

PRE-SUIT CONSIDERATIONS

- **Consulting with an Attorney:** The first step to take when contemplating a lawsuit, as well as when facing a lawsuit, is to consult with 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

- **Pleadings:** Written documents that inform each of the parties of one another's claims and defenses and specify the issues involved in the lawsuit. The primary pleadings are:
 - (1) **Plaintiff's Complaint/Petition**, which sets forth the claims asserted by the party seeking affirmative relief.
 - (2) **Defendant's Answer**, which:
 - (a) **responds** to the claims set forth in the Complaint or Petition and, where appropriate,
 - (b) asserts **affirmative defenses** (reasons why the plaintiff's claims fail or are limited as a matter of law or equity), or
 - (c) asserts **counterclaims** (claims for affirmative relief asserted by the defendant).
- If the defendant does not answer within the time allotted by the applicable rules, the plaintiff may seek a *default judgment*.
- (3) 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 at 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 – **waiver** of formal service of process.

PRETRIAL MOTIONS

- **Motion:** A request for relief from the court prior to the ultimate disposition of a lawsuit.

- **Motion to Transfer/Change Venue:** A motion seeking to move the lawsuit to a more convenient venue – must generally be filed with or prior to Defendant’s Answer.

- **Motion to Dismiss:** A motion seeking to terminate the lawsuit due to Plaintiff’s failure to comply with proper procedure or failure to state a justiciable claim – this must also generally be filed with or prior to Defendant’s Answer.

- **Motion for Judgment on the Pleadings:** A motion by either party requesting the court to decide the case solely on the pleadings. This motion may be granted only if there are no fact issues in dispute.

- **Motion for Summary Judgment:** A motion requesting the court to enter judgment, based on the pleadings and discovery to date. This motion may be granted only if there are no fact issues in dispute.

DISCOVERY

- **Discovery:** The process, subject to applicable rules of procedure, of obtaining factual information from an opposing party or a non-party by means of:
 - **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 Production:** Written requests detailing the types of documents and other things that the requesting party considers relevant to the lawsuit.
 - **Requests for Examination:** When the physical or mental condition of a party is in question, the opposing party may ask the court to order a third-party physical or mental examination.

PRETRIAL MATTERS

- **Pretrial Conference:** Prior to trial, a court will typically schedule one or more pretrial 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), is chosen to serve as 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

- **Procedural Stages:** Following jury selection, the trial proceeds (unless cut short by a mistrial or some dispositive motion) through the following stages:
 - (1) **Opening Statements:** Counsel are permitted to present to 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) **Examination of Witnesses:** The plaintiff (or, in a criminal case, the State), who has the burden of proving her (its) case, presents her witnesses first.
 - **Direct Examination:** Questioning of a witness by counsel for the party who called the witness.
 - **Cross-Examination:** Questioning of a witness by counsel for the opposing party.
 - **Re-Direct and Re-Cross:** More of the same, typically limited in scope to issues raised by opposing counsel’s questioning.

STAGES OF A TRIAL - PT. II

- (3) **Closing Argument:** After both sides have presented all of their witnesses, counsel for each party is permitted to summarize the evidence for the jury and argue why the evidence proves or disproves the plaintiff's case.
 - In most cases, counsel for the plaintiff will argue first and last – that is, plaintiff's counsel will give an “opening” jury argument, followed by defense counsel's argument, ending with a “rebuttal” argument by plaintiff's counsel.
- (4) **Jury Instructions:** The judge instructs the jury on the issues they must decide and the law governing the case. Counsel for all parties are permitted to submit proposed issues and instructions and to object to incorrect or inappropriate matters.
 - In some jurisdictions, these instructions are given *before* jury argument; in others, they are given following jury argument.
- (5) **Verdict:** After deliberating the judge's instructions and the evidence, the jury renders a *verdict* setting forth its findings and the amount of damages, etc., if any.

DISPOSITIVE MOTIONS

- **Dispositive Motions:** Motions asking the trial court to dispose of a party's claims for affirmative relief, to alter or disregard the jury's verdict, or to order a new trial.

- **Motion for 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.

- **Motion for Judgment Notwithstanding the Verdict:** A motion asking the court to enter judgment in favor of the moving party, despite the jury's verdict in favor of the non-moving party. This Motion and the Motion for Directed Verdict have been merged under the Federal Rules into a Motion for Judgment as a Matter of Law.

- **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.

- 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** the trial court's judgment or ruling **and remand** the case for further proceedings in the trial court, or

 - (3) **reverse** the trial court's judgment or ruling **and render** a new judgment or ruling without further proceedings by the trial court.

- If the party that loses before the appellate court chooses, it may appeal that 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.