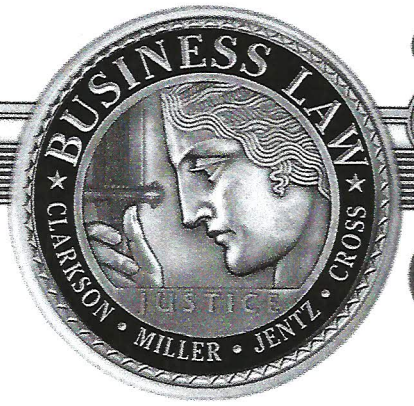


CHAPTER 3

Court Procedures

American and English courts follow the *adversarial system of justice.* Although clients are allowed to represent themselves in court (called *pro se* representation),[1] most parties to lawsuits hire attorneys to represent them. Each lawyer acts as his or her client's advocate, presenting the client's version of the facts in such a way as to convince the judge (or the judge and jury, in a jury trial) that this version is correct.

Most of the judicial procedures that you will read about in the following pages are rooted in the adversarial framework of the American legal system. In this chapter, after a brief overview of judicial procedures, we illustrate the steps involved in a lawsuit with a hypothetical civil case (criminal procedures will be discussed in Chapter 9).

1. This right was definitively established in *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Procedural Rules

The parties to a lawsuit must comply with the procedural rules of the court in which the lawsuit is filed. Although most people, when considering the outcome of a case, think of matters of substantive law, procedural law can have a significant impact on one's ability to assert a legal claim. Procedural rules provide a framework for every dispute and specify what must be done at each stage of the litigation process. All civil trials held in federal district courts are governed by the **Federal Rules of Civil Procedure (FRCP).**[2] Each state also has rules of civil procedure that apply to all courts within that state. In addition, each court has its own local rules of procedure that supplement the federal or state rules.

2. The United States Supreme Court has authority to set forth these rules, as spelled out in 28 U.S.C. Sections 2071–2077. Generally, though, the federal judiciary appoints committees that make recommendations to the Supreme Court. The Court then publishes any proposed changes in the rules and allows for public comment before finalizing the rules.

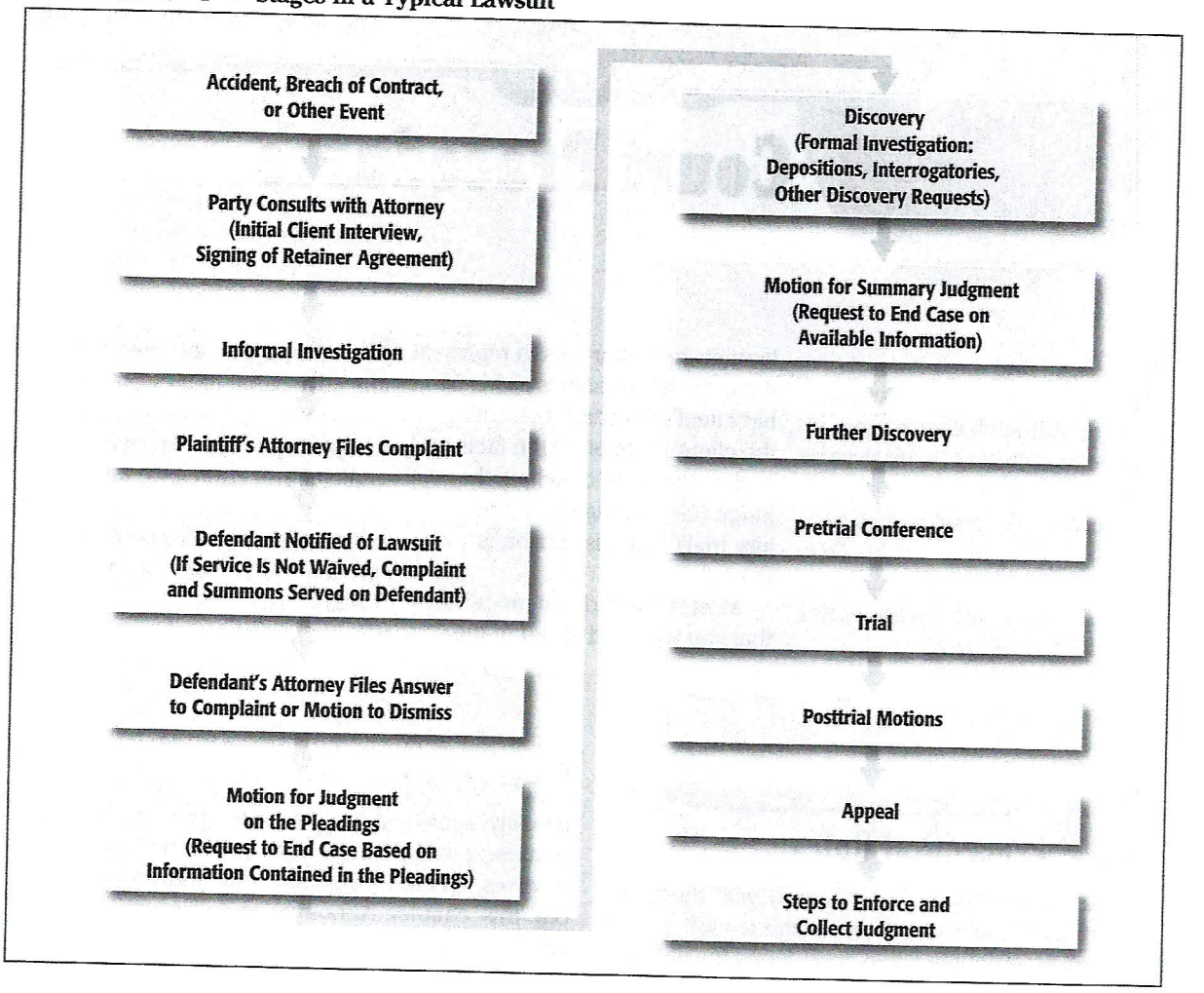
Stages of Litigation

Broadly speaking, the litigation process has three phases: pretrial, trial, and posttrial. Each phase involves specific procedures, as discussed throughout this chapter. Although civil lawsuits may vary greatly in terms of complexity, cost, and detail, they typically progress through the specific stages charted in Exhibit 3–1 on the following page.

To illustrate the procedures involved in a civil lawsuit, we will use a simple hypothetical case. The case arose from an automobile accident, which occurred when a car driven by Antonio Carvello, a resident of New Jersey, collided with a car driven by Jill Kirby, a resident of New York. The accident took place at an intersection in New York City. Kirby suffered personal injuries, which caused her to incur medical and hospital expenses as well as lost wages for four months. In all, she calculated that the cost to her of the accident was $100,000.[3] Carvello and Kirby have been unable to agree on a settlement, and Kirby now must decide whether to sue Carvello for the $100,000 compensation she feels she deserves.

3. In this example, we are ignoring damages for pain and suffering or for permanent disabilities. Often, plaintiffs in personal-injury cases seek such damages.

EXHIBIT 3–1 • Stages in a Typical Lawsuit



The First Step: Consulting with an Attorney

As mentioned, rules of procedure often affect the outcome of a dispute—a fact that highlights the importance of obtaining the advice of counsel. The first step taken by virtually anyone contemplating a lawsuit is to seek the guidance of a qualified attorney.[4] In the hypothetical Kirby-Carvello case, assume that Kirby consults with a lawyer. The attorney will advise her regarding what she can expect in a lawsuit, her probability of success at trial, and the procedures that will be involved. If more than one court would have jurisdiction over the matter, the attorney will also discuss the advantages and disadvantages of filing in a particular court. Depending on the court hearing the case, the attorney will give Kirby an idea of how much time it will take to resolve the dispute through litigation and provide an estimate of the costs involved.

The attorney will also inform Kirby of the legal fees that she will have to pay in an attempt to collect damages from the defendant, Carvello. Attorneys base their fees on such factors as the difficulty of a matter, the amount of time involved, the experience and skill of the attorney in the particular area of the law, and the cost of doing business. In the United States, legal fees range from $125 to $600 per hour or even higher (the average fee per hour is between $175 and $300). In addition, the client is also responsible for paying vari-

4. See Chapter 42 for a discussion of the importance of obtaining legal counsel and for guidelines on how to locate attorneys and retain their services.

ous expenses related to the case (called "out-of-pocket" costs), including court filing fees, travel expenses, and the cost of expert witnesses and investigators, for example.

Types of Attorneys' Fees For a particular legal matter, an attorney may charge one type of fee or a combination of several types. *Fixed fees* may be charged for the performance of such services as drafting a simple will. *Hourly fees* may be computed for matters that will involve an indeterminate period of time. Any case brought to trial, for example, may involve an expenditure of time that cannot be precisely estimated in advance. *Contingency fees* are fixed as a percentage (usually between 25 and 40 percent) of a client's recovery in certain types of lawsuits, such as a personal-injury lawsuit.[5] If the lawsuit is unsuccessful, the attorney receives no fee, but the client will have to reimburse the attorney for any out-of-pocket costs incurred. Because Kirby's claim involves a personal injury, her lawyer will likely take the case on a contingency-fee basis, but she may have to pay an amount up front to cover the court costs.

In some cases, the winning party may be able to recover at least some portion of her or his attorneys' fees from the losing party. Many state and federal statutes provide for an award of attorneys' fees in certain legal actions, such as probate matters (settling a person's estate after death). In these situations, the judge sets the amount of the fee, which may be specified by statute or based on other factors, such as the fee customarily charged for similar services in the area. An attorney will advise the client as to whether she or he would be entitled to recover some or all of the attorneys' fees in a case.

Settlement Considerations Once an attorney has been retained, the attorney is required to pursue a resolution of the matter on the client's behalf. Nevertheless, the amount of energy an attorney will spend on a given case is also determined by how much time and funds the client wishes to devote to the process. If the client is willing to pay for a lengthy trial and one or more appeals, the attorney may pursue those actions. Often, however, once a client learns the substantial costs involved in litigation, he or she may decide to pursue a settlement of the claim. Attempts to settle the case may be ongoing throughout the litigation process.

Another important factor in deciding whether to pursue litigation is the defendant's ability to pay the damages sought. Even if Kirby is awarded damages, it may be difficult to enforce the court's judgment if, for example, the amount exceeds the limits of Carvello's automobile insurance policy. (We will discuss the problems involved in enforcing a judgment later in this chapter.)

5. Note that attorneys may charge a contingency fee in only certain types of cases and are typically prohibited from entering into this type of fee arrangement in criminal cases, divorce cases, and cases involving the distribution of assets after death.

SECTION 2 Pretrial Procedures

The pretrial litigation process involves the filing of the *pleadings*, the gathering of evidence (called *discovery*), and possibly other procedures, such as a pretrial conference and jury selection.

The Pleadings

The *complaint* and *answer* (and other legal documents discussed below), taken together, are known as the **pleadings.** The pleadings inform each party of the other's claims and specify the issues (disputed questions) involved in the case. Because the rules of procedure vary depending on the jurisdiction of the court, the style and form of the pleadings may be different from those shown in this chapter.

The Plaintiff's Complaint Kirby's action against Carvello commences when her lawyer files a **complaint**[6] with the clerk of the appropriate court. The complaint contains a statement alleging (1) the facts showing that the court has jurisdiction, (2) the facts establishing the plaintiff's basis for relief, and (3) the remedy the plaintiff is seeking. Complaints can be lengthy or brief, depending on the complexity of the case and the rules of the jurisdiction.

Exhibit 3–2 on the next page illustrates how a complaint in the Kirby-Carvello case might appear. The complaint asserts facts indicating that the federal district court has jurisdiction because of diversity of citizenship. It then gives a brief statement of the facts of the accident and alleges that Carvello negligently drove his vehicle through a red light, striking Kirby's

6. Sometimes, the document filed with the court is called a *petition* or a *declaration* instead of a complaint.

EXHIBIT 3–2 • A Typical Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JILL KIRBY

Plaintiff,

v.

ANTONIO CARVELLO

Defendant.

CIVIL NO. 09-1047

COMPLAINT

The plaintiff brings this cause of action against the defendant, alleging as follows:

1. This action is between the plaintiff, who is a resident of the State of New York, and the defendant, who is a resident of the State of New Jersey. There is diversity of citizenship between the parties.
2. The amount in controversy, exclusive of interest and costs, exceeds the sum of $75,000.
3. On September 10th, 2008, the plaintiff, Jill Kirby, was exercising good driving habits and reasonable care in driving her car through the intersection of Boardwalk and Pennsylvania Avenue, New York City, New York, when the defendant, Antonio Carvello, negligently drove his vehicle through a red light at the intersection and collided with the plaintiff's vehicle.
4. As a result of the collision, the plaintiff suffered severe physical injury, which prevented her from working, and property damage to her car.

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of $100,000 plus interest at the maximum legal rate and the costs of this action.

By Joseph Roe

Joseph Roe
Attorney for Plaintiff
100 Main Street
New York, New York

1/2/09

car and causing serious personal injury and property damage. The complaint goes on to state that Kirby is seeking $100,000 in damages, although in some state civil actions the plaintiff need not specify the amount of damages sought.

Service of Process. Before the court can exercise jurisdiction over the defendant (Carvello)—in effect, before the lawsuit can begin—the court must have proof that the defendant was notified of the lawsuit. Formally notifying the defendant of a lawsuit is called **service of process.** The plaintiff must deliver, or serve, a copy of the complaint and a **summons** (a notice requiring the defendant to appear in court and answer the complaint) to the defendant. The summons notifies Carvello that he must file an answer to the complaint within a specified time period (twenty days in the federal courts) or suffer a default judgment against him. A **default judgment** in Kirby's favor would mean that she would be awarded the damages alleged in her

EXHIBIT 3–3 • A Typical Summons

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JILL KIRBY

Plaintiff,

v.

ANTONIO CARVELLO

Defendant.

CIVIL ACTION, FILE NO. 09-1047

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Joseph Roe, plaintiff's attorney, whose address is 100 Main Street, New York, NY, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

C. H. Hynek
CLERK

January 2, 2009
DATE

John Dolan
BY DEPUTY CLERK

complaint because Carvello failed to respond to the allegations. A typical summons is shown in Exhibit 3–3.

Method of Service. How service of process occurs depends on the rules of the court or jurisdiction in which the lawsuit is brought. Under the Federal Rules of Civil Procedure, anyone who is at least eighteen years of age and is not a party to the lawsuit can serve process in federal court cases. In state courts, the process server is often a county sheriff or an employee of an independent company that provides process service in the local area. Usually, the server hands the summons and complaint to the defendant personally or leaves it at the defendant's residence or place of business. In some states, process can be served by mail if the defendant consents (accepts service). When the defendant cannot be reached, special rules provide for alternative means of service, such as publishing a notice in the local newspaper. In some situations, such as when the parties are in other countries or no other alternative is available, courts have even allowed service of process via e-mail, provided that it is reasonably calculated to provide notice and an opportunity to respond.[7]

In cases involving corporate defendants, the summons and complaint may be served on an officer or on a *registered agent* (representative) of the corporation. The name of a corporation's registered agent can usually be obtained from the secretary of state's office in the state where the company incorporated its business (and, frequently, from the secretary of state's office in any state where the corporation does business).

Did the plaintiff in the following case effect proper service of the summons and the complaint on an out-of-state corporation?

7. See, for example, *Rio Properties, Inc. v. Rio International Interlink*, 284 F3d 1007 (9th Cir. 2002).

EXTENDED CASE 3.1 Cruz v. Fagor America, Inc.

California Court of Appeal, Fourth District, Division 1, 2007. 52 Cal.Rptr.3d 862, 146 Cal.App.4th 488.

***AARON*, J. [Judge]**

* * * *

[Alan] Cruz's parents purchased a pressure cooker from a vendor at the San Diego County Fair [in California] in the summer of 2001. On September 10, 2001, Cruz, who was 16 years old at the time, suffered burns on the left side of his torso and thigh when he attempted to take the lid off of the pressure cooker. Fagor [America, Inc.] is the American distributor of the pressure cooker.

On the date of the incident involving the pressure cooker, Cruz's parents sent an e-mail to Fagor to alert the company about what had occurred. * * *

On June 2, 2003, [Fagor] notified Cruz that it was denying liability. * * *

* * * *

Cruz filed a complaint [in a California state court] against Fagor on December 1, 2004, alleging causes of action for negligence and product liability. On December 14, 2004, Cruz, through his attorney, mailed the summons and complaint to Fagor by certified mail, return receipt requested. The envelope was addressed to "Patricio Barriga, Chairman of the Board, FAGOR AMERICA, INC., A Delaware Corporation, 1099 Wall Street, Lyndhurst, NJ 07071-3678."

The return receipt indicates that it was signed by an individual named Tina Hayes on December 22. Fagor did not file an answer. * * *

* * * *

A default judgment [a judgment entered against a defendant who fails to answer or respond to the plaintiff's complaint] in the amount of $259,114.50 was entered against Fagor on May 31, 2005.

Fagor did not make an appearance in the matter until November 29, 2005, when Fagor's attorneys * * * [filed] a motion to set aside the entry of default and default judgment. * * *

* * * *

* * * On February 1, the trial court granted the motion. Cruz [appealed to a state intermediate appellate court] on February 16.

* * * *

* * * [T]he trial court found that service was not effected because there was no proof that the summons and complaint (1) were served on Fagor's designated agent for service; (2) were delivered to the president or other officer, manager, or person authorized to receive service in accordance with [California Civil Procedure Code Section] 416.10; or (3) were served in accordance with [California] Corporations Code [S]ection 2110, which provides for service on a foreign corporation by hand delivery to an officer or designated agent for service of process.

* * * [But] the proofs of service demonstrate that Cruz served Fagor, an out-of-state corporation, in accordance with [California Civil Procedure Code Section] 415.40. Section 415.40 provides in pertinent part:

> A summons may be served on a person outside this state in any manner provided by this article or by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt. * * *

Because Fagor is a corporate entity, Cruz was also required to comply with the mandates of [S]ection 416.10. That section details how a plaintiff is to serve a summons on a corporate defendant and provides in relevant part:

> A summons may be served on a corporation by delivering a copy of the summons and of the complaint: * * * To the president or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the corporation to receive service of process.
>
> * * * *

A number of documents in the record establish that Cruz properly served Fagor with process pursuant to California's statutory requirements. The first is a Judicial Counsel of California proof of service form, completed and signed by Cruz's attorney, Harold Thompson. In that form, Thompson states that the summons and complaint were addressed and mailed to Patricio Barriga, the presi-

CASE 3.1 CONTINUED

dent of Fagor, at 1099 Wall Street, Lyndhurst, New Jersey 07071-3678, which is the address Fagor listed in 2003 with the New York State Department of State—Division of Corporations as its "service of process address."

* * * *Thompson's declaration was properly executed because it shows that Cruz addressed the summons and complaint to a person to be served, as listed under [S]ection 416.10.* [Emphasis added.]

Cruz also submitted a signed return receipt to establish the fact of actual delivery. A return receipt attached to the proof of service form shows that the envelope was accepted at the Lyndhurst address. The receipt was signed by Hayes. * * *

* * * *

* * * Cruz submitted the declaration of his attorney, Harold Thompson, in which Thompson states that he confirmed with a representative of the United States Postal Service in Lyndhurst, New Jersey, that Hayes regularly receives mail on behalf of Fagor at its Lyndhurst office. This is * * * sufficient to establish that an agent authorized to receive mail on the defendant's behalf received the summons and complaint.

* * * *

* * * *By virtue of her authority to accept mail on Fagor's behalf, Hayes's notice of the action is imputed to Fagor and its officers. Barriga's statement that he did not receive the summons and complaint does not establish that service of process was invalid.* Barriga had constructive knowledge of the existence of the action, and of the summons and complaint, once an individual authorized to receive corporate mail acknowledged service. To hold otherwise would be to ignore the realities of corporate life, in which the duty to sign for mail received often resides with a designated mailroom employee, a receptionist, a secretary, or an assistant. A plaintiff who has provided evidence that a person authorized to receive mail on behalf of a corporation in fact received an item that was mailed to an officer of the corporation should not be held responsible for any failure on the part of the corporate defendant to effectively distribute that mail. [Emphasis added.]

* * * Cruz has * * * satisfied all of the elements necessary to establish effective service. * * *

* * * *

The order of the trial court is reversed.

QUESTIONS

1. Suppose that Cruz had misaddressed the envelope but the summons had still reached Hayes and Cruz could prove it. Would this have been sufficient to establish valid service? Explain.
2. Should a plaintiff be required to serve a defendant with a summons and a copy of a complaint more than once? Why or why not?

Waiver of Formal Service of Process. In many instances, the defendant is already aware that a lawsuit is being filed and is willing to waive (give up) her or his right to be served personally. The Federal Rules of Civil Procedure (FRCP) and many states' rules allow defendants to waive formal service of process, provided that certain procedures are followed. Kirby's attorney, for example, could mail to defendant Carvello a copy of the complaint, along with "Waiver of Service of Summons" forms for Carvello to sign. If Carvello signs and returns the forms within thirty days, formal service of process is waived. Moreover, under the FRCP, defendants who agree to waive formal service of process receive additional time to respond to the complaint (sixty days, instead of twenty days). Some states provide similar incentives to encourage defendants to waive formal service of process and thereby reduce associated costs and foster cooperation between the parties.

The Defendant's Response Typically, the defendant's response to the complaint takes the form of an **answer.** In an answer, the defendant either admits or denies each of the allegations in the plaintiff's

complaint and may also set forth defenses to those allegations. Under the federal rules, any allegations that are not denied by the defendant will be deemed by the court to have been admitted. If Carvello admits to all of Kirby's allegations in his answer, a judgment will be entered for Kirby. If Carvello denies Kirby's allegations, the matter will proceed further.

Affirmative Defenses. Carvello can also admit the truth of Kirby's complaint but raise new facts to show that he should not be held liable for Kirby's damages. This is called raising an **affirmative defense.** As will be discussed in subsequent chapters, defendants in both civil and criminal cases can raise affirmative defenses. For example, Carvello could assert Kirby's own negligence as a defense by alleging that Kirby was driving negligently at the time of the accident. In some states, a plaintiff's contributory negligence operates as a complete defense. In most states, however, the plaintiff's own negligence constitutes only a partial defense (see Chapter 7).

Counterclaims. Carvello could also deny Kirby's allegations and set forth his own claim that the accident occurred as a result of Kirby's negligence and that therefore she owes Carvello for damage to his car. This is appropriately called a **counterclaim.** If Carvello files a counterclaim, Kirby will have to submit an answer to the counterclaim.

Dismissals and Judgments before Trial

Many actions for which pleadings have been filed never come to trial. The parties may, for example, negotiate a settlement of the dispute at any stage of the litigation process. There are also numerous procedural avenues for disposing of a case without a trial. Many of them involve one or the other party's attempts to get the case dismissed through the use of various motions.

A **motion** is a procedural request submitted to the court by an attorney on behalf of her or his client. When one party files a motion with the court, that party must also send to, or serve on, the opposing party a *notice of motion.* The notice of motion informs the opposing party that the motion has been filed. **Pretrial motions** include the motion to dismiss, the motion for judgment on the pleadings, and the motion for summary judgment, as well as the other motions listed in Exhibit 3–4.

Motion to Dismiss Either party can file a **motion to dismiss** requesting the court to dismiss the case for the reasons stated in the motion, although normally it is the defendant who requests dismissal. A defendant could file a motion to dismiss if the plaintiff's complaint fails to state a claim for which relief (a remedy) can be granted. Such a motion asserts that even if the facts alleged in the complaint are true, they do not give rise to any legal claim against the defendant. For example, if the allegations in Kirby's complaint do not constitute negligence on Carvello's part, Carvello could move to dismiss the case for failure to state a claim. Defendant Carvello could also file a motion to dismiss on the grounds that he was not properly served, that the court lacked jurisdiction, or that the venue was improper.

If the judge grants the motion to dismiss, the plaintiff generally is given time to file an amended complaint. If the judge denies the motion, the suit will go forward, and the defendant must then file an answer. Note that if Carvello wishes to discontinue the suit because, for example, an out-of-court settlement has been reached, he can likewise move for dismissal. The court can also dismiss a case on its own motion.

Motion for Judgment on the Pleadings At the close of the pleadings, either party may make a **motion for judgment on the pleadings,** which asks the court to decide the issue solely on the pleadings without proceeding to trial. The judge will grant the motion only when there is no dispute over the facts of the case and the sole issue to be resolved is a question of law. For example, in the Kirby-Carvello case, if Carvello had admitted to all of Kirby's allegations in his answer and had raised no affirmative defenses, Kirby could file a motion for judgment on the pleadings.

In deciding a motion for judgment on the pleadings, the judge may consider only the evidence contained in the pleadings. In contrast, in a motion for summary judgment, discussed next, the court may consider evidence outside the pleadings, such as sworn statements and other materials that would be admissible as evidence at trial.

Motion for Summary Judgment Either party can file a **motion for summary judgment,** which asks the court to grant a judgment in that party's favor without a trial. As with a motion for judgment on the pleadings, a court will grant a motion for summary judgment only if it determines that no facts are in dispute and the only question is how the law applies to the facts. A motion for summary judgment can be

EXHIBIT 3–4 • Pretrial Motions

MOTION TO DISMISS

A motion normally filed by the defendant in which the defendant asks the court to dismiss the case for a specified reason, such as improper service, lack of personal jurisdiction, or the plaintiff's failure to state a claim for which relief can be granted.

MOTION TO STRIKE

A motion filed by the defendant in which the defendant asks the court to strike (delete) from the complaint certain paragraphs contained in the complaint. Motions to strike help to clarify the underlying issues that form the basis for the complaint by removing paragraphs that are redundant or irrelevant to the action.

MOTION TO MAKE MORE DEFINITE AND CERTAIN

A motion filed by the defendant to compel the plaintiff to clarify the basis of the plaintiff's cause of action. The motion is filed when the defendant believes that the complaint is too vague or ambiguous for the defendant to respond to it in a meaningful way.

MOTION FOR JUDGMENT ON THE PLEADINGS

A motion that may be filed by either party in which the party asks the court to enter a judgment in his or her favor based on information contained in the pleadings. A judgment on the pleadings will be made only if there are no facts in dispute and the only question is how the law applies to a set of undisputed facts.

MOTION TO COMPEL DISCOVERY

A motion that may be filed by either party in which the party asks the court to compel the other party to comply with a discovery request. If a party refuses to allow the opponent to inspect and copy certain documents, for example, the party requesting the documents may make a motion to compel production of those documents.

MOTION FOR SUMMARY JUDGMENT

A motion that may be filed by either party in which the party asks the court to enter judgment in his or her favor without a trial. Unlike a motion for judgment on the pleadings, a motion for summary judgment can be supported by evidence outside the pleadings, such as witnesses' affidavits, answers to interrogatories, and other evidence obtained prior to or during discovery.

made before or during a trial, but it will be granted only if, when the evidence is viewed in the light most favorable to the other party, there clearly are no factual disputes in contention.

To support a motion for summary judgment, one party can submit evidence obtained at any point prior to trial that refutes the other party's factual claim. The evidence may consist of **affidavits** (sworn statements by parties or witnesses) or documents, such as a contract. Of course, the evidence must be *admissible* evidence—that is, evidence that the court would allow to be presented during the trial. As mentioned, the use of additional evidence is one feature that distinguishes the motion for summary judgment from the motion to dismiss and the motion for judgment on the pleadings.

Discovery

Before a trial begins, the parties can use a number of procedural devices to obtain information and gather evidence about the case. Kirby, for example, will want to know how fast Carvello was driving, whether he had been drinking or was under the influence of any medication, and whether he was wearing corrective lenses if he was required by law to do so while driving. The process of obtaining information from the opposing party or from witnesses prior to trial is known as **discovery.** Discovery includes gaining access to witnesses, documents, records, and other types of evidence. In federal courts, the parties are required to make initial disclosures of relevant evidence to the opposing party.

The FRCP and similar state rules set forth the guidelines for discovery activity. Generally, discovery is allowed regarding any matter that is relevant to the claim or defense of any party. Discovery rules also attempt to protect witnesses and parties from undue harassment, and to safeguard privileged or confidential material from being disclosed. Only information that is relevant to the case at hand—or likely to lead to the discovery of relevant information—is discoverable. If a discovery request involves privileged or confidential business information, a court can deny the request and can limit the scope of discovery in a

number of ways. For example, a court can require the party to submit the materials to the judge in a sealed envelope so that the judge can decide if they should be disclosed to the opposing party.

Discovery prevents surprises at trial by giving both parties access to evidence that might otherwise be hidden. This allows the litigants to learn as much as they can about what to expect at a trial before they reach the courtroom. Discovery also serves to narrow the issues so that trial time is spent on the main questions in the case.

Depositions and Interrogatories Discovery can involve the use of depositions or interrogatories, or both. A **deposition** is sworn testimony by a party to the lawsuit or by any witness, recorded by an authorized court official. The person deposed gives testimony and answers questions asked by the attorneys from both sides. The questions and answers are recorded, sworn to, and signed. These answers, of course, will help the attorneys prepare their cases. Depositions also give attorneys the opportunity to evaluate how their witnesses will conduct themselves at trial. In addition, depositions can be employed in court to *impeach* (challenge the credibility of) a party or a witness who changes testimony at the trial. A deposition can also be used as testimony if the witness is not available at trial.

Interrogatories are written questions for which written answers are prepared and then signed under oath. The main difference between interrogatories and written depositions is that interrogatories are directed to a party to the lawsuit (the plaintiff or the defendant), not to a witness, and the party can prepare answers with the aid of an attorney. Whereas depositions are useful for eliciting candid responses from a party and answers not prepared in advance, interrogatories are designed to obtain accurate information about specific topics, such as, for example, how many contracts were signed and when. The scope of interrogatories is also broader because parties are obligated to answer questions, even if that means disclosing information from their records and files.

What can a court do when a party refuses to respond to a discovery request? The following case illustrates the options.

CASE 3.2 Computer Task Group, Inc. v. Brotby

United States Court of Appeals, Ninth Circuit, 2004. 364 F.3d 1112.

Background and Facts Computer Task Group, Inc. (CTG), hired William Brotby as an information technologies consultant in 1995. As a condition of the job, Brotby signed an agreement that restricted his ability to work for CTG's customers if he left CTG. Less than two years later, Brotby left CTG to work for Alyeska Pipeline Service Company, a CTG client with which Brotby had worked on a project. CTG filed a suit in a federal district court against Brotby, alleging a breach of the agreement that Brotby had signed when he joined the firm. During discovery, Brotby refused to respond fully to CTG's interrogatories. He gave contradictory answers, made frivolous objections, filed baseless motions with the court, and never disclosed all of the information that CTG sought. He made excuses and changed his story repeatedly, making it impossible for CTG to establish basic facts with any certainty. Brotby also refused to produce key documents. The court issued five separate orders compelling Brotby's cooperation and fined him twice. Finally, in 1999, CTG filed a motion to enter a default judgment against Brotby, based on his failure to cooperate. The court granted the motion. Brotby appealed to the U.S. Court of Appeals for the Ninth Circuit.

IN THE LANGUAGE OF THE COURT

***PER CURIAM* [By the whole court].**

* * * *

Federal Rule of Civil Procedure 37 permits the district court, in its discretion, to enter a default judgment against a party who fails to comply with an order compelling discovery. * * *

In deciding whether a sanction of dismissal or default for noncompliance with discovery is appropriate, the district court must weigh five factors: (1) the public's interest in expeditious

CASE 3.2 CONTINUED

[speedy] resolution of litigation; (2) the court's need to manage its docket [calendar]; (3) the risk of prejudice to the opposing party; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. Where a court order is violated, the first and second factors will favor sanctions and the fourth will cut against them. Therefore, whether terminating sanctions were appropriate in Brotby's case turns on the third and fifth factors.

* * * Brotby engaged in a consistent, intentional, and prejudicial practice of obstructing discovery by not complying * * * with repeated court orders and not heeding multiple court warnings. Brotby violated court orders * * * by failing to provide clear answers to interrogatories, giving contradictory responses, making frivolous objections, filing frivolous motions and failing to provide the information CTG sought. He also failed to pay one of the [fines]. * * * Brotby violated orders * * * by failing to produce important financial documents and throwing up a series of baseless smoke screens that took the form of repeated groundless objections and contradictory excuses, which were absurd and completely unbelievable. The excuses included blaming the loss of documents on an earthquake, on a dropped computer and on a residential move. * * *

* * * [W]hatever Brotby actually produced was mostly incomplete or fabricated—and dribbled in only after a court order. In addition, Brotby changed his story numerous times with regard to his income from work done for Alyeska and the length of his contract with them, as well as the date of his resignation from CTG. These tactics unnecessarily delayed the litigation, burdened the court and prejudiced CTG. In the end, most of the documents CTG sought regarding the nature and extent of Brotby's work for Alyeska were never produced, despite court orders to do so * * *.

* * * *

* * * Brotby's baseless two-year fight against each and every discovery request and court order has been conducted willfully and with the intent of preventing meaningful discovery from occurring. It has clogged the court's docket, protracted this litigation by years, and made it impossible for CTG to proceed to any imaginably fair trial.

We have held that failure to produce documents as ordered * * * is * * * sufficient prejudice. * * *

In deciding whether the district court adequately considered lesser sanctions, we consider whether the court (1) explicitly discussed the alternative of lesser sanctions and explained why it would be inappropriate; (2) implemented lesser sanctions before ordering the case dismissed; and (3) warned the offending party of the possibility of dismissal.

The [district court] judge appropriately considered the alternative of lesser sanctions. He ordered Brotby to comply with CTG's discovery requests five times * * *. The [judge] also imposed two lesser (monetary) sanctions against Brotby, but to no avail. * * * [I]t is appropriate to reject lesser sanctions where the court anticipates continued deceptive misconduct. *Brotby had sufficient notice that continued refusal to cooperate would lead to [the entry of a default judgment against him].* The * * * judge warned him that he should "stop playing games" if he wanted to stay in the game. The two monetary sanctions, five orders compelling him to cooperate and repeated oral warnings were enough to put Brotby on notice that continued failure to cooperate in discovery would result in * * * default. [Emphasis added.]

- **Decision and Remedy** *The U.S. Court of Appeals for the Ninth Circuit affirmed the judgment of the lower court. The appellate court held that "[i]n light of Brotby's egregious [blatant] record of discovery abuses" and his "abiding contempt and continuing disregard for [the court's] orders," the lower court properly exercised its discretion in entering a default judgment against him.*

- **What If the Facts Were Different?** *Suppose that Brotby had not made frivolous objections and baseless motions but still had failed to comply with discovery requests. How might the court's ruling in this case have been different?*

- **The Legal Environment Dimension** *What does the result in this case suggest to parties in litigation who might be reluctant to respond truthfully to court requests?*

Requests for Admissions One party can serve the other party with a written request for an admission of the truth of matters relating to the trial. Any fact admitted under such a request is conclusively established as true for the trial. For example, Kirby can ask Carvello to admit that his driver's license was suspended at the time of the accident. A request for admission shortens the trial because the parties will not have to spend time proving facts on which they already agree.

Requests for Documents, Objects, and Entry upon Land A party can gain access to documents and other items not in her or his possession in order to inspect and examine them. Carvello, for example, can gain permission to inspect and copy Kirby's car repair bills. Likewise, a party can gain "entry upon land" to inspect the premises.

Request for Examinations When the physical or mental condition of one party is in question, the opposing party can ask the court to order a physical or mental examination by an independent examiner. If the court agrees to make the order, the opposing party can obtain the results of the examination. Note that the court will make such an order only when the need for the information outweighs the right to privacy of the person to be examined.

Electronic Discovery Any relevant material, including information stored electronically, can be the object of a discovery request. The federal rules and most state rules (as well as court decisions) now specifically allow individuals to obtain discovery of electronic "data compilations." Electronic evidence, or **e-evidence,** consists of all computer-generated or electronically recorded information, such as e-mail, voice mail, spreadsheets, word-processing documents, and other data. E-evidence can reveal significant facts that are not discoverable by other means. For example, computers automatically record certain information about files—such as who created the file and when, and who accessed, modified, or transmitted it—on their hard drives. This information can only be obtained from the file in its electronic format—not from printed-out versions.

Amendments to the FRCP that took effect in December 2006 deal specifically with the preservation, retrieval, and production of electronic data. Although traditional means, such as interrogatories and depositions, are still used to find out whether e-evidence exists, a party must usually hire an expert to retrieve the evidence in its electronic format. The expert uses software to reconstruct e-mail exchanges to establish who knew what and when they knew it. The expert can even recover files from a computer that the user thought had been deleted. Reviewing back-up copies of documents and e-mail can provide useful—and often quite damaging—information about how a particular matter progressed over several weeks or months.

Electronic discovery has significant advantages over paper discovery, but it is also time consuming and expensive. These costs are amplified when the parties involved in the lawsuit are large corporations with many offices and employees. Who should pay the costs associated with electronic discovery? For a discussion of how the courts are handling this issue, see this chapter's *Emerging Trends* feature on pages 66 and 67.

Pretrial Conference

After discovery has taken place and before the trial begins, the attorneys may meet with the trial judge in a **pretrial conference,** or hearing. Usually, the hearing consists of an informal discussion between the judge and the opposing attorneys after discovery has taken place. The purpose of the hearing is to explore the possibility of a settlement without trial and, if this is not possible, to identify the matters that are in dispute and to plan the course of the trial. In particular, the parties may attempt to establish ground rules to restrict the number of expert witnesses or discuss the admissibility or costs of certain types of evidence.

The Right to a Jury Trial

The Seventh Amendment to the U.S. Constitution guarantees the right to a jury trial for cases at law in *federal* courts when the amount in controversy exceeds $20. Most states have similar guarantees in their own constitutions (although the threshold dollar amount is higher than $20). The right to a trial by jury need not be exercised, and many cases are tried without a jury. In most states and in federal courts, one of the parties must request a jury, or the judge presumes the parties waive this right. If there is no jury, the judge determines the truth of the facts alleged in the case.

Jury Selection

Before a jury trial commences, a panel of jurors must be selected. Although some types of trials require twelve-person juries, most civil matters can be heard by six-person juries. The jury selection process is

known as ***voir dire.***[8] During *voir dire* in most jurisdictions, attorneys for the plaintiff and the defendant ask prospective jurors oral questions to determine whether a potential jury member is biased or has any connection with a party to the action or with a prospective witness. In some jurisdictions, the judge may do all or part of the questioning based on written questions submitted by counsel for the parties.

During *voir dire,* a party may challenge a certain number of prospective jurors *peremptorily*—that is, ask that an individual not be sworn in as a juror without providing any reason. Alternatively, a party may challenge a prospective juror *for cause*—that is, provide a reason why an individual should not be sworn in as a juror. If the judge grants the challenge, the individual is asked to step down. A prospective juror, however, may not be excluded by the use of discriminatory challenges, such as those based on racial criteria or gender. (See *Concept Summary 3.1* for a review of pretrial procedures.)

8. Pronounced *vwahr deehr.* These old French verbs mean "to speak the truth." In legal language, the phrase refers to the process of questioning jurors to learn about their backgrounds, attitudes, and similar attributes.

CONCEPT SUMMARY 3.1
Pretrial Procedures

Procedure	Description
PLEADINGS	1. *The plaintiff's complaint*—The plaintiff's statement of the cause of action and the parties involved, filed with the court by the plaintiff's attorney. After the filing, the defendant is notified of the suit through service of process. 2. *The defendant's response*—The defendant's response to the plaintiff's complaint may take the form of an answer, in which the defendant admits or denies the plaintiff's allegations. The defendant may raise an affirmative defense and/or assert a counterclaim.
PRETRIAL MOTIONS	1. *Motion to dismiss*—A motion requesting the judge to dismiss the case for reasons that are provided in the motion (such as failure to state a claim for which relief can be granted). 2. *Motion for judgment on the pleadings*—May be made by either party; will be granted only if no facts are in dispute and only questions of law are at issue. 3. *Motion for summary judgment*—May be made by either party; will be granted only if no facts are in dispute and only questions of law are at issue. Unlike the motion for judgment on the pleadings, the motion for summary judgment may be supported by evidence outside the pleadings, such as testimony and other evidence obtained during the discovery phase of litigation.
DISCOVERY	The process of gathering evidence concerning the case; involves (1) *depositions* (sworn testimony by either party or any witness); (2) *interrogatories* (in which parties to the action write answers to questions with the aid of their attorneys); and (3) requests for admissions, documents, examinations, or other information relating to the case. Discovery may also involve electronically recorded information, such as e-mail, voice mail, and other data.
PRETRIAL CONFERENCE	A pretrial hearing, at the request of either party or the court, to identify the matters in dispute after discovery has taken place and to explore the possibility of settling the dispute without a trial. If no settlement is possible, the parties plan the course of the trial.
JURY SELECTION	In a jury trial, the selection of members of the jury from a pool of prospective jurors. During a process known as *voir dire,* the attorneys for both sides may challenge prospective jurors either for cause or peremptorily (for no cause).

EMERGING TRENDS IN BUSINESS LAW
E-Discovery and Cost-Shifting

Before the computer age, discovery involved searching through paper records—physical evidence. Today, less than 0.5 percent of new information is created on paper. Instead of sending letters and memos, for example, people send e-mails—almost 600 billion of them annually in the United States. The all-inclusive nature of electronic information means that electronic discovery (e-discovery) now plays an important role in almost every business lawsuit.

Changes in the Federal Rules of Civil Procedure

As e-discovery has become ubiquitous, the Federal Rules of Civil Procedure (FRCP) have changed to encompass it. Amended Section 26(f) of the FRCP, for example, requires that the parties confer about "preserving discoverable information" and discuss "any issues relating to . . . discovery of electronically stored information, including the electronic forms in which it should be produced."

The most recent amendment to Section 34(a) of the FRCP expressly permits one party to a lawsuit to request that the other produce "electronically stored information—including . . . data compilation stored in any medium from which information can be obtained." The new rule has put in place a two-tiered process for discovery of electronically stored information. Relevant and nonprivileged information that is reasonably accessible is discoverable as a matter of right. Discovery of less accessible—and therefore more costly to obtain—electronic data may or may not be allowed by the court. The problem of the costs of e-discovery is discussed further below.

The *Ameriwood* Three-Step Process

The new federal rules were applied in *Ameriwood Industries, Inc. v. Liberman,* a major case involving e-discovery in which the court developed a three-step procedure for obtaining electronic data.[a] In the first step, *imaging,* mirror images of a party's hard drives can be required. The second step involves *recovering* available word-processing documents, e-mails, PowerPoint presentations, spreadsheets, and other files. The final step is *full disclosure* in which a party sends the other party all responsive and nonprivileged documents and information obtained in the previous two steps.

a. 2007 WL 685623 (E.D.Mo. 2007).

Limitations on E-Discovery and Cost-Shifting

Complying with requests for electronically discoverable information can cost hundreds of thousands, if not millions, of dollars, especially if a party is a large corporation with thousands of employees creating millions of electronic documents. Consequently, there is a trend toward limiting e-discovery. Under the FRCP, a court can limit electronic discovery (1) when it would be unreasonably cumulative or duplicative, (2) when the requesting party has already had ample opportunity during discovery to obtain the information, or (3) when the burden or expense outweighs the likely benefit.

The Trial

Various rules and procedures govern the trial phase of the litigation process. There are rules governing what kind of evidence will or will not be admitted during the trial, as well as specific procedures that the participants in the lawsuit must follow.

Opening Statements

At the beginning of the trial, both attorneys are allowed to make **opening statements** setting forth the facts that they expect to prove during the trial. The opening statement provides an opportunity for each lawyer to give a brief version of the facts and the supporting evidence that will be used during the trial. Then the plaintiff's case is presented. In our hypothetical case, Kirby's lawyer would introduce evidence (relevant documents, exhibits, and the testimony of witnesses) to support Kirby's position.

Rules of Evidence

Whether evidence will be admitted in court is determined by the **rules of evidence**—a series of rules that have been created by the courts to ensure that any evidence presented during a trial is fair and reliable. The Federal Rules of Evidence govern the admissibility of evidence in federal courts.

Many courts are allowing responding parties to object to e-discovery requests on the ground that complying with the request would cause an undue financial burden. In a suit between E*Trade and Deutsche Bank, for example, the court denied E*Trade's request that the defendant produce its hard drives because doing so would create an undue burden.[b]

In addition, sometimes when a court finds that producing the requested information would create an undue financial burden, the court orders the party to comply but shifts the cost to the requesting party (usually the plaintiff). A major case in this area involved Rowe Entertainment and the William Morris Agency. When the e-discovery costs were estimated to be as high as $9 million, the court determined that cost-shifting was warranted.[c] In deciding whether to order cost-shifting, courts increasingly take into account the amount in controversy and each party's ability to pay. Sometimes, a court may require the responding party to restore and produce representative documents from a small sample of the requested medium to verify the relevance of the data before the party incurs significant expenses.[d]

IMPLICATIONS FOR THE BUSINESSPERSON

1. Whenever there is a "reasonable anticipation of litigation," all the relevant documents must be preserved. Preserving data can be a challenge, particularly for large corporations that have electronic data scattered across multiple networks, servers, desktops, laptops, handheld devices, and even home computers.
2. Even though an e-mail is deleted, it is not necessarily eliminated from one's hard drive, unless it is completely overwritten by new data. Thus, businesspersons should be aware that their hard drives can contain information they presumed no longer existed.

FOR CRITICAL ANALYSIS

1. How might a large corporation protect itself from allegations that it intentionally failed to preserve electronic data?
2. Given the significant and often burdensome costs associated with electronic discovery, should courts consider cost-shifting in every case involving electronic discovery? Why or why not?

RELEVANT WEB SITES

To locate information on the Web concerning the issues discussed in this feature, go to this text's Web site at **academic.cengage.com/blaw/clarkson**, select "Chapter 3," and click on "Emerging Trends."

b. *E*Trade Securities, LLC v. Deutsche Bank A.G.*, 230 F.R.D. 582 (D.Minn. 2005). This is a *Federal Rules Decision* not designated for publication in the *Federal Supplement*, citing *Zubulake v. UBS Warburg, LLC*, 2003 WL 21087884 (S.D.N.Y. 2003).

c. *Rowe Entertainment, Inc., v. William Morris Agency, Inc.*, 2002 WL 975713 (S.D.N.Y. 2002).

d. See, for example, *Quinby v. West LBAG*, 2006 WL 2597900 (S.D.N.Y. 2006).

Evidence Must Be Relevant to the Issues Evidence will not be admitted in court unless it is relevant to the matter in question. **Relevant evidence** is evidence that tends to prove or disprove a fact in question or to establish the degree of probability of a fact or action. For example, evidence that a suspect's gun was in the home of another person when a victim was shot would be relevant—because it would tend to prove that the suspect did not shoot the victim.

Even relevant evidence may not be admitted in court if its reliability is questionable or if its probative (proving) value is substantially outweighed by other important considerations of the court. For example, a video or a photograph that shows in detail the severity of a victim's injuries would be relevant evidence, but the court might exclude this evidence on the ground that it would emotionally inflame the jurors.

Hearsay Evidence Not Admissible Generally, hearsay is not admissible as evidence. **Hearsay** is defined as any testimony given in court about a statement made by someone else who was not under oath at the time of the statement. Literally, it is what someone heard someone else say. For example, if a witness in the Kirby-Carvello case testified in court concerning what he or she heard another observer say about the accident, that testimony would be hearsay, or secondhand knowledge. Admitting hearsay into evidence carries

many risks because, even though it may be relevant, there is no way to test its reliability.

In the following case, the plaintiff's evidence consisted in part of printouts of Web pages purporting to indicate how the pages appeared at a prior point in time. The defendant challenged this evidence as hearsay.

CASE 3.3 Novak v. Tucows, Inc.

United States District Court, Eastern District of New York, 2007. __ F.Supp.2d __.

● **Background and Facts** In 1997, Robert Novak registered the domain name **petswarehouse.com** and began selling pet supplies and livestock online. Within two years, the site had become one of the most popular sites for pet supplies in the United States. Novak obtained a trademark for the **petswarehouse.com** name and transferred its registration to Nitin Networks, Inc., which was owned by Tucows, Inc., a Canadian firm. In an unrelated matter, John Benn obtained a judgment against Novak in an Alabama state court. Tucows transferred the name to the court on its order on May 1, 2003. After a state intermediate appellate court reversed the judgment, the name was returned to Novak on October 1, 2004. Novak filed a suit in a federal district court against Tucows and Nitin, arguing that the transfer of the name out of his control for seventeen months destroyed his pet-supply business. Novak alleged several violations of federal and state law, including trademark infringement and conversion. Tucows responded with, among other things, a motion to strike some of Novak's exhibits.

IN THE LANGUAGE OF THE COURT
***JOSEPH F. BIANCO*, District Judge.**

* * * *

Defendants contend that plaintiff's Exhibits B, J, K, O–R, U and V, which are printouts of Internet pages, constitute inadmissible hearsay and do not fall within any acknowledged exception to the hearsay rule. * * * [D]efendants [also] objected to Plaintiff's Exhibit 1, as well as to Plaintiff's Exhibits N–R. Plaintiff's Exhibit 1 is a printout from "RegisterSite.com," Nitin's Web site, as it purportedly appeared in 2003. According to plaintiff, he obtained the printout through a Web site called the Internet Archive, which provides access to a digital library of Internet sites. The Internet Archive operates a service called the "Wayback Machine," which purports to allow a user to obtain an archived Web page as it appeared at a particular moment in time. The other contested exhibits include: Exhibit B, an online summary of plaintiff's past and pending lawsuits, obtained via the Wayback Machine; Exhibit J, printouts of comments on a Web message board by [Evgeniy] Pirogov [a Tucows employee]; Exhibit K, a news article from the *Poughkeepsie Journal* Web site featuring [Nitin] Agarwal [the chief executive officer and founder of Nitin]; Exhibit N, Novak's declaration regarding the authenticity of pages printed from the Wayback Machine; Exhibit O, pages printed from the Internet Archive Web site; Exhibit P, pages printed from the Wayback Machine Web site; Exhibits Q, R and U, all of which constitute pages printed from RegisterSite.com via the Wayback Machine; and Exhibit V, a news article from "The Register," a British Web site, regarding Tucows. *Where postings from Internet Web sites are not statements made by declarants testifying at trial and are offered to prove the truth of the matter asserted, such postings generally constitute hearsay under [the Federal Rules of Evidence].* [Emphasis added.]

Furthermore, in this case, such documents have not been properly authenticated pursuant to [the Federal Rules of Evidence].[a] While plaintiff's declaration purports to cure his inability to authenticate the documents printed from the Internet, he in fact lacks the personal knowledge required to set forth with any certainty that the documents obtained via third-party Web sites are, in fact, what he proclaims them to be. This problem is even more acute in the case of documents procured through the Wayback Machine. Plaintiff states that the Web pages archived within the Wayback Machine are based upon "data from third parties who compile the data by using software

a. In this context, *authentication* requires the introduction of sufficient evidence to show that these Web pages are what Novak claims they are.

CASE 3.3 CONTINUED programs known as crawlers," who then "donate" such data to the Internet Archive, which "preserves and provides access to it." Based upon Novak's assertions, it is clear that the information posted on the Wayback Machine is only as valid as the third-party donating the page decides to make it—the authorized owners and managers of the archived Web sites play no role in ensuring that the material posted in the Wayback Machine accurately represents what was posted on their official Web sites at the relevant time. As Novak proffers neither testimony nor sworn statements attesting to the authenticity of the contested Web page exhibits by any employee of the companies hosting the sites from which plaintiff printed the pages, such exhibits cannot be authenticated as required under the [Federal] Rules of Evidence. Therefore, in the absence of any authentication of plaintiff's Internet printouts, combined with the lack of any assertion that such printouts fall under a viable exception to the hearsay rule, defendants' motion to strike Exhibits B, J, K, N–R, U and V is granted.

- **Decision and Remedy** *The court granted Tucows's motion to strike Novak's exhibits. Tucows also filed a motion to dismiss Novak's suit altogether based on a clause in the parties' domain name transfer agreement. The clause mandated the litigation of all related disputes in Ontario, Canada, according to Canadian law. The court determined that the clause was valid and reasonable, and granted Tucows's motion to dismiss the suit.*

- **The Ethical Dimension** *Hearsay is literally what a witness says he or she heard another person say. What makes the admissibility of such evidence potentially unethical?*

- **The E-Commerce Dimension** *In this case, the plaintiff offered as evidence the printouts of Web pages that he claimed once appeared on others' Web sites. What makes such evidence questionable until proved accurate?*

Examination of Witnesses

Because Kirby is the plaintiff, she has the burden of proving that her allegations are true. Her attorney begins the presentation of Kirby's case by calling the first witness for the plaintiff and examining, or questioning, the witness. (For both attorneys, the types of questions and the manner of asking them are governed by the rules of evidence.) This questioning is called **direct examination.** After Kirby's attorney is finished, the witness is subject to **cross-examination** by Carvello's attorney. Then Kirby's attorney has another opportunity to question the witness in *redirect examination,* and Carvello's attorney may follow the redirect examination with a *recross-examination.* When both attorneys have finished with the first witness, Kirby's attorney calls the succeeding witnesses in the plaintiff's case, each of whom is subject to examination by the attorneys in the manner just described.

Potential Motion and Judgment At the conclusion of the plaintiff's case, the defendant's attorney has the opportunity to ask the judge to direct a verdict for the defendant on the ground that the plaintiff has presented no evidence to support her or his claim. This is called a **motion for a judgment as a matter of law** (or a **motion for a directed verdict** in state courts). In considering the motion, the judge looks at the evidence in the light most favorable to the plaintiff and grants the motion only if there is insufficient evidence to raise an issue of fact. (Motions for directed verdicts at this stage of a trial are seldom granted.)

Defendant's Evidence The defendant's attorney then presents the evidence and witnesses for the defendant's case. Witnesses are called and examined by the defendant's attorney. The plaintiff's attorney has the right to cross-examine them, and there may be a redirect examination and possibly a recross-examination. At the end of the defendant's case, either attorney can move for a directed verdict, and the test again is whether the jury can, through any reasonable interpretation of the evidence, find for the party against whom the motion has been made. After the defendant's attorney has finished introducing evidence, the plaintiff's attorney can present a **rebuttal,** which includes additional evidence to refute the defendant's case. The defendant's attorney can, in turn, refute that evidence in a **rejoinder.**

Closing Arguments, Jury Instructions, and Verdict

After both sides have rested their cases, each attorney presents a closing argument. In the **closing argument,** each attorney summarizes the facts and evidence presented during the trial and indicates why the facts and evidence support his or her client's claim. In addition to generally urging a verdict in favor of the client, the closing arguments typically reveal the shortcomings of the points made by the opposing party during the trial.

Attorneys generally present closing arguments whether or not the trial was heard by a jury. If it was a jury trial, the judge then instructs the jury in the law that applies to the case (these instructions are often called *charges*), and the jury retires to the jury room to deliberate a verdict. In most civil cases, the standard of proof is a *preponderance of the evidence.*[9] In other words, the plaintiff (Kirby in our hypothetical case) need only show that her factual claim is more likely to be true than the defendant's. (As you will read in Chapter 9, in a criminal trial the prosecution has a higher standard of proof to meet—it must prove its case *beyond a reasonable doubt.*)

Once the jury has reached a decision, it issues a **verdict** in favor of one party; the verdict specifies the jury's factual findings. In some cases, the jury also decides on the amount of the *award* (the compensation to be paid to the prevailing party). After the announcement of the verdict, which marks the end of the trial itself, the jurors are dismissed. (See *Concept Summary 3.2* for a review of trial procedures.)

9. Note that some civil claims must be proved by "clear and convincing evidence," meaning that the evidence must show that the truth of the party's claim is highly probable. This standard is often applied in situations that present a particular danger of deception, such as allegations of fraud.

SECTION 4 Posttrial Motions

After the jury has rendered its verdict, either party may make a posttrial motion. The prevailing party usually requests that the court enter a judgment in accordance with the verdict. The nonprevailing party frequently files one of the motions discussed next.

CONCEPT SUMMARY 3.2 Trial Procedures

Procedure	Description
Opening Statements	Each party's attorney is allowed to present an opening statement indicating what the attorney will attempt to prove during the course of the trial.
Examination of Witnesses	1. Plaintiff's introduction and direct examination of witnesses, cross-examination by defendant's attorney, possible redirect examination by plaintiff's attorney, and possible recross-examination by defendant's attorney. 2. At the close of the plaintiff's case, the defendant may make a motion for a directed verdict (or judgment as a matter of law), which, if granted by the court, will end the trial before the defendant presents witnesses. 3. Defendant's introduction and direct examination of witnesses, cross-examination by plaintiff's attorney, possible redirect examination by defendant's attorney, and possible recross-examination by plaintiff's attorney. 4. Possible rebuttal of defendant's argument by plaintiff's attorney, who presents more evidence. 5. Possible rejoinder by defendant's attorney to meet that evidence.
Closing Arguments, Jury Instructions, and Verdict	Each party's attorney argues in favor of a verdict for his or her client. The judge instructs (or charges) the jury as to how the law applies to the issue, and the jury retires to deliberate. When the jury renders its verdict, this brings the trial to an end.

Motion for a New Trial

At the end of the trial, a motion can be made to set aside an adverse verdict and any judgment and to hold a new trial. The **motion for a new trial** will be granted only if the judge is convinced, after looking at all the evidence, that the jury was in error, but does not feel it is appropriate to grant judgment for the other side. This will usually occur when the jury verdict is obviously the result of a misapplication of the law or a misunderstanding of the evidence presented at trial. A new trial can also be granted on the grounds of newly discovered evidence, misconduct by the participants during the trial (such as when an attorney has made prejudicial and inflammatory remarks), or error by the judge.

Motion for Judgment *N.O.V.*

If Kirby wins, and if Carvello's attorney has previously moved for a directed verdict, then Carvello's attorney can now make a **motion for judgment *n.o.v.*—** from the Latin *non obstante veredicto*, meaning "notwithstanding the verdict." (Federal courts use the term *judgment as a matter of law* instead of *judgment n.o.v.*) Such a motion will be granted only if the jury's verdict was unreasonable and erroneous. If the judge grants the motion, then the jury's verdict will be set aside, and a judgment will be entered in favor of the opposing party (Carvello). If the motion is denied, Carvello may then appeal the case. (Kirby may also appeal the case, even though she won at trial. She might appeal, for example, if she received a smaller monetary award than she had sought.)

SECTION 5 The Appeal

Either party may appeal not only the jury's verdict but also the judge's ruling on any pretrial or posttrial motion. Many of the appellate court cases that appear in this text involve appeals of motions for summary judgment or other motions that were denied by trial court judges. Note that a party must have legitimate grounds to file an appeal (some legal error) and that few trial court decisions are reversed on appeal. Moreover, the expenses associated with an appeal can be considerable.[10]

10. See, for example, *Phansalkar v. Andersen Weinroth & Co.*, 356 F.3d 188 (2d Cir. 2004).

Filing the Appeal

If Carvello decides to appeal the verdict in Kirby's favor, then his attorney must file a *notice of appeal* with the clerk of the trial court within a prescribed period of time. Carvello then becomes the *appellant* or *petitioner*. The clerk of the trial court sends to the reviewing court (usually an intermediate court of appeals) the *record on appeal*. The record contains all the pleadings, motions, and other documents filed with the court and a complete written transcript of the proceedings, including testimony, arguments, jury instructions, and judicial rulings.

Carvello's attorney will file an appellate *brief* with the reviewing court. The **brief** is a formal legal document outlining the facts and issues of the case, the judge's rulings or jury's findings that should be reversed or modified, the applicable law, and arguments on Carvello's behalf (citing applicable statutes and relevant cases as precedents). The attorney for the *appellee* (Kirby, in our hypothetical case) usually files an answering brief. Carvello's attorney can file a reply, although it is not required. The reviewing court then considers the case.

Appellate Review

As mentioned in Chapter 2, a court of appeals does not hear any evidence. Rather, it reviews the record for errors of law. Its decision concerning a case is based on the record on appeal and the briefs and arguments. The attorneys present oral arguments, after which the case is taken under advisement. The court then issues a written opinion. In general, appellate courts do not reverse findings of fact unless the findings are unsupported or contradicted by the evidence.

An appellate court has the following options after reviewing a case:

1. The court can *affirm* the trial court's decision.
2. The court can *reverse* the trial court's judgment if it concludes that the trial court erred or that the jury did not receive proper instructions.
3. The appellate court can *remand* (send back) the case to the trial court for further proceedings consistent with its opinion on the matter.
4. The court might also affirm or reverse a decision *in part*. For example, the court might affirm the jury's finding that Carvello was negligent but remand the case for further proceedings on another issue (such as the extent of Kirby's damages).
5. An appellate court can also *modify* a lower court's decision. If the appellate court decides that the jury

awarded an excessive amount in damages, for example, the court might reduce the award to a more appropriate, or fairer, amount.

Higher Appellate Courts

If the reviewing court is an intermediate appellate court, the losing party may decide to appeal the decision to the state's highest court, usually called its supreme court. Although the losing party has a right to ask (petition) a higher court to review the case, the party does not have a right to have the case heard by the higher appellate court. Appellate courts normally have discretionary power and can accept or reject an appeal. As with the United States Supreme Court, getting a case heard in most state supreme courts is unlikely. If the petition is granted, new briefs must be filed before the state supreme court, and the attorneys may be allowed or requested to present oral arguments. Like the intermediate appellate courts, the supreme court can reverse or affirm the lower appellate court's decision or remand the case. At this point, the case typically has reached its end (unless a federal question is at issue and one of the parties has legitimate grounds to seek review by a federal appellate court). (*Concept Summary 3.3* reviews the options that the parties may pursue after the trial.)

SECTION 6 Enforcing the Judgment

The uncertainties of the litigation process are compounded by the lack of guarantees that any judgment will be enforceable. Even if the jury awards Kirby the full amount of damages requested ($100,000), for example, Carvello's auto insurance coverage might have lapsed, in which event the company would not pay any of the damages. Alternatively, Carvello's insurance policy might be limited to $50,000, meaning that Carvello personally would have to pay the remaining $50,000.

CONCEPT SUMMARY 3.3 Posttrial Options

Procedure	Description
POSTTRIAL MOTIONS	1. *Motion for a new trial*—If the judge believes that the jury was in error but is not convinced that the losing party should have won, the motion normally will be granted. It can also be granted on the basis of newly discovered evidence, misconduct by the participants during the trial, or error by the judge. 2. *Motion for judgment n.o.v. ("notwithstanding the verdict")*—The party making the motion must have filed a motion for a directed verdict at the close of the presentation of evidence during the trial; the motion will be granted if the judge is convinced that the jury was in error.
APPEAL	Either party can appeal the trial court's judgment to an appropriate court of appeals. 1. *Filing the appeal*—The appealing party must file a notice of appeal with the clerk of the trial court, who forwards the record on appeal to the appellate court. Attorneys file appellate briefs. 2. *Appellate review*—The appellate court does not hear evidence but bases its opinion, which it issues in writing, on the record on appeal and the attorneys' briefs and oral arguments. The court may affirm or reverse all (or part) of the trial court's judgment and/or remand the case for further proceedings consistent with its opinion. Most decisions are affirmed on appeal. 3. *Further review*—In some cases, further review may be sought from a higher appellate court, such as a state supreme court. If a federal question is involved, the case may ultimately be appealed to the United States Supreme Court.

Requesting Court Assistance in Collecting the Judgment

If the defendant does not have the funds available to pay the judgment, the plaintiff can go back to the court and request that the court issue a *writ of execution.* A **writ of execution** is an order directing the sheriff to seize and sell the defendant's nonexempt assets, or property (certain assets are exempted by law from creditors' actions). The proceeds of the sale would then be used to pay the damages owed, and any excess proceeds would be returned to the defendant. Alternatively, the nonexempt property itself could be transferred to the plaintiff in lieu of an outright payment. (Creditors' remedies, including those of judgment creditors, as well as exempt and nonexempt property, will be discussed in more detail in Chapter 28.)

Availability of Assets

The problem of collecting a judgment is less pronounced, of course, when a party is seeking to satisfy a judgment against a defendant with substantial assets that can be easily located, such as a major corporation. Usually, one of the factors considered by the plaintiff and his or her attorney before a lawsuit is initiated is whether the defendant has sufficient assets to cover the amount of damages sought. In addition, during the discovery process, attorneys routinely seek information about the location of the defendant's assets that might potentially be used to satisfy a judgment.

REVIEWING Court Procedures

Ronald Metzgar placed his fifteen-month-old son, Matthew, awake and healthy, in his playpen. Ronald left the room for five minutes and on his return found Matthew lifeless. A toy block had lodged in the boy's throat, causing him to choke to death. Ronald called 911, but efforts to revive Matthew were to no avail. There was no warning of a choking hazard on the box containing the block. Matthew's parents hired an attorney and sued Playskool, Inc., the manufacturer of the block, alleging that the manufacturer had been negligent in failing to warn of the block's hazard. Playskool filed a motion for summary judgment, arguing that the danger of a young child choking on a small block was obvious. Using the information presented in the chapter, answer the following questions.

1. Suppose that the attorney the Metzgars hired agreed to represent them on a contingency-fee basis. What does that mean?
2. How would the Metzgars' attorney likely have served process (the summons and complaint) on Playskool, Inc.?
3. Should Playskool's request for summary judgment be granted? Why or why not?
4. Suppose that the judge denied Playskool's motion and the case proceeded to trial. After hearing all the evidence, the jury found in favor of the defendant. What options do the plaintiffs have at this point if they are not satisfied with the verdict?

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QUESTIONS AND CASE PROBLEMS

3–1. Attorneys in personal-injury and other tort lawsuits (see Chapters 6 and 7) frequently charge clients on a contingency-fee basis; that is, a lawyer will agree to take on a client's case in return for, say, 30 percent of whatever damages are recovered. What are some of the social benefits and costs of the contingency-fee system? In your opinion, do the benefits of this system outweigh the costs?

3–2. QUESTION WITH SAMPLE ANSWER

When and for what purpose is each of the following motions made? Which of them would be appropriate if a defendant claimed that the only issue between the parties was a question of law and that the law was favorable to the defendant's position?

(a) A motion for judgment on the pleadings.
(b) A motion for a directed verdict.
(c) A motion for summary judgment.
(d) A motion for judgment *n.o.v.*

- **For a sample answer to Question 3–2, go to Appendix I at the end of this text.**

3–3. In the past, the rules of discovery were very restrictive, and trials often turned on elements of surprise. For example, a plaintiff would not necessarily know until the trial what the defendant's defense was going to be. In the last several decades, however, new rules of discovery have substantially changed this situation. Now each attorney can access practically all of the evidence that the other side intends to present at trial, with the exception of certain information—namely, the opposing attorney's work product. Work product is not a clear concept. Basically, it includes all of the attorney's thoughts on the case. Can you see any reason why such information should not be made available to the opposing attorney? Discuss fully.

3–4. Washoe Medical Center, Inc., admitted Shirley Swisher for the treatment of a fractured pelvis. During her stay, Swisher suffered a fatal fall from her hospital bed. Gerald Parodi, the administrator of her estate, and others filed an action against Washoe seeking damages for the alleged lack of care in treating Swisher. During *voir dire*, when the plaintiffs' attorney returned a few minutes late from a break, the trial judge led the prospective jurors in a standing ovation. The judge joked with one of the prospective jurors, whom he had known in college, about his fitness to serve as a judge and personally endorsed another prospective juror's business. After the trial, the jury returned a verdict in favor of Washoe. The plaintiffs moved for a new trial, but the judge denied the motion. The plaintiffs then appealed, arguing that the tone set by the judge during *voir dire* prejudiced their right to a fair trial. Should the appellate court agree? Why or why not?

3–5. Advance Technology Consultants, Inc. (ATC), contracted with RoadTrac, L.L.C., to provide software and client software systems for the products of global positioning satellite (GPS) technology being developed by RoadTrac. RoadTrac agreed to provide ATC with hardware with which ATC's software would interface. Problems soon arose, however. ATC claimed that RoadTrac's hardware was defective, making it difficult to develop the software. RoadTrac contended that its hardware was fully functional and that ATC had simply failed to provide supporting software. ATC told RoadTrac that it considered their contract terminated. RoadTrac filed a suit in a Georgia state court against ATC alleging breach of contract. During discovery, RoadTrac requested ATC's customer lists and marketing procedures. ATC objected to providing this information because RoadTrac and ATC had become competitors in the GPS industry. Should a party to a lawsuit have to hand over its confidential business secrets as part of a discovery request? Why or why not? What limitations might a court consider imposing before requiring ATC to produce this material?

3–6. Jury Selection. Ms. Thompson filed a suit in a federal district court against her employer, Altheimer & Gray,

seeking damages for alleged racial discrimination in violation of federal law. During *voir dire*, the judge asked the prospective jurors whether "there is something about this kind of lawsuit for money damages that would start any of you leaning for or against a particular party?" Ms. Leiter, one of the prospective jurors, raised her hand and explained that she had "been an owner of a couple of businesses and am currently an owner of a business, and I feel that as an employer and owner of a business that will definitely sway my judgment in this case." She explained, "I am constantly faced with people that want various benefits or different positions in the company or better contacts or, you know, a myriad of issues that employers face on a regular basis, and I have to decide whether or not that person should get them." Asked by Thompson's lawyer whether "you believe that people file lawsuits just because they don't get something they want," Leiter answered, "I believe there are some people that do." In answer to another question, she said, "I think I bring a lot of background to this case, and I can't say that it's not going to cloud my judgment. I can try to be as fair as I can, as I do every day." Explain the purpose of *voir dire* and how Leiter's response should be treated in light of that purpose. [*Thompson v. Altheimer & Gray*, 248 F.3d 621 (7th Cir. 2001)]

3-7. CASE PROBLEM WITH SAMPLE ANSWER

To establish a Web site, a person must have an Internet service provider or hosting company, register a domain name, and acquire domain name servicing. Pfizer, Inc., Pfizer Ireland Pharmaceuticals, and Warner-Lambert Co. (collectively, Pfizer) filed a suit in a federal district court against Domains By Proxy, Inc., and other persons alleged to be behind two Web sites—genericlipitors.com and econopetcare.com. Among the defendants were an individual and a company that, according to Pfizer, were located in a foreign country. Without investigating other means of serving these two defendants, Pfizer asked the court for permission to accomplish service of process via e-mail. Under what circumstances is service via e-mail proper? Would it be appropriate in this case? Explain. [*Pfizer, Inc. v. Domains By Proxy*, ___ F.Supp.2d ___ (D.Conn. 2004)]

- **To view a sample answer for Problem 3-7, go to this book's Web site at academic.cengage.com/blaw/clarkson, select "Chapter 3," and click on "Case Problem with Sample Answer."**

3-8. Motion for Judgment *N.O.V.* Gerald Adams worked as a cook for Uno Restaurants, Inc., at Warwick Pizzeria Uno Restaurant & Bar in Warwick, Rhode Island. One night, shortly after Adams's shift began, he noticed that the kitchen floor was saturated with a foul-smelling liquid coming from the drains and backing up water onto the floor. He complained of illness and went home, where he contacted the state health department. A department representative visited the restaurant and closed it for the night, leaving instructions to sanitize the kitchen and clear the drains. Two days later, in the restaurant, David Badot, the manager, shouted at Adams in the presence of other employees. When Adams shouted back, Badot fired Adams and had him arrested. Adams filed a suit in a Rhode Island state court against Uno, alleging that he had been unlawfully terminated for contacting the health department. A jury found in favor of Adams. Arguing that Adams had been fired for threatening Badot, Uno filed a motion for judgment *n.o.v.* (also known as a motion for judgment as a matter of law). What does a court weigh in considering whether to grant such a motion? Should the court grant the motion in this case? Why or why not? [*Adams v. Uno Restaurants, Inc.*, 794 A.2d 489 (R.I. 2002)]

3-9. A QUESTION OF ETHICS

Narnia Investments, Ltd., filed a suit in a Texas state court against several defendants, including Harvestons Securities, Inc., a securities dealer. (Securities are documents evidencing the ownership of a corporation, in the form of stock, or debts owed by it, in the form of bonds.) Harvestons is registered with the state of Texas and thus may be served with a summons and a copy of a complaint by serving the Texas Securities Commissioner. In this case, the return of service indicated that process was served on the commissioner "by delivering to JoAnn Kocerek defendant, in person, a true copy of this [summons] together with the accompanying copy(ies) of the [complaint]." Harvestons did not file an answer, and Narnia obtained a default judgment against the defendant for $365,000, plus attorneys' fees and interest. Five months after this judgment, Harvestons filed a motion for a new trial, which the court denied. Harvestons appealed to a state intermediate appellate court, claiming that it had not been served in strict compliance with the rules governing service of process. [Harvestons Securities, Inc. v. Narnia Investments, Ltd., *218 S.W.3d 126, (Tex.App.—Houston [14 Dist.] 2007)*]

(a) Harvestons asserted that Narnia's service was invalid in part because "the return of service states that process was delivered to 'JoAnn Kocerek'" and did not show that she "had the authority to accept process on behalf of Harvestons or the Texas Securities Commissioner." Should such a detail, if it is required, be strictly construed and applied? Should it apply in this case? Explain.

(b) Whose responsibility is it to see that service of process is accomplished properly? Was it accomplished properly in this case? Why or why not?

3-10. SPECIAL CASE ANALYSIS

Go to Case 3.1, *Cruz v. Fagor America, Inc.*, 52 Cal.Rptr.3d 862, 146 Cal.App.4th 488 (4 Dist. Div. 1 2007), on pages 58–59. Read the excerpt and answer the following questions.

(a) **Issue:** On what preliminary step to litigation does the issue in this case focus?
(b) **Rule of Law:** What are the chief requirements for fulfilling the pretrial procedure at the center of the dispute in this case?
(c) **Applying the Rule of Law:** In applying the rule of law in this case, what did the court infer, and what did that inference imply for the defendant?
(d) **Conclusion:** Did the court conclude that the plaintiff met all of the requirements for a favorable judgment in this case? If not, why not?

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www.law.cornell.edu

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www.ncsconline.org/WC/CourtTopics/stateindex.asp

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Small Claims Courts

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