The attorneys must work out a *discovery plan* at the initial meeting.
  - ii. A report describing the plan must be submitted to the court within ten days of the meeting.
- F. Subsequent Disclosures
  - i. All subsequent disclosures must be made in writing, signed by the attorneys, and filed with the court.
  - ii. Expert Witnesses
    - 1. Under FRCP 26(a)(2), each party must disclose to the other party the names of any expert witnesses who may be called to testify during the trial.
  - iii. Other Pretrial Disclosures
    - 1. Under revised FRCP 26(a)(3), each party must disclose information about other witnesses who will testify at trial or any exhibits that may be used.

### **E-Evidence**

Electronic evidence may be the “smoking gun” of the future. Be careful in your e-transmissions, both personally and professionally. Be aware of its discoverability on your behalf and on behalf of your opposing party. “Delete” does not mean “Deleted.”

- VIII. DISCOVERY OF ELECTRONIC EVIDENCE
  - A. The discovery of e-evidence is fundamentally different from the discovery of paper documents and physical evidence.
  - B. Traditional discovery methods such as interrogatories and depositions are still used to obtain e-evidence.
    - i. The Advantages of Electronic Evidence
      - 1. A great deal of data, or *Metadata* (the hidden data kept by the computer about a document), can be obtained from a computer’s hard drive.
      - 2. This data can only be obtained from the file in its electronic format, not from printed versions.
      - 3. E-mail communications
      - 4. E-mails may be the “smoking guns” of the future.
      - 5. E-mails are very believable and compelling evidence.
    - ii. Deleted Files Can Be Retrieved
      - 1. Even deleted files can often be retrieved from the “residual data” within a computer.
  - C. The Sources of Electronic Evidence
    - i. Backup Data
      - 1. Backup files can be a treasure trove for the legal team.

2. Backup files contain e-mail messages, word-processing documents and other embedded information that can be useful.
- ii. Other Sources of E-Evidence
    1. Electronic evidence is not limited to computer system data.
    2. Voice mail, video, electronic calendars, Palm Pilots®, laptops, and cell phones are other sources of e-evidence.

D. The Special Requirements of Electronic Evidence

- i. To ensure e-evidence is admissible as evidence in court, two things are required:
  1. Make sure an exact image copy of the e-evidence is obtained.
  2. Make sure that you can prove nothing has been altered or changed from the time the image copy was made.
- ii. Acquiring an Image Copy
  1. This is best left to an expert in computer forensics.
- iii. Preserving the Chain of Custody
  1. The phrase *chain of custody* refers to the movement and location of evidence from the time it is obtained to the time it is presented in court.
  2. Chain of custody is particularly crucial when dealing with e-evidence, since e-evidence is particularly prone to addition, change, or deletion.