

Chapter 14

Trial Procedures

Chapter Outline

1. Introduction
2. Preparing for Trial
3. Pretrial Conference
4. Jury Selection
5. The Trial
6. Posttrial Motions and Procedures
7. Enforcing the Judgment

Chapter Objectives

After completing this chapter, you will know:

- How attorneys prepare for trial and how paralegals assist in this task.
- How jurors are selected and the role of attorneys and their legal assistants in the selection process.
- The various phases of a trial and the kinds of trial-related tasks that paralegals often perform.
- The options available to the losing party after the verdict is in.
- How a case is appealed to a higher court for review.

Chapter 14 Trial Procedures

Chapter Outline

- I. INTRODUCTION
 - A. Trials are costly in terms of both time and money.
 - B. Pretrial negotiations, including ADR, may lead to an out-of-court settlement.
 - C. If the parties fail to settle their dispute, the case will go to trial.
- II. PREPARING FOR TRIAL
 - A. Contacting and Preparing Witnesses
 - i. Typically, litigation paralegals are responsible for ensuring that witnesses are available and in court on the day of trial.
 - ii. Contacting Witnesses and Issuing Subpoenas
 1. Paralegals often assist in contacting and issuing subpoenas to witnesses to secure their attendance at trial.
 2. The paralegal should comply with the court's requirements regarding witness fees and subpoenas.
 - iii. Preparing Witnesses for Trial
 1. The paralegal may be asked to prepare witnesses for trial by asking them questions and role-playing.
 2. Tell Witnesses What to Expect
 - a. Discuss types of questions that may be asked.
 - b. Have the witness review witness statements he previously made.
 3. Role-Playing
 - a. This type of rehearsal is often valuable in helping the witness understand more fully how questioning will proceed.
 4. Other Details
 - a. Paralegals may recommend appropriate clothing and grooming for trial.
 - B. Exhibits and Displays
 - i. Paralegals are frequently asked to prepare exhibits or displays that will be presented at trial.
 - ii. If any exhibits require special equipment, such as an easel, VCR, or laptop computer, the paralegal will need to make such arrangements.
 - C. The Trial Notebook
 - i. Many paralegals assume responsibility for preparing the trial notebook for the attorney.
 - ii. The paralegal should consult with the attorney to see how she wishes the trial notebook to be categorized.

- iii. The documents in the notebook should not be the original documents, but rather copies of them.

III. PRETRIAL CONFERENCE

- A. Prior to trial, the attorneys for both sides usually meet with the trial judge in a *pretrial conference*.
- B. At the pretrial conference, the attorneys and judge decide whether a settlement is possible.
- C. If settlement is not possible, the attorneys and judge decide how the trial will be conducted and what types of evidence will be admissible.
- D. A *motion in limine (to limit evidence)* may be made by one or both of the attorneys at the pretrial conference.

IV. JURY SELECTION

A. Voir Dire

- i. The jury-selection process is called *voir dire*.
- ii. During voir dire, attorneys for both sides question jurors to determine if bias exists or if, for other reasons, certain jurors should be excluded from the jury.

B. Challenges during Voir Dire

- i. Attorneys can exclude prospective jurors from sitting on the jury through the exercise of *challenges for cause* and a limited number of *peremptory challenges*.
- ii. Challenge for Cause
 - 1. A challenge for cause is exercised when a particular prospective juror is biased for some reason.
- iii. Peremptory Challenge
 - 1. No reason need be given for excluding a juror based on a peremptory challenge. However, such challenge cannot be discriminatory.
- iv. Procedure for Challenges

- 1. The procedure varies depending on the jurisdiction.

C. The Paralegal's Role during Voir Dire

- i. Paralegals help develop a jury profile and draft questions that will be asked during voir dire.
- ii. Attorneys frequently rely on the observations of paralegals during the questioning.

D. Alternate Jurors

- i. Because unforeseeable circumstances or illness may mean one of the sitting jurors is dismissed, the court will often seal several *alternate jurors*.
- ii. Alternate jurors will hear the entire trial. If a juror has to be excused, then an alternate can take his place without disrupting the proceedings.

I'm Trying. ...

Trial represents the culmination of litigation. As you learned in Chapter 12, litigation begins with a complaint and follows a common pattern in development of the case. Trial represents a presentation of that development of facts and legal issues to a fact finder, the judge or jury, with a resolution by the judge or jury. As you learned in Chapter 13, adapting to different personalities, and as you learned in Chapter 4, staying organized will pay off at trial.

V. THE TRIAL

A. Opening Statements

- i. The trial begins with *opening statements*.
- ii. During opening statements, the attorneys give a brief version of the facts and the supporting evidence that they will use during the trial.

B. The Plaintiff's Case

- i. After opening statements, the plaintiff's attorney presents evidence supporting the plaintiff's claim.
 1. Direct Examination
 - a. During *direct examination* the plaintiff's attorney questions the witness whom he has called.
 - b. During direct examination, *leading questions* (a question that leads the witness to a particular desired response) are not allowed.
 - c. An exception to the leading-question rule may be when questioning a *hostile witness* (an uncooperative witness testifying on behalf of the other party).
 2. Cross-Examination
 - a. After the plaintiff's attorney finishes questioning a witness on direct examination, the defendant's attorney may question that witness in what is known as *cross-examination*.
 3. Redirect and Recross
 - a. After defendant has cross-examined the witness, plaintiff's attorney may question the witness again by *redirect examination*.
 - b. Following plaintiff's attorney's redirect, defendant's attorney will be given an opportunity for *recross-examination*.
 4. Motion for Directed Verdict
 - a. After the plaintiff's attorney has presented his client's case and both attorneys have examined the witnesses, the defendant's

attorney may make a *motion for directed verdict*.

- b. A motion for a directed verdict is also called a motion for judgment as a matter of law.
- c. The motion asserts that plaintiff has not offered enough evidence to support the validity of the plaintiff's claim against the defendant.
- d. If the judge grants the motion, the case will be dismissed.

C. The Defendant's Case

- i. After the plaintiff's attorney has presented her case, the defendant's attorney presents evidence and testimony to refute the plaintiff's claims.
- ii. Any witness called to the stand by the defendant's attorney will be subject to direct examination, cross-examination, redirect examination, and recross-examination.

D. Closing Arguments

- i. After the defendant's attorney has finished his or her presentation, both attorneys give their closing arguments.
- ii. Each attorney summarizes the major points that he made during the trial and attempts to show how the evidence presented favors a verdict in his client's favor.

E. Jury Instructions

- i. Following the attorneys' closing arguments, the judge instructs the jurors.
- ii. The judge instructs the jurors in a *charge* (also called *jury instruction*).
- iii. A charge is a document that includes statements of the applicable laws and a review of the facts as they were presented during the trial.
- iv. The jury must not disregard the judge's instructions as to what the applicable law is and how it should be applied to the facts of the case as interpreted by the jury.

F. The Verdict

- i. After the jury instructions, the jury then begins its deliberations.
- ii. When the jury has reached a decision, it issues a *verdict* in favor of one party or another.

I'm Still Trying. ...

Trial may not be the conclusion of your client's case. Posttrial motions may be filed. An appeal may be taken, or enforcing a judgment may be required. Don't throw your client's file away yet.

- VI. POSTTRIAL MOTIONS AND PROCEDURES
- A. After the verdict is pronounced and the trial concluded, the losing party's attorney may make one or several posttrial motions.
 - B. Motion for judgment notwithstanding the verdict
 - i. A *motion for judgment notwithstanding the verdict* is also called a *motion for judgment as a matter of law* in federal courts.
 - ii. This motion alleges that the judge should enter a judgment in favor of the losing party in spite of the verdict actually reached.
 - iii. The basis for this motion is that the verdict was not substantiated by the evidence or was otherwise erroneous.
 - C. Motion for a new trial
 - i. This motion asserts that the trial was so flawed that a new trial should be held.
 - ii. The basis for this motion is judge or juror misconduct or other pervasive errors in the first trial.
 - D. Appealing the Verdict
 - i. An attorney may *appeal* the decision to an appellate court for further review and decision.
 - ii. Notice of Appeal
 - 1. The *appellant* (the party appealing the decision) must file a notice of appeal with the court that rendered the judgment.
 - 2. The clerk of that court then notifies the *appellee* (the party against whom the appeal is taken).
 - iii. The Appellate Brief and Oral Arguments
 - 1. When a case is appealed, both sides submit written *briefs* that present their positions regarding the issues to be reviewed by the appellate court.
 - iv. The Appellate Court's Options
 - 1. If the appellate court upholds the trial court's decision, then that judgment is *affirmed*.
 - 2. If the appellate court disagrees entirely with the trial court's decision, then the judgment is *reversed*.
 - 3. An appellate court can *modify* a lower court's decision.
 - 4. If further proceedings on another issue are needed, the appellate court will *remand* or send the case back to the trial court.
 - 5. The court may also affirm in part and reverse in part.
 - 6. The decision of the appellate court may sometimes be appealed further (to a state or the U.S. Supreme Court, depending on where the case originated). However, this court is not *required* to take that appeal.

VII. ENFORCING THE JUDGMENT

- A. Even though the plaintiff wins a lawsuit for damages, it may be difficult to enforce the judgment against the defendant, particularly if the defendant has few assets.
- B. If the defendant does not personally have the amount of money available to pay the judgment, the plaintiff's attorney must request that the court issue a *writ of execution*.
- C. A writ of execution directs the sheriff to seize and sell a particular asset of the defendant in order to pay the judgment to the plaintiff.
- D. Even as a *judgment creditor* (one who has obtained a court judgment against his debtor), the plaintiff may not be able to obtain the full amount of the judgment.