

CHAPTER 2 Overview of a Tort Case

SUGGESTED DISCUSSION

Chapter 2 will probably be a review for most students. Even if they have already been exposed to these concepts, however, it would be wise at the least to direct the students' attention to the key terms at the end of the chapter and suggest they read about those terms they are unfamiliar with or have forgotten.

Since legal assisting students need maximum exposure to the practical aspects of their anticipated profession, they need ample opportunity to apply the concepts that have been presented to them. To promote such application, you might consider introducing an actual or hypothetical case they can use as a basis for practicing their procedural skills. Using this case as a foundation in each chapter you can then introduce or review one procedural aspect of litigation. In some chapters you will be able to interweave the procedural concepts presented in the Practice Pointers into the fabric of the text but, for the most part, such interweaving will be impractical or impossible. Nevertheless, try whenever possible to incorporate the practical exercises into the substantive principles being presented.

Chapter 2 is an appropriate chapter in which to present or review the elements of a complaint. You can use the complaint included in the study guide as either a sample around which to center your discussion or as a guideline from which students can draft their own complaints for a different set of facts.

Alternatively, you may want to use the facts of *Ruby v. Construction Wizards, Inc.* (as set forth below) to focus your discussion about the structuring and organizing of a tort claim. Without going into any detail at this point, ask the students to describe chronologically what steps need to be taken to pursue a tort claim up to and through litigation. Focus in particular on the discovery process since this is the primary area in which legal assistants become involved.

The facts that will be used throughout this manual as the basis for discussion are the following:

Ruby v. Construction Wizards, Inc.

Ruby is driving down a two-lane highway one evening at dusk when a sheet of plywood flies out of the bed of a truck coming toward her. The plywood penetrates the cab of Ruby's truck, shatters her windshield, and strikes Ruby. Ruby sustains severe, long-lasting injuries to her left arm and hand, requiring her to receive ongoing medical treatment and causing her to suffer a substantial wage loss. Ruby claims that the truck, driven by an employee of Construction Wizards, Inc., was improperly loaded at the time.

QUESTIONS FOR STUDENTS

1. What will an attorney generally do before initiating a complaint?
2. What are the four elements of a complaint?
3. What possible options does a defendant have in responding to a complaint?
4. What are the five basic discovery tools, and how are they used?
5. What is a disclosure statement, and how does it relate to the concept of mandatory disclosure?
6. Identify each of the following:
 - a. motion to compel
 - b. motion for a protective order
 - c. motion for summary judgment
 - d. motion *in limine*
7. What is the difference between a jury trial and a bench trial?
8. Describe the voir dire process, and distinguish between challenges for cause and peremptory challenges.
9. What is the purpose of each of the following?
 - a. opening statements
 - b. closing arguments
 - c. direct examination
 - d. cross-examination
 - e. moving for a directed verdict
 - f. charging the jury
10. What is the difference between a general and a special verdict?
11. What options do parties have after trial?

ANSWERS TO REVIEW QUESTIONS

1. *What will an attorney generally do before initiating a complaint?*

Investigate to determine if the legal elements of a tort claim have been met. If a claim has been stated, a demand letter may be sent.

2. *What are the four elements of a complaint?*

First, a complaint must state that the court has jurisdiction, i.e., the authority to hear the case. Second, the complaint must list the parties to the action. Third, the complaint must provide a brief summary of each of the elements of the case along with the basic facts that will be used to prove each element. Finally, the complaint must specify the relief being sought by the plaintiff.

3. *What possible options does a defendant have in responding to a plaintiff's complaint?*

A defendant could choose to file an answer. At the same time, the defendant could raise any affirmative defenses it might have. The defendant may at this time also raise any counterclaims or cross-claims. It could also file a motion (FRCP 12). Motions can be filed alleging, among other things, a lack of jurisdiction over the person or subject matter, improper venue, insufficiency of process, or failure to state a claim upon which relief can be granted.

4. *What are the five basic discovery tools, and how are they used?*

They are: (1) interrogatories, (2) depositions, (3) requests for admission, (4) requests for production of documents, and (5) requests for medical and psychological examinations. Interrogatories are written questions submitted to the opposing party, which that party must answer in writing and under oath (FRCP 33). A deposition is an oral examination of a witness (or a party to the lawsuit) under oath (FRCP 27-32). Requests for admissions are requests by one party asking that the other party admit certain facts (FRCP 36). Documents vital to a case that are in the possession of the opposing party can be obtained via a request for production of documents (FRCP 34). A request for medical or psychological examination (FRCP 35) allows a party to have the opposing party examined by an independent expert.

5. *What is a disclosure statement, and how does it relate to the concept of mandatory disclosure?*

Disclosure statements are the foundation of mandatory disclosure. Under the federal rules, the body of the disclosure statement must address four areas of subject matter. These include the disclosure of the name, address, and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses; all documents in a party's possession, custody, or control and that the disclosing party may use to support its claims or defenses; the computation of damages and the documents and other evidentiary materials upon which such computations are based; any insurance policy covering the defendant for the liabilities claimed in the suit; the identity of expert witnesses who will be used at trial.

6. *Identify each of the following:*

- a. motion to compel—*A motion to compel is appropriate when the opposing party refuses to produce discoverable material (FRCP 37).*
- b. motion for a protective order—*A motion for a protective order prevents discovery of information that is privileged and therefore not discoverable (FRCP 26[c]).*

- c. motion for summary judgment—*During the discovery process a party may evaluate the dispute and determine that the other side has failed to prove one or more elements of its case. Consequently, if there is no material fact at issue for the jury to decide, the court could render a decision as a matter of law without a trial. In this event the party will file a motion for summary judgment requesting that the court enter a judgment on its behalf, thus dispensing with the need for a trial (FRCP 56). A party can also request a partial summary judgment, which, in effect, eliminates particular issues.*
 - d. motion in limine—*The purpose of a motion in limine is to resolve regarding whether the evidence should or should not be introduced to the jury because it is unduly prejudicial, irrelevant, or will confuse the jury or waste its time.*
7. *What is the difference between a jury trial and a bench trial?*
- In a jury trial all factual issues are resolved by the jury, while all legal issues are resolved by the judge. In a bench trial the judge decides both factual and legal issues.
8. *Describe the voir dire process, and distinguish between challenges for cause and peremptory challenges.*
- Jury selection is conducted through a process known as voir dire, which consists of a series of questions asked of potential jurors by the trial judge or the attorneys, depending on local practice (FRCP 47). A party who wants to excuse a particular juror and can show that the juror has already formed a judgment as to how the case should be decided or for some reason is unable to decide the case impartially, may use a challenge for cause (FRCP 47[b] and 28 U.S. Code § 1870). The party who wants to dismiss a particular juror but cannot allege bias may remove the juror using a peremptory challenge (FRCP 47[b]). No reason need be given for a peremptory challenge.
9. *What is the purpose of each of the following?*
- a. opening statements—*Give an overview of the basic elements of the case, introduce the parties and witnesses that will be involved in the trial, and in general, set the tone and theme of the case. Opening statements are not considered part of the evidence, but they are extremely important, especially in light of research showing that the majority of jurors decide the outcome of the case during opening statements and do not change their minds after hearing the testimony.*
 - b. closing arguments—*The party's attorney will summarize the facts of the case, showing how the evidence established (or failed to establish) each of the legal elements. Using the theme established in their opening statements, counsel will use their most persuasive rhetoric to convince the jury that their client should prevail and that what damages should or should not be awarded.*
 - c. direct examination—*On direct examination questions are posed by the counsel calling the witness.*
 - d. cross-examination—*Is conducted by opposing counsel. The function of cross-examination is to impeach (discredit) testimony given by the witness during direct examination.*

- e. moving for a directed verdict—*Argues that either side failed to meet the burden of proof on all the elements of their case (FRCP 50). Such motions, though frequently made, are commonly denied, but if a motion for a directed verdict is granted, the case is in essence dismissed.*
- f. charging the jury—*The judge will instruct the jury on the rules of law to be applied (FRCP 51). In some states standard jury instructions are used. In others, attorneys draft proposed instructions for the judge's consideration and, in a conference conducted outside the earshot of the jury, argue which instructions should be adopted.*

10. *What is the difference between a general and a special verdict?*

A general verdict would require the jury to decide if the defendant was liable for the plaintiff's injuries and to determine what damages should be awarded. If a special verdict were requested, the jury would be required to answer special interrogatories, and the judge would have to determine the prevailing party after reviewing the jury's answers.

11. *What options do parties have after trial?*

If the jury decides against the plaintiff, he or she can make a motion for a new trial, arguing that errors were committed during the trial (FRCP 59). Or the plaintiff can move for a judgment notwithstanding the verdict (JNOV), arguing that the verdict reached was contrary to the evidence and law (FRCP 50[b]). Such motions are generally contingent on counsel making appropriate objections during the trial; if counsel fails to do so, these procedural remedies will be denied. The plaintiff could also appeal (see *Federal Rules of Appellate Procedure*) the decision to a higher court, and if the defendant was unhappy with part of the outcome at the trial level, the defendant can file a cross-appeal.

TORT TEASERS

Events Prior to Trial

Interviews

Investigations

Demand Letter

Filing Complaints, Answers, Counterclaims, Cross-claims, and Motions Discovery

Motion for Summary Judgment

Pretrial Conference

Motions *in Limine*

Events at Trial

Voir Dire

Opening Statements

Direct and Cross-Examination

Motion for Directed Verdict

Closing Arguments

Charging of Jury

General and Special Verdicts

Events After Trial

Motion for New Trial

Motion for Judgment Notwithstanding Verdict

Appeal and Cross-Appeal

Legal assistants will be most heavily involved in the discovery process. They will draft and answer interrogatories, prepare requests for admission and requests for production of documents, and summarize depositions. To a lesser degree, they may assist in the preparation of motions and in the drafting of complaints. Many will perform investigative activities and will participate in trial preparation by preparing trial notebooks, exhibits, and exhibit lists. In some cases, attorneys may request that their legal assistants accompany them to court to assist them in locating pertinent testimony and documents, to set up demonstrations and audiovisual materials, and to take notes.

ANSWERS TO INTERNET INQUIRIES

This assignment is designed to begin familiarizing you with the provisions of the Federal Rules of Civil Procedure. For each of the following questions, find the applicable rule number in the Federal Rules that provides an answer.

1. Within what time period must a summons be served after a complaint is filed?

FRCP 4(m)

Within 120 days of filing a complaint. Must be served with the complaint.

2. What basic elements must be included in any complaint?

FRCP 7-11

Names of the parties being sued, state and county of residence of parties being sued, main facts leading up to injury, place and date of occurrence of injury, and request for damages. Must be signed.

3. What are the possible bases for an affirmative defense?

FRCP 8(c)

Accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge of bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver, or any other matter constituting an affirmative defense.

4. What are the possible grounds for a motion to dismiss?

FRCP 12(b)

Lack of jurisdiction over subject matter or person, insufficiency of process or service of process, improper venue, failure to join an indispensable party, failure to state a claim upon which relief can be granted, or failure to join a party under **FRCP** Rule 19.

5. Who can serve a subpoena, and where can it be served?

FRCP 45(b)

Anyone not a party and over 18 can serve a subpoena. It can be served anyplace within the district of the court or anyplace outside of the district if it is within 100 miles of the place the trial, hearing, deposition, etc., is taking place. Fees and mileage must also be tendered.

6. How long must a person be given to respond to a subpoena?

FRCP Rule 45(d)

Fourteen days is a presumptive minimum.

7. When must a response to a motion be filed? When must a reply be served?

FRCP Rule 6(d), Rule 12(c)–(g), Rule 37, Rule 56, Rule 59(c)

Time periods vary according to type of motion and the court setting the hearing date. Generally, a reasonable time for a responsive pleading must be given.

8. What determines the time limits of oral arguments? Must a judge allow them?

FRCP Rule 78

The court's local rules set the time limits. A judge may not be required to give oral argument, especially to nondispositive motions.

9. What must a party that is filing a motion to compel do before the court will consider the motion?

FRCP Rule 37

The party making the motion must certify that the movant has in good faith conferred, or attempted to confer, with the opposing party to resolve the matter.

10. For what reasons can a judge issue a protective order?

FRCP Rule 26(c)

To protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense.

11. When must a response to a motion for summary judgment be filed? When must a reply be filed?

This is not provided for in **FRCP**.

Local rules may set the time frame; otherwise, it is called out in a court order, thereby setting a hearing on the motion.

12. Who can file a motion to set and a certificate of readiness?

FRCP Rule 40

Some courts set the trial date automatically, and no certificate is required. Where a certificate is required, either party may file it.

13. When must discovery be completed?

FRCP Rule 16

The scheduling order generally sets forth the end date for discovery.

14. What must a party show if it wants to postpone a trial?

FRCP Rule 40 and local rule

Generally the party must show good cause and that the continuance is not for the purpose of delay.

15. What must be included in a settlement conference memorandum, when must it be completed, and to whom must it be given?

FRCP Rule 16(c) and local rule

A settlement conference memorandum must be filed as required by the scheduling order. In some cases, they are not exchanged between the parties but are given only to the settlement conference judge.

16. Who conducts voir dire in the federal courts?

FRCP Rule 47(a)

The court may conduct voir dire or allow counsel to do so.

17. To how many peremptory challenges is a party entitled?

FRCP Rule 47(b)

As provided for in 28 U.S.C. §1870. That section provides:

Sec. 1870. Challenges

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

18. At what point must a party submit requests for jury instructions?

FRCP Rule 51

Generally, at the instruction of the trial judge.

19. When can a party apply for a default judgment?

FRCP Rule 55

After default has been entered against the party failing to appear or plead. But see also **FRCP Rule 55(b)(2)**.

20. How are awards for attorneys' fees determined?

FRCP Rule 54(d)(2)

A request must be filed within 14 days of entry of judgment unless awarded as a matter of law. Usually the details of the application process are spelled out in local rule.