

CONTENTS

Preface xxix

PART I: INVESTIGATING AND PLANNING THE LITIGATION

CHAPTER 1: INTRODUCTION TO LITIGATION	3
Chapter Objectives	4
A. Introduction	4
B. The Litigation Process	4
1. Sources of law	5
a. Statutes	5
b. Court cases	6
c. Constitutions	7
2. The court system	7
3. Overview for litigation cases	10
4. Remedies	12
C. The Paralegal's Role	13
D. Computerized Litigation	14
E. Ethical Considerations	15
Chapter Summary	17
Chapter Checklist	17
Review Questions	18
Case for Discussion: Hodge v. UFRA-Sexton, LP	18
Research Questions	20
Additional Resources	21

xiii

xiv

CHAPTER 2: INFORMAL FACT GATHERING AND INVESTIGATION 23 24 Chapter Objectives A. Introduction 24 25 Structuring Fact Investigations 1. What facts do I need to get? 26 2. How do I structure my fact investigation? 27 27 a. Use of a litigation chart 28 b. How to structure a litigation chart 30 3. What are the likely sources of proof? 4. How much time should I spend? 32 5. What sources should I investigate? 33 Client Interviews 35 1. Client attitudes and disclosure 35 2. Interview preparation 36 3. Initial client interview 38 a. Liability 43 Damages 43 b. Client background 44 c. 44 d. Parties Defenses and counterclaims 45 e. 45 f. Statutes of limitation Witnesses 46 Records 46 i. Physical evidence 46 Other law firms j. 46 Client goals 47 k. 1. Next steps 47 4. Sample interview checklist 47 5. Follow-up client interviews 50 D. Exhibits Acquisition 50 1. Scene 51 52 2. Physical evidence 3. Records 53 56 Witness Interviews 1. Whom and when to interview 56 57 2. Locating witnesses 3. Purposes of the interview 58 59 4. Arranging the interview 5. Structuring the interview 60 6. Recording the interview 62 63 7. Interviewing techniques 64 8. Evaluating witnesses

Cha Cha Rev Cas i Res	G. Computerized Fact Gathering Chapter Summary Chapter Checklist Review Questions Case for Discussion: Poitra v. Sch. Dist. No. 1 in the Cnty. of Denver & Colo. Research Questions Additional Resources					er Summary 68 er Checklist 68 ev Questions 70 er Discussion: Poitra v. Sch. Dist. No. 1 the Cnty. of Denver & Colo. 70 ech Questions 72		
	HAPTER 3: CASE EVALUATION ND STRATEGY	73						
	apter Objectives	74						
	Introduction Clinical Control Clinical	74						
В.	Establishing the Terms of the Attorney-Client Agreement							
	1. Work covered	75 75						
	2. Lawyer's fee	75 77						
	3. Retainers	77						
	4. Costs	77						
	5. Billings	78 70						
	6. Authorization to file suit	78 70						
	7. Conflicts of interest	78						
	8. Next steps	80						
C.		83						
D.	Planning the Litigation	84						
	1. Reevaluate the client's objectives, priorities, and co							
	constraints	85						
	2. Define the client's litigation objectives	85						
	3. Develop a "theory of the case"	86						
	4. Plan the pleadings	86						
	5. Plan the discovery	87						
	6. Plan the dispositive motions	88						
	7. Plan the settlement approach	88						
_	8. Develop a litigation timetable	88						
E.	Example of Litigation Planning: Novelty Products,							
	Inc. v. Gift Ideas, Inc.	89						
	1. Reevaluate the client's objectives, priorities,							
	and cost constraints	91						
	2. Define the client's litigation objectives	92						
	3. Develop a "theory of the case"	93						
	4. Plan the pleadings	93						
	5. Plan the discovery	93						

xvi Contents

	6.	Plan the dispositive motions	94	
	7.	Plan the settlement approach	94	
	8.	Develop a litigation timetable	95	
F.	F. Prefiling Requirements			
	1.	Statutory notice requirements	96	
	2.	Contract requirements	96	
	3.	Mediation, arbitration, and review requirements	96	
	4.	Administrative procedure requirements	97	
	5.	Appointment of legal guardian	97	
	6.	Discovery before suit	98	
	7.	Demand letters	98	
Cha	pter	Summary	100	
Cha	pter	Checklist	101	
Rev	iew	Questions	101	
		Discussion: In re Petition for Distribution of Attorney's Fees	102	
Rese	earcl	ı Questions	103	
Ada	litioi	nal Resources	104	
СН	IAF	TER 4: PARTIES AND JURISDICTION	105	
		-		
Cha	pter	Objectives	106	
Cha A.	pter Int	Objectives roduction	106 106	
Cha A. B.	pter Int Pa	Objectives roduction rties to the Action	106 106 107	
Cha A.	pter Int Pa Joi	Objectives roduction rties to the Action nder of Parties and Claims	106 106 107 108	
Cha A. B.	pter Int Pa Joi 1.	Objectives roduction rties to the Action nder of Parties and Claims Real party in interest	106 106 107 108 108	
Cha A. B.	Int Int Par Joi 1.	Objectives roduction rties to the Action nder of Parties and Claims Real party in interest Capacity to sue	106 106 107 108 108 109	
Cha A. B.	Int Par Joi 1. 2.	Objectives roduction rties to the Action nder of Parties and Claims Real party in interest Capacity to sue Required joinder of parties	106 106 107 108 108 109 110	
Cha A. B.	Internation Paragrams Internation Internat	Objectives roduction rties to the Action nder of Parties and Claims Real party in interest Capacity to sue Required joinder of parties Permissive joinder of parties	106 106 107 108 108 109 110 112	
Cha A. B.	Int Par Joi 1. 2. 3. 4. 5.	Objectives roduction rties to the Action nder of Parties and Claims Real party in interest Capacity to sue Required joinder of parties Permissive joinder of parties Special pleading rules	106 106 107 108 108 109 110 112 113	
Cha A. B. C.	Interpretation Interp	Objectives roduction rties to the Action nder of Parties and Claims Real party in interest Capacity to sue Required joinder of parties Permissive joinder of parties Special pleading rules Joinder of claims	106 106 107 108 108 109 110 112 113 113	
Cha A. B.	Interior Int	Objectives roduction rties to the Action nder of Parties and Claims Real party in interest Capacity to sue Required joinder of parties Permissive joinder of parties Special pleading rules Joinder of claims bject Matter Jurisdiction	106 106 107 108 108 109 110 112 113 113	
Cha A. B. C.	Int Pai Joi 1. 2. 3. 4. 5. 6. Sui	Objectives roduction rties to the Action nder of Parties and Claims Real party in interest Capacity to sue Required joinder of parties Permissive joinder of parties Special pleading rules Joinder of claims bject Matter Jurisdiction Case or controversy	106 106 107 108 108 109 110 112 113 113 113	
Cha A. B. C.	Interior Int	Objectives roduction rties to the Action nder of Parties and Claims Real party in interest Capacity to sue Required joinder of parties Permissive joinder of parties Special pleading rules Joinder of claims bject Matter Jurisdiction Case or controversy Federal question jurisdiction	106 106 107 108 108 109 110 112 113 113 115 115	
Cha A. B. C.	Int Pai Joi 1. 2. 3. 4. 5. 6. Sui	Objectives roduction rties to the Action nder of Parties and Claims Real party in interest Capacity to sue Required joinder of parties Permissive joinder of parties Special pleading rules Joinder of claims bject Matter Jurisdiction Case or controversy	106 106 107 108 108 109 110 112 113 113 113	

d. The United States as a party

a. "Citizenship" requirement

b. Complete diversity requirement

c. Jurisdictional amount requirement

3. Diversity jurisdiction

4. Ancillary jurisdiction

5. Removal jurisdiction

117

118

119

119

120

121

124

125

127

128

129

129

154

155

H. Cha Cha Rev Cas Reso Ada	130 131 131 132 133 133 135 135		
Pa	RT	II: PRETRIAL LITIGATION	
CH	IAF	TER 5: PLEADINGS	139
Cha	pter	Objectives	140
		roduction	140
В.	Ge	141	
	1.	General "notice" requirements for claims	141
	2.	Alternative and inconsistent pleadings	142
	3.	Format requirements	142
		a. Caption	142
		i. File number	143
		ii. Parties to the action	143
		b. Designation	144
		c. Signing pleadings	144
	4.	Rule 11	145
_	5.	Service and filing	147
C.		mplaints	148
	1.	Subject matter jurisdiction	148
		a. Federal question jurisdiction	148
	_	b. Diversity jurisdiction	149
	2.	Statement of claims	151
		a. Use plain English	151
		b. Keep it simple	152
		c. Plead "special matters" with particularity	153
		d. Use separate paragraphs	153

E. Personal jurisdiction

F.

G. Venue

1. Due process requirements

Federal Versus State Court

1. Determining venue

2. Service-of-process requirements

Use separate counts

Use exhibits

f.

xviii Contents

	3.	Praye	r for relief	130
	4.	Jury d	lemand	156
	5.	Filing	and service of summons	157
		a. Is	suing the summons	158
		b. Si	ummons content	158
		c. Pe	ersons who may serve the summons	159
		d. M	lethods of service	161
		i.	Individuals	161
		ii.	. Infants and incompetents	161
		iii	i. Corporations, partnerships, and associations	161
		iv	c. Officers and agencies of the United States, and	
			state and municipal government organizations	162
			laiver of service	162
		f. Te	erritorial limits of service	162
		i.	The 100-mile "bulge" rule	162
		ii.	G	163
		iii	i. Federal statute or court order	163
		iv	r. The Hague Convention	163
		O	imeliness of service	164
			roof of service	164
			nformal service	165
D.			esponses	165
			n to strike	166
			n for a more definite statement	166
	3.		n to dismiss under Rule 12(b)	167
			he one motion requirement	168
			ule 12(b) defenses	168
			/aiver	169
		d. Pi	ractice approach	169
Ε.		iswers		172
	1.	Timin		172
	2.		ral requirements	172
	3.	Respo		173
			.2(b) defenses	176
	5.		native defenses	177
_			ce approach	178
F.		untercl		178
	1.	_	oulsory counterclaims	179
	2.		ssive counterclaims	180
	3.		nited States as plaintiff	180
	4.		es of limitation	181
	5.		er and amended pleadings	181
	6.		ce approach	181
G.		plies		182 183
Н.	Cross-Claims			

	1.	Discretionary pleading	184
	2.	Subject matter	184
	3.	Timing	184
	4.	Jurisdiction, venue, and joinder	184
	5.	Cross-claims against the United States	185
	6.	<u> </u>	185
	7.	Responses to cross-claims	186
I.	Th	ird-Party Practice (Impleader)	186
	1.	Discretionary pleading	187
	2.	Subject matter	187
	3.	Jurisdiction and venue	188
	4.	Statutes of limitation	188
	5.	Practice approach	188
	6.	Third-party defendant responses	189
	7.	Original plaintiff responses	191
J.	In	terpleader	191
	1.	Rule 22 interpleader	192
	2.	28 U.S.C. §1335 interpleader	192
	3.	Practice approach	193
K.	In	tervention	195
	1.	Intervention of right	195
	2.	Permissive intervention	196
	3.	O .	196
		Jurisdiction	197
	5.	Practice approach	197
L.	Cl	ass Actions	198
	1.	General class requirements	199
	2.	General facts requirements	200
	3.	Jurisdiction	200
		Procedure	201
M.	Aı	mendments of Pleadings and Supplemental Pleadings	202
	1.	Amendments by right	202
	2.		202
	3.	Statutes of limitation and "relation back"	203
		a. Changing facts and theories	203
		b. Changing parties	204
	4.	Supplemental pleadings	204
	5.	Practice approach	204
		· Summary	206
		Checklist	206
		Questions	208
	,	Discussion: Pace v. Timmermann's Ranch and	
		le Shop, Inc.	208
		h Questions	210
Ada	litio	nal Resources	211

XX Contents

CF	HAPTER 6: LAW AND MOTIONS	21 3			
Cha	apter Objectives	214			
	Introduction	214			
В.	General Requirements for Motions				
υ.	1. Form	214 215			
	2. Notice, service, and filing	215			
	3. Content of the motion	219			
	4. Responses to motions	220			
		222			
	5. Hearing and argument6. Order				
C		222			
	Extensions of Time and Continuances	223			
	Substitution of Parties	225			
E.	Removal	226			
	1. Should you remove?	226			
	2. What are the procedural requirements for removal?	227			
	a. Timing	227			
	b. Notice of removal	227			
	c. Filing a notice in state court	229			
	d. Further proceedings	229			
	apter Summary	229			
	apter Checklist	230			
	view Questions	231			
Cas	se for Discussion: Energy Management Services, LLC. v. City of				
1	Alexandria	231			
Res	search Questions	233			
Ada	ditional Resources	233			
CL	HAPTER 7: MOTION PRACTICE	235			
CI	IAITER 7: MOTION TRACTICE	250			
Cha	apter Objectives	236			
A.	Introduction	236			
В.	Judgment on the Pleadings	237			
C.	Summary Judgment	238			
	1. When made	239			
	2. Standards and matters considered	240			
	3. Hearing, order, and appealability	240			
	4. Practice approach	241			
	5. Opponent's responses	244			
D.	Dismissals and Defaults	245			
	1. Voluntary dismissals	247			
	2. Involuntary dismissals	249			
	3. Defaults	250			

E.	Co	nsoli	dation and Separate Trials	253		
	1.	Cor	nsolidations	253		
	2.	Sep	arate trials	253		
Cha	pter	_	mary	254		
	Chapter Checklist					
		Ques		255		
			ussion: Celotex v. Corp. v. Catrett	255		
			estions	257		
		-	esources	258		
CI.	. A T		NO PROVICIONAL PEMEDIES	250		
СН	AP	TEI	R 8: PROVISIONAL REMEDIES	259		
Cha	pter	Obje	ctives	260		
A.	Int	rodu	ction	260		
B.	Ter	npoi	ary Restraining Orders and Preliminary Injunctions	261		
	1.	Ten	nporary restraining orders	261		
		a.	Law	261		
		b.	Practice approach	263		
			i. Complaint and summons	264		
			ii. Application for TRO and preliminary injunction	264		
			iii. Attorney's certificate regarding notice	266		
			iv. Witness affidavits	266		
			v. Security for costs	267		
			vi. Order and service	268		
	2.	Pre	liminary injunctions	270		
		a.	Law	270		
		b.	Practice approach	271		
C.	Wr	its of	f Attachment	272		
	1.	The	law	273		
	2.	Pra	ctice approach	273		
D.	Wr	its of	f Possession	274		
	1.	The	law	274		
	2.	Pra	ctice approach	275		
E.	Lis	Pen	dens	275		
Cha	pter	Sum	mary	276		
Cha	pter	Chec	klist	277		
		Ques		277		
			ussion: Amacker v. Amacker	278		
		-	estions	281		
Additional Resources 2				281		

xxii Contents

CH	HAPTER 9: EVIDENCE	283				
Cha	apter Objectives	284				
	Introduction					
	The Paralegal's Role					
C.		285 285				
	1. Character traits	287				
	2. Habit evidence	287				
	3. Policy exclusions	287				
D.	Hearsay	288				
	1. Is it a "statement"?	289				
	2. Was the statement made "out of court"?	289				
E.	Hearsay Exceptions	290				
	1. Admission of a party opponent	290				
	2. Prior statements by witnesses	292				
	3. Statements against interest	292				
	4. Former testimony	293				
	5. Present sense impressions	295				
	6. Excited utterances	295				
	7. Statement of present or past conditions for medical	al				
	diagnosis	296				
	8. Statement of present state of mind	297				
	9. Dying declarations	297				
	10. Records exceptions	298				
	11. Other exceptions	300				
F.	Witnesses, Exhibits, Judicial Notice, and Objections	300				
	1. Witnesses	300				
	a. Competency	301				
	b. Impeachment	301				
	2. Expert witnesses	304				
	3. Exhibits	304				
	a. Real evidence	305				
	b. Demonstrative evidence	305				
	c. Writings	305				
	d. Business records	305				
	e. Public records	306				
	4. Best evidence rule	306				
	5. Judicial notice	306				
G.	Privileges	307				
	Attorney-client privilege	307				
	2. Work product privilege	308				
	3. Physician-patient privilege	308				
	4. Marital privileges	309				

Cha	pter	Summary	309			
	Chapter Checklist					
	Chapter Checklist Review Questions Case for Discussion: Dempster v. Lamorak Ins. Co.					
		ı Questions	315			
		ıal Resources	315			
2 1000	,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,					
CH	IAP	TER 10: DISCOVERY	317			
Cha	pter	Objectives	318			
A.		roduction	318			
В.	Dis	scovery Overview	319			
	1.	Types of discovery	319			
	2.	The paralegal's role	321			
	3.	Computerized litigation support	321			
		a. Conducting research	322			
		b. Locating information about parties and witnesses	322			
		c. Organizing discovery	322			
C.	Sco	ope of Discovery	323			
		Relevance	323			
	2.	Insurance agreements	324			
	3.	Statements	324			
	4.	Experts	325			
	5.		325			
		a. What privilege law applies?	326			
		b. What is the applicable federal or state				
		privilege law?	326			
	6.	Trial preparation materials	326			
D.	Dis	scovery Strategy: A Seven-Step Process	327			
	1.	What facts are needed in order to establish a winning				
		case on the client's claims (or to defeat the opponent's				
		claims)?	327			
	2.	What facts already have been obtained through				
		informal fact investigation?	327			
	3.	What "missing" facts must still be obtained				
		through formal discovery?	327			
	4.	What discovery methods are most effective for obtaining				
		the missing facts?	328			
	5.	What facts and witnesses, already identified through				
		informal investigation, must be pinned down by				
		formal discovery?	329			
	6.	What restrictions does the client's litigation budget				
		place on the discovery plan?	329			

xxiv Contents

	7.	In wha	t order should the discovery proceed?	330
		a. Wł	nen should discovery start?	330
		b. In	what order should discovery be carried out?	332
E.	Int	errogato	ories	334
	1.	Law		334
	2.	Practice	e approach	338
		a. Top	pics: What information should I seek?	338
		b. Dra	afting the interrogatories	340
		i.	Headings	340
		ii.	Definitions and instructions	341
		iii.	Interrogatory style	343
		iv.	Signing, serving, and filing	347
		c. Res	sponses to interrogatories	347
		i.	Researching and preparing answers	347
		ii.	Objections	350
		iii.	Answers	351
		iv.	Signing, serving, and filing	354
F.	Re	quests to	Produce Documents and Subpoenas	356
	1.	Law	•	356
	2.	Practice	e approach	358
			ning	358
		b. Or	ganization	358
		c. Dra	afting requests to produce	359
		i.	Heading	359
		ii.	Definitions	359
		iii.	Requests format	360
		iv.	Signing, serving, and filing	362
		d. Res	sponses to requests to produce	362
		i.	Researching and preparing responses	364
		ii.	Objections	364
		iii.	Answers	366
		iv.	Signing, serving, and filing	367
	3.	Docum	ent requests and subpoenas to nonparties	368
	4.		ent productions	368
G.	De	position	-	371
		Law		371
		a. Tin	ning	371
		b. No	otice	372
		c. Lo	cation	373
		d. Per	rsons present	373
			cording	373
			ning, correcting, and filing	374
		_	jections	375
	2.	0	e approach	375
			neduling the deposition	376
			eparing for the deposition	381

		c.	Prep	paring the client for deposition	384
		d.		ing notes at the deposition	388
		e.	Sum	nmarizing the deposition	389
			i.	Chronological summary	390
			ii.	Subject matter summary	390
			iii.	Topic index	391
			iv.	Narrative summary	391
H.	Ph	ysica	al and	d Mental Examinations	392
	1.	Lav	W		392
	2.	Pra	ctice	approach	394
I.	Re	ques	sts for	Admission	397
		Lav			397
	2.	Pra	ctice	approach	399
		a.	Tim	ing	399
		b.	Wha	at to request	400
		c.	Dra	fting the requests	401
		d.	Cho	oosing a response	402
		e.	Req	uesting a party's responses	403
J.	Dis	scov	ery Ñ	lotions	404
	1.	Pro	otectiv	ve orders	406
	2.	Or	ders c	compelling discovery	407
	3.	Sar	nction	ns for abuse	412
K.	Elε	ectro	nicall	ly Stored Information	413
	1.	Typ	es of	electronically stored information	413
	2.			of electronically stored information	414
	3.	Sar	nction	ns for abuse	414
	4.	Pra	ctice	pointers	415
Cha	pter	Sun	ımary		416
Cha	pter	Che	cklist		416
Revi	iew	Ques	stions		418
Case	e for	Disc	cussio	n: Gunn v. Gunn	418
Rese	earcl	ı Qu	estion	2S	422
Add	itioı	ıal R	lesour	ces	422

PART III: SETTLEMENT, TRIAL, AND POST-TRIAL

CH	IAPTER 11: SETTLEMENTS	425
Cha	pter Objectives	426
A.	Introduction	426
B.	Preparing a Settlement Brochure	427
C.	Settlement Contracts	427
	1. Releases, covenants not to sue, and loan receipts	428
	2. Drafting the agreement	429

xxvi Contents

	4. Terminating the suit	435	
	5. Offers of judgment	435	
	6. Evidence rules	440	
	7. Insurer good faith requirements	440	
Cha	apter Summary	441 442	
	apter Checklist		
Review Questions			
	Case for Discussion: McGinnis v. Cox Research Questions		
	ditional Resources	446	
CI	IADTED 12. TDIAL DDEDAD ATION TDIAL		
	HAPTER 12: TRIAL PREPARATION, TRIAL, ND APPEAL	447	
	apter Objectives	448	
Α.		448	
В.	O	448	
C.		449	
D.	Organization of Files	455	
E.	Trial Materials	457	
	1. Divider method	457	
	2. Trial notebook method	458	
	a. Facts	458	
	b. Pleadings	458	
	c. Discovery	459	
	d. Motions	459	
	e. Jury selection	459	
	f. Charts	460	
	g. Direct examinations (your case-in-chief)	461	
	h. Cross-examinations (opponent's case)	463	
	i. Closing arguments	463	
	j. Jury instructions	463	
	k. Research	463	
F.	Theory of the Case	464	
G.	Preparation of Witnesses	464	
Н.	Preparation of Exhibits	468	
I.	Order of Trial	469	
J.	Assistance During Trial	469	
•	1. Planning for the courtroom	469	
	2. Voir dire	470	
	3. The trial	471	

K. The Paralegal's Conduct During Trial

3. Structured and installment settlements

472

Contents	XXVII

L. Appeal	4/2
1. The appellate process	473
2. The record on appeal	474
3. Written briefs	476
4. The paralegal's role	477
Chapter Summary	478
Chapter Checklist	479
Review Questions	481
Case for Discussion: Skilling v. United States	481
Research Questions	484
Additional Resources	484
CHAPTER 42 ENEODOEMENT OF HIDOMENTS	405
CHAPTER 13: ENFORCEMENT OF JUDGMENTS	485
Chapter Objectives	486
A. Introduction	486
B. Demand Letter	486
C. Abstracts of Judgment	487
D. Writs of Execution	488
1. The till tap	490
2. The keeper	491
3. The bank levy	491
E. Wage Garnishments	491
F. Locating Assets	492
Chapter Summary	493
Chapter Checklist	493
Review Questions	494
Case for Discussion: Big M, Inc. v. Texas Roadhouse Holding, LLC	494
Research Questions	496
Additional Resources	497
CHAPTED 14. ALTEDNIATINE DICHLEE	
CHAPTER 14: ALTERNATIVE DISPUTE	400
RESOLUTION	499
Chapter Objectives	500
A. Introduction	500
B. Mediation	501
C. The Arbitration Process	502
D. Preparing for Arbitration	503
E. The Arbitration Hearing	504
Chapter Summary	506
Chapter Checklist	506

xxviii Contents

Review Questions Case for Discussion: Hercules & Co. v. Shama Restaurant Research Questions Additional Resources	
CHAPTER 15: SOCIAL MEDIA IN LITIGATION	511
Chapter Objectives	512
A. Introduction	512
B. Use of Social Media in Discovery	512
C. Use of Social Media Sites as Evidence in Court	514
D. Social Media Sites and Courts	515
E. Ethical Considerations	515
Chapter Summary	516
Chapter Checklist	
Review Questions	
Case for Discussion: Forman v. Henkin	
Research Questions	
Additional Resources	
Litigation File: <i>Jones v. Smith</i>	
Glossary Index	565 585