Chapter 6: Litigation Documents

Chapter Outline:

§ 6.1 LEGAL WRITING: LITIGATION DOCUMENTS

Litigation documents demonstrate the need for a paralegal to possess strong writing skills. These are documents created during the pre-trial, trial, and post-trial stages of the litigation process. The skills in creating these documents are transferable to many other areas of legal writing. The most common litigation documents include:

Summons	Interrogatories
Complaints	Request for Admissions
Motions	Request for Production of Documents
Notices	Request for Medical Examination
Briefs	(or Independent Medical Examination – IME)
Subpoenas	Deposition Summaries

§ 6.2 THE SUMMONS

Process is the summons and complaint. Service of process, then, is the presenting of the summons and complaint to a defendant in a legal action. (Preparing a complaint is discussed on the following pages.)

Technically, a summons is not a pleading. It is an instrument. However, it is usually placed in the pleading portion of a client's file.

Serving the summons and complaint fulfills one of the due process requirements of a lawsuit. Everyone has a due process right to know why and by whom he or she is being sued. This is called notice. If notice is not properly effectuated, the lawsuit will be dismissed.

Jurisdictions have varying requirements for the summons and for the service of the summons. Check with your attorney, instructor, or other paralegals for examples and procedures in your jurisdiction.

The typical requirements for successfully noticing a defendant are:

1. *The original complaint and a copy of the summons are filed with the court. (This is usually done before process is served. However, some jurisdictions allow filing after service of the documents.)*

2. *The summons and complaint must both be served upon the defendant.*

3. *They must be served by someone who is not a party to the action and who is at least 18 years of age.*

4. *The affidavit of service, also called return of service, must be filled out by the person who serves the documents.*

5. *The affidavit of service, also called return of service, must be filed with the court.*

A paralegal may want to hire a process server to serve the documents. Look in the *Yellow Pages*, check online, or call information. The standard cost is $50 to $100 for a private server. In some jurisdictions, the county sheriff may serve legal documents. The cost is considerably less, but usually takes longer.

Service by publication is possible, but not usually recommended. First, you must continue to publish notice of the legal action for several weeks. The time varies by jurisdiction. *Second*, affidavits must be prepared along with a motion for default judgment. Your court rules will spell out what affidavits are required, but typically they involve attesting to your efforts to locate the defendant, what the action is about, and swearing to the amount of damages. Even after all of the above steps have been taken, some courts will still require personal service of documents.

In any case, immediate filing of the affidavit of service with the court once the summons has been served is critical. This is called *perfecting service*.

For the exercise that follows in this chapter, students will prepare a summons based upon their assigned client.

About Jurisdiction

The proper jurisdiction for filing a matter can be affected by all of the following:

- *Whether the matter is a state or federal issue*
- *Where the plaintiff and defendant live (in personam)*
- *Where the litigated matter happened (in rem)*
- *The amount of damages being claimed*
- *The subject matter of the litigation*

A paralegal should never try to determine the court in which a matter will be filed. To do so would call for fundamental legal judgment, constituting an unauthorized practice of law. The attorney will determine the appropriate jurisdiction.

Example § 6.2 | The Summons

DISTRICT COURT OF CLARK COUNTY
STATE OF CONFUSION

JOHN DOE Plaintiff, vs. PHILLIP DUNCAN Defendant.	**SUMMONS**

SUMMONS

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU

WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN TWENTY DAYS.

READ THE INFORMATION BELOW.

TO THE DEFENDANT(S): A civil complaint has been filed by the plaintiff against you for the relief set forth in the complaint.

1. If you intend to defend this lawsuit, within twenty days after this summons is served on you, exclusive of the day of service, you must do the following:

    a. File with the clerk of this court, whose address is shown below, a formal written response to the complaint in accordance with the rules of the court, with the appropriate filing fee.

    b. Serve a copy of your response upon the attorney whose name is shown below.

2. Unless you respond, your default will be entered upon application of the plaintiff, and this court may enter a judgment against you for the relief demanded in the complaint, which could result in the taking of money or property or other relief requested in the complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The state of Confusion, its political subdivisions, agencies, officers, employees, board members, commission members and legislators, each have 45 days after service of this summons within which to file an answer or other responsive pleading to the complaint.

Issued at the direction of Sally Smooth

_____

Jude Justice
Attorneys for Plaintiff

CLERK OF COURT

By:_____

1212 W. North St.
Central City, Confusion

§ 6.3 THE COMPLAINT

The complaint is the pleading that initiates a legal action. While the summons informs a defendant that he or she is being sued, the complaint explains why the suit is being initiated.

There are five elements to a complaint:

- *caption (or style)*
- *jurisdiction*
- *cause of action*
- *ad damnum clause*
- *subscription*

Caption (or Style)
Each state has its own form of caption at the top of every pleading. Some states even have different forms for different counties. The federal courts have their own form of caption as well. Every caption will include:

- *the title of the document*
- *the court where the matter is being filed*
- *the names of the parties (plaintiff and defendants)*

For this document, the title will be "Complaint." Some attorneys prefer to be more specific in the title, such as *Complaint for Negligence* or *Complaint for Breach of Contract*. Ask what form the attorney prefers. If you are unsure how the court caption looks in your jurisdiction, ask the attorney for an example of a complaint filed previously in the same court. If that is not possible, go to the court clerk's office and ask to see any file that is public record. Almost all documents filed with the court are public record, meaning you have a right to view the them. Copy the complaint from the file. The caption is sometimes referred to as the *style*.

Jurisdiction
Somewhere in the document, the court must be given a reason to hear the matter. *In personam* jurisdiction is jurisdiction over the person. *In rem* jurisdiction is jurisdiction over the controversy. There are many other forms of jurisdiction as well. While additional methods exist to establish jurisdiction, the most common manner is to simply state in the first two or three paragraphs at least one of the following:

- *the address of the plaintiff (establishes in personam jurisdiction)*
- *the address of the defendant (in personam jurisdiction)*
- *address where the controversy took place (in rem jurisdiction)*

A common example of the jurisdictional paragraphs would be:

1. Plaintiff is now and at all times relevant has been a resident of El Paso County, Colorado.

2. Defendant is now and at all times relevant has been a resident of Kiowa County, Colorado.

3. The business the parties own is now and at all times relevant has been located in Denver County, Colorado.

The statements above establish potential jurisdiction in three different counties: El Paso County could have in personam jurisdiction, Kiowa County could have in personam jurisdiction, and Denver County could have in rem jurisdiction. The plaintiff must choose the jurisdiction in which to file, but would likely choose his or her own county (El Paso above).

Federal complaints often include a formalized heading titled *Jurisdictional Statement* followed by the same sort of paragraph described above.

Cause of Action

A cause of action is a legitimate reason to sue, also called claim for relief. Every complaint must have at least one cause of action. There are hundreds of possible claims. The attorney will determine what claims are to be included in the complaint. The following is just a few examples of some common claims:

- *negligence*
- *negligence per se*
- *breach of contract*
- *intentional infliction of emotional distress*
- *misrepresentation*

For a cause of action to succeed, it must establish a *prima facie case*. This means that the allegations, if they are eventually proven true at trial, could result in the plaintiff being awarded damages. If the allegations do *not* appear to constitute a valid prima facie case, the defendant could file a motion to dismiss.

Ad Damnum Clause

Also called the *Wherefore Clause*, or *Prayer for Relief*, the *ad damnum clause* tells the court specifically what the plaintiff is asking in terms of damages. A typical ad damnum clause would be:

> *Wherefore, plaintiff requests damages in an amount to be determined at trial, attorneys' fees and court costs, and for such other and further relief as the court deems just and proper.*

It is advisable to review previous complaints filed by your attorney to determine the preferred format. Lawyers tend to stick with the ad damnum clause they first learned. Present the document in a form with which the attorney is most familiar.

Subscription

A subscription looks like a signature, with the attorney's name, bar association number, address, and phone number. In legal terms, it is much more than a simple signature. By signing the document, the attorney is attesting that, to the best of his or her knowledge, the information is correct.

Additional Considerations

Numbering Paragraphs

Each paragraph should be numbered, with either standard Arabic numbers or Roman numerals. The numbers may appear at the left hand side of the paragraph or centered above each paragraph. A paralegal should notice how the attorney has numbered previous complaints and follow that format. A paragraph in a complaint may contain a single sentence or many sentences, depending on whether the jurisdiction requires *fact pleadings* or *notice pleadings* (see below). In any case, each paragraph must contain a specific element tending to establish the claim.

Fact-pleading States v. Notice-pleading States

Some states require that each individual fact that amounts to an element of a *prima facie* case be set forth in the complaint. These are called *fact-pleading* states. Other states require only sufficient notice about the allegations to be claimed at trial. These are referred to as *notice pleading* states. While not a perfect determinant, one way to tell the two kinds of pleadings apart is that pleadings in *fact pleading* state complaints tend to contain one sentence per paragraph, with each sentence being a part of the *prima facie* case. *Notice pleading* states tend to produce longer, multi-sentence paragraphs. Ask your attorney if you are unsure.

Note Regarding Verified Complaints
To verify a complaint means to have the plaintiff attest to its validity. The attestation usually occurs at the very end of the document. In most cases, however, complaints are not verified.

§ 6.4 CLAIMS FOR RELIEF – CAUSES OF ACTION

A tort is a civil wrong. A contract is a legally binding agreement between parties. Commissions of torts and breaches of contracts constitute the vast majority of causes of action in civil litigation. The following is an introduction to some basic torts and breaches of contracts that could be the basis of claims for relief (causes of actions) in civil matters.

INTENTIONAL TORTS

Defamation, Libel, and Slander
Damage to a party's reputation, image or standing in the community

Wrongful Imprisonment (or False Imprisonment)
Restriction of an individual's freedom of movement, physically or mentally

Malicious Prosecution and Abuse of Process
Forcing a party to defend him or herself against baseless prosecution

Trespass and Nuisance (these are environmental torts)
Unwarranted and unauthorized entry onto property, or devaluing the enjoyment of property due to the intrusive acts of another

Assault
The imminent fear for one's well-being

Battery
Unauthorized touching of a person

Misrepresentation
Deceit; deliberately misleading another

Conversion
Unauthorized transfer of money or property

Intentional Infliction of Emotional Distress
Doing mental or psychological harm by act or by omission

NEGLIGENT TORTS

Negligence
Establishment of a duty, followed by a breach of that duty, and an establishment of damages. (For compensation to be awarded, it must be established that the negligence was the *proximate cause* of the damages.)

Negligence per se
Negligence while violating the law

Wrongful Death
Death caused by another's negligence

CONTRACTS

Breach of Contract
Failure to fulfill certain written or oral commitments

Bad Faith
Entering into an agreement with no intention of fulfilling obligations

Breach of Fiduciary Duty
Failing to act in the best financial interest of a party when there exists an obligation to do so

Exercise § 6.4 | Causes of Action

Identify the relevant cause of action in the following:

1. An elderly woman lives in an apartment. It is winter and a portion of the sidewalk has developed a pothole one foot deep and two by three feet long. The management places a piece of plywood over the hole, but when it snows the wood becomes icy and difficult to walk on. Despite repeated complaints from tenants, nothing is done to repair the sidewalk for three months. One morning, the plywood breaks as the woman walks across it. She falls, breaking her ankle.

2. An attorney has agreed to take a divorce case. The client is concerned that the settlement agreement favors his wife. The attorney assures his client that the agreement is fair and so the client signs the document. However, shortly after the decree is entered, the attorney admits dating his client's wife throughout the divorce.

§ 6.5 THE COMPLAINT: GENERAL ALLEGATIONS

Causes of action compose the body of the complaint. There are many methods of drafting complaints and establishing valid causes. We will focus on one of the best techniques: The *three-step cause of action*.

There is a very important concept you should remember: *An attorney will never win a case in the complaint, but an attorney can certainly lose a case in the complaint*.

If the complaint does not contain at least one valid cause of action, the court can dismiss the case. No matter how well-crafted the complaint, no matter how beautifully written and convincingly presented the argument is, you will never win the matter in the complaint. So while you want to draft a strong set of allegations, don't try to prove anything at this stage. Just allege the facts and damages. *Proof will come at trial*.

One of the most effective forms of establishing valid claims for relief is the three-step cause of action presented in this manual. Your instructor may have his or her own method of drafting a complaint. If so, follow your instructor's method. As a paralegal, part of your job is to be flexible. If you work for seven litigation attorneys, there will likely be seven "most appropriate ways" to draft a complaint. Get used to it. Don't fight it. Prepare documents as you are instructed by your supervising attorney.

General Allegations

The *three-step cause of action* relies on the author to first draft a thorough set of *general allegations*, sometimes referred to as *common allegations*. The first few paragraphs within the general allegations will be the jurisdictional statements, followed by a setting forth of the alleged facts, which must include some sort of damage. Without damages, there is no case. For instance, leaving a manhole open, with the cover off, would certainly be negligent. Unless someone falls in and is injured, or damaged, by the negligent act, however, there is no actionable case.

Once the general allegations are established, you will use the *three-step cause of action* (described in following sections) for each claim. For instance, if negligence and negligence per se are claimed, the paralegal would incorporate the *three-step cause* of action twice, once for each claim.

First, though, the *general allegations* must be established.

Example § 6.5 | General Allegations

GENERAL ALLEGATIONS

(Against All Defendants)

I.

Plaintiffs are now and at all times relevant have been residents of Kent County, state of Confusion.

II.

Defendants are now and at all times relevant have been residents of Kent County, state of Confusion.

III.

On or about October 23, 2011, Defendant was driving a taxi in which Plaintiff(s) were passengers. The Defendant, traveling north on Hill Boulevard, was traveling 60 mph in a 30 mph zone.

IV.

At the intersection of Hill Boulevard and Lee Road, Defendant failed to stop for a red light.

V.

Defendant's taxi subsequently struck a vehicle traveling south on Lee Road. The vehicle that was struck possessed the right of way.

VI.

Both Plaintiffs suffered severe damages as a result of the accident requiring lengthy hospitalization.

VII.

Both Plaintiffs have been forced to miss work because of the accident.

VIII.

As a result of this litigation, Plaintiffs have secured the services of an attorney.

§ 6.6 THE COMPLAINT: ESTABLISHING THE CLAIMS

Begin by captioning the claim, such as:

FIRST CLAIM FOR RELIEF
Negligence

Keeping in mind the facts that were established, or at least alleged, in the general allegations, follow these three steps:

1. *Provide the incorporation paragraph.*
2. *Allege the cause of action.*
3. *Allege damages as a result of the cause of action.*

1. *Provide the incorporation paragraph.*
   This paragraph incorporates by reference all the facts and allegations contained in the previous paragraphs. For example, "Plaintiff hereby incorporates and realleges Paragraphs 1 through 7, as though fully set forth at length herein." Yes, it's legal jargon. The advantage is that it saves space, not requiring the restatement of facts alleged previously.

2. *Allege the cause of action.*
   Whatever the cause of action, allege that the defendant's conduct amounted to that claim. For example, "Defendant had a duty to properly obey the traffic laws of the state and county where the accident occurred and, by failing to do so, acted in a negligent manner." If the matter is a breach of contract case, the paragraph might read, "Defendant, by her failure to provide the items ordered and paid for, is currently in breach of that contract." The writer is establishing the claim as a result of the defendant's stated conduct.

3. *Allege damages as a result of the cause of action.*
   To be actionable, the plaintiff generally must claim that he or she suffered damages (although there are exceptions). For example, "As a result of Defendant's negligent conduct stated above, Plaintiff has suffered specific damages including, but not limited to, medical expenses and lost wages." Or, in the breach of contract matter, "Plaintiff, as a result of Defendant's breach of contract, has suffered loss of potential earnings and lost contracts with retailers who were promised the contracted items."

Example § 6.6(a) | Cause of Action (or Claim for Relief)

FIRST CAUSE OFACTION
Negligence

IX.

Plaintiff hereby incorporates and realleges Paragraphs 1 through 7, as though fully set forth at length herein.

X.

Defendant had a duty to obey the traffic laws of the state and county where the accident occurred, and by failing to do so acted in a negligent manner.

XI.

As a result of Defendant's negligent conduct stated above, Plaintiff has suffered specific damages, including, but not limited to, medical expenses and lost wages.

Again, recognize that your attorney or instructor may prefer a different approach. There is no single correct way to draft a complaint. If necessary, modify your document to the style that the attorney or instructor prefers.

Note about Open-line Indicators
If there are blank lines with no print at the bottom of a page, indicate that the line has been left intentionally blank by placing "// // //" or "///" on each open line. This prevents others from adding text to the line, altering the content of the document, which has happened.

Pleading Paper
Pleading paper is numbered on the left hand column. The standard is 28 lines. Not all jurisdictions require pleading paper. If a jurisdiction requires pleading paper for pleadings, it will also be used for other documents filed with the court and for discovery documents. Pleading paper is commonly used for deposition transcripts, even in jurisdictions not requiring it for pleadings.

Spacing
Almost every jurisdiction requires that pleadings be double-spaced.

Example § 6.6(b) | The Complaint

DISTRICT COURT OF CLARK COUNTY
STATE OF CONFUSION

JOHN and SALLY SMITH Plaintiff, vs. JACK DOE Defendant.	**COMPLAINT**

Come now the Plaintiffs, John and Sally Smith, and for cause of action against the Defendant(s), and each of them, complain and allege as follows:

GENERAL ALLEGATIONS
(Against All Defendants)

I.
Plaintiffs are now and at all times relevant have been residents of Kent County, state of Confusion.

II.
Defendants are now and at all times relevant have been residents of Kent County, state of Confusion.

III.
On or about November 20, 2010, Defendant was driving a taxi, in which Plaintiff(s) were passengers. Defendant, traveling north on Hill Boulevard., was traveling 60 mph in a 30 mph zone.

IV.
At the intersection of Hill Boulevard and Lee Road, Defendant failed to stop for a red light.

V.
Defendant's taxi subsequently struck a vehicle traveling south on Lee Road. The vehicle that was struck possessed the right of way.

VI.
Both Plaintiffs suffered severe damages as a result of the accident requiring lengthy hospitalization.

VII.
Both Plaintiffs have been forced to miss work and employment opportunities due to the accident.

VIII.
As a result of this litigation, Plaintiffs have secured the services of an attorney.

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// // //

FIRST CAUSE OFACTION
(Negligence)

IX.
Plaintiffs hereby incorporate and reallege Paragraphs I through VIII, as though fully set forth at length herein.

X.
Defendant had a duty to obey the traffic laws of the state and county where the accident occurred, and by failing to do so acted in a negligent manner.

XI.
As a result of Defendant's negligent conduct stated above, Plaintiffs have suffered specific damages, including, but not limited to, medical expenses and lost wages.

SECOND CAUSE OFACTION
(Negligence per se)

XII.
Plaintiffs hereby reallege and incorporate by reference Paragraphs I through XI, inclusive, as though fully set forth at length herein.

XIII.
Defendant owed a duty to the users of the public roadways to operate his vehicle in a manner consistent with the laws of the state of Confusion.

XIV.
As a direct and proximate result of the Defendant's speeding, Defendant was negligent per se, and Plaintiffs suffered specific damages.

WHEREFORE, Plaintiffs pray for judgment against the defendant as follows:

1. For general damages in excess of $10,000.00, according to proof,
2. For loss of earnings and earning capacity, according to proof,
3. For medical expenses, future medical expenses, and all incidental expenses, according to proof,
4. For interest from the date of the accident to the time of judgment,
5. For costs of suit incurred herein,
6. For attorney's fees incurred herein, and
7. For such other and further relief as the Court deems proper.

DATED this ____ day of _____, 20___.

_____

Attorney Name State Bar No. 1907
Address
Attorney for Plaintiffs

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Assignment § 6.6 | Summons and Complaint

Prepare a Summons and Complaint based on your client's case. Keep track of your billable hours while preparing these documents. Staple or attach your time sheet to the end of the assignment.

It is recommended that you utilize the *Legal Writing Labs* on the *Study Support Web Site* for all written assignments.

§ 6.7 THE ANSWER

The Answer fulfills part of the basic procedure of litigation: The defendant's response to the claims made by the plaintiff in the Complaint. Fortunately, the answer is also one of the easiest documents a paralegal will create. It must respond to each allegation in the complaint. Since the allegations in the complaint are usually broken into individual paragraphs, it is a simple matter of making clear to the court which will be admitted, which will be denied, and which will be denied due to insufficient information.

You are not going to win your case in the answer, so there is no need to present arguments, reasons, explanations, or detailed defenses. Just admit or deny the allegations. The arguments will come at trial. An admission cannot be withdrawn, so, when in doubt, deny.

When answering a complaint, each paragraph of the complaint should be admitted, denied, or neither admitted nor denied due to lack of knowledge. To accomplish this, draft three paragraphs.

In the first paragraph, admit any allegations from the complaint that cannot be denied. For example:

1. Defendant hereby admits allegations contained in Paragraphs 1, 4, and 5 of Plaintiff's Complaint.

In the second paragraph, deny those allegations that will be denied in court. For example:

2. Defendant hereby denies any allegations contained in Paragraphs 2, 3, 6, 7, 8, and 9 of Plaintiff's Complaint.

The third paragraph addresses paragraphs that the defendant is unable to answer. Example:

3. Defendant is without sufficient knowledge to answer Paragraphs 10 and 11 of Plaintiff's complaint and therefore denies the same.

Affirmative Defenses

Affirmative defenses, often included with the answer in a separate, captioned section, admit that an event occurred, but do not admit any liability for it. Note that an affirmative defense does not claim that the *defendant* suffered damages. If damages were claimed by the defendant, that would constitute a *Counterclaim* instead of an *affirmative defense*. Examples of affirmative defenses include bankruptcy, a payment, a claim upon which relief cannot be granted, and damages which are inapplicable because of the statute of limitations. Affirmative defenses are not required.

Counterclaim

If the defendant claims to have been damaged by the plaintiff, the defendant should include a *Counterclaim* within the *Answer*. This is basically a complaint by the defendant against the plaintiff and should contain all of the elements of a complaint, except that the caption does not have to be repeated. The caption for a combined document would read, "Answer, Affirmative Defenses, and Counterclaim."

Assignment § 6.7 | The Answer (Optional)

Students may switch sides in their assigned client's case for this assignment or they may use the following scenario to create an answer. Affirmative defenses and counterclaims are optional. This assignment may be required by your instructor.

Your attorney tells you she just took a new case. The complaint was filed more than two weeks ago, so the answer is almost due. She wants you to draft an answer and provides you with the basic following information.

The case is Ann Haverhill v. Gene Villipiano. The court case number is 03-1438. Your attorney wants you to admit Paragraphs 1 and 2, deny Paragraphs 3, 5, 6, and 7, and deny Paragraph 4 due to insufficient information. Your affirmative defenses are "Failure to state a claim upon which relief can be granted" and "Assumption of the risk."

This assignment is optional unless your instructor requires it.

Example § 6.7 | The Answer

DISTRICT COURT OF CLARK COUNTY
STATE OF CONFUSION

JOHN and SALLY SMITH Plaintiff, vs. JACK DOE Defendant.	**ANSWER** **AND** **AFFIRMATIVE DEFENSES**

Comes now Defendant, JACK DOE, by and through his attorneys of record, and for his answer to the Complaint filed herein, hereby admits, denies, and alleges as follows:

1. Answering Paragraph 1 of Plaintiffs' Complaint, Defendant is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegation contained therein and therefore denies the same.

2. Answering Paragraphs 2, 3, and 4 of Plaintiffs' Complaint, Defendant admits the allegations contained therein.

3. Answering Paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 of Plaintiffs' Complaint, Defendant denies the allegations contained therein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

1. Defendant hereby avers and alleges that Plaintiff fails to state a claim upon which relief can be granted in the Complaint.

SECOND AFFIRMATIVE DEFENSE

2. Defendant hereby avers and alleges assumption of risk as an affirmative defense in this matter.

THIRD AFFIRMATIVE DEFENSE

3. Defendant hereby avers and alleges the injuries, if any, suffered by Plaintiff, as set forth in the Complaint, were caused in whole or in part by the negligence of a third party over whom Defendant had no control.

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WHEREFORE, Defendant, JACK DOE, prays for judgment follows:

1. That Plaintiff takes nothing by way of the allegations contained in his Complaint;
2. For an apportionment of damages and proportion to the degree of fault of each responsible person or entity;
3. For costs of suit incurred herein;
4. For reasonable attorneys' fees; and
5. For such other and further relief as the Court may deem just and proper.

Dated this _____ day of _____, 20__.

_____

Attorney Name
State Bar No. 7190
Address
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on this day of ____, 20__, I placed a true and correct copy of the foregoing **ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' COMPLAINT** in the United States Mail, postage prepaid, addressed to counsel on the attached service list:

_____

An employee of (Law Firm)

[Attach the list of people being served]

§ 6.8 DISCOVERY

The following pages feature interactive study regarding discovery documents. Exercises will be completed in class, and the Assignments will be completed out-of-class, unless otherwise instructed. Try to be brief in completing the fill-in-the-blank questions, but use additional paper if necessary. The exercises are primarily designed to encourage the thought process. They will not be graded.

Discovery

Evidence is needed by each party to a lawsuit to support its side of the case. Both parties attempt to gather the necessary evidence to win at trial. A paralegal is intimately involved in this process. Discovery is the vehicle by which both parties to a lawsuit are entitled to certain facts, documents and other information while preparing for trial. Discovery serves three functions:

- *to clarify issues*
- *to eliminate the element of surprise*
- *to limit the length of trial*

Every attorney knows that lawsuits are won by hard work during the pretrial stage. The best and smartest attorneys use every tool available for the benefit of their clients, and the paralegal is one of the most powerful tools an attorney possesses. Also, when an attorney hears the term "pretrial," he or she thinks "discovery." Thus, since the paralegal is very involved in discovery, and since most cases are won or lost during the pretrial stage, the paralegal's importance in litigation becomes obvious.

The four most commonly used discovery techniques are:

1. *Interrogatories*
2. *Requests for admissions*
3. *Requests for production and inspection of documents*
4. *Depositions*

The Integrity of the Discovery Process

A judge in Hawaii spoke to a group of paralegal graduates about the proper use of paralegals in a law firm. During his talk, the judge addressed the paralegal's role in the discovery process, passionately making the following points:

Discovery Can Determine the Outcome of a Trial.
Paralegals must understand that the work they do during this stage is not incidental; it is critical to the results of litigation.

The Discovery Process is an Honorable Concept.
The purpose of going to trial is not to win, but to seek justice. For justice to prevail, the relevant facts should be exposed. The discovery process requires parties to disclose all relevant facts, even those facts that damage the party making the disclosure. Some attorneys pride themselves on their ability to avoid or circumvent the discovery process. This is unethical and corrosive to the litigation process.

Don't Compromise Your Ethics for Anyone.
As a paralegal, do not engage in obstructive or evasive techniques. Maintain your ethics and help your attorney maintain his or her ethics. The integrity of the litigation process is at least partially in your hands.

What can a paralegal do?
A paralegal asked to perform a task that seems evasive or deceptive should talk to the attorney about the situation. Maybe there is a reason for the conduct that is not apparent to the paralegal. At some point, the judge pointed out, the paralegal may need to ask the attorney a simple question: *Is this really the purpose of discovery?*

Assignment § 6.8 | Discovery

Based upon the same facts as the complaint previously prepared, students will create the following discovery documents:

Interrogatories • (20 questions)
Request for Admissions • (20 statements)
Request for Production • (5 requests)

The following pages will instruct you in methods for creating the above documents. For this assignment, staple all of the documents together. Keep track of your billable hours and attach your time sheet at the end of the documents.

§ 6.8(a) | Interrogatories

Interrogatories, from the word interrogate, are written questions to the other party or general requests for information relevant to the litigation. The other party must respond to interrogatories under penalty of perjury. While Requests for Admissions (discussed later) attempt to paint the opposing party into a legal comer, Interrogatories, instead, paint with a very broad brush.

Any time after the suit is filed, either party may set forth Interrogatories to the opposing party. While all discovery must be relevant to the issues being tried, Interrogatories may be general and cover extensive matters, attempting to cast a broad net to obtain as many facts as possible.

Discovery Point
Discovery is intended to expose all relevant facts that will help the court reach a fair decision. Even if the information is damaging, the responding party must disclose it.

In the past, many jurisdictions required interrogatories and their responses to be filed with the court. Most jurisdictions have eliminated this requirement, although federal rules still generally require filing of the *certificate of mailing* or *receipt of copy*. After the caption and the "comes now" paragraph, many attorneys include specific instructions regarding the responses.

Although not required, these instructions may include such subjects as who responds to the interrogatories, how certain individuals are referred to, what certain terms or phrases mean and other guidance. These instructions should also state the continuing nature of the interrogatories.

> *Continuing Nature of Discovery*
> Even after initial discovery deadlines have passed and initial discovery responses have been completed, the responding party must inform the requesting party if additional or subsequent information becomes known. For example, if a previously unidentified witness becomes known to the responding party after discovery is complete, that party is responsible for making this information known to the other side.

Remember, interrogatories attempt to find as much information as possible, from generic background information to specific questions about the matter being litigated.

The litigation process is an adversarial process. However, there are polite considerations that should be observed for the benefit of all. One such consideration is to leave enough space between interrogatories for the opposing party to respond. In fact, in some jurisdictions this is required.

Limited Discovery
Many states now have what is referred to as limited discovery. This means either that only specific questions may be posed or that the number of questions is limited.

California, for instance, has replaced traditional discovery documents created in law offices with discovery forms, featuring specific questions for specific legal matters. In some states, discovery forms are supplemented with questions created by the firm, usually requiring court approval.

Many states limit interrogatories to 40 questions per party, unless the court grants more. Many courts even count subsections listed as a, b, c, etc., as individual interrogatories. In those jurisdictions, the paralegal should rewrite or create interrogatories without subsections to maximize the amount of interrogatories available to the client.

Remember, don't reinvent the wheel. If the firm has interrogatories from a previous litigation, or if there are formbooks available to you (in the law library or online), use them.

Discussion Points § 6.8(a) | Part 1

1. At what point are interrogatories usually sent?

2. To whom are interrogatories generally sent? The opposing party, witnesses, or both?

3. Are instructions required?

4. What are the advantages to including instructions?

5. Are interrogatories responded to under oath?

Answers to Interrogatories

When a law firm receives interrogatories from the opposing party, the paralegal should stamp the "date received" on the document, and make note of the response deadline in the appropriate calendar or tickler system. There are three ways to respond to the interrogatories.

1. The attorney responds.

This is the most inefficient means of response and should only be used in cases involving very technical or complex matters. Otherwise, the client pays attorney rates for a service that could have been provided at paralegal rates.

2. The client responds by himself.

This could certainly be appropriate and cost effective. Ultimately, the complexity of the litigation or the client's experience with the litigation process may be the determining factors. If this method of response is chosen, the client must be given a date by which the responses should be returned to the attorney. This date should be well in advance of the actual due date since revisions may be required.

3. The client responds with help.

When the interrogatories are received, the paralegal should notify the clients and make an appointment to consult with them. This is the most intelligent and cost effective method of responding to discovery. If a paralegal assists the client in responding, the time an attorney must spend reviewing, correcting and rewriting the interrogatories will be reduced.

When helping a client respond to discovery, always maintain high ethical standards. Should one ever start down the slippery slope of unethical behavior, it is difficult to regain the ethical higher ground. The paralegal should also consider the fact that answers to interrogatories, or any other form of discovery, may be entered into evidence or read at trial. Since the person responding to the interrogatories does so under penalty of perjury, any discrepancy between testimony given at trial and discovery responses could place the client and attorney in jeopardy.

Unfortunately, discovery has been used by many attorneys as a means of intimidation, delay, or obstruction. Some questions are posed simply to upset, embarrass, or scare the opposing party. Other questions may ask for responses or materials of such a quantity that the responding party is overwhelmed.

When this occurs, a litigant's attorney has two choices. The attorney may wish to object to an interrogatory because it is irrelevant, inappropriate, creates a burden on the responding party, or for other reasons. If the amount of material requested is considerable or the information not readily available, the attorney may ask the court for an extension of time to respond. Of course, the attorneys may simply agree between themselves to allow additional time. As a paralegal, you can support your attorney by documenting any agreement reached between attorneys.

Discussion Points § 6.8(a) | Part 2

1. What is the advantage in having a paralegal assist the client in answering interrogatories?

2. What ethically challenging situations could arise for a paralegal who helps a client respond to interrogatories?

3. Which of the following are not under penalty of perjury?

    a. interrogatory responses
    b. affidavits
    c. verified complaints
    d. all of the above are under penalty of perjury

Interrogatory Techniques

First and foremost, when creating any discovery document, use available form books. However, there will be times when no previously existing form quite fits, or the form you find needs substantial alteration. These techniques are designed to give the paralegal a framework for creating discovery documents.

Technique One:

Personal information. Build a profile of the opposing party.

Example § 6.8(a) | Interrogatory Technique One

1. Provide your full name, address, and home, mobile, and work phone numbers.

2. Provide the names of all those involved in responding to these interrogatories.

3. Provide a general statement about your position in this action.

Technique Two:

Financial considerations. Establish the ability of the opposing party to pay damages. Look for assets in three areas:

Example § 6.8(a) | Interrogatory Technique Two

1. Assets of the party (property, certificates of deposit, etc.)

2. Assets in which the party has an interest (wills, insurance beneficiaries, etc.)

3. Assets in which the party has no direct interest, but that may be relevant to litigation (spouse's property, insurance directly covering damages, business liability, etc.)

4. If opposing party is a beneficiary to any insurance policies, he or she should be asked to provide the following:

    a. name of policy holder
    b. name of insurance company
    c. policy number
    d. your relationship to policy holder

Technique Three:
Facts pertaining to the case. Ask detailed questions regarding the matter before the court. (Who? What? When? Where? Why? How?)

Example § 6.8(a) | Interrogatory Technique Three

1. What was your response when you first saw the plaintiff, your wife's lover, on the corner?

2. How did the plaintiff react when he saw you?

3. In what manner did the plaintiff approach you?

4. When the plaintiff approached you, how did you react?

5. What occurred when the plaintiff tried to shake your hand?

Discovery Point
Avoid asking "yes or no" questions unless follow-up questions are included. (i.e. "If yes to the above question, explain those circumstances.") Instead, try rephrasing the question to avoid a simple "yes or no" response.

Example § 6.8(a) | Interrogatories

DISTRICT COURT OF CLARK COUNTY
STATE OF CONFUSION

JOHN and SALLY SMITH Plaintiff, vs. JACK DOE Defendant.	**INTERROGATORIES**

TO: (OPPOSING PARTY'S NAME)

TO: (OPPOSING COUNSEL)

Under the authority of Rule 33 of the State of Confusion Rules of Civil Procedure, Defendant, by and through his attorneys, request that Plaintiffs answer, in writing and under oath, within thirty days of receipt hereof, the interrogatories hereinafter set forth.

DEFINITIONS

1. "COMPLAINT" shall mean and refer to Plaintiffs' complaint originally filed on 2-25-11 in Department XVII of the Clark County District Court, Case No. 5076.

2. "PROPERTY" shall mean and refer to the real property owned by Defendant.

3. "YOU," "YOUR," "YOURS," and/or "PLAINTIFF" shall mean and refer to both Plaintiffs as well as their agents, attorneys, employees, accountants, family members, investigators, or any other person acting on their behalf.

4. "DOCUMENT" refers to any piece of paper or evidence, including, but not limited to, letters, correspondence, contracts, proposals, subcontracts, invoices, memoranda, notes, drawings, reports, photographs, microfilm, videotapes, and/or computer input documentation.

INTERROGATORIES

INTERROGATORY NO.1:

Describe all items YOU contend constitute defects or deficiencies on the roof at the PROPERTY.

INTERROGATORY NO. 2:

Identify all DOCUMENTS which evidence alleged defects or deficiencies at the PROPERTY.

INTERROGATORY NO. 3:

Please state all facts upon which YOU base any claim for breach of contract.

INTERROGATORY NO. 4:

Please identify all DOCUMENTS upon which YOU rely in claiming that Defendant has breached its contract with respect to the roof at the PROPERTY.

INTERROGATORY NO. 5

State all facts in support of YOUR contention in the COMPLAINT that Defendant owed a duty to YOU.

INTERROGATORY NO. 6:

State all facts in support of YOUR contention in YOUR COMPLAINT that Defendant breached his duty owed to YOU.

INTERROGATORY NO. 7:

Identify with specificity all locations where damages are claimed to have occurred.

INTERROGATORY NO. 8:

Identify all damages claimed to be the result of the alleged wrongful conduct of Defendant.

INTERROGATORY NO. 9:

For each injury identified in response to Interrogatory No. 8, please identify the total cost of the medical services.

INTERROGATORY NO. 10:

Did YOU ever make any written report or complaint to this propounding party regarding alleged injuries?

INTERROGATORY NO. 11:

If YOUR response to the preceding interrogatory was affirmative, please identify with particularity to allow the requesting party to inspect all such documents.

INTERROGATORY NO 12:

Identify each injury or damage YOU attribute to the actions or inactions of Defendant.

DATED this ____ day of ____, 20__.

_____

Attorneys for Defendant,

CERTIFICATE OF MAILING

I hereby certify that on this _____ day of ____ 20__, I placed a true and correct copy of the foregoing INTERROGATORIES in the United States mail, postage prepaid, addressed to counsel on the attached service list:

_____

An employee of [Law Firm Here]

§ 6.8(b) | Request for Admissions

Requests for Admissions force an opposing party to commit to a position or set of facts. Requests of this nature may prove to be more powerful than any other form of discovery at exposing the strategy, strengths, and weaknesses of the opposing party.

As the name of this discovery device implies, either party may request the other party to admit or deny certain facts. A party admitting to facts within requests for admissions responses will not be able to contest those facts later at trial.

Historically, requests for admissions have had two functions. The first function is to avoid lengthy examination of the opposing party during trial. Secondly, admissions can be used strategically to force the other party to declare his or her position about certain facts.

Imagine the advantage one party could have by asking the opposing party to admit to damaging information. Assuming the information is true, the opposing party is forced to choose between two unpleasant possibilities: Telling the truth and admitting to something that hurts that party's position, or lying- thereby committing perjury.

Many states now limit the number of requests that may be propounded. This makes it imperative that each request be relevant.

Requests for admissions may also be used to authenticate exhibits intended for use at trial.

Discussion Points § 6.8(b)

1. What form do the requests take? Questions, statements, or both?

2. Can requests be sent to any witness?

3. Are the requests responded to under oath?

4. Under what circumstances may the responding party refuse to respond?

5. What may happen if a request is not responded to on time?

Responding to Requests for Admissions

When a law firm receives a set of Requests for Admissions from the opposing party, the paralegal should stamp the "date received" on the document, and make note of the response deadline in the appropriate calendar or tickler system.

Responding in a timely manner is especially critical for requests for admissions because if a request is not specifically *admitted* or *denied* within the required time frame, usually 30 days, the request can be deemed admitted by the requesting party.

Discovery Point

Some states require that a responding party admit in part and deny in part requests for admissions that are only partly accurate. However, such requests are generally easy to deny.

The rule is that every request for admissions must be answered, but there are several potential options. A request for admission may be:

- *admitted*
- *denied*
- *neither admitted nor denied* due to lack of sufficient information with which to respond at this time (A specific reason must be provided for the refusal to respond.)
- *neither admitted nor denied* due to vagueness of the request
- responded to with a specific *request response omitted*

The attorney may choose not to respond to a particularly troublesome request, but this strategy may give the opposing an opportunity to have the request deemed admitted.

The final two options above may be accompanied by an objection filed with the court about the appropriateness of the request. Not responding to a request is likely to instigate a motion to compel, in which the opposing party asks the court to require a response.

When responding, don't offer additional information. Just admit or deny each request. Don't explain.

Discovery Point
It may be possible to object to a request because it is vague or inappropriate, but this tactic should not be overused.

Many beginning paralegals find it disturbing that a defendant or plaintiff may be forced to respond to potentially damaging inquiries. What about the Fifth Amendment? Remember that the Fifth Amendment applies only in criminal, not civil, matters. If answering a request places a client in potential jeopardy of being charged with a criminal offense or if the matter being litigated also involves criminal conduct, the individual cannot be forced to provide testimony, or admissions against himself or herself.

The attorney should sign the response and the respondent should sign a verification of the truth of the response for attachment to the document. Of course, a certificate of mailing should accompany the response.

Discussion Points

1. Which of the following is a valid request for admission?

    a. Admit or deny that you abandoned your child.
    b. Were you at your child's last birthday party?
    c. With whom did you spend last Christmas?

2. Can the requesting party pose a statement she or he knows has the potential to elicit a response which could incriminate the other party in a criminal act? Why or why not?

3. Why did O.J. Simpson have to answer discovery requests in his civil litigation trial?

Request for Admissions Techniques

Use form books whenever possible to create requests for admissions. However, there will be times when no form quite fits, or the form you find needs substantial alteration. The following techniques are designed to give the paralegal a framework for authoring requests for admissions.

Technique One: Verify or corroborate interrogatories.

Review each interrogatory. Can you rephrase any of your interrogatories into statements? When you receive answers to both forms of discovery, look for discrepancies between the responses to the interrogatories and answers to the requests for admissions.

Example § 6.8(b) | Admissions Technique One

1. Admit or deny that you have been an employee of the U.S. Postal Service for eight years.

2. Admit or deny that you were on duty at 1:30 p.m., July 5, 2010.

Technique Two: Give choices or degrees of liability.

The goal with this technique is to provide the other party enough "rope to hang himself." When given a choice, the answering party may wind up choosing the lesser of two evils, even when doing so admits some degree of liability.

Example § 6.8(b) | Admissions Techniques Two

11. Admit or deny that your response to seeing your wife's lover was prudent and reasonable.

12. Admit or deny that your response to seeing your wife's lover was a somewhat violent overreaction.

13. Admit or deny that your response to seeing your wife's lover was criminal in its violent intent.

Technique Three: Force the party to commit.
On points of judgment, or when a party is being evasive, present a series of statements that force the party to commit.

Example § 6.8(b) | Admissions Technique Three

23. Admit or deny that you had at least one drink during your lunch hour on the day in question.

24. Admit or deny that you had at least two drinks during your lunch hour on the day in question.

25. Admit or deny that you had at least three drinks during your lunch hour on the day in question.

26. Admit or deny that you had at least four drinks during your lunch hour on the day in question.

Example § 6.8(b) | Request for Admissions

DISTRICT COURT OF CLARK COUNTY
STATE OF CONFUSION

JOHN and SALLY SMITH Plaintiff, vs. JACK DOE Defendant.	**REQUEST FOR ADMISSIONS**

TO: (OPPOSING PARTY'S NAME)

TO: (OPPOSING COUNSEL)

YOU ARE requested to admit or deny the statements contained herein and serve your responses upon PLAINTIFF within thirty days of receipt of these requests, pursuant to court rules.

DEFINITIONS

1. "COMPLAINT" shall mean and refer to Plaintiffs' complaint originally filed on 7-05-11 in Department XVII of the Clark County District Court, Case No. 1756.

2. "PROPERTY" shall mean and refer to the real property owned by Defendant.

3. "YOU," "YOUR," "YOURS," and/or "DEFENDANT" shall mean and refer to all Defendants as well as their agents, attorneys, employees, accountants, family members, investigators, or any other person acting on their behalf.

4. "DOCUMENT" refers to any tangible piece of paper or evidence, including, but not limited to, letters, correspondence, contracts, proposals, subcontracts, invoices, memoranda, notes, drawings, reports, photographs, microfilm, videotapes, and/or computer input documentation.

REQUEST FOR ADMISSIONS

1. Admit or deny YOU were employed as a taxi driver on July 4, 2010.

2. Admit or deny Plaintiffs were passengers in YOUR taxi.

3. Admit or deny YOUR taxi collided with another vehicle at the intersection of Sahara Boulevard and Paradise Road in the state of Confusion.

4. Admit or deny YOU were negligent in your operation of YOUR taxi during or immediately preceding the event in question.

5. Admit or deny Plaintiffs were passengers in YOUR taxi during the aforementioned collision.

DATED this ____ day of _____20__.

_____
John Jones
Attorney for Defendant
Bar Number
Address

CERTIFICATE OF MAILING

I hereby certify that on this _____ day of _____ 20__, I placed a true and correct copy of the foregoing REQUEST FOR ADMISSIONS in the U.S. mail, postage prepaid, addressed to counsel on the attached list:

_____

An employee of [Law Firm Name]
Your Name, Paralegal

§ 6.8(c) | Request for Production and Inspection of Documents

Requests for Production and Inspection (most often simply referred to as Request for Production) usually involve documents, but they may also be used to inspect and take photographs of such things as cars, houses and boats. As we will discuss later, it is imperative that the paralegal be able to distinguish between discoverable and non-discoverable material. The good news is that there are only two kinds of documents that are not discoverable. The bad news is that they are not always easy to identify.

Discoverable Materials

Any materials relevant to the litigation requested by the opposing party that do not violate the Fifth Amendment rights of the responding party or any other privilege or rule are discoverable.

Non-Discoverable Materials

Some material is not subject to disclosure to the opposing party.

Attorney Work Product

Materials developed in anticipation of litigation by or for the attorney are not generally discoverable. For instance, a report produced by order of the client to update the attorney on the client's financial stability would be considered work product.

Privileged Information

Privileged information, such as records from a doctor or hospital and private communication with a spouse or with a spiritual advisor, would not be discoverable, unless the privilege has been waived. The most common way to waive a privilege is for the information to be made "non-private" by the fault of the person who owns the privilege.

Attorney-Client Privilege

Private communications between the client and his or her attorney are considered privileged communications and are not discoverable. This also applies to communications with paralegals and other staff working for the attorney on behalf of clients. However, the communication must include the following elements to remain privileged:

1. *The communication must be private*
2. *The communication must remain private*
3. *The communication must fall within the scope of the paralegal's duties.*

In addition to the attorney-client privilege, there are other privileges that affect the discoverability of certain documents. They include communications between a doctor and a patient, between a member of the clergy and a penitent, and other recognized and relevant privileges.

A paralegal is often called upon either to prepare materials for inspection by the opposing party or to inspect the materials other parties have provided. When *preparing* materials, follow these rules:

1. Withhold any documents involving communication between the client and the attorney. (This includes other staff and/or paralegals.)

2. Withhold any documents prepared to assist the attorney in arguing the case. However, be aware that any document, even if privileged or work product, will become discoverable if the attorney decides to introduce that document as evidence.

Numerous documents, photographs, reports, and other materials may be obtained through discovery. Requests for production are the mechanism by which such materials are obtained. This mechanism does not require leave of court or a subpoena. Samples of materials to consider when creating requests for production include:

- *photographs*
- *designs or drawings*
- *contracts*
- *corporate records*
- *income tax records*
- *company reports*

Some attorneys use a *subpoena duces tecum* in much the same manner as requests for production. A *subpoena duces tecum* demands the appearance of an individual at a specific time and place and demands that he or she bring specific documents with him or her. A *subpoena duces tecum* is often used for a *witness* who is not a party to the action. There are, however, no rules that prohibit the *subpoena duces tecum* from being issued upon an opposing party. At worst, the party may choose to challenge the validity of the information sought.

Discovery Point
View discovery requests as the beginning of the investigation, not the end. With that in mind, ask yourself what information the responses provide and whether they open any new doors for investigation.

Responding to Requests for Production

As with other discovery documents, when requests for production are received, they should be "date-stamped" with the response date noted in the appropriate calendars and tickler systems.

> *Discovery Point*
> If you have to think twice about whether to produce a document, ask the attorney. Once produced, information can't be taken back, even if it was produced by accident.

Paralegals are sometimes asked to help prepare documents in response to requests for production, or to review documents provided by another party in response to requests. These tasks are not often mentioned among the most important duties of a paralegal. Make no mistake: Preparing and reviewing such documents is one of the most critical tasks in which a paralegal will engage.

The paralegal may need to communicate with the client to obtain specifically requested materials. When the paralegal receives these documents from the client, he or she should make sure the documents are complete and that they accurately respond to the requests.

Privileged or work products documents should be removed from the materials before they are presented to the other side. The requesting party, however, must be alerted that the withheld documents exist but will not be produced and why.

The following is an example of a common request:

> 21. Produce any and all documents that evaluate compliance by the defendant with the terms of the ____, 20__ contract which is in dispute in this litigation.

The paralegal reviewing the documents provided by the client discovers that one of the documents is a letter from the client to the attorney. This document would not be considered discoverable, but the existence of the letter must be disclosed to the opposing party. Some attorneys feel that simply disclosing the fact that some privileged material is being withheld is sufficient notice. Other attorneys consider it more appropriate to be specific, and in fact, some courts require this. The following represents one way to deal with the matter:

1. The defendant hereby responds to plaintiff's request for production and encloses all relevant documents and information requested, with the following exceptions:

2. The following documents are privileged by means of the attorney-client privilege and, therefore, are not discoverable:

    a. August 3, 2010 letter from defendant Carl James to his attorney Judith Faye re: July 16, 2009 contract.

The requesting party may argue that, since the letter precedes litigation, it is not privileged. This would normally be a weak argument. If the document is deemed critical enough, the requesting party can file a motion to compel discovery; the court, after reviewing the document privately, will determine whether it is privileged. A similar response would be provided for work product documents as well:

3. The following documents are privileged by means of the attorney-client privilege, and therefore are not discoverable:

    a. Notes from August 11 meeting with paralegal

Finally, keep an accurate and exact copy of the documents provided to the requesting party so that months from now when the trial is about to begin, the attorney will have no doubts about what has been disclosed to the opposing party.

Discovery Point
When inspecting large quantities of produced material, take short, frequent breaks to maintain an alert mind. Remember to use one discovery document to verify or corroborate other discovery documents. Compare responses for discrepancies.

These considerations regarding work product and privileged documents require even more attention when vast amounts of materials are involved. Allowing even one out of thousands of documents to fall negligently into the hands of the opposing party could constitute malpractice.

A paralegal must review each document with the attitude that this might be the document that wins the case. If large quantities of materials must be reviewed, it is not uncommon for the paralegal to be sent to the opposing firm or even to the opposing party's place of business, to go through boxes or files and choose what to copy.

Of course, the opposing party has most likely already sanitized these boxes and files. Two principles should guide you:

1. *Be thorough to the point of obsession.*
2. *When in doubt, copy.*

Never allow the opposing party or attorney to intimidate or hurry you while you are inspecting the documents. Ask for a private, or at least a semi-private, area to do your work. If you need more time, politely inform the other party and make arrangements to return. Do not sacrifice accuracy and thoroughness to time constraints imposed by the opposing party. If you have to think twice about whether a document should be copied, copy it. It is better to obtain too much information than too little.

Example § 6.8(c) | Request for Production

DISTRICT COURT OF CLARK COUNTY
STATE OF CONFUSION

JOHN and SALLY SMITH Plaintiff, vs. JACK DOE Defendant.	**REQUEST FOR PRODUCTION**

YOU are requested to produce the documents requested herein and serve your responses upon PLAINTIFF within thirty days of receipt of these requests, pursuant to court rules.

REQUESTS

1. Produce tax returns for the past three (3) years.

2. Produce any documents or other physical item you plan to enter as evidence at trial.

3. Produce curriculum vitae for any expert witnesses you plan to call to testify at trial.

DATED this ____ day of _____20__.

_____
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on this day _____ of _____ 20__, I placed a true and correct copy of the foregoing REQUEST FOR PRODUCTION in the U.S. mail, postage prepaid, addressed to counsel on the attached list:

_____
John Carroll, Paralegal

§ 6.9 DEPOSITIONS

Depositions are oral questions posed to a witness (sometimes a party) under oath. In most cases, depositions are conducted in an attorney's office, with both attorneys present. A court reporter transcribes the testimony verbatim. The testimony is just as valid and binding as though it had been delivered in court. Since deposition testimony is given under oath, to lie in a deposition is to commit perjury.

> *Discovery Point*
> Depositions are the most powerful method of discovery. One of the primary purposes of other forms of discovery is to lay the groundwork for depositions, which lays the groundwork for examination at trial.

A paralegal may attend a deposition, make suggestions to the attorney, and even help prepare questions to ask of the witness. The paralegal may not conduct the deposition. The attorney must ask the questions; for the paralegal to do so would constitute the unauthorized practice of law.

Duties of a paralegal prior to a deposition include deposition preparation and follow-up.

Preparing for the Deposition

1. *Setting the deposition*
2. *Creating the deposition notice and subpoenas*
3. *Preparing questions for the deposition*

Setting the time and place for a deposition is generally done by agreement between the parties. The paralegal may need to coordinate the schedules of both attorneys and the individual to be deposed. Be polite when consulting with the secretary, paralegal, or attorney for the other side. After a date is agreed upon, it may be the responsibility of the paralegal to update the attorney's calendar as to the scheduled date of the deposition.

Either the paralegal or the secretary should send a follow-up letter to the opposing counsel confirming the date, time, and place of the deposition. The paralegal will want to send a letter to the person being deposed, if this person is your firm's client.

The party initiating the deposition is usually responsible for the hiring and compensation of the court reporter. Clarify this issue with the other party.

The paralegal should ask the attorney or other paralegals whether there are any specific court reporters used by the firm. If not, use the Yellow Pages. If the deposition is not held at the law office, the party initiating the deposition must make arrangements and pay for appropriate accommodations. The room must be of adequate size to accommodate the attorneys, paralegals, witness, and court reporter. Consider providing refreshments such as coffee, ice and water.

Discovery Point
Paralegals cannot ask questions of the witness at a deposition.

The notice of deposition should be sent well in advance of the deposition and filed with the court. In addition, it is good practice to *subpoena* the witness to be deposed, even if the witness has agreed to appear. The practice of issuing a subpoena even for friendly witnesses should also apply to those called to testify during the trial. The court will usually allow an absent witness to be called at a later date if the attorney can establish that the witness was subpoenaed.

A *subpoena duces tecum* should be issued if the witness is being asked to present documents at the deposition. A paralegal can help the attorney in preparing for the deposition by drafting a set of potential questions to be asked at the deposition.

To draft questions for a deposition, consider using:

1. Pleadings already filed in the case
2. Discovery documents and responses
3. Previous depositions and discovery
4. Research sources

1. *Pleadings already filed in the case*
   It is imperative that the paralegal be thoroughly familiar with the case if he or she is to be involved in the deposition. Review the client file, noting any information, or lack of information, that could be clarified by the witness to be deposed. Study the pleadings, especially the complaint, answer, and counterclaim for contributions to the interrogation.

2. *Discovery Documents and Responses*
   Much of the information your attorney needs has been requested in the various discovery documents. Pay particular attention to interrogatories and requests for admissions and their responses.

3. *Previous Depositions and Discovery*
   Law firms have a source of information that is often underused. Case files from previous clients often have documents, including deposition questions and discovery documents, which could be researched and developed for current use.

4. *Research Sources*
   The law library also contains sources for questions and strategies. *Am. Jur. Pleading and Practice Forms* and *Am. Jur. Proof of Facts* are excellent sources of information when one is developing deposition questions.

   Discovery Point
   A paralegal drafting questions for the attorney to use at the deposition should not take it personally if the attorney makes significant changes to the list. The paralegal has eliminated the time-consuming step of developing the first draft. The draft document allows the attorney to make revisions and refinements.

Deposition Follow-up

The court reporter will usually provide the deposing party with a copy of the transcript, a computer disc of the transcript, or both. The original transcript should be sent to the deposed witness who will be required to read the transcript, make any necessary changes or corrections, and sign it. The witness may change any testimony at this point without penalty of perjury. All parties involved should receive copies of the transcript with the witness' changes and corrections.

The deposition index and the deposition summary, also referred to as a deposition digest, are two tools that help organize lengthy depositions.

The deposition index is an alphabetical listing of subjects contained within the transcript. Each index item is followed by the number of the pages on which it appears. This is sometimes referred to as a key word index. The good news for the paralegal is that creating a deposition index has largely become a software task. In fact, in most cases the court reporter will provide the index with the transcript.

Discovery Point
A deposition index is usually created by software and provided by the transcriber. A deposition summary, or digest, needs to contain the heart of the deposition, and therefore cannot be computer generated.

A deposition summary is a reduced, or digested, version of a deposition transcript. There are three goals when summarizing a transcript:

1. relate relevant material
2. don't alter the context of the material
3. avoid editorializing

1. *Relate Relevant Material*
   Ask yourself whether a piece of information is part of the overall picture of the litigation. Is it likely to affect an attorney's decision on a specific matter? If yes, it is probably relevant and the paralegal should include the information in the summary.

2. *Don't Alter the Context of the Material*
   A witness' statement: "We killed them," sounds like an admission of murder. But, what if the question was "How did your football team do against the Raiders?" Obviously, the answer was taken out of context. While this is an exaggerated example, the paralegal should impart the spirit of the question (as well as the response of the witness) in the summary.

3. *Avoid Editorializing*
   It is difficult not to develop opinions and prejudices regarding a deposed witness. The paralegal needs to maintain a neutral attitude when reading the deposition and summarizing the material. Otherwise, an inaccurate reflection of the transcript may be imparted.

One more hint: Don't restate the question in the summary; restate only the information obtained from the response to the questions. There are two ways to summarize a transcript. A *topical summary* and a *page-by-page summary*. A *topical summary* excerpts and summarizes a portion of the transcript that deals with one specific topic. The portion being summarized may be a couple of lines or several pages.

Page 6, Line 5-26	Deponent (Mr. Jones) only remembers shopping, getting in the passenger seat of the car before the accident and waking up in pain in the hospital after the crash.
Page 6, Line 27 - Page 7, Line 8	Mr. Jones says his wife was not on any medication at the time of the accident, although she had received a prescription that week for back pain

A page-by-page summary simply digests each page individually. For example:

Page 6 — Mr. and Mrs. Jones went shopping at Yuckie's Supermarket. The deponent (Mr. Jones) had a headache, asked wife to drive. Although the deponent does not remember the accident itself, he does remember shopping, getting in the passenger seat before the accident, and after the crash waking up in great pain in the hospital. Deponent says his wife was not on medication.

Page 7 — Mrs. Jones had received a prescription the week of the accident for back pain. To his knowledge, Mrs. Jones was involved in one previous automobile accident. It occurred in 1991 or 1992. Mrs. Jones was driving a friend's car in Washington D.C. and was hit by a bus in a tunnel. She was not ticketed and the bus driver was found to be at fault.

Discovery Point

Accuracy is not an option in summarizing depositions. It is a necessity.

Whichever form of summarizing a deposition a paralegal chooses, the goal is always consistent: to provide the attorney with a more manageable means of accessing the deposition transcript without losing relevant information.

Example § 6.9(a) | Deposition Summary

Deposition Summary
of
Teri Phillips
Testimony taken February 7, 2010

Page 1
Deponent provided personal information and was introduced to all those present. She was then administered the oath.

Pages 2–4
Deponent described the hours leading up to her visit to Acme Department Store. She had lunch immediately before going to the store, but had no alcohol, and was not on any medication.

Page 5
When deponent entered the store, she stopped by the information booth to ask directions. She proceeded to the second and third floors, browsing for coats. After approximately twenty-five minutes, she saw a sign for the ladies' room.

Page 6
Deponent claims that when she stepped toward the restroom area, there were no signs or warnings indicating that the floor had been recently mopped or had in any way been affected. There was also no indication that the owner or any employee had been informed of the hazard.

Example § 6.9(b) | Deposition Transcript

DEPOSITION TRANSCRIPT

The pretrial deposition of HAROLD MOORE, taken at the request of the plaintiff, for the purposes of discovery, pursuant to the rules of civil procedure, by agreement of the parties on the 22nd day of January, 2010, at the law office of Sue M. Daily, Litigationville, USA, before Ty Pittout, registered court reporter and notary public.

HAROLD MOORE

Called as a witness for the plaintiff, having been first duly sworn, was examined and deposed as follows:

EXAMINATION

BY MS. DAILY:

Q. Please state your name, home phone number, and address.

A. My name is Harold Moore. My phone number is 555-3553. My address is 44 Fifth St., Litigationville, USA.

Q. When did you first have an indication that your neighbors were upset with you?

A. I don't know. I guess it began when that little girl's rabbit disappeared.

Q. When was that?

A. Oh, about a year ago. I mean, they didn't really know what happened to it, but the girl, I think her name was Cosette, she drew this drawing of her bunny and passed copies around the neighborhood. It was really kind of pathetic, you know. But I didn't have any clue.

1

Q. Did anyone suspect anything at that point?

A. I didn't. I don't think any of the neighbors did, either, even after Princess turned up missing. Of course nobody really cared too much about that, since Princess was the cat. I think it was viewed more as a community service.

Q. So you didn't - - - you wouldn't say there was cause to be concerned at this point, then?

A. Upset? Why? Just a rodent and a stupid cat at that point.

Q. Well then, you still haven't said when the neighbors were first upset, or started to suspect what was going on.

A. Well, about a month after Princess disappeared, this Cocker Spaniel puppy got loose from his yard. John Forest called me up and asked if I had seen the mutt. I hadn't. Then he started asking about Sebastian. So I guess that was when it started.

Q. What kind of questions did Mr. Forest ask?

A. Like where was he; did he have any lumps. Stuff like that.

Q. Was the conversation friendly?

A. At first, but his little girl was crying in the background, something like, "I want my Fluffy; I want my Fluffy." I could hardly hear Forest. So he started getting upset as the conversation went on.

2

He finally said that if anything happened, he'd put my face through a plate glass window. So I guess you could say that was the point where someone got a bit upset.

Q. I'd say that was a pretty good indication.

A. Uh-huh.

Q. Why did he want to know about lumps?

A. Well, there's a lump for about a week. They don't like being touched during that period either. Nasty as (expletive deleted).

Q. So that was when the neighbors first suspected. But what about you? You still had no idea?

A. No. Not till the two lumps. That was the first.

Q. Two lumps?

A. Yeah. Just about the same time the Turner twins were missing; I had noticed the two lumps earlier in the day. Then I read in the paper about the twins not returning home from school and I thought to myself, "Hey, those kids cut through by backyard all the time. I wonder …" Then I thought of the lumps.

Q. What did you do?

A. What did I do? What a stupid question. Give him an Alka-Seltzer? What could I do? Look down his throat? For all I knew, he just ate a couple of wild pigs or something.

3

Q. Are there wild pigs in your neighborhood?

A. No, of course not.

Q. Is there anything in your neighborhood that could have made those size lumps, other than the Turner twins?

A. I don't know. I can't think of anything.

Q. Has it occurred to you that keeping a boa constrictor as a pet next to an elementary school was not the wisest of choices?

A. Yeah; but I couldn't go to the place next to the animal hospital.

Q. Why would you want to be located there?

A. Because when it was dinner time, I could have asked Sebastian, "One lump, or two?"

4

Assignment § 6.9 | Deposition Summary

Using the above deposition excerpt, summarize the transcript. For this assignment, keep track of your billable hours, and attach your time sheet at the end of the document. Even though this assignment is not related to your client, place the document in the *Work Product* panel of your client file when it is returned to you.

§ 6.10 E-DISCOVERY

A paralegal today needs to be familiar with the concept of E-Discovery, including the process and potential techniques. While a paralegal will not typically be involved in the forensic duplication, copying, or search of an opposing party's computers and data drives, a paralegal may be intimately involved in the process of requesting information and evaluating information that has been produced as a result of E-Discovery.

The following is not intended to provide every aspect of E-Discovery. That would take an entire volume. Also, E-Discovery is evolving and is approached differently from jurisdiction to jurisdiction, sometimes even from county to county. The goal here is to provide students with a solid foundation in the issues involved and possible procedures to implement the process of E-Discovery. The paralegal who can speak the language of electronic data retention and acquisition has a definite advantage.

§ 6.10(a) | The Terminology of E-Discovery

Terms with asterisks (*****) are particularly important to know.

ESI *****
Electronically stored information. Basically, it means data.

Media
A device capable of storing electronic data, such as a computer, floppy disk, flash drive, tape drive, server, etc.

Forensic examination *****
In E-Discovery, forensic examination is the analysis of data on a computer, including readily accessible files and hidden files, such as metadata or embedded data.

Discovery plan *****
Even in states where rules do not require it, courts are emphasizing the importance of parties working together to establish a plan for exchanging discovery. The plan usually includes dates for responding to discovery and may include dates for a second round of discovery. The discovery plan that includes E-Discovery would typically include agreeing to a litigation hold, setting dates for examination of data or for examination of media sources by experts (if the native files are requested), a plan for dealing with private or privileged material, and the all-important *Non-Waiver of Privilege Agreement*.

Metadata *****
Visible data is that which is readily observed on a computer. Almost all visible data generated by computer includes "invisible" *metadata*, which stores such information as who created the document, when it was created, when it was last opened, when it was last altered, and so forth. The metadata is very difficult to alter or fake and is generally used to help determine the validity or authenticity of the visible data. In addition, computer systems have their own metadata. Thus, a forensic examination can determine whether the date and time on a computer system has been manipulated.

Embedded data
Similar to metadata, embedded data is typically not visible. For example, some data processing documents (such as Microsoft Word or WordPerfect) track changes to documents. While embedded data is more subject to manipulation than metadata, it is useful in determining document validity.

Native files *****
Files in their original state, including metadata and embedded data.

Preservation *****
The protection of data already created (similar to *Retention*).

Retention *****
The ongoing protection of data yet to be or being produced (similar to Preservation).

Litigation hold *****
The concept that a company involved, or potentially involved, in litigation has the obligation to preserve data that may later be deemed relevant to that litigation. Courts have ruled that a party may be subject to sanctions for failing to initiate a litigation hold early enough, even prior to the filing of a lawsuit.

Spoliation *****
Spoliation is a general legal term that refers to evidence that has not been properly preserved for use by another in pending or future litigation. In E-Discovery, this may include files that are not in their original state or files that have been lost or destroyed. Spoliation may be caused by the innocent opening of a file, or intentional attempts to delete or alter the file. Sanctions for spoliation can be severe.

Post-production spoliation motions
A party who allows spoliation may be sanctioned by the court. Sanctions may range from loss of the right to present certain evidence to dismissal of the case, depending on the seriousness of the spoliation. Remedies sought in such motions may include:

- *Default judgment*
- *Dismissal*
- *Fines*
- *Award of attorneys' fees*
- *Contempt citation*
- *Disqualification of counsel*
- *Adverse inference instruction*
- *Exclusion of evidence*

Adverse inference instruction
This dreaded measure is used in extreme cases where a party has allowed evidence to be subject to spoliation. Basically, a jury is told that evidence that should have been available has been altered or destroyed, and the jury may infer that the destruction was an attempt to hide damaging information.

Confidentiality agreement *****
An agreement between parties that certain information shall not be shared or discussed with anyone else. A confidentiality agreement is critical when dealing with experts or outside entities during the process.

Non-waiver agreements
A non-waiver agreement during the E-Discovery process usually refers to information exposed during the examination of data that would under any other circumstance be privileged, such as medical information or communications between a party and his or her attorney. The agreement states that any inadvertent disclosure of privileged information must be excluded from litigation, and any data that would constitute privileged information identified by an expert shall not be disclosed to the opposing party.

Two-Tiered E-Discovery plan *****
In order to limit the high cost of E-Discovery, courts have been receptive to alternate solutions to full-blown data extraction. One such solution is the Two-Tiered E-Discovery plan. In such a case, the responding party first discloses files and information from active data (data that is readily accessible to the user).

If the requesting party is not satisfied with those results, or if spoliation or fraud is suspected, that party may request a second, more intrusive response that would include extensive data extraction (including metadata, fragmented data, and embedded data). Typically, the court would need to be convinced that the initial (active data) response was not sufficient, and that the second tier would result in additional relevant data.

Legacy data
Data on older forms of media storage, such as tape drives.

Fragmented data
Information that is spread across a hard drive. Fragmented data may be reassembled and recovered by an expert in some cases. An example of fragmented data is a deleted document. Even though the document is no longer visible on the hard drive, the bits that made-up the document probably still reside on the drive. Those bits are now simply marked by the computer's operating system as being able to be overwritten. But until the hard drive is filled up, those bits retain the information that make up the document. An expert may be able to reassemble those bits to reconstruct the document.

Active Data *****
Files currently on the hard drive that are accessible through standard means.

Latent (or Ambient) Data *****
Deleted files and other data still on the hard drive, but not readily accessible, such as metadata, temporary files, printer spool files, and other digitally-dispersed data. This data may require an expert to recover.

Archival Data
Data kept on media other than the original drive. One problem with archival data is that it usually does not include latent data, which may be critical in determining authenticity. This is also why just copying files from a hard drive is not always sufficient for E-Discovery purposes.

Hard drive image *****
An image of a hard drive preserves the metadata and embedded data. It is an exact replica, bit by bit, of the original hard drive. Instead of simply copying the files that reside on the hard drive, an image duplicates every aspect of the hard drive. Obtaining a hard drive image must be done carefully and every step documented so as to ensure the accuracy of the evidence and to preserve the "chain of custody."

Electronic Discovery Expert
An electronic discovery expert searches through the extracted media for relevant documents, files, or other data.

Forensic Computer Technologist *****
A forensic computer technologist is the expert who extracts data.

Sampling *****
Sometimes there is a dispute over the need for E-Discovery. The responding party may claim that the request constitutes an undue burden of massive production. This is where sampling comes in. A forensic expert takes a sample, a fraction, of the data requested. If relevant information is discovered, the party will most likely have to produce. If no relevant information is found in the sample, the requesting party will have a very difficult time convincing the court that more data is needed. (FYI: Sampling is provided for in F.R.C.P. Rule 34(a)).

Cost-shifting
Courts have ruled that the party producing the documents generally bears the burden of cost. In order to shift the cost to the requesting party, a court must be convinced that doing so is justified. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) has established a 7-part test for cost-shifting. Those considerations include:

1. Is the request specifically tailored to discover relevant information?
2. Is the information available from other sources?
3. How does cost of production compare to the amount in controversy?
4. What are the relative positions of the parties in terms of resources?
5. Who is best able to control costs and has an incentive to do so?
6. Are the issues in discovery key to the issues at stake in the litigation?
7. What are the relative benefits to the parties of obtaining the data?

The Sedona Conference *
There is no single source for answering E-Discovery issues, but several groups are attempting to come up with standards that could be adopted by both state and federal courts. The *Sedona Conference* is an annual conference that deals with current legal issues, including such topics as E-Discovery. Many authorities, including courts, cite *Sedona* as an influence in developing E-Discovery procedures.

§ 6.10(b) | The Foundations of E-Discovery

A few foundational points regarding E-Discovery:

What is encompassed by the term "E-Discovery?"

Today, the majority of document creation, communication, and administration involves electronic or computer-related processes. Since the goal of discovery is to allow parties to exchange relevant information, it is natural that part of that exchange would evolve to include electronic sources. This is E-Discovery. The problem is that we as a society have not considered the fact that information inputted to a computer is potentially discoverable in litigation. When information is requested from an electronic source, extracting what is relevant and discoverable from what is irrelevant or privileged is complicated, time consuming, and often expensive. As E-Discovery becomes more mainstream, courts and law firms will devise methods and procedures to make the process fair and, hopefully, less expensive.

When E-Discovery is warranted and when it is not

Currently most cases involving E-Discovery are larger lawsuits or complicated criminal cases with issues that at some point involve information on computers. A lawsuit involving a simple car accident would not typically involve E-Discovery. An insurance fraud law suit involving the same accident might involve E-Discovery if there was reason to believe that computers, cell phones or other electronic sources held information relevant to the alleged fraud.

What kind of expert will the firm need?

It depends on what the firm is looking for. If the firm does not anticipate the need to determine whether files or drives were modified, deleted or improperly copied, an E-Discovery vendor may be enough. But if there is the need to determine whether spoliation has taken place, a highly qualified *forensic computer expert* will probably be required.

Privacy issues

If E-Discovery is part of litigation, a party may ask for more than simply a set of documents (such as emails or files) found on the other party's computer. The requesting party may ask to view the original (also called "native") files. This means that the party wants to obtain a copy of the computer hard drive (or other digital media, such as discs or back-up drives). The problem is that most of the information on that drive typically has nothing to do with the lawsuit. That other information may be private and/or confidential. Procedures are taking shape to help ensure that this material, and material protected by any potential privilege, is not at risk.

§ 6.10(c) | The Three Stages of E-Discovery

There are three stages to the E-Discovery process. They are:

1. *The Pre-Litigation Stage*
2. *The Requesting Stage*
3. *The Responding Stage*

1. Pre-Litigation Stage: Anticipating E-Discovery

This stage is often the most neglected point of the E-Discovery process. E-Discovery is a relatively new process, and the focus has been placed on demand of material and compliance. The problem is that by the time electronic data is requested, it is sometimes too late due to intentional or unintentional destruction of data. Courts, however, are in many cases holding litigants liable for the loss of relevant data and sanctioning those litigants, even if the data was destroyed prior to litigation. The key to avoiding such an outcome is for a firm to be aware of key concepts, have a "litigation hold" policy in effect, and communicate that plan to a client when it appears that litigation is even a slight possibility. As mentioned earlier in this manual, the concept of "anticipation of litigation" is incredibly important.

How a law firm needs to be prepared

A law firm should have a set of protocols in place for any potential litigation involving electronically stored data. These protocols should include helping clients establish data retention policies, how and when to communicate E-Discovery guidelines to the client, guidelines for when a litigation hold should be recommended to the client (and possibly for the law firm itself), and who will be responsible for educating the client as to data retention during a litigation hold.

Create a "Tech Team"

To be most effective, a law firm should consider creating a "Tech Team," or "E-Discovery Response Team." This team would consist of at least one lawyer, one paralegal and one legal secretary. This team would work together to educate clients about E-Discovery, help clients to develop data retention policies and coordinate E-Discovery demands and responses in coordination with the attorney of record on the case. The team would not create the requests or respond directly, but would be able to help attorneys in the firm avoid pitfalls and hire competent professionals depending on the complexity of the case. Having a Tech Team in place prevents the need for every attorney and paralegal in the firm to become expert in the mechanics of the E-Discovery process.

Help the client create email and document retention policies
Every client of a law firm, especially business clients, should be provided with at least general guidelines for electronic document creation, email, and data storage. These guidelines should be provided whether or not litigation is seen as a possibility. Some examples of typical retention policies would include:

- *Limit employees to using the firm email system for only work-related communication.*
- *Require all work-related email to be created using the company's email system (no web-based email, such as Hotmail, Gmail or AOL).*
- *Provide written guidelines, including potential punishment for violation of policies.*
- *Retain all email and documents for a specified period of time (usually 60 or 90 days).*
- *Once a file or other data is no longer needed and is past the retention period, get rid of it as a part of the normal process of records management. Keeping old files simply because there is room for them on original or back-up media will make it much more difficult, and expensive, to sort through the data later.*
- *Make sure the policy complies with state and federal regulations and, if applicable, industry standards.*
- *Enforce the policy that is adopted. Failure to enforce a policy may be worse than not having a policy at all.*

What constitutes "anticipation of litigation?"
Anticipation of litigation means that a business or individual under normal circumstances would have reason to believe that another business or individual may be interested in suing. There is no set of criteria to follow, but one standard would be if a party has discussed a matter with an attorney, or if an individual has threatened to seek legal redress.

E-Discovery Tip
Interrogatories can sometimes be useful in determining the extent of discoverable information that is contained in computers. An interrogatory can be used to identify a responding party's computer network specialist and any records-retention policy.

When does a litigation hold come into effect?
While the line is not clear, a litigation hold is usually triggered when both of the following take place:

- ☐ *A legitimate anticipation of litigation*
- ☐ *A reasonable basis to believe that electronically stored documents or communication (data) could be requested during the discovery stage of that potential litigation*

How to accomplish a litigation hold for the client
A client should be informed, in writing, that beginning immediately, the following should take place:

- Data should be retained, including:
  - ☐ All data on hard drives
  - ☐ All data on back-up drives
  - ☐ All data on servers
  - ☐ All data on tape back-ups
  - ☐ All data on portable media, such as "thumb drives," "flash drives," external hard drives, CD ROMs, DVDs or DVD ROMs, floppy disks, and any other device capable of holding data
- A more comprehensive list of potential media may be found below under the *Requesting Stage*.
- Depending on the size of the firm and the litigation involved, such data retention may be limited to individuals in the firm relevant to the litigation. The list of individuals, however, should be quite broad and include even those who possibly had documents or communication relevant to the litigation.
- Retained data may, in some cases, be date specific (such as going back to September of 2008), but again the date criteria should be overly broad to ensure retention of all relevant data.
- The data retention should be ongoing and include documents and communication created from this date forward, until otherwise informed.

The firm should be prepared to provide the client with information and references related to experts in electronic data retention and computer forensics.

2. Requesting Stage: Broad Retention - Narrow Discovery

How to initiate an E-Discovery request
E-Discovery is typically a part of a *Request for Production*. It is advisable to require broad retention, but request specific discovery. For example:

> *Request Number 1*
> Plaintiff requests the right to inspect any and all electronically stored or recorded **email communication** between Defendant and Plaintiff from September 2008 to present and demands that all potentially relevant data be retained until conclusion of this litigation. Please refer to Exhibit A for a list of media to be included in this request.
>
> *Request Number 2*
> Plaintiff requests the right to inspect any and all **electronically stored or recorded maps or image files** relevant to this litigation from September 2008 to present and demands that all potentially relevant data be retained until conclusion of this litigation.

The above requests are broad in terms of requiring retention of data (data to be retained), but specific as to the discovery documents sought (emails, and "maps or image files").

What "media" should be included in the request?
The requesting party is usually not aware of the kind of computer and document retention systems the responding party possesses. Thus, a broad brush is usually required. Media for E-Discovery could include:

- ☐ Servers
- ☐ Mainframes
- ☐ Network file systems
- ☐ Workstations
- ☐ Laptop computers
- ☐ Personal digital assistants (PDAs)
- ☐ Personal home computers
- ☐ Private branch exchange (PBX)
- ☐ Voice mail
- ☐ Digital printers or copiers
- ☐ Cell phones
- ☐ Monthly system-wide backups
- ☐ Weekly system-wide backups
- ☐ Incremental system-wide backups
- ☐ Unscheduled backups
- ☐ Personal backups
- ☐ CD-ROMs
- ☐ DVDs and DVD ROMs
- ☐ Floppy diskettes
- ☐ Zip disks
- ☐ Tape archives
- ☐ Removable hard drives
- ☐ Thumb Drives or Flash Drives
- ☐ USB Memory Sticks
- ☐ Digital camera media
- ☐ Online servers (Cloud servers)

You may also refer to the *Media Evaluation Exhibit Checklist* below for specific guidance regarding procedures for securing electronic data.

Locating a service to search the data
Your firm may already have experts in mind, but if your firm is new to E-Discovery, a search on the Internet may be the quickest way to find a firm with experience. A more reliable source may be to check attorney newsletters and Bar Association magazines for advertisements. In any case, be sure to ask for and check references.

3. The Responding Stage: Making Time Stand Still

Clear communication between the law firm and client
An attorney, sometimes with the assistance of a paralegal, must communicate the seriousness of the E-Discovery process. The steps recommended to initiate a litigation hold are helpful, but nothing replaces clear and direct communication. It is critical that if instruction is provided orally (by phone or in person), those instructions must be included in a follow-up letter. Help protect your firm by documenting the instructions you and your attorney have provided to the client. A court may become extremely agitated if an attorney failed to provide proper guidance to the client.

Initiate a Litigation Hold, if not already in place
Once a request for E-Discovery is made, a litigation hold should go into effect. But what steps, exactly, should be taken? See the *Litigation Hold Checklist* later in this chapter for a suggested set of recommended procedures.

Searching within the data
Strategies for searching within data will depend on whether the amount of data is limited or extensive. In small cases, an attorney or paralegal may be able to review the extracted data themselves, or (as is becoming common) a team of paralegals can review the information and input relevant data into a data management system such as *Concordance* or *Summation*. If the amount of information is more substantial, an E-Discovery vendor may be more cost effective in the long term. In such a case, the vendor must be provided with guidelines for the information being sought, such as emails between specific individuals or on a specific topic, documents related to specific subject matters, etc. The vendor, often using proprietary software, searches within the data and extracts all relevant "hits." This information is then provided to the firm for analysis.

§ 6.10(d) | Final E-Discovery Considerations

Online document review
In cases involving large amounts of data for review and multiple plaintiffs or multiple defendants, the parties may choose to post discovery documents online for review. Of course, the documents would not retain all metadata and embedded data, but if that is not a concern, online review is a cost-effective and efficient means of document analysis.

Trade Secrets, personal information, and other protected data
A paralegal who assists a client in responding to E-Discovery must be sensitive to private information. In most cases, personal information and trade secrets are not within the scope of E-Discovery and should not be provided to the requesting party. If there is a dispute about whether such information is relevant, the court will most likely view the document in private (called "*in camera*") and determine whether some or all of the information is relevant and should thus be disclosed.

The high cost of E-Discovery
Even though costs are decreasing somewhat with more competition from vendors, the price of E-Discovery is alarming. Even the smallest of cases can cost five to ten thousand dollars, not including the law firm's time. The largest cases can cost more than a million dollars. Courts, therefore, must sometimes be convinced that E-Discovery is a necessary burden.

A devil's bargain?
Not all attorneys are comfortable with the technology involved in E-Discovery, or they are concerned about the high cost to the client. As a result, some attorneys enter into an informal agreement that goes something like this: "I won't ask for E-Discovery if you won't ask for E-Discovery." Be aware that such an agreement is not only unethical behavior; it could possibly expose an attorney agreeing to such an arrangement to a malpractice claim. (Could some of that electronically stored information have been of value to the client?)

Authorities Shaping E-Discovery

> *Zubulake v. UBS Warburg LLC,* 217 F.R.D. 309 (S.D.N.Y. 2003)
> May be the landmark case on E-Discovery. Sets standards for aspects of E-Discovery, such as obligations to preserve electronic data and cost-shifting.
>
> *Peskoff v. Faber*, 2006 WL 1933483 (D.D.C. 2006)
> The court requires email production (not reported in F. Supp.).

- *Williams v. Sprint/United Mgmt. Co.*, 2006 WL 1867478 (D. Kan. 2006)
  A case establishing the need to include metadata in evidence production (not reported in F. Supp.).

- *Treppel v. Biovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006)
  In this defamation case, the plaintiff moved to compel the defendant to take three actions based on electronically-stored information:

  1. Preserve any paper and electronic data that could be considered discoverable

  2. Disclose in detail their document and data management policies by way of a list of questions provided by the plaintiff

  3. Produce all of the accessible and responsive data from the plaintiff's earlier request for production

- *Rule 37 Federal Rules of Civil Procedure: Failure to make disclosure or cooperate in discovery.*
  Requires the preservation of electronically stored data. Also provides protection for the good-faith loss of electronically stored information, and for sanctions if parties are negligent in data retention.

§ 6.10(d) | Useful Forms and Checklists for E-Discovery

1. General Company Retention Policies Checklist (prior to litigation)

☐ Create reasonable document storage retention policy that allows for ongoing legitimate business activity.

☐ Develop company-wide policies for home computer use.

☐ Establish policies concerning retirement of old computer systems and programs, ensuring ability to access and read old computer data (often called "legacy" data).

☐ Maintain written company policies regarding access to employees' computer systems and email, and notify employees of their limited expectation of privacy.

2. Preservation Duty in Anticipation of Litigation Checklist

- ☐ Learn client's computer environment and information available on client's computers to determine what to preserve, what to disclose, and what to withhold from disclosing.
- ☐ Implement preservation plan upon anticipation or awareness of potential litigation.
- ☐ Client must be advised of duty to preserve relevant evidence.
- ☐ Advise client to advise employees of duty to preserve relevant evidence, including, in written notice to employees, details of litigation, scope of information to be preserved, and consequences of failure to preserve.
- ☐ Assist client in developing retention plan.

3. The Preservation Plan Checklist

- ☐ Determine what electronically stored information is relevant to the claim or to the defense for any party in litigation.
- ☐ Implement backup procedures for storage devices.
- ☐ Disable auto delete and enable auto archive features of computer systems and applications.
- ☐ Make mirror-image copies of local hard drives. If possible, never erase a hard drive.
- ☐ Preserve "legacy" or outdated hardware and especially software to enable reading of older data.
- ☐ Provide written notice to employees of preservation obligations regarding potentially discoverable information.
- ☐ Monitor/record employee compliance with preservation procedures.
- ☐ Make an agreement on preservation procedures a part of initial opposing party communication.
- ☐ In some circumstances, a court order may be necessary.

4. Early Recognition of Electronic Discovery Issues Checklist

- ☐ Identify relevance and sources of potential electronically stored information in possession of the client or opposing party early in litigation.
- ☐ Consider hiring computer technician to collect, preserve, and analyze ESI (Electronically Stored Information).
- ☐ Confer with opposing counsel to avoid spoliation and establish initial expectations of electronic discovery.

- ☐ Establish a paper trail of preservation by sending a preservation letter, outlining type of evidence claimed to be relevant to claims and defenses, and demanding preservation of electronically stored evidence.
- ☐ Disclose electronically stored information that disclosing party may use to support its claims or defenses as part of disclosure obligations.
- ☐ If appropriate to the circumstances, request that court order expedited discovery to prevent destruction of relevant evidence.
- ☐ If computer equipment necessary for ongoing business operations has been seized, consider obtaining court order for release of that equipment once data has been obtained.

5. Making Electronic Discovery Requests Checklist

- ☐ Consider different forms of discoverable electronic information, including hard drives, databases, other storage media, emails, software, and residual-deleted data, as well as home computers, laptops, and mobile handheld devices in which relevant information may be available.
- ☐ Determine whether creation of special program to retrieve electronic data is necessary.
- ☐ Consider formal discovery requests pertaining to opposing party's computer environment, systems, and processes, including party's record retention and destruction policies, if information was not provided in initial disclosure.
- ☐ Consider formal discovery requests for electronically stored information relied on by opponent's expert as basis of opinion.
- ☐ Determine whether on-site computer inspection is appropriate.
- ☐ Focus discovery requests by seeking relevant information from:
  - *Individual files*
  - *Individual hard drives*
  - *Computer database accessed by individual users*
- ☐ Determine desired format of items to be produced, which may include:
  - *Electronic copies only (specifying preferred storage medium)*
  - *Paper copies only*
  - *Electronic and paper copies*

5. Responding to Electronic Discovery Requests Checklist

- ☐ When objecting, determine whether objection is based on:
  - *Relevancy*
  - *Undue expense or burden*
  - *Privilege such as work product*
  - *Assertion that request seeks cumulative or duplicative materials*
  - *Assertion that alternative, more convenient, means to obtain information is available*
- ☐ Review electronically stored information being disclosed by your client very carefully to prevent inadvertent disclosure of privileged information.
- ☐ Draft confidentiality agreement with opposition, or in the alternative seek court order, to maintain privileged status of documents inadvertently disclosed.

6. Litigation Hold for Responding Party Checklist

The following checklist is designed to be used once a party has been served with *Requests for Production* that include E-Discovery requests or a demand for a litigation hold.

- ☐ Have a Tech Team in place.
- ☐ If your client is initiating E-Discovery, the Tech Team should have templates of letters to be completed and then sent to the opposing party regarding the preservation of evidence. The letter (sent to the attorney, actually) must identify the individuals involved, issues relevant to the litigation, and a statement that failure to comply may result in sanctions.
- ☐ Workstations that are relevant to the litigation should be unplugged and stored safely. One solution is to replicate the hard drive using software (such as *Norton Ghost*) and install that replica on a new workstation computer. But lock up the original. That original hard drive becomes the secured media. The replicated drive is for use by the responding party.
- ☐ Do not defragment a drive, delete data, or add new programs. Doing so will overwrite existing data and metadata.
- ☐ The client should be warned that even looking at the files on a hard drive to determine the seriousness of the situation can be damaging. Replicate the drives, then look at the replicas. Don't search for and review evidence now. Instead, *preserve it*.

- ☐ Get a sense of the back-up system used by the client. Meet with the client's IT team to determine how best to maintain the data already on the back-up, and to prevent regularly-scheduled data destruction. Impress on the client, and the client's IT team, the importance of retention.
- ☐ Consider the need to take back-up storage media out of the loop to preserve data.
- ☐ Consider obscure sources of data, such as iPhones, BlackBerrys, voice mail systems, tablet computers, and back-up drives or external media. Depending on the matter being litigated, many of these may need to be a part of the hold.
- ☐ The litigation hold may mean altering the client's data retention policy for the time being.
- ☐ The Tech Team should have templates of letters to be sent to key individuals (from managers to partners to secretaries) who may have relevant data to the litigation. These letters need to spell out what is required of them in terms of protecting data and the often dire consequences of not doing so. The result of spoliation may be heavy fines, sanctions on the use of evidence or testimony, cost shifting or the much feared "adverse inference" instruction to the jury.

7. Analysis of Electronically Stored Information Checklist

- ☐ Check for duplicate information, especially regarding emails, and compare to determine if information has been altered.
- ☐ Utilize software designed for "data searching," in consultation with computer technician, to search visible and hidden files on a hard drive and other storage media.
- ☐ Search for potentially helpful embedded information or metadata, (which may also help with verifying authenticity and spoliation issues) such as:
  - Identity of file's author and date of file's creation, modification, and deletion
  - Blind copies of email, as well as names on distribution lists
  - Hidden formulas in excel documents and spreadsheets
- ☐ Search for files that have been deleted but still may be available in computer's free space.

8. Media Evaluation Exhibit Checklist

Following is an example of an exhibit to attach to discovery requests, outlining procedures for securing electronic data stored on media devices. (Note that this checklist is also useful for responding parties if no such list is provided by opposing counsel.)

Exhibit A
The following is requested of all media devices covered by the attached *Request for Production*:

- ☐ The responding party shall record each media device with a unique identifying number.
- ☐ The responding party shall write protect each media device.
- ☐ The responding party shall forensically duplicate each media device to create a true mirror image (note that this does not mean copying or "Ghosting"). Further, the requesting party requests documentation of any such forensic procedure.
- ☐ The responding party shall mathematically verify and validate that the mirror image is identical to the original by using hashing algorithms (MD5, SHA1, SHA2).
- ☐ The responding party shall scan media devices for viruses and spyware- document the results.
- ☐ The responding party shall produce directory structure for each media device.
- ☐ The responding party shall analyze the electronic media and extract relevant information.
- ☐ The responding party is responsible for securing each media device, both original and replica, so that such devices may be available to resolve any disputes or inconsistencies in resulting data.

CHAPTER 6 WRAP-UP

WHAT YOU SHOULD KNOW…

After reading this chapter you should know the following:

- ☐ The various forms of legal writing during litigation
- ☐ The purpose and structure of a summons
- ☐ How do draft a complaint
- ☐ How to draft discovery documents
- ☐ How to summarize a deposition
- ☐ A basic understanding of E-Discovery

ASSIGNMENTS

For this chapter you will be required to complete the following (unless otherwise instructed):

☐ **Assignment § 6.6** Due Date: / /
Prepare a summons and complaint based on your client's case

☐ **Assignment § 6.7** Due Date: / /
(Optional) Prepare an answer, switching sides momentarily or using a classmate's complaint

☐ **Assignment § 6.8(a)** Due Date: / /
Draft a set of Interrogatories (20 questions)

☐ **Assignment § 6.8(b)** Due Date: / /
Draft a set of Requests for Admissions (20 statements)

☐ **Assignment § 6.8(c)** Due Date: / /
Draft a set of Requests for Production (5 requests)

☐ **Assignment § 6.9** Due Date: / /
Based on the deposition transcript example in the manual, create a sample deposition summary.