Handout 9

The Litigation Process

In both state and federal court, a body of rules, known as court procedure, outlines the process of civil litigation from beginning to end.

Part I: Pretrial

This part describes the major steps in the litigation process that occur before the trial starts. As you walk through each step, consider what court procedures ensure that the process is fair.

The Complaint

The plaintiff begins a lawsuit by filing a complaint in a trial court. The complaint is a formal document accusing the defendant of violating the law. It provides the defendant with notice, and outlines the plaintiff's case against the defendant. Specifically, the complaint:

- identifies the plaintiff and defendant
- describes the facts that show the defendant harmed the plaintiff
- explains what law those facts violate
- requests a remedy—usually court order to the defendant to pay money damages or to start or stop doing something

The Answer

After the plaintiff formally files the complaint against the defendant, the defendant must respond to each allegation. Reponses can deal with facts, law, or both. With respect to the facts, the defendant will typically respond by admitting some of the plaintiff's allegations, denying some of them, and stating that he or she lacks knowledge about some of them. The defendant might also argue that there are additional facts that change the situation. This is done in a document called an *answer*.

Discovery

If the case is not dismissed, then the parties begin a process called *discovery*. This is how attorneys on each side gather evidence from the other side. There are several types of discovery. Parties can obtain information through *depositions*, which are interviews of witnesses, conducted under oath. Parties also find out information through *interrogatories*, which are written questions submitted to the opposing party. The opposing party's written answers to these questions are also under oath. Attorneys for both parties can also demand that the opposing side share documents and other physical evidence relevant to the case.

Since the pre-trial process can be so long, attorneys often try to get witness statements as soon as possible, when events are clearer in people's minds. They can then use those statements to corroborate or dispute what may be said during the trial. Contrary to what is often shown in movies and television, there should be no surprises in a trial, and everyone should have ample time to evaluate information and evidence.

Developing a Theory of the Case

Attorneys take all the statements and evidence they have gathered from discovery and develop a *theory of the case*. A theory of the case is a clear outline of what they hope to prove in court, the facts that will make up their argument, the evidence to support the facts, and the strategy that will lead others to the conclusion they want. Good lawyers develop themes around which the case will be centered, such as equality, human dignity, greed, or vengeance. Lawyers also organize the theory of the case so that it tells a coherent story throughout the trial.

Alternative to Reaching Trial: Settlements

Movies and television usually focus on the trial part of the litigation process but, in fact, most cases never go to trial. The biggest reason is that judges and lawyers try to resolve disputes out of court through negotiation. During negotiation, the opposing parties try to reach a *settlement*—an agreement that is acceptable to all that ends the dispute. Most cases settle, at some point. If they can reach a settlement and avoid trial, both parties save a lot of time, money, and other resources.

Alternative to Reaching Trial: Motions

Even apart from settlement, there is a long process prior to trial, during which many cases are resolved. Remember that litigation can concern *factual disputes*, *legal disputes*, or both. Trials are where facts are developed and decided. But legal disputes are sometimes resolved without a trial. Judges very often decide cases based on the law through *motions*—requests to the court.

Both parties have several chances to file *motions for judgment* in their favor. These are written arguments that claim, based on the law and whatever uncontested evidence exists, that their side should win. A motion of this type can occur before discovery, after discovery, before trial, during trial, and even after trial. In fact, more disputes are resolved by this kind of motion than by a trial.

A *Motion to Dismiss*, for example, seeks to have the case thrown out. A defendant might file a Motion to Dismiss claiming that even if the plaintiff's allegations are true, those allegations do not add up to a legal violation. Many other grounds for filing a Motion to Dismiss exist. For example, if the plaintiff filed the complaint in the wrong court, or failed to properly serve the complaint on the defendant, the judge may dismiss the case. If the judge grants a Motion to Dismiss, the lawsuit is over; the plaintiff has lost.

Part II: Trial

This Part describes the major steps in the litigation process that occur during trial. Although quite infrequent, trials remain the dramatic central moment of civil litigation. Cases are developed and settled based on the parties' expectations about what will happen at trial. So understanding how trials work is critical to understanding all the other possibilities. As you walk through each step, consider what rules ensure that the process is fair.

What Happens at a Trial?

Trials are mostly about disputed facts. During trial, the decision-maker (a judge or jury) finally decides whose facts are true. In order to establish their version of the facts, the parties introduce

evidence in court. Evidence can include witness or expert testimony, physical evidence, and documentary evidence. Nearly always, plaintiffs have the *burden of proof*. This means they have to convince the judge or jury of their version of the facts. Unlike in criminal cases, where the prosecutor must establish its version of events *beyond a reasonable doubt*, the plaintiff in a civil case has a lower burden, called the *preponderance of the evidence* standard. To meet the preponderance of evidence standard, civil plaintiffs must show that their version of events is *more likely than not*. The defendant tries to provide enough evidence, or a convincing enough explanation of the evidence, to prevent the plaintiff from meeting that burden of proof.

What Evidence can be Used During a Trial?

Not all of this evidence can be used at trial. The Rules of Evidence regulate what kinds of evidence can be used during the trial.

- First, all evidence and witness questions and answers must be *relevant*—that is, only evidence that is helpful in establishing a legal proposition involved in the case may be considered.
- *Hearsay*, or second-hand testimony, is often inadmissible (not allowed) in court. Witnesses usually must have directly seen, heard or experienced whatever it is they are testifying about. This is to improve the reliability of the testimony.
- *Character evidence,* defined broadly as any evidence showing a person's general tendency to act in a certain way, is nearly always inadmissible. This is because character evidence is often unfairly prejudicial, wastes time, and confuses the jury.
- *Privileged information*, such as conversations between a husband and wife, between a client and a lawyer, or a patient and a doctor, is also excluded from trial. This is because we want to respect these types of private relationships, and not encourage distrust or betrayal.
- Other rules of evidence inform the ways lawyers can ask questions and the ways witnesses can answer them.
    - For example, lawyers in a trial cannot ask their own sides' witnesses *leading questions*—questions phrased in a way that suggests the desired answer to the witness. This is to protect against unreliable, untruthful answers.
    - Further, the witness must answer reasonably specific questions, not provide *narration*. In other words, they must limit their answer to the information that the question calls for. This is to limit testimony so that it is both relevant and time efficient.
    - Except for technical experts, who can give opinions about matters relating to their field, witnesses cannot give opinions in their testimony. Testimony is limited to *facts, not opinions* for witnesses that are not testifying as experts. This is because the opinions of witnesses are typically irrelevant and can confuse the jury.

The Basic Trial Process

Only a very small proportion of civil cases go to trial. Although there is really no "typical" trial, the basic steps in the trial process are outlined below.

1. Jury Election. In criminal cases, and in civil cases, if the plaintiff is seeking damages, either the plaintiff or the defendant usually can choose to have the case presented or tried to a jury. This means the jury will decide factual disputes. Civil cases seeking other kinds

of relief—for example, court orders requiring the defendants to do something or stop doing something—are presented to a judge without a jury.

2. Jury Selection. Typically on the first day of trial, a pool of potential jurors—citizens from the same county (for state court) or state (for federal court)—is gathered in the courtroom. During jury selection, the judge and attorneys ask those potential jurors questions about the particular case, including questions about ideological views and life experiences that may indicate some involvement in the dispute or other bias. The questioning is called *voir dire.* If a potential juror's experience makes it difficult for him or her to be fair, the lawyers from either side can seek to exclude that person from the actual jury through a *challenge for cause*. For example, a juror can be excluded from the actual jury if he or she knows one of the parties or witnesses, already has an opinion about the facts of the case, or has himself or herself had an experience similar to the case's subject. In addition, the parties can exclude a set number of the potential jurors without explaining the reason for exclusion. This is called a *peremptory* challenge. However, peremptory challenges may not be based on the race, ethnicity, or gender of the juror.

   Once the jury is chosen, the trial can begin.

3. Opening Statements. At the beginning of trail, the attorneys representing each party introduce the case to the judge and jury as clearly and persuasively as possible. In theory the opening statement is not an argument. Instead, it summarizes the facts that each party sets out to prove. But the opening statement *is* an argument of sorts, since each lawyer tries to persuade the jury to begin to see the case in a certain way. The plaintiff's lawyer delivers the first statement, followed by the defendant's lawyer. Both speak in the future tense, using statements like "the evidence will show," to provide the jury with a helpful overview of what's to come.

4. The Plaintiff's Case. The plaintiff has the first chance to present evidence through witness testimony. If there is non-witness evidence—documents or physical evidence—a witness typically presents and explains that evidence. The plaintiff's lawyer has met with the witnesses in advance, and knows what they are going to say. The defendant's lawyer has usually deposed the witnesses (interviewed the witnesses under oath) during discovery, and therefore also knows what they are going to say.

   a. Direct Examination. To begin with, the plaintiff's lawyer asks the plaintiff's witnesses questions. Attorneys want to question witnesses and present evidence in such a way that tells a compelling story and convinces the judge and jury that the defendant violated the law.

   b. Cross-Examination. For each witness, the defendant's attorney has the opportunity to ask questions to show weaknesses in the witness's testimony. This happens after the plaintiff's attorney has completed the direct examination. All questions asked during cross-examination must relate to the questions asked in the direct examination.

c. Redirect Examination. At the close of the cross-examination, the plaintiff gets an opportunity to conduct a redirect examination. Redirect examination is limited to subjects from the cross-examination.

After the plaintiff's attorney has finished presenting the plaintiff's case, the defendant has an opportunity to try to get the case dismissed. The defendant can file a *Motion for Judgment as a Matter of Law*, arguing that the plaintiff has not presented sufficient evidence to meet his or her burden of proof. The judge hears this motion out of the presence of the jury (if there is a jury). If the judge believes that, given the evidence presented, no reasonable jury could find for the plaintiff, the judge may grant the motion. This means that the defendant will win the case without completing the trial.

5. The Defendant's Case. Once the plaintiff has presented all of his or her witnesses and evidence, it's the defendant's turn. The process is the same:

   a. Direct Examination
   b. Cross-Examination
   c. Redirect Examination

6. Plaintiff's Rebuttal. If (but only if) the defendant raises any issues that were not addressed in the plaintiff's initial presentation of evidence, the plaintiff's attorney gets an opportunity to address these issues with additional witnesses and other evidence, if there are any. This is called a rebuttal.

   Plaintiff's rebuttal closes the evidence phase of the trial. At that point, either party may file another *Motion for Judgment as a Matter of Law*, arguing that no reasonable jury could find for his or her opponent. If the judge grants the motion, the trial ends.

7. Closing Arguments. After all the evidence has been presented, the attorneys for each party summarize their main arguments, highlight the most important evidence in their favor, and explain why the jury should not believe or not care about evidence against them. This is called closing arguments. Unlike opening statements, closing arguments are just that—arguments, although they may not go beyond the evidence presented. They are attempts to persuade the judge and jury. Closing arguments give both parties one last chance to address doubts, reinforce sympathies, and explain why the judge or jury should agree with their theory of the case.

8. Deliberation and Verdict. Finally, the judge or jury considers the evidence and delivers a verdict. For a jury trial, the judge first provides instructions to the jury giving them information about the legal standards they should apply to reach their decision. In federal civil litigation, and in both federal and state criminal litigation, jury verdicts must be unanimous; if any member of the jury disagrees with the other members of the jury, the jury cannot render a verdict, and the case has to be retried. States often allow civil cases to be resolved by jury with one or two dissenting votes. Either way, the verdict ordinarily

does not include any explanation. It simply states who wins, and what damages (if any) are awarded.

(Once a jury verdict is reached, the parties can, one last time, file a *Motion for Judgment as a Matter of Law*. Even if the judge disagrees with the jury verdict, usually the verdict stands. This is because judges are supposed to overturn a jury verdict only if "no reasonable jury" could have reached that verdict.)

Part III: Post-Trial

This Part describes the major steps in the litigation process that occur after the trial. As you walk through each step, consider what rules ensure that the process is fair.

What Happens After the Judgment?

In a civil case, after the trial court enters its judgment, the losing party generally has a right to *appeal* the decision—to apply to a higher court for reversal of the lower court's decision. In the federal Courts of Appeals, a three-judge appellate panel is chosen at random from among that particular court's judges. The party that lost in the trial court must choose particular aspects of the process to appeal, making specific claims of trial-court error.

If the appeal deals with the trial court's decisions regarding questions of law, appellate review is undeferential—no weight at all is given to the trial court's opinion. The legal term for this type of review is *de novo* review. (De novo is Latin for "from the beginning" or "anew.")

If, however, the appeal deals with factual decisions, appellate review is highly deferential to the trial court's decisions. Appellate courts will not reverse jury findings unless the findings had "no reasonable basis" in the testimony or other trial evidence. If the case was tried to a judge rather than a jury, appellate courts will not reverse trial judge findings-of-fact unless those findings are "clearly erroneous." In that situation, appellate reversal of the trial judge findings is appropriate only if the appellate judges have a "definite and firm conviction that a mistake has been committed." These high standards make it difficult for the party who lost in the trial court to win any appeal on decisions of fact.

Whichever party loses the appeal may have additional options for further review. For example, the losing party can petition the Supreme Court of the United States to hear the case. The Supreme Court can choose whether or not to hear the case. Nearly always, the Supreme Court chooses against hearing the case. At that point, the decision of the Court of Appeals becomes final.

In state's court systems, cases can be appealed from the intermediate appellate court to the state's supreme court. Depending on the state, this may be rare or routine. If the issues on appeal do not involve the federal Constitution or a federal statute, that is the end. When the issues on appeal *do* involve the federal Constitution or a federal statute, the losing party in the state supreme court may, seek even further review before the U.S. Supreme Court. However, U.S. Supreme Court review is extremely rare. The Court receives thousands of applications for review each year, and decides to hear well under a hundred of them.