INTRODUCTION TO LEGAL STUDIES AND LEGAL ETHICS

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Introduction to Legal Studies and Legal Ethics

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Detailed Licensing

Licensing

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CHAPTER OVERVIEW

1: United States Legal System

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1.1: Overview of the United States Court System

Introduction

Understanding the court system in the United States is no easy task. There are multiple layers of jurisdiction, authority, and responsibility that span state, county, municipal and federal boundaries and employ thousands of individuals in roles such as judges, commissioners, clerks, bailiffs, and advocates. Adding to the confusion are the many state and federal regulations, case types, and court processes that make it difficult to understand the role of the courts or to describe their place in the overall administration of justice.

This chapter was prepared to help you better understand the intricacies of the Judicial Branch in local, state, and federal courts by providing a high-level overview of the court system, its processes, responsibilities, case flow, and person roles. It provides an overview of federal and state court systems and the different jurisdictions within these systems, and demonstrates why integration with other stakeholders is vital to the efficacy and efficiency of all courts and the successful assimilation of the judicial branch in the integrated justice process today.

Overview

Two fundamental concepts in the *United States Constitution* affect the organizational structure of the courts in the United States: separation of powers and federalism. First, the federal court system balances executive and legislative power with the judicial branch, judging the constitutionality of legislation and executive rules, policies, and procedures. The second concept, federalism, resulted in two independent court systems: the federal court system and the state court system. Although independent, the federal courts provide checks on the decisions and case law in the various state courts, with the U.S. Supreme Court always retaining the last resort right to review decisions from the individual state courts and/or state Supreme Courts.

Federal and State Court Systems

Just as there are multiple levels of criminal justice agencies, there are also multiple levels of courts. These levels are commonly distinguished by characteristics such as the geographical jurisdiction (i.e., local, county, state, and federal) and the case type jurisdiction (i.e., limited, general/trial, appellate, and special). There is also a distinction between trial and appellate courts. The following paragraphs, based on the United States Courts website, compare the case types heard by courts in the federal and state court systems.

Types of Cases Heard in the Federal Court System

- Cases that deal with the constitutionality of a law under the United States Constitution
- Cases involving the laws and treaties of the U.S., ambassadors, and public ministers
- Disputes between individuals or entities in two or more states
- Disputes between two or more states
- Admiralty law
- Bankruptcy.

Types of Cases Heard in the State Court System

- Most criminal cases
- Most small claims/minor civil cases (landlord tenant, debt, municipal matters)
- Probate (involving wills and estates)
- Most contract cases, tort cases (personal injuries)
- Family law (marriages, divorces, adoptions, etc.)
- Juvenile law
- Mental health cases
- Traffic cases
- State courts are the final arbiters of state laws and constitutions unless there is contention that the state statute or constitution conflicts with the United States Constitution. Those cases can make their way into the federal court system and may, ultimately, be appealed to the U.S. Supreme Court. The Supreme Court may choose to hear or not to hear such cases.

Federal Court System

The **federal court system** hears only about 5% of all court cases. All federal cases are first heard in a U.S. Federal District Court and are potentially moved to higher courts through the appeals process. The 94 U.S. judicial districts are organized into 12 regional circuits, each of which has a court of appeals. A court of appeals hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies. In addition, the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims.

District Courts

There are 94 federal court districts, with at least one in each state. In addition to the **district courts**, there are also specialized courts, including the U.S. Court of International Trade, a U.S. Court of Federal Claims, and a bankruptcy court, which have multiple locations. If any party loses in a district court or one of these specialized courts, then they can appeal the case to the appropriate circuit court.

Circuit Courts

The United States courts of appeals (or circuit courts) are the intermediate appellate courts of the United States's federal court system. A court of appeals decides appeals from the district courts within its federal judicial circuit and, in some instances, from other designated federal courts and administrative agencies.

The United States Court of Appeals includes 12 **Circuit Courts** located throughout the country in the 12 geographic federal circuit regions. The 11 “numbered” circuits and the D.C. Circuit are geographically defined. For example, the Fourth Circuit Court of Appeal handles appeals from US District courts located in Virginia, West Virginia, and Maryland, North and South, while the 12th Circuit handles appeals from the District of Columbia. These Courts are known as the First through 12th Circuits Courts of Appeal.

There is also a specialized Court of Appeals for the Federal Circuit, which has nationwide jurisdiction to hear appeals from any District Court for certain specialized cases such as patent appeals, as well as appeals from special jurisdiction courts such as the Court of International Trade and the Court of Federal Claims.

Supreme Court

The **United States Supreme Court** has nine justices and is the final court of review. In addition to some mandatory appeals, the justices may choose which appealed cases from the circuit courts and State Supreme Courts to review.

Due to the small number of criminal justice-related cases in the federal court system, and because the federal court system is not a common participant in IJIS Institute and/or Institute Member company efforts, the balance of this paper will focus on state court systems.

State Court System

The organizational structure of a state court is determined by individual state constitutions – none are exactly the same – but the following levels of courts exist in the majority of states.

Courts of Limited Jurisdiction

Courts of limited jurisdiction generally comprise the first tier of the judicial systems in the states. The reference to limited jurisdiction indicates that state legislatures limited the scope of these courts when they were created. These courts usually hear “less serious” or minor cases, including, but not limited to: small claims (e.g. landlord/tenant actions, debt matters, non-injury accident claims, etc.) where, typically, self-represented litigants bring claims of a “limited,” up to a pre-set, monetary value; traffic cases; city ordinance violations; and, specialized cases, such as juvenile or family matters.

Courts of limited jurisdiction also tend to be where the first appearance, charging, and bail setting for criminal cases happen in an arrest or criminal matter.

Courts of General Jurisdiction

Courts of general jurisdiction represent the second tier of the judicial systems in the states and are considered the “trial courts” in the state systems. They serve a similar function to district courts in the federal system. Although caseloads vary from state to state,

general jurisdiction courts typically handle felony cases, both criminal and civil; higher-level misdemeanor cases; special case types, such as probate, mental health, and juvenile cases; family and domestic violence; and appeals from limited jurisdiction courts. Courts of general jurisdiction are where most jury trials occur. It should also be noted that some states combine the jurisdiction of the limited and general jurisdiction courts into a single general jurisdiction court with different divisions for minor versus major matters or specialized by case type.

Appellate Courts

Appellate courts are commonly considered review courts only and not courts where citizens initiate cases. All states have an appellate level of court; some have a multi-tiered level. Most appellate matters are cases where one of the parties is not happy with the decision from the trial court and petitions the appeals court in their state to get a review of the matter. Some states have "Intermediate Appellate Courts" (see below), which handle specific appeals to which an appeal is almost guaranteed. Appeals to the "Court of Last Resort" in those states are generally discretionary. There are states, however, which do not have an intermediate appellate court and, in this case, all appeals generally go directly to the single Appellate level "Court of Last Resort."

State court systems generally follow this structure of limited/high volume courts – trial/general jurisdiction courts – appellate/review courts; however, there are three common variations that an IJIS Institute staff or Member company may encounter and that are important to integrated justice: specialty courts, juvenile courts, and intermediate appellate courts, which have many anomalies at the state level.

Specialty Courts

There are many types of limited or general jurisdiction courts – **specialty courts** – that have been established to deal with a specific type of case or a specific problem. These courts are established as stand-alone separate courts, a separate division of a larger court, or just a separate docket (calendar) of a larger court. Specialty courts may be part of the Judicial Branch or the Executive Branch, depending on the state constitution. While specialty courts may occur at the limited jurisdiction level, they are more common at the trial level. Some examples include specific courts assigned to deal with issues such as complex litigation (business courts), tax issues (tax courts), environmental issues (water or environmental courts), or drug offenses (drug courts), and, most recently, gun courts to fast-track weapons-specific offenses.

Juvenile Courts

Juvenile courts are special courts or departments of a trial court that deals with underage defendants charged with delinquency – committing offenses that would be criminal matters if committed by an adult, status offenses (violations that occur because of their age – underage drinking, truancy, runaways) – or minors who are involved in abuse and neglect matters. The normal age of these defendants is under 18, with some states allowing juveniles, usually over age ~14, to also be charged as adults. The juvenile court does not have jurisdiction in these cases in which minors are charged as adults. The procedure in juvenile court is not adversarial (although the minor is entitled to legal representation by a lawyer) and is seen more as a mediation and consultative environment. There is often the involvement of advocates, social services, and probation officers in the process to achieve positive results and to save the minor from involvement in further crimes; however, serious crimes and repeated offenses can result in sentencing juvenile offenders to a juvenile correctional or detention facility, and later transfer to state prison upon reaching adulthood with limited maximum sentences. Where abuse, neglect, and family support (care and safety of the child) are at issue, the juvenile court may work with foster care agencies, and the child may be treated as a ward of the court.

Intermediate Appellate Courts

Many, but not all, states have **intermediate appellate courts**, which are located between the trial courts of general jurisdiction and the highest court in the state. Any party, except in a case where a defendant in a criminal trial has been found not guilty, who is not satisfied with the judgment of a state trial court may appeal the matter to an appropriate intermediate appellate court. Such appeals are usually a matter of right (meaning the court must hear them); however, these courts address only alleged procedural mistakes and errors of law made by the trial court. They do not generally review the judgment of the lower court (guilty/innocent) and do not review the facts of the case, which have been established during the trial, nor do they accept additional evidence. Instead, these courts look to see that the process and procedures (e.g,. jury instructions were correctly provided; evidence was properly admitted; parties were given their rights in court; discovery during the trial process, etc.). These courts usually sit in panels of two or three

judges. Moreover, appellate decisions are normally to uphold the verdict/decision of the lower court, to reverse the decision of the lower court, or to return the case for re-hearing.

While all state court systems are different, Figure 1.1.1 graphically depicts the responsibilities and relationships discussed previously between the common levels in a state court system.

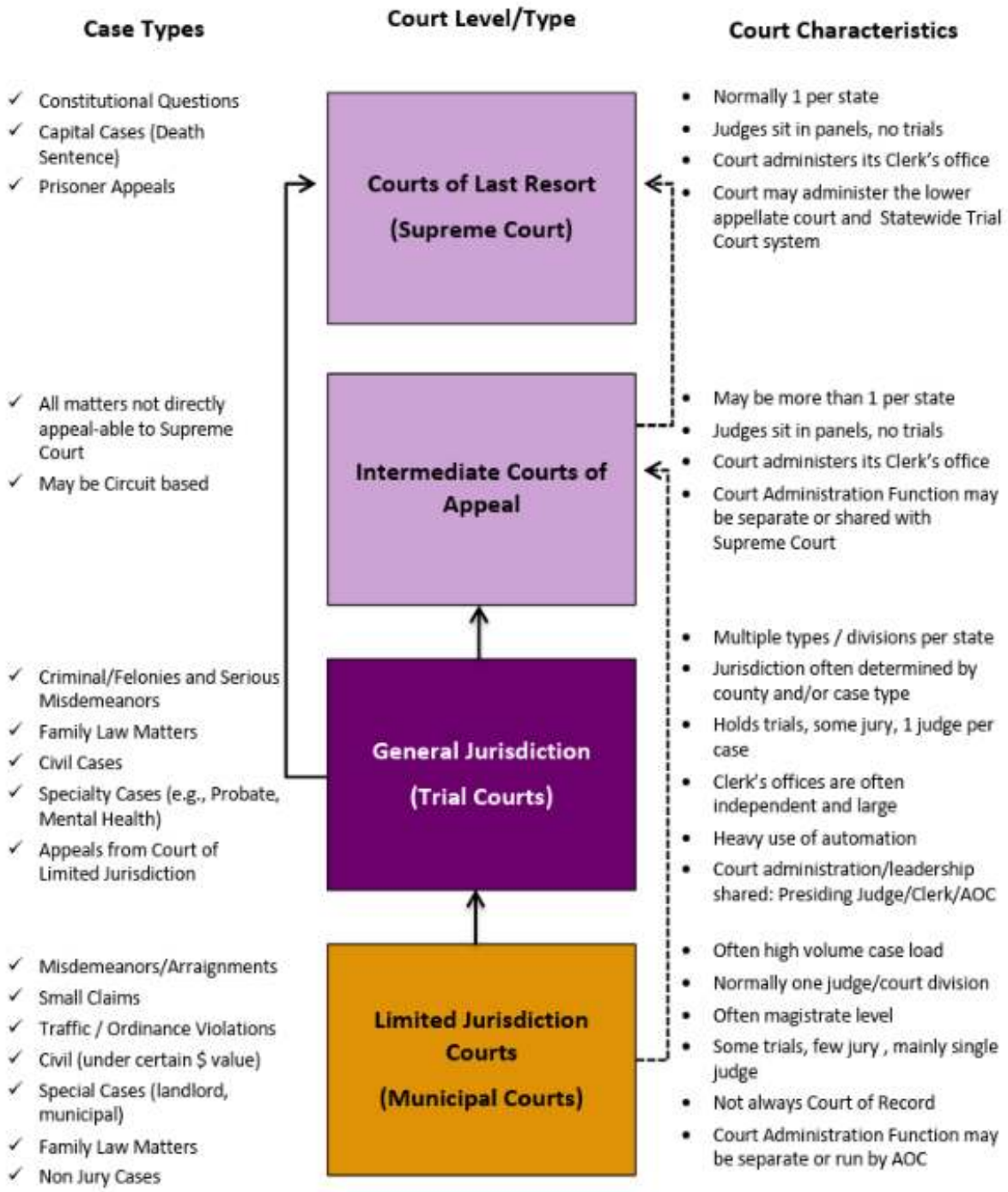

Figure 1.1.1: Court Case Flow

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1.2: The Court System in the State of Wisconsin

Federal Courts

There are two federal districts in the State of Wisconsin, the Eastern District of Wisconsin and the Western District of Wisconsin. The following maps show how the State is divided into these two districts:

Eastern District of Wisconsin

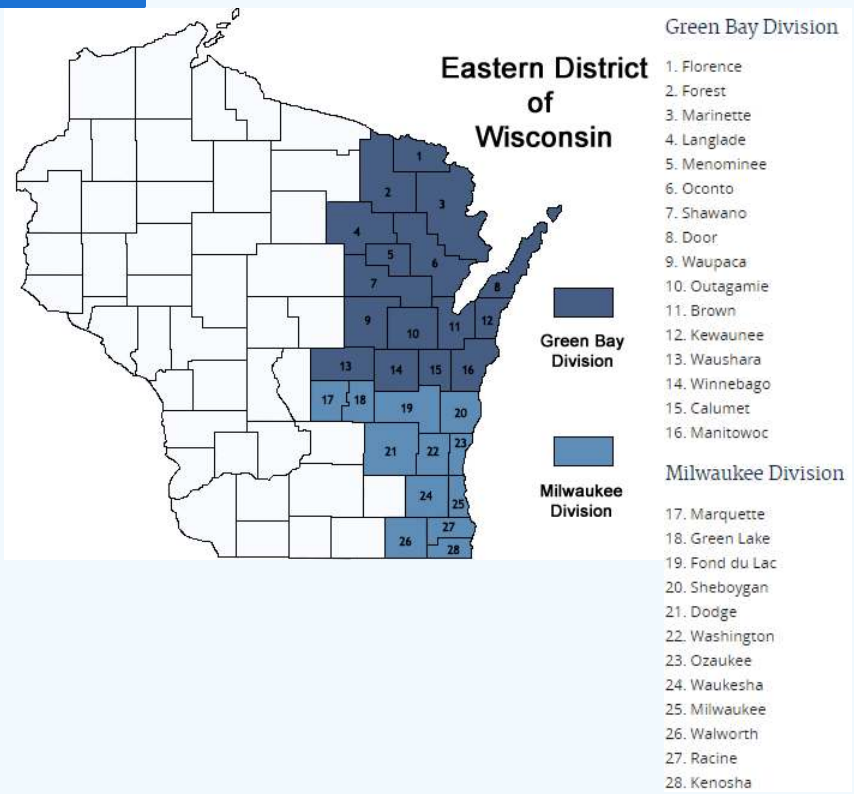

Figure 1.2.1: Counties served by the Eastern District of Wisconsin. US District Court

Western District of Wisconsin

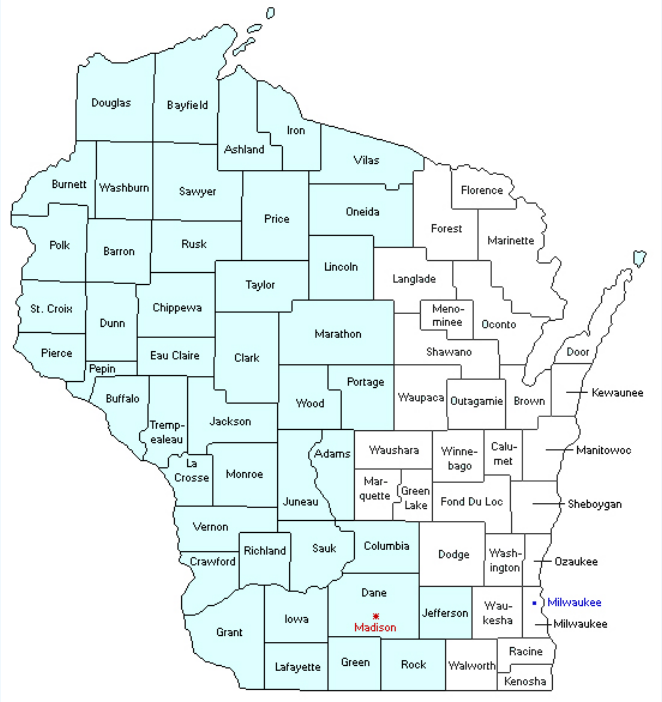

Figure 1.2.2: Counties served by the Western District of Wisconsin. US District Court

The Western District of Wisconsin comprises the following Wisconsin counties:

Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Douglas, Dunn, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, Marathon, Monroe, Oneida, Pepin, Pierce, Polk, Portage, Price, Richland, Rock, Rusk, Sauk, St. Croix, Sawyer, Taylor, Trempealeau, Vernon, Vilas, Washburn, and Wood.

Wisconsin State Government and Courts

Each State in the US has its own government and court structure. Although there are many similarities between and among States, there are many differences as well. We will focus on the State of Wisconsin's government and court structure in this course specifically and in the Legal Studies/Paralegal program generally. Let's start with the three branches of the Wisconsin government.

Legislative Branch

Wisconsin's legislature makes the laws of the state. The legislature also controls the state's purse strings: no money can be paid out of the treasury unless the legislature enacts a law that specifically appropriates it. At the same time, the legislature is required to raise revenues sufficient to pay for the state's expenditures, and it is required to audit the state's accounts. The legislature can remove any elective office holder in state government, including the governor, from office for wrongdoing. It can also remove a judge or supreme court justice from office for any reason that, in its judgment, warrants it. The legislature can override the governor's veto of legislation. Finally, the legislature has charge of the two avenues by which the Wisconsin Constitution can be amended: the legislature can propose amendments for the people to vote on, and it can set in motion the process for calling a constitutional convention.

The legislature has two houses: the senate and the assembly. The senate is composed of 33 senators, each elected for a four-year term from a different senate district. The assembly is composed of 99 representatives, each elected for a two-year term from a different assembly district. Each senate district comprises the combined territory of three assembly districts. Elections are held in November of each even-numbered year. The terms of 17 senate seats expire in alternate even-numbered years from the terms of the other 16. If a midterm vacancy occurs in the office of a senator or representative, it is filled through a special election called by the governor.

A new legislature is sworn in to office in January of each odd-numbered year, and it meets in continuous session for the full biennium until its successor is convened (Wisconsin Blue Book: The Legislature).

Executive Branch

The governor is the state's chief executive. Voters elect the governor and lieutenant governor on a joint ballot to a four-year term. Most of the individuals, commissions, and boards that head the major executive branch agencies are appointed by, and serve at the pleasure of, the governor, although many of these appointments require senate confirmation. The governor reviews all bills passed by the legislature and can veto an entire bill or veto parts of a bill containing an appropriation. A two-thirds vote of the members present in each house of the legislature is required to override the governor's veto. In addition, the governor can call the legislature into a special session to deal with specific legislation.

If a vacancy occurs in the state senate or assembly, state law directs the governor to call a special election. Vacancies in elective county offices and judicial positions can be filled by gubernatorial appointment for the unexpired terms or until a successor is elected. The governor may dismiss sheriffs, district attorneys, coroners, and registers of deeds for cause.

Finally, the governor serves as commander in chief of the Wisconsin National Guard when it is called into state service during emergencies, such as natural disasters and civil disturbances (Wisconsin Blue Book: The Executive).

Judicial Branch

The Wisconsin Supreme Court is the highest court in Wisconsin's court system. It is the final authority on matters pertaining to the Wisconsin Constitution and the highest tribunal for all actions originating in the state court system, except those involving federal constitutional issues appealable to the U.S. Supreme Court.

In addition, it has regulatory and administrative authority over all courts and the practice of law in the state. In this capacity, it establishes procedural rules and codes of conduct for the courts and for the practice of law, and it regulates and disciplines attorneys, judges, and justices.

The supreme court consists of seven justices elected to 10-year terms. They are chosen in statewide elections on the nonpartisan April ballot and take office on the following August 1. The Wisconsin Constitution provides that only one justice can be elected in any single year. In the event of a vacancy, the governor may appoint a person to serve until an election can be held to fill the seat.

The justices elect one of themselves to be the chief justice for a term of two years. The chief justice serves as the administrative head of the court system. Any four justices constitute a quorum for conducting court business.

The court decides which cases it will hear. The supreme court exercises its appellate jurisdiction to review a decision of a lower court if three or more justices approve a petition for review, if the court decides on its own motion to review a matter that has been appealed to the Wisconsin Court of Appeals, or if the court accepts a petition for bypass or a certification from the court of appeals. The majority of cases advance from the circuit court to the court of appeals before reaching the supreme court, but the supreme court can bypass the court of appeals, either on its own motion or at the request of the parties; in addition, the court of appeals may certify a case to the supreme court, asking the high court to take the case directly from the circuit court. The court accepts cases on bypass or on certification if four or more justices approve. Further, although rarely granted, a person may file a petition requesting the supreme court to exercise its superintending authority over actions and proceedings in the circuit courts and court of appeals. The supreme court may also exercise original jurisdiction as the first court to hear a case if four or more justices approve a petition requesting it to do so.

The supreme court does not take testimony. Instead, it decides cases on the basis of written briefs and oral arguments. The court is required by statute to deliver its decisions in writing, and it may publish them as it deems appropriate (Wisconsin Blue Book: The Judiciary).

Wisconsin Court of Appeals

The Wisconsin Court of Appeals consists of 16 judges serving in four districts. The Wisconsin Supreme Court appoints one of these judges to be the chief judge and to serve as the administrative head of the court of appeals for a three-year term. The chief judge, in turn, appoints a presiding judge for each of the districts. The clerk of the supreme court serves as the clerk for the court of appeals. Court of appeals judges are elected to six-year terms in the nonpartisan April election and begin their terms of office on the following August 1. They must reside in the district from which they are elected. Only one court of appeals judge may be elected in

a district in any one year. In the event of a vacancy, the governor may appoint a person to serve until an election can be held to fill the seat.

The court of appeals has appellate jurisdiction, as well as original jurisdiction to issue prerogative writs. The primary function of the court of appeals is to correct errors that occur at the circuit court level. The court also has supervisory authority over all actions and proceedings except those of the supreme court. The final judgments and orders of a circuit court may be appealed to the court of appeals as a matter of right. Other judgments or orders may be appealed upon leave of the appellate court.

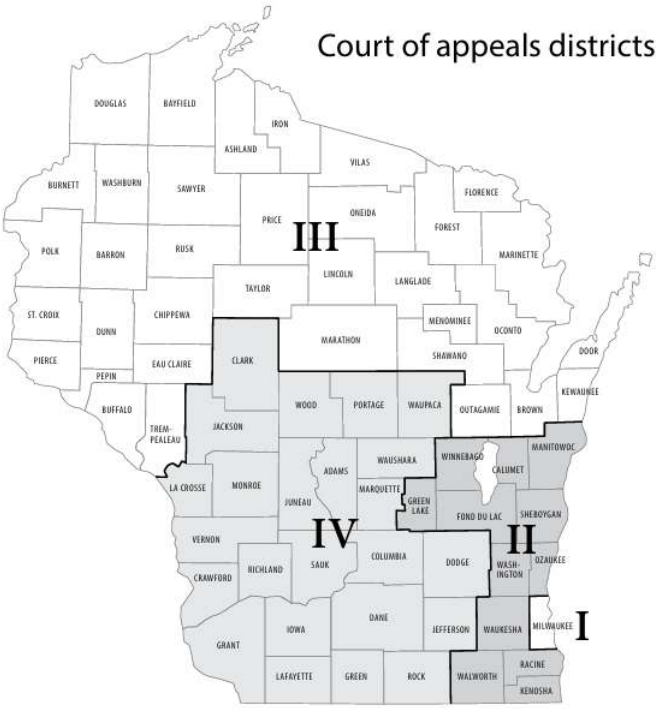

Figure 1.2.3: Wisconsin Court of Appeals Districts (Wisconsin Blue Book)

The court of appeals usually sits as a three-judge panel to dispose of cases on their merits. However, a single judge may decide certain categories of cases, including juvenile cases; small claims actions; municipal ordinance and traffic regulation violations; and mental health, contempt, and misdemeanor cases. No testimony is taken in the appellate court. The court relies on the trial court record and written briefs in deciding a case, and it hears oral argument when the judges determine it is needed. Both oral argument and "briefs only" cases are placed on a regularly issued calendar. When it is possible to do so without undue delay of civil cases, the court gives preference on the calendar to expedited and criminal appeals, as well as to appeals statutorily required to be given scheduling preference.

Decisions of the appellate court are delivered in writing, and the court's publication committee determines which decisions will be published. Published opinions have precedential value and may be cited as controlling law in Wisconsin unless overruled by the Wisconsin Supreme Court (Wisconsin Blue Book: The Judiciary).

Circuit Court

The circuit court is the trial court of general jurisdiction in Wisconsin. It has original jurisdiction in both civil and criminal matters unless exclusive jurisdiction is given to another court. It also reviews state agency decisions and hears appeals from municipal courts. Jury trials are conducted only in circuit courts. The circuit court consists of numerous judges serving in 69 circuits. Each circuit consists of the territory of a single county, except for three two-county circuits (Buffalo-Pepin, Florence-Forest, and Menominee-Shawano). Because of the varying size of their caseloads, some circuits have a single judge, while others have multiple judges. Each judge in a circuit holds court separately—circuit judges do not sit as a panel to hear cases—and each judgeship is called a "branch" of the circuit. As of August 1, 2023, there were a total of 261 circuit court branches in the state.

Circuit judges are elected to six-year terms on a nonpartisan basis in the April election and take office the following August 1. The governor may fill circuit court vacancies by appointment, and the appointees serve until a successor is elected. The state pays the salaries of circuit judges and court reporters. It also covers some of the expenses for interpreters, guardians ad litem, judicial assistants, court-appointed witnesses, and jury per diems. Counties bear the remaining expenses for operating the circuit courts.

The circuit court is divided into nine judicial administrative districts, each supervised by a chief judge appointed by the supreme court from the district's circuit judges. A judge usually cannot serve more than three successive two-year terms as chief judge. The chief judge has the authority to assign judges, manage caseflow, supervise personnel, and conduct financial planning. The chief judge in each district appoints a district court administrator from a list of candidates supplied by the director of state courts. The administrator manages the nonjudicial business of the district at the direction of the chief judge.

Circuit court commissioners are appointed by the circuit court to assist the court, and they must be attorneys licensed to practice law in Wisconsin. They may be authorized by the court to conduct various civil, criminal, family, small claims, juvenile, and probate court proceedings. Their duties include issuing summonses, arrest warrants, or search warrants; conducting initial

appearances; setting bail; conducting preliminary examinations and arraignments; imposing monetary penalties in certain traffic cases; conducting certain family, juvenile, and small claims court proceedings; hearing petitions for mental commitments; and conducting uncontested probate proceedings. On their own authority, court commissioners may perform marriages, administer oaths, take depositions, and issue subpoenas and certain writs.

The statutes require the circuit court for Milwaukee County to have full-time family, small claims, and probate court commissioners. In all other counties, the circuit court is required to have a family court commissioner (Wisconsin Blue Book: The Judiciary).

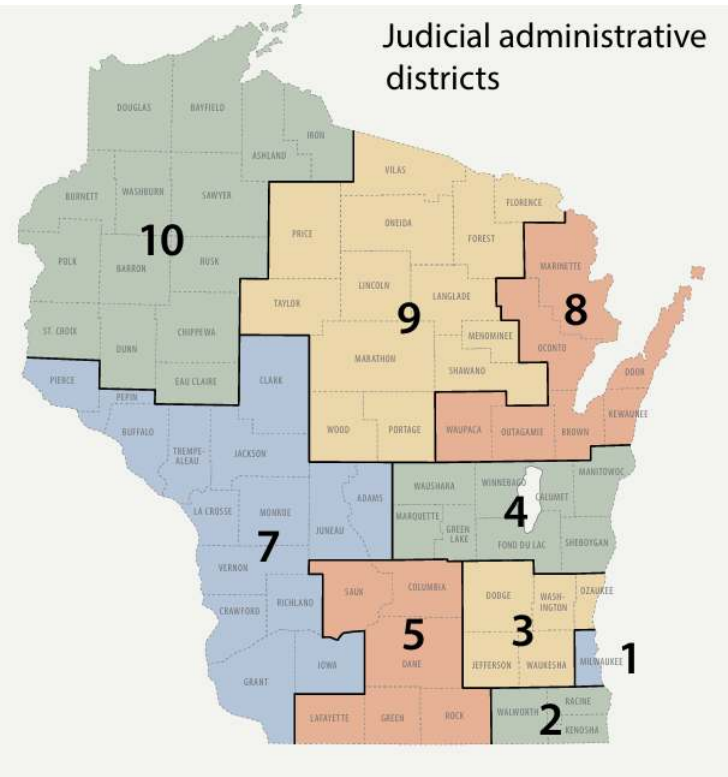

Figure 1.2.4: Map of Jucidical Administative Districts in Wisconsin (Wisconsin Blue Book)

Municipal Court

The legislature has authorized cities, villages, and towns to establish municipal courts to exercise jurisdiction over municipal ordinance violations that have monetary penalties. In addition, municipal courts have the authority to handle first-offense Operating While Under the Influence (OWI) cases. Also, municipal courts may rule on the constitutionality of municipal ordinances.

Municipal courts can have multiple branches (judges who hold court separately), and two or more municipalities can form a joint court. As of June 2023, there were 229 municipal courts and 231 municipal judges in Wisconsin. Seventy-three of these courts are joint courts that serve from 2 to 22 municipalities. Milwaukee has the largest municipal court, with three full-time judges.

There are no jury trials in municipal court. All cases are decided by a judge. Upon convicting a defendant, the municipal court may order payment of a forfeiture plus costs, fees, and surcharges, or it may order community service in lieu of a forfeiture. In general, municipal courts may also order restitution up to $10,000. In certain cases, a municipal court may suspend or revoke a driver's license.

If a defendant fails to pay a forfeiture or make restitution, the municipal court may suspend the driver's license or order the defendant to jail. Municipal court decisions may be appealed to the circuit court for the county where the offense occurred.

Municipal judges are elected at the nonpartisan April election and take office on May 1. The term of office is four years unless the municipality has adopted a charter ordinance designating a different term of at least two years but less than four years. The governing body determines the judge's salary. There is no state requirement that the office be filled by an attorney, but a municipality may enact such a qualification by ordinance. If a municipal judge is ill, disabled, or temporarily absent, the municipal

judge may temporarily designate another municipal judge from any municipality in the state to perform that judge's duties for up to 30 days, subject to an order of the chief judge of the judicial administrative district where the municipality is located. In other circumstances, such as when a judge is disqualified, the chief judge of the judicial administrative district reassigns the matter to another municipal judge. Finally, if a municipal judge is incompetent, is unable to act, or fails to act, the chief justice of the supreme court may assign cases to another municipal judge, a former municipal judge, or a former circuit court judge. If no judge is available, the chief justice may transfer a case from the municipal court to the circuit court. (Wisconsin Blue Book: The Judiciary).

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1.3: The Concept of Jurisdiction within the United States Court System

Jurisdiction in U.S. courts refers to the authority granted to a court to hear and decide cases. It involves the power of a court to require a person or entity to come to court and obey the court's orders. This authority is divided into several types, including subject matter jurisdiction, personal jurisdiction, *in rem* jurisdiction, original jurisdiction, and appellate jurisdiction.

Subject Matter Jurisdiction

Subject matter jurisdiction is the power of a court to adjudicate a particular type of matter and provide the remedy demanded. It ensures that a court has the authority to hear the specific kind of case being presented. Some cases must be filed in State court while others must be filed in Federal Court. Examples of cases that must be filed in State court are family law matters, probate cases, or breach of contract cases. Examples of cases that must be filed in Federal court are bankruptcy cases and cases involving violations of federal criminal laws.

Federal courts have limited subject matter jurisdiction, meaning they can only hear cases that fall within specific categories defined by the Constitution or Congress, such as federal question jurisdiction (cases involving federal law) or diversity jurisdiction (cases where all plaintiffs are from a different State than all defendants).

State courts, on the other hand, generally have broader subject matter jurisdiction and can hear a wide range of cases, except those exclusively reserved for federal courts. So if you go to the local courthouse and take a seat in a random courtroom, you might see cases about breach of contract, a family law matter, and a criminal matter all in the same day because these are courts of general jurisdiction.

While it varies from State to State, there are some State courts with limited jurisdiction as well. These types of courts might include probate courts, juvenile courts, or small claims courts. Each State's statutes will define the types of courts that exist in that State and what types of cases each court can hear.

Personal Jurisdiction

Personal jurisdiction, or *in personam* jurisdiction, refers to a court's power over the parties involved in the litigation. This type of jurisdiction is based on the defendant's contacts with the State where the court is located. For a court to exercise personal jurisdiction, the defendant must have certain minimum contacts with the forum State, ensuring that it is fair and just to require the defendant to appear in that court. Personal jurisdiction can be established through various means, such as residency, physical presence, or business activities within the State.

For example, if you want to sue someone in State court for a breach of contract, you will file the lawsuit either in the county where the defendant lives or the county where the contract was signed (but not both; a lawsuit can only be filed in one jurisdiction – this is called venue). As another example, probate cases are filed in the county where the deceased person lived.

In Rem Jurisdiction

In rem jurisdiction is the authority of a court over a particular piece of property or status rather than over a person. This type of jurisdiction is typically exercised in cases where the property itself is the subject of the legal action, such as disputes over real estate. In rem jurisdiction allows courts to determine the legal ownership or rights associated with the property within their geographical boundaries, and the resulting judgment applies to the property itself rather than to any individual.

As an example, you learned above that a probate case would be filed in the county where the deceased person lived. Assume that person has vacation property in a different county. The court in the county where the property is located would be the one to decide what happens to that property. That judgment would then be transferred to the county handling the probate to be incorporated in any final decisions about the deceased's estate.

Original vs Appellate Jurisdiction

The order in which cases move through the legal system is also important and governed by original versus appellate jurisdiction.

First, original jurisdiction is the authority of a court to hear a case for the first time. Courts with original jurisdiction, such as district or circuit courts as well as certain specialized courts, conduct trials and determine the facts of the case. It is in a court of

original jurisdiction where parties present evidence to a jury (or a judge if a party elects not to have a jury) and the jury (or judge) decides the facts of the case based on the evidence and testimony. This type of jurisdiction ensures that cases are initially heard and decided by the appropriate court before any appeals are made. The United States Supreme Court also has original jurisdiction in specific cases, such as those involving ambassadors or disputes between States.

Second, appellate jurisdiction refers to the authority of a court to review and decide appeals from decisions made by lower courts. Courts with appellate jurisdiction, such as the U.S. Courts of Appeals and the Supreme Court, as well as State Courts of Appeals and Supreme Courts, do not conduct trials or hear testimony but instead review the legal and procedural aspects of cases to determine if errors were made. Appellate courts, therefore, do not second-guess the fact finding of a jury, such as whether one witness was more credible than another; appellate courts simply determine whether the law was applied correctly. Appellate courts have the power to affirm, reverse, or modify the decisions of lower courts, ensuring that justice is upheld through the proper application of the law.

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CHAPTER OVERVIEW

2: Legal Ethics

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2.1: Basic Introduction to Legal Ethics

Getting a driver's license in the United States involves more than just demonstrating that you know how to properly drive a car; you also have to prove that you know the rules of the road and what you are allowed to do and not allowed to do while driving. Similarly, working in the legal field, whether as an attorney or a paralegal, requires more than just knowledge about how to locate statutes and case law, how to read and interpret them, and how to apply them to answer a client's legal question. In the legal field, the “rules of the road” relating to what legal practitioners can and cannot do while providing legal services to clients are primarily dictated by state and federal ethical rules. To be an effective member of the legal team, it is important that you understand how attorneys and other legal practitioners are regulated, the potential consequences of violating ethical rules, and the ethical rules themselves.

The Regulation of Attorneys and Other Legal Practitioners

All legal practitioners, including attorneys and non-attorneys, are expected to maintain strict ethical standards designed to protect clients, colleagues, the court, and other persons who may be impacted by a legal issue. The ethical standards are integral to every aspect of law practice, regardless of the area of practice or legal services being provided.

To practice law, an attorney must be licensed to do so by the particular state in which the attorney wishes to practice, or in the Federal justice system if the attorney wishes to practice law in the Federal courts. Attorneys refer to this licensing as “being admitted to the State and/or Federal Bar.” Each state has an “integrated bar association” that, along with the state courts and legislature, enact and enforce rules – including ethical rules – that govern law practice in that state. State bars administer bar exams and regulate entry into the legal profession. The legislature enacts laws that legal practitioners must follow. The courts and bar associations work together to establish ethical rules that members of the state bar promise to uphold. The courts also typically appoint members of state bar ethics committees that hear grievances. If the ethics committee determines it is likely an ethical violation has occurred, the courts may hold hearings to decide the nature of the violation and the proper disciplinary action.

Licensing

While each state has its own statutes regarding what is required to obtain a license to practice law within that state, the following basic requirements are applicable in most states:

- **Education**: A person must have a bachelor’s degree from an accredited university and must also have graduated from a law school accredited by the American Bar Association. Typically, law school involves three years of education beyond a bachelor’s degree.
- **Examination**: Aspiring attorneys must pass a rigorous examination testing their knowledge of the law, as well as the Multi-state Professional Responsibility Exam, which covers the ethical rules. Some states, including Wisconsin, waive the bar exam requirement if the person graduated from a law school within the state and achieved a minimum grade point average overall (this is known as the Diploma Privilege).
- **Background investigation**: After completing the two requirements above, the person must undergo a character and fitness evaluation. Specifically, the person must submit personal information regarding educational, employment, residential, financial, and other history, as well as character references and explanations of any academic infractions or disciplinary actions and criminal history. Certain criminal or other conduct, or certain behaviors/conditions, may disqualify someone from practicing law, such as crimes involving dishonesty, theft, or fraud; untreated mental health conditions; or ongoing alcohol or other substance abuse issues. As stated in Wisconsin Supreme Court Rule 40.06(1), “An applicant for bar admission shall establish good moral character and fitness to practice law. The purpose of this requirement is to limit admission to those applicants found to have the qualities of character and fitness needed to assure to a reasonable degree of certainty the integrity and the competence of services performed for clients and the maintenance of high standards in the administration of justice.” (See WI SCR 40.06).
- **Continuing Education**: Most states require continuing legal education (CLE) for practicing attorneys to remain a member of the bar in good standing and retain their law licenses. In Wisconsin, for example, attorneys must complete at least 30 credits of CLE every two years; at least three of those credits must cover ethics and professional responsibility. Certain practice areas, such as attorneys serving as *Guardians ad Litem*, have additional CLE requirements.

Anyone who is not admitted to the State Bar and licensed to practice law within a particular state – even if that person is an attorney licensed in another state – is not allowed to practice law within that state.

Ethical Codes and Rules

Each state has its own set of ethical codes and/or rules that apply to legal practitioners. Most are based on, or nearly identical to, the *ABA Model Code of Professional Responsibility* and the *ABA Model Rules of Professional Conduct*.

The *ABA Model Code of Professional Responsibility* (the Model Code) consists of nine Canons that set the standards of conduct expected of legal practitioners. Each Canon describes the way legal practitioners should behave in order to uphold the integrity of the profession. Each Canon is followed by Ethical Considerations (ECs) that are aspirational descriptions of what legal practitioners should strive for as ideal conduct. Each Canon is also followed by Disciplinary Rules (DRs) that state the minimum mandatory level of conduct required to avoid disciplinary action for violation. (See the ABA Model Code of Professional Responsibility)

The *ABA Model Rules of Professional Conduct* (the Model Rules) are more widely adopted by the states (including Wisconsin) than the Model Code. The Module Rules are divided into eight categories applicable to various types of legal practitioners (Client-Lawyer Relationships, Counselor, Advocate, Transactions with Persons Other than Clients, Law Firms and Associations, Public Service, Information About Legal Services, and Maintaining the Integrity of the Legal Profession) (See Model Rules of Professional Conduct – Table of Contents). There are separate ethical rules governing Judicial conduct.

Consequences for Violation

Penalties for violations of ethical rules can range from private reprimand (or censure) on the low end to disbarment (permanent revocation of an attorney's law license), to civil liability (typically a claim of legal malpractice), or even criminal penalties such as fines and/or jail time, depending on the severity of the violation or the existence of previous violations.

Formal Sanctions

Formal sanctions are those imposed against attorneys by the state bar for violations of the ethical rules and are designed to deter conduct that violates the rules as well as to protect the public against attorney misconduct. The formal sanctions, from mildest to most serious, are as follows:

- **Private Reprimand**: The attorney is formally "scolded" for the misconduct. A summary of the facts and explanation of the professional conduct violation is published, in part to help other attorneys avoid similar violations. The reprimanded attorney's name and other identifying information are not published. This sanction typically is imposed on first-time offenders whose conduct is a mild ethical violation, such as a lack of diligence.
- **Public Reprimand**: As with a private reprimand, the attorney is formally "scolded" for the misconduct and a summary of the facts and explanation of the professional conduct violation is published. However, the reprimanded attorney's name is published; additionally, the attorney may be required to pay the costs associated with the disciplinary proceedings. The attorney is still allowed to practice law, but the public reprimand is damaging to the attorney's reputation. This sanction typically is imposed on repeat offenders or offenders whose conduct is a bit more serious violation of ethical conduct, such as being convicted of criminal operating a motor vehicle while intoxicated.
- **Suspension**: The attorney is prohibited from practicing law for a period of time that is usually specified but is sometimes indefinite. This prohibition not only applies to practicing law within the state that imposed the sanction but also in most other states. Many states also preclude attorneys from working as paralegals during the suspension period. The suspension may require the attorney to complete specified education or treatment programs as a condition of being allowed to practice law in the future. At the end of the suspension period, the attorney will likely need to apply for reinstatement of his/her law license and demonstrate fulfillment of all requirements for reinstatement. Again, this sanction typically is imposed on repeat offenders or offenders whose conduct is an even more serious violation of ethical conduct, such as knowingly making a misleading statement to a court during a hearing and failing to later correct that statement.
- **Disbarment/Revocation:** The attorney is permanently prohibited from practicing law. Similar to suspension, this prohibition not only applies to practicing law within the state that imposed the sanction, but also in most other states. Many states also preclude disbarred attorneys from working as paralegals. This sanction is reserved for the most serious of violations, such as being convicted of a felony (for example, theft of a client's funds).

If an attorney's or non-attorney's violation of the ethical rules results in damages to another person's property or legal claims, the attorney – and possibly the paralegal – can be sued in civil court for **legal malpractice** (also known as professional negligence – the failure to exercise the type of care reasonably expected from a legal professional). Civil liability can be imposed to compensate the person who was injured or suffered other harm as a result of the ethical violation. Similar to when a patient sues a doctor for medical malpractice, the person (typically the client), sues the attorney and/or paralegal in civil court claiming that the ethical violation caused the person to suffer harm and seeking **damages** (compensation in the form of money).

Finally, if the ethical violation involves conduct that constitutes criminal behavior (such as theft or criminal fraud), the legal practitioner can be prosecuted in criminal court. Conviction can result in imprisonment and fines.

Ethical Rules and Non-Attorney Legal Practitioners

As the only members of the legal team with a license to practice law, only attorneys are directly regulated by the Rules of Professional Conduct; however, that does not mean that a non-attorney's violation of the rules has no impact. Attorneys are responsible for ensuring that neither they themselves nor anyone they supervise (such as paralegals, junior/associate attorneys, and other non-attorney staff) violates the rules. This means that if a paralegal violates one of the ethical rules, formal sanctions impacting the attorney's law license can be imposed against the supervising attorney. Additionally, as mentioned previously, a paralegal who violates the ethical rules risks both the paralegal and the attorney to be sued and held liable for damages in civil court. Finally, as with any crime, if the paralegal's ethical violation amounts to criminal conduct, the paralegal risks exposure to criminal prosecution. Another potential consequence for paralegals or other non-attorney members of the legal team who violate the rules is being fired.

In recognition of the indirect regulation of paralegals by the Rules of Professional Conduct, the American Bar Association has published Guidelines for the Utilization of Paralegal Services. NALA – The Paralegal Association, has also published similar guidelines. The National Federation of Paralegal Associations (NFPA) has published Rules of Professional Conduct and Ethical Considerations for paralegals that are based on the ABA's Guidelines and contain eight Canons similar to the ABA's Canons contained in the *Model Code*. Finally, the National Association for Legal Support Professionals (NALS) has published its own Code of Ethics and Professional Responsibility similar to the ABA's Canons contained in the *Model Code*. Non-attorney legal practitioners who are members of NALA, NFPA, and NALS are expected to abide by these rules and codes of conduct.

As Supreme Court Justice Potter Stewart once said, "Ethics is knowing the difference between what you have the right to do and what is right to do." Understanding the ethical rules will help you make decisions as a legal professional and support you if you are asked to do something that would compromise your integrity, in addition to ensuring that your clients receive high-quality legal services.

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2.2: The Three Big Cs - Confidentiality

Although all the ethical rules are important, some are more likely to impact paralegals on a regular basis than others. As mentioned previously, most states, including Wisconsin, have adopted the American Bar Association's *Model Rules of Professional Conduct*. The *Model Rules* and Wisconsin's *Rules of Professional Conduct*, along with their comments, will guide our discussion. The next several chapters will focus on the rules regarding Confidentiality, Conflict of Interest, and Competence, also known as "the Three Big Cs."

Confidentiality

> ***Rule 1.6: Confidentiality of Information.*** *A lawyer [nor any member of the legal team] shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [exceptions contained in the rule].*

One of the most important duties a legal professional owes to a client is maintaining confidentiality. This duty applies to everyone in the law office, including attorneys, paralegals, legal assistants, secretaries, and other clerical workers. This rule prohibits legal practitioners from *ever* revealing or disclosing *any and all* information relating to the client's representation, regardless of the source of the information or the nature of the information, without the client's express consent given prior to the disclosure. The overriding purpose of this rule is to establish a basis of trust between the client and the legal staff, such that the client is encouraged to be completely honest about all facts and circumstances that may impact the representation – the good, the bad, and the ugly. The legal team cannot effectively provide quality legal services or defend/protect the client against embarrassing or detrimental circumstances if the client doesn't disclose them.

The rule doesn't just apply to potentially negative or damaging information; it applies to *all* information – including the fact that a particular person or entity is a client. Additionally, the prohibition "applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. … [Any disclosure must involve] no reasonable likelihood that the [third party] will be able to ascertain the identity of the client or the situation involved." (ABA *Model Rule* 1.6, Comment 4)

So, what does this mean? Here are some "Dos and Don'ts" relating to confidentiality:

Table 2.2.1: Dos and Don'ts for Maintaining Client Confidentiality

Do	Don't
Discuss client matters in an office or other private room with a closed door, where no one can overhear the conversation	Discuss client matters in public places or in the presence of persons other than the client or other members of the legal team
Put away or cover client files or paperwork when meeting with others and at the end of each workday	Allow client files or paperwork to be visible on your desk, device screen, etc.
Use a privacy screen on devices such as desktop or laptop computers, tablets, etc.	Post, blog, tweet, or share any information about your job, a case, or a client that could potentially identify a client anywhere on social media or the Internet
Double-check email addresses and fax numbers before sending potentially confidential information (and it's best not to email confidential information, ever)	Tell friends, family, significant others, etc., about a client or a case, or acknowledge that a particular person met with your supervising attorney or that your office is handling a particular legal matter
Use social media, listservs, and other electronic communication carefully	Answer questions about a client or a legal matter – even if the answer might help the client!
Keep your professional life and personal life separate	

Exception – Informed Consent

Sometimes, however, complete and competent representation of a client requires the legal team to share confidential information with third parties. For example, the attorney may need to hire an accident reconstruction expert to testify in a lawsuit involving a car accident that injured the client; or the attorney may need to hire an appraiser to evaluate property in a client's estate. In these circumstances, it is best to explain why the disclosure is necessary and to obtain the client's informed consent to release the information**. Informed consent** means that the client has been provided with accurate and understandable information about why the disclosure is needed, and then has voluntarily agreed to the disclosure with full knowledge of to whom and for what purpose the disclosure is being made. It is best to explain to the client in writing why the disclosure is necessary and to obtain the client's signed, written consent to release the information.

Exception – Prevent "Really Bad Stuff" from Happening

There are circumstances, however, that require legal practitioners to reveal otherwise confidential information. Attorneys are allowed (and sometimes required) to "reveal information relating to the representation of a client to the extent the lawyer **reasonably believes necessary**" to do the following:

- Prevent reasonably certain/likely death or substantial bodily harm to the client or to another person. The death or injury could be caused by the client or someone else.
- Prevent the client from committing – in the very near future – a criminal or fraudulent act that the attorney reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another (in Wisconsin, the attorney is *required* to reveal this information), especially if the client has used or is using the attorney's services to support or advance the continuation of the criminal or fraudulent act or its desired results. This exception applies to criminal or fraudulent acts the client has not yet committed.
- Mitigate (or reduce the impact of) or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud, especially if the client has used or is using the attorney's services to support or advance the continuation of the criminal or fraudulent act or its desired results. This exception applies to criminal or fraudulent acts the client has already committed that impacted or that continue to impact someone else's financial interests.

So, what does this mean? Here are some example scenarios to help you understand these exceptions:

Table 2.2.2: Examples of When to Disclose or Not Disclose Confidential Information

Can/Should Disclose	Don't Disclose
Angry client tells you, in specific detail, about his/her plans to kill someone next Saturday. You are convinced that the client will follow through on these plans.	Angry client says during a meeting, "I'd rather be a widow/widower than a divorced person."
Angry client tells you, in specific detail, about his/her plans to hire someone to "beat person X to a pulp" if person X does not drop his/her claim against the client. You are convinced that the client will follow through on these plans.	An angry client says during a meeting, "Wouldn't it be great if someone would run person X over with a bulldozer?"
The distraught client tells you, in specific detail, about his/her plans to shoot himself/herself next Saturday. You know the client possesses a gun and you are convinced that the client will follow through on these plans.	A distraught client says during a meeting, "I might as well just shoot myself."
The client hired the law office to put certain property, bank accounts, etc., into trust. You later learn that the purpose of putting the property in trust was to defraud creditors and avoid paying legitimate debts owed.	The client is the personal representative of an estate and your office is assisting with the probate. Client tells you that person X agreed to purchase a car from the estate at a price that is twice the amount of the car's Kelley Blue Book (KBB) value. Client X asked person X to pay that amount, believing that person X would make a counteroffer for an amount closer to the KBB value. The client provided completely truthful and accurate information about the car's condition and accident history.
Your supervising attorney assisted the client in obtaining a $10,000,000 loan from a bank. The client tells you he/she knowingly made false statements about his/her income and assets on the loan application.	

It can be really tricky to determine which category a given situation falls under. It's always best to inform the supervising attorney about the situation and let him/her decide whether disclosure is appropriate.

Exception – Keep the Attorney in Compliance

Other exceptions to the confidentiality rule arise in situations where the attorney is seeking to comply with any of the ethical rules or comply with a court order. These exceptions allow for disclosure of confidential information when it is reasonably necessary to

- Help the attorney obtain legal advice about whether his/her conduct might violate any of the ethical rules. In other words, the attorney speaks with another attorney outside of the law office, or with an ethics expert employed by the State Bar, seeking advice about how to ethically deal with a particular situation involving a client.
- Comply with a court order to disclose what would otherwise be considered confidential client information. This exception prevents the attorney from being forced to choose between disclosing confidential information or being held in contempt of court – which could involve fines or jail time.
- Detect or resolve a potential conflict of interest (discussed in Chapter 2.3), but only if doing so wouldn't violate the attorney-client privilege (discussed below) or otherwise harm the client or the client's legal matter. For example, a legal practitioner who leaves one law firm and joins another can disclose the identities of clients he/she represented while employed in the prior law firm to avoid a conflict of interest for the new law firm, or to enable the new law firm to erect an ethical wall (discussed in Chapter 2.3) to protect the interests of the former client.

Exception – Defend Against a Legal Action

Unhappy clients sometimes file ethical complaints or civil actions (such as a claim for legal malpractice) against their attorneys, or sometimes unhappy clients refuse to pay the legal bill or challenge the reasonableness of the fee charged. To prove that the attorney complied with the ethical rules, took appropriate actions that a reasonably competent attorney would have taken, and is entitled to

payment of the fee charged may require the attorney to disclose otherwise confidential information. Similarly, if the attorney is asserted to be or charged as an accomplice or co-conspirator to a client's criminal or fraudulent activity, the attorney is allowed to disclose confidential information demonstrating that the attorney did not take part in the activity.

Related Rules

In addition to the Confidentiality ethical rule, there are two closely related rules that are intended to protect client information: the attorney-client privilege and the work product doctrine. These are not ethical rules but are contained within the rules of evidence, which govern what can and cannot be sought as evidence during civil or criminal litigation.

Attorney-Client Privilege

The **Attorney-Client Privilege** evidentiary rule prohibits the client or any member of the legal team from being required to disclose the content of confidential communications between them as part of the attorney-client relationship. For the privilege to apply, all of the 5 Cs must be present:

1. A **client** – someone who has hired or is considering hiring an attorney
2. **Communicates** – orally, in writing, digitally (such as via text or Internet form)
3. **Confidentially** – with no one else outside of the law office present at the time of the communication, and neither before (as in, the client hasn't already told friends and family or posted on social media about the fact), nor after the communication with the legal practitioner
4. With **counsel** – again, the attorney or members of his/her staff (but not through the client's friends or agents)
5. For **counsel** – that is, the information is shared for the purpose of obtaining legal advice or help. It's not enough that the person with whom the information is shared is an attorney or other member of the attorney's staff; it has to relate to the legal services that will be or are being provided to the client. For example, if a person hires an attorney to defend him/her against a murder charge that has been or might be filed against him/her and then the person confesses his/her guilt to the attorney, that confession is protected. If, however, the person confesses to the crime while riding in an elevator with someone who coincidentally is an attorney, that confession is not protected because the person had not hired the attorney, may not have known the person was an attorney, and wasn't seeking legal advice.

The attorney-client privilege lasts indefinitely, even after the representation has terminated, and even after the client has died. Only the client can terminate or waive the privilege unless one of the exceptions to the confidentiality rule applies.

Work Product Doctrine

The **Work Product Doctrine** evidentiary rule prohibits the client or any member of the legal team from being required to disclose the attorney's (or any member of the legal team's) mental impressions, conclusions, legal theories, strategies, notes, opinions, evaluations, or other materials prepared in anticipation of litigation. Protected activities include factual investigation, legal research, notes, memoranda, strategies, preparation, and organization performed by the attorney, paralegal, or other legal staff.

Maintaining client confidentiality is of utmost importance to the integrity of the legal profession. Moreover, the potential detrimental effects of confidentiality breaches (either intentional or unintentional) are extremely serious for both the client and the legal team. Therefore, it's best to err on the side of exercising excess caution when protecting client information. A good rule of thumb to follow is, When in doubt, don't let it out!

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2.3: The Three Big Cs - Conflict of Interest

Legal practitioners are required to "zealously advocate" for each one of their clients at all times. "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client" (ABA *Model Rule* 1.7, Comment 1). Divided loyalty between two or more clients, or between a client and the legal practitioner personally, is not allowed. Legal practitioners must avoid situations where their loyalty and zealous representation of one client might negatively affect the interests or representation of a different client. An attorney's representation of other clients, or his/her personal or professional relationships with any other person, must not compromise the attorney's ability to provide unbiased, competent, and zealous legal advice or representation to any client. In other words, legal practitioners must avoid situations that would cause them to have to choose which client (or interest) is the most important.

This rule prohibits representation that is adverse to or could injure the interests of another client. The rule requires legal practitioners to avoid situations in which they may need to choose between the interests of:

- multiple current clients (known as **multiple, concurrent, or simultaneous representation conflicts of interest**).
- a current client and a former client or another person from whom the legal practitioner has obtained confidential information (known as a **former client-current adversary, or successive representation conflict of interest**)
- a current client and the business or personal interests of the legal practitioner (known as a **business or personal conflict of interest**)

Multiple, Concurrent, or Simultaneous Representation

> ***Rule 1.7: Conflicts of interest – Current Clients.*** *… A lawyer [nor any member of the legal team] shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client ….*

Multiple/concurrent/simultaneous representation conflicts of interest arise when the attorney is asked to represent two or more parties in the same legal proceeding. The problem arises because the attorney (and other members of the legal team) will obtain confidential information from all of the parties who are clients of the attorney. The most obvious example is that an attorney cannot represent both drivers who are suing each other for injuries each claims the other driver caused when their cars collided in an intersection. The attorney cannot present evidence proving that the accident was Driver A's fault without harming his/her ability to prove that the accident was Driver B's fault.

Even in proceedings that start out as uncontested (everyone had the same interests and goals for the representation), conflicts between the clients and their interests can arise. Following are two examples:

Example 2.3.1

Two spouses want a divorce and they have no children. Both have jobs and they agree that they should sell the marital home and split the proceeds of the sale. Even in this "friendly" or uncontested divorce, issues can arise regarding who should receive which household furnishings, and whether Spouse A should receive a portion of Spouse B's retirement assets. Arguing in favor of Spouse A would mean Spouse B would have to give up some of Spouse B's retirement assets.

Example 2.3.2

Three adult children hire the family lawyer to probate their deceased parent's estate. They learn that the parent's most recent will does not split the estate evenly between the three children; instead, one child is to receive only 20% of the estate, while the other two children each receive 40%. A prior version of the will split the estate evenly between the three children. The child receiving only 20% of the estate wants to challenge the validity of the most recent will. One of the other two children claims that the prior will was changed because the parent had already given the child receiving 20% a substantial amount of money

before the parent signed the most recent will. No matter what argument the attorney makes, at least one of these three children will "lose."

Former Client-Current Adversary, or Successive Representation

> ***Rule 1.9: Duties to Former Clients.*** *… A lawyer [nor any member of the legal team] who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client … about whom the lawyer had acquired information [in the previous matter] that is protected by [the Confidentiality Rule] and is material [or important] to the [current] matter.*

Here, the conflict isn't between two or more parties in the same legal proceeding. Rather, this conflict may arise because the attorney is representing a new client in a new legal matter against a previous client. Remember, in each legal matter, the attorney receives confidential information from the client. If in the new legal matter, "zealous representation" of the new client would require the attorney to use that confidential information against the former client, that is a conflict of interest.

To avoid this conflict law offices maintain a database listing each client the law office has represented (or is currently representing), as well as a description of the type of legal matter involved (for example, a divorce, as the plaintiff in an automobile accident, as a defendant in a contract dispute, as a partner in a business the law office helped to create, etc.). Each time a potential new client contacts the law office and before taking on the client's legal matter, a **conflicts check** is performed. As part of this process, the following questions are asked:

- Who are the potential adverse parties in the new legal matter?
- Has anyone in the law office previously represented one of those potential adverse parties as a client? In other words, are any of the potential adverse parties a former client of the law office or any member of the legal team?
- If so, what type of legal matter was involved in the representation?
- Is the former client's legal matter **substantially related** to the new matter? In other words, did the former client's legal matter involve the same or closely related area of law as the new legal matter (For example, both legal matters involve family law issues or questions regarding the former client's business practices)?
- If so, is there a likelihood that confidential information received from the former client in the previous legal matter would now be used against that former client in the new legal matter? This is what is meant by a "**materially adverse**" interest.

If the answer to each of the above questions is "yes," the former client-current adversary conflict of interest is present. Following are two examples:

Example 2.3.3

An attorney represented Spouse A in a divorce action against Spouse B. Part of the original divorce action involved an order requiring Spouse B to pay child support for their two children. Five years later, Spouse B contacted the Attorney to represent Spouse B in an action to reduce the amount of the child support obligation.

Both of these are family law actions. The attorney previously represented Spouse A in a divorce action during which child support was an issue; presumably, the Attorney received confidential information regarding Spouse A's finances and other information directly relating to how much child support Spouse B should be ordered to pay. If the Attorney now represents Spouse B in an attempt to reduce the child support obligation, the Attorney would likely use confidential information the Attorney received during the prior action against Spouse A in the new action. This is clearly a prohibited conflict of interest and the Attorney must decline to represent Spouse B.

Example 2.3.4

Attorney represented Spouse A in a divorce action against Spouse B. Five years later, Spouse B contacted the Attorney to represent Spouse B in a personal injury case based on claims that Spouse A's negligent operation of an automobile caused an

accident that injured Spouse B.

The first action was a family law action. The second action is a tort action. These two areas of law are not substantially related. Technically, there is no conflict of interest if the Attorney decides to represent Spouse B against Spouse A in the new action.

Of course, the lines can get fuzzy, depending on what actually happened during the first legal matter. Suppose that, in Example 2.3.4, one of the issues in the original divorce action involved claims by Spouse B that Spouse A should not be allowed to drive the children anywhere due to Spouse A's history of drunken driving. In defending Spouse A against that claim in the divorce action, presumably Attorney discussed in depth with Spouse A concerns about alcohol use and operating a vehicle. Perhaps Spouse A confided in the Attorney that Spouse A struggles with alcohol addiction and frequently drives while drunk, though Spouse A has never gotten caught. Could this confidential information be used against Spouse A in the new automobile accident case? Definitely, especially if Spouse B alleges that Spouse A was drunk (as per usual) at the time of the accident.

Business or Personal Conflict of Interest

> ***Rule 1.7: Conflicts of interest – current clients.*** *… A lawyer [nor any member of the legal team] shall not represent a client if … there is a significant risk that the representation of one or more clients will be materially limited by … a third person or by a personal interest of the lawyer.*

Here, the conflict isn't between two or more clients, but between the client and the legal practitioner. This conflict isn't based on misuse of a client's or former client's confidential information; instead, it is based on the notion that the legal practitioner must always place the client's best interest ahead of any business or personal interest the legal practitioner may have that might conflict with the client's best interest. If the legal practitioner has a personal (think: family, friends, their own interest, etc.) or business (think: investments, business ownership, etc.) that might make the legal practitioner less than "zealous" in the client's representation, or to second-guess whether a certain action should be taken on the client's behalf, there is a prohibited conflict of interest between the legal practitioner and the client.

A related application of this rule prohibits the legal practitioner from using his/her representation or relationship with a client to the legal practitioner's own advantage, even if there is no detrimental consequence to the client. Receiving substantial gifts, drafting documents giving the legal practitioner substantial gifts, purchasing assets or interests from the client for an amount significantly below fair market value, providing loans to clients, entering into agreements that limit the attorney's liability for malpractice, or directing/requiring the client to hire the legal practitioner for future legal matters are all red flags. Rule 1.8: Current Clients: Specific Rules lists several types of prohibited conflicts that fall under these categories.

Conflict of Interest and the Ethical Wall

Conflicts of interest are personal to the attorney or legal practitioner and are portable. This means that if an attorney or paralegal worked at one law office, left that law office, and now works for a new law office, the new law office must be aware of the client relationships that the attorney or paralegal had at the previous law office. Thankfully, these potential conflicts of interest do not prevent individual legal practitioners from working at law offices that might have clients whose interests are contrary to those of the individual legal practitioner's former clients. However, appropriate steps must be taken to protect those former clients' interests.

First, it is critical that the law office's conflicts checking procedure includes inquiries as to the potential conflicts of each staff member resulting from their employment at a different law office. Some law offices request information from new hires who previously worked in other law offices regarding their former clients and legal matters (remember, obtaining information to determine whether a conflict of interest exists is an exception to the Confidentiality rule). Another best practice is, when a potential new client contacts the law office, a "conflicts memo" is sent to all staff. The conflicts memo identifies the new client, describes the nature of the new legal matter, and identifies potential adverse parties; the memo also requests each staff member to identify any potential professional, personal, or business conflicts of interest.

If a potential conflict of interest arises, the law office can erect an **ethical wall** around the person with the conflict (sometimes called the "tainted person") **to exclude that person's involvement in the new legal matter.** Some procedures typically included in erecting the ethical wall include:

- Sending a memo to all staff stating that the tainted person cannot be involved in the legal matter and instructing staff not to discuss the matter with or in the presence of the tainted person
- Restricting the tainted person's access to computer documents/files by password-protecting those documents/files
- Using a sticker or other red flag on physical files indicating that access to those files is restricted
- Restricting the tainted person's access to emails, faxes, or other information that relates to the legal matter

In addition to erecting the ethical wall, the Rules may require disclosure of the potential conflict to the client(s) involved, explaining the measures being taken to protect the interests of those clients, and obtaining written consent or waiver of the conflict from the clients.

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2.4: The Three Big Cs - Competence

As you have already learned, persons desiring to practice as attorneys are required to earn an educational credential (a *Juris Doctor*, or J.D. degree), pass a bar exam (in most states), and demonstrate "good moral character and fitness to practice law…to assure … the competence of services performed for clients and the maintenance of high standards in the administration of justice." (See WI SCR 40.06). Most states also require continuing legal education (CLE) for practicing attorneys to remain a member of the bar in good standing and retain their law licenses. Similarly, the use of the job title "paralegal" also requires that the person meet certain educational and training qualifications (typically an educational degree in Legal Studies or Paralegal), and also to engage in continuing legal education. The purpose of these requirements is to ensure that legal practitioners are providing competent legal services to clients.

Competence

> ***Rule 1.1: Competence.*** *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

Knowledge and Skill

Knowledge and skill go beyond just having the required educational experience. The law constantly changes, and sometimes a client's legal matter can present complex or novel legal issues. According to Comment 1 to the Model Rule, an attorney's competence to handle a specific legal matter is based on factors such as "the relative complexity and specialized nature of the matter, the lawyer's general experience, [and] the lawyer's training and experience in the field in question …." While most attorneys can competently represent a client in a straightforward personal injury case, a complex bankruptcy case may involve obscure procedures and requirements of which the average attorney (who may have had only one class in Law School that touched upon bankruptcy law) may be unaware – and that could have disastrous results for the client. Another area of law that should be practiced only by a specialist fis patent law. In fact, an attorney who wishes to prosecute a patent before the U.S. Patent and Trademark Office ("PTO"), must pass the Patent Bar exam; most of these attorneys also have scientific or engineering backgrounds, which helps in explaining and assessing technical issues.

Similarly, paralegals also have an obligation to obtain the knowledge and skills necessary to assist the attorney in providing quality legal services to the client. Canon 6 of the NALA Code of Ethics and Professional Responsibility states, "A paralegal must strive to maintain … a high degree of competency through education and training with respect to professional responsibility, local rules and practice, and through continuing education in substantive areas of law …."

Thoroughness and Preparation

Legal practitioners are required to conduct a reasonable amount of research related to the client's legal matter. Inadequate research into the facts and law involved in the client's legal matter can be problematic. Except in the most complex of cases, paralegals are typically tasked with performing the bulk of the factual investigation, which typically includes finding and interviewing many witnesses, as well as locating and scrutinizing countless documents and reports. If a paralegal's factual research fails to disclose an important relevant fact and the attorney provides bad legal advice to the client based on that inadequate research, that may constitute a breach of the duty of Competence.

Similarly, experienced paralegals may also be asked to perform legal research to locate statutes, case law, and other legal authorities that apply to the client's legal matter. Once those legal authorities are found, that research must be periodically updated to make sure the law has not changed. Suppose the paralegal locates a court decision that supports the client's claim and reports that finding to the supervising attorney. A few months later, that court decision is overturned by a later decision from a higher court. If the paralegal fails to discover that later court decision and the attorney fails to advise the client about the impact of that decision on the client's legal matter, that may constitute a breach of the duty of Competence.

Missed Deadlines

Missed deadlines are another way the duty of Competence can be breached. Legal practitioners often work on multiple clients' legal matters at once. Keeping track of every deadline for every task in every legal matter can be overwhelming. Not only is it important to have detailed checklists for each type of legal matter listing all of the required tasks, but it is also crucial to enter deadlines and multiple reminders leading up to the deadline (also known as "ticklers") on the paralegal's and the attorney's calendars. Although some missed deadlines can be "fixed," others cannot. The most critical deadline a litigation legal practitioner must not miss is a **statute of limitations**, which is the date by which a person who has a legal claim must file their claim in court; if this deadline is missed, the claim is prohibited. Missing a statute of limitations is practically guaranteed to result in a successful legal malpractice claim.

Errors in Documents

Errors in documents can also result in a violation of the duty of Competence. Problematic errors can include missing information, inaccurate information, or including improper information. Paralegals in many practice areas spend a lot of time writing correspondence, completing standardized forms or pleadings, and drafting other documents relating to the client's legal matter. It is critically important for the paralegal and the attorney to carefully review each and every document before it leaves the law office to make sure only proper and accurate information is included and that no necessary information is omitted. Proofreading for accuracy (especially in names, addresses, dates, times, measurements, and numbers), proper writing mechanics (punctuation, grammar, capitalization, and spelling), and even required formatting (margins, word limits, etc.) is essential.

Other Related Rules

Behaviors that result in poor quality of legal services may also run afoul of other ethical rules; there is some overlap in terms of how specific actions or inactions may be seen as violations of the rules. Thus, awareness of other rules designed to ensure quality legal services is helpful.

> ***Rule 1.3: Diligence.*** *A lawyer shall act with reasonable diligence and promptness in representing a client.*

It's just common sense that if a legal practitioner takes on a case, he/she should complete the required legal services within a reasonable amount of time. Delays can impact not only the ability to file a claim (as in missing the statute of limitation, as discussed above), they can also result in the loss of important evidence. For example, today many businesses and even homeowners have video surveillance of their properties. However, video footage may be kept for only a short period of time (30 days or less) depending on the surveillance provider and business standard operating procedures. If the legal practitioner waits too long to request the video, crucial evidence could be lost and the client's claim severely impacted. Delays can also result in increased costs to the client due to extra steps required to access archived information or simply rising costs as a result of inflation or other factors.

Procrastination is not the only way the duty of Diligence can be violated. Another potential breach of this duty can arise if legal practitioners take on a volume of work that is too much for them to handle, such that the quality of the legal services being provided suffers.

> ***Rule 1.4: Communications.*** *A lawyer shall (1) promptly inform the client of any decision or circumstance … (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; … (5) consult with the client about any relevant limitation on the lawyer's conduct … [and] explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*

Again, the importance of keeping clients informed about what is happening in their legal matters seems fairly obvious. Yet one of the most frequent complaints clients have lodged against legal practitioners is the lack of timely or regular communication. Lack of diligence and lack of communication often go hand-in-hand.

This Rule requires more than just regular updates about what is occurring or tasks that are being completed to keep the matter moving forward. It requires legal practitioners to provide timely and understandable communication to clients that empowers them to make informed decisions about their legal matters. Legal services are provided to and for the benefit of the client; to the extent possible, the client should be able to guide the strategy and outcomes of those services.

Good communication with clients has another reward: Clients who are aware of the services being provided to them and the value of those services are more likely to promptly pay their legal bills. Some ethical rules relating to billing clients are discussed in the next chapter.

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2.5: Timekeeping and Billing

In law practice, the products being sold to clients are legal services. Legal practitioners agree to provide legal services in the form of documents, advice, and managing/pursuing legal claims; clients agree to pay for the time and costs involved in those legal services. As with other areas of law practice, there are ethical rules governing how, how much, and for what types of activities a legal practitioner can charge a client.

Timekeeping and Billing Terminology

Definition: Terms Relating to Timekeeping and Billing

Timekeeping: The practice of tracking and recording time spent on various projects

Timekeeper: A person who can charge clients for time spent on tasks

Fees: Amounts charged to clients based on time spent performing services for them

Costs: Amounts charged for expenses related to performing services for clients

Hourly/straight hourly fee: Individual attorney/paralegal rates are charged separately according to who performed the work, according to actual hours worked, typically broken down into tenths or quarters of an hour (.1 or .25)

Flat fee: A specified charge for the performance of a specified service (e.g., drafting a will) regardless of the amount of time spent

Contingent fees: A fee charged only if the client is awarded money in judgment or settlement

Advanced fee: An "up front" payment for future legal services. Hourly fees are charged against this deposit, and any unused amount usually must be refunded when the legal matter is concluded. Sometimes referred to as a "retainer."

Billable/chargeable: Amounts that ethically can be charged to a client for time or expenses

Ethical Rules Regarding Fees and Expenses

Legal fees and costs are highly regulated. Regardless of the agreed-upon fee arrangement, the amount of the fee/cost must be reasonable. Additionally, the amount of the fee/cost and how it is calculated must be clearly communicated to the client. Moreover, the amount charged must be accurate and based on actual time and expense incurred in providing legal services.

Reasonable Fees/Costs

Though the ethical rules do not establish explicit caps or limits on fees or costs that can be charged to a client, they do provide guidelines for determining whether a specific fee or cost being charged is reasonable.

> ***Rule 1.5: Fees.*** *A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:*
>
> 1. *the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;*
> 2. *the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;*
> 3. *the fee customarily charged in the locality for similar legal services;*
> 4. *the amount involved and the results obtained;*
> 5. *the time limitations imposed by the client or by the circumstances;*
> 6. *the nature and length of the professional relationship with the client;*

> 7. *the experience, reputation, and ability of the lawyer or lawyers performing the services; and*
> 8. *whether the fee is fixed or contingent.*

Essentially, this Rule requires legal practitioners to charge reasonable fees based on time, labor, and skill required to competently perform the desired legal services. The Rule recognizes that a more experienced attorney who has a strong reputation can reasonably charge a higher fee than an inexperienced, relatively unknown attorney. The Rule also recognizes the reality that taking on a time- and labor-intensive legal matter means that the attorney may be required to decline other potential clients, in which case charging a higher fee may be warranted. As noted in the Comment to the Rule, when determining whether a fee is reasonable, the eight factors are not the only factors to consider; additionally, not all eight factors will apply in every situation. The key question is whether the fee or cost being charged to the client is reasonable under the circumstances.

Restrictions on Fee Arrangements

Although there is considerable freedom for attorneys and clients to enter into whatever type of fee arrangement they wish, the ethical rules prohibit contingency fees in family law (especially if payment is contingent upon obtaining a divorce or based on the amount of alimony or support or property settlement) and criminal defense cases. State laws may impose additional limitations on the types of legal matters for which a contingent fee is allowed, or on the amount of the fee that can be collected.

Communication with the Client

Rule 1.5 requires that the "basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." Although the Rule does not require all fee agreements to be written, providing the client with a detailed written fee agreement and asking the client to sign it before legal services are performed is simply good business practice. Written agreements protect both the client and the legal team against potential misunderstandings or unreasonable expectations.

Unethical Timekeeping and Billing Practices

Because client payments for services are the primary source of income for legal practitioners, it can be tempting to engage in billing practices that run afoul of the ethical rules. Now that you have a basic understanding of what the Model Rules require, let's take a look at some tempting – but unethical – timekeeping and billing practices.

Double Billing

This unethical practice involves charging one or more clients multiple times for the same block of time. It can occur in several ways, each of which is unethical:

- Charging two clients for the same block of time. For example, an Attorney flies to another city to interview a witness in Client X's legal matter. During the 2-hour flight, the Attorney reviews legal documents relating to Client Y's legal matter. The attorney cannot charge both Client X and Client Y for two hours (for a total of four hours), even though both travel time and reviewing legal documents are examples of properly billable time (see the discussion below). The attorney must choose one client to charge or split the two hours between the two clients.
- Charging one client for two timekeepers' attendance at the same meeting, hearing, etc. For example, the Attorney asks the Paralegal to attend a civil trial that the Attorney is handling for Client A "as an extra set of eyes and ears" and to take notes while witnesses are being questioned. Either the attorney or the paralegal can charge for time spent in the courtroom that day, but not both (unless the client agreed to it beforehand). In this situation, the attorney receives the benefit of the paralegal's presence in the courtroom much more than the client; as such, the attorney should bear the "cost" of the paralegal's time and not the client.
- Charging multiple clients "full price" for "recycled work product." For example, the Paralegal performs three hours of legal research for Client B's legal matter and charges Client B for those three hours. A few months later, Client C hires the law office to handle a case that is very similar to Client B's case, and so the same law applies. The paralegal spends 30 minutes updating the research from Client B's case to make sure the statutes haven't been amended nor the case law overturned. Even though Client C received the benefit of the three hours the Paralegal spent on Client B's case, it would be unethical for the Paralegal to

charge Client C a second time for those three hours when the Paralegal actually spent only 30 minutes performing research in Client C's case.

Inaccurate Billing

This unethical billing practice involves inflating or over-charging clients for services. Like double billing, this unethical practice can take many forms:

- Charging the client at the attorney's hourly rate for work performed by other timekeepers who should be charged at a lower hourly rate (sometimes known as "up-charging"). Attorney hourly rates are often substantially higher than paralegal hourly rates, and a senior attorney's hourly rate will be higher than a less-experienced attorney's hourly rate. Suppose the Senior Attorney's hourly rate is $300 per hour, the Associate Attorney's hourly rate is $150 per hour and the Paralegal's hourly rate is $90 per hour. It would be unethical to charge the client $300 per hour for work that was actually performed by either an Associate Attorney or Paralegal.
- Charging the client for more time than was actually spent on the service being billed. Sometimes this occurs intentionally, as when a timekeeper "pads" time by adding a few tenths of an hour to the task being charged (for example, charging .7 hours for legal research that only took .5 hours). Most often, this occurs unintentionally because the timekeeper failed to keep track of time while working on a task, failed to account for interruptions, or inaccurately calculated time due to a clerical error.
- "Block billing" rather than task-based billing. This occurs when multiple tasks are listed together as being completed during a large block of time (for example, charging the client two hours for "reviewing correspondence, discovery, pleadings and evidence re: case"). It also occurs when a vague description of services is charged for a large block of time (for example, charging six hours for "preparing for trial"). Block billing is usually a symptom of poor timekeeping practices or padding; it can also be an attempt to charge the client for tasks that are clerical and should not be charged to the client (see the discussion of non-billable time below).
- Charging more than the client agreed to pay. Regardless of whether the fee agreement is contingency-based, hourly, or a flat fee, the attorney cannot unilaterally increase the amount the client is charged. If there is a reasonable basis for increasing the fee, the attorney and the client must enter into a new fee agreement.

Charging the Client for Non-Billable Time

During a typical workday, attorneys and especially paralegals spend time on many different types of tasks. While the majority of these tasks are necessary to the business of providing legal services, not all of them are properly chargeable to clients. Clients should only be charged for the **time that attorneys and paralegals spend doing work that requires legal expertise, known as billable time**. Tasks that do not require legal training and expertise are considered non-billable; they are a "cost of doing business" that should be "paid" by the law office. Below are some examples of billable and non-billable time and costs

Billable Time/Tasks/Costs	Non-Billable Time/Tasks/Costs
Drafting (either by typing or dictation) legal documents, letters, forms, etc.	Transcribing (listening to recorded dictation and typing what is heard) legal documents, letters, forms, etc.
Attending meetings with clients, witnesses, opposing counsel, etc., or court proceedings	Scheduling meetings or hearings
Preparation for meetings with clients, witnesses, opposing counsel, etc., or court proceedings (which may include legal research, document review, strategizing)	Administrative or clerical tasks, such as conflicts checking; calendar management; attending internal office or staff meetings; entering information in law office software; and generating, reviewing, sending, or collecting bills
Reviewing legal documents, letters, forms, etc., received from others	Time spent filing, organizing, digitizing, or tabulating documents
Per page photocopying expenses as stated in the fee agreement	Time spent making photocopies
	Cost of office supplies, equipment, or storage charges

Other Related Rules

Many businesses like to provide employees with incentives to bring in new clients, work efficiently, or exceed the amount of the annual goals (such as annual billable hours goals), typically through commissions, "finders fees," revenue/profit-sharing, or year-end bonuses. Law offices are restricted with respect to the types of allowable incentives for non-lawyers.

> ***Rule 5.4: Professional Independence of a Lawyer.*** *A lawyer or law firm shall share legal fees with a nonlawyer [or] form a partnership with a non-lawyer [for the purpose of practicing law].*

In reality, paralegals and other non-lawyer staff receive salary, wages, and fringe benefits paid out of the legal fees paid to the law office by clients. However, the amount of compensation cannot be directly tied to, or fluctuate based on, the receipt of those fees. Below are some examples of impermissible fee-splitting and permissible pay incentives.

Impermissible Fee-Splitting

Example 2.5.1

- The attorney pays a "bonus" of $100 to any employee of the law office for any client the employee brings to the firm.
- Attorney promises to pay any non-lawyer a percentage of any of the following:
  - Fees received from a client that the paralegal persuaded to hire the attorney. For example, at a social gathering, a Paralegal's acquaintance mentions that she wants to hire an attorney for estate planning. The paralegal recommends his supervising attorney and the acquaintance becomes a client of the law office.
  - Fees are collected from the law office's clients on whose files the paralegal performed work. For example, Paralegal billed clients a total of 1500 hours in the past year, which is 300 hours more than Paralegal's billable hours goal of 1200 for the year. The attorney agrees to pay Paralegal 50% of the money received for those "extra" 300 hours.
  - Contingent fees received in judgment or settlement. For example, the Attorney agrees to pay the Doctor, who was hired as an expert witness in a personal injury case, a percentage of the contingent fee received if the client is successful.

Permissible Pay Incentives

Example 2.5.2

- The law office has a general profit-sharing arrangement in which a percentage of the firm's net profit (and not client fees received) is shared with non-attorneys over and above the person's salary/wages.
- The attorney agrees to pay a specified amount not tied to client fees received as a "bonus" for exceeding a billable hours goal.
- After a particularly successful year, the Attorney pays the Paralegal a discretionary bonus in recognition of the quantity and quality of the Paralegal's work and its value to the Attorney.

The rules also prohibit attorneys from giving or sharing "ownership interest" in an entity providing legal services to a non-attorney. For example, suppose an Attorney (who practices Estate Planning) and a Tax Accountant share office space and realize that they have many of the same clients. Even though they have many of the same clients and the interests of those clients with respect to Estate Planning and Taxation may be in alignment, the ethical rules prohibit them from creating a partnership or other business entity together.

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2.6: Unauthorized Practice of Law

As you have seen, paralegals can ethically charge clients for time spent on billable tasks. However, there are certain tasks and activities that can only be performed by a licensed attorney; anyone else who performs them has engaged in unauthorized practice of law, or UPL. This chapter will introduce to UPL, what paralegals can and cannot do, and the attorney's duty to supervise.

What is Unauthorized Practice of Law (UPL)?

As you learned in Chapter 2.1, each state has its own statutes regarding what is required to obtain a license to practice law within that state. Only attorneys who have been admitted to the State Bar and licensed to practice law within a particular state are allowed to practice law within that state. Each state also has its own statute that prohibits non-attorneys from practicing law; although the statutes vary, the common purpose is to ensure only attorneys provide legal services. No one else – not accountants, bankers, insurance agents, realtors, nor paralegals – is allowed to do so.

State statutes are not always clear regarding what constitutes UPL and what does not. Fortunately, NALS, NALA, NFPA, and the ABA provide some guidelines intended to assist paralegals in avoiding UPL. According to those guidelines, non-attorneys are prohibited from doing the following:

- **Accepting or rejecting a client/legal matter**. In other words, establishing the attorney-client relationship, communicating an intent to establish (or not establish) it, and signing fee agreements, contracts, or correspondence relating to establishing (or not establishing) an attorney-client relationship.
- **Setting legal fees**. Only the attorney is allowed to decide the amount and manner (hourly, flat fee, task-based, etc.) in which to charge a client for legal services. This includes signing a fee agreement.
- **Providing legal advice**. Legal advice includes recommending actions or inactions, interpreting the law or documents, evaluating legal claims or the likelihood of success, explaining legal rights or obligations, planning legal strategy, making legal decisions, and the like.
- **Preparing legal documents without attorney supervision**. In other words, any document, pleading, letter, etc., must be reviewed and approved by the attorney before it leaves the law office.
- **Representing clients in Court**. This not only includes personal appearances at hearings or trials, but also signing pleadings, motions or other legal documents to be filed in Court. According to the NFPA guidelines, this also includes taking depositions.
- **Terminating the attorney-client relationship**. Only the attorney can determine whether a legal matter has been concluded according to the retainer/fee agreement and communicate its completion with the client. This restriction especially applies to decisions to terminate the attorney-client relationship before the conclusion of the legal matter, for whatever reason.

The reason for these restrictions is that, while ***paralegals*** receive formal education that provides them knowledge and training regarding the legal system, as well as procedural and substantive law, the purpose of that education is to enable them to ***perform legal work under the supervision of an attorney***. In contrast, ***attorneys'*** formal education regarding the same topics has the purpose of enabling them to ***exercise legal judgment on behalf of clients***.

What are Paralegals Allowed to Do?

Despite the restrictions described above, there are many important things paralegals are allowed to do to assist attorneys and their clients. The table below is a side-by-side comparison of what is and is not prohibited as UPL:

Prohibited (UPL)	Allowed (Not UPL)
Accepting or rejecting a client/legal matter.	Listing the attorney's typical law practice areas Drafting a letter of acceptance/rejection to a client for the attorney's review and signature
Setting legal fees	Providing information about what is typically charged for legal services Drafting a fee agreement for the attorney's review and signature
Providing legal advice	Drafting a letter/memorandum containing legal advice for the attorney's review and signature Providing legal *information* (see the discussion below)
Preparing legal documents without attorney supervision	Drafting legal documents for the attorney's review and approval "Scrivening" – filling in the blanks of a standard form, contract, or pleading without giving any advice
Representing clients in Court	Representing yourself in Court (appearing *pro se*) Drafting pleadings, motions, or other legal documents to be filed in Court for the attorney's review and signature
Terminating the attorney-client relationship	Drafting a letter terminating the representation for the attorney's review and signature Sending a final bill to the client

Paralegals are also allowed to do the following:

- **Gather information and documents from potential clients, accepted clients, and other persons relating to a legal matter and provide it to the supervising attorney**. In this context, the paralegal is a conduit of information. Paralegals can make telephone calls, send letters under their own signatures (reviewed by the attorney), request records and documents, and engage in other forms of communication. In doing so, it is required that paralegals disclose their non-attorney status by specifically identifying themselves as paralegals at the beginning of the telephone call, or by including the term "Paralegal" after their names in the signature line of letters or other correspondence.
- **Perform legal tasks in a specific legal matter as delegated/directed by the attorney.** Some law offices have master task lists or process manuals identifying specific steps to be taken and documents, forms, or letters to be used in a legal matter. As long as the task lists or process manuals were drafted and approved by the attorney, and as long as the attorney is required to review and approve what the paralegal has drafted, the paralegal is allowed to complete the work on a more self-directed basis.
- **Receive and summarize documents or information from persons other than the supervising attorney.** While the supervising attorney should independently read and review information received in response to records requests or formal discovery, many attorneys rely on their paralegals to create summaries for use during depositions or court proceedings. The summaries collect, categorize, report, and cross-reference information in such a way that the attorney can efficiently access useful information contained in lengthy documents, and often across multiple documents.
- **Perform legal research.** Attorneys often request paralegals to retrieve specific statutes, court decisions, or other legal authorities to support their legal strategies, advice, and decision-making. Experienced paralegals may also be asked to perform more in-depth legal research and analysis to locate statutes, court decisions, or other legal authorities that become the basis for the attorney providing legal advice to the client.

The common thread in most of the permissible activities is that the attorney is ultimately responsible for providing legal services to the client. As long as the attorney has full professional responsibility for the work product and properly supervises work delegated to the paralegal, the paralegal is authorized to perform work that is crucial to law practice.

The Attorney's Duty of Supervision

As you learned in Chapter 2.1, attorneys must ensure that neither they neither they nor those they supervise violate the ethical rules; this includes making sure non-attorney staff do not engage in UPL. Additionally, attorneys must not encourage – directly or

indirectly – non-attorneys to engage in UPL.

> ***Rule 5.3: Responsibilities Regarding Nonlawyer Assistance.*** *… A lawyer [shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer….*

As Comment 2 to the Rule explains, proper supervision requires the attorney to "take account of the fact that [non-attorneys] do not have legal training and to

- be responsible for the work product of non-attorneys in the law office. As mentioned previously, this means reviewing, revising (if necessary), and approving every piece of paper, file, or correspondence before it leaves the law office.
- instruct non-attorneys "concerning the ethical aspects of their employment …." This means that as part of the onboarding process, attorneys must
  - take the time to train new employees regarding their ethical responsibilities, the ethical limitations on what they are allowed to do, and specifically what conduct constitutes UPL
  - provide continuing instruction and guidance throughout their employment regarding violations of ethical rules and steps for avoiding violations and UPL
- refrain from delegating tasks that only the attorney should perform to non-attorneys, regardless of the non-attorney's level of skill or experience.

Inadequate attorney supervision can arise in many circumstances. Sometimes, a non-attorney may be asked to do tasks that would constitute UPL because the attorney has gotten him- or herself into a sticky situation caused by the attorney's own failure to comply with rules regarding competence, diligence, or communication. For example, the attorney may have failed to properly calendar a deadline, resulting in the need to take "emergency action" to meet the deadline. Or, the attorney may have taken on too many legal matters, resulting in insufficient time to properly supervise and review non-attorney work product. Other times, an attorney simply places too much trust or reliance on an experienced and trusted non-attorney's skill or expertise. This can happen when the supervising attorney is relatively new or inexperienced. Or, the attorney and paralegal have worked together in a particular area of law for a very long time, during which the paralegal has demonstrated a high level of competence such that "micro-managing" is not necessary.

Although the duty of supervision and compliance with the ethical rules ultimately rests with the attorney, paralegals also are responsible for making sure they are adequately supervised so that they are not engaging in UPL. Paralegals who feel their supervising attorney is not adequately supervising their work can address the situation by doing the following:

- Ask the attorney to review their work and provide feedback, orally or through notes or stickers affixed to the work
- Use calendar reminders or ticklers to create tasks or "To Dos" that include review and approval of work
- Discuss with the attorney any ethical concerns or questions as they arise; if necessary, create an appointment on the attorney's calendar for this discussion
- Complete assigned work well before the deadline to ensure adequate time for the attorney to review it
- Enlist the help of the law office manager/administrator or another attorney in the law office if the supervising attorney repeatedly provides inadequate supervision, despite these other efforts

Speaking to your supervisor about inadequate supervision can be uncomfortable. It's important to be tactful and professional. Expressing your desire to provide the client with the best quality legal services while avoiding the negative consequences of potential ethical violations or UPL is an excellent strategy.

Legal Advice and UPL

Caution

Under no circumstances should a non-attorney ever give anyone legal advice. The reason a person hires an attorney is to receive legal advice regarding their legal questions or legal matters. However, friends and family may unintentionally seek

legal advice from you, as someone who has paralegal education. You must be incredibly careful to avoid providing legal advice during these discussions.

But what is legal advice? **Generally, if you apply legal knowledge to facts and give an opinion about how the legal knowledge impacts or relates to the facts, you are giving legal advice.** Legal advice can take many forms, such as

- Recommending a course of conduct or action that a person should or should not take
- Suggesting options for actions/inactions, or describing the pros, cons, or potential consequences of those options
- Evaluating the strengths or weaknesses of a case or legal action (sometimes called “merits”)
- Predicting a positive or negative outcome regarding a case, legal action, or legal proceeding
- Calculating or stating with certainty how long a legal action might take
- Explaining legal rights, obligations, or legal claims
- Interpreting statutes, court decisions, documents, contracts, insurance policies, etc.

In each of the examples above, you would be using your legal education, training, or experiences to help someone decide what to do or understand a legal document. That is the essence of legal advice.

Sometimes, however, all that is needed is legal information**. Legal information** is much more general than legal advice; it **typically points someone to information that can be accessed anywhere, provides general information/definitions, or suggests appropriate resources for information.** Examples of legal information include

- Providing the “plain English” or dictionary definition of legalese
- Giving general explanations of legal claims and procedures
- Describing the “typical” steps that are taken in a case
- Directing a person to a legal website for information
- Providing a person with samples of legal or court forms (without telling the person which forms to use or how to complete them)

As long as the information does not include evaluations, recommendations, or instructions, it is generally safe for non-attorneys to provide it to other persons. Because the distinction between legal advice and legal information can be somewhat fuzzy if there is any doubt about whether what you are about to communicate might be legal advice, keep it to yourself. Instead, explain that the most qualified person to provide the best answers is an attorney, and that if you were to provide the answer you would be breaking the law.

When it comes to compliance with legal ethics, there is little to no room for “trial and error.” Legal practitioners must always behave in an ethical, professionally responsible manner, anticipating and avoiding potential violations. Think before doing or speaking; seek guidance and direction from your supervising attorney; and remember that you represent a profession that demands the utmost in personal and professional integrity.

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CHAPTER OVERVIEW

3: Legal Research - Interviews and Investigations

3.1: Introduction to Researching the Law
3.2: Federalism
3.3: Separation of Powers and Sources of Law
3.4: Hierarchy of Authority

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3.1: Introduction to Researching the Law

The United States Legal System

> *The simplest form of remedy for the uncertainty of the regime of primary rules is the introduction of what we shall call a 'rule of recognition'… Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. – H.L.A. Hart, The Concept of Law*
>
> *We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America. – Preamble to the United States Constitution*

Learning Objectives

In working through this chapter, students should strive to be able to:

- Describe key features of the U.S. legal system, including:
  - Federalism,
  - Separation of Powers,
  - Sources of Law, and
  - Weight & Hierarchy of Authority.
- Assess how the structure of the legal system frames research.

Introduction to Researching the Law

The practice of law necessarily involves a significant amount of research. In fact, the average lawyer spends much of her work time researching. This makes sense when one considers that American law as a field is too vast, too varied, and too detailed for any one lawyer to keep all of it solely by memory. Furthermore, the law is a living thing; it tends to change over time. Thus, in order to answer clients' legal questions, lawyers typically conduct research into the laws affecting their clients.

Several things make legal research different from the types of research most law students performed prior to law school. First, rules of law tend to be both highly detailed and highly nuanced, so legal research often includes acts of interpretation even at the research stage. Second, the rules of law derive from a myriad of sources, many of which may be unfamiliar to students. Furthermore, because legal research is so important to the practice of law, the publication of legal materials has long been a profitable field. As part of their long publishing history, legal sources developed their own information systems that predate modern publishing practices. As a result, the organization of legal materials tends to differ from that of other materials. Finally, the process of legal research itself tends to be different. In other fields, researchers often investigate ideas in the abstract. In the law, a researcher must always keep the specific facts of her particular client's situation in mind, as a lawyer must always apply the results of her research to her client's problem.

Because legal research differs so substantially from other types of research, the American Bar Association requires that law schools specifically instruct students in legal research.[1] Typically, research instruction occurs in the context of a Legal Research & Writing (LRW) course. Schools teach legal research and writing together because the two activities (finding/applying the law and then communicating the found application) intertwine. However, legal writing falls outside the scope of this text, which focuses on the research portion of legal practice.

Throwing students into the deep end by having them read cases without explanation or context and then teasing understanding out of them via the Socratic Method remains the educational method of choice for most law classes. This text will not follow that method. In fact, this text seeks to do

the opposite, namely to provide enough explanation and context to demystify the art of legal research. By knowing what each of the various sources of law is, and by knowing how the various types of authority interact with each other, law students will avoid being overwhelmed by the level of detail and nuance inherent in the law and will be able to research the law in a calm, efficient manner.

Thus, this text will introduce and explain the major sources of American law one at a time. As it does so, it will provide insight into how publishers arrange the sources of law. Because legal publishers originally developed their methods of organization before the advent of electronics, each source of law will be initially introduced by referencing its print form (*i.e.*, actual law books). Once students become familiar with the sources of law—and so will know what they are looking for when they research—the text will proceed to explain the processes of modern legal research, which mostly involves computer-assisted research.

Before introducing the sources and processes involved in legal research, however, a few words must be said about the shape and peculiarities of the United States legal system. After all, it is the unique shape of our system that gives rise to the different sources of law. Furthermore, lawyers conduct research to solve legal problems, and those problems play out in the legal system. You have to know the rules to play the game.

Reference

1. American Bar Association, 2020-2021 Standards and Rules of Procedure for Approval of Law Schools, Standard 302(b) (2020).

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3.2: Federalism

The United States of America employs a federal system of government. As anyone who follows American politics can tell you, federalism means different things to different people. However, the legal definition of a federal state is:

> *A composite state in which the sovereignty of the entire state is divided between the central or federal government and the local governments of the several constituent states; a union of states in which the control of the external relations of all the member states has been surrendered to a central government so that the only state that exists for international purposes is the one formed by the union.*[1]

The key point to take away from the definition is that in a federal state, two separate governments share law-making power, or sovereignty, over the same territory. Of course, federal states differ from one another in precisely how the central and local governments share law-making power. To understand how the federal and state governments share sovereignty in the U.S., one must look to the historical development of federalism in America.

Origins of American Federalism

Prior to declaring independence from Great Britain in 1776, the territory that became the initial United States of America existed as colonies, at first of England and later of Great Britain.[2] Each of the colonies operated as an entity under its own charter as a governing document according to English law. The vast distances of America (especially compared to the relatively smaller scale of England) combined with the slow speeds of pre-Industrial Revolution travel to leave each colony effectively governing itself for large portions of the 17th and 18th centuries.[3]

When the British government attempted to reassert control over the colonies in the latter half of the 18th century, the colonies revolted and eventually won their independence.[4] Because of their history of self-rule, each rebelling colony asserted its own sovereignty (thereby rejecting British sovereignty over America) both during and after the Revolution. However, in order to coordinate the war effort, each colony sent delegates to a “Continental Congress” during the Revolution and eventually adopted the Articles Confederation,[5] which remained in force following British recognition of American independence.

The Articles of Confederation created the United States as a confederation, which resembles a federal state only with a weaker central government and more independent local governments.[6] Sadly, it turned out that a weak central government with strong state governments did not adequately administer such a large swath of territory. In particular, the fledgling United States struggled economically.[7] Thus, less than a decade after ratifying the Articles of Confederation, the Founders reconvened to draft what became the U.S. Constitution.[8]

However, even though the Founders acknowledged the need for a stronger central government, they remained wary of too strong a central power, as self-rule at the colony/state level had been the whole point of the Revolution.[9] Therefore, while the Constitution creates a strong federal government, it also specifically limits the application of federal law-making authority to specific topical competencies.[10] State governments, while subject to federal supremacy in the specified competencies,[11] retain general sovereignty and so enjoy law-making authority over a wider range of topics.[12] Thus, the federal government possesses “enumerated powers,” or law-making powers specifically enumerated by the Constitution, while state governments possess “reserved powers,” or law-making powers over everything else.[13] Please see Table 3.2.1 for a list of enumerated federal competencies.

Table 3.2.1: Enumerated Powers of the Federal Government

Enumerated Federal Power	Constitutional Origin(s) of Power
Taxation (partially shared with states)	art. I, § 8, cl. 1; amend. XVI
Borrowing on Credit of U.S.	art. I, § 8, cl. 2
Regulating Interstate Commerce, and Commerce with Foreign Nations or Indian Tribes	art. I, § 8, cl. 3
Immigration & Naturalization	art. I, § 8, cl. 4
Bankruptcy	art. I, § 8, cl. 4
Coining & Regulating Value of Money	art. I, § 8, cl. 5
Punishing Counterfeiting	art. I, § 8, cl. 6
The Mail	art. I, § 8, cl. 7
Copyright & Patents	art. I, § 8, cl. 8
Creation of Federal Courts (other than the U.S. Supreme Court)	art. I, § 8, cl. 9
Punishing Piracy on the High Seas & Crimes Under International Law	art. I, § 8, cl. 10
War & Armed Forces	art. I, § 8, cl. 11-16
Creating Laws for the District of Columbia	art. I, § 8, cl. 17
"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."	art. I, § 8, cl. 18

Impact of Federalism on Legal Research

The way in which American federalism splits sovereignty impacts legal research in a number of ways. First, for any given territorial point in the United States, a researcher may need to look at two completely different sets of laws, as both federal law and state law will apply throughout the same territory. Sometimes, a legal researcher will be able to tell at a glance whether federal or state law will govern an issue, but at other times, a lawyer may need to do initial research just to determine whether to apply federal or state law (or both) to a client's problem. For example, federal law generally governs copyright,[14] a fact familiar to most lawyers off the tops of their heads. However, the federal government's interstate commerce power derives from broader language,[15] has expanded over time,[16] and may affect areas of law typically reserved to the states. For instance, states typically define and punish crimes, such as robbery, committed inside their boundaries.[17] However, federal law also criminalizes the robbery of banks, as the federal government insures banks through the F.D.I.C. under the commerce power.[18] Thus, any given legal problem may necessitate researching multiple sets of laws.

Of course, American law comprises many more than two sets of laws. While there is only one federal government, each of the fifty states produces its own set of laws. Even 51 is too small a number to describe the sets of laws contributing to the U.S. legal system. The District of Columbia possesses its own laws, as do other Federal territories. Furthermore, American Indian tribes, as "Domestic Dependent Nations," enjoy a limited form of sovereignty.[19] While no legal problem will likely involve all possible sets of laws in the U.S., legal researchers should remain aware of the existence of multiple sets. Because most of the sets of laws present in the U.S. evolved from a common ancestor (namely, the laws of England), even if a jurisdiction's set of laws does not directly apply to a legal problem, it may contain pieces that help a researcher interpret a different jurisdiction's set that does apply.[20]This concept will be revisited a bit later in the discussion on hierarchy of authority.

Federalism impacts legal research not only by providing multiple sets of laws for which researchers must account but also by providing multiple forums for the settling of disputes about the applications of laws. In other words, in addition to worrying about

the possibility of multiple sets of laws affecting their clients, lawyers need to be aware of the options presented by multiple, independent court systems operating over the same geographic area. Sometimes, a client may be advantaged by trying a case in federal court as opposed to state court or *vice versa*.

The matter becomes more complicated when one considers the fact that a jurisdiction's court system does not necessarily always apply its own set of laws. For each controversy that comes before it, a court will determine which jurisdiction's laws should apply. This is known as choice-of-law.[21] A number of factors and guiding principles determine what set of laws a court should apply, but for purposes of legal research, it is important to remember that federal courts, while largely interpreting federal law, also sometimes interpret and apply state law. Similarly, while a state's court system most typically interprets the state's own laws, it will sometimes need to apply federal laws or even the laws of another state.

Choice-of-law matters to the legal researcher because some cases will involve applying bits of multiple sets of laws to the same facts. For example, a criminal defendant facing prosecution under state law may raise a federal constitutional defense. In such a case, the way the bits of law interact with each other changes depending upon which court system tries the case. Before we can cover more detail on the interaction between bits of law, however, we need to examine where those bits, or sources, of law originate by looking at the other key feature of the U.S. Legal System: Separation of Powers.

References

1. *State*, Black's Law Dictionary (11th ed. 2019).
2. England and Scotland became joined in a "personal union" upon the ascension of James VI of Scotland as James I of England. They did not officially merge into the Kingdom of Great Britain until the Acts of Union of 1707: Union with Scotland Act, 1706, 6 Ann, c.11 (Eng.); Union with England Act, 1707, c.7 (Scot.).
3. *See generally* Jack P. Greene, Pursuits of Happiness: The Social Development of Early Modern British Colonies and the Formation of American Culture (1988).
4. For the definitive account of how the increased assertion of central authority by the British Parliament led to the American Independence Movement, *see* Bernard Bailyn, The Ideological Origins of the American Revolution (enl. ed. 1992).
5. Articles of Confederation of 1781.
6. *Confederation*, Black's Law Dictionary 359 (11th ed. 2019).
7. The revolting colonies borrowed money heavily during the Revolution and so owed huge sums of money to a number of foreign powers, most notably the Dutch.
8. For a good legal discussion of the motivating factors behind the Constitution, *see* Calvin H. Johnson, Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution 15-60 (2005).
9. *See id.* at 100-127.
10. U.S. Const. art. I, § 8.
11. U.S. Const. art. VI.
12. U.S. Const. amend. X.
13. Please note that it is not always entirely clear whether something is enumerated or reserved, and in fact the definition of each has tended to change over time. For purposes of legal research, just be aware that you will tend to deal with more state law than federal but that federal law can trump state law on certain topics.
14. U.S. Const. art I, § 8, cl. 8.
15. U.S. Const. art I, § 8, cl. 3.
16. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Wickard v. Filburn, 317 U.S. 111 (1942).
17. *See, e.g.*, Wash. Rev. Code § 9A.56.200 (through December 7, 2020), *available at* https://app.leg.wa.gov/RCW/default.aspx?cite=9A.56.200.
18. 18 U.S.C. § 2113 (Legal Information Institute through Pub. L. No. 116-193).
19. American Indian law is largely outside the scope of this text. For a good introduction to the subject of American Indian sovereignty, *see* William C. Canby, Jr., American Indian Law in a Nutshell (6th ed. 2015). For a list of federally recognized tribes and contact information for their respective governments, *see* Bureau of Indian Affairs, U.S. Dep't of the Interior, Tribal Leaders Directory (2022).
20. There are a few notable exceptions to the proposition that American law evolved from English Common Law. Louisiana's law derived from the French civil law system. Also, a number of states, primarily in the American Southwest, feature elements of

Spanish property law, and are known as “Community Property” states. Finally, rather obviously, American Indian legal systems did not evolve from English law.

21. *Choice of Law*, Black’s Law Dictionary (11th ed. 2019).

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3.3: Separation of Powers and Sources of Law

At the same time that the Founders, in drafting the Constitution, limited the central government to enumerated powers, they also broke the federal government into three distinct branches. They did so in the hopes that the various branches would serve as checks and balances on each other and prevent the sort of tyranny that the former colonists rejected from the unified British government.[1] This type of government structure is called Separation of Powers, which is defined as:

> *The division of governmental authority into three branches of government—legislative, executive, and judicial—each with specified duties on which neither of the other branches can encroach.*[2]

Subsequent to the creation of the federal government with the U.S. Constitution, each of the states in the United States adopted similar provisions in their own constitutions. Indeed, every state government in the U.S. features the Separation of Powers.

American government, therefore, features three distinct branches at both the state and federal levels: the legislative branch, the judicial branch, and the executive branch. In the process of governing, each of the branches contributes rules to the body of law of its jurisdiction. The term "sources of law" refers to the different forms the various rules take.[3] The legislative branch passes statutes, the judicial branch issues opinions, and the executive branch drafts regulations. However, a constitution underpins each of the other sources and serves as the ultimate source of law.

Constitutions

Scholars often describe the United States legal system as a legally positivist system. Legal positivism is a theory of jurisprudence that essentially states that all law is human-made and is only valid in a state because people accept that it is.[4] H. L. A. Hart, a twentieth-century British legal philosopher, wrote perhaps the clearest articulation of legal positivism in his seminal work, *The Concept of Law*, which was quoted at the beginning of this chapter. Part of Hart's theory of legal positivism involves a "rule of recognition," which alerts citizens of a jurisdiction to the validity of its laws.[5]

For a legal rule in the U.S. to be valid, it must have been created by a process described by the applicable constitution. Thus, in the United States, the U.S. Constitution serves as the rule of recognition for the federal government. Similarly, state constitutions serve as the rules of recognition for their respective state governments. Under positivism, constitutions derive their authority from the will and acceptance of the people. Thus, for the American legal researcher, constitutions represent the ultimate source of law.

Of course, our constitutions do flesh out the processes by which our governments may create other sources of law. We have already seen how constitutions separate the various American governments into three distinct branches. Logically enough, the constitutions also provide each branch a method by which it can create legal rules.

Statutes

Under the American system of Separation of Powers, as described by the various constitutions, the legislative branch creates laws in the form of statutes. Generally, to create a law, a legislator will introduce a bill into whatever legislative house she belongs; then, once the bill receives an affirmative vote in each legislative house and the signature of the jurisdiction's chief executive, it becomes an enacted law.[6]

On the federal level, the legislative branch, known as Congress, consists of the House of Representatives and the Senate. Bills that pass both houses and are signed by the President become enacted and receive the designation "Public Laws." The Government Publishing Office (GPO) publishes all Public Laws of the United States in a multi-volume set called the *Statutes at Large*. The GPO also divides the Public Laws into their constituent parts by topic and fits them into a topically-organized publication of all federal laws in force called the *United States Code*.

State legislatures follow the same process as the federal legislature, but the nomenclature varies. For instance, in Kentucky, the legislature is called the General Assembly, which is comprised of the House of Representatives and the Senate. Bills that pass both houses become Acts, which researchers can find in chronological order in the *Kentucky Acts* or in the topically-organized *Kentucky Revised Statutes*. Meanwhile, bills that pass both houses of the Texas Legislature become General Laws published in the *Texas*

General Laws before being folded into one of a number of different codes named for the topics they cover. Thus, while the processes resemble each other, each state may call its statutes by slightly different terms.[7]

Because constitutions charge the legislative branches, they create with general law-making ("legislative" actually means law-making)[8] ability,[9] statutes represent laws in their most basic sense. As such, they are the next most important source of law after constitutions and typically control legal problems over other sources of law.

Judicial Opinions

Although a statute on point would typically control a given legal controversy, it is not always readily apparent how precisely a statute would apply to a specific set of facts or even whether it would cover the facts at all. This ambiguity occurs because, generally, legislatures write statutes in broad, abstract terms in order for the statute to cover as many scenarios as possible. Thus, abstract statutes typically require interpretation in order to apply them to specific controversies. Under the Separation of Powers, the judicial branch takes on the role of the interpreter of laws.

The judicial branch typically comprises several levels of courts, with a high court at the top, trial courts at the bottom, and one or more levels of intermediate appellate court in between, though the names of the various courts vary by jurisdiction. At the federal level, the United States Supreme Court acts as the high court, District Courts serve as the usual point of entry to the system, and Courts of Appeal (also sometimes called Circuit Courts) connect the two.[10] Constitutional grants of judicial power generally extend to the respective court system as a whole.[11]

Courts interpret the law by issuing judicial opinions, also referred to as cases. Although subservient to the statutes they interpret, judicial opinions create their own rules of law through the force of precedent.

Precedent works through the principle of *stare decisis*, which is defined as:

The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.[12]

Basically, consistency benefits law in that it allows those governed by the law to predict what they need to do to comply with the law. Following earlier decisions as precedents leads to greater consistency. If courts begin interpreting a statute in a certain way, society benefits if they continue to interpret the same statute in the same way.

Sometimes, judicial opinions create legal rules through precedent even absent a statute. This often happens when courts interpret constitutional sections. It also happens when courts apply legal rules that predate the widespread use of statutes.[13] The term "common law" refers to law made through judicial opinions rather than by statutes.[14] Many common law rules remain in force in American law, particularly in the fields of Torts and Property.

Thus, through the force of precedent, judicial opinions contribute legal rules to the various bodies of American law, both through statutory interpretation and common law. Indeed, many lawyers spend the majority of their research time on case research.

Administrative Regulations

The final branch of government formed by constitutions mandating Separation of Powers is the executive branch, which consists of a chief executive and various cabinet departments and agencies that report to the chief executive. At the federal level, the President of the United States acts as the chief executive, and at the state level, the Governor fills the same role. A constitution usually charges the chief executive with enforcing or executing the laws of its jurisdiction.[15]

Of course, chief executives do not personally enforce all the laws of their jurisdictions. Instead, they rely on employees of the various executive departments and agencies for the enforcement of different areas of law. Often, an agency or department will need to provide specific rules in order to enforce a broad statute. Rules issued by agencies/departments take the form of administrative regulations. In modern times, legislatures actually delegate regulation-making authority to executive branch agencies by statute, giving regulations the force of law.

While administrative regulations do contribute legal rules to the various sets of American laws, lawyers generally regard them as the weakest of the sources of law. Since regulatory authority comes via legislative delegation, a legislature can remove the authority at any time.

References

1. For the classic account of the Constitutional Convention of 1787, when these decisions were made, *see* Catherine Drinker Bowen, Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787 (1966).
2. *Separation of* Powers, Black's Law Dictionary (11th ed. 2019).
3. *Source of* Law, Black's Law Dictionary (11th ed. 2019).
4. *Legal Positivism*, Black's Law Dictionary (11th ed. 2019).
5. H. L. A. Hart, The Concept of Law 94-110 (2d ed. 1994).
6. This process holds true for the federal legislature and all but one of the state legislatures. Nebraska, the odd state out, features a unicameral legislature, so bills only need pass one house in the Cornhusker State.
7. For a thorough list of what each state calls its statutes, *see* The Bluebook: A Uniform System of Citation 242-294 tbl.T.1.3 (Columbia Law review Ass'n et al. eds., 21st ed. 1st prtg. 2020).
8. *Legislative*, Black's Law Dictionary 1039 (11th ed. 2019).
9. *See, e.g.*, U.S. Const. art. I, § 1; R.I. Const. art. VI § 2.
10. For a state-by-state breakdown of state court systems, *see* The Bluebook: A Uniform System of Citation 242-294 tbl.T.1.3 (Columbia Law review Ass'n et al. eds., 21st ed. 1st prtg. 2020).
11. *See, e.g.*, U.S. Const. art. III, § 1; Minn. Const. art. VI § 1.
12. *Stare Decisis*, Black's Law Dictionary (11th ed. 2019).
13. The concept of the statute slowly developed in England during the late Middle Ages, but statutes did not achieve primacy until the 16th Century. Furthermore, legislatures tended to operate on strictly part-time schedules well into the 19th century.
14. *Common Law*, Black's Law Dictionary 334 (11th ed. 2019).
15. *See, e.g.*, U.S. Const. art. II, § 3; Pa Const. art. IV § 2 .

3.3: Separation of Powers and Sources of Law is shared under a CC BY-NC-SA 4.0 license and was authored, remixed, and/or curated by Beau Steenken & Tina M. Brooks.

3.4: Hierarchy of Authority

As we have seen, American law comes from many sources. Not only does each branch of government create its own source of law, but each separate jurisdiction within the U.S. possesses its own set of laws. As such, knowing how the different pieces of law interact with each other takes on huge importance for legal researchers (especially if the different pieces of law in any way contradict each other, which is not an unusual occurrence).

Lawyers refer to individual sources of law as authorities and describe their relationship to each other as the hierarchy of authority. As discussed above, the standard hierarchy of authority starts with constitutions as the most authoritative and then proceeds in order of authoritativeness through statutes, judicial opinions, and administrative regulations. However, this simple hierarchy does not capture the nuance involved when dealing with authorities from multiple jurisdictions or authorities from one jurisdiction being applied by the courts of another. Furthermore, not all judicial opinions carry equal weight. Some additional concepts are therefore necessary to sort and rank authorities.

Primary v. Secondary Authority

Legal authority can be divided into two broad categories: primary authority and secondary authority. Collectively, this distinction is referred to as "type of authority." Primary authority refers to "authority that issues directly from a law-making body."[1] Thus, the four sources of law discussed previously make up primary authority.[2] Secondary authority, therefore, refers to "authority that explains the law but does not itself establish it, such as a treatise, annotation, or law-review article."[3] While lawyers may cite secondary authorities, courts do not view secondary authorities as possessing as much persuasive weight as primary authorities possess.

Mandatory v. Persuasive Authority

Legal authority can also be divided into mandatory (sometimes called binding) authority and persuasive authority. Collectively, this distinction is referred to as the "weight of authority." Mandatory authority refers to an authority that a court considering a case must apply, while persuasive authority refers to "authority that carries some weight but is not binding on a court."[4] Obviously, lawyers benefit from knowing whether a court must apply an authority to a case or whether a court may choose not to apply an authority. Therefore, being able to determine the relative weights of authority is a skill every legal researcher should aspire to acquire.

Determining Weight of Authority

Determining the weight of authority for some sources of law can be quite straightforward. If a jurisdiction's constitution applies to a set of facts before a court, then the constitution acts as mandatory authority. Similarly, if a statute from the jurisdiction in question relates to the facts in controversy, a court must apply it. The same holds true for regulations, though they tend to apply to more narrowly defined sets of facts. In other words, constitutions, statutes, and regulations tend to be either mandatory or irrelevant and are rarely used persuasively. Conversely, secondary authority, since it is not actually law but merely interpretation, can never be mandatory but only acts as persuasive authority. Thus, a determination of weight for many authorities will be quick and easy.

The weight of authority of judicial opinions, however, depends on several factors. A lawyer must first consider the choice of law. In order to be binding, a precedent must apply the same jurisdiction's laws as would apply to the controversy at hand. However, the choice of law alone does not determine the weight of authority.

Second, the lawyer must consider the venue, or the court where her controversy would be heard if it went to trial. In order to be mandatory, an earlier case must have been issued from the same court system as will be adjudicating the controversy to which a lawyer would like to apply the precedent. Furthermore, the earlier case must be from a higher court, in a direct line of appeal, from the current controversy's venue. As state court structures vary, let us look at a hypothetical case in the federal court structure as an example.

As discussed above, the federal court structure consists of trial level courts (District Courts), intermediate appellate courts (Courts of Appeals), and ultimately, the United States Supreme Court. District Courts and Courts of Appeals are grouped into twelve geographic circuits (and one topical circuit). If a lawyer loses a trial in a District Court, she may appeal to the Court of Appeals for whichever geographic circuit contains the District Court that tried her case. See Table 3.4.1 for a list of which circuits contain which districts.

Table 3.4.1: The Federal Judicial Circuits

Federal Circuit	Corresponding District Courts by State in which they Reside
First Circuit	ME, NH, MA, RI, Puerto Rico
Second Circuit	NY, VT, CT
Third Circuit	PA, NJ, DE, Virgin Islands
Fourth Circuit	MD, VA, WV, NC, SC
Fifth Circuit	TX, LA, MS
Sixth Circuit	TN, KY, OH, MI
Seventh Circuit	IN, IL, WI
Eighth Circuit	MN, IA, MO, AR, ND, SD, NE
Ninth Circuit	CA, AZ, NV, ID, OR, WA, MT, AK, HI, Guam, Northern Mariana Islands
Tenth Circuit	UT, WY, CO, NM, KS, OK
Eleventh Circuit*	AL*, GA*, FL*
D.C. Circuit	D.C.
The Federal Circuit	certain appeals are determined by subject matter

* The Eleventh Circuit split from the Fifth Circuit on October 1, 1981. Therefore, Fifth Circuit Court of Appeals decisions prior to that date are binding upon District Courts in the Eleventh Circuit.

If a lawyer were trying a case applying federal law in the United States District Court for the Eastern District of Kentucky, mandatory opinions would include opinions from the Sixth Circuit Court of Appeals and the United States Supreme Court. Because cases from the Eastern District of Kentucky may only be appealed to the Sixth Circuit Court of Appeals, opinions from other circuits' Courts of Appeals would merely be persuasive, even though those courts are higher courts. Similarly, if the same lawyer were handling the appeal from the District case in the Sixth Circuit Court of Appeals, only Supreme Court cases would be mandatory, as the Supreme Court is the only court higher than a Court of Appeals in the federal system.

To complicate matters, however, an exception exists if the choice of law and venue do not match, *i.e.*, a case in federal court involves state law, or a case in state court is applying federal law or the law of another state as a choice of law. Under these circumstances, the court applying a different jurisdiction's laws will treat opinions from the high court of that jurisdiction as mandatory. This is because each jurisdiction's high court acts as the final arbiter of its laws under the constitutional principles of federalism. For example, if the United States District Court for the Eastern District of Kentucky hears a negligence case governed by Kentucky state tort law, it will treat opinions from the Kentucky Supreme Court as mandatory.

Of course, even if a lawyer determines an opinion only serves as persuasive authority, she may still choose to use it, particularly if it features facts similar to her controversy. Furthermore, some cases may be more persuasive than others. Generally speaking, opinions coming from higher courts are more highly persuasive. Also, cases from the court system of the jurisdiction whose law has been selected as the choice of law tend to be better than cases from other court systems. In the abstract, more recent cases tend to be favored over older cases, as the more recent cases will be presumed to have been aware of the earlier cases and to have incorporated them into the more recent holding. Finally, although they are not binding because they may technically be overturned, earlier cases from the same court hearing the current controversy would be a higher level of persuasive authority as courts generally try to avoid overturning their earlier decisions.

Although not always an easy task, the evaluation of the hierarchy of authority for a given legal problem is an essential skill for legal researchers to determine what research paths to pursue. Furthermore, a legal researcher needs to be able to recognize the

various sources of law that create the rules that govern the problem being researched. For these reasons, legal researchers should keep the structures of the U.S. Legal System firmly in mind as they research.

References

1. *Authority*, Black's Law Dictionary (11th ed. 2019).
2. Note that in addition to the sources of law, government bodies often produce various amounts of documentation in the process of creating the sources themselves. These supporting documents will be primary in nature but will not be legally binding. Nonetheless, researchers will sometimes look at them to help interpret the sources of law they relate to.
3. *Authority*, Black's Law Dictionary (11th ed. 2019).
4. *Id*.

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CHAPTER OVERVIEW

4: Communication in the Law Office

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4.1: Introduction to Communication in the Law Office

We all share a fundamental drive to communicate. Communication can be defined as the process of understanding and sharing meaning (Pearson & Nelson, 2000). You share meaning in what you say and how you say it, both in oral and written forms. If you could not communicate, what would life be like? A series of never-ending frustrations? Not being able to ask for what you need or even to understand the needs of others?

Communication Influences Your Thinking about Yourself and Others

Being unable to communicate might even mean losing a part of yourself, for you communicate your self-concept—your sense of self and awareness of who you are—in many ways. Do you like to write? Do you find it easy to make a phone call to a stranger or to speak to a room full of people? Perhaps someone told you that you don't speak clearly or your grammar needs improvement. Does that make you more or less likely to want to communicate? For some, it may be a positive challenge, while for others it may be discouraging. But in all cases, your ability to communicate is central to your self-concept.

Take a look at your clothes. What are the brands you are wearing? What do you think they say about you? Do you feel that certain styles of shoes, jewelry, tattoos, music, or even automobiles express who you are? Part of your self-concept may be that you express yourself through texting, or through writing longer documents like essays and research papers, or through the way you speak.

On the other side of the coin, your communication skills help you to understand others—not just their words, but also their tone of voice, their nonverbal gestures, or the format of their written documents provide you with clues about who they are and what their values and priorities may be. Active listening and reading are also part of being a successful communicator.

Communication Influences How You Learn

When you were an infant, you learned to talk over a period of many months. When you got older, you didn't learn to ride a bike, drive a car, or even text a message on your cell phone in one brief moment. You need to begin the process of improving your speaking and writing with the frame of mind that will require effort, persistence, and self-correction.

You learn to speak in public by first having conversations, then by answering questions and expressing your opinions in class, and finally by preparing and delivering a "stand-up" speech. Similarly, you learn to write by first learning to read, then by writing and learning to think critically. Your speaking and writing are reflections of your thoughts, experience, and education. Part of that combination is your level of experience listening to other speakers, reading documents and styles of writing, and studying formats similar to what you aim to produce.

As you study business communication, you may receive suggestions for improvement and clarification from speakers and writers more experienced than yourself. Take their suggestions as challenges to improve; don't give up when your first speech or first draft does not communicate the message you intend. Stick with it until you get it right. Your success in communicating is a skill that applies to almost every field of work, and it makes a difference in your relationships with others.

Remember, luck is simply a combination of preparation and timing. You want to be prepared to communicate well when given the opportunity. Each time you do a good job, your success will bring more success.

Communication Represents You and Your Employer

You want to make a good first impression on your friends and family, instructors, and employers. They all want you to convey a positive image, as it reflects on them. In your career, you will represent your business or company in spoken and written form. Your professionalism and attention to detail will reflect positively on you and set you up for success.

In both oral and written situations, you will benefit from having the ability to communicate clearly. These are skills you will use for the rest of your life. Positive improvements in these skills will have a positive impact on your relationships, your prospects for employment, and your ability to make a difference in the world.

Communication Skills Are Desired by Business and Industry

Oral and written communication proficiencies are consistently ranked in the top ten desirable skills by employer surveys year after year. In fact, high-powered business executives sometimes hire consultants to coach them in sharpening their communication skills. According to the National Association of Colleges and Employers, the following are the top five personal qualities or skills potential employers seek:

1. Communication skills (verbal and written)
2. Strong work ethic
3. Teamwork skills (works well with others, group communication)
4. Initiative
5. Analytical skills

Knowing this, you can see that one way for you to be successful and increase your promotion potential is to increase your abilities to speak and write effectively.

Your Responsibilities as a Communicator

Whenever you speak or write in a business environment, you have certain responsibilities to your audience, your employer, and your profession. Your audience comes to you with an inherent set of expectations that you will fulfill these responsibilities. The specific expectations may change given the context or environment, but two central ideas will remain: be prepared and be ethical.

The Communicator is Prepared

As the business communicator's first responsibility, preparation includes several facets which we will examine: organization, clarity, and being concise and punctual.

Being prepared means that you have selected a topic appropriate to your audience, gathered enough information to cover the topic well, put your information into a logical sequence, and considered how best to present it. If your communication is a written one, you have written an outline and at least one rough draft, read it over to improve your writing and correct errors and sought feedback where appropriate. If your communication is oral, you have practiced several times before your actual performance.

The Prepared Communicator is Organized

Part of being prepared is being organized. Aristotle called this *logos*, or logic, and it involves the steps or points that lead your communication to a conclusion. Once you've invested time in researching your topic, you will want to narrow your focus to a few key points and consider how you'll present them. On any given topic there is a wealth of information; your job is to narrow that content down to a manageable level, serving the role of gatekeeper by selecting some information and "de-selecting," or choosing to not include other points or ideas.

You also need to consider how to link your main points together for your audience. Use transitions to provide signposts or cues for your audience to follow along. "Now that we've examined X, let's consider Y" is a transitional statement that provides a cue that you are moving from topic to topic. Your listeners or readers will appreciate your being well-organized so that they can follow your message from point to point.

The Prepared Communicator is Clear

You have probably had the unhappy experience of reading or listening to a communication that was vague and wandering. Part of being prepared is being clear. If your message is unclear, the audience will lose interest and tune you out, bringing an end to effective communication.

Interestingly, clarity begins with intrapersonal communication: you need to have a clear idea in your mind of what you want to say before you can say it clearly to someone else. At the interpersonal level, clarity involves considering your audience, as you will want to choose words and phrases they understand and avoid jargon or slang that may be unfamiliar to them.

Clarity also involves presentation. A brilliant message scrawled in illegible handwriting, or in pale gray type on gray paper, will not be clear. When it comes to oral communication, if you mumble your words, speak too quickly or use a monotonous tone of voice, or stumble over certain words or phrases, the clarity of your presentation will suffer.

Technology also plays a part; if you are using a microphone or conducting a teleconference, clarity will depend on this equipment functioning properly—which brings us back to the importance of preparation. In this case, in addition to preparing your speech, you need to prepare by testing the equipment ahead of time.

The Prepared Communicator is Concise and Punctual

Concise means brief and to the point. In most business communications you are expected to "get down to business" right away. Being prepared includes being able to state your points clearly and support them with clear evidence in a relatively straightforward, linear way.

It may be tempting to show how much you know by incorporating additional information into your document or speech, but in so doing you run the risk of boring, confusing, or overloading your audience. Talking in circles or indulging in tangents, where you get off topic or go too deep, can hinder an audience's ability to grasp your message. Be to the point and concise in your choice of words, organization, and even visual aids.

Being concise also involves being sensitive to time constraints. How many times have you listened to a speaker say "in conclusion" only to continue speaking for what seems like forever? How many meetings and conference calls have you attended that got started late or ran beyond the planned ending time? The solution, of course, is to be prepared to be punctual. If you are asked to give a five-minute presentation at a meeting, your coworkers will not appreciate your taking fifteen minutes, any more than your supervisor would appreciate your submitting a fifteen-page report when you were asked to write five pages. For oral presentations, time yourself when you rehearse and make sure you can deliver your message within the allotted number of minutes.

Figure 4.1.1: Good business communication does not waste words or time. Angelina Earley – Times! Of! The World! – CC BY-NC-ND 2.0

There is one possible exception to this principle. Many non-Western cultures prefer a less direct approach, where business communication often begins with social or general comments that a U.S. audience might consider unnecessary. Some cultures also have a less strict interpretation of time schedules and punctuality. While it is important to recognize that different cultures have different expectations, the general rule holds true that good business communication does not waste words or time.

Communicator is Ethical

The business communicator's second fundamental responsibility is to be ethical. Ethics refers to a set of principles or rules for correct conduct. It echoes what Aristotle called *ethos*, the communicator's good character and reputation for doing what is right. Communicating ethically involves being egalitarian, respectful, and trustworthy—overall, practicing the "golden rule" of treating your audience the way you would want to be treated.

Communication can move communities, influence cultures, and change history. It can motivate people to take a stand, consider an argument, or purchase a product. The degree to which you consider both the common good and fundamental principles you hold to be true when crafting your message directly relates to how your message will affect others.

The Ethical Communicator is Egalitarian

The word "egalitarian" comes from the root "equal." To be egalitarian is to believe in basic equality: that all people should share equally in the benefits and burdens of a society. It means that everyone is entitled to the same respect, expectations, access to information, and rewards of participation in a group.

To communicate in an egalitarian manner, speak and write in a way that is comprehensible and relevant to all your listeners or readers, not just those who are "like you" in terms of age, gender, race ethnicity, or other characteristics.

In business, you will often communicate to people with certain professional qualifications. For example, you may draft a memo addressed to all the nurses in a certain hospital, or give a speech to all the adjusters in a certain branch of an insurance company. Being egalitarian does not mean you have to avoid professional terminology that is understood by nurses or insurance adjusters. But it does mean that your hospital letter should be worded for all the hospital's nurses—not just female nurses, not just nurses working directly with patients, not just nurses under age fifty-five. An egalitarian communicator seeks to unify the audience by using ideas and language that are appropriate for all the message's readers or listeners.

The Ethical Communicator is Respectful

People are influenced by emotions as well as logic. Aristotle named *pathos*, or passion, enthusiasm and energy, as the third of his three important parts of communicating after *logos* and *ethos*.

Most of us have probably seen an audience manipulated by a "cult of personality," believing whatever the speaker said simply because of how dramatically he or she delivered a speech; by being manipulative, the speaker fails to respect the audience. We may have also seen people hurt by sarcasm, insults, and other disrespectful forms of communication.

This does not mean that passion and enthusiasm are out of place in business communication. Indeed, they are very important. You can hardly expect your audience to care about your message if you don't show that you care about it yourself. If your topic is worth writing or speaking about, make an effort to show your audience why it is worthwhile by speaking enthusiastically or using a dynamic writing style. Doing so, in fact, shows respect for their time and their intelligence.

However, the ethical communicator will be passionate and enthusiastic without being disrespectful. Losing one's temper and being abusive are generally regarded as showing a lack of professionalism (and could even involve legal consequences for you or your employer). When you disagree strongly with a coworker, feel deeply annoyed with a difficult customer, or find serious fault with a competitor's product, it is important to express such sentiments respectfully. For example, instead of telling a customer, "I've had it with your complaints!" a respectful business communicator might say, "I'm having trouble seeing how I can fix this situation. Would you explain to me what you want to see happen?"

The Ethical Communicator is Trustworthy

Trust is a key component in communication, and this is especially true in business. As a consumer, would you choose to buy merchandise from a company you did not trust? If you were an employer, would you hire someone you did not trust?

Your goal as a communicator is to build a healthy relationship with your audience, and to do that you must show them why they can trust you and why the information you are about to give them is believable. One way to do this is to begin your message by providing some information about your qualifications and background, your interest in the topic, or your reasons for communicating at this particular time.

Your audience will expect that what you say is the truth as you understand it. This means that you have not intentionally omitted, deleted, or taken information out of context simply to prove your points. They will listen to what you say and how you say it, but also to what you don't say or do. You may consider more than one perspective on your topic, and then select the perspective you perceive to be correct, giving concrete reasons why you came to this conclusion. People in the audience may have considered or believe in some of the perspectives you consider, and your attention to them will indicate you have done your homework.

Being worthy of trust is something you earn with an audience. Many wise people have observed that trust is hard to build but easy to lose. A communicator may not know something and still be trustworthy, but it's a violation of trust to pretend you know something when you don't. Communicate what you know, and if you don't know something, research it before you speak or write. If you are asked a question to which you don't know the answer, say "I don't know the answer but I will research it and get back to

you" (and then make sure you follow through later). This will go over much better with the audience than trying to cover by stumbling through an answer or portraying yourself as knowledgeable on an issue that you are not.

The "Golden Rule"

When in doubt, remember the "golden rule," which says to treat others the way you would like to be treated. In all its many forms, the golden rule incorporates human kindness, cooperation, and reciprocity across cultures, languages, backgrounds, and interests. Regardless of where you travel, who you communicate with, or what your audience is like, remember how you would feel if you were on the receiving end of your communication, and act accordingly.

Additional Resources

- The International Association of Business Communicators (IABC) is a global network of communication professionals committed to improving organizational effectiveness through strategic communication.
- Explore the Web site of the National Communication Association, the largest U.S. organization dedicated to communication.
- Read The National Commission on Writing's findings about the importance of communication skills in business. www.writingcommission.org/pr/writing_for_employ.html
- The National Association of Colleges and Employers offers news about employment prospects for college graduates.
- Dale Carnegie, author of the classic *How to Win Friends and Influence People*, may have been one of the greatest communicators of the twentieth-century business world. The Dale Carnegie Institute focuses on giving people in business the opportunity to sharpen their skills and improve their performance in order to build positive, steady, and profitable results.
- Purdue University's Online Writing Lab (OWL) provides a wealth of resources for writing projects.
- To communicate ethically, check your facts. FactCheck is a nonpartisan project of the Annenberg Center for Public Policy at the University of Pennsylvania.
- To communicate ethically, check your facts. PolitiFact is a nonpartisan project of the St. Petersburg Times; it won a Pulitzer Prize in 2009.

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4.2: Oral Communication in the Law Office

As a paralegal, you will have many opportunities to interact “in real time” (or synchronously) with clients, your supervising attorney and other law office co-workers, and people outside of the law office. As such, it is important to develop strong and professional oral interpersonal communication skills.

Basic Considerations for Effective Oral Communication

Although both written and oral communication involve the use of words, each has a unique set of considerations to follow to ensure effective communication. Unlike written communication, when speaking with another person you must be concerned with proper pronunciation, clear articulation, and fluent delivery of words (also known as enunciation). Moreover, a person’s understanding of what you are saying is also impacted by your tone of voice, volume, rate of speaking, and voice inflection.

Word choice/Vocabulary

In the law office, you should always choose your words carefully and use formal and professional speech. Avoid using slang, colloquialisms (words and phrases that are used incorrectly but have gained widespread use in informal conversation; for example, “down by the lake” is a colloquialism for “near the lake”), idioms (words or phrases having a meaning different from the literal meaning of the words themselves, typically established by common usage in a particular culture or region; for example “bubbler” instead of “drinking fountain”), or other unprofessional language. It is also important to avoid using specialized legal terms (also known as “legalese”) if the person with whom you are speaking is unlikely to understand them.

Enunciation

When speaking with another person, especially over the telephone or web conference, it is important to speak clearly and confidently. Make sure you know how to properly pronounce specialized or complex words that you may be required to use (for example, “larynx”). Speak clearly and evenly; do not mumble or drop syllables or letter sounds. Pause between thoughts, or when you would have used a comma, semicolon, or other punctuation in writing. Try to avoid the use of “fillers” (such as um, er, like). Finally, make sure you don’t have anything in your mouth (gum, food, toothpicks, etc.) that impacts your ability to speak clearly.

Vocalization

You must not only be aware of what words you say, but how you say them so that the person listening to you can truly understand what you mean.

- **The tone of voice**. This is commonly thought of as the “emotion” conveyed by your voice. You know from interacting with others that the same words, spoken with different tones of voice, have different meanings. One illustration of this is the way in which you interact with pets. If you angrily say, “Good dog!” the dog is likely to cower in response to the angry tone, even though the words are positive.
- **Volume**. When speaking with another person, especially over the telephone or web conference, it is important to speak loudly enough (but not too loudly) for the other person to clearly hear and understand you. One funny episode of *Seinfeld* (“The Puffy Shirt”) shows what can happen if someone speaks too quietly.
- **Speed**. Again, when speaking with another person, especially over the telephone or web conference, it is important to avoid speaking too rapidly (like Kramer after he drank too much coffee in the *Seinfeld* episode “The Maestro”), or too slowly (like the sloth who works for the DMV in the movie *Zootopia*).
- **Inflection**. In natural speech, inflection is the change of tone or pitch in speech. For example, when asking a question, your voice pitch should rise at the end of the sentence; when making a statement, your voice pitch should drop slightly lower. Some people have a habit of allowing their voice pitch to rise at the end of every sentence, which can sound unsure or timid, at best, or be confusing, at worst. Variations in vocal tone and pitch also help to emphasize certain words or phrases (when appropriate) and keep you from speaking in a monotone (which can seem robotic or just plain odd, like Ron Swanson from *Parks and Recreation*).

As with any communication skill, the best way to strengthen your skills or overcome insecurities is to practice them in low-risk environments.

Telephone Procedures and Skills in the Law Office

With the increasing popularity of text messaging, instant/direct messaging, and chat, using the telephone to speak with someone is becoming less frequent, at least in social or personal situations. In business, however, and especially in the law office, communication frequently takes place orally over the telephone. Following are some important telephone guidelines:

- **Answer the telephone**! It's understandable that many people don't answer their personal phones as a means to avoid scams, telemarketers, pollsters, and the like. However, it's unprofessional to do so in the law office. The receptionist will screen most calls before they are connected to your office phone line; they should not be allowed to "go to voicemail" unless you truly cannot be interrupted because you are engaged in another conversation with a client, your supervising attorney, or your co-worker. If the call interrupts a project you are working on, take the time to pause and "bookmark" your project before picking up the phone so you can easily return to it after taking the call.
- **Respond to voicemails with a telephone call**. While it may seem easy and convenient to respond to a voicemail with a text or email message, professional courtesy dictates that you respond to communications using the same (or equivalent) communication method that was used in the original communication. Taking the time to return a phone call shows that you respect and value the person enough to speak with them directly. It also avoids the inefficiency and ineffectiveness of multiple back-and-forth emails/text messages necessary to clarify communication or answer follow-up questions. After you have engaged in a complete discussion, you can confirm in writing what you discussed, if necessary (confirmation letters and interview summaries are discussed in later chapters).
- **Keep a positive attitude**. If your attitude toward telephone calls is that they are inconvenient or a nuisance, that attitude will likely be evident in your voice. Believe it or not, your smile can be "heard" over the telephone.
- **Use empathy and sincerity**. From the moment you answer the phone, use a genuine and sincere tone of voice. Keep your greetings and responses natural rather than scripted or generic. Connect with callers by attempting to understand their perspective throughout the phone call. Stay patient with them as you listen and answer questions. If they ask you difficult questions, or questions involving responses that would constitute unauthorized practice of law, respectfully refer them to the supervising attorney.
- **Show gratitude and appreciation**. Showing appreciation for people is an effective way to continue building lasting relationships. At the end of the call, politely thank the person for speaking with you. If you're reaching out to someone and they're taking time out of their schedule to talk to you, show your appreciation for allowing you to speak with them.

There are many resources on the Internet that can assist you with improving your basic oral communication and telephone skills. Your increased confidence and professionalism will be well worth the time spent with these resources. In later chapters, you will be introduced to oral communication skills and considerations that are especially important in the context of interviewing clients and witnesses.

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4.3: Introduction to Conducting Interviews

Paralegals frequently interview clients and witnesses. After the initial intake process has been completed and the attorney has decided to take on the client's legal matter, the first step usually is to conduct an in-depth interview of the client to help clarify what the client wants from the legal representation and collect the information needed to accomplish the client's goals. Depending on the nature of the legal matter, additional interviews may be needed. Developing interviewing skills and understanding how to employ varied techniques in specific situations is an important part of paralegal education.

Interviewing Skills

Regardless of the purpose of the interview or the identity of the interviewee (the person being interviewed), the same basic interpersonal and questioning skills apply. Most interviewees will have little if any, experience with the legal system; those with experience may have had negative experiences. Although your primary purpose in conducting the interview is to obtain needed information from the interviewee, an equally important purpose is to gain the interviewee's trust and confidence in you as a professional.

Interpersonal Skills

With both clients and witnesses, you want to demonstrate acute sensitivity toward the interviewee's feelings and experiences which may be embarrassing, frustrating, or anger-provoking. Simple things like budgeting enough time for the interview (most often an hour or more), creating a comfortable and safe environment for the interview, and acknowledging the interviewee's feelings throughout the interview go a long way toward fostering a successful interview.

During the interview, it's critical to maintain your objectivity and remain neutral at all times. This means keeping your emotions and biases – both positive and negative – in check. You will learn a lot about the client and/or witness you are interviewing, and it would be expected that you might disagree with their actions or find them unsavory. You might naturally have opinions about their truthfulness or the merit of their claims. Nevertheless, the need to uncover and objectively evaluate all of the information to be obtained during an interview demands the ability to set aside and mask your emotions and biases as much as possible during the interview.

Questioning Skills

As mentioned previously, in addition to interviewing clients, you will be asked to interview **witnesses, or persons having information directly or indirectly related to the client's legal matter, but who are not parties to the legal matter**. There are several different types of witnesses, with each type presenting unique challenges requiring different questioning techniques.

Lay witnesses are "ordinary" people with no specialized training, experience, or knowledge who can provide information about a fact or document relating to the client's legal matter. They could be the client's coworkers, friends, or acquaintances. They could be employees, customers, vendors, or others with a business relationship to the client. Their knowledge relating to the client matter is based on everyday occurrences and interactions.

- **Potential challenge**: tendency to provide information that may be irrelevant
- **Potential challenge**: willingness to talk about matters outside their actual knowledge or actual perception of an event or circumstance (making assumptions)
- **Potential challenge**: temptation to offer opinions beyond their area of expertise

Eyewitnesses are lay witnesses who saw, heard, or otherwise experienced a specific event firsthand. For example, if the client's legal matter involves an automobile accident, these would be witnesses who saw or heard the crash and its aftermath.

- **Potential challenge:** similar to lay witnesses, above
- **Potential challenge:** tendency to make logical, but false/inaccurate, assumptions about an event they witnessed. For example, an eyewitness who arrived at the scene of a motorcycle accident after the impact notices that the motorcyclist lying in the road does not have a helmet on his/her head says that the motorcyclist wasn't wearing a helmet when the

accident happened. This may be a logical assumption, but the witness, who did not see the accident happen, can't verify that fact. It is equally possible that the helmet was dislodged from the motorcyclist's head by the impact.

Expert witnesses are people who are qualified to give professional opinions regarding a topic related to the client's legal matter because they have specialized training, education, experience, or knowledge specific to that topic. An expert witness does not need to have a degree or other scholarly credentials. An experienced auto mechanic or a licensed electrician can qualify as an expert in their field of work. Because qualification as an expert is limited to the person's field of work or study, it is important to establish the basis for their expertise during the interview by gathering information relating to their training, knowledge, and experience. It is also important to remember that a person's qualification as an expert in one context does not make that person an expert in all topics. For example, an orthopedic surgeon qualifies as an expert in orthopedic surgery, but not as a financial expert; similarly, a podiatrist qualifies as an expert in the human foot, but not for matters involving the human brain.

- **Potential challenge:** use of terminology or professional jargon that is unfamiliar to you as the interviewer.
- **Potential challenge:** overly technical explanations of their opinions, or the bases for their opinions
- **Potential challenge:** may lack – or be unwilling to spend – the time necessary for you as the interviewer to obtain a complete understanding of the topic and/or the expert's opinion. As a corollary, expert witnesses often charge substantial fees for their expertise; you as an interviewer must be conscious of this cost and very efficient in the interview.

Friendly witnesses are any of the above types of witnesses who are biased against the client's adversary or sympathetic toward the client. Friendly witnesses also might be people who have a "stake" or an interest (financial or otherwise) in making sure the client is successful.

- **Potential challenge:** tendency to be "overly helpful" or worse, to provide information that they think the interviewer wants to hear but is not entirely true or accurate.
- **Potential challenge:** inclination to omit information that they think would be harmful to the client or helpful to the adversary

Hostile witnesses are any of the above types of witnesses who are biased against the client or sympathetic toward the client's adversary. Hostile witnesses also might be people who have a "stake" or an interest (financial or otherwise) in making sure the client is unsuccessful.

- **Potential challenge:** refusal to be interviewed or worse, tendency to be uncooperative during the interview. This can take the form of no-shows, one-word answers that force you as the interviewer to draw out information, or combative or threatening behavior.
- **Potential challenge:** inclination to omit information that they think would be helpful to the client or harmful to the adversary
- **Potential challenge:** may attempt to "highjack" the interview to obtain from you that may be confidential or damaging to the client

If at any point you feel uncomfortable or unsafe during an interview, you should immediately (and professionally) pause or stop the interview and inform your supervising attorney. Sometimes a momentary break is all that is needed to diffuse and reset the situation. Other times it may be necessary to bring your supervising attorney into the interview to address problematic behavior. Thorough preparation – including background checks and investigations of witnesses prior to the interview – is crucial. Having a plan for responding to challenging situations will help you handle them when and if they arise.

Questioning Techniques

In the absence of a safety issue, many of the challenges noted above can be addressed or diffused by using good questioning techniques in addition to thorough preparation. The table below describes the different types of interview questions and when you might want to use them.

Types of Interview Questions

Elements	Open-Ended Question	Closed-Ended Question	Leading Question	Hypothetical Question
Description	A broad, exploratory question that invites a narrative response	A question that requires or limits the response to a “yes” or “no” answer	A question that suggests (or leads the person to) the desired answer (typically “yes”)	A question that asks the person to assume certain facts or imagine a scenario when answering
Example	Describe your dinner at the restaurant before the accident. What did you eat, drink, and talk about?	Did you consume any alcohol while you were at the restaurant before the accident?	You consumed at least three martinis while you were at the restaurant before the accident, correct?	If a 120-pound woman drank three martinis in two hours, how long would it take before the alcohol was out of her system so that it would not affect her ability to drive?
Typical use	Gather information, explore background or experience, typically with clients or lay/eyewitnesses who are not hostile	Clarify or confirm information already provided. Keep the interview on track or redirect a talkative witness. May help draw out information from a reluctant or hostile witness	Draw out information from a reluctant or hostile witness.	Seek information and opinions from expert witnesses
Why they work well	Tend to put the interviewee at ease Encourage the interviewee to elaborate Allows the interviewee to express feelings in addition to providing facts	Helpful when you have a limited amount of time to gather important information A ”polite” way to pin a reluctant interviewee down to a needed “yes” or “no” answer	Rarely used in interviews; however, can be a helpful way to confirm the accuracy of information received	Encourages the interviewee to elaborate while providing information especially pertinent to the client’s legal matter

The Human Factor

All of these skills are meaningless if you fail to treat the interviewee as a human being deserving of dignity and respect. Some things to consider any time you interview someone:

- **Use empathy**. Merriam-Webster’s Dictionary defines empathy as “the action of understanding, being aware of, being sensitive to, and vicariously [or indirectly] experiencing the feelings, thoughts, and experience of another ….” Think about what you would be feeling if you were the interviewee. Be compassionate and acknowledge their feelings – even the uncomfortable ones. Empathy is sometimes described as “walking a mile in someone else’s shoes.”
- **Exercise sensitivity**. Asking interviewees how they would prefer you address them (by first name, last name, professional title, etc.) and then implementing that preference is part of sensitivity. Being aware of cultural, ethnic, racial, or gender differences in communication style is also critical. For example, some gestures are completely acceptable in the United States, but highly offensive in other cultures. Direct eye contact can be seen as rude in some cultures. If you do inadvertently offend the interviewee, apologize quickly, gracefully, and professionally without making excuses or minimizing the offense.
- **Avoid stereotyping**. Stereotypes can be based on a variety of attributes or circumstances, including culture, race, ethnicity, gender, educational background, marital status, and employment status/field. Regardless of the source, do not treat interviewees

on the basis of any stereotypes. Be especially careful not to come across as condescending (I'm better than you) or patronizing (you aren't very smart and/or important).

At all times, remember that you are a representative of the lawyer, law office, or legal department. Always be professional, courteous, and respectful.

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4.4: Interviewing Guidelines

The in-depth client interview should occur only after the client has officially hired the law office by signing a fee agreement and paying any required up-front fee. Similarly, an effective witness interview (someone other than the client, such as an eyewitness or an expert witness), relating to a client's legal matter should only occur after the client has official hired the law office, and then only at the direction of the supervising attorney.

Here are some things to keep in mind when conducting the interview.

Prepare an Appropriate Space

Make sure the interview takes place in a private space so that all information remains confidential. For a web-conference interview, make sure both you and the interviewee are in private spaces, and use a secure network (not public wi-fi) and a secure web-conferencing platform. If the interviewee is coming in person, reserve a private conference room at the office. Supply it with writing materials, water (or coffee, juice, or soda), and a box of facial tissues; make sure the interviewee is comfortable. Turn on "do not disturb" for electronics and other devices and take other steps to prevent interruptions. Make sure there are no other files or papers lying open in the interview space.

Formulate Responses to Interviewee Questions to Which You Cannot Respond

It's practically guaranteed that interviewees will ask questions you are ethically not allowed to answer. Having prepared responses will give you confidence to respond without feeling awkward. For example,

Example 4.4.1

"As a paralegal, I don't have as much knowledge and skill as the attorney, so I can't answer that question as it involves legal advice. I'll be sure to refer that question to the supervising attorney."

"Every case is different, so I can't predict how long the case will take, what it will cost, or what the outcome will be. Rest assured that our office will use its skills and expertise to seek the best outcome in the most efficient way possible."

Prepare Yourself for the Interview

Know what information you want/need to obtain from the interviewee. Review the information from the client's initial intake form and legal consultation; discuss with your supervising attorney any questions you have about the interview, its purpose, and what is needed. Make sure you have the appropriate interview checklist and other documentation ready before the interview begins. If you will need the interviewee to sign releases, complete those documents and have them ready for the interviewee's signature. Plan how you will take notes during the interview (for example, handwritten, or on a computer or a tablet)

Begin with Required Disclosures

- As a paralegal, you cannot give legal advice. You will be working closely with the attorney handling the legal matter and will refer all requests for legal advice to the attorney.
- Although you can provide general information about procedures, you cannot predict costs, time required, or results for their legal matter.
- You need to take detailed notes during the interview to ensure you have complete and accurate information.
- Complete and honest answers are critical to the successful representation of the client's interests; remind the client that all information will remain confidential.

Obtain Permission Before Recording the Interview

- Before recording the interview, get permission to do so from both the supervising attorney and the interviewee.
- Once you receive permission to record the interview, start the recording with the following information:
  - Name of the interviewee and any other relevant information about the interviewee (for example, mention that the interviewee is an eyewitness to the accident that occurred on a specified date)
  - State your name and the names of any other persons who are present

  - Identify the date, time, and place of the interview
  - Ask the interviewee for permission to record the interview. Wait to begin asking your questions until after you have received permission
- Keep in mind that while there are benefits to recording an interview, the downside is that sometimes interviewees feel uncomfortable or may be less open and forthcoming when they know they are being recorded. Many times, the downsides of recording outweigh the benefits.
- Even if you don't plan to record the interview, let the interviewee know you will be taking notes to share with your supervising attorney

Use Empathetic and Active Listening Techniques

- Maintain eye contact as much as possible (unless doing so would make the interviewee especially uncomfortable).
- Encourage the interviewee to speak freely and explain answers beyond one or two words (tell me about that; help me understand …).
- Repeat back portions of what the interviewee has just told you to demonstrate your listening and understanding -- this may also encourage more details from the interviewee.
- Use language the interviewee understands, and check for understanding if you are using legal terms (such as spousal support, maintenance, etc.).
- Acknowledge the interviewee's emotions and experiences before redirecting, if necessary ("I can understand why that would make you feel angry …). Take breaks when necessary to help diffuse strong emotional responses.
- Be aware of how your tone of voice, verbal language, and body language may be impacting the interviewee, particularly if the interviewee has been a victim of abuse or domestic violence.
- Do not "talk down to" or disparage the interviewee.
- Notice the interviewee's body language and other verbal and non-verbal reactions to your questions and be prepared to adjust your interview techniques if necessary.

Use Language that the Interviewee Will Understand

Avoid technical or legal jargon (sometimes called "legalese") when possible and be prepared to explain if necessary. Make sure you know enough about the interviewee to use language and terminology that take into consideration the interviewee's education level, experience with the legal system, and comfort with the English language. Check for understanding frequently by observing the interviewee's non-verbal cues, asking the interviewee to confirm understanding, and inviting questions from the interviewee.

Listen Carefully to What is Said – And What is Not Said

- Wait for the interviewee to finish answering the question and pay attention to all the details of what the interviewee has said.
- Be prepared to ask follow-up questions to obtain more specific details. Refer back to previous information as the basis for follow-up questions
- Expect the interviewee to skip around topics, or to not tell the story in chronological order. Make sure you understand the order in which events occurred.
- Clarify when necessary. If the interviewee uses pronouns (he, she, they) instead of names, you may need to ask the interviewee to confirm/use proper names rather than pronouns to refer to people.
- Pay attention to the interviewee's body language and mannerisms. Sometimes changes in posture, facial expression, or even tone of voice can signal the need for additional follow-up questions. If the interviewee seems uncomfortable, it's okay to take a break.

Make Mental Notes on the Client's Personality

During the initial legal consultation, the attorney is primarily concerned with determining whether the office can help with the client's legal matter. The follow-up interview is also an assessment of the client's demeanor and to discern potential red flags. Ask yourself whether the client

- Appears emotionally distraught or volatile, overly angry, or vengeful
- Has unrealistic objectives or expectations, or appears to want to tell the office "how to run" the case

- Answers questions inconsistently or avoids directly answering questions
- Frequently rambles wanders off topic, constantly interrupts you, or appears otherwise unable to focus
- Seems to be compromised by a mental health condition, or is under the influence of alcohol, drugs, or medications
- Is flirtatious or otherwise makes you feel uncomfortable

With witnesses, particularly those whom the attorney may need to appear in court, it is very important to assess the interviewee's demeanor and to discern potential red flags, similar to what is listed above for clients.

Wind up the Interview Appropriately and Plan for Needed Follow-Up

- Know how you will end the interview.
- Invite the interviewee to provide additional information. A good way to do so is by asking, "Is there anything else about this incident/legal matter that I haven't asked about and that you think I should know?"
- Double-check your checklist to ensure you received all of the information you need to have
- If appropriate (typically with clients), invite the interviewee to voice concerns or ask questions. Be careful that your answers don't constitute UPL!
- If interviewing a client, let the client know it is often necessary to meet more than once
- Compile a list of documents still needed from the interviewee. A pre-prepared checklist that allows you to use checkboxes to let the interviewee know which additional documentation is needed is beneficial.
- Determine how to access any necessary electronic data you may need for the client's legal matter. Find out what the client/client's family use for
  - computers/devices/phones?
  - email providers/addresses?
  - social media platforms/accounts?
  - cloud-based applications, such as Microsoft Office 365, Google Drive, etc.
- Let the interviewee know what will happen next, if applicable. Will there be follow-up interviews or information requested? If so, from whom should they expect contact and in what time frame? Will the interviewee likely be asked to appear at future court proceedings or depositions?
- Thank the interviewee for their time
- Provide contact information for you and the supervising attorney; usually, this is done by providing the person with business cards

Post-Interview Steps to Take

As soon as possible after the interview, review the notes that you took during the interview. Summarize the interview in a memo to yourself or, if requested, to your supervising attorney. Depending on the type and purpose of the interview, you should also do the following:

- **Write a brief letter to the interviewee**. In this letter
  - Begin with a sentence stating that (as appropriate) you and/or the lawyer enjoyed/appreciated meeting with the person. Include the date and location of the interview (for example, on the day/month/year at our office)
  - Briefly summarize what was discussed and/or decided during the interview as applicable
  - Inform the interviewee of the dates/times of additional actions, scheduled meetings, or deadlines for taking actions/making decisions where appropriate
- **Enter reminders** (also known as ticklers) for tasks, to follow up on needed information, or for upcoming deadlines on your calendar. If requested, add these reminders to your supervising attorney's calendar as well.
- **Meet with your supervising attorney** to discuss the next steps the attorney would like you to take, such as drafting witness statements or interview summaries.

Interviewing clients and witnesses is one of the most important tasks a paralegal can undertake. It's also a great opportunity to let your professionalism shine while you help to make the interviewee's interaction with the legal system as positive as possible.

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4.5: Introduction to Written Communication in the Law Office

Legal practitioners draft a wide variety of written documents, including letters, summaries, pleadings, motions, discovery requests and responses, legal research memoranda, briefs, and contracts, to name a few. Regardless of the type or purpose of the document you are drafting, the same writing principles and mechanics apply to all of them. The next several chapters are designed to help you lay the foundation for quality, professional legal writing.

Getting Ready to Write

As Yogi Berra once said, “The best place to begin is at the beginning.” Legal writing has three stages:

1. Pre-writing (research, planning)
2. Drafting (writing)
3. Revising (rewriting, proofreading, editing)

Expect to spend 50% of your budgeted time in the pre-writing stage, and the remaining 50% in the drafting and revising stages.

Stage 1 (Pre-Writing)

The first stage involves factual and legal research, as well as general planning of how you will draft the required document. Let’s look at each of these steps.

Factual research. Most legal writing involves drafting documents related to client services (for example, wills, contracts, or other legal forms), or documents related to answering client questions. Regardless of the type of document you are drafting, you need a factual context. For wills, contracts, and most other legal forms, those documents will inform you as to the factual information you need to complete them. Most law offices have checklists and/or templates for those types of documents. In fact, you may have performed some of this “factual research” by interviewing the client, as discussed in previous chapters. Of course, you’ll want to discuss with your supervising attorney what information is required, the attorney’s strategy for obtaining the information, and the scope of your responsibility/authority for obtaining it.

Legal research. Keeping in mind your time and cost constraints, thoroughly research your issue(s). Your supervising attorney should provide you with guidance as to the best place to start your legal research. Often, the best places are statutes, administrative codes, and jury instructions. Remember to organize your notes by legal issue, using a separate piece of paper for each legal question that requires research. Doing so will help you when the time comes to experiment with issue organization in the drafting stage.

Planning. Before setting pen to paper (or fingers to keyboard), it’s important to know the purpose, identity of the intended reader, desired tone, and required content.

- **Assess purpose.** To inform, persuade, or advise; that is the question! How will you or your supervising attorney use the document? The purpose may be to inform the attorney and others working on the file of the current state of the law, as in a legal research memorandum. Sometimes the purpose is to persuade someone to adopt your view of the facts/law, as in a trial brief or settlement demand. Other times the purpose is to advise the client of the best course of action, given the facts and the state of the law. Your assessment of the document’s purpose will affect its tone and language.
- **Assess audience.** Who is your intended reader? Your assessment of the intended audience will affect your document’s tone, language, and degree of formality. For example, if your intended reader is an adversary, your tone will be more assertive. Similarly, if your intended reader has a legal or other specialized background, you are more likely to use legal or technical jargon in your document than if your intended reader is an average layperson. Additionally, the degree of formality will be higher if your intended audience is a Judge than it would be for a long-time client (but of course, your tone will always be professional).
- **Assess tone.** What emotion do you want your document to convey? For example, a document having an informative purpose will use a neutral tone. A document having a persuasive purpose will use an assertive tone. Finally, when advising a client, a respectfully instructive tone is appropriate. The tone is conveyed primarily through word choice and sentence structure. Certain words have positive or negative connotations (or “feelings”) attached to them: there is a world of difference between a “child” and a “juvenile.”

- **Assess content.** What information must your document contain, and in what order? For simpler documents, such as letters, status memos, or transactional documents, checklists are a particularly effective means to ensure that you include all of the necessary components/information. For documents involving legal analysis, such as legal research memoranda or trial/appellate briefs, outlining each issue to be addressed is an important step.

Your supervising attorney will provide you with guidance with respect to these considerations, and the law office will likely contain templates or samples for you to use or follow. If you are uncertain about any aspect of a writing assignment, never hesitate to ask for clarification or additional guidance.

Stage 2 (Writing/Drafting)

Once the planning is complete, it's time to move to Stage 2: Drafting. In this stage, you will use your checklist/outline from Stage 1, as well as your assessments of audience, purpose, and tone to start writing. Remember, you probably have about 50% of your budgeted time to spend in Stage 2 and Stage 3 (revising).

How much time you spend drafting versus revising depends on the type of writer you are. Some people spend a lot of time on their first drafts, revising as they go, such that very little revision is needed once that first draft is complete. Others are more comfortable getting their ideas down on paper (or computer) very quickly; these people spend much more time (hopefully!) revising than drafting. Whatever your personal style, plan to spend quality time in each stage.

When you are starting your first draft, there are several things to consider to help you keep in mind what the final product should look like.

- **Format.** How should your documents look? Many legal documents require a specific format, with specialized headings and/or components. For example, letters are written on company letterhead. In Wisconsin, pleadings and other documents that are e-filed have required formats.
- **Framework.** How will you address the substance of your documents? Case Briefs and Legal Research Memoranda are based on formulas directing the order in which to address components. Letters and other legal documents use different components to ensure the proper or expected order of content. Different lawyers may use frameworks that differ slightly from the frameworks you will see in this class, but most of the components will be very similar. Before starting your first draft, make sure you know your supervising attorney's preferences.
- **Structure.** How will you compose/construct paragraphs and sentences within each component of your document? Different documents call for different types of paragraph and sentence structures.
- **Clear writing.** Which words, grammatical structure, punctuation, etc., will best convey your message? Usually, simple, direct, short words and sentences are most clear. Above all, you must remain professional. The components of clear writing are discussed in the next chapter.

Sometimes the hardest part of writing is getting started. Again, looking at samples or templates within your law office can be very helpful, especially when you don't know how or where to start.

The ultimate goal is that your readers understand what you are trying to convey to them. Whether you are writing a letter, a case brief, or a memorandum, your communication must be clear and organized. The proper formats, used at different times, will make your writing easier to read and understand. The time you spend planning, writing, and revising will pay off in the form of supervising attorneys who trust your work and then reward you with more interesting and complex work as you continue in your legal career.

Prewriting

Think about the last time you needed to write a paper. Did you sit down at your desk with your laptop, open up Microsoft Word to a new blank document, place your fingers on the keyboard, and start composing beautiful prose that flowed from your mind through your fingers onto the screen without any need to stop until you had finished writing a complete and perfect paper? Wait, does that not sound right? What about this: Did you sit down at your desk with your laptop, then get up to get a drink, then text some friends, then go to the bathroom, then return to your laptop and think to yourself, "I will never ever find a single word to write on this paper and the assignment is stupid and I just can't"?

You could also be a student who has never written a lengthy paper, so you do not have prior writing experiences to reflect on. Maybe you are returning to school after some time out of school, and you cannot remember how you used to write a paper of any length. Or maybe you do not yet see how projects you have completed also count as writing projects, or at least will benefit from the same steps that are used in the writing process. Making a presentation to a boss, generating a lab report, and filling out spreadsheets with collected data are all projects that benefit from implementing the writing process, including these prewriting steps.

One of the biggest mistakes that writers make is to fail to consider the entire writing process timeline of a document. Prewriting, that time before you sit down to put words on a page, is an often-overlooked part of the writing process. There are two parts to prewriting. The first step is to assess what you need as a writer to create the best possible environment, and the second step is to perform the preparation steps that come prior to writing.

Self-Assessment

Assessing yourself as a writer is something that you should complete in-depth every semester. You should be sure to implement what you learn about yourself as a writer for every writing project you undertake, but you will not have to complete a full assessment each time.

For a starting point, consider completing this self-assessment questionnaire from Pam Jenoff, The Self-Assessed Writer: Harnessing Fiction-Writing Processes to Understand Ourselves as Legal Writers and Maximize Legal Writing Productivity, 10 Legal Comm. & Rhetoric: JALWD 187, 192 (2013).

? Self-Assessment Questionnaire

Part One - Environmental/Atmospheric Preferences

- What is your preferred time of day to write? Why?
- What is your preferred writing environment? (Location? Activity or quiet?)
- What is your preferred writing medium? (Desktop, laptop, longhand?)
- Are there particular foods or beverages that enhance your writing experience?

Part Two - Substantive Assessment

- What are your writing strengths?
- What are your writing weaknesses?
- Describe some of your prior favorite writing experiences. Least favorite?
- Describe your writing style.
- How do you like to begin a writing project?

You should consider these questions to be a starting point to assess yourself. Other things you can consider for environmental and atmospheric preferences include what you prefer to wear when you write, whether you want to listen to music, and how much space you like to have to spread out your materials. When completing your substantive assessment, also ask yourself what evidence you have to support your strengths and weaknesses. Ask why you identify certain previous writing experiences as favorites and least favorites; what do the favorites have in common and what sets them apart?

Once you have determined what your preferences are to create an ideal writing environment, you will then need to assess whether you can meet those preferences. If you cannot, and chances are there will be times when you cannot, have a plan for what to do to cope with writing environments that are less than perfect. Consider how you can use your current environment to work best for you. If you have to write in a noisy environment, can you use earplugs or noise-canceling headphones? If you do not have access to a desk, can you use a dining room table? If your internet is unstable, can you go to a library or coffee shop?

Preparation Steps

The second part of prewriting is the series of steps that you should take prior to sitting down to put pen to paper. This part should feel familiar! However, many people forget to include these steps as vital parts of the writing process, which can result in either people not budgeting sufficient time for these steps or feeling like they are wasting time when they should be writing. Paying

careful attention to these steps of the writing process is just as important as the others! This list is an overview of the prewriting process that you should use before starting to compose your written document:

1. Read the assignment and any accompanying documents.
2. Gain mastery over the facts.
3. Develop your research plan.
4. Read the authorities you find.
5. Develop what categories you will use to determine relevancy.
6. Retain the authorities that are relevant to deciding your legal issue.
7. Analyze the remaining authorities to determine what narrow issue to use to answer your legal question.
8. Map out how you will use the authorities to support the conclusion you draw.
9. And then, write.

Conclusion

Accept that there is more to creating a quality written document than just the time spent typing away on the keyboard. Discover the set-up that works best for you and build in time to your writing process to lay the groundwork that sets you up for success.

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4.6: Writing Fundamentals

Once you've completed Stage 1 in the writing process, it's time to move on to Stage 2, the drafting stage. Here, we will review the components of clear writing: Proper punctuation, spelling, and grammar; appropriate word choice; effective sentence structure; smooth transitions; and logical organization.

> *Wait a minute. I know I've had that stuff in other courses…do I really have to learn about it again?*

Yes, yes, absolutely yes! As a legal practitioner, your primary means of communication will be written communication. Your written language is thus a direct reflection of you as an intelligent, credible professional. Poor writing is a bad reflection on you and could sabotage your career. Clear writing enhances others' opinions of your intellect and credibility; clear writing commands respect.

Compare your writing to a construction project. Your final product is the "dream house" that will become your home. The punctuation, spelling, grammar, and words are your building materials; sentence structure, transitions, and organization are your workmanship. Substandard building materials and shoddy workmanship inevitably lead to a crummy house. You wouldn't put a pit toilet in a castle, would you? Regardless of the type of toilet you install, you wouldn't put it in the kitchen or forget to connect the drain, right?

Let's take a closer look at our building materials…

Proper Punctuation

Punctuation is the material that holds your sentences and words together. The wrong nails will not properly hold the framing or might stick out, ruining other materials. Likewise, the wrong punctuation won't hold your words or sentences together, and, to the trained eye, will certainly "stick out." For example, misuse of the lowly comma can wreak havoc with a sentence: "Students who cheat and plagiarize should be removed from the program" versus "Students, who cheat and plagiarize, should be removed from the program". In the first scenario, only the cheaters will be removed. In the second scenario, all students will be removed since they are all cheaters (this is most certainly not true!).

Proper punctuation placement proclaims professionalism. Punctuation pitfalls are pernicious! Following are some of the most common "Punctuation Pitfalls" to avoid.

The comma is the workhorse of the English language. It is properly used to

- Precede a title (Mr. Jones, President; Al Johnson, Jr.)
- Write about a specific date (September 23, 2019)
- Differentiate between an abbreviation and the end of a sentence. (Andromeda, Inc., manufactures widgets.)
- Set apart a parenthetical phrase (Babies, who are helpless, require constant care.)
- Introduce a quotation. (She said, "I'll have what she's having.")
- Separate words in a series (I like bananas, coconuts, and grapes). There is disagreement over whether a comma should precede the word "and" in a series. Either include it or don't, but be consistent throughout your document.

The comma *should not be used*

- As a cure-all for run-on sentences
- Following the phrase, "as well as"
- To connect two sentences together into one sentence (this is known as a comma splice)
- To write about a non-specific date (***not*** Spring, 2020 or September 2019 – also, don't put the word "of" in these date phrases)

The Semicolon (;)

The semicolon is used when a comma isn't strong enough to get the job done. It is properly used to

- Separate two related ideas contained in one sentence, when each of the ideas is itself a full sentence. (Roses are yellow; violets are blue.)
- Precede an adverbial conjunction, such as however, therefore, nevertheless. (Dogs are great pets; however, cats require less maintenance. Every bone in her body ached; nevertheless, she finished the race.)

- Separate the series within a series. (I like bananas, coconuts, and grapes; beef, turkey, and fish; and broccoli, carrots, and corn.)

The Colon (:)

A colon is primarily used as a grand introduction. It strongly emphasizes the phrase that follows it.

- A colon should only be used following a main clause that is itself a complete sentence. (President Clinton walked up to the podium: "It depends on what the meaning of 'is' is.")
- A colon should not be used to introduce information or a series. (***Not*** "The library hours are: 9 a.m. to noon." ***Not*** "She played: soccer, baseball, and basketball.")

Quotation Marks (" ")

Quotation marks record what others have said. Make sure you understand when to use double (" ") and single (' ') quotation marks.

- Use double quotation marks
  - around a short (less than 4 lines of text) quotation.
  - around a quote within a long quote (long quotes are single-spaced, double-indented, and have no quotation marks surrounding them. Court opinions frequently use this format.)
- Use single quotation marks for a quote within a quote when the entire quote is less than 4 lines of text. (Karen said, "I heard Tom tell Jane, 'I went shopping yesterday.' We were standing outside when he said it."

? Exercise

To test your punctuation prowess, go to GrammarBook.com (opens a new window).

Capitalization, Numbers, and Time

Once again, there are so many tricky rules to follow! Here are some you will most commonly run into in legal writing:

- **Capitalization is required**
  - For proper names and titles, if the title refers to a specific person or entity (President Lincoln; the State of Wisconsin; George Jones, President and CEO of Americo; the Trial Court)
  - For the first word of a quotation, if the quotation is a complete sentence ("Haynesworth is a dirty crook," the witness stated.)
  - In a phrase using a room designation, if the room name or number is right before or after the word "room" (Today's meeting is in Room 322. The wedding reception is in the Niagara Room.)
- **Capitalization is not required**
  - For titles, if the title refers to a general category of persons or entities (All of our presidents have been men. There are fifty states in the United States of America. Trial courts must make specific findings of fact.)
  - For the first word of a quotation, if the quotation is not a complete sentence ("Haynesworth," the witness stated, "is a dirty crook.")
- **Numbers should be written out as words when**:
  - The number is ten or less
  - For approximations (The paper route is approximately twenty miles long.)
  - Writing about fractions that are not preceded by a whole number ("The meeting starts in one-half hour" ***not*** "The meeting starts in ½ hour")
  - Writing about decades or centuries (The twentieth century; The roaring twenties)
- **Use numerals when:**
  - The number is 11 or higher
  - Writing about fractions that are preceded by a whole number; use a space after the whole number (1 ½, ***not*** 1½, or one and one half)
  - Using numbers in a series (Jimmy ate 2 apples, 11 grapes, and ½ pound of watermelon.)

- Writing about dimensions, measurements, temperatures, percentages, and page numbers (The room is 12 by 15 feet; yesterday's temperature was 85 degrees; see the sample on page 1002; Unemployment is down 2 percent) – notice that the measurements (feet, degrees, percent) are written out and not abbreviated.

- **When writing about time:**
  - Write out the numeral if using "o'clock", and don't use "a.m." or "p.m." (The hearing begins at eleven o'clock.)
  - Use numerals and either "a.m." or "p.m." if you don't use "o'clock" (The hearing begins at 10:30 a.m.)
  - Use only the numeral if writing about a time exactly on the hour ("The meeting will end at 11 a.m." ***not*** "The meeting will end at 11:00 a.m." The reason for this rule is that :00 is actually an abbreviation for o'clock.)

Proper Spelling

Always run spell-checker on everything you draft, whether it's a document, Excel workbook, PowerPoint presentation, etc.! While you're at it, **make sure your spellchecker is checking words in ALL CAPS (in MS Word, click file>more>options>proofing, uncheck "ignore words in UPPERCASE").**

When you run spell-checker, be careful! Look closely at every error that is flagged as a spelling error. It's so easy to go quickly through and "ignore" when a person's name comes up as a misspelling. If a name comes up as a misspelling and you've spelled the name correctly, it's OK to click "ignore all" – you can even add the name (and other legalese, such as per stirpes) to the dictionary.

After you run spell-checker, run "dumb-checker" – that's your brain. Although spell-checker is constantly improving, it won't catch all of the errors involving missing words (or missing letters in words). Spell-checker also might not catch homonyms (words that sound alike but are spelled differently and have different meanings). Beware these tricky "evil twins!"

Word	Meaning	"Twin"	Meaning
effect	the result (a noun)	affect	impact (a verb)
principle	rule, standards, primary	principal	the "main man" $ in a trust/investment
lead	as a noun, it's a metal	led	past tense of the verb "lead" (She led the way)
elude	escape, dodge	allude	suggest, refer to
waiver	giving up something	waver	being indecisive
incite	start, provoke	insight	perception, knowledge
weather	the conditions outside	whether	if
to	a preposition (give it to me) part of an infinitive (to run)	too two	also the number 2
ensure	make definite	insure	protect against loss
choose	rhymes with chews present tense verb (choose me!)	chose	rhymes with hose past tense verb (he chose me)
loose	rhymes with moose adjective (the loose moose)	lose	rhymes with booze verb (drive with booze and you will lose)
their(s)	possessive of "they"	there's	there is
your	possessive of "you"	you're	you are
its	possessive of "it"	it's	it is

Of course, there are many others, so it's important to slowly and carefully proofread for spelling. If you're unsure, take the time to look up the word in a dictionary. The time you spend doing this will be worth it. Mistaken use of homonyms can be fatal to an otherwise excellent piece of writing.

Proper Grammar

Grammar is crucial to getting your ideas across accurately. Improper grammar can result in the meaning of your sentence being lost or changed. There are many components to proper grammar; only a few are highlighted here. Spell-checker can help with grammar too, but it's not perfect. Here are some common grammar gaffes:

Adjective/Adverb Confusion

Both adjectives and adverbs give us additional information about something, adding context and interest to your sentence. However, there are some important differences.

- Adjectives describe nouns (size, color, characteristics).
- Adverbs describe verbs, conditions, or reasons; sometimes they answer the question of "how." Typically, adverbs end in "ly." Notice the differences below:
  - A quick fox (adjective). A fox runs quickly (adverb).
  - Use clear writing (adjective). Writing clearly is important (adverb).

Pronouns

These are designed to replace a noun and can be very troublesome! Make sure you are using the correct pronoun (and spelling it correctly), based on what part of the sentence in which it appears.

- Use subject pronouns in the subject part of the sentence (Who or what is doing the action in the sentence)
  - "He and I went to the store." (***not*** "Him and I went to the store;" also not "Him and me went to the store.") When in doubt, write it separately before combining pronouns: "He went to the store." (We'd never say, "Him went to the store.") "I went to the store." (We'd never say, "Me went to the store.")
  - "Who is that masked man?"
  - "This is the man who was in jail." (Two sentences would be "This is the man. He was in jail." He and who are both subject words)
- Use object pronouns in the object part of the sentence. Use them when they receive the action, or after a preposition (such as to, for, from, under, etc.)
  - "Billy hit me/him/her/us/them."
  - "She gave the ball to me/him/her/us/them."
  - "Give me/him/her/us/them the ball."
  - "This is the man whom I mentioned earlier." (Helpful hint: two sentences would be "This is the man. I mentioned him earlier." Him and whom are both object words)
  - "To whom are you speaking?"
- Use possessive pronouns to show possession. (**NOTE**: **none of the possessive pronouns uses an apostrophe**!!)
  - "His dog is cute. Its name is Fido."
  - "Whose dog is this?"
- Use reflexive pronouns only if you have a subject that relates to the pronoun
  - "I ask myself this question all the time."
  - "He gave himself a raise."
  - "If you have any questions, feel free to contact Attorney Ramsdon or me." ***not*** "If you have any questions, feel free to contact Attorney Ramsdon or myself." (Again, think of two separate sentences. "If you have any questions, feel free to contact Attorney Ramsdon." and "If you have any questions, feel free to contact me." You wouldn't tell a client, "If you have any questions, feel free to contact myself."

Here's a chart that can help you choose the correct pronoun:

Subject, object/preposition, possessive, and reflexive pronouns

Subject	Object/Preposition	Possessive	Reflexive
I	Me	My/mine	I … myself
You	You	Your/yours	You … yourself
He/she/it	Him/her/it	His/hers/its	He … himself She … herself It … itself
We	Us	Our/ours	We … ourselves
They	Them	Their/theirs	They … themselves
Who	Whom	Whose	(not applicable)

Once you decide how your noun or pronoun is being used (or one of many pronouns in a phrase), you can substitute virtually any pronoun in the same column. Choose the one that is easiest for you to write correctly.

Additional problems can arise when substituting a pronoun for one or more nouns or names.

- Substitute singular pronouns for singular nouns or a single name:
  - "Each child should know his or her phone number." ***not*** "Each child should know their phone number."
  - "Schneider Corporation should fairly pay its employees." ***not*** "Schneider Corporation should fairly pay their employees."
- Substitute plural pronouns for plural nouns or multiple names
  - "All children should know their phone number."
  - "Schneider Corporation and McDonald's Corporation should fairly pay their employees."
- Don't substitute a pronoun for a noun or a person's name if the result is a vague meaning.
  - She loaned her her prom dress. *I have no idea what's going on here!*
  - Tiffany loaned Justina her prom dress. *OK, now I know who is loaning whose dress to whom.*

Verbs

These action words present many potential traps for the unwary. Regular verbs, irregular verbs, and all the possible verb tenses (would you believe there are **24** of them?) make English one of the most difficult languages to learn. Watch out for these common verb usage traps:

- Singular/plural subject-verb disagreement (when there is only one subject of the sentence)
  - A singular subject requires a singular verb
    - These nouns are singular: corporation, jury, class, anyone, each, either, everybody, everyone, neither, nobody, none (usually), no one, somebody, and someone
    - "The jury is required to answer all of the verdict questions." ***not*** "The jury are required to answer all of the verdict questions." (even though a jury is made up of multiple people, the sentence refers to a single group).
    - "A dog makes a fine pet."
  - Plural subjects require a plural pronoun and a plural verb
    - "The jurors are required to answer all of the verdict questions." ***not*** "The jurors is required to answer all of the verdict questions."
- Singular/plural subject-verb disagreement (when there are multiple subjects in the sentence)
  - When all of the subjects are singular, the verb form is dictated by the "connector" between the subjects:
    - "Or" is disjunctive (or separating). That means multiple singular subjects require a singular verb:
      - "A dog **or** a cat makes a fine pet." ***not*** "A dog or a cat make a fine pet." If you were to write two separate sentences, you would write, "A dog makes a fine pet. A cat makes a fine pet."

    - "And" is conjunctive, bringing together multiple subjects and making them a plural subject requiring a plural verb:
      - "My cat and dog are good companions." ***Not*** "My cat and dog is a good companion."
  - When you have combinations of singular subjects and plural subjects connected by the word "or," the subject closest to the verb dictates the verb form:
    - The cat (singular) or the dogs (plural) are (plural) responsible for the damage to the furniture.
    - The dogs (plural) or the cat (singular) is (singular) responsible for the damage to the furniture. (Grammatically correct, but awkward to read. The first version of this sentence is better)
- Split infinitives – don't put an adverb between the parts of an infinitive verb ("To run quickly" ***not*** "to quickly run")

Prepositions

A preposition is a word or group of words used before a noun, pronoun, or noun phrase to show direction, time, place, location, spatial relationships, or to introduce an object. Some examples of prepositions are words like "in," "at," "on," "of," and "to." Here are a few tricky rules:

- To refer to one point in **time**, use the prepositions "in," "at," and "on." **Do not use "for!"** (Reja had to be at work at 8 a.m. ***not*** Reja had to be at work for 8 a.m.)
- **Do not end a sentence with a preposition.**
  - "The class in which I am currently enrolled" ***not*** "The class I am currently enrolled in."
  - "To whom am I speaking?" ***not*** "Who am I speaking to?"

Contractions

Because they are informal writing, it's usually best to avoid using contractions in legal writing. Because you sometimes need to use them when writing a direct quotation, knowing how to properly write contractions is important. Here is a contraction table that might help you:

Examples of contractions

Original	"To be" (am, is, are)	"Have"	"Would"
I	I'm (I am)	I've	I'd
You	You're (you are)	You've	You'd
He/She/It	He's She's It's (it is)	He's (he has) She's (she has) It's (it has)	He'd She'd It'd
We	We're (we are)	We've	We'd
They	They're (they are)	They've	They'd
Who	Who's (who is)	Who've	Who'd
Where	Where's (where is)	Where've (where have)	Improper – often "where'd" = where did
What	What's (what is)	What've (what have)	Improper – often "what'd" = what did
Why	Why's (why is)	Why've (why have)	Improper – often "why'd" = why did
How	How's (how is)	How've (how have)	Improper – often "how'd" = how did

One more note: **"Would of" is never correct!** The correct way to write out the contraction for "would've" is "would have." The same is true for should've and could've.

Modifiers

These are words that give us additional information about words, typically either nouns or verbs. One thing to watch out for is the placement of modifiers within your sentence. Modifiers are descriptions of the word/words closest to them. A misplaced modifier can change the meaning of your sentence in unintended ways.

- A “female former attorney” = a female who once was an attorney, but no longer practices law
- A “former female attorney” = an attorney who once was a female and has transitioned to being a male (and continues to practice law)

Another tricky modifier is “only.” The following sentence is ambiguous and could have several meanings: “Liu agreed only to lend her sister money.” Here are the potential meanings:

- Liu agreed to lend money to her sister and no one else.
- Liu agreed to lend her sister money and nothing else (not clothes).
- Liu agreed to lend money, but not to give it as a gift.

To fix the sentence, either use one of these three options or place the word “only” right next to the word to modify (only her sister… only money … only to lend)

? Exercise

To find out whether you are a grammar guru, take a practice test at GrammarBook.com (opens in a new window).

Appropriate Word Choice

Words are the basic building blocks in your document. High-quality building blocks (words) are concise, concrete, and accurate. This is not to say that a writer never wants to use words that are not concise or concrete! Sometimes, if you want to de-emphasize something that is harmful to your client, you want to use words that are less concise or concrete (but accurate nonetheless). The important thing is to make a ***conscious decision*** about the words you use.

Concise Words

Words are concise if they are direct and clear.

- Avoid using flowery language or unnecessary words that don’t add meaning to the sentence

Examples of wordy and concise phrases and words

Wordy	Concise
In order to	To
Whether or not In the event that	If or whether (We will play soccer regardless of whether it is raining. He was unsure if we would play baseball next weekend.)
Enclosed please find	Enclosed is/are
In accordance with	Under

- Avoid jargon or “legalese” unless it’s absolutely necessary to the idea you are expressing or the document you are drafting
  - Jargon should be used only with experts in the related field (when writing to a doctor, refer to the larynx, rather than the voice box)
  - Legalese to avoid: phrases using “said” as a substitute for “the” (as in, “said plaintiff”); heretofore, wherefore, aforementioned.
  - Avoid Latin phrases unless you are writing to an attorney or judge (and even then, be careful!)

Do not use this ...	If this will work as well
Accord	Give
Bequeath, Devise	Give
Per annum	Yearly, each year
Forthwith	Immediately
Party of the first (or second) part	The party's name or title
Utilize	Use
Inter alia	Among other things
Arguendo	For the sake of argument

Concrete Words

When writing descriptions of events or things, it's important to help the reader to visualize an event or action. Sometimes we call these "picture words." Like actual concrete, we want our words to be strong and effective, rather than weak. Below are some side-by-side comparisons to help illustrate this point. Notice how the words on the "concrete" side allow you to create a detailed picture in your mind of what is being described, while the words on the right provide too little information for a detailed picture.

Examples of sentences using concrete/powerful words and weak/vague words

Concrete/Powerful	**Weak/Vague**
His arm was severed when it became caught in the threshing machine.	He injured his body part in the device at issue.
It rained every day for a week.	A period of unfavorable weather set in.
The defendant boasted that he knew where the witness was secreted	The defendant stated he knew where the witness was.

Examples of sentences using concrete/positive words and weak/negative words

Concrete/Positive (what is/was)	**Weak/Negative (what isn't/wasn't)**
He usually came late to class.	He did not often arrive on time to class.
The politician was dishonest.	The politician was not truthful.
She forgot/failed to do her homework.	She did not remember to do her homework

Accurate Words

In legal writing, we need to use words that convey exactly the intended meaning (both dictionary meaning and "emotional" meaning).

Sometimes simple is better. What good is a word if your reader really doesn't understand it?

- "inapposite" is a very powerful word, but few people outside the legal field know what it means. It is an adjective meaning that an example or legal authority is completely irrelevant and inapplicable
- "apropos" is also a powerful word, but it is often misused as a synonym for "appropriate." Apropos means "having the characteristics of" or "an example of": "The team's inability to produce any offense in the playoffs is apropos of the entire season." (this problem has nagged the team all season long)

Be aware of the connotation (or emotional baggage) attached to certain words and choose your words accordingly. Here are some examples of words that have the same basic meaning, but very different "emotions" attached to them:

- Child – juvenile
- Affordable – cheap
- Determined – stubborn

Watch out for slang and colloquialisms

- Ain't, cop, and other slang aren't used in legal writing unless you are directly quoting someone who used those words
- Colloquialisms (words with "local flavor") such as y'all and bubbler (instead of drinking fountain) also aren't used in legal writing unless you are directly quoting someone who used those words

Watch out for "made up" words or usage that is always incorrect

- "**I seen**" is incorrect – instead, write "I saw" or "I have seen"
- **Irregardless** is not a word!
- Other incorrect words**:** alright, anyways, a lot

Don't abuse your thesaurus! A thesaurus is a useful tool to help you avoid repeatedly using the same words or to help you find more accurate words. However, not all synonyms are created equal; don't just substitute a synonym for a word without being certain of its exact meaning. Following are some examples of substitutions to be used with caution:

Examples of words with synonyms that should be used with caution

Word	Meaning/Usage	"Synonym"	Meaning/Usage
Guilty of	Used with crimes He was found guilty of larceny.	Liable for	Used with civil matters. He was found liable for damages.
comprise	include, make up of A jury is comprised of 12 persons.	constitute	add up to Seven days constitute one week.
imply	suggest, indicate Her hesitation to answer implies guilt.	infer	assume, deduce One might infer from her hesitation to answer that she is guilty.
apprise	notify, inform He was apprised of the situation.	appraise	estimate value, opine Please appraise these diamonds.
disinterested	neutral Service of process should be completed by a disinterested person.	uninterested	bored, uncaring I am uninterested in hearing about that event.
prescribe	to order Doctors prescribe medication.	proscribe	forbid, prohibit Criminal laws proscribe certain conduct.
Different from	used to show contrast, typically between nouns This situation is different from the one we had yesterday.	Differently (than)	used to show contrast (typically other than nouns) Let me know if you conclude differently. Berta saw things differently than Jonas.

Effective Sentence Structure

Sentence structure provides the framework for your words. The best building materials are useless if they aren't put together properly. There are a few things to consider when choosing your sentence structure.

Active Voice

As a general rule, the subject (or main idea/actor) comes first, with the verb (action) as close to the subject as possible, and the object (where the action is going) following the verb. This is known as subject-verb-object (s-v-o) structure, or active voice. The active voice is preferred; the subject is doing the action described by the verb, rather than having the action done to it.

Examples of sentences in active voice and passive voice

Jade hit the ball. S V O	Active voice. The subject, Jade, does the verb action, hitting.
The ball was hit by Jade. S V O	Passive voice. The subject, the ball, is receiving the verb action, hitting. If you see the word "by" in your sentence right after a verb, it's likely is passive voice.
Mary was arrested yesterday. S V No object/actor	Passive voice. The subject, Mary, is receiving the verb action, arresting. We know a police officer was the actor. Active voice would read, "The police officer arrested Mary yesterday."
The parties entered into mediation.	Passive voice. The verb, mediate, was turned into a noun (nominalization – look for -tion, -sion, or -ment endings to words). Active voice would read, "The parties mediated."

HOWEVER: This is not to say that a writer never wants to use passive voice! Sometimes, if you want to de-emphasize something that is harmful to your client, you want to use passive voice. I want you to make a ***conscious decision*** about the sentence structure you use.

Sentence Fragments

If a sentence does not contain a subject or a verb, it is a sentence "fragment." Sometimes sentence fragments are tricky to identify.

- Whether a person is liable for dog bite injuries. This looks like a complete sentence, but it isn't!
  - The word "whether" is a conjunction (a connector, like and, but, or).
  - This sentence is incomplete because we don't know what happens next. Substitute the word "if" and the incomplete thought becomes clear: "If a person is liable for dog bite injuries."
  - Make the sentence complete by adding an active verb and an explanation: Whether a person is liable for dog bite injuries requires examination of the totality of the circumstances.
- Adverb clauses also are not complete sentences, for similar reasons – we don't know what happens next. The following are all sentence fragments:
  - Even when I'm sick.
  - When you have finished working.
  - Whenever you like.
  - Wherever we prefer.
  - Since I returned from vacation.
  - As she was not there.
  - Since you always do well.
  - Before entering high school.

Run-On Sentences

Too many thoughts, topics, or ideas with only a period at the end constitute the classic run-on sentence. Many times, these are multiple sentences connected with commas (a comma splice) or no punctuation at all. A good rule of thumb is that if your sentence

runs longer than two full lines in a document, look at it carefully to determine whether there are multiple sentences covering multiple ideas that should be split into multiple sentences with appropriate transitions.

Parallel Construction

Just like you want to use the same size lumber throughout your house frame, you want to use a similar structure for nouns, pronouns, verbs, or articles for similar ideas. Parallelism involves:

- Consistency in series as to nouns
  - Last week we studied cultures of the French, the Spanish. and the Germans (all start with “the”).
  - I like bananas, coconuts and grapes (all fruits); corn, carrots and beans (all vegetables); and beef, pork and chicken (all meats).
- Consistency in series as to verbs
  - Diedre was not certain her call was being recorded, but she suspected it may be recorded (Verbs are all past tense. Don’t switch from past tense to present tense or future tense).
  - We discussed hiring, training, and supervising new employees (all -ing verbs).
- Consistency when using correlative or comparative expressions
  - both…and; not…but; not only…but also; either…or; etc.) should be followed by the same grammatical construction
  - The ceremony was both long and tedious (one adjective on each side of both/and).
  - The ceremony was not only long but also tedious.
  - ***Not*** It was both a long ceremony and very tedious.
- Patterns in writing, in which similar ideas are expressed with similar words. An excellent example of good parallelism is the Beatitudes, which consistently uses a “blessed are ... for they shall” structure.

Smooth Transitions

The blueprint shows how all of the materials come together and relate to each other to make the building. Transitions between sentences and paragraphs give your document “flow” and tell the reader how the ideas are related. Transitions also signal the reader when a new idea is being introduced. Imagine the foreman gives you a bunch of building materials and tells you to build a castle, without giving you directions as to how to put the materials together. If you fail to use transitions in your document, you leave the reader with no direction as to how to put your ideas together. Your ideas will come across much better if the reader doesn’t have to work hard to understand them.

- Transitions between sentences tell the reader how the two sentences are related
- Transitions between paragraphs tell the reader how the two topics are related
- Transitions also let the reader know when you are discussing a new topic

Here are some examples of the different types of transitions you can use:

Examples of transitional words and phrases

Similarity	Contrast	Combinations	Chronology	Summary
Similarly Similar to Likewise Like In the same way	In contrast Unlike However On the contrary Contrary to On the other hand	Additionally Also Moreover Furthermore	First Next Finally Lastly	Therefore Thus Hence In Conclusion Ergo

Exercise

For more ideas for using transitional words and phrases, visit The Writing Center at UW-Madison's website (opens in a new window).

Logical Organization

The floor plan, layout, and flow of your dream house need to make sense. When you walk through the front door of your dream house, you don't want to walk into the bathroom. The same is true for the overall flow of your writing.

- Make sure the order in which you discuss topics makes sense. Some possible ways to organize:
  - Chronological (tell the story from beginning to end)
  - Cause/effect (it's usually best to discuss cause before effect/result)
  - By claim/transaction (discuss each legal claim or transaction completely before moving on to the next one)
  - By party/person (discuss each party's role in the legal claim or transaction completely before moving on to the next one)
- Finish your discussion of one topic before going on to the next topic. Going back and forth between topics, or jumping back to previous topics, can be very confusing.
- Other common problems to avoid include
  - improper cause and effect (I sneeze every time I go to my friend's house, so I'm allergic to my friend);
  - wrong proof, right conclusion (improper data or facts are used to reach a conclusion – all diamond rings are engagement rings);
  - right proof, wrong conclusion (other conclusions may follow from the facts – Lassie is a girl's name, therefore all dogs that portrayed "Lassie" were girls. This conclusion is incorrect.)

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4.7: Revising Your Writing

Once your ideas are down on paper, it's time to move to Stage 3: Revising. In this stage, you will refine the presentation of your ideas. The idea is to make sure your writing doesn't get in the way of the reader's comprehension of your message. **No matter how good your first draft appears, you should spend time revising it**!

Revising has two elements. Usually, people are strong in one element and may struggle a bit with the other element. When deciding where to start your revisions, think about how you would answer the following questions:

- Do you work more effectively if you first tackle difficult tasks and then move on to tasks that are more "in your wheelhouse?" Or does it work better for you to build confidence with tasks that come naturally to you before moving on to challenging tasks?
- Are you detail-oriented or big-picture-oriented?

Regardless of how you answered those questions, be sure to spend quality time in both elements of revision: (1) Micro-editing (making sure the details are correct) and (2) Macro-editing (making sure the document "as a whole" is correct). Here, we will look at the two components involved in proofreading and learn some tips on how to put the final "polish" on our product.

Micro-Editing

Detail-oriented people typically experience micro-editing as a strength. It's like putting the final touches on your home construction project. This part of the project is a combination of artistry and skill. You need to catch all the mistakes!

- Check for all components of clear writing (punctuation, capitalization, numbers, time, spelling, and grammar).
- Review word choices and eliminate unnecessary words; make sure the words are appropriate to your tone and audience.
- Look for typographical errors in dates, measures, and names.
- Check all details for accuracy.
- Run spell-checker – carefully and slowly
- Run "dumb-checker" – there is no substitute for human eyes and brains.
- Check citations. Here are some tips for effective citation-checking:

    1. Mark all citations: Use a highlighter, red pen, or other method
    2. Ask your supervisor for specifics: Where is this document going to be filed/used? Does your supervisor or the judge prefer underlining or italics?
    3. Know the Rules: Familiarity with *The Bluebook* and local court rules is key. For local court rules, ask a law librarian or the clerk of courts, or check the court's home page on the Internet.
    4. Document your corrections: Write down the page number of *The Bluebook* that supports your corrections.
    5. Develop a system to track the citations you have corrected, in case you are interrupted during your cite-checking process.
    6. Focus on the task at hand: Don't attempt to proofread for spelling, grammar or other items while cite-checking. If you notice a problem, highlight it for correction at a later time.
    7. Be thorough: Check ***all*** citations in the document, not just those appearing in the argument or discussion section.
    8. Be consistent: Make sure titles and signals (such as *supra, id., see*) are always either underlined or italicized (not both). Make sure abbreviations are consistent.

Among other things, legal writing is characterized by the need for

- Precision/clarity – words matter! To many of us, the word "drinking" in certain contexts means consuming alcohol (Were you drinking prior to the accident?). However, a person can also drink juice, coffee, water, and other things, so the word "drinking" by itself is imprecise.
- Correct punctuation – misplaced commas can change meaning! There's a big difference in the meaning of "Let's eat, Grandma!" and "Let's eat Grandma!"
- Accuracy – make sure your sentence says exactly what you mean it to say.
- Conciseness – believe it or not, some types of legal documents have word limits. Also, your reader is much more likely to understand and/or be persuaded by sentences, arguments and documents that are not unnecessarily wordy. More is not always better

Exercise 4.7.1

Read more about concise legal writing here (opens in new window)

Macro-Editing

Big-picture-oriented people typically experience macro-editing as a strength. It involves looking at the "big picture" to make sure you've used the proper tone, that your document is logically organized with smooth transitions between ideas and paragraphs, that it contains all legally required components, and that it is internally consistent. It's like the "final walk through" in your construction project, when you ensure everything was built to specifications and the whole project and its components are consistent and work well together.

- Check for effective sentence structure.
  - Are the sentences clear and easy to read?
  - Are the sentences neither too long nor too short?
- Check for smooth transitions.
  - Do you effectively signal the reader when you are changing topics?
  - Is it clear how sentences, paragraphs, and topics relate to one another?
  - Is the document as a whole easy to read? Does it flow well?
- Make sure the document's tone matches its purpose and audience.
- Use professional writing at all times
  - Avoid informal words, contractions, slang, and colloquialisms.
  - Don't "personalize" your writing with phrases such as "I believe" or otherwise using the first person "I."
  - Don't use exclamation marks, all caps, or a lot of boldfacing.
  - Your writing should never be sarcastic, hostile, or condescending.
- Review organization. Is it logical? Does the ordering of topics make sense?
- Check for internal consistency throughout the document.
  - Does the document, as a whole, make sense?
  - Later parts of the document should not conflict with earlier parts of the document.
- Make sure the document is complete.
  - Does it have all of the required components?
  - Did you include all of the important facts and legal provisions?

Revision may seem like a tedious waste of time, but it is one of the most important steps in preparing a well-written document. The tricky thing about revising is that it's very difficult to catch errors in your own work. Your brain knows what is supposed to be there, and it will "fill the gaps" with missing words and unclear meaning. To combat this, set your document aside for a few hours before doing your micro- and macro-editing.

After you have finished both micro- and macro-editing, read your document out loud – slowly.

As a legal practitioner, your primary means of communication will be written communication. Don't skip or gloss over this stage! Editing is a difficult skill to learn, and the best writers are not always the best editors. Remember, the client is paying for effective legal writing. More importantly, your writing should come across as professional and intelligent as you are.

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4.8: Introduction to Legal Correspondence

Legal correspondence is perhaps the most common type of document you will draft as a paralegal. It is also the type of document that presents the highest potential for violations of the *Model Rules of Professional Conduct* and prohibitions against unauthorized practice of law (UPL). Thus, it is critical to be mindful of the purpose, intended reader, and content to ensure the correspondence is signed by the correct person. Understanding the expected components of legal correspondence is also an important part of making sure the communication effectively serves its intended purpose.

Formatting Components of Legal Correspondence

Regardless of the purpose, recipient, and person signing it, legal correspondence should contain the components discussed below.

Official Letterhead: This is the name, address, and other contact information for the law office or attorney sending the letter. Most law offices have letterhead templates that should be used.

Date: The date appears below the letterhead and should be the date on which the correspondence is transmitted to the recipient, whether by U.S. Mail, facsimile, or hand delivery. Because the date may establish when the recipient had legal notice of a particular event or the contents accompanying the correspondence, accuracy is critical. Backdating (putting an earlier date on the correspondence than the actual date on which it was delivered to the post office, for example) is unethical. If U.S. Mail is being used, the date of the correspondence should match the date stamped on the official postmark on the outside of the envelope. Thus, when dating correspondence, you must be aware of the time the post office closes and dates on which it is closed (for example, Sundays and Federal holidays).

Address Block: This part of the letter indicates to whom the original letter is being sent, who is also sometimes referred to as the primary recipient. The address should include:

- the person's legal first and last name. It is extremely important to double-check the proper spelling of the person's name! This is not only a matter of courtesy, respect, and professionalism, but is also vital to avoiding a breach of confidentiality resulting from the wrong name being placed on the envelope.
- if applicable, the person's appropriate suffix (Jr., Sr., I, II, III, etc.).
- professional title or abbreviation, if applicable. When using professional titles or abbreviations, use them either before or after the person's name, but not both (for example, Dr. Yuri Zhivago or Yuri Zhivago, M.D., but not Dr. Yuri Zhivago, M.D.). As with the spelling of the person's name, double-check the proper professional abbreviation/title.
- if you are writing to the person as an employee or representative of a business, include the person's job title and the name of the business.
- mailing address and/or post office box number. Again, it is crucial to ensure the accuracy of street numbers, post office box numbers, and zip codes. Confirm that you have correctly spelled street names and used accurate suffixes or types (st., blvd., ln., ter., cir., etc.)! Inaccurate mailing addresses also can result in a breach of confidentiality.

Delivery Method: If the correspondence is being sent by regular U.S. Mail, do not indicate any delivery method. All other delivery methods (certified mail, registered mail, facsimile, hand delivery, FedEx) should be noted either above the address block or flush right on the same line as the recipient's name.

Reference (or RE:) Line: The purpose of this component is to inform the recipient about the matter discussed in the correspondence. Typically, it includes a brief description of the topic (for example, Personal injury claim), as well as any other identifying information that will help the recipient quickly place the correspondence in context (for example, date of injury, court case name, and docket number, the recipient's file number or claim number, or other helpful information; many law offices also include their internal file number).

Greeting Line (or Salutation): This is the greeting to the primary recipient. Because legal correspondence is a professional means of communication, usually you will use the following format: "Dear [professional title, if applicable] [first name] [last name]" and a colon (:) is used at the end of the greeting line. Unless the recipient has specifically identified him/herself as "Mr., Mrs., Ms., or Miss" it is generally best to avoid using these titles in front of the recipient's first name.

Opening: The first few sentences of the correspondence should place the correspondence in context for the recipient. Although the content of the opening will vary depending on the purpose of the correspondence, it should always be written professionally and

communicate context effectively. For example, it may refer to a previous meeting, transaction, or other communication. Avoid stereotypical statements such as, “I am writing because …”, “This letter is in response to …”, “Enclosed please find …” When writing to someone other than the client, start by identifying the law office’s or the attorney’s relationship to the client (for example, “[Client name] has retained our law firm to pursue damages for personal injuries suffered on [date of the accident].”

Body: This is where the purpose of the correspondence is stated clearly, concisely, accurately, and completely. Include all of the information the recipient needs to be able to understand the correspondence and to comply with any requested action. Make sure requested actions are specific and include instructions and a reasonable deadline for completion, if applicable. Use correct spelling, grammar, and punctuation; avoid slang, informal language, or inflammatory language. When writing to someone other than the client, take care to remove privileged or confidential information or information that might be harmful to the client’s legal matter.

Closing: The final paragraph should professionally thank the recipient and, if appropriate, invite further communication. As with the opening, the content of the closing will vary depending on the purpose of the correspondence. Here are some examples of typical closings:

- Thank you for your consideration. If you require further information regarding this matter, please contact Attorney [Attorney name].
- Thank you for your prompt attention to this matter.
- If you have any questions or concerns regarding this matter, please contact me or Attorney [Attorney name].

Signature Block: This part of the letter identifies the name, title, and business affiliation of the person signing the letter. The appearance of the signature block is usually dictated by the law office, and typically contains the following components:

- **“**Sincerely,” or “Very Truly Yours” or some other professional closing line
- If applicable, the business name of the law office/attorney
- A line for the person’s signature
- The signor’s name and job title (for example, Walter Raleigh, J.D.; Denny Crane, Attorney at Law; Jerry Espenson, Esq.). If the signor is a non-attorney, the job title is required (Vicki Voisin, Paralegal).

Enclosure Notation: If you are sending additional documents with the correspondence, a line that states, “Enclosure” or “Enc” should be included. Some attorneys also like to include a brief description of the enclosures.

“Copy Fields”: If someone other than the primary recipient is receiving copies of the correspondence and/or its enclosures, this is indicated with cc (courtesy copy) or bcc (blind courtesy copy). When and how these fields should be used is discussed below.

Signatory/Writer/Typist Notations: Although the use of these notations is becoming less common, some attorneys prefer to include them. These notations identify who drafted the correspondence and who typed it.

Here is an example letter with these components labeled.

Crane, Poole & Schmidt, S.C.
500 Boylston Street
Boston, MA 02116

letterhead

March 15, 20xx

Date of mailing

Tina Templeton, M.D.
32 Bones Road
Anytown, WI 54412

Address Block

VIA FACSIMILE

Delivery method

RE: Ima Whiner, D.O.B. 6-6-1966
Date of injury: 1/1/20xx
Our file: PI-20xx-552

Regarding line

Dear Dr. Templeton:

Greeting line/ salutation

Your patient Ima Whiner has retained our law firm to represent her regarding an automobile accident that occurred on January 1, 20xx. To pursue her claim, we need information regarding treatment she received at your office.

Opening

Please provide this office with a complete copy of Ms. Whiner's medical records, detailing the treatment she received at your office. Enclosed is the release form provided by your office and signed by Ms. Whiner. Also enclosed is this firm's draft #1234 in the amount of $100 to cover your standard copying fee. Please provide the copies on or before April 15, 20xx.

Body

Please contact me if you require additional information, or if you will be unable to provide the copies by the above date. Thank you for your prompt attention to this matter.

Closing

Very Truly Yours,
CRANE, POOLE & SCHMIDT, S.C.

Signature Block

By_____
Tara Wilson, Paralegal

Enclosure

Enclosure notation

cc: Ms. Ima Whiner (via U.S. mail, w/o enclosure)

Copy field

TMW:las

Signatory/writer/typist notation

Figure 4.8.1: Example letter

The above example uses "modified block" formatting. Some attorneys prefer to use "full block" formatting, where each line after the letterhead starts at the left margin, including the date and delivery method. Some law offices want to have the letterhead (or a shortened version of it) repeated at the top of each subsequent page, in addition to having page numbers at the bottom of pages 2 and following pages. Make sure you follow all of your supervising attorney's requirements for letter formatting and basic content.

Preparing to Draft Legal Correspondence

Before you write any type of correspondence, you should take the following steps:

- Make sure to use the law office's current official letterhead
- Find out whether the law office has letter templates or samples to use
- Verify who will receive the original
- Take note of whether you need to enclose anything with the correspondence

- Carefully review the client file/legal matter and all instructions provided by your supervising attorney; make sure you understand exactly what the attorney wants you to do.
- Ascertain the purpose of the letter (provide or request information, confirm information or transactions, give an opinion, demand action, or accept/reject/terminate a client)
- Determine whether you can ethically sign the letter, or whether the attorney must sign it

Ethics Watch

Remember, any document you draft – including correspondence – that contains or does any of the following ***must be signed by the attorney***:

- Establishing, creating, or explaining the details of an attorney-client relationship
- Declining to establish an attorney-client relationship
- Setting legal fees
- Providing legal advice or opinions (see Chapter 2.6 to review what might constitute legal advice)
- Directing or suggesting actions the reader should or should not take
- Terminating an attorney-client relationship

Knowing all of these things before you begin drafting reduces the likelihood that major corrections will be necessary, allowing you to complete the writing assignment more efficiently.

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4.9: Types of Legal Correspondence

Legal correspondence usually serves one of the following 5 purposes: (1) providing or seeking information, (2) confirming events or other information, (3) providing opinions, (4) demanding action, and (5) defining relationships. The purpose dictates the content, tone, and wording you will use in the body of the correspondence, as well as whether a non-attorney is ethically allowed to sign the correspondence.

Informative Correspondence (Providing or Seeking Information)

This is the most common type of correspondence that paralegals write. The purpose is to convey or request information to/from a client, witness, or other person regarding a legal matter. The body should be concise and brief, but with enough detail for the recipient to understand the information provided or what is being requested. There are several sub-types of informative correspondence. Some examples of these sub-types follow.

Cover Letters

The function of this information-providing letter is to inform the recipient about documents being provided as enclosures, provide a brief explanation of the purpose of those enclosures, and direct the recipient as to what steps should be taken with respect to the enclosures. In these letters:

- The opening should provide context for the enclosure by referring to a previous meeting, transaction, or conversation relating to the enclosure.
- The body should explain the nature of the enclosure, if necessary, and direct the next steps with a reasonable deadline (stated as a specific date) for completing them. Describe the document and point out any portions to which you want the recipient to pay particular attention. Explain in detail the action you wish the recipient to take. If there are a lot of steps, consider using a numbered or bulleted list to simplify them. Highlight important deadlines by using boldfaced font. Be sure to add ticklers/reminders to your calendar to confirm that the requested actions have been taken.
- The closing should invite the recipient to contact the appropriate person (either the supervising attorney or the paralegal) with questions or concerns.

Ethics Watch

If the cover letter includes advice or recommendations, the attorney must sign it.

Scheduling Letters

These letters function as reminders of meetings, hearings, or other events that the recipient is expected to attend. These letters are usually quite short:

- The opening and body are often combined into a single paragraph that simply states the details – time, date, location, and purpose – of the meeting or event. Again, highlight the time, date, and address using boldfaced font. A suggested arrival time and a brief explanation of what is likely to occur may also be included.
- The closing should invite the recipient to contact the appropriate person (either the supervising attorney or the paralegal) with questions or concerns.

Requests for Information

These letters might be written to clients or third parties, asking them to provide documents or other information you need. Before writing these letters, it is important to be aware of any requirements or prerequisites for obtaining the information. For example, government agencies might not release information unless you follow the specific steps/format requirements of a Freedom of Information Act (or FOIA) request. Healthcare providers and other entities may require a signed release (such as a HIPAA form) from the person about whom you are seeking to obtain information. Sometimes these providers have their own forms that the person must sign. It is also becoming more frequent for third parties to request pre-payment for copies or other expenses related to providing the requested information. Thus, it is best to contact third parties prior to requesting the information to determine if there are any such requirements and to confirm that you are contacting the correct person/location to obtain the desired information. In these letters:

- The opening should provide context for the request. When writing to the client, refer to a previous meeting, transaction, or conversation relating to the enclosure. When writing to someone other than the client, start by identifying the law office's or the attorney's relationship to the client (for example, "[Client name] has retained our law firm to pursue damages for personal injuries suffered on [date of the accident]."
- The body should explain the nature of the requested information in detail. Define the necessary parameters of the requested information, such as relevant time periods, desired formats, and sources/resources for locating the information (if necessary). Include a reasonable deadline (stated as a specific date) by which you would like to receive the information. Giving the recipient two to four weeks after the date of the letter is fairly typical. Be sure to add ticklers/reminders to your calendar to confirm that the requested information has been received.
- The body should also confirm compliance with the recipient's requirements for providing the information and enclosure of necessary documents, releases, or payments.
- The closing should invite the recipient to contact the appropriate person (either the supervising attorney or the paralegal) with questions or concerns or to advise of an inability to provide the requested information by the stated deadline.

Ethics Watch

Letters to third parties might be discoverable by opposing counsel. Thus, you must very carefully review the information you include about the client or the client's legal matter to avoid a breach of confidentiality. It is also important to ensure you don't include any negative information about the client, the client's legal matter, or anything that might indicate a client's previous conditions, injuries, or problems. Don't include information about the supervising attorney's litigation strategy. Many times, you must limit your explanation to, "This law firm is involved in litigation concerning an accident between Sally Smith and Jim Jones." This type of background also reduces the likelihood that your source will bias the information provided, so as to tell you what he/she thinks you want to hear.

Status Letters

Status letters are an update to the client concerning the matter your firm is handling for the client. These letters are used to keep the client informed of recent developments, or sometimes serve to let the client know that his/her legal matter has been reviewed by the supervising attorney (this is especially important if a few weeks have passed and there has been little to know outside activity occurring, as sometimes happens in litigation matters). In the body, be sure to include a description of the next step(s), when each step needs to be completed, and who is responsible for completing each step.

Ethics Watch

If the status letter includes advice or recommendations, the attorney must sign it.

Confirmation Letters

Confirmation letters are used to provide a permanent and official record of meetings, agreements, conversations, discussions, or other information. The purpose of these letters is to safeguard against misunderstandings, misinterpretations, or disagreements about the subject matter. Accuracy and detail are important, as well as a neutral and professional tone.

- The opening should refer specifically to a previous meeting, transaction, or conversation, including its date, time, location, and persons present.
- The body should describe in detail the content of what was discussed; what each party agreed to do or not do; and a description of the next step(s), including when each step needs to be completed and who is responsible for completing each step; and state that the description is a complete, full, and accurate description of what transpired.
- The closing often includes a statement that the writer will presume that the description is a complete, full, and accurate description of what transpired unless the recipient responds in writing (typically by a certain date) with an objection or statement of what information is erroneous. Sometimes, the recipient is provided with a duplicate copy of the letter with a request that the recipient sign and return the copy to confirm its accuracy. These letters typically do not contain a closing inviting the recipient to contact the supervising attorney with questions or concerns.

Ethics Watch

Depending on the nature of what is being confirmed or the nature of the relationship (adversarial or non-adversarial) the ethical rules may require the attorney to sign it.

Opinion Letters

Ethics Watch

Because opinion letters always contain legal advice or opinions, paralegals may draft them but should never sign them. Sometimes your supervising attorney will ask you to research a specific legal question and report the results to him/her, usually in a legal research memorandum. If it is thorough and well-written, the attorney may ask you to convert your memorandum to an opinion letter to be sent to the client.

- The opening should refer specifically to the client's legal question and detail the facts the client provided that relate to the question. The last sentence of the opening paragraph should include a statement that all opinions and advice in the letter are based on the facts provided and that any new or omitted facts might change the opinion, advice, or outcome.
- The body should explain the law and the attorney's opinion/advice, a description of potential outcome(s) of the course(s) of action the client could take, and provide guidance as to the best action to take. If applicable, politely, but persuasively, direct the client to the best course of action. Make sure to use language the client will understand – avoid legalese.
- The closing should invite questions from the client, and/or request that the client inform the attorney (who will sign the letter) of the course of action the client chooses.

Demand Letters and Settlement Offers

Sometimes, legal correspondence is sent to "the other side," (for example, an opposing party or adversary counsel), seeking settlement or demanding payment of a claim. While these letters are similar, each has unique requirements.

Settlement Offers

These letters are typically sent to insurance companies or opposing counsel. Often, they include settlement brochures or copies of other documents supporting the proposed settlement of the claim. Supporting documentation, such as excerpts from medical records or a copy of the contract at issue, is often included. Organize the information in a logical and user-friendly manner; you want to make it easy for the recipient to understand your information and be persuaded by it.

- The opening should refer to the legal matter between the two parties, including the date and location of the incident underlying the claim, if applicable. Typically, the last sentence of the opening paragraph includes a statement about the nature of the proposed settlement; and specifically, whether it is a statutory offer of settlement or judgment being made pursuant to Wisconsin statutes.
- The body should explain the facts and the law impacting the case and supporting the proposed settlement. It often includes references to relevant documents, pleadings, or discovery associated with the case. Politely, but persuasively, state that the law and facts favor the client and the recipient should accept/comply with the proposed settlement terms. The tone should be respectfully assertive, but not overbearing, threatening, or inflammatory.
- The body should also provide in specific detail the proposed settlement terms, including actions/inactions for each party; the amount of money to be paid, by whom, and by what date; and any releases or other documents to be signed by the parties to finalize the settlement.
- The closing should provide a deadline by which the proposed settlement must be accepted, as well as the method by which it must be accepted, and thank the recipient for his/her consideration.

Demand Letters

These letters are similar to settlement offers, except that they use stronger persuasion. Many demand letters expressly assess blame to the recipient or the recipient's client. Demand letters that constitute an attempt to collect a debt or a judgment fall under this category, and there are statutory rules regarding what those letters are required to include, as well as prohibited actions.

- The opening should refer to the legal matter between the two parties, including the date and location of the incident underlying the claim, if applicable.
- The body should describe in detail the action you are seeking from the recipient; for example, the amount of money to be paid, the action that must be taken, or the actions that the recipient must cease and desist from taking.
- The body should also provide a deadline by which the demanded action must be completed, as well as the method by which it must be completed. The closing usually also includes a statement of the consequence for failure to act by the stated deadline: "If we do not hear from you on or before [month, day, year], we will take whatever action is necessary to protect our client's interests." If you can legally do so without sounding overly threatening, you may wish to list some of the actions you are considering taking. Use a very assertive, but not hostile, tone.
- The closing typically thanks the recipient for his/her prompt action, as if assuming compliance will occur immediately.

Ethics Watch

Because demand letters and settlement offers always contain legal opinions and recommendations for specific legal actions to take or not take, paralegals may draft them but should never sign them.

Retainer, Non-Retainer, Disengagement and Termination Letters

Ethics Watch

Because these letters always involve establishing (or not establishing) or terminating an attorney-client relationship, the attorney must sign them. Additionally, other ethical rules require very careful drafting of these letters.

Retainer Letter

Also known as an **engagement letter**, the purpose of this letter is to inform the client that the attorney has accepted the client's legal matter, and to specify the parameters of the representation. Usually, a written fee agreement is enclosed for the client to review, sign, and return.

- The opening should refer to the initial consultation or meeting with the client, including its date, location, and the identity of others present. The opening also informs the client of the attorney's decision. A typical opening would be, "My paralegal, [name of paralegal] and I enjoyed meeting with you at our office to discuss your [describe the legal matter; for example, your estate plan, your claim against xx]. I am pleased to inform you that our law office has decided to [draft your estate plan, represent you, or accept your case]." If a legal matter is a claim that might be litigated, include a statement directing the client to refrain from giving any statements concerning the accident or discussing your claims with anyone outside of the law office.
- The body should describe the nature and limitations of the representation, if any. What is the goal of the representation? What services or tasks are being performed, or what documents are being drafted, for the client?
- The body typically also highlights important portions of the fee agreement, such as any up-front payment (or advanced fee) required, the amount of the flat fee, or the hourly rates for persons who will be working on the file. Sometimes additional information or documents are requested from the client at this time.
- The closing should request the client to carefully review the entire fee agreement and contact the attorney with any questions before signing it. Often, the closing ends with a statement such as, "We look forward to working with you."

Non-Retainer Letter

Also known as a **non-engagement letter**, the purpose of this letter is to inform the recipient that the attorney has decided not to accept the client's legal matter, or that the law office is declining to represent him/her.

- The opening should refer to the initial consultation or meeting with the client, including its date, location, and the identity of others present. The opening also informs the client of the attorney's decision. A typical opening would be, "My paralegal, [name of paralegal] and I enjoyed meeting with you at our office to discuss your [describe the legal matter; for example, your estate plan, your claim against xx]. Unfortunately, I regret to inform you that our law office has decided not to [draft your estate plan, represent you, take on your case]." It is important to end the opening with a statement such as "We will be taking no action on your behalf."

- The body must inform the recipient if there are any important deadlines coming up. If the claim involves a statute of limitations, inform the recipient, in bold font, when the statute will expire. You should also explain the consequence of allowing the statute to expire (i.e., “You will be forever barred from making a claim.”).
- The closing should reiterate, unequivocally, that the law office is declining the legal matter, using neutral language (for example, "We are unable to assist you in pursuing your claim.") The closing should not invite questions or any other type of response from the recipient. Typically, the closing ends with a sentence reiterating the need to seek alternative legal counsel at the recipient's earliest convenience.

Ethics Watch

The ethical rules applicable to attorneys require all of these disclosures to avoid malpractice or other ethical complaints.

- **Do not include** any statements about the strength of the recipient’s case or any other evaluations.
- Specify any important deadlines that may impact the recipient's ability to pursue his/her claim
- Recommend that the recipient seek the advice of a different attorney.
  - Name a specific attorney or law firm if the reason for the non-engagement is that your firm either has a conflict of interest, doesn’t practice in that area of law, or is simply too busy to handle the matter.
  - Don’t name a specific attorney or law firm if the reason for the non-engagement is that your firm is uncomfortable with either the claim or the recipient (but don’t express this in the letter). Legal communities are quite small, and you don’t want to be known for sending bad clients/claims to other attorneys. Instead, refer the recipient to a lawyer referral service.

Disengagement Letter

A close relative of the non-engagement letter is the disengagement letter, which is used to communicate to a current client the decision to stop representation before the legal matter is concluded (also known as “firing” the client). Some dos and don’ts for writing these letters:

- The opening of the letter is typically very brief. It may refer to the ongoing legal matter, but only summarily (“As you are aware, since [date] this office has been engaged in [generally describe legal services] on your behalf.’). Next, the opening provides a professional, generic reason for the disengagement, such as, “Due to our fundamental differences in opinion with respect to the best course of action regarding your claim, we are unable to continue representing you.” Although it is acceptable to provide professional reasons, such as non-payment of fees or failure to attend required hearings, do not include inflammatory reasons – especially if they would be difficult to prove (for example, the client lied). You don’t want to anger the recipient, which may invite an ethical complaint or a lawsuit against the attorney.
- The body must inform the recipient if there are any important deadlines coming up. If the claim involves a statute of limitations, inform the recipient, in boldfaced type, when the statute will expire. You should also explain the consequence of allowing the statute to expire (i.e., “You will be forever barred from making a claim.”).
- Enclose a copy of the final bill, if applicable, and request payment in full by a specified date.
- The closing should reiterate, unequivocally, that the law office is declining the legal matter, using neutral language (for example, "We are unable to further assist you in pursuing your claim.") The closing should not invite questions or any other type of response from the recipient. Typically, the closing ends with a sentence reiterating the need to seek alternative legal counsel at the recipient's earliest convenience.

Ethics Watch

The ethical rules applicable to attorneys require all of these disclosures to avoid malpractice or other ethical complaints.

- Direct the client to hire a different attorney immediately. Do not name a specific attorney or law firm. Instead, refer the recipient to a lawyer referral service.
- If the client owes the firm money for services and/or fees, include a copy of the fee agreement and a final bill. Request that the outstanding amount be paid by a specific date, but don’t threaten any action at this point.
- Specify any important deadlines that may impact the recipient's ability to further pursue his/her claim

Termination Letter

Unlike the disengagement letter, this letter is used to inform the client that the legal matter is now concluded. Typically, the final bill is enclosed.

- The opening should describe the manner in which the legal matter has concluded. For example, the goals of the representation have been met, or all of the documents have been drafted and signed, or a final judgment has been entered. Often, the opening ends with a statement such as, “In accordance with our signed fee agreement this legal matter is now concluded.”
- The body outlines any final steps that need to be taken by the client. Include any final documents relating to the legal matter. If the client owes the firm money for services and/or fees, include a copy of the fee agreement and a final bill. Request that the outstanding amount be paid by a specific date, but don’t threaten any action at this point. If the client is owed money, enclose payment and state in the body the amount of payment that is enclosed and what it represents (for example, the full and final settlement, or reimbursement of unused legal fees).
- The closing typically ends with a statement thanking the client for retaining the law office and an invitation to re-hire the law office for any future legal needs.

Final Steps Before Sending the Correspondence

Correspondence is a “permanent record” of you and your supervising attorney’s integrity and professionalism. As such, it is critically important to ensure the correspondence is accurate, concise, understandable, and professionally written. Some final things to check:

- Confirm that all names and addresses are correct, complete, accurate, and spelled correctly
- Verify that the correspondence does not contain
  - Slang, informal, or inappropriate language
  - Statements that are inflammatory or unprofessional
  - Information that might be confidential, or harmful to your client/client’s case (when writing to someone other than the client)
- Ascertain whether enclosures should be included with the original correspondence
- Determine the proper delivery method of the original correspondence
- Make sure you know who will receive copies of the correspondence, and use cc and bcc appropriately; ascertain whether these persons will receive copies of the enclosures, as well as the proper delivery method for each of these persons
- If the client is not the primary recipient, send a copy of the correspondence to the client. Do not include
  - Enclosures the client has already been provided
  - Copies of things the client does not need to have (for example, copies of checks accompanying records requests)
- Place a copy of the correspondence in the law office’s client file (but do not cc the file or the supervising attorney)
- If a bcc is used
  - The bcc line should be included only on the copies retained in the client’s file and the copies sent to the persons listed as a bcc. Do not include the bcc line on the letter to the primary recipient or anyone receiving a courtesy copy (cc)
  - Do not include copies of enclosures the bcc recipient does not need
  - The client should not be billed for bcc copies of correspondence, nor for copies of enclosures sent with bcc copies.

These are just some examples of the types of correspondence you may write as a paralegal. As with any legal document, if you have any doubts about the purpose or desired content of any correspondence, ask your supervising attorney for guidance.

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4.10: Emailing, Texting and Netiquette in the Law Office

Legal practitioners, like people everywhere, are communicating electronically more than ever before. Many government agencies, businesses, and law offices have adopted rules regarding job-related electronic communications. In addition, great care must be taken to ensure that these communications do not violate client confidentiality, any other ethical rules, or prohibitions against unauthorized practice of law (UPL). The following are general considerations for electronic communication in a business setting; as a general matter, texting and emailing should be avoided in the legal field.

Texting

Whatever digital device you use, written communication in the form of brief messages, or texting, has become a common way to connect. It is useful for short exchanges and is a convenient way to stay connected with others when talking on the phone would be cumbersome. Texting is not useful for long or complicated messages, and careful consideration should be given to the audience.

Tips for Effective Business Texting

- It is generally best to use complete words and not abbreviations, "text speak" or emoticons. "Text speak" often uses symbols and codes to represent thoughts, ideas, and emotions. This can easily lead to misinterpretation. Emoticons are simply unprofessional.
- Contacting someone too frequently can border on harassment. Texting is a tool. Use it when appropriate but don't abuse it.
- Unplug yourself once in a while. Do you feel constantly connected? Do you feel lost or "out of it" if you don't have your cell phone and cannot connect to people, even for fifteen minutes? Sometimes being unavailable for a time can be healthy—everything in moderation, including texting.
- Don't text and drive. Research shows that the likelihood of an accident increases dramatically if the driver is texting behind the wheel (Houston Chronicle, 2009). Being in an accident while conducting company business would reflect poorly on your judgment as well as on your employer.

Email

Electronic mail, usually called email, is quite familiar to most students and workers. It may be used like text or synchronous chat, and it can be delivered to a cell phone. In some businesses, it has largely replaced print hard copy letters for external (outside the company) correspondence, as well as taking the place of memos for internal (within the company) communication (Guffey, 2008). Email can be very useful for messages that have slightly more content than a text message, but it is still best used for fairly brief messages.

Emails may be informal in personal contexts, but business communication requires attention to detail, awareness that your email reflects you and your company, and a professional tone so that it may be forwarded to any third party if needed. Email often serves to exchange information within organizations. Although email may have an informal feel, remember that when used for business, it needs to convey professionalism and respect. Never write or send anything that you wouldn't want to read in public or in front of your company president.

Tips for Effective Business Emails

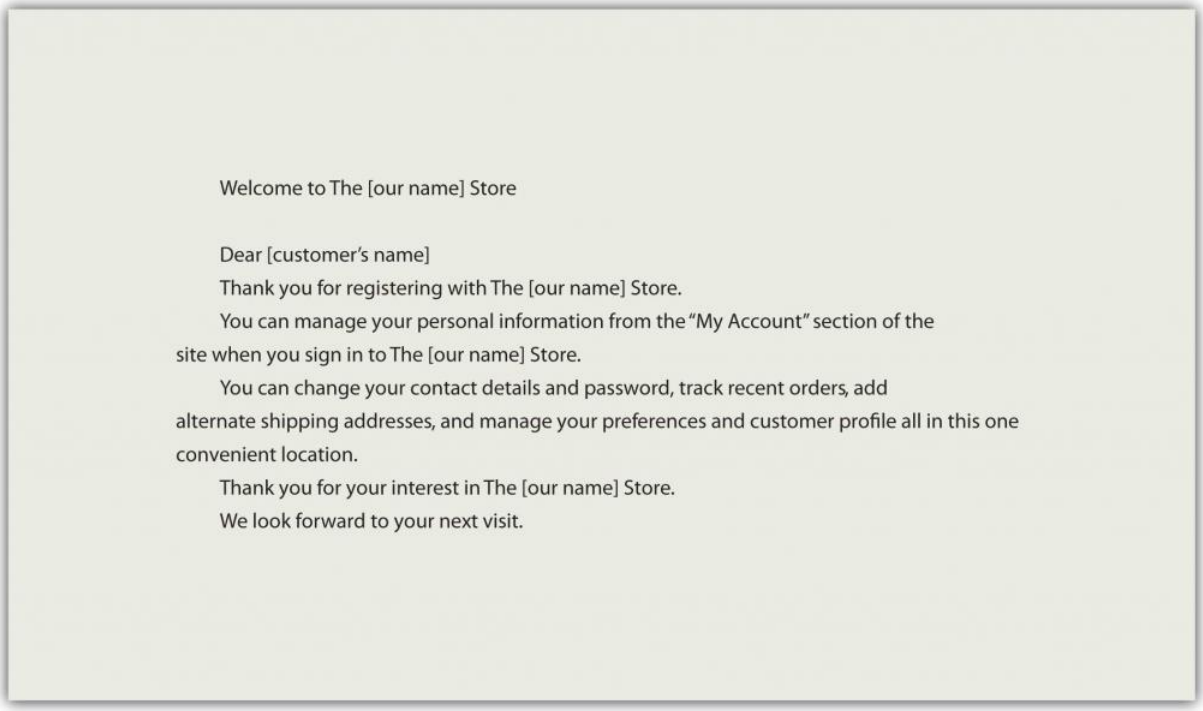
- Proper salutations should demonstrate respect and avoid mix-ups in case a message is accidentally sent to the wrong recipient. For example, use a salutation like "Dear Ms. X" (external) or "Hi Barry" (internal).
- Subject lines should be clear, brief, and specific. This helps the recipient understand the essence of the message. For example, "Proposal attached" or "Your question of 10/25."
- Close with a signature. Identify yourself by creating a signature block that automatically contains your name and business contact information.
- Avoid abbreviations. An email is not a text message, and the audience may not find your witty remark to be a reason to ROTFLOL (roll on the floor laughing out loud).
- Be brief. Omit unnecessary words.
- Use a good format. Include line breaks between sentences or divide your message into brief paragraphs for ease of reading. A good email should get to the point and conclude in three small paragraphs or less.

- Reread, revise, and review. Catch and correct spelling and grammar mistakes before you press “send.” It will take more time and effort to undo the problems caused by a hasty, poorly written email than to get it right the first time.
- Reply promptly. Watch out for an emotional response—never reply in anger—but make a habit of replying to all emails within twenty-four hours, even if only to say that you will provide the requested information in forty-eight or seventy-two hours.
- Use “Reply All” sparingly. Do not send your reply to everyone who received the initial email unless your message absolutely needs to be read by the entire group.
- Avoid using all caps. Capital letters are used on the Internet to communicate emphatic emotion or yelling and are considered rude.
- Test links. If you include a link, test it to make sure it is complete.
- Email ahead of time if you are going to attach large files (audio and visual files are often quite large) to prevent exceeding the recipient’s mailbox limit or triggering the spam filter.
- Give feedback or follow-up. If you don’t get a response in twenty-four hours, email or call. Spam filters may have intercepted your message, so your recipient may never have received it.

Let’s look at two examples of business email. In Figure 4.10.1, we have an email form. In Figure 4.10.2, we have a letter written specifically for the situation and audience.

Netiquette

We create personal pages, post messages, and interact via mediated technologies as a normal part of our careers, but how we conduct ourselves can leave a lasting image, literally.


Welcome to The [our name] Store

Dear [customer’s name]
Thank you for registering with The [our name] Store.
You can manage your personal information from the “My Account” section of the site when you sign in to The [our name] Store.
You can change your contact details and password, track recent orders, add alternate shipping addresses, and manage your preferences and customer profile all in this one convenient location.
Thank you for your interest in The [our name] Store.
We look forward to your next visit.

Figure 4.10.1: An email form

The photograph you posted on your Instagram or FaceBook page may have been seen by your potential employer, or that nasty remark in a post may come back to haunt you later. Some fifteen years ago, when the Internet was a new phenomenon, Virginia Shea laid out a series of ground rules for communication online that continue to serve us today.

Virginia Shea’s Rules of Netiquette

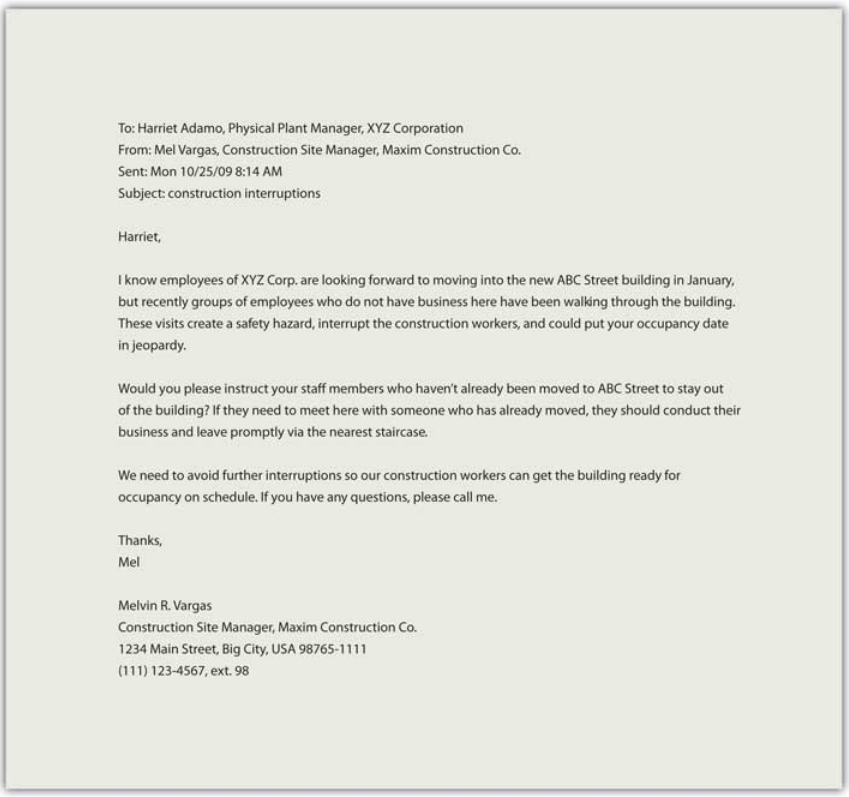
- Remember the human on the other side of the electronic communication.
- Adhere to the same standards of behavior online that you follow in real life.
- Know where you are in cyberspace.
- Respect other people’s time and bandwidth.
- Make yourself look good online.
- Share expert knowledge.
- Keep flame wars under control.
- Respect other people’s privacy.

- Don't abuse your power.
- Be forgiving of other people's mistakes (Shea, 1994).

Her rules speak for themselves and remind us that the golden rule (treat others as you would like to be treated) is relevant wherever there is human interaction.

Special Considerations for Electronic Communication in the Law Office

Electronic communication is not recommended as a method of correspondence in the legal field, mainly due to concerns about confidentiality. Most electronic communication – especially texting and direct messaging – is not encrypted and can be easily intercepted by others. Even encrypted email isn't foolproof. If your client insists on communicating electronically, be sure to inform your supervising attorney, who may direct you to write a letter to the client regarding concerns about confidentiality, and have the client affirm in writing his/her continued desire to communicate electronically.



To: Harriet Adamo, Physical Plant Manager, XYZ Corporation
From: Mel Vargas, Construction Site Manager, Maxim Construction Co.
Sent: Mon 10/25/09 8:14 AM
Subject: construction interruptions

Harriet,

I know employees of XYZ Corp. are looking forward to moving into the new ABC Street building in January, but recently groups of employees who do not have business here have been walking through the building. These visits create a safety hazard, interrupt the construction workers, and could put your occupancy date in jeopardy.

Would you please instruct your staff members who haven't already been moved to ABC Street to stay out of the building? If they need to meet here with someone who has already moved, they should conduct their business and leave promptly via the nearest staircase.

We need to avoid further interruptions so our construction workers can get the building ready for occupancy on schedule. If you have any questions, please call me.

Thanks,
Mel

Melvin R. Vargas
Construction Site Manager, Maxim Construction Co.
1234 Main Street, Big City, USA 98765-1111
(111) 123-4567, ext. 98

Figure 4.10.2: A customized business letter

If you do use electronic communication, here are some tips:

- Do not use electronic communication for any client or other confidential communications without the prior consent of your supervising attorney.
- Do not use the addressee auto-fill or auto-complete function; the likelihood of sending electronic communication to the incorrect person is extremely high and can result in a breach of confidentiality.
- Do not use "Reply to All."
- Make sure you reply only to the appropriate person, not a listserv or distribution list
- Before forwarding a message from the client to anyone outside the law office, get the supervising attorney's and the client's permission.
- Use clear, concise (short), and specific descriptions in your subject line.
- Provide context/explanation when you reply to or forward a message. Restate dates, times, and subject matter in your message to reduce the likelihood of confusion or misinterpretation.
- Maintain professionalism – write complete, correct sentences and leave out "text speak" (using numbers or letters instead of complete words), other abbreviations, or emoticons. Use proper wording, spelling, grammar, and punctuation at all times. Use professional language.
- Carefully proofread your message before sending it in addition to running spell-checker.
- Avoid underlining. Underlined text can be difficult to read and also implies that the text contains a link to a website.
- Avoid using all capital letters (which is interpreted as shouting).
- Do not reply to a communication if you are irritated, angry, or upset. Wait and reply when you can do so neutrally, objectively, and professionally.
- Make sure your email includes a confidentiality disclaimer.
- Remember, if you agree to use email, the client will likely expect you to check your email every day and respond within 24 business hours! If you can't respond right away, send a quick message letting the client know you received his/her email, and will respond at a later time.

Legal Netiquette

Legal netiquette refers to the principles of respectful, professional, and appropriate behavior in online communication for legal professionals. For paralegals, practicing netiquette isn't just about courtesy; it's about protecting your credibility and ensuring that your actions align with ethical guidelines. Whether you're sending an email, engaging on social media, or participating in online discussions, your conduct reflects your professional integrity.

Email Etiquette: Your Digital Front Door

When you are using email for legal communication, getting it right is essential. Keep these tips in mind:

- **Use Clear and Professional Subject Lines**: Summarize the content of your email concisely.
- **Start and End Respectfully**: Proper salutations and professional sign-offs set the right tone.
- **Check for Errors**: Typos and grammatical mistakes can undermine your credibility. Always proofread!
- **Take a Breather Before Responding**: If an email has left you feeling frustrated, don't hit "send" in the heat of the moment. Draft your response, step away, and revisit it later with a calmer perspective.

Remember, emails are permanent records. Once sent, they can be shared widely, so always write as though the world might see it.

Social Media and Online Interactions: Proceed with Caution

Beyond email, your behavior on platforms like Facebook, LinkedIn, and even private group chats matters. Here's what you need to watch out for:

- **Assume Everything is Public**: Even in private groups or chats, messages can be leaked or made public. Always ask yourself, "Would I want my boss or the state bar to read this?"
- **Be Mindful of Your Posts**: Sharing, liking, or commenting on sensitive or controversial content can be interpreted as an endorsement. This can blur the line between personal and professional boundaries.
- **Respect Confidentiality**: Never discuss clients, cases, or sensitive information online—even in vague terms. Protecting client privacy is non-negotiable.

The internet remembers everything. Once something is online, you lose control over how it's shared or interpreted. Think before you click!

Ethical Considerations for Paralegals

As a paralegal, you'll have to navigate specific ethical obligations that apply to your online behavior:

- **Avoid Giving Legal Advice**: Be cautious about how you phrase your responses, even in casual online conversations.
- **Respect Advertising Rules**: If your role involves online marketing, familiarize yourself with regulations about promoting legal services.
- **Maintain Professional Boundaries**: Keep personal opinions separate from your professional life. A misstep on social media can affect both your reputation and your firm's.

For guidance on ethical issues, consult your firm's policies, your state bar association, or the American Bar Association.

A Few Golden Rules for Digital Professionalism

1. **Think Twice, Post Once**: Assume that everything you say or share online could become public.
2. **Keep a Formal Tone**: Even informal platforms require professionalism when your role as a paralegal is visible.
3. **Stay Informed**: Technology evolves, and so do its risks. Keep up with trends to safeguard your digital footprint.
4. **Use Common Sense**: If it feels risky, inappropriate, or unprofessional, it probably is. Trust your instincts.

Why It Matters

As paralegals, your online behavior is an extension of your professional conduct. By practicing netiquette, you'll not only avoid embarrassing missteps but also build trust and respect in the legal community. A careless comment or an unfiltered rant can have lasting consequences—so think critically, act responsibly, and always err on the side of caution.

Text messages and emails are part of our communication landscape, and skilled business communicators consider them a valuable tool to connect. By understanding the principles of netiquette, you'll contribute positively to the digital landscape while upholding

the high standards of the legal profession. Remember, your professional reputation is one of your most valuable assets. Guard it well!

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CHAPTER OVERVIEW

5: Careers in Transactional Law

5.1: What is Transactional Law?
5.2: Transactional Practice in Law Firm Settings
5.3: Transactional Practice in Non-Law Firm Settings
5.4: Skills Needed for Legal Professionals Working in Transactional Law Fields

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5.1: What is Transactional Law?

Transactional law encompasses various legal practice areas that deal primarily with business and financial transactions but include other areas of law as well. This field is essential for the smooth operation of businesses and the economy, as it involves the legal aspects of creating, managing, and dissolving business entities, as well as the transactions they engage in.

Business/Corporate Law

Corporate law governs the formation, operation, and dissolution of corporations. Legal professionals will work with many different types of business entities as seen in the following Exhibit.

Type of Business Entity	Definition
Sole Proprietorship	A **sole proprietorship** is a type of business structure where a single individual owns and operates the business. Here are some key characteristics: • **Ownership**: The business is owned by one person (the sole proprietor) • **Control**: The owner has full control over all business decisions. • **Liability**: The owner has unlimited personal liability for all debts and obligations of the business. **Unlimited personal liability** means that an individual is personally responsible for all the debts and obligations of their business. This can be a significant risk for business owners, which is why many opt for structures like LLCs or corporations that offer limited liability protection. • **Taxes**: Business income is reported on the owner's personal tax return (pass-through taxation) It's a straightforward and common way to start a business, especially for small enterprises.

General Partnership	A **general partnership** is a business structure where two or more individuals share ownership and management responsibilities. Here are some key characteristics:
	• **Ownership**: The business is owned by two or more partners.
	• **Control**: All partners share control and decision-making authority.
	• **Liability**: Each partner has joint and several unlimited personal liability for the debts and obligations of the business. **Joint and several unlimited personal liability** means that each individual involved is personally responsible for the entire amount of a debt or obligation, not just a portion of it. This means that a creditor can pursue any one of the partners for the entire debt, and that party would then need to seek contribution from the others
	  ○ **Joint Liability**: All parties are collectively responsible for the full amount of the obligation.
	  ○ **Several Liability**: Each party can be held individually responsible for the full amount.
	• **Taxes**: Business income is reported on the partners' personal tax returns (pass-through taxation)
	General partnerships are often chosen for businesses where collaboration and shared expertise are beneficial.

Limited Liability Partnership	A **limited liability partnership (LLP)** is a business structure that combines elements of partnerships and corporations. Here are some key characteristics: • **Ownership**: The business is owned by two or more partners. • **Control**: Partners share control and decision-making authority. • **Liability**: Partners have limited personal liability for the debts and obligations of the business, protecting their personal assets. • **Taxes**: Business income is typically reported on the partners' personal tax returns, but the LLP itself may also be subject to certain taxes.

Type of Business Entity	Definition
	LLPs are often chosen by professional services firms, such as law and accounting firms, due to the liability protection they offer.
Limited Liability Company	A **limited liability company (LLC)** is a flexible business structure that combines elements of partnerships and corporations. Here are some key characteristics: • **Ownership**: The business is owned by one or more members. • **Control**: Members can manage the business themselves or appoint managers. • **Liability**: Members have limited personal liability for the debts and obligations of the business, protecting their personal assets. • **Taxes**: LLCs offer flexible tax options. They can be taxed as a sole proprietorship, partnership, or corporation, depending on the number of members and elections made. Typically, owners of an LLC elect to be taxes as a partnership. LLCs are popular due to their flexibility and the liability protection they offer.
Corporation	A **corporation** is a legal entity that is separate from its owners, providing distinct advantages and characteristics. Here are some key features: • **Ownership**: The business is owned by shareholders who invest in the corporation. • **Control**: Managed by a board of directors and officers who make major decisions and oversee operations. • **Liability**: Shareholders have limited liability, meaning they are not personally responsible for the corporation's debts and obligations. • **Taxes**: Corporations are subject to corporate taxes on their profits. Shareholders may also be taxed on dividends received. This is called double taxation and is a significant disadvantage of the corporate form. Corporations are often chosen for larger businesses due to their ability to raise capital and provide liability protection.

Business/corporate law includes the creation of corporate entities, mergers and acquisitions, corporate governance, and compliance with regulatory requirements. Legal professionals might work in a company's in-house counsel's office or in a law firm specializing in corporate or business law.

Business and corporate legal professionals ensure that businesses operate within the legal framework and help them navigate complex transactions. Legal professionals will complete tasks such as drafting business documents, researching applicable laws, and attending meetings/drafting minutes of those meetings.

Commercial Law

Commercial law deals with the sale and distribution of goods and services. This area of law covers contracts, warranties, and consumer protection.

Commercial legal professionals will assist businesses in drafting and negotiating contracts, resolving disputes, and ensuring compliance with laws related to commerce. Legal professionals will assist the attorney with drafting these documents and researching the relevant laws.

The primary law governing commercial transaction is the Uniform Commercial Code, which in Wisconsin is codified in Chapter 401 of the Wisconsin Statutes.

Securities Law

Securities law regulates the offer and sale of securities, such as stocks and bonds. It aims to protect investors and ensure fair and efficient markets.

Legal professionals focusing on securitites work on matters related to public offerings, private placements, compliance with securities regulations, and addressing issues of fraud and insider trading.

Real Estate Law

Real estate law covers the purchase, sale, and use of land and buildings. This area includes transactions involving residential and commercial properties, leasing, zoning, and land use regulations. Leal professionals might work for real estate agencies, property managers' offices, title companies, or law firms.

Real estate legal professionals help clients navigate the complexities of property transactions and ensure that their interests are protected.

Intellectual Property Law

Intellectual property law protects creations of the mind, such as inventions, trademarks, copyrights, and trade secrets. This area of law is crucial for businesses that rely on innovation and branding.

Type of Intellectual Property	Definition
. **Copyright**	**Copyright** is a legal right that grants the creator of original works exclusive control over the use and distribution of their creations, such as literature, music, art, films, and software. The creator has the exclusive right to reproduce, distribute, perform, display, and create derivative works based on the original. Copyright ensures that creators can benefit from their work and control how it is used.
. **Trademark**	A **trademark** is a symbol, word, phrase, design, or combination thereof that identifies and distinguishes the source of goods or services of one party from those of others. Trademarks help consumers recognize and differentiate products or services. Examples include brand names, logos, slogans, and even distinctive packaging. Trademarks are essential for building brand identity and protecting the reputation of a business.
. **Patent**	A **patent** is a form of intellectual property that grants the inventor exclusive rights to their invention for a certain period. Examples include new inventions, processes, or designs. To be patentable, an invention must be novel, non-obvious, and useful. Patents encourage innovation by allowing inventors to benefit from their creations.
. **Trade Secret**	A **trade secret** is a type of intellectual property that consists of confidential information that provides a business with a competitive edge. Examples include formulas, processes, methods, designs, and proprietary data. Trade secrets are not publicly disclosed and are protected through secrecy measures.
. **Trade Dress**	**Trade dress** refers to the visual appearance of a product or its packaging that signifies the source of the product to consumers and includes the design, shape, color, and overall look of a product or its packaging. Only the non-functional aspects of a product's appearance can be protected as trade dress, for example, the shape of a Coke bottle. Trade dress can be a powerful tool for brand identity and consumer recognition.

Intellectual property legal professionals assist clients in securing and enforcing their rights, as well as in licensing and transferring intellectual property.

Tax Law

Tax law involves the assessment and payment of taxes. It covers various types of taxes, including income, corporate, sales, and property taxes.

Tax professionals help individuals and businesses understand their tax obligations, plan their tax strategies, and resolve disputes with tax authorities. They might work for government agencies such as the IRS, for law firms specializing in tax law, for tax preparation or accounting companies, or in corporate in-house counsels' offices.

Employment Law

Employment law governs the relationship between employers and employees. It includes issues such as hiring, firing, workplace safety, discrimination, and wage and hour laws. Knowledge of employment law is crucial to make sure employers are not violating State and Federal employment laws.

Employment legal professionals advise businesses on compliance with labor laws and represent them in disputes with employees. Alternately, they may work in the Human Resources departments of businesses.

Insurance Law

Insurance law involves topics such as compliance, risk management, and addressing claims. This area of law is essential for businesses that need to manage risks and protect themselves against potential losses.

Insurance legal professionals help clients understand their insurance policies, navigate claims processes, and ensure compliance with regulatory requirements. They may work in law firms, insurance companies, or for medical providers.

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5.2: Transactional Practice in Law Firm Settings

Many legal professionals who work in transactional law do so in a traditional law firm. Some law firms engage entirely in transactional law, while others have separate litigation and transactional departments, with legal professionals specializing in one or the other area. Those in a transactional law practice work primarily in an office setting and spend most of their time either meeting with clients or drafting documents. Unlike their litigation counterparts, transactional professionals do not spend much, if any, time in a courtroom setting.

Corporate Governance

One of the key tasks for transactional legal professionals is advising on the structure and management of corporations. This involves ensuring that corporate entities are set up correctly, advising on best practices for corporate governance, and helping to navigate regulatory requirements.

Effective corporate governance is crucial for the smooth operation and long-term success of any corporation.

Mergers and Acquisitions (M&A)

Assisting in the buying and selling of companies is another significant aspect of transactional law. Mergers and acquisitions (M&A) require meticulous planning, negotiation, and execution.

Legal professionals in this area help clients understand the implications of M&A transactions, conduct due diligence, draft necessary documents, and ensure that all legal requirements are met.

Securities Law

Handling the issuance and trading of securities is a specialized area within transactional law. Securities lawyers work on matters related to public offerings, private placements, and compliance with securities regulations.

The lawyers play a vital role in ensuring that companies can raise capital while adhering to legal standards designed to protect investors.

Real Estate Transactions

Managing the legal aspects of property transactions is another critical function of transactional law professionals. This includes drafting and negotiating purchase agreements, leases, and other real estate documents.

Real estate lawyers also conduct due diligence to identify any potential issues that could affect the transaction.

Intellectual Property

Protecting and managing intellectual property rights is essential for businesses that rely on innovation and branding. Intellectual property lawyers help clients secure patents, trademarks, copyrights, and trade secrets.

The lawyers also assist in licensing agreements and resolving disputes related to intellectual property.

Bank Finance and Project Finance

Structuring and negotiating financing deals is a complex task that requires a deep understanding of financial instruments and legal frameworks.

Legal professionals in this area work on bank finance and project finance transactions, helping clients secure the necessary funding for their projects while ensuring compliance with relevant laws and regulations.

Drafting Documents

Preparing initial drafts of contracts, agreements, and other legal documents is a fundamental task for transactional lawyers. These documents must be precise and comprehensive to protect the interests of the clients and ensure that all aspects of the transaction are covered.

Performing Due Diligence

Conducting due diligence by reviewing documents and identifying potential issues is a critical step in any transaction. Legal professionals must thoroughly examine all relevant information to ensure that there are no hidden risks or liabilities that could impact the transaction.

Closing Transactions

Assisting in the preparation of closing binders and ensuring all documents are properly executed is the final step in many transactions. This involves coordinating with all parties involved, reviewing final documents, and ensuring that everything is in order for a smooth closing.

Engaging in Regulatory Compliance

Ensuring transactions comply with relevant laws and regulations is an ongoing responsibility for transactional legal professionals. This includes staying up-to-date with changes in the law, advising clients on compliance issues, and helping to implement necessary changes to business practices.

Managing Client Interaction

Communicating with clients to gather information and provide updates on transaction progress is a crucial aspect of transactional law practice. Building strong client relationships and maintaining clear and open communication helps ensure that transactions proceed smoothly and that clients are satisfied with the legal services provided.

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5.3: Transactional Practice in Non-Law Firm Settings

Many transactional legal professionals work in non-law firm settings, such as in-house counsel, insurance companies, and other industries. These roles offer unique opportunities and challenges, allowing legal professionals to apply their skills in diverse environments.

In-House Counsel

In-house legal professionals support the legal department of a corporation, working directly for the employer rather than a law firm.

Their responsibilities include drafting and reviewing contracts, ensuring regulatory compliance, managing corporate governance matters, and assisting with mergers and acquisitions.

In-house counsel must have a strong understanding of business operations, excellent communication skills, and the ability to manage multiple tasks simultaneously. They play a crucial role in aligning legal strategies with business goals and providing day-to-day legal support to various departments within the organization.

Insurance Companies

Legal professionals in the insurance industry assist with drafting policy documents, adjudicating claims, and defending the company against claims in court.

Their responsibilities include reviewing and drafting insurance policies, conducting legal research, managing claims, and supporting litigation efforts.

Attention to detail, strong analytical skills, and familiarity with insurance regulations are essential for success in this role. These professionals help ensure that insurance companies operate within the legal framework and effectively manage risks associated with their policies.

Other Industries

Transactional legal professionals also find opportunities in various other industries, each with its own set of legal challenges and requirements:

- **Technology and E-Discovery**: Legal professionals in the technology sector manage electronic data and ensure compliance with state and federal rules. They may work on issues related to data privacy, cybersecurity, and intellectual property, helping companies navigate the complex legal landscape of the digital age.
- **Healthcare and Pharmaceutical**: In this industry, legal professionals navigate healthcare laws and regulations, draft compliance documents, and support litigation. They play a vital role in ensuring that healthcare providers and pharmaceutical companies comply with regulatory requirements and maintain high standards of patient care and safety.
- **Finance and Consulting**: Legal professionals in finance and consulting assist with regulatory compliance, draft financial agreements, and support business transactions. They help clients understand and comply with financial regulations, structure complex financial deals, and provide legal advice on various business matters.

Transactional practice in non-law firm settings offers a dynamic and rewarding career path for legal professionals. Whether working as in-house counsel, in the insurance industry, or in other sectors, these professionals play a vital role in ensuring legal compliance, managing risks, and supporting business operations. Their expertise and skills are essential for the success and growth of the organizations they serve.

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5.4: Skills Needed for Legal Professionals Working in Transactional Law Fields

Legal professionals working in transactional law fields need a diverse set of skills to manage various aspects of transactions. These skills are essential for ensuring that transactions are conducted smoothly and in compliance with legal requirements.

Analytical Skills

Analytical skills are crucial for legal professionals in transactional law. They must be able to analyze complex legal documents and identify key issues that could impact a transaction. Additionally, understanding financial statements and business operations is essential for providing sound legal advice and making informed decisions.

Attention to Detail

Precision in drafting and reviewing legal documents is vital. Legal professionals must ensure that all filings are accurate and comply with relevant regulations. Attention to detail helps prevent errors that could lead to legal complications or financial losses for clients.

Organizational Skills

Managing multiple tasks and deadlines is a common challenge in transactional law. Legal professionals need strong organizational skills to keep track of documents, maintain organized files, and ensure that all aspects of a transaction are handled efficiently. Effective organization helps streamline processes and improves overall productivity.

Communication Skills

Strong written and verbal communication abilities are essential for transactional legal professionals. They must be able to communicate effectively with clients, attorneys, and other parties involved in a transaction. Clear communication helps build trust, facilitates negotiations, and ensures that all parties are on the same page.

Research Skills

Conducting legal research to support transactions is a fundamental skill. Legal professionals must stay updated on relevant laws and regulations to provide accurate advice and ensure compliance. Research skills enable them to find and interpret legal information that is critical for successful transactions.

Technical Skills

Proficiency in legal software and document management systems is increasingly important in transactional law. Familiarity with electronic filing systems and databases helps legal professionals manage documents efficiently and stay organized. Technical skills also enhance their ability to work with modern tools and technologies.

Project Management Skills

Coordinating various aspects of transactions requires strong project management skills. Legal professionals must manage timelines, ensure that all parties meet their obligations, and oversee the progress of a transaction from start to finish. Effective project management helps keep transactions on track and minimizes delays.

Knowledge of Local Laws and Regulations

Understanding state statutes and local regulations is essential for legal professionals working in transactional law. They must be familiar with their state's statutes, especially those related to business and financial transactions. Additionally, using proper state-specific forms and ensuring compliance with state filing requirements are critical for successful transactions.

Legal professionals in transactional law need a combination of legal knowledge, technical skills, and organizational abilities to support attorneys and ensure successful transactions. By developing these skills, legal professionals can play a crucial role in the transactional law field, whether in law firms or non-law firm settings. Their expertise and attention to detail help facilitate smooth transactions and ensure that clients' interests are protected.

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CHAPTER OVERVIEW

6: Areas of Civil Practice

6.1: Introduction to Areas of Civil Practice
6.2: Introduction to Tort Law
6.3: Introduction to Family Law
6.4: Introduction to Estate Planning and Probate Law
6.5: Introduction to Life in a Law Firm

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6.1: Introduction to Areas of Civil Practice

Technically, civil law involves areas of law that you learned about in previous chapters, such as business law (business organizations, intellectual property, creditor/debtor law), transactional law (contracts, insurance law), international law, and the like. Some areas of civil law, however, are more likely to involve representation of individuals rather than companies. The next several chapters will introduce concepts in Tort law, Family Law, and Estate Planning and Probate law.

Basic Introduction to Litigation Terminology

Definition: Terms Relating to Litigation

Lawsuit: a claim or dispute brought to a court of law for adjudication. It might also be called a case, legal matter, or litigation matter.

Litigants/parties: the people involved in the lawsuit

Plaintiff: the person who begins the lawsuit by bringing it to court

Defendant: the person being sued by the plaintiff

Witnesses: people having information relating to the lawsuit, but who are not suing/being sued. They may be lay witnesses, eyewitnesses, or expert witnesses.

Pleadings: documents filed in a court proceeding that define the nature of the dispute between the parties

Summons: a notice pleading filed by the plaintiff to start the lawsuit. The purpose of the summons is to inform the defendants that they have been sued, by whom, the action the defendant must take to respond to the complaint, how to submit the response, and the deadline for responding.

Complaint: a fact pleading filed by the plaintiff to start the lawsuit. The purpose of the complaint is to provide the defendant with information about all of the parties involved in the lawsuit, the factual basis for the lawsuit, the legal claims being made in the lawsuit, and the relief being requested by the plaintiff.

Service of Process: steps that must be taken by or on behalf of the plaintiff to provide the defendant with official notice of the lawsuit. Usually, the defendant must be physically handed the summons and complaint in person. Sometimes, service of process can occur through publication in a newspaper.

Answer: a fact pleading filed by the defendant in response to the plaintiff's complaint. The purpose of the answer is to inform the plaintiff which facts and legal claims the defendant is admitting or denying (also known as **contesting**)

Affirmative defenses/defenses: claims or allegations included in the defendant's answer that, if true, could have a negative impact on the plaintiff's complaint. Some defenses could result in the complaint being dismissed, or some or all of the plaintiff's legal claims being dismissed. Other defenses could result in a reduction in the amount of the plaintiff's potential judgment against the defendant.

Counterclaim: a legal claim asserted by the defendant against the plaintiff in the same lawsuit. Most states require counterclaims to be included in the defendant's answer. Counterclaims are used when the defendant was also injured in the same incident described in the complaint, and the defendant wants to hold the plaintiff responsible.

Cross-claim: a legal claim asserted by one defendant against another defendant in the same lawsuit. Most states required cross-claims to be included in the defendant's answer. Cross-claims are sometimes used when one defendant wants to claim the other defendant is the one actually at fault in causing the plaintiff's injuries.

Motions: requests to the Court seeking some type of court action. For example, a request to the Court to dismiss the plaintiff's complaint, or to disallow certain testimony or evidence

Discovery: the pre-trial phase where both parties exchange information and gather evidence to prepare for trial. This process allows each side to obtain facts, documents, and testimony that are relevant to the case. There are many discovery tools available to both parties in civil cases, including

Interrogatories: asks the other party to answer, in writing, a series of written questions while under oath

Request for Production: asks the other party to provide copies of things, or allow access to records, land, things, documents

Request for Physical/Mental/Medical Exam: asks the other party to submit to examination by a doctor of the requester's choice

Request for Admission: asks the other party to admit or deny the truth of a series of written statements

Subpoena duces tecum: asks a witness to appear and provide copies of documents/things in his/her possession

Records requests: asks a party's employer or medical provider to provide copies of records

Freedom of Information Act (FOIA) requests: asks a government agency to provide records

Depositions: asks a party or a witness to appear and orally answer a series of questions while under oath

Additional terminology will be discussed as it arises later in this chapter.

Basic Introduction to Litigation Procedure

As you learned previously, each state has its own court system for litigating civil claims. While there are some variations among states, the basic process is fairly consistent. The flowchart below gives an overview of the procedure.

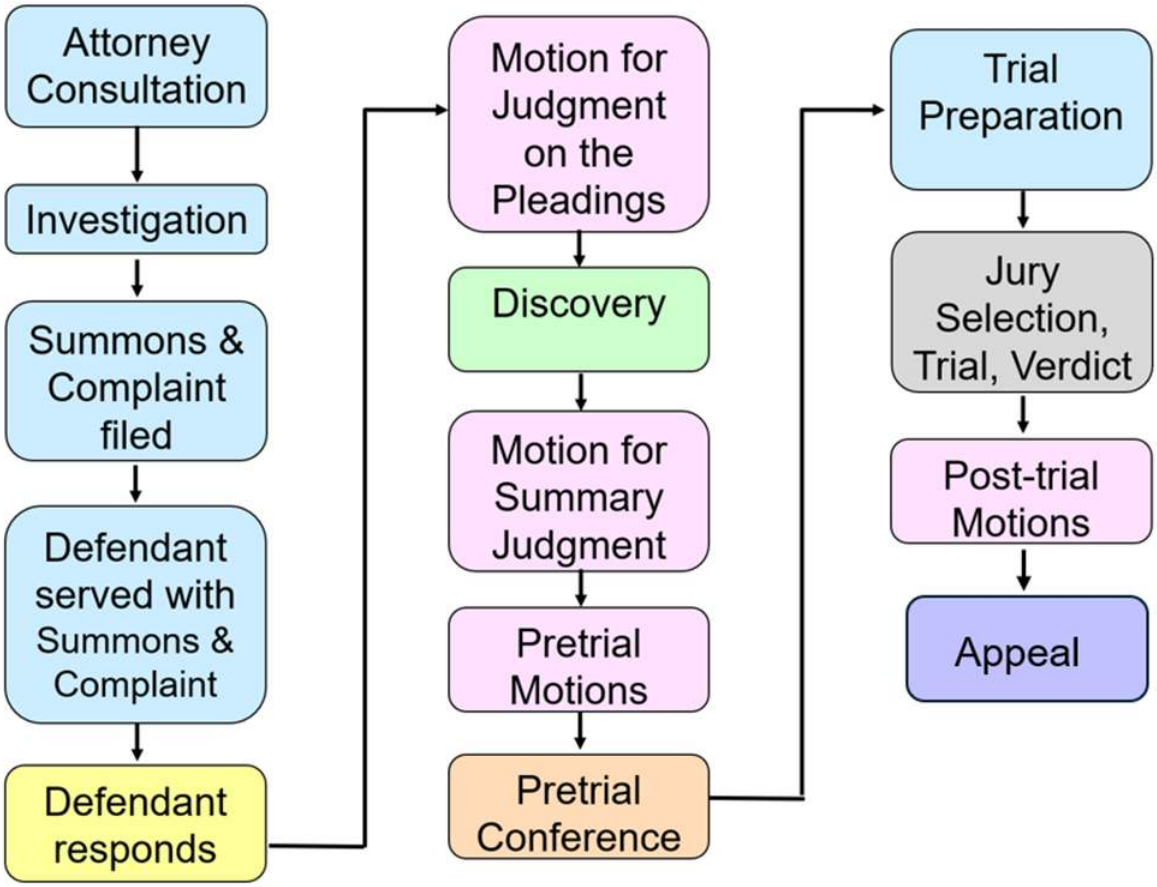

Figure 6.1.1: Flowchart of Litigation Procedure

Much of the time and work occurs during the discovery phase. During this time, the legal team is engaged in factual investigation, interviews, legal research, document review and summaries, and even attempts to negotiate a settlement before the trial. Paralegals do much of this work, including drafting pleadings, motions, discovery, and other court documents necessary to the lawsuit. You will learn more about civil litigation practice and procedures in the Civil Litigation class and have the opportunity to draft many of these documents in the Civil Trial Advocacy class.

A Day in the Life of a Litigation Paralegal: Staying Organized, Adapting, and Excelling

As a paralegal, no two days will be alike, yet certain tasks and skills will consistently shape your daily routine. Let's walk through what you can expect when you step into this vital role.

The Morning Routine: Starting Strong

Your day often begins with a focus on organization. Checking and responding to emails is your first task, ensuring nothing urgent goes unnoticed. For tasks that can wait, you'll create reminders or add them to your to-do list using tools like Microsoft Tasks. Staying on top of communication is key. Next, you'll review your physical inbox and prioritize your workload for the day. Sorting by case and addressing documents immediately (when possible) ensures efficiency and prevents backlog. This early effort sets the tone for a productive day.

Managing Cases: The Backbone of Your Role

As a litigation paralegal, you'll handle multiple cases, often keeping a case list to track trials, mediations, and depositions. Organizing your cases with tools like Excel helps you review them regularly—typically weekly or monthly—so you're always prepared.

For new cases, you'll gather background information on involved parties using resources like Westlaw, PeopleMap, Wisconsin's Circuit Court Access Program (CCAP) and local court dockets. Background checks and research on criminal records, social media activity, and prior lawsuits provide valuable insights for your attorneys. For existing cases, reviewing discovery responses, medical records, and other evidence is a crucial part of your job.

In addition, you'll create and update documents like medical chronologies, expense summaries, and employment chronologies. Flagging key documents and saving them in organized folders ensures they're easily accessible for trial preparation.

Communication and Collaboration

Teamwork is the foundation of your role. Regular meetings with attorneys allow you to discuss cases, strategize, and prepare for deadlines. Flexibility is essential, as attorneys may request urgent tasks that require immediate attention. Building strong relationships with your attorneys by understanding their preferences and communication styles ensures smooth collaboration.

Adapting to the Unexpected

In litigation, surprises are part of the job. A sudden case update or request for new evidence can shift your priorities. Being organized, using checklists, and staying flexible are your best tools to manage these changes without losing momentum. You might also find yourself dealing with unique situations, such as gathering information on an overnight traffic fatality. Locating news stories, performing background checks, or seeking surveillance video are just some examples of tasks you may handle on short notice.

Trial Preparation: Crunch Time

Trials bring a new level of intensity to your role. Months before a trial, you'll begin preparing by gathering updated records, creating witness and exhibit lists, and communicating with experts to confirm availability. As trial approaches, you'll refine trial notebooks, organize key documents, and ensure everything is ready for court. During trial, staying organized and responsive is vital. You'll manage last-minute requests, monitor emails during breaks, and maintain clear communication with the legal team. Your ability to juggle multiple responsibilities while staying calm under pressure is invaluable.

Work-Life Balance and Professional Growth

Despite the demands of the job, maintaining work-life balance is possible with proper organization and prioritization. Many paralegals handle 100+ cases without regularly working overtime by sticking to efficient systems and workflows. Using lunch breaks to stay current with the field—by reading legal blogs or industry publications—keeps you informed and sharp. Leveraging tools like Word's Quick Parts and email shortcuts can also save you significant time on repetitive tasks.

Tips for Success as a Litigation Paralegal

- **Stay Organized**: Create systems to manage cases, deadlines, and documents efficiently.
- **Be Flexible**: Adapt to changes and unexpected tasks with a positive mindset.

- **Communicate Clearly**: Build strong relationships with your attorneys and colleagues through effective communication.
- **Continuously Learn**: Stay updated on legal trends and technology to enhance your skills.

By embracing these practices, you'll be well-prepared for the exciting and rewarding challenges of a litigation paralegal. It's a role that requires diligence, adaptability, and teamwork—but the impact you'll have on your cases and legal team is well worth the effort.

References

- Nita Serrano. A Day In the Life of a Paralegal.

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6.2: Introduction to Tort Law

The vast majority of civil litigation lawsuits are based on **torts.** There are many different kinds of torts. Some are based on unintentional (or accidental) acts. Others are based on intentional acts. Still others are based on acts that aren't necessarily defined as unintentional or intentional but are seen as being especially dangerous. Finally, some torts are based on a person's failure to properly perform as professionals, such as doctors, accountants and attorneys.

Definition: Terms Relating to Tort Law

Tort: a person's wrongful actions that caused harm to another person.

Tortfeasor: a person who commits a tort.

Elements: the essential components that a plaintiff must prove to establish their case and win a lawsuit**.** Each type of legal claim has its own specific elements that need to be demonstrated. The elements form the foundation of the claim, and the plaintiff must provide sufficient evidence (based on the required burden of proof) for each one.

Liable/liability: being legally responsible for something in a civil claim. When a person or entity is found liable, they are obligated to do something, stop doing something, or pay for damages caused by their actions. "Guilty" is a term used only in criminal law and not in civil law.

Damages: an award (nearly always money) to the plaintiff in a civil claim that the defendant is required to pay after being found liable. In tort law, there are two types of damages that might be imposed, depending on the nature of the plaintiff's claim.

Compensatory damages: money intended to compensate the plaintiff for actual injuries or other damage caused by the defendant's tortious conduct. Examples include lost wages, medical expenses, and pain and suffering.

Punitive damages: money intended to punish the defendant for particularly "bad" tortious conduct and deter others from similar tortious conduct. They are also sometimes called exemplary damages (as in, making an example of what happens to defendants who engage in that conduct). One of the most well-known examples of punitive damages was awarded in the "McDonald's hot coffee case" in which McDonald's was ordered to pay the plaintiff $2.7 million in addition to the $160,000 in compensatory damages to a plaintiff who suffered severe burns caused by overly hot coffee.

Tort Law vs. Criminal Law

Although some torts, especially some intentional torts, have the same or similar names to crimes, they are not the same! The primary purpose of tort law is to "make the plaintiff whole" by compensating the plaintiff for injuries suffered as a result of the defendant's wrongful (or **tortious**) conduct. In contrast, the primary purpose of criminal law is to punish defendants for wrongful acts against society (though there are most often individual victims), and to deter others from committing those same wrongful acts. This difference in purpose is reflected in the consequences imposed. A **tortfeasor** is usually required to pay money to the plaintiff or may be ordered to stop engaging in certain types of conduct. A **convict** (**a person found guilty of committing a crime**) may be sentenced to jail or prison and may have to pay fines and/or restitution.

Another important difference between tort law and criminal law is how strong the plaintiff's (or prosecutor's) case must be.

Definition: Terms Relating to Proof

Burden of Proof: The obligation to prove assertions or claims – and how well they must be proven.

- **Preponderance of the evidence:** Burden of proof In ordinary unintentional tort cases. It is "more likely than not" that the claims are true. This is the lowest burden of proof.
- **Clear and convincing evidence:** Burden of proof In intentional tort cases. It is "highly or substantially likely" that the claims are true. This is sometimes known as the "middle" burden of proof
- **Beyond a reasonable doubt:** Burden of proof In criminal cases. It is "nearly certain" that the claims are true. This is the highest burden of proof.

The table below further compares tort law and criminal law.

Table 6.2.1: A comparison of tort law and criminal law.

	TORT LAW	CRIMINAL LAW
Parties (individuals, companies, the State)	Individuals vs. Individuals Companies vs. Companies Companies vs. Individuals Individuals vs. Companies	"The State" or "The People" vs. Individuals
Purpose	Recovery of damages ($) "Make the plaintiff whole"	Punish and deter crimes
Burden of Proof (the legal term)	Plaintiff (or counterclaimant) must prove: • Ordinary torts (for example, negligence): preponderance of the evidence • Intentional torts: clear & convincing evidence	Plaintiff (prosecutor) must prove: Beyond a Reasonable Doubt
Define the Burden of Proof in plain English	• Preponderance of the evidence = more likely than not or 51% likely that a fact is true or something occurred • Clear & convincing evidence = 70-75% likely that a fact is true or something occurred	Beyond a Reasonable Doubt = 90-95% likely that a fact is true or something occurred

Basic Introduction to Unintentional (Accidental) Torts

Sometimes people cause harm to other people as a result of careless or unintentional actions. Such actions could result in liability if the person failed to exercise average care, skill, and judgment that we would ordinarily expect in the particular situation. In tort law, this is referred to as the **"reasonable person" standard**. In other words, how would an ordinary, typical person have acted? For example, a reasonable person would stop at a red light. It is an objective standard that isn't impacted by the particular alleged tortfeasor's personal beliefs or intentions.

Definition: Terms Relating to Unintentional Torts

"Reasonable person" standard: An expectation that persons will exercise average are, skill, and judgment that we would ordinarily expect in the particular situation.

Negligence: a tort based in part on a person's failure to exercise reasonable care.

Contributory Negligence: a person's failure to exercise reasonable care that results in damages to that person.

To successfully assert a **negligence** claim, the plaintiff must prove four elements by a preponderance of the evidence:

- **Legal duty/duty of care**. The tortfeasor must have owed a legal duty of care to the plaintiff that required the tortfeasor to act (or not act) in a certain manner. For example, everyone driving a vehicle on a public roadway has a legal duty to obey all traffic laws, and to operate their vehicle in a safe manner.
- **Breach of duty**. The tortfeasor failed to act as a reasonable person would have acted. For example, exceeding the posted speed limit (an act of commission) or failing to stop at a red light (an act of omission).
- **Causation**. The tortfeasor's breach of duty must have caused the plaintiff to suffer damages. There are two types of causation:
  - **Direct/actual**. The injury would not have happened without the breach of duty. For example, if the tortfeasor had stopped at the red light, the collision between the plaintiff's vehicle and the tortfeasor's vehicle would not have happened, and the plaintiff would not have been injured.
  - **Indirect/proximate**. It was predictable (or **reasonably foreseeable**) that the tortfeasor's conduct would result in the injury. For example, the tortfeasor runs a red light and collides with another vehicle. As a result of the collision, the second vehicle

is pushed onto the sidewalk and hits a pedestrian. The pedestrian's injury was a foreseeable consequence of the tortfeasor running a red light.

- **Compensable Damages**. The plaintiff must have suffered actual harm, such as physical injury, property damage, or financial loss. The harm also must be a type that is recognized in tort law. For example, while it would be natural for a bystander to the accident described above to be frightened and suffer from anxiety, this is not a type of harm that tort law recognizes as compensable.

Of course, sometimes the plaintiff's damages are caused by the plaintiff's own failure to exercise reasonable care; this is called **contributory negligence**. When that happens, the amount of damages the plaintiff is able to recover from the tortfeasor is reduced by the percentage of "fault" attributable to the plaintiff. For example, if a jury decides that the plaintiff is 10% at fault for causing a car accident, the plaintiff can only recover 90% of the compensatory damages awarded by the jury. In Wisconsin, if the plaintiff's contributory negligence is greater than the tortfeasor's negligence, the plaintiff cannot recover any damages from the tortfeasor.

Negligence can arise in many types of scenarios, including motor vehicle accidents, "slip and fall" incidents (where someone fails to clean up a slippery substance from the floor), or failing to secure a potentially dangerous area (for example a swimming pool), to name a few.

Basic Introduction to Intentional Torts

Unlike torts that form the basis of a negligence claim, intentional torts arise when people cause harm to other people as a result of intentional actions. The important aspect of intentional torts is that **it is the act that must be intentional. It does not matter if the tortfeasor did not intend that any injuries or damage should result from those acts.** As long as the injuries, or damage that actually happen were reasonably expected or foreseeable consequences of the intentional act, the tortfeasor might be liable for an intentional tort. For example, shoving someone is an intentional act. If someone shoves another person near the top of a staircase, it's quite likely the person will fall down the stairs and suffer serious injuries. The act of shoving is an intentional tort, even if the shover did not intend for the other person to fall down the stairs and did not intend for that person to be injured.

There are two categories of intentional torts: intentional torts against persons and intentional torts against property. Each intentional tort has its own elements that must be proven, as discussed below. One thing intentional torts have in common, however, is that the tortfeasor might be required to pay punitive damages in addition to compensatory damages. Because of the possibility for punitive damages to be imposed, some states require clear and convincing evidence of the elements of intentional torts.

Definition: Intentional Torts Against Persons

Assault. Any word or action intended to make another person fearful of immediate harm. All that is required is a reasonably believable threat that causes immediate apprehension of injurious, offensive, or unwanted contact. It does not matter if the threat is not carried out.

Battery. Any intentional, offensive or unwanted contact to another person without lawful justification. Sometimes battery occurs after an assault – the threatened action is completed. Other times, the battery occurs without threat or warning. The contact must be a type that a reasonable person would consider to be offensive or unwanted and unjustified.

Defamation. Publicly making a false statement about another person that causes harm to the person's good name, reputation, or character. One key element is that the statement must be false; if the statement is true, there is no defamation, no matter how nasty the statement may be. Thus, truth is an absolute defense to defamation. Additionally, if the victim is a public figure or a celebrity, the victim must prove the speaker had actual malice (real and demonstrated evil intent) as a motive for making the statement.

Libel: Written defamation, including on the Internet.

Slander: Spoken defamation.

False imprisonment. Intentionally confining or restraining another person's activities without justification. The confinement/restraint can result from actions (tying someone up, locking a door), or words (threatening harm as a means of restraint).

Intentional infliction of emotional distress. Engaging in intentional, extreme, and outrageous conduct that results in severe emotional distress to another person. Many times, courts require physical symptoms of the distress that can be documented by a medical or mental health professional.

Misrepresentation/Fraud. Knowingly misstating or failing to mention an important/material fact with the intent to deceive the other person, resulting in the other person justifiably taking or not taking action to his or her detriment. One example would be if a seller claims to be selling an authentic, original Picasso painting even though the seller knows it is a very clever fake. If the buyer reasonably believes the painting is authentic and pays the seller $1 million, a misrepresentation/fraud has occurred.

Definition: Intentional Torts Against Property

Conversion. Wrongfully taking and keeping another person's property. Essentially, this is the civil claim related to the criminal act of theft.

Trespass to land. Any intentional entry onto, above, or below the surface of land owned by another without the owner's permission. Interestingly, actual harm or damage to the land is not required. This tort is designed to protect a landowner's right to exclusive enjoyment of his/her land without interference. Common trespasses to land include walking or driving on someone's land, shooting a gun over the land, flying a drone over the land, or causing water or other debris to back up on someone's land.

Trespass to personal property. Any intentional use or harm of another person's personal property without permission. Similar to trespass to land, this tort is designed to protect a landowner's right to exclusive enjoyment of his/her personal property without interference. An example of trespass to personal property might be using someone's bicycle without asking permission first – especially if the bicycle is returned in a damaged condition. The difference between trespass to personal property and conversion is that the initial taking of the property without permission is the trespass; keeping it is conversion.

Basic Introduction to Strict Liability Torts

Unlike negligence-based and intentional torts, strict liability torts impose liability for reasons other than fault. Instead, liability is imposed when injuries/damage are caused by activities or things that are "abnormally dangerous" or that create an exceptional amount of risk. Strict liability torts are based on the tortfeasor's exposure of others to dangerous (or ultrahazardous) activities, animals, or products.

Dangerous Activities

The following factors help determine whether an activity is "ultrahazardous":

- The activity presents a high degree of risk; existence of a high degree of risk of some harm to the person, land, or personal property of others
- There is a strong likelihood that the harm that results from it will be great
- The exercise of reasonable care does not eliminate the risk
- The activity itself is not a matter of common usage
- The place where the tortfeasor engaged in the activity is inappropriate
- The activity's value to the community is outweighed by its dangerous attributes.

Examples of ultrahazardous activities include using explosives and transporting, using, or storing dangerous materials (such as chlorine gas or other highly toxic or flammable materials).

Dangerous Animals

Wild animals, even if tamed or interbred with domestic animals (for example wolf-hybrid dogs or serval-hybrid cats), have been categorized as "inherently dangerous," subjecting their owners to strict liability if they cause injury or damage. Similarly, domestic animals that are trained to be aggressive or that previously have exhibited unprovoked aggression may also be considered "abnormally dangerous." For example, in Wisconsin, if a dog has previously seriously bitten a person without provocation, strict liability (and double damages) may be imposed against its owner if it bites again.

Dangerous Products

Manufacturers, distributors, and sellers of defective products may also be subject to strict liability pursuant to **product liability law**. There are three ways in which a product can be deemed "unreasonably dangerous"

- **Design defects.** Some products are inherently dangerous due to the way they are designed (for example, the way a car model is designed makes it highly likely to roll over during sharp turns due to a high center of gravity). Other times, the design is defective if a reasonable alternative design (in terms of feasibility and cost) would have reduced or eliminated a foreseeable risk of harm (for example, placing a guard over a table saw).
- **Manufacturing defects.** Sometimes the product's design isn't problematic, but the manufacturer didn't properly follow the design specifications. Examples include cans of soda contaminated with bacteria due to improper sterilization; mistakes made while assembling a car resulting in a faulty brake system; a batch of children's toys is produced with sharp edges because the molding machine malfunctioned and left sharp edges rather than the required smooth edges.
- **Warning defects.** Some products pose a higher risk of harm even if they are designed to and manufactured properly. These products must include a conspicuous and understandable warning to consumers about the risks – including risk of harm that would result from foreseeable misuse of the product. This is why some product packaging includes "obvious" warnings, such as "sharp edges" for knives, "do not use in the bathtub" for electric hair dryers, and "caution: hot" for hot coffee. Of course, consumers still must use common sense when a product poses "obvious" risks.

The common thread between these types of strict liability is that the tortfeasor is in the best position to know the dangers of the activity, animal or product, and also is in the best position to take appropriate measures to alleviate or eliminate the risk of harm posed.

Basic Introduction to Malpractice-Based Torts

People who are specially trained, certified, or licensed professionals (such as doctors, accountants and attorneys) can be held liable for negligently performing their professional duties. This negligence claim is known as **malpractice**. Although malpractice claims are similar to ordinary negligence claims, there are some key differences:

- The "standard of care" for professionals is established by the standards set by their specific profession. These standards can be found in various authoritative sources, depending on the profession. For example, the American Nurses' Association's *Nursing Scope and Standards of Practice*, guidelines and standards published by the American Medical Association, and the American Bar Association's *Model Rules of Professional Conduct*.
- Acts of malpractice can be unintentional (leaving a surgical instrument inside a patient) or intentional (a doctor knowingly performs an extremely risky surgical procedure)

Summary

There are many different types of tort claims, but they are all civil claims designed to compensate persons injured or harmed as a result of some type of unreasonable conduct. Some types of torts are very complex, such as product liability and malpractice cases. Others are more straightforward. Each case is unique and offers many opportunities to interact with clients, witnesses and experts, as well as working closely with attorneys to draft legal documents relating to the legal matter.

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6.3: Introduction to Family Law

Family law, also known as **domestic relations law**, is an area of law that has touched (or will touch) nearly everyone's life. It covers a wide range of topics and circumstances impacting marriage (creation, contracts, and dissolution), spousal property ownership, parent-child relationships, and other issues related to family relationships. Domestic relations laws vary widely among states; however, there are some consistencies in terms of issues that must be addressed.

Entering into Marital Relationships

While some of the specific details of the requirements are different from state to state, there are some **basic (or essential) requirements** imposed by every state impacting a person's ability to marry pursuant to the state's **civil marriage laws**, also known as "**traditional" or "ceremonial marriage**" laws. Many of these requirements sound similar to what you already learned about contractual requirements:

- **Intent to marry**. Both parties must enter into the marriage freely and willingly, with no fraud, duress, or undue influence affecting the decision to marry. In some states, if a person marries for "the wrong reasons" (for example, solely to support a specific immigration or other status), the marriage is invalid.
- **Capacity to marry**. As with contracts, two types of capacity are required:
  - *Mental capacity*: the person must be of sound mind, free of the influence of substances or illnesses impacting that capacity
  - *Minimum age*: the minimum age varies by state; in some states, an underage person can marry with parental consent
- **Legality**. The resulting marital relationship must be allowed under the State's laws. For example, a person may only be married to one person at a time (polygamy/bigamy – multiple spouses – is prohibited). Most states also restrict how closely related the two persons can be, either by blood, marriage, or legal status. For example, siblings (whether full blood, half siblings, adopted siblings, or even step siblings) are generally not allowed to marry. All states also have a "waiting period" imposed on a recently divorced person that prohibits them from remarrying within a certain number of months after the final divorce judgment is entered.

In addition to these basic requirements, most states impose technical or procedural requirements on traditional/ceremonial marriage. Procedural requirements may include being present in the state for a certain period of time prior to the ceremony, applying for a marriage license, participating in a ceremony officiated by an authorized person and witnessed by a certain number of people (usually two – this is often the role of the "best man" and "maid/matron of honor"), undergoing blood testing, and recording the signed and dated marriage license with the state.

A dwindling number of states also allow **common law marriage**. While the essential requirements for marriage apply to common law marriages, the procedural requirements do not. Instead, the couple must demonstrate, through their actions and inactions, a continuing intent to be married. In other words, they must act the way society would expect a married couple to act. This includes living together (also called cohabiting) in a monogamous relationship; sharing income, expenses, and property; and "holding themselves out to the public" as being a married couple (for example, registering at hotels as spouses, or introducing each other as spouses).

Once a couple is legally married in one state, the marriage must be treated as valid in all of the other states, even if the other state's procedural requirements were not met. Questions about marital validity become complicated when the couple travels to another state to marry as a means to avoid the requirements of their home state (sometimes called forum shopping or "marital tourism").

Spousal Rights and Obligations

Marriage brings with it certain rights and obligations. Most of these rights relate to finances, property ownership, and relationships with marital children.

Definition: Terms Relating to Spousal Rights and Obligations

Community/marital property. In several states, all property and income acquired by the couple during the marriage (with a few exceptions) is considered community/marital property owned fully and equally by both spouses, no matter how or by whom it was acquired. Wisconsin is one of those states.

Separate/individual property. This is the exception to the rule described above. If a spouse owned the property before the marriage, it is not community/marital property. Similarly, if one spouse receives a gift or inheritance during the marriage, it also is not community/marital property.

Alimony/spousal support. When a marriage is dissolved, the obligation to support one's spouse might continue. Alimony/spousal support is the amount of money a Court may order one spouse to pay to the other spouse in consideration of the impact the couple's decisions during the marriage may have on the spouse's ability to support himself/herself financially.

Legal custody. The right of a parent to make major decisions regarding a child's life relating to the child's health, education, religion, and general welfare. Legal custody is shared equally by both parents, even after the marriage is dissolved.

Physical placement. Both parents have an equal right to have their child residing with them and to enjoy a relationship with their child. There are a number of potential physical placement orders that can be entered; most states have an assumption that placement should be shared equally.

Child support. Both parents have an equal obligation to provide financial support (money, clothing, food, shelter, health care) to their children. There are a number of different ways that child support can be calculated; most states' calculations factor in the parents' incomes and the amount of physical placement each parent has with the child.

Contracts Impacting Marital Relationships

Sometimes spouses enter into agreements that alter their marital rights and obligations. As you already learned, the Statute of Frauds requires contracts impacting marriage to be in writing; otherwise, such contracts are not enforceable. Marital contracts also involve the same contractual requirements as other contracts, with some special rules and procedures. For example, whether the contract is **prenuptial** (before the marriage), **postnuptial** (during the marriage) or a **contract to dissolve the marriage**, there must be full financial disclosure by both parties and an opportunity for each party to seek the advice of independent legal counsel and/or other financial professionals. Additionally, there are certain agreements that the parties are not allowed to include in these contracts. You will learn more about that when you take a Family Law course.

Court Actions Impacting Marital Relationships

Although divorce rates in the United States have been steadily declining since the year 2000, as the divorce rate is 40-50% for first marriages. Divorce, however, is not the only legal action directly impacting marriages. Although far less common, legal annulments (as opposed to church annulments) still occur. A third legal action, legal separation is a bit more common than annulments; some experts estimate that 80% of couples receiving a judgment of legal separation ultimately obtain a divorce judgment. (Reunion After Separation? Here are the Stats | Jerkins Family Law).

It is important to understand the differences between these three legal actions impacting marriage:

Annulment

With annulments, the marriage is voided, as if it never even happened. As a result, any marital rights and obligations regarding finances and support cease to exist, with some states refusing to divide property or order spousal support. However, children born to the couple before the date of the annulment are still treated as if they were marital children; courts will thus enter orders regarding child custody, placement, and support. Grounds for annulment are limited to fundamental flaws in the marriage itself, primarily relating to the essential requirements of intent, capacity, and legality.

Divorce

In a divorce, the marriage was valid and is now terminated. Most states are "no-fault" divorce states, meaning that it only needs to be proven that "irreconcilable differences" exist such that the marriage cannot continue. In Wisconsin, the parties must prove the marriage is "irretrievably broken." Judgments of divorce may include orders regarding property division, spousal support, child custody, child placement, and child support.

Legal Separation/Judicial Separation

For legal separation or judicial separation, the marriage is *not* terminated; however, the couple lives separately. Sometimes, a couple is not mentally or emotionally ready to terminate their marriage with finality. Many couples view legal separation as a

"trial divorce" that provides a "cooling off" period during which couples can assess their feelings and future plans. Some couples choose legal separation for religious, cultural, or financial reasons. A legal separation can include the same orders as a divorce. Most states also make it very easy for couples to convert a legal separation action into a divorce action.

The procedures and orders that can be entered in each action vary by state. You will learn more about them when you take a Family Law course.

Establishing Parent-Child Relationships

Parenthood brings with it some important rights and obligations with respect to the child. Determination of parentage can be tricky, even with respect to determining whether the woman who gave birth to the child is legally the child's mother. Here are a few of the different ways a parent-child relationship can be established:

Birth

The woman who gives birth to a child is presumed to be the child's mother. Parentage continues unless and until the birth mother's parental rights are terminated (either voluntarily by the mother, or involuntarily by the state).

Marriage

If the birth mother is married to a man at the time the child was conceived or is born, most states presume that the husband is the child's father. Some extend that presumption up to 300 days after a judgment of divorce is entered, such that a child born within that time is still presumed to be the child of the now ex-husband. Some states make it very difficult to overcome this presumption, even if DNA tests exclude the husband as the child's father.

Paternity Proceedings

If a child is born to an unmarried woman, the identity of the father can be established in several ways: (1) a man signs a sworn acknowledgement of paternity (sometimes called an affidavit of paternity); (2) a judgment of paternity is entered by a court, usually based on DNA test results and after court procedures are followed; (3) in some states, if the birth mother subsequently marries a man shortly after the child's birth, the husband is presumed to be the child's father.

Adoption

This is the legal process that creates a permanent parent-child relationship after the parental rights of one or both of the child's birth parents have been terminated. Because it creates a permanent parent-child relationship, **adoption is different from foster care**, which is temporary. The termination can occur through the death or the statutory termination of parental rights (voluntary or involuntary). For example, if one of a child's parents dies and the other parent remarries, the stepparent can legally adopt the child (known as stepparent or second parent adoption). The more commonly known procedure is when both of the child's birth parents have died, or have voluntarily terminated their parental rights, and another person (or a married couple) adopts the child. Once the adoption is finalized, the child is treated the same as if the child were biologically related to the adoptive parent(s). That is, the parents have the same rights and obligations as birth parents with respect to the child, and the child has the same rights with respect to the parents as a biological child.

Laws regarding parentage and how it is established are currently changing in many states, in response to the United States Supreme Court's ruling legalizing same-sex marriage in all 50 states. Some states allowed one person, or a same-sex couple, to adopt children prior to the Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015); however, states that previously allowed only married couples to adopt children may need to modify their procedures, especially if same-sex marriage had been illegal in that state before 2015. Additionally, at this time, the marital presumption has not been applied to same-sex couples who bring children into their marriage either by birth to one of the women or artificial insemination using the sperm of one of the men. Currently, in the case of two married women, the "non-gestating" parent possibly would be required to adopt the child; for two married men, it is possible that one of the men would need to complete one of the paternity processes mentioned above and the other would then adopt the child. Each state will likely have its own processes for these situations.

Summary

Domestic relations laws across the 50 states in the United States and around the world are as varied as the people they impact. The culture, religion, accepted traditional customs, and societal norms of each state or country help to shape those laws.

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6.4: Introduction to Estate Planning and Probate Law

Estate planning and probate law, also known as **elder law**, is an area of law that covers topics and circumstances primarily relating to making decisions about finances, property, and health care, if we become incapacitated and when we die. The only way to assure that will happen is through estate planning. When we die, our final bills must be paid and our property distributed to the people who are entitled to receive it. As with other civil law practice areas, each state has a unique set of rules and procedures relating to estate planning and probate; however, there are some consistencies.

What is an Estate Plan?

As we live our lives, we hope to accumulate property, to take care of our bodies and minds, and (in some cases) raise children. While we're living and healthy, we value being able to. However, circumstances can happen that can impact our ability to do these things. Most people desire to make known their wishes about what will happen to their property, bodies, and/or children in the event they are unable to express their wishes or upon their death. That's where estate planning comes in. An **estate plan is a set of legal documents that present a person's wishes for the distribution of property, guardianship of minor children, and healthcare decisions**. It is an arrangement of a person's assets using the laws of various disciplines to gain maximum financial benefit for the disposition of the person's assets during life and after death.

Laws and regulations regarding property ownership and distribution, insurance, wills, trusts, taxes, guardianship and custody of children and incompetent or disabled family members, and healthcare all have a role to play. Comprehensive estate planning can involve the services of a variety of professionals, including lawyers, accountants, financial planners, and life insurance representatives.

Estate Planning Terminology

Definition: Terms Relating to Estate Planning

Estate: all property owned at death before it is distributed by will, trust, or intestacy laws. An estate may contain real property and personal property.

Heir: a person entitled by law (e.g., spouse, children or other family members) to a person's property after death

Beneficiary: someone receiving property or money pursuant to an estate planning tool

Fiduciary: a person appointed to serve in a position of trust, who controls and manages property exclusively for the benefit of others

Inter-Vivos/Non-Testamentary: during life

Testamentary: after death

Testate: death with a will, trust or will substitute

Intestate: death without a will, trust or will substitute

Intestacy laws: State statutes that dictate who will inherit a person's property that is not contained in a trust, will, or will substitute.

Testator: a person who makes a will

Executor: a person named in a will who is responsible for managing the testator's estate (also known as a **personal representative**).

Settlor/Grantor: a person who makes a trust

Trustee: a person named in a trust to manage for the benefit of a person who is the beneficiary named in the trust.

Decedent: a person who has died

Administration of an Estate: any proceeding relating to the settlement of a decedent's estate, whether testate or intestate

> **Probate:** court procedure in which a will is "proved" and the decedent's estate is collected, managed and distributed under the court's supervision

Documents in an Estate Plan

There are many documents involved in an estate plan. Following is a brief introduction to some of the most common ones.

Durable General Power of Attorney for Property and Finances

A durable, general financial power of attorney allows you to appoint someone to handle your financial and property matters if you are unable to do so, even if you become incapacitated. Once you pass away, the authority given under this document terminates. The person you choose as your Financial Power of Attorney can handle matters such as:

- Writing checks and paying bills
- Buying or selling property
- Managing your investments
- Speaking with your accountant, your investment advisor, and the IRS on your behalf
- Filing your taxes

Once you pass away, the authority given under this document terminates.

Advance Healthcare Directives

Included in this category are documents that allow you to appoint someone to make health care decisions on your behalf (for example, a Health Care Power of Attorney). Other documents allow you to provide instructions to your health care providers about treatment you do or do not want (for example, Letters of Instruction, Advance Medical Directives, Living Wills, and Do Not Resuscitate Orders). These documents activate only if you are unable to make or express healthcare decisions because you are incapacitated. Similar to the Durable General Power of Attorney, once you pass away, the authority given under these documents terminates.

Inter-Vivos Trusts

These documents transfer legal ownership of property from one person (the **settlor or grantor**) to another person (the **trustee**), to manage for the benefit of a person who is the **beneficiary** named in the trust. An inter-vivos trust is active during the settlor's lifetime, and sometimes the settlor is also a trustee and/or a beneficiary. A trust can be **revocable**, meaning it can be canceled or changed at any time by the settlor, or **irrevocable**, meaning that it cannot be canceled or changed.

Most inter-vivos trusts also have provisions that state what should happen to the settlor's property when the settlor dies. Of course, once the settlor dies, the trust becomes irrevocable. Property put into a trust does not have to go through probate or be supervised by the court, even after the settlor dies.

Wills

Unlike powers of attorney, wills activate only after the testator has died. A will appoints an **executor** (also known as a **personal representative**), who is responsible for managing the testator's estate. This person collects and preserves the testator's property, pays final bills, and distributes the property to the beneficiaries named in the will. Some wills also contain **testamentary trusts** that are created on behalf of beneficiaries who might be unable to properly manage their inheritance because they are too young, are incapacitated, or are **spendthrifts** (people who are at high risk of mismanaging their inheritance). Unlike inter-vivos trusts, wills are required to go through probate.

Requirements for Estate Planning Documents

While some of the specific details of the requirements for each of these documents are different from state to state, there are some **basic (or essential) requirements** imposed by every state. Many of these requirements sound similar to what you already learned about contractual requirements:

- **Intent**. The person signing an estate planning document does so freely and willingly, with no fraud, duress, or undue influence affecting their decisions.
- **Capacity**. As with contracts, two types of capacity are required:

- *Mental capacity*: the person must be of sound mind, free of the influence of substances or illnesses impacting that capacity
- *Minimum age*: the minimum age varies by state; in most states the minimum age is 18 or 21 years of age.

- **Legality**. In the context of estate planning documents, this typically relates to procedures required when the document is signed. In most states, these documents are all required to be in writing and must also be signed and dated by the estate planning client. Some documents require, in addition to the client's signature, signatures of one or more witnesses; another common requirement is that the documents be **notarized** (signed in front of a certified **notary public** who then adds their official seal or stamp to confirm the document's authenticity).

You will learn more about these documents, as well as other estate planning tools, when you take an Estate Planning or Elder Law course.

Basic Introduction to Probate

When a person dies with a trust, the trust dictates what happens with the person's property without the need for any court processes. However, if a person dies intestate, or dies with a will, probate is required. **Probate is the court procedure in which a will is "proved," and the decedent's estate is collected, managed and distributed.** There are many different types of probate processes that can be used, depending on the size and complexity of the decedent's probate estate. Following is a brief overview of some of these processes.

Transfer or Collection by Affidavit

Many states, including Wisconsin, allow the smallest estates to be transferred to beneficiaries or heirs using an **affidavit, a document that is sworn to and signed in front of a notary public**.

Summary Proceedings

Some states, including Wisconsin, have additional simplified probate processes that can be used for small estates when transfer by affidavit is not appropriate. In Wisconsin, if there is a surviving spouse or minor children, the process is called **Summary Settlement.** A similar process – **Summary Assignment** – is available for these same types of estates where there is no surviving spouse or minor children.

Informal Administration

Informal Administration is used when an estate is too large to qualify for summary proceedings. It applies to both testate and intestate estates. The court supervision is minimal, and in Wisconsin it is largely driven by state-mandated forms. The administration often is under the supervision of a **Probate Registrar** or **Register in Probate** (an officer of the court who is not a judge). It is the most common form of probate.

Formal Administration

Formal Administration is the administration of a decedent's estate under the supervision of a Circuit Court, Probate Court, or Judge. This type of probate is required if there are interested parties who wish to contest the validity of the decedent's will, who do not agree to the appointment of the nominated personal representative, if the decedent died intestate and all heirs do not consent in writing to Informal Administration, or if an interested person/heir/beneficiary demands Formal Administration.

Each State has its own statutory probate process, and the process often differs depending on factors such as the size/value of the estate, whether the decedent has a surviving spouse, the type of property owned by the decedent (real property or personal property) at the time of death, and where the decedent's real property is located. Once again, you will learn more about probate when you take an Estate Planning or Elder Law course.

Summary

As Benjamin Franklin once said, "In this world, nothing can be said to be certain, except death and taxes." A well-written and comprehensive estate plan can cover many of life's contingencies, providing peace of mind to clients and to the families and friends that care for them. As with domestic relations laws, estate planning and probate procedures, as well as inheritance laws, across the 50 states in the United States and around the world are as varied as the people they impact. The culture, religion, accepted traditional customs, and societal norms of each state or country help to shape those laws.

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6.5: Introduction to Life in a Law Firm

There are many employment opportunities in both the public and private sectors for legal practitioners interested in civil law. You will learn more about public sector (government, agencies, and courts) employment in later chapters. A large proportion of civil law employment opportunities relating to tort law, family law, and elder law exist in the private sector, primarily in law firms. This chapter will introduce you to some of the things you can expect when working in a law firm.

What is a Law Firm?

A law firm is a business owned and operated by one or more licensed attorneys that provides legal services to clients who may be individuals, corporations, or other entities. If you've decided that one or more areas of civil law practice interest you, the next step is to decide what type of law firm would best suit your personality and work preferences.

Size

Law firms can range in size from one attorney (a **solo/sole practitioner**) in a single office to hundreds of attorneys in multiple offices throughout the state or across many states. While each law firm is different, there are some general characteristics you can expect to encounter in different-sized law firms.

In smaller law firms, you will work closely with one or a handful of other individuals whom you will get to know fairly well. You're also more likely to be required to perform a substantial amount of clerical/administrative work, as many small law firms may have less support staff (such as secretaries or receptionists) to assist you. Paralegals in smaller law firms typically enjoy a great amount of client contact and a fair amount of workplace autonomy, depending on their supervising attorney's work personality. They might work more independently with very little "micromanaging" and less bureaucracy and management hierarchy than might exist in a larger law firm. Smaller law firms might also offer smaller compensation packages in terms of salary, health insurance, retirement plans, and other employee benefits.

Larger law firms will likely offer higher compensation, access to more sophisticated technology, and more delegation of clerical/administrative duties to support staff. Very large law firms (sometimes called mega-firms) might also offer opportunities for professional development, promotions, and career advancement; however, it is also possible that a paralegal might get pigeonholed in one practice group (or even a specific type of task, such as summarizing and indexing documents). Paralegals in larger law firms also may encounter a higher level of "micromanaging," bureaucracy, and management hierarchy. Direct client contact may be less frequent.

Practice Areas

Some attorneys limit their practice to one or two areas of law; others are general practitioners who provide legal services in three or more different practice areas. There are advantages to both, depending on what is most attractive to you. For example, working with a specialist allows you to develop deeper expertise in one or two areas of law; the tasks are consistent and familiar, which can produce a strong sense of confidence and professional competence. In contrast, working with a generalist (or a law office with attorneys practicing in multiple areas of law), allows you to gain experience in different areas of law; the tasks are more varied and may be unfamiliar, which can produce a strong sense of achievement and professional satisfaction. Ask yourself whether you prefer consistency and familiarity in the work you perform, or whether the idea of frequently being challenged to learn new things is more appealing to you.

Environment/Culture

Law firm work environments and cultures are as varied as the attorneys themselves; some are informal and personal, while others are more formal and "all business" in terms of culture. In some law firms, tasks and processes are well-defined and may be included in employee handbooks or process manuals. Other law firms provide generalized guidance through instructions provided by supervising attorneys or other experienced legal staff.

Billing and Timekeeping

As you learned in Chapter 2.5, there are a variety of ways that attorneys bill clients for legal services. Many types of civil practice charge clients for each hour (or portion of an hour) that legal work is performed. Hourly fee arrangements are frequently used when representing defendants in civil litigation matters, clients in family law matters, and in probate proceedings. Most law firms charge

their clients in 6-minute increments, or tenths of an hour. When working on an hourly basis, it is crucial that you keep track of how much time you spend on legal tasks related to specific client matters diligently and in detail. Here are some timekeeping best practices:

- Keep a chart handy for calculating tenths of an hour (1-6 minutes = .1 hours; 7-12 minutes = .2 hours, and so on)
- When you are ready to begin a task, document the client matter related to the task. Some law firms use software for this purpose, and may use client numbers, matter numbers, or other codes to identify clients
- Write down or otherwise take note of the time you start working on a project and the time you stop working on the project; with interruptions, you may have multiple start- and stop-times in a single day. Some timekeeping and billing software includes a stopwatch function to help with this.
- Record/enter your time contemporaneously (or "as it occurs"). Accurately reconstructing how you spent your time at the end of the day is nearly impossible.
- Describe the tasks you are performing in detail, so that the client will understand what work you performed. For example, "telephone conference with client regarding interrogatories received from defendant" as opposed to just "called client."
- On a separate document, keep track of time you spend on tasks that cannot be ethically charged to the client, such as attending continuing education seminars, performing clerical/administrative tasks, or meeting with law firm personnel. Some law firms have a separate "client" in their timekeeping software systems (often called "Admin" or a similar name), or specific task codes (such as "conflicts checking" or "file maintenance") for recording this time.
- Be aware of your annual "billable hours" goal. Most law firms have billable hours goals for attorneys and paralegals, ranging from 1200 to 2300 hours per year. This is different from the actual hours you spend working at the law firm. A person working 40 hours per week for 50 weeks (with no sick days or vacation during those 50 weeks) works a total of 2,000 hours. As you know from Chapter 2.5, not all of those hours will count as "billable." An annual billable hours goal of 1600 equates to 32 hours each week for 50 weeks; this is only achievable if most days the timekeeper spends no more than 1.6 hours per day on "non-billable" tasks during a 40-hour work week. For more information about billable hours, check out this blog.

Some types of civil practice use billing arrangements – contingency fees and flat/fixed fees – that are not calculated based on the number of hours the attorney and paralegal spend working on the client's legal matter. These types of fees are typically used when representing plaintiffs in personal injury litigation (contingency fees) and estate planning (flat/fixed fees for each document drafted). Even in these practice areas, it's still a good practice to keep track of your time as if you were billing hourly, especially with respect to "non-billable" tasks. Having that information handy can be helpful when seeking productivity bonuses or pay raises, or to support a request for additional staffing.

Typical Paralegal Tasks and Responsibilities in Civil Practice

Paralegals assist attorneys in many different ways. The specific tasks and responsibilities vary depending on the size of the law firm, the area of law practiced by attorneys in the law firm, and the experience and skills of the paralegal. Following are tasks and duties typically delegated to paralegals in civil practice:

- Pre-client screening and conflicts-checking before the law firm accepts the client
- Drafting the fee agreement and engagement/retainer letter for the attorney's review and signature (or alternately, drafting the non-engagement letter for the attorney's review and signature)
- Opening and managing the client's internal file, both physical files and electronic files in the law firm's client matter management software
- Conducting in-depth client interviews and other intake procedures
- Drafting any necessary releases (for example, HIPAA release forms) for the attorney's review and the client's signature
- Assisting the client with locating, obtaining, producing, and organizing information and documentation relevant to the client's legal matter
- Drafting legal correspondence to the client, witnesses, court personnel, and other parties/attorneys involved in the client's legal matter
- Conducting factual investigation and legal research regarding the client's legal matter
- Interviewing witnesses regarding the client's legal matter
- If necessary, assisting with locating experts for consultation and/or testimony regarding the client's legal matter

- Speaking on the telephone with the client, witnesses, experts, court personnel, and other parties/attorneys involved in the client's legal matter
- Drafting pleadings, discovery, motions, court forms, and other legal documents necessary to fulfill the agreed-upon legal services to the client
- Facilitating the completion and signature of legal documents by the client as requested by the attorney
- Filing and/or e-filing documents with the court
- Receiving, organizing, and summarizing documents and other information received from third parties in response to interviews and document requests
- Acting as liaison between the client and the attorney with respect to providing legal information to the client and requesting legal advice from the attorney
- Assisting the attorney with preparation for hearings, trials, and other proceedings
- Attending legal proceedings (such as depositions, hearings, trials) at the attorney's request
- Managing deadlines, calendars and task lists relating to the client's legal matter (including entering reminders and ticklers into the law firm's calendar system)
- Engaging in administrative tasks such as making copies, sending faxes, emailing, attending inter-office meetings, scheduling appointments, generating and reviewing bills to send to clients, and placing documents in the client's file at the end of the day
- Staying current in local court rules/procedures, as well as State and Federal statutes, regulations and case law impacting the client's legal matter

Typical Paralegal Tasks and Responsibilities in Tort Law Practice

In addition to the tasks and responsibilities listed above, paralegals working with attorneys in tort law practice also collaborate closely with the attorney with respect to litigation plans, strategies, and information management. Some specific tasks and duties typically delegated to paralegals include:

- Creating a litigation plan with the attorney
- Assisting with locating opposing parties for service of process
- Coordinating service of process on opposing parties
- Tracking and docketing deadlines for opposing parties to respond to pleadings, motions, and discovery
- Determining the quickest and most cost-effective way to obtain documents and information from opposing parties
- Implementing a discovery management plan
- Drafting pleadings, motions, and discovery requests
- Assisting clients with responding to discovery requests, including gathering, organizing, categorizing, controlling, and producing the necessary documents
- Redacting privileged or confidential information from documents as directed by the attorney
- Maintaining document production and privilege logs
- Assisting clients with preserving evidence
- Ordering transcripts of depositions, hearings, trials, and other court proceedings
- Preparing deposition abstracts and summaries
- Calculating damages
- Supporting the attorney's preparation for alternative dispute resolution, hearings, and other court proceedings
- Preparing settlement offers
- Assisting with trial preparation, including contacting witnesses, organizing documents, creating exhibits, and compiling a trial notebook
- Taking steps to docket and enforce judgments

Typical Paralegal Tasks and Responsibilities in Family Law Practice

Family law is one of the most client-contact intensive practice areas for paralegals, and it can also be one of the most emotionally charged practice areas. Additionally, especially in client matters involving marital contracts or dissolution of marriage, some tricky financial calculations may be involved. Court actions impacting marriage and children involve many of the same tasks and duties listed for Tort Law practice. Some additional tasks and duties typically delegated to paralegals in Family Law practice include:

- Assisting with obtaining information regarding employment, income, expenses, and property values
- Drafting marital contracts
- Calculating child support and/or spousal support
- Preparing requests for temporary restraining orders or other protective orders
- Drafting parenting plans
- Acting as liaison between the client and guardians ad litem (attorneys who represent the children's best interests)
- Working with government and other agencies (such as child support enforcement agencies and adoption agencies)

Typical Paralegal Tasks and Responsibilities in Estate Planning and Probate Practice

Similar to Family Law practice, Estate Planning and Probate practice is also very client-contact intensive. Because it deals with death, dying, and property ownership, emotions can run high. Also similar to Family Law practice, both estate planning and probate proceedings can involve some tricky financial calculations. Many of the same tasks involved in Family Law are involved in this practice area. Some additional tasks and duties typically delegated to paralegals in Estate Planning and Probate practice include:

- Locating, classifying, and determining type of ownership of the client's/decedent's property
- Assigning a monetary value to the client's/decedent's property
- Locating, contacting, and meeting with the client's/decedent's heirs, family and blood relatives
- Obtaining certified copies of death certificates
- Assisting with preparing claims for money or property the decedent is entitled to receive (for example, life insurance proceeds or death benefits from retirement plans)
- Publishing required notices in the newspaper
- Assisting the personal representative with maintaining detailed and accurate records
- Reviewing claims made against the estate by creditors or other persons
- Preparing transfer of title documents
- Reviewing fees charged against the estate by personal representatives, trustees, and other experts/consultants
- Preparing an inventory of probate property and a final account of all transactions completed in the estate
- Assisting with preparation of tax returns
- Coordinating transfer of assets to beneficiaries or trusts

Summary

Regardless of the area of civil practice in which you choose to engage, successful paralegals have strong empathy and interpersonal skills, as well as the ability to set aside personal biases toward various situations or diverse persons. Maintaining healthy work/life balance by placing appropriate boundaries and compartmentalizing are also key to a rewarding practice. Other personal attributes and skills necessary to providing effective legal services include strong written and oral communication skills, attention to detail, time management skills, ability to work independently and as a member of a legal team, flexibility, adaptability, ability to work in a fast-paced and sometimes stressful environment, and well-developed research and investigation skills.

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CHAPTER OVERVIEW

7: Legal Careers in Government

7.1: Introduction to Legal Careers in Government
7.2: Primary Court Participants
7.3: Court Administration
7.4: Careers in Government

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7.1: Introduction to Legal Careers in Government

There are many career opportunities for those interested in serving the public and upholding the law in a setting outside of law firms. This chapter explores various paths within the government sector, including roles in the court system, public defense and prosecutors' offices, and government agencies. Each career path involves unique tasks and requires specific skills to be successful.

Careers in the Court System

Working in the court system encompasses roles such as clerks and court administrators. Legal professionals in this area are responsible for ensuring the smooth operation of court proceedings, maintaining records, and facilitating communication between parties. Their tasks include managing case files and court documents, coordinating schedules and court activities, and providing administrative support to judges. To excel in these roles, individuals need strong organizational abilities, attention to detail, excellent communication skills, and a thorough knowledge of legal procedures and terminology.

Public defenders and prosecutors also play crucial roles in the criminal justice system. Public defenders represent individuals who cannot afford private legal representation, while prosecutors work on behalf of the government to bring charges against accused individuals. Their tasks involve conducting legal research and preparing cases, representing clients or the government in court, negotiating plea bargains, and interviewing witnesses and gathering evidence. Success in these careers requires analytical thinking and problem-solving skills, strong advocacy and negotiation abilities, the capacity to work under pressure, and a high level of ethical judgment and integrity.

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7.2: Primary Court Participants

Courts hear a variety of case types, and these types dictate the court participants that will be involved. Common court participants that [someone] may encounter in criminal matters usually include the following types of participants.

Judicial Officers, Magistrates, Judges, Justices

The role of a judicial officer/magistrate is perhaps the most dynamic across the variety of court types. In limited jurisdiction courts, the “lawgiver” is often a judicial officer or a magistrate and may not be a “sworn” judge. In trial courts, judges (called justices in some state systems) are responsible for maintaining order, determining the admissibility of the evidence presented, and giving instructions to the jury regarding laws applicable to the case. Judges are also often responsible for sentencing in criminal cases. In bench trials (no jury), judges are responsible for hearing the facts of the case and determining the outcome. In trial courts, there is normally only one judge presiding over the case; however, appellate courts are more likely to be governed by a panel of judges or justices.

Magistrates and judges at the state and local level may be appointed or elected, depending upon the jurisdictions’ rules. All judges in the federal court system are appointed by the President, approved by the United States Senate, and serve for a good tenure (usually life), while state judges are either appointed or elected, and the length of their terms can vary depending on the court and the jurisdiction. You may hear judicial officers being referred to in a variety of ways (e.g., judges, justices, magistrates, referees, etc.) in various levels of courts, depending on the specific court and jurisdiction.

Court Administrators

The duties of court administrators vary depending on the jurisdiction, location, and size of the court in which they are employed. They may be competitively hired or appointed on recommendation by the chief/presiding judge. Typically, court administrators are responsible for administrative functions, rather than legal areas, such as court policy, human resource management, fiscal administration, technology management, space planning and facility management, community relations, performance management, and project leadership and oversight.

Clerk of Courts

The Clerk of Court is responsible for the administrative tasks of the trial and the physical exhibits presented as evidence in the trial. In most jurisdictions, they are responsible for maintaining the official court record, whether it is in paper or electronic form. They collect the information/forms, store them, retrieve them, and distribute them. In some jurisdictions, they are also responsible for providing clerical staff help in the courtrooms. The Clerk of Court can be appointed by the Court, hired through a competitive process, or elected to that office. There are differences in the latitude and role of the Clerk of Court based upon the jurisdiction, their appointment/election type, and the organizational structure of the court. In some courts, the Clerk of Court may also function as the court administrator.

Prosecutors

The prosecutor is responsible for bringing criminal charges against defendants and presenting evidence relative to the charges. The prosecutor tries the case on behalf of the federal or state government. In most jurisdictions, they also play a major role in managing victims’ rights and processing restitution.

Defense Counsels

The defense counsel can be either a privately retained lawyer or an appointed public defender. When a criminal defendant is determined to be unable to pay for legal services, they are appointed a public defender because they have the right to counsel. The defense counsel is responsible for preparing the defendant’s case and evidence, cross-examining witnesses, and advising the defendant about pleas and negotiated agreements.

State Grand Juries

Most states – all but Connecticut and Pennsylvania – and the District of Columbia retain the option of a state grand jury indictment. Every state uses a grand jury for some function, although such use has diminished. State grand juries are generally made up of 6-23

people with a statutory term of service of up to one year, which is much longer than the typical term of service required by petit jurors (trial jurors). The scope of activities varies but usually includes criminal indictments and investigations. Some states also allow grand juries to take on other roles, such as investigating public officials and public buildings or serving on special review committees (e.g. as part of a statewide grand jury to examine larger crime problems, such as drug distribution and gang violence).

Trial Juries

A civil petit jury, normally 12-15 jurors, decides the outcome of a case and sets compensation if applicable. A criminal petit jury, customarily 6-15 jurors, determines the facts of a criminal case and arrives at a verdict. Many limited jurisdiction courts will also employ a “six-person” jury for minor matters. Jury Commissioners and jury selection processes vary by state and locality.

Court Reporters

The court reporter is responsible for creating a verbatim transcript of court proceedings. The transcript is available upon request of either party and is especially important when a case is appealed. Not all courts use court reporters – some are not courts of record, meaning there is no verbatim transcript of the proceeding, while others use audio or video technology to capture the record and only transcribe the record upon request of a party.

Bailiffs and Courtroom **Clerks**

The bailiff maintains order in the courtroom, monitors juror independence, and calls witnesses to testify. The bailiff may be an officer of the court, or may be provided as part of a court security unit that is operated by the local sheriff or law enforcement agency. In many courts, there is also a courtroom clerk that functions as the judge’s in-court assistant, handling court reporting, producing forms, and calling witnesses, while a separate sheriff’s deputy or court security officer handles the order and security of the actual courtroom. When the trial or matter is highly confidential, sensitive, high profile, or of media interest, there may be additional officers and clerks assigned to assist in maintaining the sanctity and safety of the court and the participants.

Reference

- Courts 101: An Understanding of the Court System. IJIS Institute.

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7.3: Court Administration

The division of responsibilities for the administration of and record-keeping for courts varies from state to state. In some states, record keeping, calendaring, scheduling, and case management are supported by the Clerk of Court. Because court systems are often organized to align with county boundaries, the Clerk of Court may also be the City or County Clerk, especially when they are elected, which means that the court records and the computer systems that maintain those records are the responsibility of the City or County Clerk.

In other states, some or all of these responsibilities are addressed on a statewide basis for all court levels or only for some court levels. State court administrations provide an organization to maintain control over the administrative aspects of the judicial system, which provides simplified organization, centralized administration, and unitary budgeting. While there is no single model for these statewide organizations, most report to the chief justice. These statewide court administrative organizations are managed by a state court administrator and staff. These organizations are often referred to as the administrative office of the courts (AOC), whose function is to carry out the judiciary's administrative duties.

State Court Administrative System

Various elements of a state court administrative system may include the following:

- A court of last resort that includes a division/staff, which sets administrative policy for the judicial branch, often reflecting this policy in rules of court, directives, or orders;
- A chief justice who generally serves as an executive overseer to see that court policy is implemented;
- A state court administrator whose office provides administrative support to the chief justice and the court in implementing policy and in serving various other administrative or legal functions;
- Chief judges of trial courts and intermediate appellate courts who administer the operations of their respective courts in conformity with the policy set by the supreme court and by the court they serve; and/or,
- Trial court administrators and trial court administrative offices provide the principal, but not the sole, assistance to the chief judges in implementing their administrative responsibilities.

The Chief Justice is one of two key decision makers for a statewide court system. While responsible for judicial administration statewide, some chiefs involve some or all members of their court in administrative decisions. Others may establish a "cabinet" model, enlisting the state court administrator and presiding judges from limited and general jurisdiction courts. The power and authority of chief justices vary according to the method by which they are selected, their tenure, and the degree of unification within the court system.

Perhaps the most important factor in the power of a chief is the degree of court unification. Strong vertical lines of authority running from the Supreme Court down through the trial court system, buttressed by control over the trial court budget, can greatly enhance the authority of the chief justice and the Supreme Court.

The second key decision maker in a state court system is the state court administrator. This person serves the state supreme court, the chief justice, or a judicial council as the principal administrative officer of the state court system. Court administrators bring professional knowledge and experience to the judiciary and relieve the administrative burdens of judges so they can devote more time to adjudication.

Of importance is that this assignment of responsibility and control impacts what court information is collected, where it is maintained, how the system is funded, when it is published, and how it is otherwise shared. Courts may be more focused on the efficiency of court operations, maintaining tools, and sharing information that aids scheduling and case management. Clerks may focus their resources on ensuring the completeness, accuracy, and security of their records. State court administrators may have more of a statewide focus for records, systems, and information sharing than county clerks serving as record keepers for their local jurisdictions.

Reference

- Courts 101: An Understanding of the Court System. IJIS Institute.

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7.4: Careers in Government

Legal professionals in government agencies work in various capacities, including regulatory compliance, policy development, and legal advising. These roles can be found in agencies such as the Department of Justice, Environmental Protection Agency, and Federal Trade Commission. Their tasks include drafting and reviewing legislation and regulations, providing legal advice to government officials, investigating and enforcing compliance with laws, and developing and implementing policies. To be effective in these roles, individuals need in-depth knowledge of specific areas of law, strong research and writing skills, the ability to analyze complex legal issues, and effective communication and collaboration abilities.

Conclusion

Legal careers in the court system, criminal justice system, and government offer rewarding opportunities for those dedicated to public service and the rule of law. Whether working in the court system as a public defender or prosecutor or within a government agency, legal professionals play a vital role in maintaining justice and order. Success in these careers requires a combination of specialized skills, ethical judgment, and a commitment to serving the public interest.

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CHAPTER OVERVIEW

8: Your Career Path

8.1: Next Steps on Your Career Path

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8.1: Next Steps on Your Career Path

There are many things you can do with a Paralegal degree! Careful career planning will guide you in shaping the remainder of your academic journey. There are three steps you should take: (1) defining your long-term goals; (2) setting short-term goals; and (3) networking with others in the legal field to learn more. This chapter will introduce you to some things to consider when setting long-term and short-term goals, some of the different things you can do once you've obtained your Paralegal degree, and some networking resources to consider.

Setting Long-Term Career Goals

When thinking about your long-term, overall professional goals, there are many questions you should ask yourself. What are you looking for in a career? Do you want to become a paralegal, an attorney, or use your skills in a different profession? What factors are most important to you (for example, income, location, job satisfaction, opportunities for advancement, work environment, expected work hours, ability to work remotely, flexible work hours, or amount of client-facing/interpersonal interaction)? Are there things you feel passionate about that could translate into a career in the legal field? Do you prefer a career with predictable, perhaps repetitive tasks or one that consistently requires you to learn new skills? Does working in a fast-paced, high-volume environment excite you? Does the potential for fluctuating work volume make you uncomfortable? The answers to these questions can help you envision the overall trajectory of your career, which is a crucial first step toward achieving a fulfilling professional life.

Employment Opportunities

As you know from previous chapters, once you have earned your paralegal degree you can seek employment with a private law firm, a corporate legal department, a government agency, or many other legal-related employers. The skills and knowledge you obtain during your Paralegal education can lead to diverse career opportunities beyond what might be considered "traditional" paralegal roles. Any position requiring research skills, attention to detail, ability to manage and keep information confidential, strong written and oral communication skills, and interpersonal skills would be a good match for your degree. Paralegal graduates have obtained employment relating to insurance, real estate, compliance, banking, title companies, justice and community advocacy, private investigation, and human resources – just to name a few.

Continuing Education Opportunities

An Associate Degree in Legal Studies/Paralegal can be a gateway to additional educational credentials. Many accredited universities will accept some or all of your Associate Degree credits in transfer to various bachelor's degrees related to the legal field. Once you earn a bachelor's degree (or if you already have a bachelor's degree), you can continue on to Law School to earn a law degree (a Juris Doctor or Doctor of Law). Law students who previously earned a Legal Studies/Paralegal credential have reported increased confidence and success – with less stress – in Law School because the topics of study and some of the writing styles are familiar.

Setting Short-Term Career Goals

Once you have visualized your desired career path, the next step is to determine your short-term goals: in other words, the steps you need to take to achieve your long-term goals.

Paralegal Certification Opportunities

In Chapter 2.1, you learned that several national organizations such as the National Federation of Paralegal Associations (NFPA), the National Association of Legal Assistants (NALA), and the National Association for Legal Support Professionals (NALS), publish codes of ethics or professional conduct for non-attorney legal practitioners. Many of these same organizations also offer certification exams to further demonstrate professional competency as a generalist or as a specialist. Many states, including Wisconsin, also offer voluntary certification to paralegals practicing within the state. Still other states provide limited licensing programs for paralegals (such as Washington State's Limited License Legal Technician).

> For more information about these certifications, visit the following websites:
>
> - **National Federation of Paralegal Associations (NFPA):** National Federation of Paralegal Associations

- **National Association of Legal Assistants (NALA):** NALA – The leading paralegal association
- **National Association for Legal Support Professionals (NALS):** National Association for Legal Support Professionals
- **American Alliance of Paralegals, Inc. (AAPI):** American Alliance of Paralegals, Inc.
- **State Bar of Wisconsin:** Wisbar-Paralegal

Although these certifications are voluntary, obtaining them signals to employers that you possess advanced skills and knowledge, which can translate into enhanced employability and career opportunities as well as potentially higher pay.

Other Law-Related Certification Opportunities

A Legal Studies/Paralegal degree also provides an excellent foundation for certification in other law-related fields. Below are just a few of them:

- For legal practitioners interested in the role of a Law Office Administrator, the **Association of Legal Administrators (ALA)** offers a Certified Legal Manager credential: ALA Certification
- For those interested in providing services related to Alternative Dispute Resolution (ADR), **the National Association of Certified Mediators (NACM)** offers education and certification in mediation: NACM - Largest Certification Association for Mediators
- Legal practitioners can choose to specialize in e-Discovery, by obtaining certification **through the Association of Certified e-Discovery Specialists (ACEDS**): Association of E-Discovery Specialists
- Federal Bankruptcy enthusiasts can obtain certification as **Bankruptcy Judicial Assistance from the Association of Bankruptcy Judicial Assistants (ABJA):** Certified Bankruptcy Assistants (CBA) Program

Networking

As part of your Paralegal education, you learned valuable investigative researching skills, as well as interpersonal skills. Those same skills are instrumental in helping you determine and attain your career goals. One of the best ways to learn more about potential career paths and open job positions is through networking with others working in the legal field.

Some survey data suggests that more paralegals find employment through networking than through searching for job postings online. While professional networking websites such as LinkedIn are useful, there are many other networking opportunities that can be even more effective and provide other valuable resources.

Associations for Legal Professionals

Each of the paralegal associations mentioned above (NFPA, NALA, NALS, AAPI) includes the opportunity for members to network and post/apply for job opportunities. Many of them also have links to local (at the State level) affiliates/branches (for example the Paralegal Association of Wisconsin). Nearly all of these associations offer student memberships for free or very low cost. Even the American Bar Association offers free membership for Legal Studies/Paralegal students! In addition to networking opportunities, most of these associations offer blogs and other educational materials to members.

Volunteer Organizations

Not only can you develop your skills while helping people in need of low-cost legal services, but you can also make valuable networking connections with paralegals, attorneys, and other legal practitioners. Legal Aid offices, organizations providing support to aging, disabled, or displaced individuals, and shelters for homeless persons or victims of domestic violence are nearly always seeking volunteers. You can also make connections while nurturing your personal passions by serving on an advisory board (for example, library boards, museum or gallery boards, or botanical garden boards).

Job-Placement Agencies

While the primary purpose of these agencies is to assist people with job-searching, they can also provide helpful connections in the community. Most colleges and universities have job-placement or career services offices for students. Similarly, nearly every medium- to large-sized city has a local government-funded employment agency. Even private temporary employment agencies can be great resources for finding job opportunities (and many part-time or limited-term placements become permanent). Likewise,

internships provided through your educational institution also provide excellent experience with the possibility of conversion to full-time employment.

Legal Directories

There are several legal directories designed to assist clients with locating a local lawyer to help them with their legal matters. They can also be a great resource for paralegals seeking employment in local law firms or corporate offices. These include Martindale Hubbell Law Directory, West's Legal Directory at Findlaw.com, and Justia Lawyers. Many State Bar Associations also provide searchable lawyer directories (for example, Wisbar.org).

Summary

Embarking on the path to a fulfilling career in the legal field is exciting! The keys to successfully landing your first job include maximizing your educational opportunities (take time to learn **well**), careful and thoughtful planning, and seeking guidance from persons with experience in the legal field.

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