

CONTENTS

Preface

xxix

PART I: INVESTIGATING AND PLANNING THE LITIGATION

CHAPTER 1: INTRODUCTION TO LITIGATION 3

<i>Chapter Objectives</i>	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 of litigation cases	10
4. Remedies	12
C. The Paralegal's Role	13
D. Computerized Litigation	14
E. Ethical Considerations	15
F. The Use of Artificial Intelligence	16
<i>Chapter Summary</i>	17
<i>Chapter Checklist</i>	18
<i>Review Questions</i>	19
<i>Case for Discussion: Hodge v. UFRA-Sexton, LP</i>	19
<i>Research Questions</i>	21
<i>Additional Resources</i>	21

CHAPTER 2: INFORMAL FACT GATHERING AND INVESTIGATION	23
<i>Chapter Objectives</i>	24
A. Introduction	24
B. Structuring Fact Investigations	25
1. What facts do I need to get?	26
2. How do I structure my fact investigation?	27
a. Use of a litigation chart	27
b. How to structure a litigation chart	28
3. What are the likely sources of proof?	30
4. How much time should I spend?	33
5. What sources should I investigate?	33
C. Client Interviews	35
1. Client attitudes and disclosure	35
2. Interview preparation	36
3. Initial client interview	38
a. Liability	43
b. Damages	43
c. Client background	43
d. Parties	44
e. Defenses and counterclaims	45
f. Statutes of limitation	45
g. Witnesses	45
h. Records	46
i. Physical evidence	46
j. Other law firms	46
k. Client goals	46
l. Next steps	47
4. Sample interview checklist	47
5. Follow-up client interviews	49
D. Exhibits Acquisition	50
1. Scene	50
2. Physical evidence	52
3. Records	53
E. Witness Interviews	56
1. Whom and when to interview	56
2. Locating witnesses	57
3. Purposes of the interview	58
4. Arranging the interview	59
5. Structuring the interview	60
6. Recording the interview	62
7. Interviewing techniques	63
8. Evaluating witnesses	64

F. Expert Reviews	65
G. Computerized Fact Gathering	67
<i>Chapter Summary</i>	68
<i>Chapter Checklist</i>	68
<i>Review Questions</i>	70
<i>Case for Discussion: Poitra v. Sch. Dist. No. 1</i> <i>in the Cnty. of Denver & Colo.</i>	70
<i>Research Questions</i>	72
<i>Additional Resources</i>	72

CHAPTER 3: CASE EVALUATION AND STRATEGY 73

<i>Chapter Objectives</i>	74
A. Introduction	74
B. Establishing the Terms of the Attorney-Client Agreement	74
1. Work covered	75
2. Lawyer's fee	75
3. Retainers	77
4. Costs	77
5. Billings	78
6. Authorization to file suit	78
7. Conflicts of interest	78
8. Next steps	80
C. Declining Representation	83
D. Planning the Litigation	84
1. Reevaluate the client's objectives, priorities, and cost 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: <i>Novelty Products, Inc. v. Gift Ideas, Inc.</i>	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

6. Plan the dispositive motions	94
7. Plan the settlement approach	94
8. Develop a litigation timetable	95
F. Prefiling Requirements	95
1. Statutory notice requirements	96
2. Contract requirements	96
3. Mediation, arbitration, and review requirements	96
4. Administrative procedure requirements	96
5. Appointment of legal guardian	97
6. Discovery before suit	97
7. Demand letters	98
<i>Chapter Summary</i>	100
<i>Chapter Checklist</i>	100
<i>Review Questions</i>	101
<i>Case for Discussion: In re Petition for Distribution of Attorney's Fees</i>	101
<i>Research Questions</i>	103
<i>Additional Resources</i>	103

CHAPTER 4: PARTIES AND JURISDICTION 105

<i>Chapter Objectives</i>	106
A. Introduction	106
B. Parties to the Action	107
C. Joinder of Parties and Claims	108
1. Real party in interest	108
2. Capacity to sue	109
3. Required joinder of parties	110
4. Permissive joinder of parties	112
5. Special pleading rules	113
6. Joinder of claims	113
D. Subject Matter Jurisdiction	113
1. Case or controversy	115
2. Federal question jurisdiction	115
a. "Arising under"	115
b. Specific grants of jurisdiction	116
c. Pendent jurisdiction	117
d. The United States as a party	117
3. Diversity jurisdiction	118
a. "Citizenship" requirement	119
b. Complete diversity requirement	119
c. Jurisdictional amount requirement	120
4. Ancillary jurisdiction	121
5. Removal jurisdiction	122

E. Personal Jurisdiction	124
1. Due process requirements	125
2. Service-of-process requirements	127
F. Federal Versus State Court	128
G. Venue	129
1. Determining venue	129
2. Change of venue	130
H. Choice of Court Based on Choice of Law	131
<i>Chapter Summary</i>	131
<i>Chapter Checklist</i>	132
<i>Review Questions</i>	133
<i>Case for Discussion: International Shoe v. Washington</i>	133
<i>Research Questions</i>	135
<i>Additional Resources</i>	135

PART II: PRETRIAL LITIGATION

CHAPTER 5: PLEADINGS **139**

<i>Chapter Objectives</i>	140
A. Introduction	140
B. General Pleading Requirements	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. Complaints	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. Use separate counts	154
f. Use exhibits	155

3. Prayer for relief	156
4. Jury demand	156
5. Filing and service of summons	157
a. Issuing the summons	158
b. Summons content	158
c. Persons who may serve the summons	159
d. Methods of service	161
i. Individuals	161
ii. Infants and incompetents	161
iii. Corporations, partnerships, and associations	161
iv. Officers and agencies of the United States, and state and municipal government organizations	162
e. Waiver of service	162
f. Territorial limits of service	162
i. The 100-mile “bulge” rule	162
ii. State long-arm statutes	163
iii. Federal statute or court order	163
iv. The Hague Convention	163
g. Timeliness of service	164
h. Proof of service	164
i. Informal service	165
D. Rule 12 Responses	165
1. Motion to strike	166
2. Motion for a more definite statement	166
3. Motion to dismiss under Rule 12(b)	167
a. The one motion requirement	168
b. Rule 12(b) defenses	168
c. Waiver	169
d. Practice approach	169
E. Answers	172
1. Timing	172
2. General requirements	172
3. Responses	173
4. Rule 12(b) defenses	176
5. Affirmative defenses	177
6. Practice approach	178
F. Counterclaims	178
1. Compulsory counterclaims	179
2. Permissive counterclaims	180
3. The United States as plaintiff	180
4. Statutes of limitation	181
5. Waiver and amended pleadings	181
6. Practice approach	181
G. Replies	182
H. Cross-Claims	183

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. Practice approach	185
7. Responses to cross-claims	186
I. Third-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. Interpleader	191
1. Rule 22 interpleader	192
2. 28 U.S.C. §1335 interpleader	192
3. Practice approach	193
K. Intervention	195
1. Intervention of right	195
2. Permissive intervention	196
3. Timing	196
4. Jurisdiction	197
5. Practice approach	197
L. Class Actions	198
1. General class requirements	199
2. General facts requirements	200
3. Jurisdiction	200
4. Procedure	201
M. Amendments of Pleadings and Supplemental Pleadings	202
1. Amendments by right	202
2. Amendments by leave of court	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
<i>Chapter Summary</i>	206
<i>Chapter Checklist</i>	206
<i>Review Questions</i>	208
<i>Case for Discussion: Pace v. Timmermann’s Ranch and Saddle Shop, Inc.</i>	208
<i>Research Questions</i>	210
<i>Additional Resources</i>	211

CHAPTER 6: LAW AND MOTIONS 213

<i>Chapter Objectives</i>	214
A. Introduction	214
B. General Requirements for Motions	214
1. Form	215
2. Notice, service, and filing	215
3. Content of the motion	219
4. Responses to motions	220
5. Hearing and argument	222
6. Order	222
C. Extensions of Time and Continuances	223
D. 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
<i>Chapter Summary</i>	229
<i>Chapter Checklist</i>	230
<i>Review Questions</i>	231
<i>Case for Discussion: Energy Management Services, LLC. v. City of Alexandria</i>	231
<i>Research Questions</i>	233
<i>Additional Resources</i>	233

CHAPTER 7: MOTION PRACTICE 235

<i>Chapter Objectives</i>	236
A. Introduction	236
B. 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. Consolidation and Separate Trials	253
1. Consolidations	253
2. Separate trials	253
<i>Chapter Summary</i>	254
<i>Chapter Checklist</i>	254
<i>Review Questions</i>	255
<i>Case for Discussion: Celotex v. Corp. v. Catrett</i>	255
<i>Research Questions</i>	257
<i>Additional Resources</i>	258

CHAPTER 8: PROVISIONAL REMEDIES **259**

<i>Chapter Objectives</i>	260
A. Introduction	260
B. Temporary Restraining Orders and Preliminary Injunctions	261
1. Temporary 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. Preliminary injunctions	270
a. Law	270
b. Practice approach	271
C. Writs of Attachment	272
1. The law	273
2. Practice approach	273
D. Writs of Possession	274
1. The law	274
2. Practice approach	275
E. Lis Pendens	275
<i>Chapter Summary</i>	276
<i>Chapter Checklist</i>	277
<i>Review Questions</i>	277
<i>Case for Discussion: Amacker v. Amacker</i>	278
<i>Research Questions</i>	281
<i>Additional Resources</i>	281

CHAPTER 9: EVIDENCE	283
<i>Chapter Objectives</i>	284
A. Introduction	284
B. The Paralegal's Role	285
C. Relevance	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
3. Is the out-of-court statement "offered to prove the truth of the matter asserted in the statement"?	290
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 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	307
G. Privileges	307
1. Attorney-client privilege	307
2. Work product privilege	308
3. Physician-patient privilege	308
4. Marital privileges	309

<i>Chapter Summary</i>	309
<i>Chapter Checklist</i>	310
<i>Review Questions</i>	311
<i>Case for Discussion: Dempster v. Lamorak Ins. Co.</i>	311
<i>Research Questions</i>	315
<i>Additional Resources</i>	315

CHAPTER 10: DISCOVERY **317**

<i>Chapter Objectives</i>	318
A. Introduction	318
B. Discovery 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. Scope of Discovery	323
1. Relevance	323
2. Insurance agreements	324
3. Statements	324
4. Experts	325
5. Privileges	325
a. What privilege law applies?	326
b. What is the applicable federal or state privilege law?	326
6. Trial preparation materials	326
D. Discovery 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

7. In what order should the discovery proceed?	330
a. When should discovery start?	330
b. In what order should discovery be carried out?	332
E. Interrogatories	334
1. Law	334
2. Practice approach	338
a. Topics: What information should I seek?	338
b. Drafting the interrogatories	340
i. Headings	340
ii. Definitions and instructions	341
iii. Interrogatory style	343
iv. Signing, serving, and filing	347
c. Responses to interrogatories	347
i. Researching and preparing answers	347
ii. Objections	350
iii. Answers	351
iv. Signing, serving, and filing	354
F. Requests to Produce Documents and Subpoenas	356
1. Law	356
2. Practice approach	358
a. Timing	358
b. Organization	358
c. Drafting requests to produce	359
i. Heading	359
ii. Definitions	359
iii. Requests format	360
iv. Signing, serving, and filing	362
d. Responses to requests to produce	362
i. Researching and preparing responses	364
ii. Objections	364
iii. Answers	366
iv. Signing, serving, and filing	367
3. Document requests and subpoenas to nonparties	368
4. Document productions	368
G. Depositions	371
1. Law	371
a. Timing	371
b. Notice	372
c. Location	373
d. Persons present	373
e. Recording	373
f. Signing, correcting, and filing	374
g. Objections	375
2. Practice approach	375
a. Scheduling the deposition	376
b. Preparing for the deposition	381

c. Preparing the client for deposition	384
d. Taking notes at the deposition	388
e. Summarizing the deposition	389
i. Chronological summary	390
ii. Subject matter summary	390
iii. Topic index	391
iv. Narrative summary	391
H. Physical and Mental Examinations	392
1. Law	392
2. Practice approach	394
I. Requests for Admission	397
1. Law	397
2. Practice approach	399
a. Timing	399
b. What to request	400
c. Drafting the requests	401
d. Choosing a response	402
e. Requesting a party's responses	403
J. Discovery Motions	404
1. Protective orders	406
2. Orders compelling discovery	407
3. Sanctions for abuse	410
K. Electronically Stored Information	413
1. Types of electronically stored information	413
2. Location of electronically stored information	414
3. Sanctions for abuse	414
4. Practice pointers	415
<i>Chapter Summary</i>	415
<i>Chapter Checklist</i>	416
<i>Review Questions</i>	418
<i>Case for Discussion: Gunn v. Gunn</i>	418
<i>Research Questions</i>	421
<i>Additional Resources</i>	422

PART III: SETTLEMENT, TRIAL, AND POST-TRIAL

CHAPTER 11: SETTLEMENTS **425**

<i>Chapter Objectives</i>	426
A. Introduction	426
B. Preparing a Settlement Presentation	427
C. Settlement Contracts	427
1. Releases, covenants not to sue, loan receipts, and Mary Carter agreements	428

2. Drafting the agreement	429
3. Structured and installment settlements	434
4. Terminating the suit	435
5. Offers of judgment	435
6. Evidence rules	440
7. Insurer good faith requirements	440
<i>Chapter Summary</i>	441
<i>Chapter Checklist</i>	442
<i>Review Questions</i>	442
<i>Case for Discussion: McGinnis v. Cox</i>	443
<i>Research Questions</i>	446
<i>Additional Resources</i>	446

CHAPTER 12: TRIAL PREPARATION, TRIAL, AND APPEAL 447

<i>Chapter Objectives</i>	448
A. Introduction	448
B. The Paralegal's Role	448
C. Pretrial Conferences	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
H. 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	472

L. Appeal	472
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: <i>Skilling v. United States</i>	481
Research Questions	484
Additional Resources	484

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: <i>Big M, Inc. v. Texas Roadhouse Holding, LLC</i>	494
Research Questions	496
Additional Resources	497

CHAPTER 14: ALTERNATIVE DISPUTE 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	506
Chapter Summary	506
Chapter Checklist	507

<i>Review Questions</i>	507
<i>Case for Discussion: Hercules & Co. v. Shama Restaurant</i>	508
<i>Research Questions</i>	510
<i>Additional Resources</i>	510

CHAPTER 15: SOCIAL MEDIA AND ARTIFICIAL INTELLIGENCE IN LITIGATION **511**

<i>Chapter Objectives</i>	512
A. Introduction	512
B. Use of Social Media In Discovery	513
C. Use of Social Media Sites As Evidence In Court	514
D. Social Media Sites and Courts	515
E. The Use of AI as a Tool in Litigation	516
F. Ethical Considerations	516
<i>Chapter Summary</i>	518
<i>Chapter Checklist</i>	519
<i>Review Questions</i>	519
<i>Case for Discussion: Forman v. Henkin</i>	519
<i>Research Questions</i>	521
<i>Additional Resources</i>	522

Litigation File: <i>Jones v. Smith</i>	523
--	-----

<i>Glossary</i>	567
<i>Index</i>	587