

CHAPTER **1**

Introduction to Litigation

- A. Introduction
- B. The Litigation Process
- C. The Paralegal's Role
- D. Ethical Considerations

CHAPTER OBJECTIVES

In this introductory chapter to litigation you will learn:

- ◆ What the differences are between civil litigation and other types of litigation
- ◆ Where to find the law applicable to litigation matters
- ◆ How the California court system is structured
- ◆ How a case moves through the process
- ◆ What types of remedies an aggrieved party may seek from the court
- ◆ What the paralegal's role is in the litigation process
- ◆ What ethical standards paralegals must follow

A. INTRODUCTION

You have just been called into the office of an attorney in the firm that recently hired you. The attorney tells you that a prospective client will be coming to the office shortly who has a "problem" that might lead to litigation—a problem that appears to be just right for you to assist with and help manage. With a smile the attorney hands you a note containing the prospective client's name and appointment time. Apprehensively you walk out of the attorney's office, thinking: "My God—what do I do now?"

What you do, when you do it, how you do it, and why you do it is what this book on litigation is all about. This first chapter provides an overview of the litigation process and your role in that process. Each step in the process will be discussed in detail in the following chapters.

B. THE LITIGATION PROCESS

Litigation

Resolution of disputes through the court system

Civil litigation

Resolution of disputes between private parties through the court system

Litigation is the resolution of disputes through the court system. This book is about the civil litigation process, as compared to criminal or administrative litigation. **Civil litigation** is the resolution of disputes between private parties through the court system.¹ Criminal litigation is not between private parties; rather, in criminal litigation the government prosecutes an action against individuals who have committed crimes against society. If the crime also results in damages to the victim's person or property, the victim may bring a civil action to obtain recovery for the damages. This civil action is separate from the criminal action.

1. An alternative to the use of courts, arbitration is becoming a popular method by which civil disputes are resolved. See Chapter 14.

Administrative litigation is the process by which administrative agencies resolve disputes that concern their administrative rules and regulations. For example, if an employee is injured on the job and a worker's compensation claim is filed, the worker's compensation agency will determine the claim and hear any appeal or dispute the employee has regarding the determination of the claim. In general, if an administrative remedy exists, the claimant must first exhaust the administrative remedies before proceeding with a court action.

Civil litigation permits parties to settle their disputes in an orderly and nonviolent manner. The entire litigation process is governed by formal rules that specify the procedures the parties must follow from commencement of the litigation until the litigation terminates. Accordingly, once a dispute is submitted to the courts for resolution, all parties to the litigation must carefully follow the court's procedural rules.

Each state has its own rules of procedure. A party filing an action in a state court must follow the procedural rules of that particular state court. Actions filed in federal court are governed by the Federal Rules of Civil Procedure. Always consult the appropriate rules of procedure before handling any litigation matter.

The rules discussed in this book are for the California state courts. However, in many respects, the Federal Rules of Civil Procedure are similar. Accordingly, once you have mastered the procedural requirements for California, you will be able to easily understand and apply the Federal rules if you have a litigation matter in federal court.

1. Sources of law

Where do you find the law applicable to the matter you are handling? There are three sources of law that you will need to consult for every litigation matter: statutes, court cases, and constitutions.

a. Statutes

Statutes are laws enacted by state or federal legislatures that govern substantive and legal rights and principles, as well as procedural rules. In some instances statutes are referred to as codes. For example, all laws enacted by Congress are found in the United States Code. The United States Code is divided into various Titles, which deal with specific subject matters such as agriculture, banking, copyrights, education, and so on.

In California there are a number of statutes and rules that govern the litigation process. The primary statutes and rules you will consult are the Code of Civil Procedure (the "CCP"), the Civil Code (the "CC"), and the California Rules of Court. In addition, courts also have **local rules** that

need to be followed. Local rules apply to each court within a particular county. For example, the superior courts within Los Angeles County will be governed by the Rules of Court for the Los Angeles Superior Court. The local rules govern everything from the type of paper on which a complaint might be filed to the dates on which motions may be heard. Judges often have rules for their individual court as well. Before the trial of any case it is important to check with each individual judge to determine whether the judge has special rules that need to be followed.

In addition to state and local statutes and rules that govern a litigation matter, individual municipalities, such as your town or city, may also enact their own laws, which apply only in their municipality. The municipal laws are often referred to as ordinances. These ordinances typically govern matters such as rent control, parking, and items of local interest. A municipality may not enact ordinances that conflict in any way with the law of the federal or state governments.

All of these statutes, codes, and ordinances help to determine the legal rights of parties and help to regulate the litigation process. Accordingly, they are all sources that must be referred to when handling any litigation matter.

b. Court cases

Cases are decisions of the courts interpreting the law. Once a decision has been made, the court will generally write an opinion. Certain opinions that address a unique or important legal issue are published in bound volumes and are used by other litigants to determine how the law may be interpreted with respect to their particular dispute. Throughout the course of our nation's history, thousands of opinions have been published and relied on as precedents to decide new controversies as they arise.

Even prior to the published opinions of our courts, the early American colonists brought with them a body of law from England referred to as the **common law**. Common law developed in England from usage and custom, and was affirmed by the English judges and courts. Common law, to the extent it is not inconsistent with the constitutions or laws of the United States or of the individual states, is generally still applicable in the United States.

Common law

Body of law developed in England from custom and usage

c. Constitutions

The federal Constitution is the highest law of the land. In addition to the United States Constitution, each of the 50 states has its own constitution. No rule of law enacted by a state may violate the state's constitution.

Moreover, no state constitution or state or federal law may violate the federal Constitution.

2. The court system

Litigation begins when the aggrieved party files a complaint in the appropriate court. The aggrieved party is called the **plaintiff**. The party whom the complaint is filed against is called the **defendant**. In the **complaint** the plaintiff must state the basis of the claim against the defendant so that the defendant will be apprised of the action giving rise to the claim. As discussed in section 4, the plaintiff must also request specific relief from the court. The complaint is served upon the defendant along with a **summons** commanding the defendant to appear before the court.

The complaint is always filed in the **trial court**. Under the California court system, the superior court is the trial court. The superior court hears unlimited general matters and also limited civil cases. Limited civil cases means that the court only has the power to hear and decide limited types of cases. When acting as a limited civil court, the court can only hear cases that are for a money judgment in the amount of \$25,000 or less. Accordingly, the superior court of limited jurisdiction cannot hear cases involving divorce, title to real property, or probate. The type of limited cases are listed in CCP §86. A limited civil case may be brought in the **small claims division**. The small claims division hears matters involving less than \$5,000 in dispute. The small claims division is often called the "people's court" because attorneys may not represent individual parties in a small claims matter. An unlimited jurisdiction case is everything else that is not limited; that is, all types of cases and matters seeking judgments greater than \$25,000.

The federal court system also has trial courts. In the federal system this trial court is called the **United States District Court**. There are 90 district courts in the United States. Each state has at least one district court, and several states have two or more, depending on the state's population.

If a party loses in the trial court, that party has an automatic right to appeal to the next highest court. In California, the party appeals municipal court decisions to the appellate division of the Superior Court. Appeals from Superior Courts go to the **Courts of Appeal** for the appropriate district in which the lower court sits.

On appeal, the appellate court is limited to a review of the record of the court below. The court will not hear from any witnesses or take new evidence. The party appealing the decision of the trial court must demonstrate that there was an error in the court below that affected the outcome of the case. The appellate court will determine whether the law was incorrectly applied on the facts, or if the decision reached is not supported by the facts. Even though new evidence may not be presented

Complaint

Document filed by an aggrieved party to commence litigation

Summons

Notice accompanying the complaint that commands the defendant to appear and defend against the action within a certain period of time

to the court, all parties to the appeal will have an opportunity to submit a written brief on the issues before the appellate court. After the parties submit briefs, the court will hear oral argument. Oral argument is an opportunity for the lawyers to answer any questions the appellate judges may have and to more fully explain their clients' positions.

After oral argument, the court will render one of four decisions. The court will either **affirm**, **affirm with modification**, **reverse**, or **reverse and remand**. A decision is affirmed if the court rules the same way as the trial court. Sometimes the court will rule the same way, but modify some element of the decision below. For example, assume that a trial court rules in an action for unlawful detainer that the plaintiff is entitled to possession of property and back rent in the amount of \$1,200. If the appellate court agrees that the plaintiff should be entitled to possession of the property, but believes the back rent owed is only \$998, the appellate court will affirm the trial court's decision and modify the amount of back rent.

If the court disagrees with the trial court, the appellate court will reverse the decision. Sometimes, however, the appellate court is not certain, based on the record before it, whether it disagrees with the trial court. In this situation the court gives an opinion stating how it would rule assuming that certain facts are true. The appellate court will then reverse the decision and send it back (remand) to the trial court for a decision in accordance with the opinion expressed by the appellate court.

If a party loses in the appellate court, the losing party may petition the **Supreme Court** for review. The Supreme Court is the highest court in the California court system. If a case before the California Supreme Court involves a question of federal or constitutional law, the losing party may be able to petition the United States Supreme Court for review.

Appeal to the California Supreme Court is not automatic, but rather is discretionary with the Court. The losing party must petition the California Supreme Court to review the matter. If review is granted, the Court will affirm, affirm with modification, reverse, or reverse and remand the decision of the appellate court. If review is denied, the decision of the appellate court will become final.

An organizational chart for the California state court system is shown in Exhibit 1.1. The federal court system is shown in Exhibit 1.2. You will note that special courts such as bankruptcy courts and the Court of International Trade exist to hear specific cases in the federal court system.

3. Overview for litigation cases

Litigation consists of four basic stages: (1) information gathering, (2) pleading, (3) discovery and motions, and (4) trial and post-trial proceedings. Each of these stages is discussed in detail in subsequent chapters. However, this section gives you a brief overview of the four stages and a sample path for a typical litigation case.

Exhibit 1.1. California State Court System

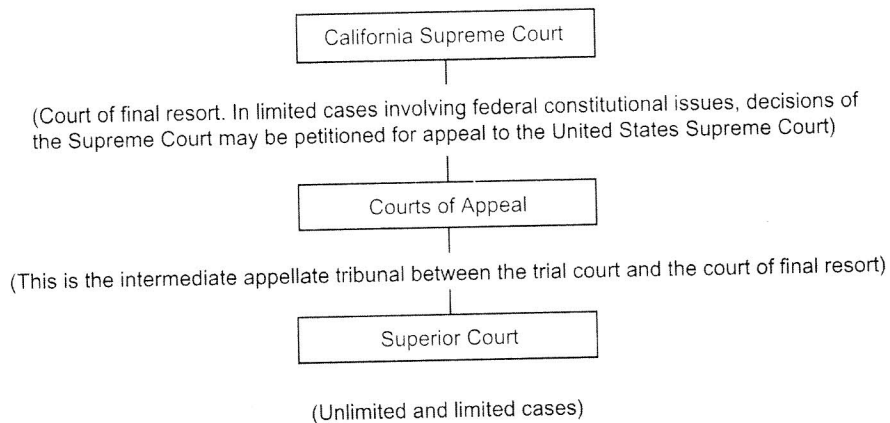
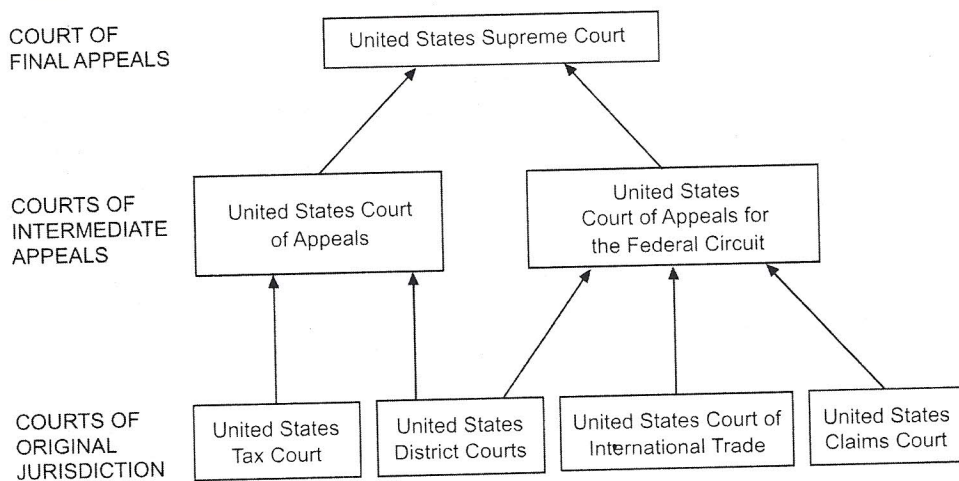


Exhibit 1.2. The Federal Court System



Default

Failure of a party to respond to the pleading of the opposing party

Prior to the filing of any lawsuit, you and the attorney will spend time gathering information and obtaining the facts necessary to support your client's case. This is the first stage of litigation. This stage will be engaged in by both sides since a potential defendant is often aware that a lawsuit may be filed against him. After sufficient facts are gathered by the plaintiff to support a lawsuit, the lawsuit will begin by the filing of a complaint. The complaint, along with the summons, is served on the defendant.

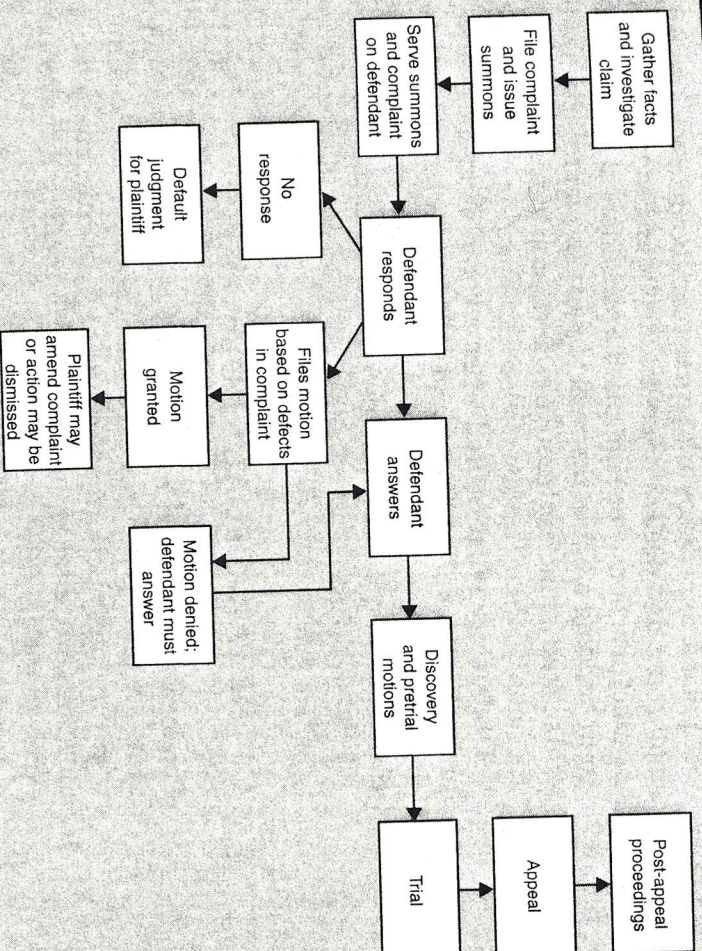
Upon receipt of the summons and complaint, the defendant must file a response, or else the defendant will be in **default** and a judgment may be entered against the defendant. This is the second stage. The defendant has several choices with respect to the type of response that may be made. First, if the defendant believes that there is some defect in the complaint, either a procedural rule that is not followed or insufficient facts alleged against the defendant, the defendant may file a **motion**. A motion is a request to the court for an order or ruling. The types of motions that may be filed by the defendant are discussed in Chapter 5. If the defendant does not file a motion or if the motion is denied by the court, the defendant will answer the complaint. The **answer** is the defendant's response to the specific allegations in the complaint and states any defenses the defendant may have. Once an answer is filed, the **pleading** stage—that is, formal written documents by the parties to either start litigation or respond to litigation—is complete.

The third stage is the **discovery and motion stage**. At this point the parties will conduct formal factual investigation through written responses and oral testimony received from the other side. The parties may also obtain discovery formally from other individuals who are not parties but who may be witnesses or in possession of information that is helpful to the case. During this stage there may also be a number of **pretrial motions**. These motions may include a request to the court to enter judgment without a trial if none of the facts are in dispute, or involve requests to obtain discovery from the other side if one side does not voluntarily provide the information. The bulk of litigation time is spent at this stage, and it is usually at this stage that cases will settle.

The final stage is the **trial and post-trial proceedings**. Both during trial and after trial, there are a number of different motions that either side can make. These motions include requests for judgments if one side has failed to prove its case, or requests to the court to enter a different judgment if the jury's verdict is not consistent with the evidence produced at trial. As discussed earlier, at this stage the losing party also has an automatic right to appeal the decision. An appellate court could reverse the judgment and require a new trial, which would start this stage over again. This explains why some cases go on for several years winding their way through the trial court, appellate courts, and back to the trial court again.

The chart in Exhibit 1.3 gives an example of how a litigation case may move through the several stages.

Exhibit 1.3. Litigation Case Moves through the System



4. Remedies

When a party brings a civil action, the party must request some relief or remedy from the court. Remedies may be divided into two categories: legal and equitable.

The most common **legal remedy** is money **damages**. For example, if a party suffers a personal injury or is the victim of a breach of contract, the party will request to be compensated by payment from the defendant. Money damages are further divided into two main categories: compensatory and punitive.

Compensatory damages are all those damages that “compensate” the injured party, including damages that directly flow from the injury or breach. Compensatory damages may be either general (i.e., compensation for pain and suffering) or specific (i.e., payment for medical expenses or loss of income from time missed at work).

In some types of action where the defendant’s conduct is willful or malicious, the plaintiff may be entitled to **punitive damages**. Punitive damages, also called exemplary damages, are meant to “punish” the wrongdoer for his or her conduct. Such damages may be awarded in addition to the compensatory damages.

Damages

Monetary compensation requested by plaintiff from defendant

Equitable remedy
Relief requested from defendant that is usually designed to prevent some future harm

If the legal remedy is inadequate to compensate the plaintiff fully, the plaintiff may be able to obtain an **equitable remedy**. There are many kinds of equitable remedies. The two most commonly used in civil litigation are injunctions and declaratory relief. An **injunction** is used to stop certain conduct or actions. For example, if a plaintiff wants to stop the defendant from building a house that will impair the plaintiff's view, the plaintiff will seek an injunction from the court to stop the defendant from building the house.

Declaratory relief is used when a controversy arises over the rights and obligations of the parties and neither party has yet failed to live up to these obligations. The parties request a declaration from the court to settle the controversy so they may govern their future conduct accordingly.

C. THE PARALEGAL'S ROLE

Paralegals play a vital role in the efficient handling of litigation. Law firms are finding that paralegals can, and do, handle many tasks that were previously performed by attorneys. Use of paralegals not only frees the attorney to engage in other matters, but also helps reduce litigation expenses for the client.

As a paralegal you will find that, aside from appearing in court, representing witnesses at deposition, and giving legal advice, there is virtually nothing a lawyer can do that, as a litigation paralegal, you cannot do under the supervision of an attorney. Thus, you have the opportunity to play a significant role in analyzing, planning, and executing the lawsuit.

The following is just a sampling of the numerous tasks you may be called on to undertake in litigation:

1. Preparing for litigation
 - ◆ Interview the client
 - ◆ Gather background facts
 - ◆ Locate witnesses
 - ◆ Interview witnesses
 - ◆ Obtain medical records, tax records, educational records, etc.
 - ◆ Research claims the client may have against other parties
 - ◆ Draft demand letters
 - ◆ Obtain and analyze documents from client
2. Conducting the litigation
 - ◆ Draft pleadings
 - ◆ Prepare summons
 - ◆ Prepare pretrial motions
 - ◆ Prepare discovery to propound upon the opposing parties

- ◆ Prepare responses to discovery propounded by the opposing parties
 - ◆ Review and organize documents produced by opposing parties
 - ◆ Arrange for the taking of depositions
 - ◆ Prepare witnesses for deposition
 - ◆ Prepare deposition summaries
 - ◆ Take notes on testimony given at depositions
 - ◆ Calendar due dates for filing briefs, motions, pretrial orders, etc.
 - ◆ Prepare discovery plan
3. Trial preparation
- ◆ Prepare trial notebooks
 - ◆ Organize exhibits
 - ◆ Prepare witness files
 - ◆ Prepare demonstrative exhibits
 - ◆ Draft jury instructions
 - ◆ Subpoena witnesses
 - ◆ Draft trial brief
 - ◆ Coordinate scheduling of trial witnesses
 - ◆ Take notes at trial
 - ◆ Assist attorney with exhibits at trial
4. Post-trial work
- ◆ Assist with any post-trial motions
 - ◆ Prepare record for appeal
 - ◆ Enforce judgment
5. Settlement
- ◆ Prepare settlement agreement
 - ◆ Prepare releases
 - ◆ Assist in closing file and obtaining necessary dismissals

Do not be alarmed by the breadth and complexity of these tasks. The purpose of this book and your litigation course is to familiarize and train you in each task so you perform your job competently and confidently.

D. ETHICAL CONSIDERATIONS

Ethical considerations underlie every aspect of the practice of law. Accordingly, while preliminarily discussed here, throughout this text ethical considerations are identified and discussed.

The conduct of lawyers is governed by the rules of professional conduct enacted in their particular states. In 2000, the California state legislature

enacted rules governing the regulation of the paralegal profession which became effective on January 1, 2004.²

Under the rules, a “paralegal” means a person who is qualified “by education, training or work experience” who contracts with or is employed by an attorney, law firm, corporation, governmental agency or other entity, who performs substantial, specifically delegated legal work under the direction and supervision of an active member of the State Bar of California or an attorney practicing law in the California federal courts. Accordingly, a paralegal must work under supervision and not independently. In addition, unless you have met educational prerequisites, you may not call yourself a “paralegal.”

Also, under the rules, a paralegal may not provide legal advice or represent a client in court. However, a paralegal may represent clients before state or federal administrative agencies if permitted by statute, court rule, or administrative rule or regulation.

In addition to general continuing education requirements, one of the requirements of a paralegal is to certify completion every three years of a minimum of four hours of legal ethics mandatory continuing education. To fully understand the ethical role of a paralegal, it is first important to understand the nature of the attorney-client relationship.

The relationship between an attorney and client is one of trust. The client seeks the advice of an attorney to help counsel them with a potential legal problem. The situation is similar to advice you might seek from a doctor, counselor, or clergy person. It is easy to understand in the context of these other professions. The trust that is necessary to establish a good early relationship then allows you to seek the consult of the professional. The same is true of an attorney. As an important part of the legal team, your trust is the same.

While it has always been important that paralegals keep client information confidential, the new rules specifically provide that a paralegal has a duty to maintain the confidentiality of client information. The communication between an attorney and client is **privileged**. This means that the attorney cannot reveal any information received by the client to anyone else. Thus, the privileged nature of a client’s communications extends to paralegals as well. Accordingly, any information you receive in the course of your employment from the client or in connection with the client or the client’s business must be kept confidential and not be disclosed to third parties. In addition, given the private nature of attorney-client communications, you must also be careful to avoid discussing a client’s case in public places where eavesdroppers may be present.

Other ethical considerations paralegals should keep in mind are **conflicts of interest**, and communicating with adverse parties. A lawyer may

Privileged

Rules providing that certain communications are inadmissible because the communications are deemed confidential

Conflict of interest

When two or more parties with adverse interests are represented by the same counsel

2. The rules are found in Business and Professions Code §6450 et seq.

never represent two or more parties who have adverse interests. Accordingly, as a paralegal charged with fact gathering, you should be cognizant of situations in which a conflict may arise. For example, your office may be representing two defendants who, at least initially, appear to have no conflict in their interests. Should a conflict develop, however, the lawyer has an ethical obligation to withdraw from representing one or both of the clients. Accordingly, immediately notify the attorney if you discover any facts in your investigation of a case indicating that a conflict may exist between two or more of your clients.

In addition, paralegals must avoid communicating directly with an adverse party who is represented by counsel. A party represented by counsel is entitled to be free of any direct contact with the opposing party's counsel or that counsel's employees. Even if the adverse party contacts you directly, you must refuse to speak with the client without the presence of the party's attorney. In essence, a party who is represented by counsel may not represent himself until he formally relieves that counsel from representation.

Finally, you are not authorized to practice law and therefore must never give anyone the impression that you are a lawyer. When speaking with a client, opposing counsel, or other parties, always identify yourself as a paralegal. Similarly, when writing any letter on behalf of the law firm, place a notation of "Legal Assistant" or "Paralegal" directly below your signature to avoid any misunderstandings as to your position with the law firm.³

These ethical considerations are by no means exclusive. You, of course, must be guided by a sense of moral integrity. If something doesn't seem right to you, it probably isn't. If you are unsure if something is ethically correct, check with the lawyer in charge or contact your local paralegal association for information.

CHAPTER SUMMARY

Civil litigation involves the resolution of disputes through the court system and starts with the plaintiff filing a complaint against the defendant in the trial court. In the complaint, the plaintiff will request either monetary or equitable relief (or both) from the court. The losing party in the trial court has an automatic right to appeal the decision to the next highest court.

As a paralegal, you will take on significant responsibility during all aspects of the litigation process from the initial fact gathering through trial preparation and post-trial proceedings. Throughout this entire

3. Pursuant to Business and Professions Code §6454, the terms "Legal Assistant" and "Paralegal" are synonymous.

process it is essential that your conduct conform to the following ethical guidelines discussed in this chapter:

- ◆ Keep all client communications confidential
- ◆ Avoid all conflicts of interest
- ◆ Do not communicate directly with an adverse party who is represented by counsel
- ◆ Always identify yourself as a paralegal

KEY TERMS

Affirm	Injunction
Affirm with modification	Legal remedy
Answer	Litigation
Civil litigation	Motion
Common law	Plaintiff
Compensatory damages	Pleading
Complaint	Pretrial motions
Conflict of interest	Privileged
Constitutions	Punitive damages
Court cases	Reverse
Courts of Appeal	Reverse and remand
Damages	Statutes
Declaratory relief	Summons
Default	Trial and post-trial proceedings
Defendant	Trial court
Discovery and motion stage	United States District Court
Equitable remedy	United States Supreme Court

REVIEW QUESTIONS

1. What is civil litigation and how does it differ from other types of litigation?
2. How is the California court system structured?
3. What are the differences between equitable and legal remedies? Identify two types of equitable remedies.
4. Where do you find the sources of law applicable to litigation matters? Explain the differences between the various sources of law.

5. Once a litigation matter is appealed, what are the four types of decisions that an appellate court may make? Explain each type.
6. What are the four stages of the litigation process?
7. What is the role of a paralegal in the litigation process?
8. What ethical rules must be followed by paralegals? What are the goals of the ethical rules?