

PRE-SUIT CONSIDERATIONS

- **Consulting with an Attorney:** The first step to take when contemplating a lawsuit, or when facing a lawsuit, is to consult a qualified attorney.
- **Legal Fees:** The anticipated expenses of investigating and prosecuting or defending the case, if necessary through an appeal, and the manner in which those fees will be paid.
 - **Fixed Fees:** A flat rate for the attorney's time and effort, typically excluding expenses for expert witnesses, depositions, etc.
 - **Hourly Fees:** A fee based on the attorney's time expended on the matter, sometimes varying depending on whether that time is spent researching, engaging in discovery, or before the court.
 - **Contingent Fees:** Typically set as a percentage (or a declining percentage) of the damages recovered in the event of a successful outcome.
- **Settlement Considerations:** The limited time and money a client has to invest in a lawsuit, particularly when the remedy the client might recover is also limited, may suggest trying to resolve the dispute without filing suit or early in the litigation process.

PLEADINGS

- Documents filed with a court that specify the issues involved in the lawsuit and inform each party of each other party's claims and defenses.
- The plaintiff's **complaint** states her claims for relief.
- The defendant's **answer** responds to the complaint and, where appropriate, may assert
 - (1) *affirmative defenses* (i.e., reasons why the plaintiff's claims fail or are limited as a matter of law or equity) and
 - (2) *counterclaims* the defendant argues entitle him to relief.
- If the defendant does not answer within the time allotted by the applicable rules, the plaintiff may seek a *default judgment*.
- If the defendant asserts a counterclaim, the plaintiff may file a **reply**.

SERVICE OF PROCESS

- Once the plaintiff has filed her complaint or petition, she must have each defendant served with *process* – typically, a copy of the complaint and a *summons* from the court informing each defendant of his obligation to answer or otherwise appear within a specified time or risk default.
- A court may not exercise jurisdiction over a defendant until it has proof that the defendant was properly served.
- While the acceptable means of service of process vary depending on the court and the circumstances, generally:
 - an **individual defendant** may be served at his residence or his principal place of business;
 - a **corporate defendant** may be served by serving an officer or *registered agent*, designated for the purpose of receiving service; and
 - a **partnership defendant** may be served by serving any (general) partner.
- The Federal Rules of Civil Procedure permit – and even encourage – **waiving** formal service of process.

PRETRIAL MOTIONS

- **Motion:** A request for relief from the court prior to the ultimate disposition of a lawsuit.
- **Motion to Dismiss:** A motion seeking to terminate the lawsuit due to the plaintiff's failure to comply with proper procedure or to state a justiciable claim.
- **Motion for Judgment on the Pleadings:** A motion by either party requesting that the court decide the case solely on the pleadings. The court may grant this motion only if there are no disputed facts.
- **Motion for Summary Judgment:** A motion requesting the court to enter judgment based on the pleadings and discovery to date. The court may grant this motion only if there are no disputed facts.
 - The movant and respondent typically support their motion for summary judgment and reply in opposition, respectively, by attaching one or more *affidavits*, copies of relevant documents revealed through *discovery*, and even excerpts from *depositions* taken in the course of discovery.

DISCOVERY

- **Depositions:** Sworn testimony, recorded by a court reporter and often by videotape, of the parties and other key witnesses. Depositions are taken prior to trial, and are often used to obtain the testimony of witnesses who cannot be compelled to attend and testify at trial.
- **Interrogatories:** Written questions related to the subject matter of the lawsuit that must be answered under oath.
- **Requests for Admission:** Questions to the responding party phrased in an “admit” or “deny” format, giving no opportunity for explanation, and binding the responding party to its admissions.
- **Requests for Documents, Objects, or Entry:** Written requests either detailing the types of documents and other things that the requesting party considers relevant to the lawsuit or requesting permission to enter premises.
- **Requests for Examination:** When the physical or mental condition of a party is in question, the opposing party may request a third-party physical or mental examination.
- **Electronic Discovery:** The federal rules and most state rules now allow for the parties to obtain electronic “data compilations.”

PRETRIAL MATTERS

- **Pretrial Conference:** Prior to trial, a court will typically schedule one or more conferences or hearings to resolve procedural matters and to narrow the issues for trial.
- Once the trial court has ruled on all pending motions, if one or more of plaintiff's claims or defendant's counterclaims has/have survived, the case will proceed to trial.
- Trial may be with or without a jury. A trial without a jury is called a **bench trial**. In a bench trial, the trial judge is the arbiter of all questions of fact and of law.
- By contrast, in a **jury trial**, the judge decides questions of law, but the jury decides all questions of fact (including the amount of damages, if any, due the plaintiff).
- **Jury Selection:** In the case of a jury trial, the trial judge or the attorneys for the parties ask a panel (or *venire*) of prospective jurors to answer a series of questions (a.k.a. *voir dire*) – most of which may not have any apparent relationship to the lawsuit. The judge and attorneys will then remove certain members from the panel until a group of six or twelve jurors (depending on the court), and usually one or more alternate jurors (to serve in the event of illness or other emergency), comprise the jury.

RULES OF EVIDENCE

- **Evidentiary Matters:** Since much of the trial is directed toward proving or disproving facts, and facts are gleaned from the evidence, it is important to understand a couple of basic concepts:
 - **Relevance:** Evidence is relevant if it tends to prove or disprove a disputed fact or to establish the likelihood of a disputed fact.
 - Even highly relevant evidence may be disallowed by the court if its probative value is outweighed by the prejudice it would likely cause to the opposing party's case.
- **Hearsay:** Any oral or written testimony given in court about a statement made by someone else.
 - Courts recognize numerous exceptions to the rule against hearsay – indeed, most law students spend the better part of a semester on that one subject.

STAGES OF A TRIAL - PT. I

- (1) **Opening Statements:** Counsel present the jury an overview of their case and the reasons they believe their client should prevail. In some instances (and in most instances in criminal trials), the defendant's counsel may reserve her opening statement until immediately before presenting her first witness.
- (2) **Examining Witnesses:** The party who bears the burden of proving its case presents its witnesses first. Counsel examine each witness as follows:
 - **Direct Examination** by counsel for the party who called the witness;
 - **Cross-Examination** by counsel for the opposing party; and, where appropriate and permitted,
 - **Re-Direct and Re-Cross:** More of the same, typically limited in scope to issues raised by opposing counsel's questioning.
- (3) **Motion for Judgment as a Matter of Law/Directed Verdict:** A motion for the judge to take the decision out of the jury's hands and direct a verdict for the moving party because the non-moving party has failed to provide sufficient evidence to prevail on its claims.

STAGES OF A TRIAL - PT. II

- (4) **Closing Argument:** After both sides have presented their witnesses and evidence and the judge has determined that the case should proceed to the jury, counsel for each party may summarize the evidence for the jury and argue why the evidence proves or disproves the plaintiff's case.
- In most cases, the plaintiff's counsel will argue first and last – that is, plaintiff's counsel will give an opening argument, followed by defense counsel's argument, ending with plaintiff's counsel's rebuttal.
- (5) **Jury Instructions:** The judge instructs the jury on the issues they must decide and the law governing the case. Counsel for all parties may submit proposed issues and instructions and object to proposed instructions.
- In some jurisdictions, the judge instructs the jury *before* argument; in most jurisdictions, she does so only after jury argument.
- (6) **Verdict:** After deliberating the judge's instructions and the evidence as long as needed, the jury delivers its findings.
- If the verdict includes a finding that one party owes the other money damages, the jury will decide the amount of the *award*.

STAGES OF A TRIAL - PT. III

(7) **Posttrial Motions:** Motions asking the trial court to alter or disregard the jury's verdict or to order a new trial.

- **Motion for New Trial:** A motion asserting that the trial was so fundamentally flawed – because of error by the trial judge, newly discovered evidence, prejudice, or other reason(s) – that a new trial is required to prevent a miscarriage of justice.

- **Motion for Judgment Notwithstanding the Verdict:** A motion asking the court to enter judgment *as a matter of law* in the moving party's favor, despite the jury's verdict – as a matter of fact – in the non-moving party's favor.

(8) If the losing party is unsuccessful in persuading the trial court to grant any of its post-trial motions, the trial court will enter its **judgment**, based on the jury's verdict.

APPELLATE PROCEDURE

- Following entry of judgment, the losing party may timely file an **appeal**, asking a court with appellate jurisdiction over the trial court to review and set aside the judgment.
- What is filed with the appellate court? While it varies from state to state and from state to federal court, generally:
 - (1) a **notice of appeal**, evidencing the *appellant's* intent to appeal the judgment or one or more rulings of the trial court;
 - (2) a **record** or **transcript** of the pleadings, motions, hearings, and trial before the trial court, and particularly the judgment and any other ruling by the trial court that is being challenged; and
 - (3) **briefs** outlining the **legal** arguments supporting the appellant's request to set-aside the judgment and the *appellee's* request that the appellate court let the trial court judgment stand.
- Appellate courts generally do not rule on questions of **fact** unless the evidence is so overwhelming that no reasonable person could disagree.

APPELLATE REVIEW

- Once all of the briefs are on file, the appellate court will generally, though not always, schedule an **oral argument** at which counsel for the parties may briefly outline their positions and at which the court may ask counsel pointed questions to aid the court's disposition of the appeal.
- Based on the arguments raised in the briefs and, if there is one, at oral argument, the appellate court may:
 - (1) **affirm** the trial court's judgment or ruling,
 - (2) **reverse** part or all of the trial court's judgment or ruling **and remand** the case for further proceedings in the trial court, or
 - (3) **reverse** part or all the trial court's judgment or ruling **and render** a new judgment or ruling, without necessitating further trial court proceedings.
- If the party that loses before the appellate court chooses, it may appeal an intermediate appellate court's ruling to the jurisdiction's supreme court or its equivalent, beginning a new round of briefing. Often, the first issue for the higher court is whether it will entertain the appeal at all. In such cases, initial briefing to the higher court may be limited to the question of why it should do so.