

ANATOMY OF A LAWSUIT

by William A. Markham, San Diego Attorney © 2007

Introduction

This article is written for the lay-person (non-lawyer) who wants to better understand how a lawsuit and trial actually work in practice, as well as for young litigators and non-litigator attorneys who want to do the same thing.

Too many practice guides and handbooks on litigation procedure and trial work are hopelessly complicated and lengthy, making them useful to the practitioner but unhelpful or pointless for the casual observer.

In this article, I will try to give a general overview of what actually happens in lawsuit from the time it is started until it is "finished" (i.e., adjudicated to conclusion in the court of first instance, with all ensuing appeals exhausted or waived).

If you want the labyrinth details, I refer you at once to the many excellent practice guides. Since I practice law in San Diego, my own favorites for this purpose are the Rutter Group Guides to pre-trial procedure and trial procedure in both the California and federal court systems.

But please continue reading if what you seek instead is an informative overview with various tips and pointers from a battle-scarred litigator, along with a smattering of colorful, illustrative examples.

What Is a Lawsuit?

If two or more legal persons become embroiled in a dispute that they cannot resolve on their own, one or more of them may decide that the dispute can be resolved only by means of a lawsuit. A lawsuit is a legal proceeding by which one or more parties asks a court of law to give specified relief because of legal wrongs that another party or parties have allegedly committed.

More exactly, a lawsuit is a legal proceeding undertaken to redress an alleged legal wrong that is brought by one or more plaintiffs against one or more defendants in a court that wields jurisdiction over the litigants and over the subject-matter of the controversy. Once the lawsuit is properly begun, the Court has jurisdiction over the parties and over their dispute, and it therefore has the power to resolve the controversy by issuing interim orders and eventually a final judgment, which bind the parties and can be enforced against them.

This is no joking matter. If Mr. Smith obtains, say, a judgment for \$85,000 against Mr. Jones, the judgment will accrue interest at 10% per year and can be renewed every ten years. All the while, Mr. Smith can try to enforce the judgment by recording it as a lien against real property that Mr. Jones owns, by levying money that Mr. Jones holds in his bank accounts, by garnishing his wages, by summoning him and his colleagues to "judgment-debtor" exams at which they are examined about Mr. Jones' financial dealings, by sending a sheriff into Mr. Jones' shop to collect funds paid by his customers, and so on and so forth.

If the judgment includes an injunction that permanently forbids Mr. Jones to engage in a certain activity, then Mr. Jones can be fined and sent to jail for contempt of court every time

he engages in the proscribed activity. If the lawsuit is a criminal prosecution brought by a public prosecutor (as opposed to a civil prosecution brought by a private litigant), the accused can be sent to jail or even ordered to forfeit his life.

Lawsuits matter, and sometimes the stakes are very high.

After a lawsuit is begun, but before it is concluded, the parties can agree to settle it at any time. If they fail to do so, the Court will ultimately decide the case by either dismissing it or entering a judgment against one or more of the parties.

The Court in which the lawsuit is litigated is called the court of first instance or the trial court, and its decision in the case can be appealed, as can certain of its interim orders made before its final decision. The original judgment might or might not be modified or reversed by an appeal, but eventually there will be a final judgment from which no more appeals can be made. This final judgment constitutes the definitive resolution of the controversy, and the parties can never again complain about the matters in dispute in this controversy. It has been thus resolved. This definitive resolution is called *res judicata*, and the related doctrine of collateral estoppel can be used to bar a re-litigation of specific issues in a subsequent proceeding.

All properly prepared settlements likewise resolve their underlying controversies, so that a settlement of a lawsuit brings a final end to the underlying dispute. Nearly all lawsuits settle, but some cases do go to trial.

The Litigator's Paradox

I have noted above that most lawsuits settle by voluntary agreement between the litigants before the case is decided.

But never forget the *litigator's paradox*: If you bring suit in the hope of getting a good settlement, you will either receive a paltry settlement or none at all from defendants who will probably see right through your ploy and despise you for it. But if you bring suit with every intention of gathering and organizing the evidence you need in order to prove your claims, the defendants will take you much more seriously. They may still resist and genuinely believe you have no good case, but if you persevere and begin to make clear to them that you might well prevail at trial, they will usually become inclined to resolve the case by offering a reasonable or even a handsome settlement.

I call this the litigator's paradox. If you go to court to settle, you will get no decent settlement and will end up having to try the case. If you go to court to win, you might well obtain a good settlement far earlier than you hoped. Of course, every case depends upon its own variables and internal dynamic, but this has been my general experience.

This in turn means the following: A litigator must always be prepared to take his case to trial. If he is not, he is merely beating his chest and bellowing in the wind, not litigating a case.

First Illustrative Example

In this article I mean to walk you through the basic steps of a lawsuit. In order to do so, I want to have a standing example, which I can refer to as I wish in order to make my points more clearly. Here then is my example.

We will suppose that my neighbor has stolen tomatoes from my expansive tomato garden, and that I have filmed the episode on video-tape (in real life my neighbors are fine, upstanding citizens and delightful neighbors, but I need an example, and this one will have to do).

Let's further suppose that I was under contract to sell these tomatoes to a famous French chef, named Paul DuBois, who lives in France but shops for the best tomatoes all over the world. Chef DuBois intended to use my tomatoes to make his world-famous "authentic tomato sauce", which he sells in grocery stores across Europe and North America, with an expanding market in Asia and Latin America. Since he cannot buy tomatoes from me, he is forced to buy his produce instead from another gardener whose tomatoes, unlike mine, are infested with the e-coli bacteria. Dubois' tomato sauce then kills seventeen innocent customers, one of whom was a 29 year-old neurosurgeon with a lifetime earnings probability of at least \$20 million. Dubois' food products in the meantime suffer horrible press around the world, and his once promising business collapses irreparably.

Dubois resolves to have justice, exclaiming in fury: "I will sue everyone responsible for this catastrophe. I will have justice from everyone involved, even if it is the last thing that I ever do!" (He says this in French, but I have given you the translation).

This then will be our example.

In this example, I am furious at my neighbors, whom I trusted, and who stole my tomatoes from me, putting into motion a chain of events that culminated in a worldwide health crisis! I am very furious indeed.

"Private Justice"

Suppose that my first impulse is to confront my neighbor, perhaps manhandle him a little, seize my tomatoes by force from him, and threaten violence unless he pays me "every penny that his theft will cost me". Suppose my neighbor is a swaggering bully who at this provocation takes out his pistol and shoots me, crippling me for life. Imagine an ensuing feud between our families that lasts five generations and takes the lives of fourteen people. Think about the Hatfields and the McCoys. This is probably how they got started.

You see my "private justice", however pleasing to me in my daydreams, is fraught with peril and is very likely to miscarry horribly. I cannot accost my neighbor, even if he has stolen my tomatoes, and even if I have videotape of the entire incident. If I do so, I perhaps run the peril of my life, or perhaps I involve my family and his in an ever-worsening rivalry. If nothing else I fear that I will be arrested and publicly disgraced.

I never even have to consider these points because I belong to a civilized society in which disputes are resolved by rule of law, not by brute force or private justice. Those who breach the peace refuse to accept these bedrock principles, and the law must be especially firm in its dealings with them (but this is another topic, reserved for another day).

Why We Have the Law and Lawyers

As noted above, I cannot seize and punish my neighbor myself, but must instead seek redress from "the law". This is the whole point.

In a civilized society we resolve conflict by *rule of law*, using regular, pre-defined procedures that meet standards of due process. Anything less is lawlessness and barbarism.

This is why we have laws, lawyers, and lawsuits. Remember that the next time you put down a lawyer, thinking yourself clever or funny for doing so. Lawyers are necessary to the administration of the rule of law. We are officers in a system of rule of law, by which our many, inevitable controversies are resolved: Criminal offences are handled by public prosecutors, who in turn are usually aided by an investigative police force that has authority to arrest and detain those suspected of criminal wrongdoing. Private offenses are pursued by private litigants in civil court, where in the final instance a judge and perhaps a jury say what must be done as between the plaintiff who brought the suit and the defendant who answered it. If a government officer breaches his duty or abuses his authority, he too can be held to account in a number of different ways. Yes, this system has its many drawbacks and burdens, and many lawyers deserve all the ridicule and derision that a scornful public enjoys heaping upon them. But the law and lawyers are infinitely better than gangs and thugs or than kings and lords, and to my knowledge rule of law is the best method in an imperfect world for resolving human disputes. I am therefore very proud of what I do and make no apology to any man for my profession, which rather is my honor as well as my calling.

A lawsuit, then, is the procedure that we use to resolve disputes that the protagonists cannot resolve on their own by a private agreement.

If my neighbor steals my tomatoes, I can bring a civil suit against him myself, or I can report the matter to the police, hoping that they will initiate a criminal investigation that will result in a public lawsuit (criminal prosecution) of my neighbor. Or I can do both.

Criminal Prosecutions and Civil Lawsuits

Let's return now to my example, which has taken place in lovely San Diego, where I am angry at my neighbor and wish to report him to the local police. I therefore make a visit to the local police and show them the incriminating videotape, confident that I have just given convincing proof of the crime of the century (each person naturally tends to think that his matter is the most important of all, but most the time no one else does).

Of course, the police and public prosecutors have enormous discretion to decide which criminal matters they wish to investigate and prosecute. After viewing my video, the police offers snicker, saying that they have better things to do with their time than to pursue such "small tomatoes".

So there will be no *criminal prosecution* of this tomato larceny: My neighbor, by stealing the tomatoes, has committed the criminal offence of larceny, but again the public authorities have decided not to bring a criminal lawsuit against him.

If there were to do so, they would act in their capacity as public officials bringing a lawsuit for criminal offenses against the defendant, who is sometimes called the accused. Such a lawsuit is always an independent proceeding in which no other claim can be litigated except for related criminal charges. The burden of proof and procedural issues in a criminal case are different from a civil lawsuit that one private party might wish to bring against another, seeking not a criminal conviction but rather a civil judgment.

Thus it may be said that a criminal prosecution and a private lawsuit are two different kinds of lawsuits, but each is lawsuit all the same: In each instance, one party brings suit against

one or more defendants in a court of law, which can then conduct a trial of the alleged facts and apply the law to these facts in order to reach an outcome, which is binding on the parties and constitutes a definitive resolution of the matter adjudicated. Criminal lawsuits are different from civil ones, but both are lawsuits. A private person has no authority to bring a criminal case. Only a public prosecutor can do so.

These points are probably obvious to you, but you might be surprised at how many people do not understand either (1) the difference between a criminal prosecution and a civil lawsuit, or (2) the similarities between them.

This said, I observe that I am a civil litigator who represents private litigants in civil claims that they bring or that are brought against them, and this article will now devote itself to an examination of civil lawsuits.

Have An Attorney Represent You

Let's now return to our illustrative example, in which there will be no criminal prosecution of my neighbor for his larceny of my tomatoes.

My only remaining lawful recourse is to bring a private suit myself against my neighbor, who I will allege has committed the tort of "conversion of assets": He has "converted" my tomatoes to his own use. (Theft of another's goods typically gives rise to a criminal charge of "larceny" and to a civil claim for "conversion").

I naturally hire an attorney to represent me in this matter and to prepare a complaint against my neighbor: Why do I do so? First, a non-attorney should never represent himself pro se, as he is an easy, sitting target in nearly every instance for an opposing attorney trained to litigate a case. But I am an attorney, so why should I not represent myself? The answer, of course, is that I lack the disinterested analysis and detachment necessary to litigate my case.

Thus the adage, "an attorney who represents himself has a fool for a client". It would also be overly difficult for me to make a persuasive presentation of my evidence at trial, if I had to act as both my own attorney and the chief witness in my own behalf. So I choose to hire an attorney to represent me. If you ever have to bring a lawsuit, you should do the same.

Personal Jurisdiction, Subject-Matter Jurisdiction, and Venue

One of the first issues that my attorney must consider is where to file my lawsuit against my neighbor? The answer is always the same: My suit must be brought in a court that has *personal jurisdiction* over all the defendants and *subject-matter jurisdiction* over the underlying controversy.

When I file suit in this matter in a given court, I am asking the court to exercise its personal jurisdiction over the defendant (my neighbor), summoning him to appear before it to answer my charges, over which it must have subject-matter jurisdiction, or else it cannot hear the case.

In this instance, both points will be child's play to establish. My neighbor lives in this jurisdiction (California), and the best way to establish personal jurisdiction is to sue the defendant where you find him, or, in other words, in the jurisdiction where he maintains his legal domicile.

Another way to establish personal jurisdiction is to say that the defendant committed the wrongdoing in the jurisdiction where you wish to sue him, and this argument would work for me as well: My neighbor not only resides in California, but also committed the legal wrong here. In other cases you can establish personal jurisdiction by showing that the defendant breached a contract that was supposed to be performed or that was made in the jurisdiction; or by showing that he maintains sufficient "minimal contacts" so that he can expect to be sued in this jurisdiction, at least with respect to the transactions at issue, etc.

As for subject-matter jurisdiction, it is likewise a simple matter in this instance. Stealing another's tomatoes is both a criminal offense that can be publicly prosecuted (larceny) as well as a civil offense that can be privately litigated (conversion of assets). The state courts of California have subject-matter jurisdiction of all common-law torts, such as conversion of assets.

Indeed, all state courts everywhere in the United States have subject-matter jurisdiction over all crimes and civil claims, save those as to which the federal courts have pre-emptive or exclusive jurisdiction.

Suppose I were to bring suit under the federal Sherman Act (an antitrust statute). I would be obliged to do so in federal court. The state courts do not have subject-matter jurisdiction over matters brought under Sherman Act. The federal courts have pre-empted jurisdiction over all claims made under the Sherman Act. This is called pre-emptive or exclusive federal jurisdiction.

But in our example, that of tomato-thievery, I can sue my neighbor in a California court, which will have personal jurisdiction over my neighbor as well as subject-matter jurisdiction over my civil claim for conversion, which I want to make against him.

California of course is a very big state. Should I sue him in any particular part of the State? There are trial courts sitting in every county of California. Should I arrange to bring my suit in the part of California that is most remote from San Diego, say in Altoona, California? If I were to try, I would be surely sanctioned for an obvious misuse of a civil procedure, and besides my neighbor would instantly be able to have the matter transferred to a more suitable *venue* (place): He would make a *motion to transfer venue*, arguing that San Diego is a more convenient venue than Altoona because it is the location where both the plaintiff and defendant reside, where the wrong allegedly occurred, and where all the witnesses and documentary evidence is located.

The case would be instantly transferred to San Diego, where I should have brought it in the first place. Since I am no fool (I hope), I would bring suit in the proper venue in the first place, and so none of this would ever happen.

These then are the related issues of personal jurisdiction, subject-matter jurisdiction and venue. They sometimes can present really difficult problems, but not in our example.

Cross-claims and Consolidation of Related Claims.

To return to our example, I have sued my neighbor for conversion in the California Superior Court for San Diego County. When answering my complaint, my neighbor might consider asserting *cross-claims* against me or someone else who might have an involvement in the suit.

In the meantime, the DuBois Company has sued me for breach of contract in this same court, but in a different proceeding. In response, my attorney makes a *motion to consolidate* the two proceedings on the ground that they largely concern the same series of transactions and occurrences, and that both cases should be litigated together or at least that the common issues of fact and law should be litigated together, so as to avoid duplicative proceedings or contradictory adjudications of the same issues of fact and law.

The judge agrees with my attorney, and he grants the motion, so that my case against my neighbor and DuBois case against me are consolidated.

The Summons, the Complaint, Personal Service, and Judgment By Default

In our example, we will assume that it was an easy matter for me to serve my neighbor, and that I graciously accepted service from the DuBois Company, so that all the parties in both proceedings have been served.

But let's back up for a moment to consider the matter of personal service, without which a lawsuit cannot proceed.

To begin a lawsuit, an attorney will prepare a *complaint*, file it in court, and have the Court issue a *summons*. The attorney will then arrange to have the complaint and summons served on each named defendant. In my case against my neighbor, my attorney has prepared a complaint for conversion of assets, which he has filed, and he has prepared a related summons, which he has submitted to the local court for issuance. He now has a file-stamped copy of the complaint and an issued summons, which he must arrange to have personally served on my neighbor. Once this occurs, my neighbor is in the case, no matter how much he would prefer to be out of it.

This then is the simple process of having the court issue a summons and accept my civil complaint. I then must have the summons and complaint personally served on my neighbor or otherwise served on him in accordance with the service statutes. To do so, I will typically hire a professional process-server to perform the service. Once this service is properly accomplished, I will return the summons along with proper proof of service, showing the court that I have served its summons and my complaint on the named defendant.

In the meantime, my neighbor must *respond to my complaint* within the time stated in the summons (in our example, he would have to respond within thirty days of the date of service). My neighbor is now the defendant in my civil suit against him, and if he fails to respond on time I can submit a request for entry of default to the court, asking that it declare the defendant *in default*. The court, upon confirming that I have properly served the defendant, will enter a default against him, meaning that he can no longer appear in the case to defend himself, unless he first brings a motion to be relieved from his default.

Typically a court will relieve a default if the defaulted defendant requests relief within six months of the date of entry of default. Even so, the defendant must present some reasonable excuse for his failure to respond on time to the complaint. The courts indulge many such excuses on the theory that it is better to have an adjudication on the merits than a judgment by default, but the courts are not obliged to relieve a default, and any sensible person will never ignore or default upon a lawsuit brought against him.

After six months, however, it becomes harder and harder for a defendant to obtain this relief, and after a year or so the burden becomes very difficult or insuperable. This is because

parties are entitled to "settled expectations" and a "resolution of disputes", and besides it is poor policy to allow defendants to default for extended periods, only to resurface at some later date, perhaps when the evidence is no longer available.

If a default is entered, the plaintiff can then make a submission or appear unchallenged in order to prove his damages, and the clerk or the judge will then enter a judgment in his favor according to his proof.

This is the quickest way to win – or lose – a lawsuit. If someone is sued but does not respond, he will lose by default, and then the plaintiff can appear unopposed to present his claim for damages, which, upon a proper showing, will become a judgment that he can enforce. It is often only at this point that the defaulted defendant wises up and seeks relief from his default. If he arrives within six months he has some chance of getting relief. Otherwise it might well be too late for him. It is never a good idea simply to ignore a lawsuit that has been served on you.

Responding to the Complaint or Cross-Complaint: Motions to Quash, Demurrers, Motions to Strike, and Answers

Suppose that my neighbor sensibly decides to answer my complaint.

In our example, I have sued him for conversion of assets. He must respond within the stated time. When doing so, he can decide before answering to do one or more of the following:

1. *Move to quash service* (on the ground that the personal service was improperly performed).
2. *Demur* to my complaint, arguing that it is poorly worded or that its underlying legal reasoning is flawed.
3. *Move to strike* various allegations made in the complaint on the ground that they are scurrilous, improper as a matter of law or otherwise impermissible.

On rare occasion a defendant or cross-defendant can have all the claims made against him dismissed on demurrer, but demurrers usually serve to oblige the pleader to state his claims more clearly and to abandon legally untenable claims while maintaining only the proper ones. Thus demurrers too often serve only to run up the bill while educating your adversary about certain conceptual problems that beset his claims, and the courts usually allow a pleader to reform his pleadings even when they uphold or sustain demurrers made against them. I therefore think demurrers make sense only when the claims at issue are a hopeless shambles that require clarification, or when certain claims clearly cannot be cured. Otherwise demurrers tend to help your adversary to understand his own case better.

To return to our example, my neighbor will almost certainly choose to respond to my complaint by answering it. My neighbor then provides his answer to my claim for conversion. In his answer, he will state his defenses as well as any affirmative defense that he might have.

He might at this time choose to assert cross-claims against me and/or others, and then I and/or these other cross-defendants must in turn respond to these cross-claims. But he obviously has no tenable or "colorable" cross-claim against anyone else in this matter, and so he makes no cross-claim at all.

Recall that in our example I have persuaded the court to consolidate my case against my neighbor him with the DuBois case, which the DuBois Company has brought against me. Now that the two cases have been consolidated, it is time for me to respond to the complaint of the DuBois company.

I will likewise file an answer to DuBois claims against me, in which I assert a number of affirmative defenses, i.e., various arguments to the effect that I should not be deemed legally responsible even if the alleged wrongs and harmed actually occurred. I will also file a cross-claim against my neighbor, seeking equitable indemnification from him for any liability that I might ultimately be deemed to owe to the DuBois Company.

In our example, I will have three essential affirmative defenses against the DuBois Company: Supervening cause; no consequential damages; and failure to mitigate properly.³ In addition, I will have my cross-claim against my neighbor for equitable indemnification, so that my neighbor will have to reimburse me any amount that I am ordered to pay to DuBois Company.

Now the stage for our litigation has been set: Two lawsuits have been brought, they have been consolidated, the defendants in each have answered, and a cross-claim has been made by the defendant in the second suit against the defendant in the first one.

Judicial Stays

Mindful that DuBois Company has brought substantially identical claims against the other seller of tomatoes (the one who sold the tainted tomatoes), I might seek a *judicial stay* of DuBois' claims: I would argue that DuBois Company seeks these very same damages against the other, culpable seller of poisoned tomatoes, and that its case against me should therefore be judicially stayed against me until its claims against the other seller are resolved, so as to avoid the risk of inconsistent adjudications or a double recovery for DuBois Company.

If I choose this approach, I would ask the Court to allow a full litigation of my neighbor's conversion of my tomatoes and perhaps also a litigation of the issue of his duty to indemnify me for any harm that DuBois could later prove against me.

But let's suppose that I wish instead quickly to dispose of most of DuBois' claims by proving (1) supervening causes, (2) no responsibility for his exaggerated consequential damages, and (3) DuBois' own failure to mitigate harm. Let's suppose that I forgo a judicial stay and decide to proceed with a full litigation of the matter so that I can quickly make and prevail on these defenses.

So I have now made my answer and affirmative defenses to the ambitious claims of the DuBois Company, which seeks "hundreds of millions" from me, whom it blames for the illness and death caused by the e-coli outbreak and the ensuing collapse of its worldwide business. I have also made a cross-claim for indemnification against my neighbor, who is the defendant in my case against him and a cross-defendant in the consolidated case that DuBois has brought against me.

From this example I hope the reader will grasp how each case can become a complicated affair with its own procedural and substantive issues.

At-Issue and Case Management

Once every litigant has answered the claims or crossclaims made against him, the case is said to be *at issue*, and the court can set a trial date and other mandatory pre-trial deadlines and dates.

In California courts and in the federal courts, the court will hold a *case management conference* after every party has been or should have been served, unless before then the plaintiff obtains a default against all the defendants.

At the case management conference, the court will wish to make sure that all the parties have been served and have appeared by responding to the complaint or cross-complaint made against them. The court will then declare that the case is "at issue". It will typically wish to keep informed of what discovery procedures the litigants have conducted or proposed to conduct.

(In federal court, no discovery is allowed until the court authorizes discovery, which it typically does at the first case management conference, but before this occurs the parties must exchange initial disclosures of evidence.)

At the first case management conference, the court might ask the litigants a few questions about the case, and invariably it will refer them to some sort of alternative dispute resolution procedure, such as mediation or early neutral evaluation. In federal court, the case management conference often entails a more thorough analysis of the underlying case than it does in state court, at least in California.

Sometimes the court will set a trial date and related pre-trial dates at the first case management conference, but in California courts the case is often referred to mediation before a trial date will be set. Where this occurs, the court will refer the litigants to mediation, and then instruct the parties to report to the court at a second case management conference, unless before then the case settles.

If the case does not settle at mediation, the court will typically set the matter for trial and will also provide certain pre-trial deadlines, such as the final date for discovery procedures, the final date for hearing pre-trial motions, the date of the trial readiness conference, and the dates for expert disclosures.

All of this can get a little tricky. Sometimes it is not possible to have a successful mediation until there has been discovery of the key issues in the case. The parties will typically wish to confer with one another about these matters and to make clear to the court what discovery procedures should be completed before a mediation is attempted. Working out a discovery calendar is therefore critical to the case management process.

In our example, I will want a mediation only after I have used discovery to prove that (1) I bear no legal responsibility to DuBois Company, save for the trifling difference between the price of my tomatoes and the price of my competitor's; and (2) my neighbor indeed stole my tomatoes, which is why I could not deliver them to DuBois (I will "produce" my videotape and provide my eye-witness testimony at a deposition to prove this last point). I will use discovery to establish that I have only a tiny debt at most to the unfortunate DuBois Company, and that my neighbor should bear full responsibility for this debt plus reimburse me for the value of my tomatoes.

Discovery Procedures

What precisely is this all-important stage of a case called "discovery"?

Discovery refers to a series of civil procedures by which the parties are supposed to exchange information, documents and legal contentions that are relevant to the underlying claims and cross-claims.

Using these civil procedures, each side can learn about all the relevant details of the case, assess the evidence that each side has, and gather and organize the evidence that it means to use at trial. It is also an excellent occasion to assess the credibility of the different parties and witnesses as well as the skill and abilities of their respective attorneys.

The principal discovery procedures are written discovery and oral depositions. Written discovery refers to the following procedures:

- *Interrogatories*: These are questions that the examining party poses to the respondent party. Form interrogatories, which are available in the California courts, state a series of specially approved questions that arise in nearly all cases, including questions about the respondent's education, work history and other background information. Special interrogatories are far more important in any difficult litigation: They are special questions that the examining party prepares specifically for the case at hand: In response to them, the responding party is typically asked to state his contentions and/or to provide specific, detailed information that might be difficult for him to remember or state clearly at an oral deposition.
- *Requests for Production*: These are formal requests for "documents" (defined in the broadest possible terms). Typically, each side will wish to examine every document that is relevant or possibly relevant to any aspect of the case, and so each side will send expansive document requests to every other party.
- *Requests for Admissions*: These are formal requests, in response to which the responding party must admit or deny certain propositions of fact that are relevant to the case. The respondent can also be asked to confirm that specified documents are "genuine" originals or copies.

Written discovery can be served only on other parties, but not on non-party witnesses.

Oral depositions refer to live examinations, by which one party examines another party in the presence of a court reporter, who transcribes and sometimes videotapes everything that the examining party asks, everything that the witness says, everything that the witness attorney says (such as objections, etc.), and in fact everything that everyone in the room might say.

Oral depositions can be used to conduct an examination of another party or of any nonparty, but of course a non-party cannot be compelled to appear unless the notice of his deposition is personally served on him along with a *deposition subpoena*. A party can be instructed to bring specified documents with him to his deposition, meaning that there are two ways to obtain documents during discovery – by using a request for production and by including a document request along with a notice of deposition. Since a request for production cannot be served on a non-party, a deposition subpoena is the only means by which to obtain documents from a nonparty witness. Sometimes the deposition subpoena will instruct the non-party witness that he need not appear, so long as he produces the specified documents in time. If one party serves a deposition subpoena, the recipient or any other party can object and move to have the subpoena quashed.

In addition the foregoing, the parties must *designate their respective expert witnesses* and exchange disclosures of the topics on which their experts are expected to testify at trial. After doing so, each will have occasion to designate additional experts to respond to the other side's expert testimony. Each side is afforded an opportunity to examine the other's expert witnesses. In federal cases the expert disclosure requirements are much more thorough than they are in state court.

In addition, any party to a case can seek a *protective order* in order to obtain certain protections from discovery procedures. The most common kind of protective order is one that limits how and to whom sensitive commercial information can be disclosed and used. Another kind of protective order excuses a litigant from answering excessive or burdensome discovery that has been propounded in order to harass or overwhelm an adversary or that is otherwise unreasonably burdensome under the circumstances of the case.

If one party tries to conduct discovery but the responding party fails to cooperate reasonably, the propounding party can make a *motion for to compel discovery and for monetary sanctions*. Such a motion can also be brought against a party who insists on making abusive discovery requests or who otherwise engages in objectionable conduct that obstructs discovery or abuses its proper purpose – which is to ascertain the truth of the contested matters in a reasonable manner.

Before a motion for discovery misuse can be brought, the parties must try to resolve the discovery dispute on their own.

The scope of discovery is very broad, but it is subject to the above protections and to various legal privileges, such as the attorney-client privilege, as well as the "attorney's workproduct immunity," which is a qualified privilege.

It is by discovery that the parties really learn the nuts and bolts of the case. Gone are mere general allegations. Now for each disputed issue of fact there is either clear proof, an absence of proof, or contradictory evidence that has to be assessed by the trier of fact.

In our glorious example, we will suppose that my attorney will astutely use discovery procedures to demonstrate by a preponderance of evidence that (1) my neighbor entered my garden at night and stole my tomatoes; (2) all the harm caused to DuBois company was directly or indirectly caused by the e-coli contamination, which in turn was caused by a supervening event for which I bear no legal responsibility; and (3) I could not have reasonably foreseen when agreeing to sell my tomatoes to DuBois that, if I failed to do so, it might purchase poisoned tomatoes from another and then find itself ruined by the ensuing e-coli outbreak.

My attorney will now wish to have the entire case resolved as a matter of law, using his discovery findings to argue that there are no "triable issues of fact", and that therefore there should be a summary judgment or at least a summary adjudication of certain causes of action.

Summary Adjudication and Summary Judgment

By the close of discovery, the stage has been set for ultimate resolution of the case: Sometimes the defendant will decide to move for *summary adjudication* of entire claims or *summary judgment* of the entire case, arguing that there is no longer any reasonable or triable dispute over any issue of fact necessary to the case; and that the court can therefore

apply the law to the established facts in order to issue a judgment or partial judgment in the defendant's favor. On rare occasion a plaintiff might seek summary judgment or summary adjudication in its own favor. A party can successfully oppose such a motion by showing that there remain in dispute issues of contested fact, meaning that there can be no resolution by summary adjudication or summary judgment.

If a defendant loses at summary judgment, it will often find that it is confronted with the prospect of a trial in front of a hostile jury, and this in turn might well lead to a favorable settlement. A plaintiff, faced with the real threat of losing its entire case on summary judgment, might settle on the cheap if it is faced with a persuasive motion for summary adjudication or summary judgment, fearing that if the motion is heard part or all of the case might be tossed out. Thus the filing of an excellent motion for summary judgment can either lead to a good settlement or to early disposition on the merits of the entire case (summary adjudication refers to a disposition of certain claims or issues, as opposed to the entire case).

Our example is perhaps too slanted in my favor: I have a videotape of the theft and might be tempted to take the rare initiative of seeking a plaintiff's summary adjudication of my conversion claim against my neighbor. He in the meantime will have argued that (1) the videotape has captured someone else other than him stealing my tomatoes; and (2) if it is him in the videotape, he had my permission to enter my garden at night in order to take my tomatoes. This is called arguing a case "in the alternative". I would argue that he can plead these defenses, but that he is judicially estopped from making contradictory averments of fact. The Court will agree with me on this point and require my neighbor to choose one line of defense. He will likely concede that he was indeed in the garden, but that he had either my express or implied permission to take tomatoes because he had done so many times before without complaint from me. Using these arguments, it is probable that he will barely survive my motion for summary judgment, but I do not like his prospects at trial.

But I will likely summary adjudication against DuBois Company at least as to the following issues: A supervening event caused most its damages; and as a matter of law most these damages are unrecoverable consequential damages that are too remote from the original contract.

Yes, there will be a trial, but it will concern only my neighbor's theft and the valuation of the difference in price paid by DuBois for its tomatoes from the second seller, along with incidental damages. This would be a silly, overly simple trial, but the point is that motions for summary adjudication can serve to streamline proceedings, allowing only triable issues of fact to proceed to trial. Motions for summary judgment are used to fully adjudicate cases in which there is no triable issue of fact.

Other Motions

In addition to the all-important motions for summary adjudication and summary judgment, there are many other kinds of motions that a party can bring both before trial or at trial. A motion is simply a formal request that the court take a certain action in the case. Most motions are made on the court's regular law and motion calendar, but some can be presented on an expedited basis, using the court's ex parte procedures. Motions can be used to seek protective orders, sanction discovery abuses, have openly scurrilous matters or claims dismissed, have issues bifurcated at trial, have a special referee or special master appointed, or have any aspect of the case administered or addressed in a manner that promotes justice or judicial economy and is done according to law.

An astute practitioner will often make skillful, sparing use of motions in order to narrow the issues and have the case administered on more sensible terms that tend to favor his client.

Motions *in limine* are motions made on the eve of trial, typically to exclude evidence, so that its very existence cannot be properly mentioned at trial, but also for a variety of other important purposes.

Other Trial Preparations

Hundred of books, maybe thousands, have been written on how best to prepare for a trial. Every attorney must find his own approach. But at a minimum you must organize all the claims, defenses, affirmative defenses and cross-claims made in the case, asking the following: What are the elements of each claim or defense, and what evidence do I have to support or disprove each of these elements. This in turn requires you to organize your evidence, which means arranging to have witnesses appear, organizing your documents and other exhibits, organizing any demonstrative presentations that you wish to make, etc. The attorney will also have to disclose to the other side what witnesses and exhibits he intends to use, etc.

Every good attorney will devote an enormous amount of effort to preparing his case before he takes it to trial. This is the time when you re-organize all the work that you have done until now, while making an action list of everything that you must do in order to try the case. If the attorney is really ahead of the game, he will have begun these preparations at the very start of the case. But even if he has done so, now is the time to complete these pre-trial preparations, all of which should be done for once and all before the trial readiness conference, which is a formal hearing at which the parties submit reports to the court, listing their witnesses and exhibits, and certifying that they are ready to proceed in short order to the trial of the case.

The Trial of the Case

The case will be tried by the *finder of fact*, which can be a jury if one has been timely requested and preserved, or a judge or magistrate judge if no jury has been preserved. The judge will preside over proceedings and rule on all evidentiary matters. Once the parties have presented their claims, the judge will decide the case if he is the decider of fact, or he will instruct the jury about the law and its applicability to the jury's findings of fact. *The finder of fact, whether judge or jury, must then decide the case in accordance with the law.*

In a jury trial, each side will take great care to select the jurors during a procedure called *voir dire* (literally, "see to say" or "let's see what these prospective jurors have to say"). Each side will also take great care to persuade the judge to use its preferred *jury instructions*. The judges tend to prefer using approved boiler-plate instructions (to avoid the risk of being overturned on appeal), but sometimes special instructions are necessary, especially on critical points in the case or in complex cases for which the boiler-plate instructions do not come close to covering all the points.

Each side will also submit a *trial brief* to the judge, so as to state its version of the case succinctly and persuasively, while alerting the judge to anticipated evidentiary disputes or other possible complications at trial.

At trial, the *order of presentation* proceeds as follows. The plaintiff makes its *opening statement*, providing a non-argumentative summary of the case and stating what the

evidence will prove or tend to prove. The defendant can then make its own opening statement (and usually should do so), or it can allow the plaintiff to present the plaintiff's evidence and then make its own opening statement right before presenting its rebuttal evidence. (This latter approach should be sparingly or never used in my opinion: Cases are often won or lost during the opening statements, and you should give yours at the first opportunity unless the high drama of a belated presentation outweighs the importance of having the finder of fact consider your version of events while hearing the plaintiff's evidence.)

After the plaintiff has presented its evidence, which is called his *case-in-chief*, the defendant can try to have the case dismissed on a *motion for non-suit*, arguing that the plaintiff has failed to present sufficient evidence to support its claims. If the motion is denied, the defendant will present its defense (if it has not yet made its opening statement, it will do so beforehand). If there are more than two litigants, the court will determine the order of opening statements and presentation of evidence.

After all the parties have presented their evidence, any defendant or cross-defendant can move for a *directed verdict*, urging the judge to refuse to refer certain claims or cross-claims to the jury for further deliberations.

If the judge declines to issue a directed verdict, each side will now make its *closing argument*, during which it will summarize the evidence, invoke legal arguments and basic concepts of fairness, and appeal to the finder of fact to decide the case in its favor. This is when the attorney finally ties it all together, connects the dots, and makes a compelling appeal for his client. It is the culmination of the attorney's work in the case.

Now the finder of fact (judge or jury) retires for deliberation, or in some judge trials simply rules from the bench.

Once the verdict is given, various post-trial motions can be made, such as a *motion for judgment notwithstanding the jury's verdict*, or a *motion for a new trial*. Once the court rules on these motions, the original trial is concluded.

From here *appeals* can be made. An appellate court might oblige the trial court to retry the entire case or certain aspects of it. Most the time the appellate court declines to "disturb the decision reached below", but not always. Once all appeals have been exhausted or waived, the lawsuit is over, and either there has been a dismissal of claims or a judgment on them or some combination of both. *The controversy has thus been resolved, forever and always.*

This then is what happens during a lawsuit.

In our example, the trier of fact will easily find against my neighbor on the claim for conversion after viewing my video-tape and listening to my sorrowful testimony in which I lay the foundation for the videotape and relate my own observation of the matters at issue. The trier of fact will likewise find for DuBois Company on the limited issue of whether I failed to deliver my tomatoes on time and what contract damages I must pay (the price differential, if any, along with incidental damages). The trier of fact will likewise have an easy time in finding that my neighbor should indemnify me for my liability to DuBois Company. The trier of fact will very likely conclude that I bear no responsibility for the harm caused by the e-coli outbreak, which was caused by a supervening event, and which I could not have reasonably contemplated as a probable consequence of my failure to deliver tomatoes when I agreed to sell mine to DuBois.

At the close of trial, a prevailing party can recover its attorney's fees only if it is entitled to do so by statute or under a contract. In this case, there is no such statute or contract, and so each side will have to bear its own fees. (In California, the allocation of fees and costs can be greatly affected by the skillful use of early settlement offers made under Section 998 of the California Code of Civil Procedure, and indeed a proper use of "998 offers" can promptly lead to sensible settlements of difficult cases, but this is matter that deserves separate attention).

Watching Trials Yourself

To gain a much better understanding of the process, you should go to your local court to watch trials for yourself. Attending actual trials in person is the second best way to learn how a trial is conducted, and any young lawyer who wishes to become a litigator or "trial lawyer" should make a regular habit of watching trials from time to time, especially before his calendar becomes so crowded with his own work that he no longer has the time to go watch. If possible, your staff should accompany you, so that they too can better understand what all the fuss is about back at the office.

What is the best way to learn about trials? Of course there is only one correct answer: By trying cases yourself!

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