CHAPTER 1

CASE PLANNING

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§ 1.1 ELEMENTS OF PLANNING

§ 1.1.1 INTRODUCTION

Welcome to litigation practice. You will learn how to analyze a case, draft and respond to pleadings, plan and implement discovery, and present and defend motions. You will learn what to do, when to do it, and why to do it. You will become an effective, efficient, and economical advocate and an ethical professional.

This book describes civil advocacy practice in federal and state court systems. The materials cover the Federal Rules of Civil Procedure, comparative state court rules, and representative federal and state court decisions. There are many similarities between these practices, even in states that have not modeled their rules on the federal rules. This book explores common practices, as well as dissimilar practices, in both forums.

This text also covers administrative cases and arbitrations. These two forums actually try more cases than are tried in the courts. Some types of cases previously resolved in court are now pursued through these tribunals, regulated by either arbitral rules or administrative procedures. Civil practice before arbitrators and administrative law judges (ALJs) is very similar to judicial practice, with some aspects more streamlined, faster, and less formalistic.

These materials analyze and present approaches used by successful advocates. Attorneys learn from each other and adopt and adapt methods that have worked well for other lawyers. This book presents these common and winning approaches to dispute resolution practice.

Chapters describe alternative strategies and tactics to help you make well-informed choices. The Preface to this text describes those contents in more detail. The decisions advocates make—from the drafting of pleadings through discovery to the bringing of motions—are based on analytical legal reasoning and incisive judgments. Both the theory and practice of why and how attorneys think and reason are analyzed.

The psychological and emotional dimensions involved in civil practice are also explored. The adversary process can become overly adversarial. This text will guide you through these professional experiences and significantly increase your confidence level.

Lawyers make mistakes in every case, and problems occur. A key to success is not to let the errors and troubles overwhelm you. Many problems can be anticipated and many mistakes eliminated through an understanding of the theories, knowledge, rules, procedures, cases, statutes, strategies, tactics, and techniques underlying successful civil advocacy, explained throughout this textbook.

Ethical issues arise during any dispute resolution practice. A major premise of these materials is that lawyers must hold themselves to high ethical standards. An understanding of professional rules, norms, and values assist in identifying ethical concerns, resolving problems, and becoming a responsible advocate.

Our legal profession is a helping profession. We have the privilege and responsibility to help clients. This humanistic view of advocacy shapes and influences our work. The situations and problems appearing in this book involve and affect the lives of clients, lawyers, parties, witnesses, decision makers, and other persons. You need to bring to life what you read so you can experience this human dimension of practice.

Our dispute resolution system involves alternative ways to resolve disputes for clients. Cases commonly and finally get resolved through negotiated or mediated settlements. These compromise and settlement approaches provide viable and effective ways to satisfy the interests of parties before and during pretrial and prehearing practice.

There will come a day—and it may seem like it cannot come soon enough—when you will be out in the real world representing parties, taking depositions, arguing motions, trying to collect fees, and wishing you were back in law school. The real point to remember when you are out there is this: You can influence how our civil practice system operates. Yes, you can make things better for your clients and your professional life, or, at the very least, you can certainly try.

You may not be able to avoid litigation problems and some of the rascals out there, but you can review, monitor, and improve the way you practice. You may not be able to change how a judge decides an issue, but you can serve on a bar committee to change the underlying rules. You may not be able resolve all the problems your clients may experience, but you can explain to them our justice system is the best there is.

§ 1.1.2 THE DISPUTE RESOLUTION PROCESS

This book covers the primary means our society relies on to resolve civil disputes: through judicial, arbitral, and administrative processes. Litigation involves cases in all three of these forums. These procedures involve a sequence of events that may occur in a patterned order. The table of contents of this book outlines that sequence: pleadings follow research and investigation; discovery precedes dispositive motions; and settlement discussions may then resolve the case. This sequence of events does not always occur. You should not presume—now having reread the table of contents—that civil advocacy always reflects this precise order.

There is no one single or singular way to "practice" civil law. Those of you still questing for dogma and natural law should reconsider your vocation and avocation. The bulk of dispute resolution decisions involve judgmental and strategic decisions about which road to take: to the right or to the left or on the road less traveled. Yes, there are some mechanical black-and-white rules (you have to serve a summons with a complaint). Sure, there are some commonly accepted tactical approaches (do not wear a clown outfit to an arbitration). Certainly, civil practice requires you repeatedly to exercise wise discretion and make decisions based on sound professional opinions and well-reasoned judgments.

As you read and digest these materials you will become knowledgeable, surprised, wiser, curious, pleased, and perhaps shocked. Not everything in the practical and theoretical world of civil practice will conform to your experience and expectations and your notions of the legal profession, the adversary process, and our system of justice. This book presents a variety of alternative approaches, strategies, tactics, and techniques based on rules of law and ethics that are employed in the real world. We present both the way things are and the way things could or should be. Your task, in part, is to make these ways coalesce.

This chapter focuses on these phenomena and various factors that underlie the decision-making process. We need to understand the dynamics and nuances that shape and influence the process before we study advocacy practice in detail. Various objective and subjective factors influence these decisions. The following sections describe the more common of these influences: the law and facts, the role of the lawyer, the adversary system, the client, and litigation games.

§ 1.1.3 THE LAW AND THE FACTS

Knowledge of the Law. You knew before your first law school class that knowledge of the law is of paramount importance in representing a client. But not all legal minds are created equal. Overestimating our legal knowledge or the unassailability of our positions is dangerous. A

commitment to thorough and ongoing legal research and a willingness to learn instead of assuming or guessing are indicia of a smart legal mind.

Standards of Excellence. Differences of opinion among professionals and the public regarding lawyer competency reflect different standards. What is superior work for one attorney is unacceptable to another. What is superlative work by one law firm is deemed average by another. There is more uniformity of opinion regarding incompetent work because of malpractice standards and ethical guidelines. What constitutes excellent work depends more on internal values and external community norms.

Accountability for Excellence. All lawyers have their own internal set of professional and personal standards that guide their conduct. Unfortunately, these principles may be insufficient and additional restraints are necessary to prompt some lawyers to do their very best. Current external guidelines establish minimal legal competency standards and not the highest principles, allowing for less than adequate lawyering.

Perceptions of Excellence. It's quite unlikely an advocate wakes up in the morning and says: "Well, today I feel like doing far less than excellent work. I may try to scrape along as close to the line of minimal competency as possible." We may believe that we do good work and try to do our best work. Our perceptions of quality affect the way we gauge our efforts, and our perceptions are affected by rationalizations.

Practice Rationalizations. All too often rationalizing can become a substitute for thinking, analyzing, and doing what should be accomplished. For example: "I don't need to do all that much research because I recall the law really well from my law school courses." Or, "Who needs to prepare much when we for sure will win that motion?" These thoughts can be alluring, but perilous. Tolerating less than professional legal work as acceptable is not a viable option.

Familiarity with the Facts. Obviously, we know that attorneys need to gather, digest, and know the facts in order to win. The difficulty in becoming familiar with facts is that they are not presented in a nice, neat package as they are in an appellate decision or on reality television. An advocate has to collect and interpret them and fashion order from disorder. This can be as difficult as finding a fact in nationallampoon.com.

§ 1.1.4 THE ROLE OF THE LAWYER

Extra-Legal Talents. Success or failure depends on winning facts and law as well as extra-legal factors. The advocate must not only be a legal expert but also a counselor, motivator, therapist, mind reader, negotiator, and a host of other characters at different stages. These talents can influence case results. This phenomenon explains why some bottom-half-of-the-class graduates own more majestic homes than some top-ten law grads.

Motivating Factors. Our primary motivation is to help our clients. Why we do so may influence that motivation. One attorney may focus on championing the client's cause and winning; another may be concerned with achieving a fair and just result; still another wants to make as much money as possible in legal fees. Such factors can affect case results.

Attorney Role Models. From their birth through school and into practice, lawyers model their work after others. Mentors, colleagues, opposing lawyers, judges, professors, and others shape how advocates think and act. The key is modeling the right role model. A reason why some lawyers do curious things is because they've seen it done that way before—but by someone who didn't know what to do successfully. It's critical for lawyers to review what and why they do things to avoid bad work.

Lawyer Personalities. The personality of advocates shape their work. An attorney with a naturally aggressive personality may be that much more aggressive in the already competitive world of conflict resolution. A lawyer with a naturally cooperative approach may be more conciliatory during a case. The predisposition of a lawyer may help with some cases and hinder others. Attorneys need to be aware of their dominant personality influences and use, modify, and control them effectively.

Cooperative Approaches. Modern civil practice encourages lawyers to be cooperative. The tenets of current practice openly promote and cajole attorneys into establishing reasonable professional relationships. Rules often mandate that counsel actually converse about bartering discovery information or compromising motion relief. These approaches are the prevailing preference of successful advocates.

Collaborative Resolutions. In many cases, it takes only a cell phone call or a text message to obtain an answer from or resolve a procedural dispute with an opposing lawyer. In other cases, an email exchange or a conference call may yield the necessary facts or outcome. These simple methods are often an effective way to exchange information and obtain results.

Prevailing Ethical Standards. Professional responsibility guidelines range from specific rules telling advocates what not to do to broad prescriptions suggesting what to do. The situational ethical lawyer may be more flexible than a fundamentalist attorney. It's often up to advocates to decide what ethical norms govern litigation conduct. Each of us develops our principles, values, and morals growing up as an advocate.

§ 1.1.5 THE ADVERSARY SYSTEM

Lawyer Control. Our dispute system places much of civil practice within the control of the lawyers. Advocates can do what they want, within reason and within the parameters of the rules. Judges, arbitrators, and ALJs are there primarily to oversee the case, enforce the rules, and resolve motions if the attorneys are unable to be conciliatory.

Stipulation Power. Lawyers have in many situations reasonable discretion to modify, change, tinker with, or transubstantiate many rules of pretrial and prehearing procedure, by themselves, without resort to an order or an oracle. Counsel need only agree and their stipulation becomes the governing regulation. Section 5.11 explains this power.

Cooperative Approach. Modern judicial, arbitral, and administrative rules of procedure require and encourage lawyers to disclose information, resolve problems and disputes on their own, and make reasonable efforts to cooperate. "Meet and confer" rules require advocates to discuss pleading issues, agree on discovery requests and responses, and try and resolve motion disputes. These rules attempt to make our justice system what it is supposed to be: an effective, efficient, and economic resolution process.

Judicial, Arbitral, and ALJ Assistance. Procedural rules also help refine the role of the decision makers. They have the opportunity, ability, and responsibility to assist counsel early in a case and issue scheduling and conference orders to facilitate the progress of a case.

The Lawyer as Lawmaker. Not all law is made by judges, justices, or legislators. Lawyers "make" law when they decide to do or not do something. This action makes the attorney a lawmaker for purposes of that decision. The lawyer who says to a client "This cannot be done because the law does not allow it" becomes the decision maker who has decided that issue in the case. That decision, whether correct or not, in effect acts as controlling law. Different interpretations of the governing law explain, in part, why some attorneys act in some situations and others do not.

Case Theory. Every legal rule, case, and statute has its own theories supporting its existence or reasoning. An advocate needs to grasp the philosophy underlying the law to properly interpret and apply it. An attorney must understand why the rules exist, how the case law developed, and how the statutes evolved in addition to knowing the law. A lawyer must be a legal philosopher as well as a legal scientist and artist, which helps justify those well-deserved legal fees.

Decision Maker Differences. Anyone who knows of two or more federal or state judges who have exactly identical approaches to the litigation process should contact Ripley's Believe It or Not. Different judges, even in the same district or county, have varying approaches to civil practice. The same can be said for arbitrators and administrative judges.

The Adversary System. "One that contends with, opposes, or resists: the enemy." That is a dictionary adversary. The extent of that opposition and resistance varies among advocates. Nonetheless, the litigation process (which encourages cooperation) often occurs in the midst of a battle within a war (with possible "enemies"). Resolving some judicial confrontations can be achieved with the same ease of putting a parallelogram peg into a

hexagonal hole. Arbitration and administrative cases may provide a less contentious environment, resulting in more collaborative opponents.

Partisan Differences. Attorneys on opposite sides of the case are partisan and often interpret the law differently. This is due in large measure to the demonstrable truth that statutes, cases, and rules can be read from left to right and can be interpreted from right to left, particularly when applied to cases involving two or more varied stories.

Varying Factual Stories. "He was roller skating at least 35 miles an hour." "No, it was a she who was skateboarding about 1.5 kilometers per minute." Differing accounts, varying perspectives, conflicting interests, slanted perceptions, and defective memories lead to varying stories. Different lawyers representing divergent views also leads to differing approaches regarding what happened and how it should be resolved.

§ 1.1.6 THE CLIENT

Best Interests of the Client. The wants and needs of a client influence the outcome of a case. The client's choice of available legal options affects what an attorney can or cannot do during a case.

Client Financial Resources. Economic restraints affect legal decisions. Whether a client can afford to pay the costs and fees of a case often determine what approach the advocate may take. Lawyers with clients can dream about litigation strategies. But only attorneys with clients who have sufficient money and resources can litigate. Cases can be too expensive, precluding pursuit of valid and effective legal strategies. The task of the advocate is to conduct a case within the financial means of the client.

The reverse financial problem may arise when a client has extensive resources and the other party does not. The litigation strategy may be to take advantage of this economic superiority and force the opponent into further financial distress. The ethical considerations involved in this approach are addressed later in this book, but you know by now that such a tactic is unfair and may well be reprehensible.

Client Participation. The extent to which a client participates in a case will affect how strategic decisions are made. Clients often know what is best for them and what they can afford. Lawyers usually know what advocacy tactics and techniques will be the most effective. The extent to which a client participates in a case depends on the advocate's approach to client counseling, the preferences of the client, and the need for involvement.

Client Understanding. Clients may be knowledgeable about the dispute resolution system, or may be first time or unsophisticated parties. They may know others involved in litigation, or think they know what advocates need to do. They may search for legal information online through

a variety of resource websites ranging from Wikipedia to proprietary sites to the Legal Information Institute. They may explore dispute resolution websites about lawsuits (local courts), arbitration (ADRForum.com), administrative cases (state agencies), and mediation (Mediate.com). As a result, they will find some answers and also have questions and concerns about their options. They may seek your professional help with some understanding and misunderstandings about the law.

The Stake. What is the case worth? How important are the issues? What value do the client and attorney place on the case? How effective are the available remedies? Does the potential recovery justify a specific outcome? These issues need to be addressed and resolved.

Time and Money. Sometimes there is just not enough time. Remedies may be beyond reach, discovery may be lost, and motions may be unavailable because of costs. Litigators cannot control these forces; if we could then we would be certain that cosmic forces are on our side and not with the allegedly better-paid transaction lawyers. An arbitration or administrative proceeding may be able to provide a prompt and affordable result instead of the years and costs required for court cases, and may be a more economical option.

§ 1.1.7 WHAT, A GAME?

Playing Games. A tactic used by some attorneys with alarming skill, gaming is designed to undercut the litigation process. Who knew: lawyers playing games for the sake of trying to win? Sometimes it's the inane assertion of laughable claims or frivolous defenses; other times it's incomplete or self-serving discovery responses; and still other times it's the misuse of motions and hearings. Subgames include "Name that Claim," in which a defense lawyer must guess what the complaint alleges; "E-menacing," in which requests for electronic discovery responses seem downright mean spirited; and "Motion Feud," in which law firms vie for prizes for being the most obnoxious.

Changing the Rules of the Game. Federal and state rules of procedure discourage game-playing. Rules explicitly prohibit abusive discovery, regulate lawyer misconduct, and allow for sanctions. The prevailing recognition by attorneys, judges, and the public that our litigation system should be free of game playing helps reduce the problem. And, games may be less likely to proliferate in arbitrations and administrative hearings.

"Oh, My Goodness." Many cases have a bit of information that if disclosed to an opponent causes the disclosing attorney to say, "Oh, my goodness." This harmful information weakens the case, and it would be much better if the other side and the world did not know about it. But if relevant and properly requested, the facts need to be disclosed. The

creative advocate places this information in perspective by reducing its harmful nature or by drawing from it reasonable and helpful inferences.

Lawyer Inaction. Sometimes attorneys don't do something because they don't know what to do or how to do it. This inaction results from inadequate experience or a lack of competence. We all want to avoid the knots in our stomach, the weakening of our knees, the sweat in our palms, the shudder of our body, the quivering of our voice, and the whisper in our ear: "Do something! Really. . .But what?"

We may not acknowledge this phenomenon often enough (unless it happens to someone else we don't like all that much), or what effect it has on a case, and there is precious little discussion in the legal literature. We know we should naturally be afraid of the bar exam. Many of us have a difficult time admitting we are afraid of the legal unknown. But we experience this and know the toll it can take on our judgment.

Mature attorneys can reduce the impact of these concerns through experience and success. Novice lawyers can overcome these feelings by out preparing the other side, by relying on their natural enthusiasm to carry on, and by resorting to the power generated by the competitive genes that initially caused them to enter law school.

§ 1.2 CASE PREPARATION

The process of "thinking like a lawyer" may be more than just a convenient rationalization for law school or a preoccupation by law professors. Many effective advocates think in a systematic way, and it's this systematical approach that we want to explore in this section.

Successful advocates are effective planners and creative problem solvers. It also helps, of course, if they have all the law and the facts on their side. Usually, there is not much attorneys can do to change the law (unless they can create jurisdictional firmament) or the facts (whatever happened to rent-a-witness?), but lawyers can improve their abilities to analyze and plan.

Case planning consists of an organized, structured approach, including the following factors:

- Assessing the client's needs and interests.
- Identifying potential claims and defenses.
- Researching the elements of claims and defenses.
- Considering possible sources of information.
- Advising clients to preserve and hold documents and electronically stored information that may be relevant.

- Selecting an available administrative or arbitration forum in lieu of a court.
- Planning informal discovery approaches.
- Determining what information must be affirmatively disclosed to other parties and what information could be disclosed voluntarily.
- Drafting document production requests, interrogatories, requests for admissions, deposition notices, and other discovery requests.
- Reviewing available case strategies, tactics, and techniques.
- Reconsidering what procedural remedies and relief may be sought.
- Preparing motions seeking such relief.
- Creating a timetable for pleadings, discovery, and motions.
- Reassessing costs, expenses, and fees.
- Initiating settlement talks with the opponents.
- Appraising available mediation and ADR methods.

This process needs to be reviewed and updated periodically as a case progresses. It is critical to develop an overall strategic plan initially in the case even if it will be significantly revised as the case progresses. Civil advocacy is difficult enough without it being haphazard and disorganized. A lawyer's judgment about strategies needs to be based on an overall view of the case and not merely on reactions to individual situations.

A thorough planning process consists of a number of assessments.

§ 1.2.1 PROFESSIONAL ASSESSMENTS

ASSESSING CLIENT NEEDS

Clients seek advice for any number of reasons and their sought-after remedy may or may not be viable. Not all client problems may be resolvable through civil advocacy. Just like the surgeon may be eager to spend more time in the operating room, the litigator may be inclined to spend more time in the courtroom. The first stage of planning is determining client needs and wants and the likelihood of their being met. Negotiation may be much preferable to immediately initiating an action. Mediation may be the much better approach than continuing with obtaining discovery and fighting over motions. An arbitration or administrative proceeding may be much more affordable and useful than a lawsuit.

ASSESSING APPLICABLE LAW

Reviewing the Law. The applicable law significantly affects the planning process. The support for a claim or defense is found wherever laws are found: in statutes, case law, constitutional provisions, rules, and regulations. A lawyer needs to thoroughly research the substantive law of a jurisdiction to determine what law applies.

Creating the Law. A lawyer faced with a situation for which no current legal doctrine provides a remedy may need to create a legal theory. An advocate may have to craft a good faith argument expanding existing law. Sometimes this process occurs in an evolutionary way in small increments. Occasionally, it occurs in a revolutionary way with a big bang.

ASSESSING FACTS

Gathering Facts. Collecting information requires ongoing efforts. Supportive facts need to be sought, corroborative information documented, electronically stored information preserved, and impeachment material identified.

Creating Facts. A case planner must not only collect facts but may also need to legitimately "create" facts during investigation. While gathering information, the lawyer can reasonably shape and mold data. These opportunities allow the attorney to construct facts that support the client's position and contradict the opponent's claims or defenses.

Identifying the Legal and Factual Issues. The gathering of facts and the assessment of the law allow a lawyer to identify the relevant factual and legal issues. They may be obvious, or they may need research. If the issues are multiple, the most relevant should be selected.

MAINTAINING A PARTISAN BALANCE

Maintaining an Objective Viewpoint. It is easy for the advocate as a partisan in the adversary process to view issues and theories from a slanted or biased perspective. It is important for the lawyer to maintain a balanced and objective perspective in assessing a case.

Weighing Strengths and Weaknesses. Every case has strong points and weak points. Thorough planning requires an honest assessment of all strengths and weaknesses.

CRAFTING A THEORY OF THE CASE

Developing a Legal Theory. A case without a legal theory is like a lawyer with no real sense of humor. Both will eventually be a loser. A legal theory consists of the elements of a claim or defense supported by the facts of the case. Legal theories are based on existing law or a good faith argument extending, modifying, or attempting to change existing law. Many legal theories are well recognized and accepted, such as a breach of contract for failure to perform an obligation under a written contract. Other

legal theories may be proposed by an attorney to advance a claim or defense that expands existing law, such as a breach of an implied covenant of good faith and fair dealing in an oral employment contract.

Selecting Theories. At the beginning of the case a number of alternative claims and defenses may appear to be applicable. As the case develops, the legal theories supporting these claims and defenses need to be reviewed to determine their continuing applicability. A lawyer should attempt to reduce legal theories to the fewest possible, unless a case by its nature involves numerous legitimate theories. The assertion of too many claims and defenses may confuse the ALJ, arbitrator, judge, or jury, as well as the attorneys and cause misunderstandings.

Composing a Case Theory. Words and phrases need to be chosen that portray the prevailing case theory with a compelling and captivating description. An overall theory of the case should be composed so that it is understandable, comprehensive, and persuasive. An effectively phrased theory is expressed in a theme that consists of simple, declarative sentences.

Other available sources explain the importance of crafting an effective theory of the case. Presenting a case to a judge, jury, arbitrator, and ALJ is well beyond the scope of this book. Other texts provide valuable insights, explanations, and examples.[1]

§ 1.2.2 DEVELOPING THE PLAN

Making Predictions. Deciding what to do requires an advocate to predict the future. It helps to be naturally clairvoyant, and law school can help hone extra sensory legal talents. The accuracy of forecasting what the other party, opposing lawyer, and decision maker will most likely do affects planning success.

Composing a Tentative Plan. Early on, advocates need to develop a tentative plan. Sports litigators call them game plans; spiritual litigators call them divine plans. Whatever name or process employed, whether reduced to writing or emblazoned in the mind, this plan should delineate how the advocate anticipates obtaining what the client needs or wants.

Revising the Plan. The dispute resolution process is not static. One component affects another. The discovery of one fact may strengthen or weaken the applicability of a legal proposition. A recent judicial opinion may force a change in the results available to a party. The planning process requires constant and continuous reassessment.

Seeking Planning Advice. An effective technique to assist with the process is to describe a proposed plan to a colleague. If the colleague laughs

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[1] *See, e.g.,* Roger Haydock and John Sonsteng, *Trial Advocacy Before Judges, Jurors, and Arbitrator,* § 2.5 (West Academic 6th ed. 2020).

at the suggested approach, you may want to reconsider your position. If the colleague looks extraordinarily perplexed, you may want to update your resume. If the colleague seems to understand your explanation or offers alternative ideas, you may be on the right track.

Considering the Case from Other Perspectives. Another effective method is to review the proposed plan from the perspective of the opposing lawyer. What are the best theories, issues, and arguments of the other side? How do these factors affect the plan? A similar technique is to view the plan from the perspective of the decision maker. Does the plan make legal sense? Are the most persuasive arguments advanced?

§ 1.2.3 SEARCHING FOR RESOURCES

Various sources exist for information about pretrial and prehearing practice beyond this text. Internet searches reveal proprietary websites offering innovative litigation analytical and support services. Websites, blogs and other books explain advocacy developments and describe successful strategies, tactics, and techniques. Legal publishers have an array of specialized texts. There are a variety of commentators and bloggers who post periodic legal updates, case opinions, and dispute resolution events and results. These and other easy to access sources are readily available to you.

Advocates can also learn pretrial and prehearing skills from watching videos of lawyers taking depositions and arguing motions. Professional videos provide educational demonstrations of these skills.[2] These can be found online, in law libraries, and in legal publishing catalogs.

Cameras in the courtrooms provide another way to view cases. Some appellate courts record their oral arguments, and some trial courts record motions and hearings. Remote and distant proceedings that occur via video conferencing may be recorded and available for review. Ubiquitous video sharing and other social media websites provide other opportunities to view some sort of reality.

Observing real lawyers conduct live motion hearings is another valuable resource. Courtrooms in your locale offer a wide variety of civil cases. Court administrators can provide schedules of hearings. Law clerks are receptive to helping law students attend motion arguments. Attorneys will typically make themselves available to answer questions and explain what is happening. And judges commonly and graciously welcome advocates-to-be to their courtrooms and chambers.

Administrative and arbitration motion hearings may likewise be useful resources for observing these types of procedures. Administrative

[2] You can freely review and evaluate the lawyers in depositions and cases appearing at: https//eproducts.westacademic.com/Public/LawyeringSkills.

staff can provide schedules for public hearings. Arbitration administrators and arbitrators may allow observations with the consent of the parties.

Experiencing the real thing provides ideal educational training. Law clinics, internships, externships, and practicum courses likely have some of these experiences available. Pro bono opportunities during and after law school are another worthwhile source of civil practice and provide invaluable community legal services.

§ 1.2.4 MAKING TIME PREDICTIONS

Planning a case also includes making predictions regarding how the case will proceed and how much time it will take. These reasonable forecasts need to be made early on in the case in order to counsel a client initially regarding alternatives and to prepare an overall case plan. An attorney needs to make a reasonable estimate regarding the number of hours each of the major facets of a case may take. For example:

Factual/Legal Investigation and Research	15 hours
Drafting and Responding to Pleadings	7 hours
Discovery Requests, Disclosure, Responses	50 hours
Motion Documents, Briefs, Hearings	40 hours
Pretrial and Trial Preparation	45 hours
Trial and Post-Trial	30 hours

These estimates will need to be reviewed and refined as a case progresses. So much of what occurs in many cases is beyond the control and even the influence of an advocate, that clients need to understand the factors that affect the progress of a case. Settlement efforts and possible mediation are additional factors that need to be included, considered, and evaluated.

§ 1.2.5 ASSESSING COSTS AND FEES

A lawyer also needs to determine how much the case may cost a client. A reasonable financial forecast can typically be made with possible future events decreasing or increasing the estimate. There are several types of fees and expenses.

ATTORNEY FEE ARRANGEMENTS

There are many ways lawyers may be paid. The most common are hourly fees, contingent fees, and fixed fee agreements, along with hybrid and alternative fee arrangements. An hourly paid attorney can multiply the estimated number of hours the case may take times the reasonable hourly fee. A contingency fee may range from 25% to 40%, or more, or less,

with the percentage depending on the type of case, its complexity and risks, and the legal market. Fixed amounts are commonly a flat fee, with periodic reviews and possible modifications.

There are multiple combination and alternative fee arrangements: A hybrid may include a mix of a flat fee with a partial contingent fee for some claims or comprising an hourly fee for some defenses. A portfolio arrangement may include a formula with a range above and below a specific budget and recurring assessments that look back and ahead for adjustments. Other variations include a value-based premium fee for a successful outcome or a risk sharing formulary for cases with uncertain prospects or unpredictable events.

The type of existing fee arrangements for advocacy cases will reflect the prevailing legal market and case prospects. Some markets will be local, and the preferences of the lawyers may control the fee structures; other markets will be state-wide, national or international, and the clients and locale may influence the fee structures. Some cases will be difficult to evaluate, or entail unforeseen events or multiple possible outcomes. The available and preferred fee arrangements obviously need to be discussed in detail and often negotiated with clients.

CASE EXPENSES AND COSTS

Another source of expenses includes litigation costs. These commonly include costs for filing and service, document production, depositions, transcripts, and expert witnesses. Similar or reduced costs may be involved with administrative cases and arbitrations.

Courts establish the amount of the filing fees, which can range from $200 to over $400 for the commencement of a lawsuit, including the filing of pleadings. The fee to serve a summons and complaint depends on the type of process used. Personal service costs include mileage and a set amount or hourly rate for public or private process servers. There may be additional court fees for the filing of litigation documents.

Federal Rule 5 and similar state rules allow subsequent litigation documents to be served by mail or by email with the consent of the parties. Submitting electronic documents is a common and expected practice among advocates in many jurisdictions, and is mandated by court order or rule in many cases, especially in complex or multi-party cases. Private delivery companies may also be used to deliver paper documents.

The cost of reporters for depositions varies widely. Reporters typically charge an hourly rate for their appearance at a deposition and a charge per page for each page of deposition transcript prepared. For example, a court reporter may charge $65 an hour to attend a deposition and a $3.85 per deposition transcript page. Video recording equipment will be an additional charge.

Expert witness fees vary widely in amount. The type of expert, how many experts there are in an area, the expert's years of experience, and other factors determine the market rate for an expert witness. Many experts charge an hourly rate for their assistance, others charge a set rate, and still others charge a combination of both rates. The cost of an expert may range from several hundred to thousands of dollars or more.

Costs for an arbitration or administrative proceeding may be substantially less than for a lawsuit. The costs of an arbitration (filing, hearing fee, and attorney expenses) are often appreciably less than the total costs for a lawsuit because arbitration takes less time, involves fewer procedures, and provides for a timely hearing. Administrative hearings with public judges may cost even less.

§ 1.2.6 IMPLEMENTING THE PLAN

The organization of a case includes the creation of a file often involving both electronic and printed documents. The divisions or folders of a digital or paper file typically consist of the following:

- A client folder, including information and the fee retainer.
- A correspondence folder, including emails/letters to and from opposing counsel, affidavits of service, and court communications.
- A theory of the case folder, containing possible legal and case theories.
- A chronological index, including a listing of all pleadings and discovery and motion documents and litigation events.
- A pleading folder, including—surprise—all pleadings.
- An investigation folder, including memos and investigation notes.
- A disclosure folder, with mandated and voluntarily disclosed data.
- A discovery folder, with interrogatories and answers, document production, deposition notices, admission requests and responses.
- A document folder, including duplicates of the documents and electronically stored information disclosed.
- A document production folder, including all documents and electronically stored information received.
- An exhibits folder, with potential case exhibits, marked with numbers, labels, or bar codes.

- Deposition summaries, with deposition outlines and digests.
- Deposition transcripts and records separately retained.
- A motion folder, including affidavits, briefs, and other documents.
- An order folder, including proposed and actual orders issued in a case.
- A research folder with all legal information listed.
- A notes/ideas folder, for thoughts, impressions, and musings.
- A settlement/ADR folder, including demands, offers, offers of judgment, and alternative dispute resolution options.
- A celebration folder, with brochures for travel after the victory.

There are, of course, other ways to organize a file. For example, all pleadings, discovery, and motion documents can be retained in chronological order in sequential or electronic files. Whatever system is used depends on the attorney's organizational preference.

All cases need to be professionally well organized. Cases may be handled by teams of lawyers and other professionals. A simple case can be managed by one lawyer with or without assistance. Complex and multi-party cases require a team approach with professionals having specific responsibilities for particular tasks and meeting periodically to reassess the case and review the ongoing work. Clients may prefer to retain different attorneys and law firms for various tasks: one for pretrial, another for trial, and still another for settlement. The next to last planning stage is catching up on your sleep. This process can get exhausting.

§ 1.2.7 ADVOCACY OPPORTUNITIES

Evolutionary changes in advocacy forums provide new and innovative approaches to dispute resolution. Some cases are being handled through virtual hearings (interactive video motions) and online exchanges of evidence and decisions (domain name dispute resolutions). Other innovative methods are forthcoming that provide fair and affordable justice. *See* § 1.10.

Our traditional notions of justice view dispute resolution as an event that occurs in a place, such as a courthouse or an arbitration or administrative hearing room. Another view is that dispute resolution is a *service*—without boundaries. This notion provides additional opportunities for advocacy-trained lawyers to serve clients.

There will always be a need for advocates to plan, draft pleadings, conduct discovery, and present motions. Disruptive and eruptive changes

and improvements in pretrial and prehearing practice will continue to occur. There will also be new and evolving opportunities to offer legal services to clients before, during, and after disputes arise, including the following.

Wise Counselor. The value added benefits advocates provide their clients are their insights, acumen, and judgment. Lawyers offer legal wisdom.

Legal Risk Manager. Attorneys can help clients avoid legal disputes. They know what may cause disputes, and can predict how and when they may occur. Smart clients may retain counsel to prevent disputes and not just to resolve problems after they arise.

Hybrid Professional. Advocates may have other skill sets to offer clients. They may have expertise in technology, business, accounting, or other professions that, combined with their knowledge of advocacy, afford clients multi-talented advocates. Professionals from various disciplines can collaborate and provide a range of advocacy services.

Advocacy Adviser. Because of the multiple options clients will have regarding pre-dispute, ongoing dispute, and post-dispute choices and decisions, advocates can guide them through these processes. The value of the advocacy adviser is reflected in saving clients money and time and avoiding worries and disruptions to their business or personal lives.

Data Processor. Much of civil practice work involves the processing of information, documents, and data. Legal experts can use modern technology systems to analyze data, organize case materials, preserve discovery information, sort e-discovery documents, compose deposition summaries, compile motion documents, and develop case strategies. These approaches will make the resolution of large complex cases and small recurring disputes more economical. Advocates need to become data fluent and proficient.

Project Manager. Advocates can readily manage and monitor available dispute resolution processes. A holistic dispute process can be subdivided into various components with specific tasks performed by a variety of professionals managed by the advocate. For example, different lawyers can manage different parts of the litigation process with one handling pleadings, another discovery, and still another substantive motions.

Online Dispute Expert. Dispute resolution services will continue to evolve beyond physical locations, virtual hearings, teleconferences, and video hearings to online submissions. Online dispute resolution (ODR) programs such as SettlementIQ and other computerized systems of e-negotiation can provide efficient and affordable ways to resolve litigation disputes. Advocates can provide clients with assistance to enhance the effectiveness of these methods.

§ 1.3 CREATIVE PLANNING

Advocates need to be adept at resolving problems by being creative. It's easy to say "be creative," and it's another thing to explain how. Creative approaches are readily recognizable and obvious after the fact. You need only look at a Disney cartoon or watch a Spielberg film to recognize creativity. Some lawyers are naturally more creative than others. All advocates can mimic how creative litigators think and act.

§ 1.3.1 BRAINSTORMING AND FOCUSING

Brainstorm. Allowing the imagination to run wild may produce some creative ideas. This process can be difficult, especially in a group, because of fear that a proposed idea as well as its originator will be considered naive, weird or bizarre. It often requires courage and the willingness to be laughed at to discover a truly creative solution.

Broaden the Problem or Issue. Focusing on the specifics and details of a problem may reduce the vision necessary to see beyond the problem. Defining the problem or redefining the issues in broader terms may produce an innovative idea.

Narrow the Focus of the Inquiry. Considering broad and far ranging alternatives may result in abstract or unrealistic solutions. Narrowing a broad inquiry can result in specific and available solutions.

Recognize the Significance of Not-So-Obvious Notions. The obvious solutions may be easy to recognize. Discovering the less-than-obvious poses a challenge. For example, it takes no great insight to serve requests for admissions in a case. It does take some ingenuity to consider serving requests for admissions with a pleading to force the other side into admitting or denying certain information early in the process and then subsequently consider serving interrogatories requiring the other party to explain the basis for denying some of the requests for admissions.

§ 1.3.2 OPENNESS AND FLEXIBILITY

Modify Assumptions and Positions. Doing something based solely on habit can squelch creative impulses. Reviewing assumptions and re-examining positions can liberate creative insights.

Be Flexible. A proposed solution to a problem may initially appear appropriate but may need to be reexamined when implemented. The advocate needs to be flexible. There is a time to be firm and persistent, even stubborn, but not during creative thinking.

Alter the Goals of the Case. Often a reasonable and workable solution cannot be achieved because what the client or attorney wants is not reasonable or workable. These goals may need to be reviewed to determine if the ends sought can or cannot be reached by any conceivable means.

Formulate New Courses of Action. Set patterns and established systems may result in efficient procedures but also restrict alternative courses of action. For example, an arbitration or administrative proceeding may be a better choice for a client than a judicial lawsuit.

§ 1.3.3 VISUALIZING AND BELIEVING

Visualize the Problem. Sometimes the advocate gets caught up with concepts or words and loses the overall perspective of a problem. Viewing the problem in images may trigger new responses. How to approach a witness or present complex evidence may come easier if talking to the witness or reviewing the real evidence can be visualized.

Believe in Your Own Ideas. It is possible that you have thought of an idea previously not thought of by any other lawyer. It is much more likely, however, that you have only reinvented a small part of the legal wheel and that some other attorney has thought of the same idea in some other case, which may have been settled or unpublished. This realization—that this idea has been thought of and probably used before—may make it easier for you to implement it. And this approach may help you avoid any fear of being embarrassed or viewed by opposing counsel as being foolish.

Seek Advice. A third person may be able to offer fresh insights. Sometimes the advocate gets too close or involved in a problem and loses perspective. A well-informed colleague or friend may be a resource to resolve a dilemma.

Take a Break. Thinking too long and hard may block the development of fresh ideas. That's why most of us did not attend all our law school classes. Taking a break from thinking about the problem may later result in an idea when the advocate returns to analyze the problem.

§ 1.4 FACTUAL ANALYSIS AND DEVELOPMENT

The process of obtaining information requires an understanding of the sources and types of information involved in the dispute. The two major sources of information are people and documents. Chapter 2 explains investigation methods to identity and locate witnesses and paper and electronic documents.

Much of the information will come from a client or representative. Lawyers have an obligation to advise clients and their employees or agents to preserve information and documents that may possibly relate to a dispute and not to destroy or delete such information. This preservation hold may be sent via email, letter, memo, or other forms of communication to everyone associated with a client who has such data. A lawyer on retainer or in-house counsel will send this mandatory hold as soon as a

dispute may be anticipated. An attorney hired by a client will initially advise a client to preserve everything possibly relevant.

Business companies commonly have retention and destruction policies in place regulating how long documents and materials are retained before being destroyed or deleted. These policies need to be based on rational and sensible reasons, such as how long best practices or government regulations require documents to be maintained. The advent of a dispute or the issuance of a preservation hold order may suspend these retention/destruction policies.

Two broad categories of information are the evidentiary concepts of direct evidence (I saw Bowie knife the plaintiff) and circumstantial evidence (I saw Bowie holding a knife standing over the injured body of the plaintiff). Other types exist that provide a conceptual framework helpful to properly analyze the facts of a case.

§ 1.4.1 TYPES OF INFORMATION

Existing Information About an Event. The initial information a lawyer learns about a case usually includes information that explains the details of the event. The task of the advocate is to document and develop this existing information.

Affirmative Information. Obviously, information that supports the story of a client must be discovered.

Negative Information. Less obviously, perhaps, information that negates the story of a client must also be sought. The primary reasons are twofold. First, it is necessary for the attorney to know everything that happened; and second, it is essential this includes learning about weaknesses.

Potential Information About an Event. The initial stages of the case also involve the development of information that may exist. The task of the lawyer is to discover what might have happened, what might have caused what happened, and other what might haves.

Information Supportive of the Opponent's Story. A complete investigation includes learning as much as possible about the supportive information available to the opponent.

Rebuttal Information. Information that disproves, contradicts, denies, clarifies, or negates the position of opponents needs to be uncovered.

Non-Information. What did not occur, what someone did not say or do, what was not preserved, these and other types of non-existent information may help prove or disprove a fact.

§ 1.4.2 CATEGORIES OF INFORMATION

It is also helpful to review possible categories of information.

Corroborative Information. Corroborative sources strengthen both the quantity and quality of the information. There may be more than one eyewitness to an event or a document may contain duplicate information.

Before and After Information. What happened before and after an event often supports or negates a story. The event itself is only one aspect of the overall story. It is critical for an attorney to learn the events that precede and follow the main event.

Explanatory Information. Why something happened or why someone said or did something also comprise essential information. Factors that caused an event or motives that influenced a person must be investigated.

Inferential Information. Some information will initially appear worthless because it has no direct impact proving or disproving an event. Information from which inferences may be drawn may tend to confirm or negate an incident and can be linked with other information to form a supportive conclusion.

Opinion Information. The opinions of laypersons are common in cases; and the opinions of experts are necessary in many cases. These opinions, often inseparably intertwined with the facts, need to be reviewed in the same way facts are assessed.

Information About Emotions and Feelings. What a person emotes or feels often reveals something of value in a case. These responses, whether normal or extreme, may lead to useful factual information.

Internet Information. Computer searches are very valuable in uncovering the various types of information described above.

§ 1.5 CREDIBILITY ANALYSIS

The manner in which the information is made available to a fact finder is often as important as the content of that information. Various factors influence the weight afforded a story, witness, or document.

§ 1.5.1 THE STORY

Is It Plausible? A story has to be reasonable. If facets of the story sound or appear unreasonable it loses its persuasive impact. A plaintiff who claims to have been rear-ended by a car driven by the defendant will tell a plausible story unless the plaintiff claims the driver was the Abominable Snowcreature.

Is It Consistent? Is the story internally consistent? Does the story of the witness make chronological sense? The plaintiff who claims she was

driving to Katmandu from San Diego when the accident occurred may not spin a credible story. Is the story externally consistent? Does corroborating evidence support the story? Unless the plaintiff can produce the Snowcreature's driver's license, with a photo, victory may be out of reach.

Is There Sufficient Detail? A story must contain those details a reasonable person would have perceived and remembered. The lack of sufficient details will reduce the believability of a story. The plaintiff who does not know whether the Snowcreature wore sunglasses, a fake fur, or fuchsia snowmobile boots, has missed some critical details.

§ 1.5.2 THE WITNESS

What Is the Source of Knowledge? Does the witness have personal knowledge? First-hand information? Did the witnesses learn what happened from another source? Did someone else tell them? Did they read it?

What Did the Witness Perceive? Were the circumstances such that it is reasonable for the witness to have seen or heard what is claimed? What was the environment like? What was the witness doing?

What Was the Physical/Mental Condition of the Witness? Was the witness alert? Attentive? Distracted?

What Does the Witness Recall? Does the witness recall what a reasonable person would remember? Does the witness only recall helpful information and overlook harmful information?

How Does the Witness Communicate? How does the witness sound? Credible? What is the demeanor of the witness? Incredible?

What Motivation Does the Witness Have? Why was the witness at the event? Why will they testify?

Does the Witness Have Any Bias or Prejudice? Does the witness favor a party? Does the witness dislike another party? Why?

What Is the Status of the Witness? Is the witness likely to be believed by a jury of peers or by a judge, arbitrator, or ALJ?

Has the Witness Made Any Prior Inconsistent Statements or Omissions? Did the witness give a previous statement that contains information different from their present statement?

§ 1.5.3 THE DOCUMENT

Is the Document Authentic? Can it be properly identified? Is it self-authenticating?

Is It Reasonable for the Document to Exist? Should it have been created? Is it a logical part of the event? Is there some reason why it may have been manufactured?

Is It an Original or a Duplicate? Where is the original? Is it an accurate duplicate? Should the two be compared?

Who Created, Received, or Forwarded It? The author or recipient may be able to vouch for its contents. Meta-data may reveal further facts.

Does It or Did It Exist in an Electronic File, or on a Hard Drive, or in a Cyber Cloud? Was it deleted? Who deleted it? Computer data recovery programs can be a significant source for document retrieval.

These and other factors influence the value of information. It is not enough in analyzing facts to determine their content. One must also focus on their source, credibility, and authenticity.

§ 1.6 LEGAL ANALYSIS AND REASONING

Analysis is the process of using current information and informed predictions to plan for the future. The process involves reflecting on the information at hand, determining its significance, and deciding what to do. Legal analysis requires the lawyer to analyze the applicable law, available facts, client interests, economic resources, time limitations, and alternative strategies, and then compose a winning plan.

Well it's not quite that simple. Legal reasoning presumes an understanding of logical reasoning including deductive and inductive reasoning.

§ 1.6.1 LOGICAL REASONING

Deductive reasoning is the process of reasoning from one or more premises presumed to be true to reach a logically certain conclusion. It reasons from general statements to a specific conclusion. It's known as top-down logic and is the less common form of legal reasoning. A deductive syllogism argues, for example, that very good friends are biased, that witness O is a very good friend, and that therefore witness O is biased. Deductive reasoning culminates in an apparent incontrovertible position. A primary reason it's less commonly available is because there are fewer instances or cases where there's a dispute over a conclusion, or no worthwhile dispute.

Inductive reasoning constructs broad generalizations from specific observations by combining one or more premises presumed to be true to reach a conclusion. It reasons from specific information to a general conclusion. It's known as bottom-up logic and is a much more common form of legal reasoning. The inductive process argues, for example, that witness O is a very good friend and is a biased witness. This argument does not

lead to certainty and remains subject to interpretations and inferences. Witness O may value honesty over friendship, or may refuse to testify favorably, or may prefer to end the friendship. Inductive reasoning may provide a proposition that is correct and believable or questionable and susceptible to differing propositions.

Much of the case planning process involves the development of evidence through inductive analysis. The lawyer who opposes the proposition asserted by inductive evidence has four options:

(1) The fact can be flatly denied (witness O is not a friend).

(2) Contradictory information may be introduced (witness O speaks poorly of the alleged friend).

(3) Additional facts can be offered (witness O is also a friend of the opposing party).

(4) Reasonable inferences can be explained away (the bias is insufficient to influence witness O to lie).

These choices provide options in analyzing the strengths of a proposition.

§ 1.6.2 LEGAL ANALYSIS

There is nothing magically precise about the analysis and reasoning applicable to case planning. There is no perfect formula based exclusively on objective, rational, and logical components. Common sense, life experiences, instinct, intuition, emotions, feelings, and attitudes influence the process.

Effective planning derives from experiences based on similar circumstances. These situations may be personally or professionally experienced, observed, read about, or thought about. The more a lawyer directly or indirectly "experiences" cases from whatever source, the better the lawyer can analyze a case to make the best informed judgments and decisions.

The most sensible formula for successful planning varies depending on case specifics. Advocates will be responsible for many cases at the same time, and many more from the past. Most law students find juggling 4 or 5 courses each semester challenging. Imagine the task of a lawyer involved in 5, 25, or 50 cases simultaneously. Civil practice ranges from simple (small claim arbitration cases) to complex, complicated cases (multi-district litigation). Proper planning needs to be customized to the particular case. And you hoped advocacy life would have more clarity.

§ 1.7 CLIENT INTERVIEWING AND COUNSELING

There are aspects of interviewing and counseling a client with a civil dispute that deserve special emphasis in a book on litigation practice.

Detailed analysis of client interviewing and counseling extends beyond the scope of these materials and can be found elsewhere.[3] Initial advice and counseling a lawyer extends involves the need for a client and representatives to preserve all information and documents that may relate to a potential dispute. Review § 1.4. Parties may be subject to "spoliation" sanctions for the failure to do so. *See* § 11.4.

§ 1.7.1 CLIENT INTERVIEW

Goals of Initial Interview. The goals of an initial client interview may include: obtaining the client's story and information about documents and other witnesses, reassuring the client that the lawyer will represent the client's best interests, establishing a sound attorney-client relationship, explaining fees, describing necessary legal research and fact investigation, forecasting costs and timing, and suggesting future steps.

Multiple Interviews. More than one interview may be necessary to discuss what the research and investigation has revealed and what alternatives the client has. A firm decision by the client to proceed, defend, settle, or do nothing usually awaits a second or third conference.

Clear and Understandable Explanations. The dispute resolution process can be complex and chock full of procedures and tactics that make little sense to a layperson. An advocate must continually be certain that what is explained is understood by the client. For example, clients may say "no" when a lawyer asks whether they were served with a "summons and complaint" and then later in the interview reveal they did receive some papers they didn't know were legal something-or-others. It is better for the lawyer to be overly simplistic than to presume the person knows the meaning of a legal term, while being careful not to insult the individual.

More than One Version. Whatever facts the client relates will much of the time be challenged or contradicted in part by someone or something else. Disagreements over what happened may involve major and minor discrepancies that typically involve specific details and reasonable inferences. Many clients believe that their version is and must be the correct version. The task of the lawyer is not to initially agree the client is right or in the right, but to be supportive and prepare and present a realistic version of the facts and story.

§ 1.7.2 CLIENT COUNSELING

Predicting Results. An advocate must provide the client with information about the prospects of the case. The degrees of prediction may include: (1) the very likely, (2) the most likely, (3) the probably likely, (4) the possible, (5) the unlikely, and (6) the very unlikely. These gradations

[3] *See* Roger S. Haydock and Peter B. Knapp, Lawyering: Practice and Planning (4th ed. West Academic).

do not lend themselves to exact percentages, and modified predictions are appropriate in many cases. There will be some cases and situations where a definitive response may be explained.

Explaining Advantages and Disadvantages. Advice provided to a client is usually described in terms of the advantages and disadvantages of alternative remedies, approaches, and tactics. The client retains the attorney not only to win but for informed explanations of the strengths and weaknesses of alternatives.

Exploring Alternatives. Lawyers must consider alternatives to a judicial proceeding. Many disputes can or must be resolved through arbitration or administrative hearings. Prompt settlement or mediation may provide a more reasonable and economical result. Sometimes doing nothing is the best approach. *See* § 1.8 and Chapter 15.

Consequences to the Client. Dispute resolution methods and tactics have several effects on the client, including financial, psychological, business, and social consequences. Counsel needs to discuss these matters. Often this discussion and the client's reaction will resolve or dictate what alternative approach or strategy should be implemented.

§ 1.7.3 CLIENT ADVICE

Impact on a Client. A dispute may well be a frightening and unnerving experience, and clients may underestimate or exaggerate the psychological costs. The advice a lawyer provides must be given at a time when the client can accept and understand the advice.

Rendering Premature Advice. There are cases in which it is obvious that the client has no valid claims or defenses. Not many cases, however, allow a lawyer to provide complete legal advice during the initial interview. The client's legal rights need to be researched and facts need to be investigated before the attorney can meaningfully evaluate the case.

Assessing the Client as a Witness. One factor that affects case evaluation is the ability of a client to be a credible witness. This vital factor should not be overly emphasized at the early stages of a case. The opposing lawyer may not be aware of any credibility problems, and the story of a less than credible party may be buttressed by witnesses and documents.

The Very Likely End. An explanation of the entire legal process including a lengthy and expensive hearing, trial, and appeal process may provide a distorted view to the client, who may misunderstand what actually may happen. Clients need to understand the likelihood of settlement and that a very high percentage of cases end by compromise.

§ 1.7.4 CLIENT PARTICIPATION

The Extent of Client Participation. Lawyers and clients may differ on their approach to client counseling. Many attorneys will rightfully want the client to make major decisions; some lawyers will prefer to control most decisions; and still others divide control within this range of counseling approaches. Some advocates suggest that clients make strategic decisions and lawyers make tactical decisions, but this approach presumes there is a clear distinction between strategic and tactical choices. Some clients, especially business clients, want to make the decisions, while other clients prefer to be dependent and rely on the attorney's judgment.

Lawyer's Attitude Toward Client. The legal counselor needs to remain aware of any conscious or unconscious attitudes toward a client that may affect representation. For example, some attorneys in representing an experienced business person are much more deferential to that client's opinion than to the opinion of an inexperienced client. The assumption that the business person knows best, whereas the layperson probably does not, may or may not be accurate. Similarly, people who are financially better off or who occupy a position of authority may appear to be better at selecting choices. An assessment can be based on inappropriate stereotypes. Advocates must review their decisions to determine to what extent they may be based on unfounded or improper attitudes.

What Is Best for the Client. This is the ultimate goal. And so it makes sense to involve clients as much as possible in decision-making that affects them. Ultimately, only clients can really know what is best for them. Don't you, after all, think you know what's best for you in law school?

§ 1.8 NEGOTIATION AND MEDIATION

Other methods to resolve disputes instead of litigation need to be considered prior to as well as during a case. Another method may well be a more effective, efficient, and economical way to meet the client's needs and interests. Common methods to resolve disputes prior to or instead of litigation are settlement and mediation (discussed in this section) and arbitration (explained in § 1.9). Additional methods discussed in Chapter 15 may be available at later stages, especially after discovery has been completed and motions have been resolved.

§ 1.8.1 NEGOTIATED SETTLEMENTS

Parties and their attorneys can readily resolve disputes through negotiations on their own initiative and on their own terms. Threatened or actual litigation is a major motivating force behind compromises. Settlement approaches and documents are explained in §§ 15.2 and 15.5.

The initiation and timing of settlement discussions depends on the issues in the case, preferences of the client, and advice by counsel. It may well be that compromise efforts ought to be made when a cause of action arises or matures. Or, negotiations may be more effective after discovery or a significant motion order. Or, a settlement may be more suitable after pretrial and prehearing conferences or on the eve of the trial or final hearing. The vast majority of civil cases are resolved through a settlement. The best timing of that resolution needs to be continually assessed as a case progresses.

§ 1.8.2 MEDIATION

If negotiation efforts fail, parties can seek the help of a mediator. Mediation involves disputing parties voluntarily resolving their differences with the assistance of a mediator who facilitates the reaching of an agreement by the parties. Participants in a mediation include the parties, their attorneys or representatives, and the mediator. A mediator is a neutral, impartial professional who can clarify what the parties want and why, focus on their needs and interests, be a source of trust and confidence, diffuse hostilities and reduce the adverse impact of emotions, suggest reasonable and alternative ways to reach an accord, and facilitate a final resolution.

Mediation is a voluntary, non-binding, confidential process. Mediation differs from arbitration in that no person issues a decision that is involuntarily binding on the parties. Mediation may take only a couple of hours, several hours, a number of days, or longer, depending on the complexity of the issues and the positions of the parties. The costs of mediation include the mediator's hourly or fixed fees and expenses and perhaps an administrative fee.

Some federal and state court jurisdictions and forums have established rules that mandate litigating parties to try to mediate a settlement if negotiations have failed. Arbitration clauses may contain a provision requiring mediation, called a Med-Arb agreement. In these cases, parties are required to attend a mediation and negotiate in good faith but cannot be required to accept a proposed resolution. Often, this process eventually results in a mutually acceptable settlement.

Mediation can occur anytime during a dispute, including before a case is served. Early mediation may provide the parties and their counsel with an opportunity to settle, or to learn more about the strengths and weaknesses of the case and to file or defend an action. A mediator can be contacted at any stage of a case to schedule settlement discussions.

§ 1.8.3 MEDIATION CRITERIA

Whether or when a case can or should be mediated depends on multiple factors. The following list details the major considerations.

REASONS TO MEDIATE

Time Considerations. Mediation may be able to create an agreement or resolve a problem faster than other methods.

Cost Considerations. A mediated agreement may make or save the parties money. The substantial costs of further litigation, arbitration, or administrative proceedings and additional attorney fees can be avoided.

Party Preferences. Parties may prefer to engage in mediation, and lawyers can encourage parties to do so.

Mutual Gains. Parties may lose an opportunity to create a relationship or complete a transaction if no agreement is reached. Mediation may allow the parties to mutually gain from a result.

Relief Sought. A jury verdict, a judge's order, an arbitration award, or an administrative decree may not provide the relief a party wants. A mediated settlement may be the only way parties can have their needs met.

Problems Initiating or Sustaining Negotiation Discussions. Parties may have difficulty initiating negotiation discussions. Neither side may want to suggest settlement or negotiation efforts may have failed. Mediation may be the best way for the parties to start or continue this process.

Substantially Different Perspectives. There may be substantial gaps between the positions asserted by the opposing sides. These differences may require the work of a mediator to reach an accord.

Removing Barriers. Mediation can help resolve procedural, discovery, and motion disputes allowing parties to mediate a final settlement.

Relationship Between the Parties. Opposing parties may want a continuing relationship after the dispute is resolved. Mediation offers a reasonable opportunity to create or maintain an ongoing relationship.

Complex Problems. Some matters may be very difficult, time-consuming, and expensive to resolve. Mediation may provide a much more efficient and affordable way to resolve problems.

Confidentiality. The process and results of mediation are more private and less public than other efforts, and easier to keep confidential.

The Effect of Obtaining a Judgment. It may be best for a party to avoid the adverse effect of an order or award. Mediation can avoid the effect of a judgment and its precedential value for similar future cases.

REASONS NOT TO MEDIATE

The following factors suggest that mediation may not be useful:

Substantial Party Resistance. A party may be so opposed to mediation that it would be useless to mediate. Mediation requires the cooperation of a party to engage in good faith and serious discussions.

Unavailability of Significant Participants. If the party representatives who are needed to reach an agreement are unavailable or unwilling to compromise, mediation may be unworkable.

Non-Negotiable Positions. If a party asserts an intractable position regarding a critical issue and states that nothing will change that position, mediation may be questionable. However, simply stating an unyielding position does not necessarily reflect an inflexible position. A party may be "posturing" or may reluctantly change positions in mediation.

Financially Destitute Party. Mediations that involve the payment of money or distribution of assets may be unsuccessful if a party does not have sufficient financial capabilities.

Sabotaging the Mediation. There may be occasional situations when a party approaches a mediation with no intent for it to succeed. It makes little sense to attempt to mediate with a party who has this attitude.

Timely Information. Mediation scheduled before discovery is completed or a motion decided may need to be re-scheduled if one or both parties need to obtain or exchange information to evaluate a case.

§ 1.9 ARBITRATION

§ 1.9.1 ARBITRAL PROCESS

Arbitration involves the submission of a dispute to a neutral arbitrator who makes a decision following a hearing. There are three primary routes to arbitration: (1) a pre-dispute agreement, (2) a post-dispute agreement, or (3) court-mandated arbitration.

1. The parties may agree in a contract to submit future disputes to arbitration. Before any dispute arises, the parties realize that a dispute is possible and they choose to arbitrate instead of litigate potential disputes. This process has become a preferred choice by participants in many types of relationships, contracts, and transactions. The pre-dispute arbitration clause states that the parties agree to submit to final, binding arbitration all disputes arising between them. The clause will also typically name an arbitration organization to administer the proceeding (e.g., Forum Arbitration or American Arbitration Association) and a set of

rules (e.g., Forum Code of Procedure or JAMS International Rules).[4]

2. In post-dispute arbitration, the parties submit an existing dispute to arbitration that may be final or advisory. After a dispute arises, the parties decide they would prefer an arbitrator to resolve the dispute instead of a judge or juror or ALJ. The arbitration agreement may refer the case to an arbitration organization or an arbitrator and reference specific arbitration rules. Post-dispute agreements are less common than pre-dispute agreements because the disputing parties may be unable to agree on a mutually acceptable resolution process.

3. In court-mandated arbitrations, a judge orders the parties to arbitrate the dispute before trial. Some states have adopted rules that require some cases to proceed to non-binding arbitration before a case may proceed to trial.[5] The decision by an arbitrator may be accepted by the parties (making it binding), used as a basis for settlement talks, or rejected by any party with the result that the case then proceeds to a trial de novo with the advisory award having no effect.

Arbitration is an independent, private judging process. A neutral arbitrator who is an expert in the area of the dispute decides the case after a hearing. Arbitrations may proceed similarly to a bench trial with the parties appearing in person before the arbitrator at a participatory hearing with evidence presented by witnesses and exhibits. Other arbitrations may proceed by parties appearing through video transmission or over the phone, or by submitting evidence to the arbitrator in a document hearing, or through online exchanges.

Arbitration proceedings are less formal than trials. Arbitrators accept relevant and reliable evidence and generally are not required to follow strict rules of procedure. Arbitrators may or will be required to follow the law. The applicable code of procedure contains the powers of the arbitrator and procedural rules.[6]

Many arbitration cases are completed in half a day, with others not taking more than a full day. An arbitrator usually decides a case by issuing an arbitration award promptly following the hearing. A party may seek to challenge, vacate, or modify an award in court. The costs of an arbitration include the arbitrator's fees and administrative expenses incurred by the arbitration organization.

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[4] *See* www.adrforum.com and www.jamsadr.com.

[5] *See, e.g.,* Minn.Gen.R.Prac. 114.

[6] Arbitration Forum Code of Procedure Rule 20, www.adrforum.com.

Arbitration awards are legally binding and enforceable in all fifty states and in the federal courts.[7] An arbitration award is as effective as a judgment entered after a judicial trial. All state laws and the federal laws allow a party to "confirm" an arbitration award to a judgment.

§ 1.9.2 ARBITRATION CRITERIA

This section itemizes factors that help determine whether or not the parties should submit a dispute to arbitration.

REASONS TO ARBITRATE

Willingness of Parties. Parties who are open to the arbitration process obviously will be the best candidates for arbitration. And, the best time for parties to agree to arbitrate is before a dispute arises by including a pre-dispute clause in their contract, relationship, or transaction.

Efficient Procedures. Arbitration avoids the use of strict procedural and evidentiary rules, legal technicalities, and delaying tactics. The hearing can be scheduled promptly or within a reasonable amount of time.

Affordable Process. The expenses of arbitration are often much less than the costs of litigation, particularly attorney fees. In addition, indirect litigation costs incurred by the client for time spent in responding to numerous discovery requests, expended in preparing motion documents, and spent attending lengthy trials can be avoided.

Expertise of Arbitrator. An arbitrator may be selected who is an independent expert regarding the issues to be arbitrated and who is well equipped to resolve the dispute fairly and quickly. Former judges, experienced lawyers, and special masters make excellent arbitrators because they know the law and can properly conduct a hearing.

Reduction of Adversarial Atmosphere. The arbitration process helps promote the development and continuation of good relations, reducing the adversarial posture of the parties, permitting them to work together during and after the resolution of the dispute. The simplicity of the arbitration process also helps reduce animosity and tension between the parties.

Privacy. The private nature of arbitration proceedings results in a more confidential process.

Finality. The decision of an arbitrator in a binding arbitration procedure is final, subject to limited judicial review.

No Compromise. Parties should not have to compromise some disputes. They may prefer to have a neutral expert arbitrate their problems.

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[7] 9 U.S.C.A. §§ 1–15.

REASONS NOT TO ARBITRATE

Court Trial. It may be best to have a judge or jury decide the case.

Extensive Discovery. If parties need to exchange substantial discovery or engage in dispositive motions, a judicial process may be preferred.

Judicial Ruling. Cases involving constitutional issues, public affairs, and related matters may be better decided in court.

Multi-District Cases. The same disputes that involve some of the parties in different jurisdictions may be resolved through the courts.

Appellate Decision. The issues involved in a case may be of special importance requiring ultimate resolution by an appellate court.

Regulatory Control. Cases that can only be brought before an administrative agency cannot be arbitrated.

§ 1.10 ETHICS

Ethical rules govern litigation, and professional responsibility issues may arise in litigated cases. In practice, the rules adopted by many state high courts are substantially influenced by the recommendations of state bar associations and select committees that recommend rule adoptions and changes. These forces are in turn heavily influenced by the ABA Model Rules. Most of the ABA-passed recommendations (the product of years of committee work modified and ratified by the ABA House of Delegates) have been enacted by states, and their code will closely resemble the ABA model.

The ABA Model Rules of Professional Conduct deal with problems of modern legal practice—e.g., large firms, branch offices, conflicting client loyalties, and in-house counsel—and have also attempted to more closely grapple with the tension between the attorney's duties to the client (e.g., confidentiality) and to the system (e.g., preventing fraud, perjury, and injury to others). Increasingly sophisticated state bar regulators have modified the Rules, merged various provisions of the Code of Professional Responsibility, and adopted revisions to reflect state practice.

Some of the major rules based on the Model Rules of Professional Conduct that apply to advocates include the following.[8]

Provide Competent Representation

The attorney must be competent and act with reasonable diligence and promptness. Competent representation minimally comprises sufficient legal knowledge, comprehensive investigation, thorough preparation, and effective advocacy. Counsel must provide a client timely and candid advice and exercise professional, independent judgment. Model Rule 1.1.

[8] The model rules discussed throughout this textbook appear in the ABA Model Rules of Professional Conduct at www.americanbar.org under the Professional Responsibility menu.

Abide by Client's Decisions

Model Rule 1.2 provides that a lawyer must consult with a client regarding how a case is to proceed and follow the client's decision regarding the goals and objectives of a case. An advocate has an obligation to discuss with the client the strategies and tactics that are to be pursued, as discussed in Section 1.7.

Confidentiality

The information a client provides a lawyer and the advice a lawyer renders is confidential and may not be revealed unless a client consents, or a specific situation allows or requires disclosure. See ABA Model Rule 1.6. The attorney-client privilege protects such communications. Trust is the hallmark of this professional relationship.

Conflict of Interest

A lawyer may not represent a client if the representation will compromise or be compromised by the lawyer's representation of another client. See Model Rule 1.7. A client, after being fully informed by the attorney of a conflict, may agree to be represented by that attorney.

Be Truthful

It's obviously wrong for an advocate to assert any false statement of law or fact to any tribunal or fail to correct any false statement of material fact or law that the advocate previously made. See Model Rule 3.3(a)(2). Honesty and integrity are the twin virtues of a successful advocate.

Disclosing Controlling Authority

An attorney has an obligation to disclose to a judge, arbitrator, or ALJ any adverse controlling legal authority applicable in a case. It's wrong for an advocate to knowingly fail to advise the decision maker regarding controlling law that is directly contrary to the client's position which law was not disclosed by opposing counsel. See Model Rule 3.3(a)(1). An attorney must disclose controlling authority—supporting or adverse—but is not obligated to disclose legal authority that is not precedent. A lawyer may suggest the law of other jurisdictions be adopted by analogy.

Evidence

It is no surprise that an advocate shall not unlawfully destroy, delete, alter, conceal, or suppress documentary evidence or other material relevant to a case. Neither may an advocate thwart, impede, or obstruct access to evidence sought by another party. See Model Rule 3.4(a).

Expediting a Case

An attorney must make reasonable efforts to expedite the resolution of a case, consistent with the legitimate interests of the client, and not delay proceedings for improper reasons. See Model Rule 3.4. It is ethically

inappropriate for an attorney to engage in expensive and extensive litigation practices if these strategies do not validly promote a client's case. It is also unethical to employ tactics for the primary purpose of wasting resources or unreasonably extending the resolution of the case.

Complying with Rulings

A lawyer must not knowingly refuse to obey an order or ruling of a judge, arbitrator, or ALJ unless there is no obligation to do so. See Model Rule 3.4(c). The rulings and orders of a tribunal must be complied with by counsel, except where no legal obligation exists or in extraordinary circumstances in which an attorney is willing to accept adverse consequences for disobedience.

Influencing an Official

A lawyer is prohibited from influencing a judge, juror, arbitrator, or administrative law judge regarding a case and may not communicate ex parte with such persons. Model Rule 3.4(c). An advocate may obtain information from clerks and administrators about general procedural matters but cannot contact such individuals in an attempt to influence them.

Good Faith

An advocate must have a good faith argument for all positions asserted on behalf of a client. A novel case may not be brought or defended or an issue advanced or controverted unless there is a good faith support for the extension, modification, or reversal of existing law. See Model Rule 3.1. Federal Rule of Civil Procedure 11 and related state rules contain a similar standard.

These rules prohibit an attorney from presenting a claim or defense unless to the best of that attorney's knowledge, information, and belief, formed after reasonable investigation and research, it is well grounded in fact and is warranted by existing law or a good faith argument for the development of new law. This standard represents an objective standard of conduct as distinguished from a subjective belief. An attorney who personally believes that a claim or defense is valid does not meet the standard. The attorney must have an objective basis in law and fact to support a claim or defense. It is not sufficient for an attorney to have a "pure heart" in asserting a claim or defense. The rules require an attorney have a "good legal head" and sufficient support for a claim or defense.

The discussion of these and other ethical issues in this book does not supplant the course in professional responsibility, nor does it cover all possible ethical considerations involved in litigation practice. And you thought we'd have all the answers for you.

§ 1.11 CHANGES AND REFORMS

What significant changes may occur in the future regarding pretrial and prehearing practice? What evolutionary or novel developments may transform advocacy? Clients will continue to expect lawyers to represent them economically, efficiently, and effectively. This section summarizes what advocacy experts and commentators predict for the future.

Dispute Forecasting

Clients will expect advocates to be better at predicting how disputes may arise. Other professions, including business and financing, have had success with developing useful predictive models. Parties may prefer to retain lawyers to work on preventative measures in addition to resolving legal problems.

Data Analysis

Attorneys will need to become more adept at collecting and interpreting data, as described previously. Clients may have access to a lot of information that would be helpful to forecast what may go wrong with services, products, transactions, and relationships and when problems could need or require legal responses. Algorithms and related software systems can identify and search data sources for relevant information. This computer-based data can be analyzed by advocates to reduce the chances of disputes occurring.

Law Practice Analytics

Data can also improve the practice of law. This information can help lawyers develop better approaches to case forecasting, resource management, and informed billing. Quantitative analysis can make lawyering tasks more productive.

Advocacy Automation

Lawyering skills that involve routine and repetitive tasks can be automated and augmented with robotic and artificial intelligence systems that mimic the work of lawyers. Currently, computerized software systems can conduct useful legal research, extract relevant discoverable information, and identify sources of potential evidence. Advanced systems can do much more. Artificial intelligence methods are transforming many societal services and will also transform the delivery of legal services. A variation of the "Legal Watson" computer will both replace and enhance some of the work of advocates.

Lawbot Advancements

In the legal domain, "lawbots" are being developed to permit natural language interactions via text, voice, or video between a lawyer and a computer learned in the law to perform a variety of legal tasks. These

include: gathering facts, conducting research, directing investigations, managing interviews, composing documents, and performing pretrial and prehearing work. The Internet reveals current chatbot efforts relating to law practice. These potentially may be available and effective, depending on the case and the issues.

Current Developments

Online and video communication methods will change the way advocacy practice operates. Web based applications and devices will transform the way advocates exchange information, submit documents, and represent their clients. Innovative communication systems may further replace travel, face to face meetings, and in person hearings. It will become more efficient and economical to conduct distant procedures with parties, lawyers, and decision makers in different and remote locations. Current social, health, and financial circumstances will affect these developments. Some depositions and hearings are effectively being conducted via remote communications, and this approach may continue to provide accessible and affordable procedures with suitable outcomes.

Pretrial and Prehearing Reforms

Changes in the law governing judicial, arbitral, and administrative procedures occur regularly. These revisions affect federal and state rules of procedure, arbitration codes, administrative regulations, local rules, standing orders, statutory provisions, and applicable case law. These modifications clarify, modernize, and improve existing practice.

An advocate needs to remain informed about these ongoing changes. It is better to know what the applicable law is instead of having opposing counsel remind you or, even worse, having the decision maker chide you about how your professional life is passing you by. Change, Heraclitus said, endures. It will go on throughout your life after law school.

CASE FILES AND PROBLEM ASSIGNMENTS

This book presents a variety of cases, assignments, and exercises to help you develop your litigation skills. Problems appear at the end of this and the following chapters that reflect the broad range of civil practice. Many problems are based on the activities of Hot Dog Enterprises (HDE) and the lives of its top management. The disputes arise from the business operated by HDE, from the personal lives of its CEO, Pat LaBelle, and its Chairperson of the Board, Casey Pozdak, and from events involving companies and individuals who have contact with HDE and its personnel.

The problems presented throughout the text involve both continuing disputes and new conflicts. Case files appear at the end of this book in Appendix B and provide fact patterns for the chapter problems. The assignments provide a broad range of civil disputes and conflicts.

This Eleventh Edition contains two new contemporary case files: *FJE Enterprises v. Arbor Vineyards* involves challenging disputes between a boutique hotel and a landscape company, whose contracts were based on emails, texts, and emojis and whose work was disrupted by a viral contagion. *Tymons v. Allgoods and Razzle* entails intriguing conflicts involving a witness protection family with claims against a hacker, a business, a search engine company, and a lawyer, all who may have breached and damaged their privacy and security. These case files join eleven previous conflict scenarios involving a variety of contract, tort, discrimination, civil rights, real estate, fraud, business, consumer, employment, product liability, intellectual property, insurance coverage, and related legal issues.

One major case appearing in most chapters involves a complex dispute between HDE and Tri-Chem, a corporation that manufactured and supplied a bonding additive known as Bond-Mor to the mortar used in the construction of some of HDE's restaurant buildings. Events based on this case file allow you to track the development of a major conflict through the multi-district litigation process.

Each chapter also includes additional problems, some continuing and some new. The novel disputes raise issues germane to the subject matter of the chapter in which they appear. Further, additional problems appear at FundamentalsPretrialLitigation.com. See Appendix B, E-Discovery Files. This website contains searchable electronic document discovery assignments, available on an accessible server. No other law school text offers this unique educational opportunity.

Your professor will select and assign some of these problems and case files for your work as an advocate. You will act as the lawyer representing the various parties in your assigned disputes. You will engage in diverse lawyering skills ranging from analysis to preparation to performance. We integrate these opportunities into this text to provide you with a richer educational experience and to better prepare you for the practice of law.

The conflicts and cases often take place in the mythical jurisdiction of the State of Summit, County of West, City of Mitchell. Other states include Beachland, Coastland, Peakland, Grassland, Gothamland, Heartland, Forestland, and Gulfland. All these state jurisdictions have adopted civil procedure rules that are identical with the Federal Rules of Civil Procedure and the Federal Rules of Evidence, have enacted state statutes that resemble corresponding federal statutes, and have issued state court judicial opinions that reflect prevailing federal court decisions. Further explanations regarding the problems appear in the Preface.

The following paragraphs describe Hot Dog Enterprises and facts about Tri-Chem and Bond-Mor. Further information including memoranda, correspondence, emails, and promotional materials is available in subsequent chapters and in Case A of Appendix B. Your instructor may provide you with revised or supplementary case materials.

HDE v. TRI-CHEM

HOT DOG ENTERPRISES

Hot Dog Enterprises is a corporation that operates hot dog dining establishments throughout the country. HDE is incorporated in Delaware, has its main corporate headquarters in Illinois, a research and development center in Minnesota (R&D), and a hot dog manufacturing plant in Texas. It also owns and manages hot dog stands and restaurants or operates franchises in every state.

HDE had its beginnings in a hot dog stand in Chicago, Illinois. Casey Pozdak and Pat LaBelle started a small operation on the Southwest side of Chicago over 28 years ago. Their business grew over the years to its current status. HDE owns and operates more than 100 hot dog dining establishments consisting of hot dog stands, fast food drive-ins, and sit-down restaurants.

Approximately 50 franchisees operate another 50 restaurants. HDE owns about 25 buildings and parcels of property. In 15 of these locations it operates its own restaurants and in the other 10 it rents space to its franchisees. HDE markets itself nationally, regionally, and locally through television, cable, radio, magazine, newspaper, internet, websites, social media, smart phone apps, and other advertisements. HDE sponsors marathons and car and motorcycle races and donates generously to various charitable organizations and educational institutions.

Pat LaBelle is the Chief Executive Officer of HDE, and Casey Pozdak is Chairperson of the Board. Approximately 120 employees work in its Illinois principal place of business, which includes offices for its management, accounting, marketing, sales, and legal staff. HDE employs about 200 people at its Texas manufacturing plant that produces its famous hot dogs based on a trade secret recipe and 15 staff in its Minnesota R & D Center. More than 2400 employees work at HDE dining establishments throughout the country. The managers of these restaurants and the managers of the franchise restaurants attend "hot dog school" at HDE corporate headquarters to learn the HDE way to serve and sell hot dogs.

TRI-CHEM CORPORATION

Tri-Chem Corporation is a company that develops, manufactures, distributes, and sells chemical additives and products for consumer and commercial use. Tri-Chem is incorporated in New York, has its corporate headquarters in California, and has research facilities, manufacturing plants, distribution centers, and sales offices in Massachusetts, Georgia, Arkansas, Michigan, Colorado, Arizona, Montana, and Oregon. Tri-Chem sells its products in every state and is a parent corporation to a number of wholly owned subsidiaries involved in related products and also unrelated businesses including the media and communications field.

Tri-Chem developed and manufactured and sells throughout the country a mortar additive for use in brick masonry, cement, cinder blocks, and related

building materials, known under the tradename Bond-Mor. Tri-Chem also provides technical advice and services to contractors, engineers, and architects who use Bond-Mor in the construction of buildings incorporating brick masonry, cement, cinder blocks, and other related materials. Tri-Chem Corporation sold Bond-Mor for use in the original construction of HDE's restaurant buildings in Kansas and Ohio.

CHAPTER QUESTIONS AND PROBLEMS

1. In addition to those factors described in Section 1.1, what other factors, objective or subjective, influence litigation decisions?

2. How can an attorney maintain high standards of excellence in practice when faced with the difficulties discussed in Section 1.1.3?

3. What additional suggestions do you have regarding how a lawyer maintains a proper role as an advocate in addition to the comments made in Section 1.1.4?

4. What aspects of the adversary system discussed in Section 1.1.5 need to be reformed to make an advocate more effective? More efficient?

5. How may a client influence the progress of a case in addition to those factors described in Section 1.1.6?

6. Hot Dog Enterprises decides to hire a law firm to handle its litigation including its plaintiff and defense work, and is especially interested in how you would handle discovery and motion matters. HDE interviews you, the managing partner of a medium sized firm in your community. What presentation would you make to HDE to obtain its legal business?

(a) HDE asks what kind of an advocate you are. How would you respond?

(b) HDE asks what interests and needs you think HDE ought to preserve and protect in litigation. What would you say in response?

(c) HDE asks what types of disputes you predict may involve HDE as a party in the future. What dispute types do you predict?

(d) HDE asks you to suggest ways the disputes can be avoided. Select two types of disputes and suggest ways they could best be avoided or reduced.

(e) HDE asks what dispute resolution forums or methods can be used to resolve disputes. Select two types of disputes and suggest ways they can be best resolved.

7. You apply for an attorney's position in the litigation department of Tri-Chem Corporation. The General Counsel (GC) of Tri-Chem interviews you as a finalist for the position. What presentation would you make to the General Counsel to obtain the job?

(a) General Counsel asks what kind of advocate you are. How would you respond?

(b) GC asks what interests and needs you should protect in representing Tri-Chem. What would you say in response?

(c) GC asks what types of disputes you predict may involve Tri-Chem as a party in the future. What types of disputes do you predict?

(d) GC asks you to suggest ways disputes can be avoided. Select two dispute types and suggest ways they could best be avoided or reduced.

(e) GC asks what dispute resolution forums or methods can be used to resolve disputes. Select two types of disputes and suggest ways they can be best resolved.

8. You have always wanted to work for yourself and you have decided to start your own litigation law firm with you as the only partner.

(a) Compose a list of the various business components needed to operate your law firm (e.g., accounting services).

(b) Search the Internet for information on starting your own law firm and compose a list of what you need to do to start your practice.

(c) Outline the contents to be included in your law firm's website.

(d) You decide to hire associate lawyers to work for and with you. What characteristics, abilities, and experience do you want your associates to have?

(e) Consider what types of disputes your law firm could become involved in as a party in the future (e.g., employee disputes). What can you do to prevent disputes or reduce the chance they would arise?

(f) What can you do now in anticipation of potential disputes? What dispute resolution alternatives would you prefer to plan for now or use in the future?

9. Congratulations! Hot Dog Enterprises retains your law firm. You learn that HDE is violating a number of federal and state environmental laws at its manufacturing plant and is also discharging employees at its headquarters in a way that may violate employment laws. What do you do?

10. You decide private practice is not for you. Tri-Chem thinks the world of you, and you accept its offer to be Director of Litigation. You learn that Tri-Chem has a policy prohibiting its attorneys from doing pro bono work. You want to do pro bono work. What do you do?

11. What reaction do you have to the "games" and problems discussed in Section 1.1.7? Why do lawyers play these and other games?

12. Section 1.2 outlines a planning process for litigation. What other components of the planning process can you add?

13. Creative problem solving discussed in Section 1.3 can be readily recognized after the fact. What creative solutions do you know or have you heard that have resolved legal or analogous problems?

14. Section 1.4 lists categories of information available in a case. What other categories can you add?

15. Section 1.5 explains some factors that influence the plausibility of a story, the credibility of a witness, and the authenticity of a document. What other factors can you add?

16. Hot Dog Enterprises claims that the Bond-Mor mortar additive manufactured and sold by Tri-Chem has caused damage to four of its restaurant buildings and that it will cost approximately $1,000,000 to repair the damage. Tri-Chem denies liability and claims that poor design and maintenance caused the problems.

(a) You represent HDE. Would you suggest that instead of litigation the dispute be submitted to mediation? To binding arbitration? To settlement negotiations between the parties? Why? Is any method likely to be more effective than another? Why?

(b) You represent Tri-Chem. Would you suggest that instead of litigation the dispute be submitted to mediation? To binding arbitration? To settlement negotiations between the parties? Why? Is any method likely to be more effective than another? Why?

17. Hot Dog Enterprises fires its sales manager for poor performance. The manager, who is a 55-year-old woman, claims the firing was discriminatory on the basis of gender and age and was also a breach of contract.

(a) You represent HDE. Would you suggest that instead of litigation the dispute be submitted to mediation? To binding arbitration? To settlement negotiations between the parties? Why? Is any method likely to be more effective than another? Why?

(b) You represent the sales manager. Would you suggest that instead of litigation the dispute be submitted to mediation? To binding arbitration? To settlement negotiations between the parties? Why? Is any method likely to be more effective than another? Why?

18. After reviewing the explanations regarding professional conduct and ethical rules in § 1.10, what met your expectations? What did not?

19. What is your view regarding the predictions described in § 1.11? What other or divergent changes do you forecast? What reforms would you recommend?

20. Compare the similarities and differences between the rules and practice of federal court with the rules and practice of a state chosen by you or your instructor regarding:

(a) Pleadings and related rules

(b) Discovery process and procedures

(c) Electronic discovery and electronically stored information

(d) Motion rules and procedures

(e) Alternative Dispute Resolution

(f) Other Pretrial Litigation Matters

21. Conduct research over the Internet and locate, review, and summarize:

(a) Readily accessible sources that explain litigation practice.

(b) Blogs that contain commentary about litigation practice.

22. Conduct research on the Internet and locate litigation law firm websites. Select three firm websites: a large firm, a medium size firm, and a small firm, or one or more firms as instructed by your professor.

(a) Summarize the legal work each does and the reasons listed why clients should retain them.

(b) If you were a client in need of their services, would you be interested in retaining them to represent you? Why or why not?

(c) If you were the managing partner at the firm, what changes would you make to the website?

23. Conduct research over the Internet. Search for lawsuits, arbitrations, or administrative law cases in an area of practice that interests you. Select a case.

(a) If it has been recently filed, summarize it, suggest alternative ways it could be resolved, and predict how you think it will be resolved.

(b) If it has been resolved by a settlement, review the published terms and decide whether the settlement seems fair and reasonable and why or why not.

(c) It is has been decided, explain the result and state whether you believe it to be a fair and reasonable result and why or why not.