Chapter 8

DISCOVERY

You and Ms. Heyward are reviewing the discovery plan in the Wesser case. You inquire: "We have taken three of the five depositions permitted in this case. Whom else do you plan to depose?"

Ms. Heyward replies, "We need to review our answers to interrogatories before we decide. We do not want to waste our limited number of depositions if we already have the information through interrogatories or another discovery device."

"Do you want me to review and summarize the interrogatories?"

"Yes," Ms. Heyward answers. "Then we will meet tomorrow to plan our remaining depositions."

INTRODUCTION TO DISCOVERY

The term *discovery* refers to the series of activities through which litigants obtain from one another information that enables them to prepare for trial. Although information gathering is its primary function, discovery serves several additional purposes. Discovery helps to clarify the factual and legal issues and preserve witnesses' testimony, especially when a witness might not be available for trial. Testimony obtained through discovery can be used to impeach a witness who gives contradictory testimony at trial. Another important function of discovery is that it guards against surprises at trial. Discovery has virtually eliminated the courtroom ambush, thus making the trial process more efficient.

Methods of Discovery

FRCivP 26(a)(5) sets forth the five methods of discovery. The methods do not have to be used in the order they are listed in FRCivP 26(a)(5). As noted later in the chapter, there is great flexibility in the order in which discovery takes place, and methods may be used more than once.

The first method listed in FRCivP 26(a)(5) is the ***deposition***, which consists of the oral responses of a witness to questions asked by the attorney representing another party. A deposition is taken under oath, without a judge present, and the setting is outside the courtroom. Depositions are governed by rules 27 through 32 of the Federal Rules of Civil Procedure.

Second is the use of ***interrogatories,*** which are written questions submitted to another party. The party responds in writing to each question, and the answers are given under oath. FRCivP 33 governs the use of interrogatories.

The third method of discovery is through ***requests for production*** of documents and things and for entry upon land for inspection. This method of discovery is governed by FRCivP 34. As a paralegal, you may encounter frequent requests for the production of documents, which may be inspected and copied by the requesting party. You may also request or answer requests for the production of tangible things, such as the electric blanket in the Wesser case, for inspection and testing. Requests for entry upon land enable one party to a lawsuit to inspect, measure, survey, photograph, test, or sample the property of the opposing party.

The fourth method of discovery is ***physical and mental examination of a person,*** the request that a person undergo a physical or mental examination when that person's condition is at issue. FRCivP 35 governs physical and mental examination and requires a court order for the examination if the person will not voluntarily submit to it. This method of discovery is not applicable to every type of lawsuit; it is most common in personal injury litigation.

The fifth method of discovery is through ***requests for admission,*** written requests asking the opposing party to admit to the truth of facts, the genuineness of documents, and the application of law to fact. Requests for admission are not appropriate for all issues related to the litigation. For instance, it would be fruitless to request that a party admit to the fact that the party is liable and should pay one million dollars to the other party. Requests for admission are useful, however, for parties to state in writing their agreement on certain uncontroverted facts so that they will not have to waste time at trial. This is particularly true for admissions that documents are authentic. FRCivP 36 governs requests for admission.

Rules That Govern the Discovery Process

The rules that govern the discovery process are the same ones that control the entire litigation process: the Federal Rules of Civil Procedure, state rules of civil procedure in state courts, and local rules.

Federal Rules of Civil Procedure and Local Federal Court Rules. Due to amendments to the Federal Rules of Civil Procedure in 1993, federal courts' local rules have taken on far more importance in the discovery process. FRCivP 26(a)(1) now requires parties to disclose certain information without awaiting a discovery request; however, the rule also permits each federal court by local rule or order to opt out of the requirements of FRCivP 26(a)(1), reprinted in Figure 8–1. Thus, a federal court may choose to exempt from the requirements of FRCivP 26(a)(1) all cases or certain categories of cases.[1] As a result, the discovery disclosure requirements can differ even in federal courts in the same state. For instance, the United States District Court for the Northern District of Florida has put into effect the initial disclosure requirements of FRCivP 26(a)(1), but the United States District Court for the Southern District of Florida has chosen to opt out of FRCivP 26(a)(1), except as ordered by the judge in the specific case or stipulated by the parties and approved by the judge.

FIGURE 8–1 FRCivP 26(a)(1)

Rule 26. General Provisions Governing Discovery; Duty of Disclosure
(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

Other sections of FRCivP 26 do not have opt-out provisions. Throughout the discussion of FRCivP 26, the text cites the choices that some of the federal courts have made in regard to the opt-out provisions, but it is crucial that attorney-paralegal teams consult the local court rules in the specific districts in which they litigate to ensure that they follow the requirements of that particular court.

SIDEBAR It is important to note at the outset that the 1993 amendments do not alter the basic methods of discovery, such as depositions and interrogatories. Rather, the revised rules affect the timing of discovery and types of information that must be automatically disclosed in the federal district courts in which the revised rules are implemented.

State Rules of Civil Procedure. The 1993 amendments to the Federal Rules of Civil Procedure regarding discovery have influenced some state courts. As with federal courts, there can be great variation among state courts; therefore, it is imperative that you consult the state rules in state court actions.

SIDEBAR It is important to understand that a discovery method may be used more than once during a lawsuit. A party may take the depositions of several witnesses. A party may submit multiple sets of interrogatories. However, parties must not abuse the discovery process by requesting unnecessary or repetitious information.

Although the rules do not specify a sequence for using the various methods of discovery, common sense does. This will become clearer as we explore the types of questions generally asked in interrogatories and depositions. The first set of interrogatories usually requests the identification of witnesses and documents. Once the documents are identified, the attorney-paralegal team can request production of the documents. After the attorney and paralegal review the documents, they may submit more interrogatories and/or take depositions to develop the evidence further. After a series of interrogatories and depositions has narrowed the issues and delineated the disputed and undisputed facts, a party may submit requests for admission to nail down the undisputed facts and issues. Mental and physical examinations may follow in personal injury cases.

This sequence is not set in stone. In fact, it is important to remain flexible because the facts develop in different ways in different lawsuits. In addition, different types of lawsuits require different discovery methods. A physical examination may be necessary in the Wesser case because of Mr. Wesser's physical injuries from the fire, but no physical examination would be needed in the Chattooga case, where the dispute centers around the reason for Sandy Ford's discharge, not her physical condition.

TIMING AND SEQUENCE OF DISCOVERY

The timing of discovery depends upon the local rules of the federal courts. FRCivP 26(d) addresses the timing and sequence of discovery and must be read in conjunction with FRCivP 26(f). Both are reprinted in Figure 8–2.

Note that both sections begin by stating that they can be altered by a local court rule or a court order. Thus, the timing and sequence will be determined by whether a particular federal court has adopted the provisions of FRCivP 26(d) and (f) or has another local rule in place.

In federal courts that implement the provisions of FRCivP 26(d) and (f), the parties must meet and develop a proposed discovery plan before any party may seek discovery. At the meeting, frequently called a 26(f) meeting, the parties must discuss the nature and basis of their claims and defenses and discuss the possibility of settlement. Further, they must make or arrange to make the

FIGURE 8–2 FRCivP 26(d) and (f)

(d) Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

. . .

(f) Meeting of Parties; Planning for Discovery. Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

disclosures required by FRCivP 26(a)(1). The 26(f) meeting must be held at least fourteen days before a scheduling conference is held or a scheduling order is due; therefore, the attorney-paralegal team must plan for discovery from the outset of the litigation in order to comply with these time restraints.

Over two-thirds of the federal district courts have implemented FRCivP 26(f), requiring the parties to meet and prepare a discovery plan. More than half of the federal district courts have implemented FRCivP 27(d), which requires parties to postpone discovery until they have held the 26(f) meeting.[2]

In courts that have opted out of some of the provisions of FRCivP 26, there still may be local rules that set limits on the timing and sequence of discovery. For instance, the United States District Court for the Eastern District of New York has adopted, as part of its Civil Justice Expense and Delay Reduction Plan, detailed provisions for discovery practice, some of which have more stringent disclosure requirements than FRCivP 26. Other courts, such as the Middle District of Tennessee, have opted out of the 26(f) meeting requirement but give the individual judge the discretion to order such a meeting in a specific case.

Sequence of Discovery After Filing of the Discovery Plan

The sequence of discovery may vary, according to whether a particular federal district court has implemented the initial disclosure requirements of FRCivP 26(a)(1). Only half the federal district courts have implemented FRCivP 26(a)(1), and half have opted out.[3] In the federal courts that have opted out, four require initial disclosure, at least in certain types of cases, through local rules. Seventeen federal courts give individual judges the authority to require initial disclosure, and twenty-six courts routinely require no initial disclosure, either through local rules or through FRCivP 26(a)(1).[4] The text discusses the sequence of disclosure required under FRCivP 26; however, paralegals must be mindful that local rules may require a different sequence.

Initial Disclosures

In courts that follow FRCivP 26(a)(1), the parties must, without awaiting a discovery request, disclose certain information within ten days after the 26(f) discovery planning meeting. These categories are set forth in detail in Figure 8–1. To summarize, the parties have a duty to disclose:

- the name, address, and telephone number of each person likely to have "discoverable information" relevant to disputed facts;
- a copy or a description by category and location of all documents and tangible things, in the custody of the party, relevant to disputed things;
- a computation of damages claimed by the disclosing party, including materials concerning the nature and extent of injuries suffered. These materials must be made available for inspection and copying; and
- copies of insurance policies that may be used to satisfy all or part of the judgment that may be entered in the lawsuit.

Thus, initial disclosures made by the plaintiff in the Wesser case would include, among other things, the name, address, and telephone number of Mr. Wesser and the fire inspector; the warranties covering the electric blanket and the electric blanket itself; a computation of Mr. Wesser's damages; and copies of insurance policies. This is not a comprehensive list but gives you an idea of the physical evidence that the attorney-paralegal team must have assembled and ready to disclose near the beginning of the lawsuit.

Disclosure of Expert Testimony

FRCivP 26(a)(2) does not include a provision for opting out, yet some twenty percent of the federal courts have interpreted it that way.[5] The text discusses only the requirements of FRCivP 26(a)(2), but again paralegals must be alert for variations implemented by local rules.

Under FRCivP 26(a)(2), each party must disclose to the other parties the identity of any expert witness who may testify at trial. Further, the expert witness must prepare and sign a report disclosing certain facts, ranging from a complete statement of all opinions to be expressed and the basis and reasons therefor to a list of all the cases in which the witness has testified as an expert within the preceding four years. For a complete list of the facts that must be disclosed, see Figure 8–3, which reprints FRCivP 26(a)(2).

FIGURE 8–3 FRCivP 26(a)(2)

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

Pretrial Disclosures

FRCivP 26(a)(3) requires further pretrial disclosures. There is no opt-out provision in this section, but roughly twenty percent of the federal courts have declined to implement this section or have varied the requirements.[6]

Under the provisions of FRCivP 26(a)(3), a party must provide to the other parties specific information regarding the evidence that will be presented at trial. The required disclosure includes the name, address, and telephone number of witnesses, with a designation whether the witness "will be called" or "may be called." Parties must also designate witnesses whose testimony is expected to be presented at trial through depositions. Further, the parties must identify the exhibits to be presented and designate whether they "expect to offer" or "may offer" the exhibit at trial.

The disclosure requirements of rule 26 are detailed, and the attorney-paralegal team must work together closely and quickly to be prepared to meet the disclosure deadlines. Even after the detailed disclosure requirements have been met, further discovery will follow. Additional information will be gathered by the attorney-paralegal team through various discovery devices—interrogatories, depositions, and others. Before discussing the details of the various discovery methods, it is necessary to consider the scope of discovery, that is, the limits of the information that can be gained.

SCOPE OF DISCOVERY

The Federal Rules of Civil Procedure allow a wide range of information to be discovered. There are some limitations, however, particularly regarding privileged information. It is crucial for paralegals to understand the scope of discovery so that the attorney-paralegal team does not accidentally turn over protected information. Before information is released to the other parties, the attorney reviews it. Paralegals, however, are integrally involved in the screening and review of information.

The General Rule for Scope of Discovery

FRCivP 26(b)(1) states the general scope of discovery. It provides that

> [p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

It is important to remember that the information requested does not itself have to be admissible evidence, but only "reasonably calculated" to lead to admissible evidence. Recall the discussion of hearsay in Chapter 3. Suppose that two weeks after the fire, Mr. Wesser and his neighbor were discussing the cause of the fire. Their conversation is hearsay and most likely fits into no hearsay exception; however, it is reasonably calculated to lead to discoverable evidence, such as further information about what Mr. Wesser's neighbor observed at the time of the

fire. The content of their conversation, therefore, could be obtained through discovery.

FRCivP 26 further states that information about the claims or defenses of any party are subject to discovery. The rule specifies that this includes "the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter."

Limitations on Discovery

Although the scope of discovery is broad, there are limitations. That is, some information is protected from disclosure. It is crucial that paralegals be alert for privileged material so that it will not be inadvertently disclosed.

FRCivP 26(b)(2) gives the court the discretion to alter the limitations on discovery, such as the limit on the number of depositions and interrogatories and the length of depositions under FRCivP 30. These limitations are discussed in the following sections that address the various discovery methods; however, paralegals should be aware of the broad discretion given to the court in FRCivP 26(b)(2), which is reprinted in Figure 8–4. FRCivP 26(b)(4) sets forth limitations on depositions and interrogatories for expert witnesses, and the limitations are greater for an expert who is not expected to be called as a witness at trial. These issues can become somewhat complex, and paralegals should consult with their supervising attorneys.

FIGURE 8–4 FRCivP 26(b)(2)

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

. . .

(2) Limitations. By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

Privileged Information. Recall the discussion of privileges in Chapter 3. If information is privileged, it is protected from disclosure, even during discovery. A privilege you will frequently encounter is the attorney-client privilege. It would obviously be unreasonable to expect parties to turn over communications with their attorneys, such as letters from attorneys explaining the strategy for the lawsuit.

Another privilege that surfaces often in the discovery process is the work product privilege, set forth in FRCivP 26(b)(3). Work product is often called "trial preparation materials." Remember that this privilege precludes disclosure of the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Other trial preparation materials, however, may be discoverable. A party may be able to obtain documents and tangible things prepared in anticipation of trial if the party can establish that "he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Suppose, for example, that the fire inspector gave Ms. Heyward a statement explaining his opinion about the cause of the fire. If Mr. Benedict wants the statement, he may not be able to obtain it through a request for the document because Mr. Benedict could easily contact the fire inspector and get a statement. This situation would not constitute "undue hardship."

FRCivP 26(b)(5) specifies that when parties withhold information on the ground that it is privileged, they must make the claim of privilege expressly and describe the nature of the material not produced, without revealing the information that is privileged or protected. This enables other parties "to assess the applicability to the privilege or protection."

Protective Orders. Parties may file motions asking the court to enter protective orders—that is, orders to protect information that is not privileged, but the disclosure of which would cause "annoyance, embarrassment, oppression, or undue burden or expense" (FRCivP 26(c)). FRCivP 26(c) enumerates a number of ways that the court may protect the information, ranging from sealing the information and filing it with the court to allowing only certain persons to be present at a deposition.

Suppose that Woodall Shoals possesses a lengthy research paper that discusses the results of their development of advanced safety features for electric blankets. The document may mention the model of the blanket that Mr. Wesser had. Ms. Heyward requests production of the research paper. Woodall Shoals does not want to release the research paper because the paper discusses some advanced features that are not yet protected by patents. Mr. Benedict can file a motion for a protective order to prevent disclosure of this confidential research. The court may then order that Woodall Shoals produce those parts of the paper that do not discuss the confidential research, or the court may deny the motion for a protective order and instead order Woodall Shoals to produce the entire document.

Duty to Supplement Responses

FRCivP 26(e) requires parties to update and supplement their responses when a prior response is no longer accurate. For instance, if Mr. Wesser answers an interrogatory stating that the blanket model number was 6102 but later finds out that the model number was 6100, he has a duty to supplement the answers. FRCivP 26(e) also requires parties to supplement their responses regarding their witnesses, including expert witnesses. Parties frequently change or add witnesses as the case develops.

The duty to supplement applies both to the disclosures required by FRCivP (a)(1)–(3) and to responses subsequently given in answers to interrogatories, requests for admission, and requests for production. The duty to correct and update information applies whether the information is learned by the attorney or the client.

DISCOVERY PLANNING

The attorney-paralegal team must plan the discovery process carefully to make it effective. The strategy will be different in different types of lawsuits.

It is helpful to consult the chart of the essential elements to prove the claim, as discussed in Chapter 4. Review the essential elements that the client must establish. Most discovery takes place after the complaint and answer are filed, so next the text examines the pleadings to review the contentions of the defendants and the facts that are disputed.

Next the attorney-paralegal team must determine the likely sources for the facts needed to prove the claim and defeat the defendants' assertions. Some possible sources are listed on the essential elements chart in Chapter 4. Paralegals may find that much information was already obtained through the informal investigation and that formal discovery will not be needed for certain facts. Formal discovery, however, may still be necessary to develop those facts more fully or to pin down a witness's statement. Consider, too, whether some witnesses may be unavailable for trial. If they may disappear, it is best to pin down their statements in depositions.

Next consider the most effective method for obtaining the information needed. Discovery generally moves from the general to the specific. For instance, in the first set of interrogatories, the defendants are asked to identify the witnesses. The next step may be to take those witnesses' depositions. Or the first step may be a request for the production of documents and, after examining the documents, more interrogatories may be submitted or more depositions may be taken to develop some facts found in the documents.

Time and money are considerations in discovery planning. It is best to start discovery early so that you do not get close to the trial date and find that discovery is not complete. Also, prompt initiation of discovery sends the message to the other parties that you plan to litigate aggressively.

Remember, not every discovery method is necessary in every lawsuit. Discovery can be very expensive. If you plan several depositions, this will be costly

considering the amount of time the attorney and paralegal must devote. There may be additional costs such as court reporters, conference rooms at an airport, and the like. Therefore, it is important to consider how much discovery your client's litigation budget can afford.

Effect of Local Rules on Discovery Planning

The attorney-paralegal team must pay close attention to local court rules when planning discovery. As the text has already discussed, the timing and sequence of discovery varies substantially, depending upon whether the particular federal court has implemented all the provisions of FRCivP 26 or has opted out. Local rules also may place restrictions on deadlines for the completion of discovery. Most courts require some type of scheduling conference to set discovery deadlines; however, the attorney-paralegal team can be best prepared by determining, prior to any type of pretrial conferences, the deadlines that a particular federal court applies to all lawsuits. For instance, the United States District Court for the Western District of Texas requires completion of discovery in not more than six months, except for cases assigned to the Expedited Docket.

Consider the Restrictions on Discovery Imposed by Local Rules. The Federal Rules of Civil Procedure state some restrictions on discovery, such as limitations on the number of interrogatories and depositions. For instance, FRCivP 33(a) limits each party to twenty-five interrogatories, without leave of court or stipulation by the other party. Some federal courts, however, have opted out of these limitations and have imposed their own restrictions. For instance, the United States District Court for the Southern District of Ohio allows each party forty interrogatories. The restrictions on individual types of discovery are discussed in the following text under each particular method. From the outset, however, the attorney-paralegal team must consider the restrictions in order to avoid using up the allotted number of interrogatories or depositions before all the information needed can be obtained.

Consider the Information That Will Be Obtained Through Initial Disclosure Requirements. As already noted, half the federal courts have implemented the initial disclosure requirements of FRCivP 26(a)(1). In courts that have opted out of this provision, local court rules may nevertheless require similar mandatory disclosure near the outset of the litigation process. Paralegals must study the local federal court rules carefully in planning the questions to ask during the discovery process, particularly when drafting interrogatories. For instance, if copies of pertinent insurance policies have already been obtained through the mandatory disclosure requirements, it would be a great waste to request this information in interrogatories.

The purpose of the 1993 revisions to the Federal Rules of Civil Procedure was to reduce the frequency and expense of discovery, especially the use of interrogatories. With careful discovery planning, the attorney-paralegal team not only complies with the spirit of the rules but also delivers efficient legal services.

INTERROGATORIES

Now that you have an overview of discovery, the text addresses the procedures for the various discovery methods and the important duties that paralegals perform in discovery. The first step in the discovery process is usually interrogatories.

Procedures

FRCivP 33 explains the procedures for using interrogatories. Interrogatories may be served on any other party. It is important to remember that you can serve interrogatories only on the parties to the litigation. For instance, in the Wesser case, the fire inspector is a likely witness, but he is not a party. Therefore, you can take his deposition, but you cannot submit interrogatories to him.

If the party is a business organization, such as a corporation, or a governmental agency, the interrogatories are served on an officer or agent of the organization or agency. When we speak of "serving" interrogatories, this is not the same as service of a lawsuit. Attorneys generally mail the interrogatories to the attorney who represents the party. If the party is unrepresented, the attorney mails the interrogatories to the party.

In federal courts that implement all sections of FRCivP 26, interrogatories may not be served on another party prior to the meeting of the parties under rule 26(f), except by leave of court. Paralegals must consult local court rules for further information on the timing of serving interrogatories.

The party on whom the interrogatories are served must answer within thirty days, although FRCivP 33(b)(3) gives the court discretion to allow a longer time for responses. The parties also may stipulate in writing to a longer response time. Refer to Figure 8–5, which illustrates a stipulation for an extension of the time for responding.

SIDEBAR Remember that parties often need more than thirty days to prepare answers, especially answers to long, detailed interrogatories. Parties frequently seek an extension of time to answer, and the attorneys often can agree on an extension, unless the party has been dragging its feet.

FRCivP 33 requires that each interrogatory be answered "separately and fully in writing under oath, unless it is objected to." If a party objects to an interrogatory, the party must state the reason for the objection. When the answer to an interrogatory can be found in a party's business records, FRCivP 33(d) allows the party to answer the interrogatory by specifying the records in which the answer can be found. The party must then let the requesting party inspect and copy the records. For examples, see the Responses to Interrogatories in the Appendix.

FIGURE 8–5 Stipulation

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,

Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,

and

Second Ledge Stores, Incorporated,
Defendant.

STIPULATION

NOW COME THE PLAINTIFF and the defendants Woodall Shoals Corporation and Second Ledge Stores, Incorporated, and hereby stipulate and agree that the time for responding to "Plaintiff's First Set of Interrogatories" shall be extended through and including the 25th day of April, 1996.

Leigh J. Heyward
Attorney for Plaintiff

David H. Benedict
Attorney for Defendants Woodall Shoals Corporation and Second Ledge Stores, Incorporated

Drafting Interrogatories

Paralegals sometimes prepare the first draft of the interrogatories. The attorney reviews the draft and may make revisions, just as with pleadings. When you are asked to draft a set of interrogatories, there are many sources you may consult. First, you may look at other files in your office dealing with similar issues. Other attorneys and paralegals usually can point you in the right direction. Form books are available showing sample interrogatories for different types of lawsuits. As with pleadings, forms are a good starting point, but you cannot follow them slavishly. In some law libraries, you can find the records on appeal for cases that were appealed in the state's appellate courts and for some cases appealed to the United States Supreme Court. The record on appeal often contains some or all of the discovery materials from the trial of the case.

Topics to Include in Interrogatories. To make an initial list of the topics to include, keep in mind the facts you must establish to prove your client's claim. It may help to review once again the chart of the essential elements of the claim. Also review the pleadings and all other pertinent documents to see the facts that you already know. The documents may also give you ideas for questions you need to ask. In addition, the attorney may give you specific topics to include.

Parties may serve several sets of interrogatories on each other during the course of a lawsuit. The topics covered in the first set of interrogatories are usually more general than those in subsequent sets of interrogatories. The topics, especially in the first set, will vary, depending upon the mandatory disclosure requirements of the federal district court in which the case is being litigated. If the local court rules require disclosure of certain information, the attorney-paralegal team does not want to waste an interrogatory on that information. Below are some of the topics generally covered in interrogatories.

1. The identity of the person answering the interrogatories

Note that when interrogatories are addressed to a corporation, as in the Wesser case, your question should require persons to specify their position in the company and to identify other persons in the company who provided information.

2. Whether corporate defendants have been correctly designated in the pleadings

You may not be aware that a company is a subsidiary or division of another corporation. This can be important for purposes of jurisdiction and venue.

3. The identity of witnesses

FRCivP 26(a)(1) requires disclosure of individuals "likely to have discoverable information" as part of the initial disclosures in a lawsuit. Later in the discovery process, parties must identify expert witnesses (FRCivP 26(a)(2)). As the trial date approaches, the parties must identify the witnesses they will call at trial (FRCivP 26 (a)(3)). The timing of these disclosures may be altered by local rules, which in turn will affect the questions to include in the various sets of interrogatories. It is important to identify potential witnesses as early as possible in case you choose to take their depositions. Standard interrogatories request phone numbers and addresses to aid further discovery.

4. Information about expert witnesses

The content of the interrogatories about expert witnesses is also influenced by the requirements of FRCivP 26(a). As noted earlier, about eighty percent of the federal courts follow FRCivP 26(a)(2), which requires disclosure of specific information about expert witnesses. Thus, interrogatories need not request the information about expert witnesses that must be disclosed pursuant to the court rules. In federal courts that do not implement FRCivP 26(a)(2), however, more detailed interrogatories will be necessary.

5. Information about pertinent documents

The degree of detail in the interrogatories depends upon whether the particular federal district court has implemented FRCivP 26(a)(1), which requires disclosure of all documents relevant to the disputed facts. Assume that the Wesser case is being litigated in a district that does not require these mandatory disclosures. Interrogatories would then be necessary to identify documents.

There are many ways of requesting information about documents, including business records. Refer to the sample Wesser case interrogatories in the Appendix. Here many types of documents are pertinent, from the warranty that came with the blanket to quality control records to documents about the design procedures for the blanket. As you cover the topics about which you need information, it usually will be clear what the related documents are.

6. Details of the other parties' version of the events

Parties frequently request that other parties detail their version of the events in issue. For example, where contributory negligence is an issue, the defendant may ask the plaintiff to describe the events leading up to the accident in the hope that the plaintiff did something negligent. In cases like the Chattooga case, the sequence of events is crucial. For instance, it is important to know when Sandy Ford helped her friend file a complaint with the Equal Employment Opportunity Commission.

7. Specific information about damages

Recall that the Wesser complaint requests damages "in excess of $50,000." Interrogatories can address the plaintiff 's specific injuries and property damage, and the amount of damages attributed to each. In districts that implement FRCivP 26(a)(1), parties are required to disclose a computation of damages and must make available for inspection related documents that are not protected by an evidentiary privilege.

8. Insurance coverage

If you do not already know the details of the defendants' insurance coverage, be sure to include a question about their insurance policies—the name of the provider, amount of coverage, and so on. You need to know right away if a defendant does not have sufficient coverage to pay a judgment. In districts that implement FRCivP 26(a)(1), the disclosure of pertinent insurance agreements is mandatory, even without a discovery request.

These general topics are applicable to many types of litigation. There are many other topics that you may include, depending upon the subject matter of the lawsuit.

Guidelines for Drafting the Questions. There are several general guidelines to bear in mind when you draft interrogatories. First, make the questions clear and uncomplicated. If it is not clear what information you seek, you will not get the information that you need. If a question is too complex, it may be ambiguous, or it may prompt an objection. Second, try to avoid questions that call for yes/no

answers. Such questions do not draw out the details that you need from the other party. Third, ask the person answering the interrogatories to identify who is the source of the information for any answer that is not based on personal knowledge.

Format for Interrogatories. Paralegals should check the local court rules before drafting interrogatories. Some courts have both general and specific requirements not only for interrogatories but also for other discovery documents. Refer to Figure 8–6, which reprints a local rule from the United States District Court for the Southern District of Ohio. Note that this federal court requires that each interrogatory be numbered sequentially, regardless of the number of sets of interrogatories throughout the entire course of the action. Another requirement is that one inch must be left after each question for the party to insert an answer.

FIGURE 8–6 Local Rule Regarding Format of Discovery Documents

Rule 26.1. Form of discovery documents

The party serving interrogatories, pursuant to Rule 33, FRCP, requests for production of documents or things, pursuant to Rule 34, FRCP, or requests for admission pursuant to Rule 36, FRCP, shall provide sufficient space, of not less than one inch, after each such interrogatory or request for the answer, response, or objection thereto. Parties answering, responding, or objecting thereto shall either set forth their answer, response, or objection in the space provided, or shall quote each such interrogatory or request in full immediately preceding the statement of any answer, response, or objection thereto. The parties shall also number each interrogatory, request, answer, response, or objection sequentially, regardless of the number of sets of interrogatories or requests throughout the entire course of any action.

Other federal courts have more general rules for interrogatories. For instance, the United States District Court for the Eastern District of New York requires that interrogatories must be "drafted reasonably, clearly and concisely" and must not be "duplicative or repetitious." Taking into account the fact that many attorneys use forms to draft their interrogatories, the Eastern District of New York also requires attorneys to review the forms and ensure that "they are applicable to the facts and contentions of the particular case."

Refer to the Plaintiff's First Set of Interrogatories to Defendant Woodall Shoals in the Appendix. Interrogatories have captions like those of pleadings. It is important to indicate to which defendant interrogatories are directed. It is also important to specify which set of interrogatories you are submitting—first, second, and so forth.

Definitions comprise a section of most interrogatories, certainly for lengthier or more complex sets of interrogatories. Some federal court rules address the subject of definitions. Refer to Figure 8–7, which reprints the local rule regarding definitions from the United States District Court for the Eastern District of New

FIGURE 8–7 Local Rule Regarding Discovery Definitions

Rule 47. Uniform Definitions in Discovery Requests

(a) The full text of the definitions and rules of construction set forth in paragraphs (c) and (d) is deemed incorporated by reference into all discovery requests, but shall not preclude (i) the definition of other terms specific to the particular litigation, (ii) the use of abbreviations, or (iii) a more narrow definition of a term defined in paragraph (c).

(b) This rule is not intended to broaden or narrow the scope of discovery permitted by the Federal Rules of Civil Procedure for the United States District Courts.

(c) The following definitions apply to all discovery requests:

(1) *Communication.* The term 'communication' means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

(2) *Document.* The term 'document' is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a). A draft or non-identical copy is a separate document within the meaning of this term.

(3) *Identify (with respect to persons).* When referring to a person, 'to identify' means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(4) *Identify (with respect to documents).* When referring to documents, 'to identify' means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

(5) *Parties.* The terms 'plaintiff' and 'defendant' as well as a party's full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

(6) *Person.* The term 'person' is defined as any natural person or any business, legal or governmental entity or association.

(7) *Concerning.* The term 'concerning' means relating to, referring to, describing, evidencing or constituting.

(d) The following rules of construction apply to all discovery requests:

(1) *All/Each.* The terms 'all' and 'each' shall be construed as all and each.

(2) *And/Or.* The connectives 'and' and 'or' shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

(3) *Number.* The use of the singular form of any word includes the plural and vice versa.

York. This local rule provides definitions that are deemed incorporated by reference into all discovery requests. Note some of the terms that are defined, such as *document* and *identify*. This local rule acknowledges that definitions more specific to the particular litigation may be necessary. If the Wesser case were litigated in the Eastern District of New York, the definition for the term *the subject blanket* would need to be included. Refer to the interrogatories in the Appendix, which include that definition.

Read through the remainder of the interrogatories in the Appendix, noting the format of consecutively numbered questions. Because of space limitations, the sample interrogatories do not include the space for answers. At the end is the attorney's signature, with address and phone number. Finally, there is a certificate of service.

Answering Interrogatories

Paralegals often obtain information from clients and draft answers to interrogatories. The attorney reviews the draft, but you want the draft to be as accurate as possible. Remember that there are two options with each interrogatory—an answer or an objection. Answers are discussed first.

The first step is to send a copy of the interrogatories to the client so that the client can gather the information you need. This should be done immediately so that you will have time to prepare the answers, clarify information, and obtain any further information that you need.

Before drafting the answers, compare the information received with other information you already have from the client. If there are any inconsistencies, clarify them immediately. Remember that the opposing party will be looking for inconsistencies and anything else that can damage your case.

There are several general guidelines for drafting answers. First, do not volunteer any more information than is necessary to answer the question. You do not want to disclose any more material than you have to. Second, make the answers clear and unambiguous. Third, be consistent; do not give contradictory answers. Fourth, ask the attorney any questions that you have. Above all, discuss any material that may be privileged. Finally, remember that FRCivP 33(d) provides the option to produce business records for the opposing party to inspect and copy. You must strike a balance between not volunteering information unnecessarily and disclosing information as required by the Federal Rules of Civil Procedure and local court rules

Objections to Interrogatories. There are several grounds for objections to interrogatories. If a question seeks privileged information, this is a ground for objection. Be especially alert for information protected by the attorney-client privilege and work product privilege (trial preparation materials). An answer may call for disclosure of trade secrets, and the responding party will request a protective order. For an example, see the response to interrogatory 6 in the Appendix. A question may be irrelevant, and this is a ground for objection. See the response to interrogatory 8 in the Appendix. Remember, however, that the

scope of discovery is broad, so it may be difficult to assert that the information sought is irrelevant.

Particularly after the first set of interrogatories, a party may not seek information that is unreasonably cumulative or duplicative. This is one of the grounds for objection set forth in FRCivP 26(b)(2). Another ground for objection in FRCivP 26(b)(2) is that the discovery is unduly burdensome or expensive. The grounds in FRCivP 26(b)(2) apply to all discovery methods but may be particularly applicable to interrogatories, especially when the parties exchange multiple sets of questions.

FRCivP 33(b) gives some specific requirements for stating objections to interrogatories. It provides that all grounds for objection must be stated "with specificity." Thus, when paralegals draft objections, they must ensure that the objections and the grounds for them are stated clearly. Under FRCivP 33(b), any ground that is not "stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown."

Procedure After Answering Interrogatories. Be sure that the attorney signs the interrogatories. The format for signature is the same as in pleadings. (See the responses in the Appendix for an example.) The person who provides the answers should sign the interrogatories. This is your client or the authorized agent when your client is a business organization. The person signs a verification, the wording of which may differ depending on whether your client is an individual who has personal knowledge of the facts or an organizational agent who does not necessarily have personal knowledge. Refer to the sample verification signed by Mr. Wesser (Figure 8–8), and compare the verification signed by the designated employee of Woodall Shoals in the Appendix. The person's notarized signature follows the verification.

FIGURE 8–8 Bryson Wesser's Verification

STATE OF NORTH CAROLINA
COUNTY OF WATAUGA

BRYSON WESSER, being duly sworn, deposes and says that he is the plaintiff in this action; that he has read the foregoing Answers to Defendants' First Set of Interrogatories and knows the contents thereof; that the same is true to his own knowledge except as to those matters and things therein stated on information and belief and as to those he believes it to be true.

_____
Bryson Wesser

Subscribed and sworn to before me
this the _____ day of June, 1996.

_____
Notary Public
My commission expires: _____

For each set of interrogatories or answers, mail a copy to each party, with a certificate of service attached. Remember to check the state and local rules to determine whether the interrogatories and answers should be filed with the clerk of court or retained by the law firm until trial.

One important task for paralegals is to ensure that service of the answers to interrogatories is made in a timely manner. A copy of the answers and objections must be served within thirty days after service of the interrogatories. FRCivP 33(b)(3) gives courts the discretion to shorten or lengthen the amount of time allowed to serve answers. Further, the parties may agree in writing to an extension.

SIDEBAR Always enter in the docket control system the date on which answers to interrogatories are due. Also arrange for reminders well ahead of the deadline so you can be sure to obtain information from the client in time.

REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

FRCivP 34 provides that a party may request other parties to produce designated documents for inspection and copying. Documents include more than just papers such as contracts or warranties. FRCivP 34 defines documents to include "drawings, graphs, charts, photographs, phonorecords, and other data compilations. . . ."

FRCivP 34 also provides that a party may request tangible things for inspection and testing, including physical evidence such as the electric blanket in the Wesser case. The third category in FRCivP 34 is the request to enter property under another party's control in order to inspect, measure, survey, photograph, test, or sample the property. If two parties have a dispute over land ownership, for example, one party may want permission to enter the property to survey it and perhaps take photographs.

For all three categories—documents, tangible objects, and land—the item requested must be "in the possession, custody or control of the party upon whom the request is served." Assume that you request accounting records from an officer of a corporation, who replies, "Sorry, our accountant has those papers." This response is unacceptable. FRCivP 34 requires that the corporate officer get the records from the accountant and produce them, because these records are under the corporation's control. This prevents parties from giving documents to other persons to avoid having to produce them.

This discussion focuses on document production because this is the most frequent request, but remember that the general rules discussed apply also to requests for tangible things and to entry and inspection of property.

Procedure

As with interrogatories, requests for production cannot be made prior to a discovery planning meeting in federal court districts that implement all

provisions of FRCivP 26(a). In districts that do not implement all of FRCivP 26(a), paralegals must consult the local court rules regarding timing of requests for production. As with all methods of discovery, requests for production must comply with the terms of the discovery plan.

The party has thirty days to serve a written response to the requests. If the requests are served on a defendant along with the summons and complaint, however, the defendant has forty-five days to serve a response. The response must state for each separate request either that the party will produce the document or that the party objects to production of the particular document, or part of it.

Format and Content of Requests to Produce

Like interrogatories, requests to produce have the case caption at the top, specifying the court, parties, and file number. (See Figure 8–9.) The requests must be specifically labeled; that is, they must specify to which party the requests are directed and whether this is the first, second, or some subsequent set of requests to produce. For example, the request for production in Figure 8–9 is an excerpt from the Plaintiff's First Request for Production of Documents to Defendant Woodall Shoals Corporation.

The request to produce begins with a simple statement that the defendant is requested to produce the documents in accordance with rule 34 of the Federal Rules of Civil Procedure. This is sometimes followed by definitions. If definitions are necessary, be sure that they are consistent with the definitions in the interrogatories.

As with interrogatories, check for any local court rules that require specific definitions. For instance, the definitions required by the United States District Court for the Eastern District of New York, illustrated in Figure 8–7, apply also to requests for production and, in fact, to all forms of discovery requests.

Next is the numbered list of the documents requested. There are several ways to describe the documents. The general guideline in FRCivP 34 is that the documents be described "with reasonable particularity." That is, the party from whom the documents are requested must be able to understand which documents the other party wants. It is not sufficient to request "all your business records," as this is too vague.

Detailed requests for production are often the second step in the discovery process. One purpose of interrogatories is to identify the documents that you need to request. Therefore, the best start for formulating the description of documents is a review of the interrogatories and answers to them. For instance, in interrogatory number 11 (see Appendix), the plaintiff asked the defendant Woodall Shoals to describe warnings to consumers that electric blankets might overheat. Woodall Shoals replied that copies of recent examples were attached and that copies of all other instructions, warnings, and labels were available for inspection in their New York office. In a request for production, you might ask for instructions, warnings, and labels used by Woodall Shoals at the time the subject blanket was manufactured and for the two years before and the two years after its manufacture.

FIGURE 8–9 Request for Production of Documents

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL NO.: 3:96 CV 595 MU

Bryson Wesser,
Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT WOODALL SHOALS CORPORATION

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, the defendant Woodall Shoals is requested to produce for inspection and copying at the office of Heyward and Wilson, 401 East Trade Street, Charlotte, NC, within thirty (30) days of receipt of this request, or at a time and location to be mutually agreed upon by the parties, the documents requested herein.

DEFINITIONS

(same as in interrogatories in Appendix)

REQUESTS

1. In the defendant's response to interrogatory No. 6 in the Plaintiff's First Set of Interrogatories, the defendant referred to reports on specific design/quality control tolerances for specific components of the defendant's electric blankets. Please produce reports for tolerances for the control unit for Model 6102 for the period from two years before the manufacture of the subject blanket to two years after the manufacture of the subject blanket. Note that the court entered a protective order on April 24, 1996, and that the production of documents must comply with the protective order.

This the _____ day of May, 1996.

Leigh J. Heyward
Attorney for the Plaintiff
Heyward and Wilson
401 East Trade Street
Charlotte, NC 28226-1114
704-555-3161

The description of documents differs, depending on the nature of the lawsuit. For instance, in personal injury litigation, interrogatories typically ask the plaintiffs to describe their injuries and the medical treatment they received as a result of their injuries. A request for documents related to the medical treatment may describe the documents as follows:

1. All reports, photographs, charts, diagrams, and any other documents regarding the plaintiff's medical treatment as a result of the events described in the plaintiff's complaint, including but not limited to medical records and reports of the plaintiff's treating physicians; hospital and emergency room records, including the reports of x-rays and other laboratory tests; and the bills for the medical treatment obtained.

You may draft requests for production with much more detailed descriptions. For instance, in a lawsuit involving complex financial transactions, you may need very specific descriptions because so many documents were generated by the transactions. For instance, the defendant in a lawsuit involving allegations of fraud in the sale of securities may request from the plaintiff "documents relating to purchases by defendants in private placement transactions of unrated securities for which mortgage loans served as collateral."

FRCivP 34 requires that the request for production "specify a reasonable time, place, and manner of making the inspection and performing the related acts." This means that the parties must agree to a reasonable method for inspection and copying of the documents requested. In lawsuits that do not involve a great number of documents, a simple statement that the documents are to be produced at the office of the requesting attorney on a certain date and at a certain time will suffice (see Figure 8–9). In more complex lawsuits that involve hundreds or thousands of documents, the procedure is more involved. These methods for production are discussed in the next section.

Both the requests for production and the responses to the requests are signed by the attorneys and mailed to all parties, as with interrogatories. Remember to attach a certificate of service. Remember also to check local rules for additional requirements. In North Carolina, for instance, some courts require that a representative of the client other than the attorney attest to the accuracy of responses to interrogatories.

Production of Documents

One of the most important duties paralegals may perform is the production of documents. You may think initially that this is simple—you just put the papers in a box and take them to the other party to copy. Actually document production is much more involved than this, especially in lawsuits that involve reams of documents. Your assignment as a paralegal may be to screen the documents to help determine which ones should be produced; you may be in charge of a clerical team that helps with the copying and numbering of the documents. FRCivP 34(b) provides only a general guideline for the production of documents. It states that a party shall produce the documents "as they are kept in the usual course of business or shall organize and label them to correspond with the

categories in the request." The purpose of this rule is to prevent the producing party from scrambling the documents to make discovery more difficult for the requesting party.

There are special considerations in gathering, screening, organizing, and copying the documents. The text examines each step individually.

Gathering the Documents. Sometimes you already have at the law office all the documents that you need to produce. You may have a simple personal injury claim, and the client may have already brought all the documents you need.

However, with complex litigation involving many documents, your first task may be to gather the documents. This often requires a search of the client's business records, which may be in files at the corporate office or even in a warehouse. When your client is a large company, the documents may be in several locations throughout the United States and even in offices overseas. In such a case, the attorney-paralegal team needs to meet with the client to discuss the nature of the documents requested and where the documents are located. There are many issues you may need to discuss, such as whether any of the older documents have been destroyed through the company's regular retention and disposal system.

Other questions may concern how to gain access to computer records. The attorney should explain to the client the attorney's interpretation of the description of the documents requested. For instance, the attorney may have already decided that certain documents are not covered by the request for production. He or she may have already objected to certain portions of the request for production and even obtained a protective order to prevent disclosure of those documents. This also must be explained to the client.

The client and the attorney-paralegal team must decide who will search the client's files—the law firm personnel or the client's employees. The search may be faster if the client's employees perform it. On the other hand, the law firm personnel may be better able to determine which documents need to be produced. Whatever the decision, the person performing the search must have detailed instructions from the attorney. Paralegals may find that they are in charge of the persons performing the search. In this case, be sure you have reviewed the instructions with the attorney and clarified any questions you have about the scope of the document search.

Screening the Documents. It is imperative that you screen the documents to ensure that no protected information is released to the other party. The documents are also reviewed to be sure that no more information than necessary is released. Both the paralegal and the attorney should review the documents. Sometimes the paralegal performs the initial screening, and sometimes the attorney does it. It may be more efficient for paralegals to perform the initial screening so that they can flag issues that the attorney needs to consider.

Your screening should focus on four categories of information. First, look for information that is irrelevant—that is, unrelated to the subject matter of the lawsuit. Second, screen out documents that are unresponsive. These are

documents that are related to the subject matter of the lawsuit but do not fall within the description in the request for production. You may set these documents aside and even go ahead and return them to the client.

The third category is confidential documents. These documents generally are already covered by a protective order. Remember that the court may enter orders to prevent the discovery of all or part of certain documents or to limit the discovery in other ways specified in FRCivP 26(c). Be sure to review all protective orders before producing documents. If the court has allowed the discovery of confidential documents, stamp "confidential" on them before they are copied.

The fourth category is privileged information. Recall our discussions of the attorney-client privilege and work product privilege. The attorneys make the ultimate decision whether the information is protected from disclosure by privilege. The paralegal should pull potentially privileged documents from the file and put them in a separate file for the attorney's review.

Organizing and Numbering the Documents. The first decision to make is whether to produce the original documents or to make copies. The parties generally reach an agreement on which of these to produce, and if they cannot agree, the court can decide. Parties generally produce copies but sometimes produce originals. An advantage of producing originals is saving copying costs. There are disadvantages to producing originals, however, such as the risk that they will be altered. In addition, the documents may get out of order and become confusing.

Production of large numbers of documents is unmanageable without a system to organize and identify the documents. There are a number of ways to organize documents, and the methods are often combined. For instance, all documents in a certain group may concern a common subject, and within the group they may be arranged in chronological order.

Once the attorney-paralegal team decides how to organize the documents, paralegals can put the documents in order and assign a number to each. These numbers are generally known as production numbers. There are many different systems for assigning production numbers. Some law firms begin each production number with a letter to designate which party produced the document. For instance, the plaintiff's documents may all start with "A," and the defendant's documents may start with "B."

The production number is then stamped on each document. Some law firms place a number on the front page of the document, and others number each page of the document. For instance, the third page of one of the plaintiff's documents may be "A-503-3."

Production numbers serve several purposes. First, they form the basis for an index to the documents so that you can find them easily in a sea of papers. Second, they ensure that documents are still complete when they are submitted at trial. Paralegals keep records of the number assigned to a document and the numbers of the first and last pages. Thus, if at trial the opposing party submits the document as evidence, you can make sure that the document still has all its

original pages. Production numbers ensure ready access to documents, which is crucial during discovery and at trial.

The numbers may be handwritten on the documents, but some law firms use a "Bates stamp" when large numbers of documents are involved. A "Bates stamp" is a hand-held stamp that automatically advances to the next highest number each time you stamp a document. If you use a Bates stamp, watch carefully to be sure that it does not skip any numbers. If it does skip a number, insert a blank sheet of paper to mark the gap.

Copying the Documents. As paralegals organize and number the documents, they generally place them in heavy cardboard boxes to move them to the copying room. It is best to label the outside of the box with the range of numbers contained in each box.

Before copying the documents, check to be sure that confidential documents are marked "confidential." Some law firms also stamp documents with a stamp that says "Produced by _____." For instance, the documents produced by Leigh Heyward for Mr. Wesser would be stamped "Produced by Heyward and Wilson." This is helpful when there are multiple parties.

Paralegals should be sure that they have adequate clerical help for making the copies. It helps to have people to remove staples, place the documents in the copy machine, and restaple the documents. It also helps to have a person to put the documents back in the box to ensure that the documents are kept in proper order.

Some oversized documents can be reduced to standard size paper on your copy machine. However, you may have to rely on an outside copying center to handle very large documents such as blueprints.

Finally, paralegals ensure that the documents are properly indexed. There are several methods for indexing, as discussed in Chapter 9.

DEPOSITIONS

Depositions are a commonly used discovery method. The Federal Rules of Civil Procedure allow two types of depositions—written and oral. Oral depositions are far more common than written depositions. In an oral deposition, an attorney asks the deponent (the person whose deposition is taken) questions in much the same way that an attorney questions a witness in a trial. The deponent is under oath, and a court reporter records all the questions and answers. The court reporter then prepares a transcript of the deposition and sends a copy to the attorneys for all the parties.

Written depositions are governed by FRCivP 31, which provides that written questions may be submitted to a deponent. The deponent answers the questions under oath, and the court reporter records the answers and prepares a transcript, as with oral depositions. However, with written depositions, attorneys are not present. The deponent simply answers the written questions, and the attorney is not present to follow up with additional questions to develop the deponent's testimony. Oral depositions are more common because the attorney

can develop the testimony, observe the deponent's demeanor, and get a better idea of what the deponent knows and what type of witness the deponent would be at trial. The remainder of the discussion focuses solely on oral depositions because they are so much more commonly used.

Who May Be Deposed

Depositions are the only discovery device that can be used to get information from both parties and nonparties to a lawsuit. For instance, you cannot force a witness who is not a party to answer interrogatories, but you can force a nonparty witness to answer questions at a deposition, by serving a subpoena in accordance with FRCivP 45.

Attorneys generally do not depose their own witnesses. That is, Ms. Heyward would not take Mr. Wasser's deposition. Attorneys may choose to depose their own witnesses, however, if there is a strong possibility that a witness will not be available at trial. For instance, a key witness may be terminally ill. It is wise to take that witness's deposition to preserve his or her testimony for trial. FRCivP 32(a)(3) permits this use of a deposition at trial, and rule 804(b)(1) of the Federal Rules of Evidence allows admission of the deposition as an exception to the hearsay rule.

Limitations on Number of Depositions and on Timing

The 1993 amendments to the Federal Rules of Civil Procedure place limitations on the number of depositions that each side can take and on the timing of depositions. Refer to Figure 8–10, which reprints FRCivP 30(a). By now, it comes as no surprise that depositions may not be taken prior to the 26(f) discovery conference. There is one exception, which is when the deponent is about to leave the country and become unavailable for a deposition. In this situation, however, the court's permission or agreement of the parties must be obtained.

There are two additional situations in which it is necessary either to get the court's permission or for the parties to stipulate to a deposition. First, permission is necessary to take the same person's deposition more than once. Second, each side is limited to ten depositions. FRCivP 30(a)(2) states that the plaintiffs as a group, the defendants as a group, and third-party defendants as a group, are each limited to ten depositions. This includes both oral and written depositions. Assume that in the Wesser case, Second Ledge wants to schedule eight depositions and Chattooga Corporation wants to schedule five depositions. The defendants would have to get the court's permission to take three more depositions, unless Mr. Wesser stipulated in writing that he agreed to three depositions beyond the presumptive limit of ten.

The limitation on the number of depositions is yet another means to ensure that the parties confer and develop a cost-effective discovery plan. If a party sees the need for more than ten depositions, this should be brought up at the discovery conference and scheduling conference. This way, the parties can agree to additional depositions, if they agree that they are necessary, saving the time and expense of court intervention later. Further, the parties on each side of

FIGURE 8–10 FRCivP 30(a)

Rule 30. Depositions Upon Oral Examination
(a) When Depositions May Be Taken; When Leave Required.

(1) A Party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties.

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 81 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

the litigation must work together closely to choose the depositions that are most beneficial and cost-effective for them.

Local Court Rules. Paralegals must remember that local court rules may vary from the Federal Rules of Civil Procedure in regard to the number of depositions allowed. For instance, the local rule for the United States District Court for the Eastern District of New York provides that a limitation on the number of depositions must be established by agreement of the parties or by court order. In the absence of an agreement or order, the number of depositions is limited to ten per side. In contrast, there are no presumptive limits in the United States District Court for the Eastern District of California, only a provision that parties may seek a protective order if proposed discovery is "burdensome, oppressive or otherwise improper."

Methods of Recording Oral Depositions

The traditional method for taking depositions is for a court reporter to record the deponent's answers and prepare a transcript. In recent years, parties have increasingly used *nonstenographic means* to record depositions, that is, means other than the traditional court reporter/transcript method. Videotapes are an increasingly popular method because of the ability to capture the deponent's demeanor.

FRCivP 30(b) authorizes the use of nonstenographic means without first having to obtain permission of the court or the other parties. Thus, parties may record depositions by either videotape or audiotape. They must, however,

understand that a transcript is required by FRCivP 26(a)(3)(B) and 32(c) if the deposition is to be offered later at trial or in support of a motion for summary judgment. The party that takes the deposition chooses the means of recording it. Other parties may designate another method of recording the deposition at their own expense.

Paralegals should note that rule 30 provides safeguards in the use of nonstenographic recording methods. Refer to Figure 8–11, which reprints FRCivP 30(b)(4). Note especially the provision that the "appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques." This affords protection should a person's voice "mysteriously" take on the impure tones of a questionable informant rather than the tone of the deponent's true voice, which is clear and rings with veracity.

FIGURE 8–11 FRCivP 30(b)(4)

Rule 30. Depositions Upon Oral Examination

. . .

(b) Notice of Examination; General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

. . .

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

FRCivP 30 also allows the taking of depositions by telephone or satellite television. This method, however, requires leave of court or agreement by the parties.

Procedure

FRCivP 30 gives some general rules for notices of depositions and other procedural matters. Some variations may arise, however, from local rules.

Notice of Deposition. FRCivP 30(b) requires that attorneys give "reasonable notice" of their intent to take a deposition. FRCivP 30 does not define the term

reasonable notice. Some local court rules, however, do define that term. For instance, the United States District Court for the Southern District of Florida requires at least five working days' notice for depositions taken within the state of Florida and ten working days' notice for depositions outside Florida. The local rule correctly notes that FRCivP 32(a)(3) requires eleven days' notice if the deposition is to be used against a party. Thus, if the deposition is to be used to impeach the party, perhaps in light of earlier answers to interrogatories, eleven days' notice is required.

SIDEBAR Paralegals must be ever mindful of the interplay of local rules and the Federal Rules of Civil Procedure. Even when local rules deviate in some permissible way, there may nevertheless be other sections of the Federal Rules of Civil Procedure that pertain.

Written notice must be given not only to the deponent but also to all parties to the lawsuit. As a practical matter, most parties will be represented by counsel, so you send the notice to the parties' attorneys.

The notice states the name of the person to be deposed and the date, time, and location of the deposition. The attorney should include a request for production of documents if the attorney wants the deponent to bring pertinent documents. See Figure 8–12 for an illustration of a notice, combined with a request for production. A certificate of service is attached, and the notice and request are served on all parties.

The procedure is different when the deponent is not a party. You send a notice of the deposition to the deponent and all parties, but you must also prepare a subpoena to compel the appearance of the nonparty deponent. See Figure 8–13 for an illustration of a subpoena. Note that you must include in the subpoena the documents that you want the nonparty deponent to produce at the deposition. Review FRCivP 45, and be sure that the subpoena complies with its requirements.

The subpoena must be personally served on the deponent. FRCivP 45(b) provides that a subpoena may be served by a person over eighteen years of age who is not a party to the lawsuit. In fact, paralegals sometimes serve the subpoenas. FRCivP 45(b) also requires that a check for witness fees and mileage costs accompany the subpoena unless the subpoena is issued on behalf of a United States agency. Attach a copy of the subpoena to the notice of deposition that you send to all the parties.

When the Deponent Is a Corporation or Agency. When the deponent is a corporation or government agency, FRCivP 30(b)(6) requires that the notice or subpoena "describe with reasonable particularity the matters on which examination is requested." The corporation or agency then designates one or more persons to testify at the deposition. For instance, in the Wesser case, Ms. Heyward may want to depose an employee of Woodall Shoals about its procedures for

FIGURE 8–12 Combined Notice of Deposition and Request for Production

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
Civil Action No.: C-96-2388-B

Equal Employment Opportunity Commission,
Plaintiff,

-vs-

Chattooga Corporation,
Defendant.

NOTICE TO TAKE DEPOSITION AND REQUEST FOR PRODUCTION OF DOCUMENTS

To: Edward R. Cheng, attorney of record for the plaintiff:

YOU ARE HEREBY notified, pursuant to Rule 30(b)(1) of the Federal Rules of Civil Procedure that the deposition of Sandy Ford will be taken in the offices of Gray and Lee, P.A., attorneys for the defendant, at 380 South Washington Street, Philadelphia, Pennsylvania, before a certified reporter, at 10:00 a.m. on Tuesday, April 25, 1996, and may continue from hour to hour and day to day until completed. You are requested to produce the person above identified at said time and place. You are invited to attend and participate in the examination of said witness.

Pursuant to Rule 30(b)(5) and Rule 34(a) of the Federal Rules of Civil Procedure, the defendant requests production for copying by the defendant's attorney and for use during the deposition the documents described in the attached addendum to this notice.

This the _____ day of _____, 1996.

Nancy Reade Lee
Attorney for the Defendant
Gray and Lee, P.A.
280 South Washington Street
Philadelphia, PA 19601
215-555-2500

(Addendum not shown)

+ Certificate of Service

FIGURE 8–13 Deposition Subpoena

DC 9 (Rev. 10/82)

DEPOSITION SUBPOENA

United States District Court

DISTRICT: WESTERN DISTRICT OF NORTH CAROLINA

Bryson Wesser, Plaintiff

V.

Woodall Shoals Corporation and Second Ledge Stores, Incorporated, Defendants

DOCKET NO.: C-89-1293-B

TYPE OF CASE: ☒ CIVIL ☐ CRIMINAL

SUBPOENA FOR: ☒ PERSON ☒ DOCUMENT(S) or OBJECT(S)

TO: John Nisenheimer
Charlotte Fire Dept.
809 Savannah Street
Charlotte, North Carolina 28226-5431

YOU ARE HEREBY COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above-entitled case.

PLACE	DATE AND TIME
The offices of Benedict, Parker & Miller 100 Nolichucky Drive Bristol, North Carolina	May 11, 1998 10:00 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):[1]

Fire inspection report and all other documents concerning your investigation of the fire at the home of Bryson Wesser, 115 Pipestem Drive, Charlotte, North Carolina, on January 3, 1998.

☐ *Please see additional information on reverse*

Any subpoenaed organization not a party to this suit is hereby admonished pursuant to Rule 30 (b) (6), Federal Rules of Civil Procedure, to file a designation with the court specifying one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which he will testify or produce documents or things. The persons so designated shall testify as to matters known or reasonably available to the organization.

U.S. MAGISTRATE (2) OR CLERK OF COURT	DATE
J.P. McGraw	April 11, 1998
(BY) DEPUTY CLERK: Glenda G. Bradford	

This subpoena is issued upon application of the:

☐ Plaintiff ☒ Defendant ☐ U.S. Attorney

ATTORNEY'S NAME AND ADDRESS
David H. Benedict
100 Nolichucky Dr.
Bristol, North Carolina 28205-0890
704-555-8810

(1) If not applicable, enter "none."

(2) A subpoena shall be issued by a magistrate in a proceeding before him, but need not be under the seal of the court. (Rule 17(a), Federal Rules of Criminal Procedure.)

inspecting blankets, but she may not know the name of the person qualified to give this testimony. She may address the notice to Woodall Shoals, who will designate a person such as its quality control manager to appear and testify.

Procedure During and After a Deposition. Depositions are usually held in a conference room in the office of the lawyer who instigates the deposition. The persons present may vary but usually include the deponent, the attorneys for all parties and for the deponent, and a court reporter to record the testimony. A court reporter is also a notary public and, therefore, authorized to swear in the witness. After any preliminary statements, the attorney begins to question the deponent. The other attorneys may cross-examine, and the rules of evidence generally apply. The attorney representing the deponent may voice objections to questions. The attorneys often stipulate in advance which grounds may be asserted as the basis for objection at the time of the deposition, and which grounds may be reserved and asserted at trial if the other party seeks to use the deposition at that point. In accordance with FRCivP 30(c), witnesses must still answer the questions to which the attorneys object unless the attorneys instruct otherwise. The court reporter notes the objection in the transcript. If a party seeks to use the transcript at trial, the judge can rule on the objection at that time. Refer to Figure 8–14, which illustrates excerpts of a deposition in the Chattooga case.

During the deposition, the examining attorney frequently enters documents as exhibits. The court reporter marks the documents—that is, assigns numbers or letters to them and labels them. The court reporter notes in the transcript when documents are entered as exhibits.

Objections. Depositions have often been interrupted and prolonged by lengthy objections by attorneys. FRCivP 30(d)(1) seeks to diminish improper objections, providing that objections to "evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner." Depositions also have been disrupted by attorneys' instructions to deponents not to answer questions. FRCivP 30(d)(1) seeks to prevent this as well, providing that a deponent may be instructed not to answer a question only in three circumstances:

- to preserve a privilege;
- to enforce a limitation on evidence directed by the court; or
- to present a motion that "the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party. . . ."

The person who voices the objection may demand that the deposition be suspended for the time necessary to make a motion for a protective order. The attorney-paralegal team should be able, in most instances, to avoid such disruptions with careful planning in the discovery conference but should seek a protective order when necessary.

Reviewing, Signing, and Filing Depositions. Deponents are not required to review the transcripts of their depositions. The deponent or a party to the litigation, however, may request, prior to completion of the deposition, that he

FIGURE 8–14 Excerpts from a Deposition

This is the deposition of Sandy Ford being taken by notice and in accordance with the Federal Rules of Civil Procedure before Romelia Sanchez, Notary Public, in the offices of Gray and Lee, P.A., 380 South Washington Street, Philadelphia, PA, before a certified reporter, on the 3rd day of April, 1996, beginning at 10:00 a.m.

IT IS STIPULATED AND AGREED by and between counsel for the parties that all objections, including those as to the form of the question, and all motions to strike are reserved and may be interposed at the time of trial.

FIGURE 8–14 (Continued)

EXAMINATION (by Ms. Lee)

Q. State your name, please.

A. Sandy Ford.

Q. Do you understand what a deposition is about?

A. Yes.

Q. You understand that a court reporter is present taking down everything that is said and that you are under oath?

A. Yes.

Q. Where were you employed in June 1995?

A. With Chattooga Corporation.

Q. Did you fill out an employment application on June 10, 1995?

A. Yes.

MS. HEYWARD: Let's get this marked as Exhibit 1.

(Whereupon, the Reporter marked the document referred to as Defendant's Exhibit Number 1 for identification.)

Q. I'll hand you a document identified as Defendant's Deposition Exhibit 1 consisting of two pages and ask you to state whether you can identify that document. Can you identify it?

(Whereupon, Ms. Lee hands the document to the witness for her review.)

A. Yes.

Q. What is that?

A. That is the employment application I filled out for Chattooga Corporation.

Q. Is that your signature on page 2?

A. Yes, it is.

or she be allowed to review the deposition and make changes if necessary. If such a request is made, the deponent must review the deposition within thirty days of notification that the transcript or recording is available. If any changes are made, they are appended.

The person who recorded the deposition, usually a court reporter, certifies in writing that the witness was duly sworn and that the deposition is a true record of the testimony given by the witness. The deposition and the documents produced during the deposition are sealed by the court reporter and either filed with the court or given to the attorney who arranged for the deposition. The attorney in turn must, under the provisions of FRCivP 30(f), store these sealed records under conditions that will "protect [them] against loss, destruction, tampering, or deterioration."

The requirements of FRCivP 30(f) for filing deposition recordings and transcripts may be altered by court order. In fact, most federal courts have local court rules addressing the filing and safekeeping of the recordings and transcripts. Generally, the party who took the deposition retains the transcript. If, however, there is a dispute and a motion is filed with the court, either the transcript itself must be filed or else the relevant parts set forth in the moving papers or in responding memoranda.

Paralegal Tasks to Prepare for Depositions

Paralegals often prepare the notices and subpoenas for depositions. Paralegals also assist with the logistics of setting up depositions. Your first consideration is where the deposition will be held. You may need to reserve a conference room in your law office. Depositions can be lengthy, so you may need to arrange for delivery of breakfast or lunch. If the deposition is to be held at another law office, find out the contact person there and make sure that the person has arranged for a room and for the court reporter.

Making the arrangements with the court reporter is simple if the deposition is held in your town. Your firm probably has one or two court reporter agencies that it uses frequently. Arrange for the court reporter to be present, and send a copy of the notice of deposition. You also may arrange the manner in which the reporter delivers the transcript. The text has discussed transcripts prepared when the entire deposition is over, but with a lengthy deposition, the lawyer may want a daily transcript. Sometimes depositions are videotaped. If the deposition is to be videotaped, check with the court reporting firm to see whether it can arrange for technicians. Otherwise, make the arrangement yourself.

There are other considerations when the deposition is to be held somewhere outside your law office, for example, you must make sure that copy machines and fax machines are available, and if huge numbers of documents must be copied, you may need to arrange for an outside copying service. These logistics are not so complex when the deposition is held at another law firm, but sometimes depositions are taken in conference rooms at hotels or airports.

An important task is to prepare the proper number of copies of the exhibits the attorney will use at the deposition. You will need one copy for the court reporter to stamp and show the witness, one copy for each of the attorneys on your team, one copy for yourself, one copy for each of the other attorneys present, and a few extra copies in case there are extra persons in attendance.

Although the attorney asks the questions at the deposition, you may help the attorney prepare an outline of the questions. If you help to prepare questions, review with the attorney the general areas he or she wishes to cover. Review the pleadings and discovery documents already in the file for additional issues. Keep your eyes open for statements the witness has already made. The witness may make contradictory statements at the deposition, which may help to impeach the witness's credibility at trial.

Paralegals sometimes help to prepare a client or other witness for the deposition testimony. Paralegals' duties can take many forms, depending on the law firm's procedures. Often paralegals keep the deponent informed of the schedule for the deposition, explain the general procedure for a deposition, and help coordinate meetings with the attorney. Paralegals may be present when the attorney meets with the deponent to prepare for the deposition. This generally involves reviewing questions that the deponent is likely to be asked. The attorney-paralegal team may even have the deponent go through a mock deposition. Paralegals can make suggestions to the deponent on how to be a more effective witness, such as suggesting that the deponent not pause for a long time before answering each question.

Paralegal Tasks During Depositions

Paralegals do not always attend depositions, but when they do, they can perform useful duties. For instance, if there are many documents to be entered as exhibits, paralegals can keep the documents in order, hand them to the examining attorney, and keep track of the number or letter assigned to each document. Paralegals also can take notes that are useful for reference before the transcript is prepared. For instance, if a deposition lasts two days, you and the examining attorney may meet after the first day to discuss the testimony and refine the questions for the next day. In addition, paralegals can observe the demeanor of deponents and help assess their credibility as witnesses. Attorneys may be so busy thinking about the next question that they do not have the opportunity to observe a witness sufficiently.

Preparing Digests of Depositions

After the attorney-paralegal team receives the transcript of the deposition, the paralegal often prepares a digest—that is, a summary of the deposition. After you have attended depositions and read some transcripts, you will see that the meat of the deponent's testimony is not always readily apparent. Interruptions to introduce exhibits may obscure the testimony, or the attorney may have to reword a question several times, forcing you to sort through the interchange to find the real answer.

There are several reasons why it is important to summarize, or digest, depositions. The digest pulls out the deponent's actual testimony so that it is clear what the answers actually were. Inconsistent or incomplete answers then become apparent. You may find that further discovery is necessary to complete

the information sought from that particular deponent. It is important to note inconsistencies because they can be used to impeach the witness at trial.

Before you prepare a digest of a deposition, talk with the attorney to determine the format to use. The attorney may want a digest set up in paragraphs, summarizing the testimony in the order it was given. This is sometimes called a witness digest. (See Figure 8–15 for an example.[7])This type of digest is most useful for short depositions. It should be a very succinct narrative of the deposition, relating the deponent's testimony in an abbreviated, clear form.

FIGURE 8–15 Excerpt from a Witness Digest

Digest of Deposition of Sandy Ford (SF)
March 31, 1996
Pages 1–53

By Ms. Lee:

SF is a 29-year-old engineer. She has lived at 314 Linville Drive, Philadelphia, PA, since February 1993. She is married and has one daughter, age three. (pp. 1–3)

SF graduated from Greenbrier State University in December 1992, with a B.S. degree in mechanical engineering. Immediately after graduation from college, she was hired by Watauga Plastics, a company that manufactures kayaks. SF worked as a mechanical engineer for Watauga Plastics continuously until she was hired by Chattooga Corporation.

On June 15, 1995, SF filled out an employment application to work as a consulting engineer for Chattooga Corporation. Three days later she had an interview with the human resources manager for Chattooga Corporation, Leslie Gordon. She was also interviewed by Carla Fernandez, supervisor of the consulting engineers. . . .

Another format is the subject matter digest. Here, instead of paragraphs summarizing the testimony in the order it was given, the paragraphs are arranged by subject matter. Your first task is to make a list of the subjects to include. For instance, if you are preparing a digest of the deposition of Sandy Ford's supervisor, your subjects may include personal background, job experience, review of Sandy Ford's employment application, employment interview, events leading to discovery of Ford's felony conviction, events after discovery of Ford's felony conviction, and knowledge of Ford's assisting another employee with an EEOC claim. There may be other useful topics, but this gives you some indication of the types of subjects you may have.

Next, each subject is placed in a column on the left-hand side of the page, and the paragraphs digesting the testimony about that subject are in a column on the right-hand side of the page. (See Figure 8–16 for an example.) Be sure to include after each sentence or paragraph the page number of the transcript where this testimony is found. It is also helpful to cite exhibit numbers.

A third type of digest is the chronological digest. This type of digest is set up like a subject matter index, except that your topics on the left-hand side of the page are dates on which events occurred. The purpose is to construct a chronological history of the important events.

FIGURE 8–16 Excerpt from a Subject Matter Digest

Digest of Deposition of Sandy Ford
March 31, 1996
Pages 1–53

SUBJECT	DIGEST
Personal background	SF is 29 years old. She has lived at 314 Linville Drive, Philadelphia, PA, since February 1993. SF earned a B.S. in mechanical engineering from Greenbrier State University and then worked for three years for Watauga Plastics, a company that manufactures kayaks.
Application and employment interview	On June 15, 1995, SF filled out an employment application as a consulting engineer at Chattooga Corporation. On June 18, 1995, she had an employment interview with Leslie Gordon, human resources manager, and with Carla Fernandez, supervisor of consulting engineers. . . .

PHYSICAL AND MENTAL EXAMINATIONS

FRCivP 35 provides for the examination of a party's mental or physical condition when that person's condition is at issue in the litigation. FRCivP 35 requires a court order for the examination unless the parties stipulate to the examination. If a party files a motion for an examination, FRCIVP 35 requires that the motion include the details of the examination—time, place, manner, conditions, and scope of the examination—as well as the persons who will conduct the examination. The parties may agree on all these details and include them in their stipulation. For instance, Leigh Heyward and David Benedict can file a stipulation reflecting their agreement that Mr. Wesser will undergo a physical examination by a physician they have agreed on, to evaluate the residual effects of his burns.

FRCivP 35 also provides that if the party who is examined requests the results of the examination, the party who requested the exam must forward the results. FRCivP 35 requires "a detailed written report of the examining physician or

psychologist, setting out the physician's findings, including results of all tests made, diagnoses and conclusions, together with like report of all earlier examinations of the same condition."

Physical and mental examinations are most common in personal injury lawsuits. Paralegals may assist in preparing the motion or stipulation. See Figure 8–17 for a sample motion. If you prepare a motion, remember to include a proposed order for the judge to sign.

REQUESTS FOR ADMISSION

FRCivP 36 governs requests for admission. It provides that a party can serve on another party requests that the other party admit the truth of any matters within the general scope of discovery as defined in FRCivP 26. Thus, requests for admission can cover a broad range of matters, but not matters that are privileged or irrelevant.

FRCivP 26 sets forth three categories of requests for admission: (1) the truth of facts, (2) the application of law to facts, and (3) the genuineness of documents. These three categories are illustrated in the sample response to requests for admission in Figure 8–18. The first request is to admit that the employment application that Sandy Ford signed is authentic. This is the third category—genuineness of documents. The second request is to admit that Sandy Ford completed and signed the application on June 15, 1995. This is the first category—the truth of facts. The third request is to admit that Sandy Ford knowingly falsified her application when she stated that she had no felony convictions. This is the second category—the application of law to facts. Ford could contend that she did not "knowingly" make a misstatement.

FRCivP 36 provides that if a matter is admitted, it is admitted only for the purposes of the pending action. Thus, an admission cannot be used against the party in a different lawsuit.

The purpose of requests for admission is to eliminate the need to prove at trial those matters that are not in dispute. This discovery device is particularly helpful for the parties to acknowledge their agreement on the authenticity of documents. This can save a great deal of time at trial. Requests for admission can also give a party a preview of the issues that the other party will contest at trial.

Responses to requests for admission must be precise, and the attorney-paralegal team must be absolutely certain that the fact should be admitted. Once a matter is admitted, the admission of truth is conclusive.

Procedure

As with other forms of discovery, requests for admission cannot be served until after the discovery conference in federal courts that implement all provisions of FRCivP 26(a)(1). As a practical matter, requests for admission usually come later in the discovery process. They are more helpful after you have explored the other parties' positions and the facts of the case through the use of interrogatories and depositions.

FIGURE 8–17 Motion for a Physical Examination

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CIVIL NO.: 3:96 CV 595-MU

Bryson Wesser,
Plaintiff,

-vs-

Woodall Shoals Corporation,
Defendant,
and
Second Ledge Stores, Incorporated,
Defendant.

MOTION FOR PHYSICAL EXAMINATION

Defendant Woodall Shoals, pursuant to Rule 35 of the Federal Rules of Civil Procedure, moves the court for an order requiring the plaintiff to submit, at defendant's expense, to a physical examination, including, if necessary, X-rays, by a physician to be appointed by the court, to identify injuries allegedly sustained by the plaintiff, which are the subject of plaintiff's complaint.

The physical condition of the plaintiff is in controversy and the defendant has no means of ascertaining other than by independent medical examination, the actual nature and extent of the injuries complained of, and such examination is necessary to enable the defendant to prepare for trial.

Defendant has no reason to believe that the requested physical examination will be painful or dangerous to the plaintiff.

This the _____ day of _____, 19__.

David H. Benedict
Attorney for the Defendants
Benedict, Parker & Miller
100 Nolichucky Drive
Bristol, NC 28205-0890
704-555-8810

A party must serve a response within thirty days of receipt of the requests for admission unless the court allows additional time or the parties agree to additional time in writing. If the party does not respond within thirty days, the matters are deemed admitted. Obviously, the consequences of letting this deadline slip are disastrous. Paralegals must enter this deadline in the docket control system as soon as the requests for admission are received and follow up to ensure that the responses are made on time.

Format of Requests for Admission

Figure 8–18 illustrates the format of requests for admission. Requests for admission have the case caption at the top, specifying the court, parties, and file number. As with other discovery requests, the requests for admission must be specifically labeled, specifying the party to whom the requests are directed and whether this is the first, second, or some subsequent request for admission. The requests begin with a simple statement such as "Plaintiff EEOC requests defendant Chattooga Corporation to make the following admissions within thirty (30) days after service of this request."

Next follow the requests, individually numbered. The requests should be short and specific. A request that is too vague or complicated invites an objection from the party to whom it is directed.

Both the requests for admission and responses to the requests are signed by the attorneys and mailed to all parties. Remember to attach a certificate of service.

Drafting Requests for Admission

Requests for admission require careful planning because the consequences of a party admitting the truth of a request are extremely significant. If a party states a fact in a deposition or interrogatory, it is still possible at trial for the party to present contradictory evidence. For instance, a party may say something damaging at a deposition and at trial may state that he or she was confused and that something else really happened. In contrast, an admission of truth in response to a request for admission is conclusive.

SIDEBAR Another reason for careful planning is that some local court rules place a limit on the number of requests for admission that a party may submit. FRCivP 36 states no limitation. In contrast, the United States District Court for the Southern District of Ohio limits parties to forty requests for admission, and the Western District of Texas imposes a limit of thirty.

When the attorney-paralegal team drafts requests for admission, they should review the pleadings and the discovery already completed. Your goal is to pick out the facts that have been admitted. Be alert for documents that will be exhibits at trial and try to establish their authenticity. By this point in the litigation process, you will be familiar with the pleadings, discovery materials including

FIGURE 8–18 Excerpts from Requests for Admission

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
Civil Action No.: C-96-2388-B

Equal Employment Opportunity Commission,
Plaintiff,

-vs-

Chattooga Corporation,
Defendant.

PLAINTIFF'S FIRST REQUESTS FOR ADMISSION

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, the defendant Chattooga Corporation requests the plaintiff, Equal Employment Opportunity Commission, to make the following admissions, within 30 days of service of this request, for purposes of this action only:

1. That each of the following documents, exhibited with this request, is genuine:

   a. The employment contract, attached as Exhibit A, is a true and accurate copy of the employment contract signed by Sandy Ford on June 15, 1995.

*

2. That each of the following statements is true:

   a. The employment contract, a copy of which is attached as Exhibit A, was completed by Sandy Ford on June 15, 1995, and the signature on the original is Sandy Ford's signature.

   b. Sandy Ford knew on June 15, 1995, that she had a felony conviction and knowingly falsified the employment contract when she stated that she had no felony convictions.

*

This the _____ day of October, 1996.

*These are merely excerpts from a Request for Admission. A Request for Admission in the Chattooga case would include more references to documents and facts.

transcripts of depositions, and the documents that are potential exhibits. A paralegal's familiarity with all these materials is helpful to the attorney who is drafting and answering the requests for admission.

Again, the requests for admission *must* be simple and clear. A party is unlikely to admit to a vague request or a request that contains too many facts. You should try to limit each request for admission to one fact—for example, the authenticity of one document.

Responding to Requests for Admission

FRCivP 36 provides four possible responses to a request for admission. First, the party may admit the request. See Figure 8–19, an illustration from the Chattooga case. Here the EEOC admitted the authenticity of Sandy Ford's employment application and admitted that she completed and signed the application on the date stated.

Second, the party may deny the request. In Figure 8–19, the EEOC denied that Ford "knowingly" falsified the application. The party may admit part of a request and deny the other part, just as in an answer to a complaint. For instance, if Woodall Shoals asked Wesser to admit that he used the blanket regularly in a manner contrary to the instructions, Wesser may admit that he used the blanket regularly but deny that he used it in a manner contrary to the instructions.

A third response is to object to a request, usually on the basis that the information is privileged or that the request is irrelevant. FRCivP 36 does not allow a party to object to a request simply by stating that it is a genuine issue for trial. Rather, the party must deny the request or explain why it cannot admit or deny the request.

A statement of the reasons why the party cannot admit or deny the request is the fourth response. A party may cite lack of information as a reason for failure to admit or deny, but not unless the party has made "reasonable inquiry" and still is not able to respond.

A paralegal's familiarity with the contents of a litigation file is even more helpful in responding to requests for admission than in drafting them. Paralegals are often more familiar than the attorney with the detailed contents of the file in the pretrial stage. Therefore, paralegals can easily locate the documents the attorney needs to review when preparing responses. When you make copies of documents for the attorney to review, be sure to label them accurately—for example, "page 3 of deposition of Sandy Ford."

MOTIONS FOR CONTROLLING THE DISCOVERY PROCESS

From the overview of the discovery process, you can see that the parties usually can conduct discovery without the court's intervention. Sometimes, however, parties reach an impasse and must file motions with the court to regulate some aspects of discovery. For instance, a party may refuse to attend a deposition or to answer some interrogatories.

FIGURE 8–19 Response to Requests for Admission

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
Civil Action No.: C-96-2388-B

Equal Employment Opportunity Commission,

Plaintiff,

-vs-

Chattooga Corporation,
Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S FIRST REQUESTS FOR ADMISSION

The plaintiff EEOC, responding to the defendant Chattooga Corporation's Requests for Admission served on the 15th day of October, 1996, states as follows:

Request No. 1.a.: The employment contract, attached as Exhibit A, is a true and accurate copy of the employment contract signed by Sandy Ford on June 15, 1995.

Response: Admitted.

Request No. 2.a.: The employment contract, a copy of which is attached as Exhibit A, was completed by Sandy Ford on June 15, 1995, and the signature on the original is Sandy Ford's signature.

Response: Admitted.

Request No.2.b.: Sandy Ford knowingly faisified the above-described employment contract.

Response: Denied.

This the _____ day of November, 1996.

Kathy M. Mitchell
Regional Attorney

Edward R. Cheng
Senior Trial Attorney

Equal Employment Opportunity Commission
1301 North Union Street
Philadelphia, PA 19601
215-555-3000

Judicial Intervention in the Discovery Process

The Federal Rules of Civil Procedure give judges the power to control discovery in several ways. FRCivP 26 allows judges to limit the frequency or extent of use of all discovery methods when the discovery sought is "unreasonably cumulative or duplicative" and when the burden or expense outweighs its likely benefit. In scheduling orders entered pursuant to FRCivP 16, judges influence the control and scheduling of discovery. Judges may enter a wide range of sanctions under FRCivP 37, discussed in the following.

Attorneys are encouraged, however, to try first to resolve their discovery disputes without court intervention. Cooperation in the discovery process is encouraged, if not mandated, in local court rules. Most local court rules require the attorneys to certify that they have made reasonable efforts to resolve discovery disputes before filing motions for court intervention. Refer, for example, to the local rule from the Eastern District of Pennsylvania, which is reprinted in Figure 8–20.

FIGURE 8–20 Local Rule Regarding Efforts to Resolve Discovery Dispute

Rule 26.1

. . .

(f) No motion or other application pursuant to the Federal Rules of Civil Procedure governing discovery or pursuant to this rule shall be made unless it contains a certification of counsel that the parties, after reasonable effort, are unable to resolve the dispute.

Local court rules also provide for methods of obtaining the court's intervention, short of motions with lengthy accompanying legal memoranda. For instance, in the United States District Court for the Eastern District of New York, attorneys may notify the court of an unresolved discovery dispute either by telephone or by a letter not to exceed three pages in length outlining the nature of the dispute and attaching relevant materials. The judge may then schedule a telephone conference or other conference and has the option to require more papers. The local rules allow the judge to enter a written order by informal means as well. Refer to Figure 8–21, which reprints this section of the rule.

Paralegals should be mindful that one purpose of the Civil Justice Reform Act was to expedite litigation through cooperation among the parties. Attorney-paralegal teams that earnestly endeavor to cooperate will have more credibility with judges when they encounter a discovery dispute that cannot be resolved and requires the filing of formal motions.

FIGURE 8–21 Local Rule Regarding Court Intervention in Discovery

6. Mode of Raising Discovery and Other Procedural Disputes with the Court.

(a) *Premotion Conference.* Prior to seeking judicial resolution of a discovery or procedural dispute, the attorneys for the affected parties or nonparty witness shall attempt to confer in good faith in person or by telephone in an effort to resolve the dispute.

(b) *Resort to the Court.*

(i) Depositions. Where the attorneys for the affected parties or nonparty witness cannot agree on a resolution of a discovery dispute that arises during the taking of a deposition, they shall notify the court by telephone and request a telephone conference with the court to resolve such dispute. If such dispute is not resolved during the course of the telephone conference, the court shall take other appropriate action, including scheduling a further conference without the submission of papers, directing the submission of papers, or such other action as the court deems just and proper. Except where a ruling which was made exclusively as a result of a telephone conference is the subject of de novo review pursuant to (iii) hereof, papers shall not be submitted with respect to such a dispute unless the court has so directed.

(ii) Other Discovery. Where the attorneys for the affected parties or non-party witness cannot agree on a resolution of any other discovery dispute, they shall notify the court, at the option of the attorney for any affected party or non-party witness, either by telephone or by a letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials. Any opposing affected party or non-party witness may submit a responsive letter not exceeding three pages in length attaching relevant materials. Any affected party or non-party witness may request a hearing or the opportunity to submit additional written materials, or to make any other appropriate presentation to the court. If the dispute is not resolved during the course of the telephone conference or if the letter option is exercised, the court shall take appropriate action to resolve the dispute, including scheduling a telephone or other conference without the submission of papers, directing the submission of papers, or such other action as the court deems just and proper. Except for the letters and attachments authorized herein or where a ruling which was made exclusively as a result of a telephone conference is the subject of de novo review pursuant to (iii) hereof, papers shall not be submitted with respect to such a dispute unless the court has so directed.

(iii) Where a ruling is made exclusively as a result of a telephone conference it may be the subject of de novo reconsideration by a letter not exceeding five pages in length attaching relevant materials submitted by any affected party or non-party witness. Any other affected party or

FIGURE 8–21 (Continued)

non-party witness may submit a responsive letter not exceeding five pages in length attaching relevant materials.
(iv) Where papers are filed or a letter submitted, the attorneys shall set forth in appropriate detail the efforts they have made to resolve the dispute prior to raising it with the court.

(c) *Decision of the Court.* The Court shall record or arrange for the recording of the Court's decision in writing. Such written order may take the form of an oral order read into the record of a deposition or other proceeding, a hand-written memorandum, a hand-written marginal notation on a letter or other document, or any other form the Court deems appropriate.

Procedure to Compel Discovery

The primary rule addressing discovery disputes is FRCivP 37. It is important to understand the context in which discovery disputes usually arise. Often one party objects to a discovery request, such as an interrogatory, stating that it is irrelevant or unduly burdensome. Sometimes a party gives an answer, but it is incomplete or evasive. Either way, the party has failed to respond to the discovery request. FRCivP 37(a) provides that an incomplete or evasive answer constitutes failure to respond. Thus a party cannot get off the hook by giving a vague answer that begs the question. Motions to compel discovery also arise when the parties do not make initial disclosures required by FRCivP 26.

FRCivP 37 specifies that before filing a motion for an order to compel discovery, the litigants must try to resolve the dispute by informal means. The moving party must attach to its motion "a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." The certification and motion should detail the efforts that the moving party made to secure the requested information. This includes the type of discovery sought and all follow-up methods used to try to secure the information, such as phone calls and letters. For instance, a motion to compel answers to interrogatories should set forth the dates that the interrogatories were mailed and the dates of follow-up letters, as well as a statement that the unresponsive party did not tender any response and did not file a motion for an extension of time.

The motions are generally filed in the judicial district where the lawsuit is pending. In the case of depositions, however, the motion is filed in the district where the deposition is held.

As with all motions, the attorney signs the motion, and a notice of motion informs all parties of the date, time, and location of the hearing on the motion. The motion and notice of motion are then served on all parties in accordance with FRCivP 5.

Discovery Sanctions

FRCivP 37 gives courts the authority to impose sanctions on parties who do not comply with reasonable discovery requests. Assume that Woodall Shoals refused to answer the first set of interrogatories sent by Ms. Heyward. Instead of giving the answers shown in the responses in the Appendix, suppose Mr. Carlton gave this response to questions 2 through 11: Woodall Shoals does not manufacture an electric blanket with the model number 6102; therefore, these questions cannot be answered. Although Mr. Carlton gave a response of sorts, Ms. Heyward asserts that the response is incomplete and evasive. Therefore, she files a motion asking the court for an order compelling the defendant Woodall Shoals Corporation to answer completely interrogatories 2 through 11. The court orders Woodall Shoals to answer the interrogatories within two weeks. Three weeks pass, and Ms. Heyward has not received a response. She writes to Woodall Shoals's attorney, who has not returned her phone calls, and ten days later still has no response. Ms. Heyward now files a motion pursuant to FRCivP 37(b), asking the court to impose sanctions on Woodall Shoals for its failure to respond to the interrogatories. The court has the authority to impose a wide range of sanctions on the disobedient party. (See Figure 8–22.)

When a party refuses to answer questions about certain facts, the court can order that those facts are established for purposes of the lawsuit. Assume that Woodall Shoals had refused only to answer interrogatories about its inspection procedures. The court could order that it is deemed admitted that Woodall Shoals' inspection procedures are insufficient to detect defects in the manufacture of the blanket.

The court also can order that the disobedient party not be allowed to present evidence to support or oppose claims or defenses. FRCivP 37(b) also allows the court to stay—that is, to postpone—the proceeding until the party obeys the order compelling discovery. In extreme cases, where the party has been persistently and blatantly disobedient, the court has the power to dismiss the disobedient party's claim or to enter a default judgment against the disobedient party. Thus, if Mr. Wesser refuses to attend depositions and answer interrogatories even after the court orders him to comply, the court can dismiss his claim against Woodall Shoals and Second Ledge. If Woodall Shoals and Second Ledge refuse to comply with the court's orders compelling discovery, the court can enter a default judgment against them.

FRCivP 37(b) also allows the court to find the disobedient party in contempt. An important sanction is the court's authority to order the disobedient party to pay the other party's reasonable expenses, including attorneys' fees, caused by the party's failure to cooperate.

FRCivP 37(c) provides that when a party fails to admit the genuineness of a document or the truth of any other matter in a request for admission, and the other party then proves the truth of the matter or genuineness of the document, the court can order the uncooperative party to pay the expenses of proving these matters, including attorneys' fees. Of course, if the party had a good reason for

FIGURE 8–22 Provisions of FRCivP 37(b)

(b) Failure to comply with order.

(1) Sanctions by Court in District Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

failure to admit, the court will not order the refusing party to pay the other party's expenses. Note that the expenses of proof can be great. They can include attorneys' fees, lodging for witnesses, and travel expenses.

FRCivP 37(d) addresses disobedient persons who are designated to appear on behalf of a party under FRCivP 30(b)(6) or 31(a). Remember that when the defendant is a corporation, the corporation must designate an officer of the company or other agent to answer questions. The court has authority to impose all the preceding sanctions except for contempt.

Thus, the court can fashion a variety of sanctions in response to motions to compel discovery and to impose sanctions, when a party refuses to respond to a discovery request. The court may also impose sanctions if a party fails to make a disclosure required by FRCivP 26(a), for which no discovery request is needed. This is authorized by FRCivP 37(a)(2)(A), which requires the party moving for sanctions to attach a certification that the movant has in good faith attempted to confer with the uncooperative party and to secure the information without court intervention.

In conclusion, it is best for the parties to cooperate. When the parties resort to the court to referee their discovery, the consequences can be grave. Paralegals help to obtain information from clients in a timely manner and help the attorneys so that the discovery process can run smoothly.

ETHICS BLOCK

Both the ABA Model Rules and Model Code dictate truthfulness in statements made to the court and to other persons, including the opposing party. In general, lawyers must not make a false statement of material fact or law and must not conceal information that they are required by law to disclose. In addition, lawyers must not use evidence that they know to be false, including testimony that the lawyer knows is perjured. Paralegals can help ensure that their supervising attorneys are aware of evidence, such as witnesses' statements, that seem suspicious. Often paralegals have a firm grasp of all the evidence and thus are able to spot inconsistencies.

SUMMARY

Discovery is an important topic for paralegals because much of your work is done in the discovery phase of litigation. Discovery refers to the pretrial methods used by the parties to obtain information from one another. Discovery has several purposes, including clarification of facts and preservation of testimony for later use. One of the primary purposes of discovery is to avoid surprise at trial.

Methods of Discovery

There are five principal methods of discovery. One is the deposition, where an attorney orally questions a witness, who responds under oath. A court reporter records the testimony and prepares a transcript. A second method is the use of the interrogatories, written questions submitted by one party to another and answered "separately and fully in writing under oath," unless a valid objection is raised. A third method is requested for production of documents and things and for entry upon land for inspection. Requests for production of documents are the most common. Parties may also request things—that is, tangible objects—for inspection, and they may request entry upon land to inspect, survey, or otherwise investigate the property. A fourth method is requests for admission. These are written requests asking other parties to admit that certain things are

true. If a party admits the truth of a fact, that fact is deemed to be true throughout the entire lawsuit. The fifth method of discovery is through physical or mental examination of a person whose condition is at issue in the lawsuit.

Rules That Govern the Discovery Process

The rules that govern the discovery process derive from the same sources as other rules for civil litigation—Federal Rules of Civil Procedure, state rules of civil procedure in state court, and local court rules. State rules tend to follow federal rules, but there can be important differences. FRCivP 26–37 govern discovery, and you should know all of these rules. Consult local court rules regularly, as they often contain important requirements. The disclosure requirements and discovery conference requirements of FRCivP 26 require early disclosure before formal discovery requests are made. Some federal courts have opted out of these provisions.

An example of how rules can vary is seen in rules regarding whether to file discovery materials with the court. FRCivP 5(d) gives the court the option, whereas some state rules specifically direct parties not to file discovery documents, and other state and/or local rules leave the filing to the judge's discretion.

Timing and Sequence of Discovery

FRCivP 26 allows parties to use discovery methods in any sequence unless the judge directs otherwise. One common sequence is to use interrogatories first, followed by depositions when you have identified the other party's witnesses through interrogatories. Requests for admission follow, after the facts and issues have been sufficiently narrowed. Physical and mental examinations may follow in personal injury cases. Different types of lawsuits may require different sequences.

The timing depends upon which, if any, of the provisions of FRCivP 26 the local court rules have adopted. If a court has adopted all the rule 26 provisions, early disclosure of witnesses, damages computations, and other information will be required. There are deadlines for responding to interrogatories and other requests, and the consequences of missing a deadline can be severe. Local rules may impose deadlines for completion of all discovery. Judges also may set deadlines, especially if the parties abuse discovery.

Scope of Discovery

The general rule for scope of discovery is in FRCivP 26(b)(1), which allows discovery of any matter that is relevant, is not privileged, and is reasonably calculated to lead to admissible evidence. Note that the evidence itself does not have to be admissible. For example, hearsay evidence that fits no exception to the hearsay rule can lead to admissible evidence. FRCivP 26 specifically allows the discovery of insurance agreements that may serve to pay the judgment.

Duty to Supplement Responses

Parties must update and supplement their answers when a prior response is no longer accurate. The duty to supplement continues throughout the litigation.

Discovery Planning

Both the Federal Rules of Civil Procedure and local court rules place limits on the number of interrogatories and depositions that each party may have. This, and other provisions of local court rules, necessitates careful planning. Planning is important. First review all the facts you have to establish. Then list the possible sources of information. Next, consider the method that is best for obtaining that information. It is important to consider your client's budget because discovery can be expensive.

Limitations on Discovery

Some information is protected from discovery, and paralegals must remain alert for privileged material so that it will not be inadvertently disclosed. Two common privileges to watch for are attorney-client privilege and work product privilege. While attorney-client privilege is self-explanatory, work product privilege (which refers to certain trial preparation materials) demands careful scrutiny. The work product privilege protects the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation according to FRCivP 26(b)(3). Other trial preparation materials may be discoverable if the other party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Parties may obtain protective orders from the court to protect confidential information, such as trade secrets. Parties also can seek protective orders when disclosure would cause annoyance, embarrassment, oppression, or undue burden or expense. FRCivP 26(c) enumerates a number of means of protections from sealing documents and filing them with the court to limiting the attendance of persons at depositions.

Interrogatories

FRCivP 33 addresses the procedure for interrogatories. Only parties to the lawsuit can be required to answer interrogatories. If a party is a corporation, the corporation must appoint an officer or agent to provide answers. Interrogatories may be served on the plaintiff at any time and on the other parties at any time after service of the summons and complaint. A party has thirty days to answer, unless the interrogatories were served concurrently with the summons and complaint, in which case forty-five days are allowed. A party must either answer or object to each interrogatory. In federal court districts that adopt the early disclosure requirement of FRCivP 26, you will have much information before you draft interrogatories.

Paralegals often draft interrogatories. Sources of questions to include are other files in your office, form books, and records on appeal from similar cases. You must always be careful, however, to tailor the questions to your case. This is especially important because most courts limit the number of interrogatories a party can send. Frequent topics include the following: identity of the person answering the interrogatories, whether a corporate defendant has been correctly named in the pleadings, identity of witnesses, information about expert witnesses, information about pertinent documents, details of the other parties' version of the facts, further specification of the amount and type of damages, and insurance coverage. General guidelines in composing interrogatories include making the questions clear, trying to avoid questions that require yes/no answers, and asking the respondent to specify the source of each reply so that you can tell whether that person has firsthand or secondhand knowledge of the information given. The format for interrogatories includes a caption, introduction with definitions, numbered paragraphs with subparts, attorney signature and address, and certificate of service.

To draft answers to interrogatories, you begin by obtaining the basic information from the client. Send the client a copy of the interrogatories, answer any of the client's questions, and follow up to be sure the client returns the information in time to prepare the answers. Remember to answer or object to each question. Be especially careful not to disclose confidential information. Besides privilege, grounds for objection may be that the information sought is unreasonably cumulative or duplicative, or the discovery is unduly burdensome and expensive. These are the general grounds for objections to discovery.

The final draft of the answers must be reviewed by the attorney and signed by the attorney and/or client, depending largely on local rules. When the client is a business organization, the company designates someone with sufficient knowledge to answer the interrogatories, and that person signs the responses. The client may be required to sign a statement verifying that the answers are true.

Requests for Production of Documents and Things

Parties can request that tangible objects be handed over for inspection. A good example is the electric blanket in the Wesser case. Parties may request to enter a person's land to inspect, measure, or survey the property. Documents, the most frequently requested items, include drawings, charts, photographs, and other items specified in FRCivP 34. When items are requested, it is not a valid excuse to say that they are in someone else's possession. The items must be obtained and produced unless there is a valid reason to object.

The text discussion centers on requests for production of documents because paralegals frequently play a major role in producing documents. Requests may be served on the plaintiff at any time and on other parties with service of the summons and complaint or at any time afterward. Parties have thirty days to

serve answers unless the requests were served with the summons and complaint, in which case they are allowed forty-five days.

The format of a request consists of caption, introductory paragraph with definitions if necessary, numbered list of documents requested, attorney signature, and certificate of service. The request should specify the date, time, and location for inspecting or copying the documents. The request must be clear enough for parties to determine which documents you seek. A request that is unjustifiably broad can be too burdensome or otherwise objectionable.

In large lawsuits, production of documents is a massive undertaking. Paralegals may supervise a team of clerical assistants who help to gather and copy the documents. You may have to go through clients' files at their offices or warehouse. Sometimes the clients' own employees search their files for the pertinent information, but you are more likely to get all the needed information if you and your team do the search.

It is important for the attorney-paralegal team to screen the documents to ensure that protected information is not released to the other party. You should focus your review on four categories of information: irrelevant documents, unresponsive documents, confidential documents, and privileged information.

The next big step is to organize the documents for copying. Arrange the documents in a logical order—for example, by subject matter. Assign a number to each document to identify it. These so-called production numbers serve several purposes, including forming the basis for an index. The numbers also help you ensure that all documents are accounted for before trial. You are ready to copy the documents. Put them in boxes, labeled on the outside, and make sure that you have enough clerical help for copying and putting the documents back in order.

Depositions

There are two types of depositions, written and oral. The most common by far is oral, where an attorney asks the deponent questions, and a court reporter records the questions and answers. After the deposition is over, the court reporter prepares a transcript, which the deponent reviews and corrects, if necessary. Usually the attorney for each party gets a copy of the transcript. Attorneys may use exhibits as part of the questioning, asking a deponent to identify documents and verify signatures. The exhibits are numbered and attached to the transcript.

Both parties and nonparties may be deposed. Deponents may be forced to attend by service of a subpoena. Attorneys generally depose other parties' witnesses rather than their own, because they know what their witnesses are going to say. However, if the attorneys fear that a witness may be unavailable for trial, they may depose the witness to preserve the testimony and introduce it at trial.

A written notice of the deposition is sent to the deponent and the attorneys for all parties. FRCivP 30(b) requires only "reasonable notice," but local rules may require a specific time. (Examine the notice in Figure 8–12 in the text.) The notice states the place, date, and time for the deposition. For a nonparty witness, prepare a subpoena (illustrated in the text in Figure 8–13). The subpoena must

be personally served on the witness. When the deponent is a corporation or agency, the notice or subpoena must describe "with reasonable particularity" the matters on which examination is sought. The agency or corporation then designates one or more persons to testify.

Depositions are usually held in conference rooms in law offices. The persons present include the deponent, the attorneys for all parties, the court reporter, and often paralegals on the attorneys' teams. The attorney who scheduled the deposition examines the deponent; then there is an opportunity for cross-examination. An attorney may object to a question, but the deponent has to go ahead and answer. Questions of admissibility of the testimony are determined at trial.

After the transcript is reviewed and signed, local rules differ as to the procedure. Some rules direct that the transcript be filed with the court, and others direct that the transcript be delivered to the attorney who took the deposition. Copies go to all attorneys.

Paralegals help arrange depositions by helping to arrange the time and place, making reservations for conference rooms when necessary, arranging for the court reporter, and arranging exhibits to be used in the deposition. During the deposition, paralegals may help the attorneys keep track of exhibits, take notes about the testimony, and observe the deponent's demeanor. Be alert for any contradictory statements that the deponent makes.

After a transcript is received, the paralegal often prepares a digest (summary) of the testimony. There are three principal types of digests. One is the witness digest, a simple summary of the testimony in the order it was given. Another is the subject matter index, where a subject appears in the left-hand column and each reference to that subject appears in the right-hand column, with the page number on which the statement appears. The third type of digest is chronological, set up like the subject matter digest with pertinent dates instead of subjects in the left-hand column.

Physical and Mental Examinations

Physical or mental examinations are appropriate in lawsuits where a person's condition is a matter of controversy, such as in personal injury litigation. FRCivP 35 requires a court order for an examination. The motion requesting the examination must specify the time, place, and scope of the exam, and name the persons who will conduct it. The results of the exam must be detailed in a written report, which is distributed to the attorneys for all parties.

Requests for Admission

FRCivP 36 sets out three categories of requests for admission: the truth of facts, the application of law to facts, and the genuineness of documents. Once a matter is admitted, it is deemed true for the purposes of the pending lawsuit and parties cannot change their minds and try to retract the admission. The purpose of requests for admission is to eliminate the need to prove at trial those matters

that are not in dispute. Parties frequently admit the genuineness of documents to make the admission of evidence at trial less time-consuming. It is obviously important to answer requests for admission precisely, because the consequences of an incorrect admission can be severe.

Requests for admission may be served on the plaintiff at any time after the commencement of the lawsuit. They may be served on other parties with the summons and complaint or at any time thereafter. As a practical matter, requests for admission usually come fairly late in the discovery process, when the facts and issues have been narrowed and clarified.

Parties must serve responses within thirty days of receipt of the requests for admission, except that a defendant is allowed forty-five days when the requests are served with the summons and complaint. It is imperative that paralegals enter the response deadlines in the docket control system. If a party does not respond in a timely manner, the requests for admission are deemed admitted.

The format includes a caption, introductory paragraph, numbered paragraphs for each request, attorney signature, and certificate of service. It is important to state the requests precisely and word them so that the party is likely to admit their truth. Responses to requests for admission must be drafted with care. Be careful not to overlook any request or part of a request. Remember that failure to respond is deemed a conclusive admission of truth. The responses are to admit, deny, or object to the requests. A fourth response is to state why the party is unable to respond, and lack of knowledge is a suitable response only after the party has made reasonable inquiry but is still unable to respond. Paralegals help with responses by locating documents that refer to the information in the requests and by reviewing those documents.

Motions for Controlling the Discovery Process

Usually the discovery process can be regulated by the attorneys without court intervention. In some cases, the attorneys and the judge call a discovery conference early in the litigation to set the ground rules and basic schedule.

Occasionally, opposing attorneys reach an impasse over certain subjects. For instance, one party may refuse to answer interrogatories or may give only vague, evasive answers. An incomplete or evasive answer constitutes failure to respond. FRCivP 37 provides the procedure for enforcing discovery. Most federal courts require attorneys to certify that they tried to resolve their dispute before seeking judicial intervention. If a party refuses to disclose information upon the court's request, the court may impose sanctions. FRCivP 37(b) provides for a wide range of sanctions, which can be quite strong. The court even has the power to strike the uncooperative party's defenses and enter default judgment against that party. The court also can award attorneys' fees for the amount generated by the party's failure to cooperate. Review the sanctions in FRCivP 37(b) and take note of their severity. The sanctions are ample incentive to cooperate in the discovery process.

REVIEW QUESTIONS

1. Which of the following statements are true about the discovery requirements of FRCivP 26(a)(1)?
   a. Local federal court rules may exempt certain types of cases from the discovery requirements.
   b. Local federal court rules may exempt all cases from the discovery requirements.
   c. It is permissible for one federal district court in a state to opt out of the requirements while another federal district court in the same state follows the requirements.
   d. all of the above
   e. a and c only
2. Which of the following statements are true about rule 26(f) discovery meetings?
   a. The parties discuss settlement.
   b. The parties discuss their claims and defenses.
   c. The parties arrange to make disclosures required by FRCivP 26(a)(1).
   d. all of the above
   e. b and c only
3. In which of the following circumstances is an attorney allowed to instruct a deponent not to answer a question during a deposition?
   a. to preserve a privilege
   b. to enforce a limitation on evidence directed by the court
   c. to harass the other parties
   d. all of the above
   e. a and b only
4. Requests for admission can include requests to admit which of the following?
   a. the genuineness of documents
   b. the truth of facts
   c. the application of law to facts
   d. all of the above
   e. a and b only
5. Which of the following are purposes for preparing digests of depositions?
   a. to plan future discovery
   b. to note inconsistencies in a person's statements
   c. to make a person's answers readily apparent
   d. all of the above
   e. a and c only
6. T F FRCivP 26 gives the court discretion to alter limitations on discovery stated in other Federal Rules of Civil Procedure.
7. T F Objections to interrogatories must be stated with specificity.
8. T F Testimony at depositions is given under oath.
9. T F Potential witnesses can be required to bring documents to depositions.

10. T F One purpose of discovery is to avoid surprises at trial.

PRACTICAL APPLICATIONS

Assume that the Wesser case is being litigated in the United States District Court for the Eastern District of New York. The defendants have repeatedly refused to answer interrogatories or have given vague or incomplete responses. Refer to Figure 8–21, which reprints the local rule for raising discovery disputes with the court.

1. Before asking the judge to resolve the discovery dispute, must Ms. Heyward first talk with Mr. Benedict, the defendants' attorney?

2. Must Ms. Heyward and Mr. Benedict meet in the judge's chambers to discuss their discovery dispute?

3. If Ms. Heyward decides to write a letter to the judge to explain the discovery dispute, what is the maximum length allowed for her letter?

CASE ANALYSIS

Read the excerpt from *Sanders v. Alabama State Bar,* 161 F.R.D. 470 (M.D. Ala. 1995), and answer the questions following the excerpt.

ORDER

CARROLL, United States Magistrate Judge.

I. FACTS

According to the evidence before the court, many complaints have been lodged with the Alabama State Bar against Rose M. Sanders, the plaintiff in this case. The Alabama State Bar, through its counsel, has investigated each complaint and made a ruling as to what action, if any, should be taken. Six of these complaints were made between 1989 and 1993. The subject of one of these complaints is Ms. Sanders' engagement in protests against the treatment of African-American children and poor Caucasian children by the Selma public school system, against the holding of secret meetings by the Selma City Board of Education, and against the refusal of the School Board to extend the contract of Norward Roussell, the first black superintendent. The issue before the court is whether the memoranda and investigative reports filed by Bar counsel for these complaints are discoverable.

II. PROCEDURAL HISTORY

On February 9, 1994, Rose Sanders filed this action against the Alabama State Bar, Gilbert Kendrick, Assistant General Counsel of the Alabama State Bar, and John Yung, a licensed attorney in Alabama, and the former Assistant General Counsel of the Alabama State Bar (from 1980–1991). She alleged that her First, Fifth, and Fourteenth Amendment rights were violated because the defendants subjected her to a public censure without due process of law, and because she was denied equal protection of the law based on her race and political activity. She also alleged that the defendants invaded her privacy rights by taking unfair disciplinary action against her and by releasing confidential proceedings to the press; that they intentionally inflicted emotional distress upon her; and that they were negligent. . . .

During the course of discovery in this case, Sanders moved to compel defendants Kendrick and the Alabama State Bar to produce, among other things, copies of all notes, tapes and documents relative to their investigation, involvement, and processing of all complaints against her from 1989 to the present. Ms. Sanders contends that she needs these documents to prove that she was treated more fairly by the Bar before she engaged in the above-referenced protests. This, she believes, will help her establish her claim that she was denied equal protection of the law based on her race and political activity. The defendants produced all such information except the investigative reports and memoranda created by counsel for each complaint. The defendants objected to the production of these documents on the ground that they are protected from disclosure under the attorney work product doctrine. . . .

III. DISCUSSION

The issue before the court is whether the memoranda and investigative reports filed by Bar counsel in the complaints against Rose Sanders are discoverable. Information is only discoverable if it falls within the scope of discovery outlined in Federal Rule of Civil Procedure 26(b)(1). According to this rule, "[P]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). As a result of this rule, the threshold issue in a discovery dispute is relevancy. *See* 8 Charles A. Wright & Arthur R. Miller and Richard L. Marcus, *Federal Practice and Procedure: Civil 2d* § 2008 (1994) ("Perhaps the single most important word in Rule 26(b)(1) is 'relevant' for it is only relevant matter that may be the subject of discovery").

Ms. Sanders contends that the investigative reports and memoranda generated by Bar counsel are relevant because they will reveal that she was treated differently by the Bar after she engaged in political protests. The court has reviewed these documents *in camera* and concludes that the investigative reports and memoranda of defendants Kendrick and Yung are relevant. Both defendants have issued investigative reports and memoranda regarding possible claims against Ms. Sanders both before and after her protests took place. Thus, the reports are relevant in assessing whether the defendants treated Ms. Sanders differently after she engaged in the protests.

Although these investigative reports and memoranda are relevant, they still may not be discoverable. According to Rule 26(b)(1), relevant information is not discoverable if it is privileged. . . .

A. THE WORK PRODUCT DOCTRINE

The work produce doctrine was established by the Supreme Court in *Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) ("[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."). The doctrine is now codified in Fed.R.Civ.Pro. 26(b)(3). This rule states, in part, that*

> a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent

> of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Id. According to this rule, a party may invoke the protection of the work product privilege if the materials sought to be protected were prepared in anticipation of litigation.

Defense counsel explained at the January 25, 1995, hearing and in his brief how these documents are generated. He stated that when a complaint is received, a copy of the complaint is forwarded to an attorney within the Office of General Counsel. When appropriate, a thorough investigation is conducted. For example, witnesses may be contacted or documents obtained. Once the matter has been factually exhausted, the attorney prepares an investigatory report and recommendation (the documents at issue in this case) for the Disciplinary Commission; this commission makes the final decision. This procedure is followed pursuant to Rule 12 of the Alabama Rules of Disciplinary Procedure.

It appears to the court that these procedures are not followed because of pending or potential future litigation; instead, they are followed as an ordinary course of business whenever a complaint is filed. Indeed, "in the majority of investigations conducted by the Office of General Counsel of the Alabama State Bar, the process generally follows the same format." (Def. Brief at p. 2)

Documents prepared in the regular course of business rather than for purposes of litigation, even if litigation is already a prospect, are not protected as privileged work product. 8 Charles A. Wright, Arthur R. Miller and Richard L. Marcus, *Federal Practice and Procedure: Civil 2d* § 2024 (1994). In amplifying the phrase "in anticipation of litigation," the 1970 Advisory Committee to Rule 26(b)(3) noted that "materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other non-litigation purposes are not under the qualified immunity provided by this subdivision." Fed.R.Civ. Pro. 26(b)(3) advisory committee note. Based on the defendant's rendition of how these documents are generated, the court finds that these documents were made in the ordinary course of business, and not in anticipation of litigation. . . .

In this case, however, the defendants were not anticipating litigation when they performed their routine tasks of preparing investigatory reports and memoranda in response to complaints filed against attorney Sanders. For these reasons, the court finds that these documents are not privileged under the work product doctrine. . . .

IV. CONCLUSION

For the reasons stated above, the court finds that the investigative reports and memoranda at issue in this case are discoverable. In so holding, however, the court recognizes the importance of defendants' objections to disclosing these documents. The court further understands the defendants' concern that the possibility of disclosure could chill an attorney's willingness to provide frank opinions and recommendations. As such, the court is limiting its holding to the narrow and specific facts of this case only. In addition, the court will issue a protective order limiting disclosure of this information to counsel for the purposes of this case only.

For the foregoing reasons it is hereby ORDERED that the Plaintiff's Motion to Compel is GRANTED. The Alabama State Bar shall provide the withheld documents

to counsel for the plaintiff on or before February 10, 1995. The documents shall be furnished under the terms of a separate protective order issued by the court.

1. What is the name of the court deciding this case?
2. What is the issue before the court?
3. Did the court find that the requested materials were relevant?
4. On what basis did the defendants seek to withhold from discovery the documents in question?
5. In which of the Federal Rules of Civil Procedure is the work product privilege codified?
6. Did the court find that the documents in question were covered by the work product privilege? Why or why not?

ENDNOTES

1 Donna Steinstra, "Implementation of Disclosure in United States District Courts, with Specific Attention to Courts' Responses to Selected Amendments to Federal Rules of Civil Procedure 26," 64 F.R.D. LXXXV (April 1996).
2 *Id.*
3 *Id.*
4 *Id.* at LXXXIII, ff.
5 *Id.* at LXXXVI.
6 *Id.* at LXXXVI, ff.
7 The formats for digests illustrated here are similar to those in Brunner, Hamre, and McCaffrey, *The Legal Assistant's Handbook* (1982). There are many variations on format, so check with attorneys in your firm for the format they prefer.

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Chapter 9

DOCUMENT CONTROL AND TRIAL PREPARATION

In reviewing the week's calendar with Ms. Heyward, you note: "We have discovery planning conferences coming up in two different lawsuits. They are in different federal court districts. How can I find the rules that apply?"

Ms. Heyward replies, "I am glad that you are getting this information together. Often the discovery planning requirements differ among various federal courts. The local rules of one district court may be different from the local rules of another."

Ms. Heyward explains where to find the rules and asks, "Can you sit down at 4:00 P.M. to prepare for the discovery conferences? Just bring the files and rules to my office then, and we will get started."

INTRODUCTION

Discovery has been completed, most motions have been made and ruled on, and it is time for final pretrial preparation. There is still a chance that the lawsuit will be settled. For effective settlement discussions or for trial, however, the file must be well organized. Throughout the litigation process, the task of keeping an orderly file often is delegated to paralegals. Paralegals become just as familiar with the documents in the case as do the lawyers. In fact, paralegals often are the first to review the documents received from clients and other parties to the litigation.

TRIAL SCHEDULES

Before we discuss how to organize the file for trial, it is useful to understand how trials are scheduled by the court. This is crucial so that the attorney-paralegal team allows plenty of time for trial preparation, including file organization.

Different courts have different methods for scheduling trials. In federal court, the judge may discuss with the attorneys at the final pretrial conference when they will be ready for trial. Some courts assume that a case is ready for trial a certain number of days after the complaint is filed. Other courts require the attorneys to complete a certificate of readiness for trial, and then the case is scheduled. A sample state court certificate of readiness is shown in Figure 9–1.

FIGURE 9–1 Sample State Court Certificate of Readiness

CERTIFICATE OF READINESS FOR TRIAL

		COMPLETED	NOT WAIVED	REQUIRED
1.	All pleadings served	X		
2.	Bill of Particulars served		X	
3	Physical examination completed		X	
4.	Medical reports exchanged		X	
5.	Appraisal reports exchanged		X	
6.	Compliance with rules in matrimonial actions (22 NYCRR 202.16)	X		
7.	Discovery proceedings now known to be necessary completed	X		
8.	There are no outstanding requests for discovery.			
9.	There has been a reasonable opportunity to complete the foregoing proceedings.			
10.	There has been compliance with any order issued pursuant to Precalendar Rules (22 NYCRR 202.12).			
11.	If a medical malpractice action, compliance with any order issued pursuant to 22 NYCRR 202.56			
12.	The case is ready for trial.			

Dated: New York, New York
December 1, 1996

_____
, Esq.
Attorney for Plaintiff
Address
Telephone

In some courts, a specific date and time are assigned for the trial to commence. This is more common in federal court than in state court. In state court, the case may be assigned to a particular session of the court, and the case will be heard during that session if time allows. A judge may travel throughout the state and stay in one judicial district for perhaps two weeks at a time to preside over trials, usually hearing only civil cases or only criminal cases during this two-week period. The period is called the ***session*** or ***term*** of court. The words *session* and *term* are often used interchangeably.

As discussed in the section on docket control in Chapter 4, fifty cases may be assigned to a particular session of court. Even if your case is number thirty on the list, you must be ready for trial at the beginning of the session. Three cases ahead of you may be tried and the rest may be settled, taking number thirty to the top of the list. This uncertainty of date and time can be troublesome for witnesses, especially those who have to take time off from work or travel long distances. Most courts have a system for a ***peremptory setting***—that is, a provision for setting a certain date and time due to extraordinary circumstances. For instance, some courts allow a peremptory setting if a witness has to travel more than two hundred miles to attend the trial.

Once the court's schedule is established for a particular day or a particular session, the court publishes the schedule, which is called the *court calendar*. The calendar is sometimes called a ***docket*** or *trial list*. Different courts publish their calendars in different ways. In some cities, the calendars are published in periodicals to which attorneys subscribe. Other courts mail their calendars directly to the attorneys involved and/or post the calendars on bulletin boards in the courthouse. Other courts may require the attorneys to pick up the calendars at the office of the clerk of court. It is important that you learn the procedures used in the courts in which your attorney-paralegal team has cases pending. Often the duty of reviewing the court calendars is assigned to paralegals.

Sometimes the trial date is set by the judge to whom the case has been assigned all along. This is common in federal court, where a case is usually assigned early to a judge who hears all motions and makes all rulings throughout the litigation. This leaves the judge discretion concerning the time that the case will be scheduled and the manner in which the attorneys are informed of the date. Figure

FIGURE 9–2 The Scheduling Rule of a District Court

RULE 111 SCHEDULING AND CONTINUANCES

(a) Scheduling. All hearings, conferences and trials shall be scheduled by the judge to whom the case is assigned, except that matters referred to a magistrate shall be scheduled by the magistrate.

(b) Continuances. No application for a continuance of a hearing, conference or trial shall be made unless notice of the application has been given to all other parties. An application for a continuance shall be ruled upon by the judge or magistrate before whom the hearing, conference or trial is to be held.

(c) Notice. The Clerk shall give notice to counsel of every matter set by the court, unless the matter is scheduled orally in open court in the presence of counsel for all parties, in which case further notice is not required. All scheduling orders pursuant to Rule 16(b), Federal Rules of Civil Procedure, must be in writing.

9–2 shows rule 111 of the United States District Court for the District of Columbia, which addresses scheduling by the judge to whom the case is assigned.

In some courts, the trial dates are set by the trial court administrator or clerk of court. This is common in state court, where cases are not always assigned to one judge who rules on all motions and presides throughout the litigation. Often in state court the case is set for a certain time, and the judge is whichever one is assigned for that date or court session.

Continuances

The attorney-paralegal team should make every effort to be ready for trial at the scheduled time. Sometimes, however, circumstances beyond the team's control preclude trying a case at its appointed time. The postponement of a trial to a later date is called a ***continuance.*** Rules for granting continuances vary from court to court and even from judge to judge. You must know the inclinations of the various judges before whom the cases are scheduled. Some judges are lenient in granting continuances. Other judges will grant a continuance for nothing short of death of counsel.

Aside from judges' inclinations, there are some commonsense guidelines for determining whether a continuance might be granted. A case that appears on the court calendar for the first time is more likely to be continued than one that previously has been continued three times. Courts like to rid their dockets of old cases. The reason for seeking a continuance is also important. If the attorney who was going to try the case broke her leg two days before the trial date, a continuance will likely be granted, but if the attorney seeks a continuance because she decided to go to Bermuda for three days just before trial, the chances of a continuance are slim.

Often trial attorneys have more than one case scheduled for trial at the same time. This frequently happens in state court, when the attorney has cases in both criminal and civil court on the same day. If the cases are the type that can be heard quickly, it is possible for the attorney to move between courtrooms and try the cases all in the same day. For instance, an attorney may have a child-custody hearing and two uncontested divorce actions scheduled for the same day. Divorces are frequently heard at the beginning of the court session, because they take little time if they are uncontested. The attorney can have the two divorce hearings finished by 10 A.M. and conduct the child-custody hearing afterward.

Sometimes, however, the attorney would have to be cloned to dispose of all cases scheduled on a particular day. Many courts have local rules that establish which cases take precedence over which others. For instance, if an attorney has one case in state superior court and one in state district court at the same time, the case in superior court takes precedence, and the district court case has to be continued. Likewise, a case in federal court usually takes precedence over a state court case. The attorney-paralegal team must learn the local court rules thoroughly.

ORGANIZING CASES FOR TRIAL

Organizing a case for trial can be a massive undertaking, especially in a complex case that has been in litigation for several months or even years. Effective organization requires intimate familiarity with all the documents in the file. Because as a paralegal you will have read all the documents and helped to prepare many of them, you will be indispensable for trial preparation.

There is no magic formula for organizing cases for trial. The organization depends on the subject matter of the litigation and the size of the case file. Mr. Wesser's case, which involves product liability, will be organized differently from the Chattooga case, which involves employment discrimination. A case involving collection on a promissory note is smaller and less complex than an antitrust lawsuit and thus will require a different type of organization. Different lawyers prefer different methods of organization. There are many variables that determine the organizational scheme for preparing a case for trial.

Your goal, however, is always the same—to develop a logical and effective system for organizing documents and retrieving them quickly and accurately. Regardless of the details of your system, the basic organization for trial generally involves preparing an outline of the case, organizing the documents in subfiles, and developing an effective method to retrieve the documents. You begin by outlining the case, but your three projects are so intertwined that you usually end up performing all three simultaneously. As you outline, the topics for which you need subfiles become evident. Your subfile topics become topics in your indices, and you also detect more refined subcategories that need to be indexed.

Organizing the Facts and Outlining the Case

At trial, the plaintiff's objective is to present the proof to establish the essential elements of the claims asserted in the complaint. The defendant's objective is to establish that the plaintiff has not proved the essential elements of the claims. Therefore, you need to pull your chart that lists the essential elements of the claims and the proof you plan to use for each element.

Beneath each element you have already listed the evidence you plan to use to establish that element. Review the chart and determine whether you have gathered additional evidence. If you have, insert it in the chart. If you find any deficiencies in the evidence, consult with the attorneys on your team immediately.

Include in your outline of the case the names of the witnesses who will testify and the exhibits that will be introduced, including documents and photographs. In preparing the outline, it is also helpful to note exhibits and witnesses that other parties may introduce to try to refute each element of the claims.

The chart of proof of the essential elements for breach of express warranty in the Wesser case (from Chapter 4) is reprinted in Figure 9–3. In working through the chart and developing part of the outline in the Wesser case, the first element to establish is that Woodall Shoals made an express warranty that the blanket would be free of defects for two years from date of purchase. Proving this

FIGURE 9–3 Chart of Facts to Prove

Woodall Shoals: Express Warranty

Elements of Claim	Sources of Information	Method of Obtaining Information
1. Woodall Shoals made express warranty that blanket would be free of defects for two years from date of purchase	Written warranty that came with blanket	Obtain from Mr. Wesser
2. Electric blanket had defects, which constitutes breach of warranty	Fire inspector Fire inspector's report Remains of blanket and control Inspection of scene Testing and testimony of expert witnesses	Interview Request by letter Obtain from Mr. Wesser Go to scene Retain expert witnesses
3. Defects caused Mr. Wesser's damages	Same as #2	

element is fairly straightforward. Ms. Heyward will present the warranty that came with the blanket, so list that on the outline.

The next consideration is how to present that exhibit. Remember that documents must be authenticated. Most likely Woodall Shoals has stipulated to the authenticity of the warranty. If not, when Mr. Wesser is testifying, Ms. Heyward presents the warranty for him to examine and asks him whether this is the warranty that came with the electric blanket that he purchased. In listing the sources of proof, a review of Woodall Shoals's answer shows that Woodall Shoals admitted in the answer that it warranted the blanket to be free of defects for two years from date of purchase. Examine the partial outline in Figure 9–4 that lists this element and how Ms. Heyward will prove it.

Ms. Heyward will use several witnesses and many exhibits to establish the other two elements. First, she lists the witnesses. The list includes Mr. Wesser, the fire inspector, and expert witnesses. Some of the exhibits will be the fire inspector's report and reports prepared by the expert witnesses. Physical evidence will include the remains of the blanket and its control. Ms. Heyward also will introduce photographs. The defendants will present their own expert witnesses and reports to try to refute the assertion that the blanket had defects that caused the fire. As you review the exhibits, determine which witnesses will be used to identify and discuss the documents. Also note references to discovery documents—interrogatories, transcripts of depositions, and requests for admission—that address the elements you must establish. Review the documents

FIGURE 9–4 Partial Outline of the Wesser Case

I. Breach of Express Warranty by Woodall Shoals

A. Essential Elements of the Claim

1. Woodall Shoals made express warranty that blanket would be free of defects for two years from date of purchase	Sources of proof: 1. Written warranty (WS stipulated to authenticity) 2. Answer WS admitted in answer that it gave express warranty for two years

your opponents produced during discovery and identity pertinent information. Enter these references on your outline.

By now you will have consulted with the attorneys on your team to determine the type of outline they prefer to use and whether they have any special instructions. Some attorneys want more detailed outlines than others. You will have questions as you prepare the outline. Discuss your questions promptly with the attorneys on your team. The eve of trial is no time to make assumptions that may prove erroneous.

Summarizing Facts. The outline is a very short summary of proof. As noted earlier, to prepare it you must review many lengthy documents for pertinent facts. Reports from experts may be many pages long. You may even have to read books the experts published so that you can spot inconsistencies in their reports and testimony. You must also review lengthy discovery documents and flag the pages that pertain to the subject you are preparing for the outline.

Review the discussion of deposition digests in Chapter 8. If you have not already prepared digests of all depositions, now is the appropriate time to prepare them. You also may prepare digests or summaries of other important documents—the fire inspector's report, for example. You may assemble a large number of related documents and summarize their collective contents. For instance, you may review all Mr. Wesser's medical records and prepare a summary of his injuries, treatment received, prognosis, and total cost of treatment.

The summaries serve many purposes. You review the entire file and extract the most important facts. This helps you to prepare the outline for trial. As you prepare the summaries, the factual issues crystallize. The broad issues and the subissues emerge. You see which witnesses and documents prove which facts. Your outline falls into place, and you arrange the entire file for trial as you go. You can determine the subfiles into which the entire file needs to be divided for use at trial.

Organizing Files for Trial

For final pretrial preparation, you may need to rearrange the documents in the working files. The attorney-paralegal team must have subfiles that are arranged in a manner that will be useful at trial. At a moment's notice you must be able to locate documents pertaining to certain witnesses, issues, or specific subjects such as electrical design. You may need to create a subfile for each witness if you have not done so already. You may take the reports written by the fire inspector, for instance, and place them with the fire inspector's deposition and even interrogatories that address his knowledge and opinions. You may create subfiles for expert witnesses containing the same information, plus information on the expert's qualifications. If the expert is a witness for the other party, include any documents that will be used to impeach the expert or question the expert's qualifications.

Assume that it has been your responsibility in the Wesser case to arrange and keep in order the file. Recall the discussion of files and subfiles in Chapter 4. As the documents have arrived, you have reviewed them and ensured that they were placed in the appropriate subfiles for ready access. You have maintained both the central file, where the originals are kept, and the working file, where the copies used daily are kept. If you have kept the documents in their proper subfiles and maintained an index, the file should be in good working order for final pretrial preparation. However, there is a chance that someone on the attorney-paralegal team at some point in the litigation process has been in a hurry and failed to replace a few documents in their proper subfile, especially in the working file. Therefore, your first step should be to go through the file, find any loose papers, and place them in the proper subfile.

It is important that paralegals arrange the case files so that the attorney-paralegal team has ready access to all documents. The specific arrangement for documents will differ, depending on the subject matter and complexity of the lawsuit. One method to determine the best arrangement for document retrieval is to review the documents in the entire file and list important words, names, topics, and so on. As noted, you can do this while preparing a case outline.

Next, try to fit the documents into your tentative scheme to determine whether it will work. Further refinements may be necessary. You may need to put a document in more than one group. For instance, the fire inspector's deposition may be useful in your group of documents arranged by subject matter: cause of fire. You may also place it in the group of documents concerning this particular witness: fire inspector. Your goal is to develop a system that allows quick retrieval by arranging the documents in logical groups so that you do not have to spend time trying to recall in which group a particular document may be found.

The law firm's computer programs may permit a search of the documents for certain words or names. This can help you find the most effective method to arrange the documents for quick retrieval. You can enter names of witnesses or certain subjects, such as "cause of fire," and the computer will locate

all documents that contain the words you have entered. The computer search can help you in preparing the case outline and indexing documents as well.

Indices and Document Retrieval

Once you define the categories you will use to organize the file for trial, you need to prepare an index. You may already have an index of document numbers and other subfile indices. These may still be useful, particularly the document number index, but the aim now is to prepare the documents for trial, so you need subindices that indicate how you have arranged the documents for retrieval at trial. A computer search program can create subindices by listing all documents that contain specific categories of information.

You also need to formulate the method to use for document retrieval. Document retrieval means locating documents so that you can pull them and use them. Documents may be retrieved either manually by looking at indices or by a computer search. The retrieval methods are numerous and depend on the size of the case file, the method preferred by the attorneys on your team, and the capacity of the law firm's computer system. The text does not discuss specific indexing and retrieval systems in great detail because the systems can vary widely from law firm to law firm, but some general guidelines that will help you adapt to whatever system your law firm uses are covered.

Individual Document Identification. Some law firms index documents by assigning a number to each document. There are different schemes for assigning the numbers. For instance, Mr. Wesser's documents could be designated by numbers ranging from 1000 to 1999. Defendant Woodall Shoals's documents could be designated by numbers ranging from 2000 to 2999, and defendant Second Ledge's documents could be assigned numbers from 3000 to 3999. Another method is to prefix the numbers with different letters. For instance, Mr. Wasser's documents would have the prefix "A," defendant Woodall Shoals's documents "B," and defendant Second Ledge's "C."

The numbers are generally assigned to documents in chronological order—that is, by the date they are received. The assigned number gives a sure identification to a document. The documents are sometimes kept in strict numerical order in a central file. The numbers alone typically provide few clues about the content of the document.

Indices Used for Trial Organization. The documents are not useful for a working file unless they are indexed according to subject matter, issue, or the party from whom the document was received. Therefore, it is important to arrange and index the documents so that they can be readily located and used for trial preparation. Actually, you have been preparing some type o f useful index as you created subfiles throughout the litigation. By this stage of the litigation, you have an index in front of every subfile—court papers, correspondence, depositions, and so on. Consider an index for a subfile containing correspondence with Mr. Wesser, as illustrated in Figure 9–5. For each document in the subfile, you entered the information for each of the index headings. At a glance

FIGURE 9–5 Subfile Index

Doc. #	Description	Date	Author	Confidential Info.
A-1001	Letter *re* date of purchase of blanket	3-8-96	Mr. Wesser	no
A-1002	Letter transmitting medical bills	5-20-96	Mr. Wesser	no

you know who wrote the letter, the date it was written, a summary of the content, and whether it contains confidential information.

The information in the subfile indices you have already prepared can help you to formulate the indices for final trial preparation. The short descriptions will help you flag important issues and facts. Your outline will also help. As noted previously, a computer search for names or key words also helps to formulate index topics.

Once you have identified index headings, you need to prepare the written index. There are different methods for reducing the indices to writing, but there are two primary approaches—a manual index card system and computer programs.

The manual index card system works best when you have a relatively small number of documents. The key to a good index card system is division of documents into useful subject categories. Your outline will be helpful for picking the categories. To be sure that the categories are useful and inclusive, you should discuss the categories with the lawyers who will actually try the case. Once you have selected the categories, assign a number or key word to each.

The next step is to prepare for each document an index card that includes a document locator number, a short description of the content of the document, date of the document, and author of the document. You should be able to lift this information from the subfile indices that you prepared as the litigation progressed. The document locator number may be either the original number assigned to it (*e.g.*, A-101) or the exhibit number you plan to use at trial. At the top of each card, write the key word or category number assigned to the document. If the document is important in more than one category, write all the numbers and make copies of the card. For instance, the fire inspector's report may fall into four categories. Make four cards, and include a card in each category.

You may also index the documents by witness, date, or author, in addition to the categories arranged by topics. Arrange the cards by categories and any other chosen designations, and you can then pick out the cards you need to pursue a particular issue or fact.

Computers are helpful, and often essential, for indexing and document retrieval in lawsuits with numerous documents. The methods for setting up the

computer document retrieval system differ according to the complexity of the lawsuit and capabilities of the firm's computers. As with the manual system, first you must review the documents to determine the topics by which they need to be indexed. The topics are assigned subject codes, which are entered into the computer. Other basic information about the documents is also entered, such as date, document number, and author.

The attorney-paralegal team, together with computer personnel, must work to establish the format for entering information into the computer. Once the format is established, paralegals can enlist the aid of data-entry personnel. A well-designed computer program can create a quick and effective document retrieval system.

Trial Notebook

So far the text has discussed organizing documents into subfiles for use at trial. Many attorneys like to use a trial notebook when they try a case. A ***trial notebook*** is a three-ring binder with tabbed dividers, and in each tabbed section are the documents needed for that portion of the trial. For instance, in a simple lawsuit concerning failure to pay a promissory note, the defense attorney's trial notebook may have the following sections: jury selection, opening statement, cross-examination of plaintiff 's witnesses, motion for directed verdict, direct examination of defendant's witnesses, jury instructions, and closing argument.[2] The attorney may include in the appropriate section such items as copies of case law needed to support arguments over the admission of evidence or other issues that will arise at trial. If space allows, attorneys may include in separate sections the pleadings, discovery materials, motions and orders granting or denying the motions, memoranda submitted for trial or in support of motions, and research memos.

Different attorneys arrange and use trial notebooks in different ways. Trial notebooks can be used either as a supplement to the subfiles you have created or as an alternative to them. If the documents in the lawsuit are too voluminous to place in the trial notebook, the notebook is best used as a supplement to the subfiles. Actually, the notebook is a way to organize presentation of the evidence, and the documents can be taken from the appropriate subfiles as they are needed for introduction as exhibits or for reference. This use of the trial notebook and subfiles is effective when the trial notebook outlines the use for the documents and the point at which they will be used. The subfiles are arranged so that the documents can be easily found at the time they are to be used.

When used this way, the notebook must contain an outline of the trial. It should also contain an outline of the questions to be asked of each witness on direct and cross-examination. The outline can be annotated with notes regarding arguments that will be made at trial. For instance, you may anticipate that opposing counsel will object to the admission of an important piece of evidence. The attorney-paralegal team can research case law and prepare an argument to support admission of the evidence. An annotation in the outline directs the attorney to the place in the trial notebook where the legal argument is set out or

to the appropriate subfile that contains the legal argument and copies of supporting cases.

The trial notebook is a versatile tool that can make the trial go more smoothly. Paralegals who help to prepare the trial notebook need to work closely with the attorney who will try the case to determine how to make the notebook most useful for that attorney.

Review the File to Ensure That Specific Documents Are Ready

Certain documents must be ready before the attorney-paralegal team can complete preparation for trial. It is best to ensure that these documents are complete well before trial because their completion may take a substantial amount of time.

The Trial Brief. The trial brief presents legal issues that the court will consider during the trial and an argument explaining why the judge should rule in favor of your client on these issues. The trial brief is sometimes called a ***memorandum of law*** or ***trial memorandum***. Different attorneys prefer different formats for trial briefs, but the general format includes the following sections: cover or title sheet, statement of facts, questions presented, argument, and conclusion. The argument cites the statutes, rules, and authorities relied on. The trial brief may have a separate section that sets out the statutes and cases relied on and the page numbers on which there are references to each of the statutes and cases.

The format and length of the trial brief can differ, depending on local court rules, judges' preferences, and the nature and complexity of the lawsuit. Be sure to check local court rules because there may be specific requirements for the contents of briefs and the citations of cases. Rule 7.2 of the United States District Court for the Southern District of Ohio sets forth such requirements and appears as an example in Figure 9–6.

Usually the attorneys write the trial brief, at least the legal argument section. Paralegals, however, often contribute to the trial brief in important ways. Paralegals may prepare first drafts of the statement of facts, check case citations, and shepardize cases. Paralegals ensure that the required number of trial briefs are ready and that the brief is served on opposing counsel, complete with certificate of service.

Forms Required by Local Court Rules. Local court rules require that in certain types of lawsuits the parties must file specific forms for use at trial. For instance, in a lawsuit to divide marital property at the time of divorce, local court rules may require that each party file an affidavit stating the value they assign to each piece of property, the date the item was purchased, and so forth. An excerpt from this type of affidavit is illustrated in Figure 9–7.

Another example is a state court action for child support. The party seeking child support files an affidavit of income and expenses, which itemizes monthly income and lists expenses for shelter, food, clothing, and so on. Most of these forms are filed long before the trial date approaches, but it is best to check the file in the pretrial stage to ensure that no required forms were overlooked.

FIGURE 9–6 Local Court Rule Regarding Specific Requirements for the Contents of Briefs

Rule 7.2

. . .

(3) *Limitation upon length of memoranda.* Memoranda in support of or in opposition to any Motion or application to the Court should not exceed twenty (20) pages. In all cases in which memoranda exceed twenty (20) pages, counsel must include an abbreviated introductory summary of all points raised and of the primary authorities relied upon in the memorandum. No such summary may exceed fifteen (15) pages.

(b) Citation of legal authorities. (1) *Statutes and regulations.* All pleadings, briefs and memoranda containing references to statutes or regulations shall specifically cite the applicable statutes or regulations. United States Statutes should be cited by the United States Code Title and Section number, e.g., 1 U.S.C. Section 1. Citations such as "Section so and so of the Act" are discouraged, even cumulatively.

(2) *Preferential authorities.* In citing authorities, the Court prefers that counsel rely upon cases decided by the Supreme Court of the United States, the United States Court of Appeals for the Sixth Circuit (or in appropriate cases the Federal Circuit,) the Supreme Court of Ohio, and this Court.

(3) *Supreme Court citations.* Citation to United States Supreme Court decisions should be to the official U.S. Reports if published. Supreme Court Reporter and Lawyer's Edition shall be used where the official U.S. Reports are not yet published. For more recent decisions, United States Law Week, Lexis, or Westlaw citations are acceptable.

(4) *Unreported opinions.* If unreported or unofficially published opinions are cited, copies of the opinion shall be attached to the memorandum and shall be furnished to opposing counsel.

. . .

(f) Attachments to memoranda. Evidence ordinarily shall be presented, in support of or in opposition to any Motion, using affidavits, declarations pursuant to 28 U.S.C. § 1746, deposition excerpts, admissions, verified interrogatory answers, and other documentary exhibits. Unless already of record, such evidence shall be attached to the memorandum or included in an appendix thereto, and shall be submitted within the time limit set forth above.

Evidence submitted, including discovery documents, shall be limited to that necessary for decision and shall include only essential portions of transcripts or exhibits referenced in the memorandum.

When a substantial number of pages of deposition transcripts or exhibits must be referenced for the full and fair presentation of a matter, counsel shall simply reference in their memoranda the specific pages at which key testimony is found, and assure that a copy of the entire transcript or exhibit is timely filed with the Clerk. Counsel shall assure that all transcripts relied upon include all corrections made by the witness pursuant to Rule 30(e), FRCP.

FIGURE 9–7 Excerpt from Marital Property Affidavit

IV. ASSETS (If any asset is held jointly with spouse or another, so state, and set forth your respective shares. Attach additional sheets if needed)

A. Cash Accounts

Cash

1.1 a. Location: _____
b. Source of funds: _____
c. Other information: _____
d. Amount: _____

Checking

2.1 a. Financial institution: _____
b. Account number: _____
c. Title holder: _____
d. Date opened: _____
e. Source of funds: _____
f. Other information: _____
g. Balance: _____

2.2 a. Financial institution: _____
b. Account number: _____
c. Title holder: _____
d. Date opened: _____
e. Source of funds: _____
f. Other information: _____
g. Balance: _____

2.3 a. Financial institution: _____
b. Account number: _____
c. Title holder: _____
d. Date opened: _____
e. Source of funds: _____
f. Other information: _____
g. Balance: _____

Savings

(Individual, joint, totten trusts, CDs, treasury notes)

3.1 a. Financial institution: _____
b. Account number: _____
c. Title holder: _____
d. Type of account _____
e. Date opened: _____
f. Source of funds: _____
g. Other information: _____
h. Balance: _____

STATEMENT OF NET WORTH

YOUR FIRM NAME
Street Address
City, State, Zip
Telephone Number

Pretrial Order. Pretrial orders set forth guidelines for the trial and list the witnesses and exhibits the parties will present. Pretrial orders are discussed in detail in Chapter 10. The procedure for preparation of the pretrial order can differ. Particularly in state court the attorneys often prepare the pretrial order before their final pretrial conference with the judge. In federal court, the pretrial order is formulated largely at the final pretrial conference. Paralegals should check court rules for deadlines pertaining to pretrial orders and ensure that the orders are prepared on time. Some rules require that the attorneys meet and exchange information before they meet with the judge and make the final determinations that are written in the pretrial order. This is another deadline of which paralegals must remain aware.

PREPARATION OF WITNESSES

Witnesses need as much advance notice of the trial date as possible. They often have to arrange to be absent from work. They may have to make transportation arrangements.

Paralegals generally perform several tasks to ensure that witnesses have proper notice and are present for trial at the proper time. For instance, you may be responsible for making reservations for lodging if the witnesses have to stay for several days. Whatever your tasks, your goal is to ensure that all witnesses are present at the proper time and place to testify. Therefore, there are several tasks you must perform in advance of trial.

Inform Witnesses of the Trial Date

As soon as possible, contact all witnesses, inform them of the trial date, and make sure that they will be available. It is best to subpoena all witnesses, so explain to them that they will be served with subpoenas closer to trial. Confirm the witnesses' addresses and phone numbers. Especially be sure to confirm the phone number at which the witnesses can be reached during the trial. Explain that it is not always possible to know the exact hour and minute that they will testify, but that you will call them and give them as accurate a time estimate as possible.

Subpoena Witnesses

All witnesses should be served with a subpoena before trial. The subpoena commands the witness to be present. The subpoena gives the judge the authority to order the witness's attendance. If the witness falls to attend after being properly subpoenaed, the witness can be held in contempt.

It is important to serve a subpoena on every witness, whether the witness is friendly or hostile. Even if the witness is your client's mother, subpoena her. Many persons have been known to promise to appear and testify, but when the trial date comes, they never appear. You cannot take this risk. Judges are reluctant to grant a continuance simply because a witness does not appear, and the attorney-paralegal team can be forced to proceed without

important witnesses. Paralegals should contact all witnesses and explain that they will receive a subpoena.

In federal court actions, refer to FRCivP 45 for issuance and service of subpoenas. The clerk of court issues the subpoena. The subpoena must be personally served on the witness. Review FRCivP 45 to ensure that your subpoena is correctly issued and served. If you require the witness to bring any documents, list them on the subpoena. See Figure 9–8 for a sample subpoena.

Procedures may differ in state court actions. For instance, in some states the attorney can issue the subpoena. The form of the subpoena is likely to be the same as that of the federal court subpoena. Be sure to check state rules of civil procedure and local court rules for issuance and service of subpoenas.

After the subpoenas are served, file copies with the clerk of court. The subpoenas will become part of the court file, and the judge can readily see when witnesses have been subpoenaed.

Prepare Witnesses to Testify at Trial

Generally the attorneys meet with the witnesses to prepare them to testify at trial. Paralegals, however, may help in several ways. Paralegals may help to prepare the questions to be asked at trial. They also may set up the appointments for the witnesses to come to the office to meet with the attorneys. It is a good idea to take a witness to the courtroom to see what it looks like, especially if the witness has never been to court before. You can take the witnesses to the courthouse and show them around. This will help them to be more relaxed at trial.

Paralegals may be present when the attorneys meet with the witnesses. If you are present, you can help by sharing your observations about the witness with the attorneys. For instance, you may notice that the witness pauses too long before answering a question. This makes witnesses less credible because they appear either to have insufficient knowledge or to be planning their answer too thoroughly, as persons sometimes do when they are not telling the truth.

There are some practical guidelines that the attorney-paralegal team should share with witnesses before they testify. Witnesses should always tell the truth. If they do not know the answer to a question, they should say that they do not know rather than hazard a guess. Witnesses should answer the question and then be quiet; they should not ramble and volunteer extra information. This is not an effort to hide information. Rather, a clear, concise answer is more effective than chatter and provides less ammunition for cross-examination. Instruct witnesses to stop talking as soon as the attorney objects to a question. They can resume their testimony after the judge has ruled on the objection. Advise witnesses to review their depositions carefully before trial. This will minimize contradictions, which are damaging. These are just a few guidelines. The attorneys on your team can provide even more guidelines for effective testimony in a particular case.

It is important to talk to witnesses about appropriate dress for the courtroom. Witnesses' attire should be neat and formal, but not too formal. Tuxedos and cocktail dresses are not appropriate. Nor are shorts appropriate. Judges

FIGURE 9–8 A Sample Subpoena

AO 89 (Rev. 5/85) Subpoena

United States District Court

Western DISTRICT OF North Carolina

Bryson Wesser, Plaintiff

V.

SUBPOENA

Woodall Shoals Corporation and
Second Ledge Stores, Incorporated, Defendants

CASE NUMBER: 3:96CV896-MU

TYPE OF CASE: [X] CIVIL [ ] CRIMINAL

SUBPOENA FOR: [X] PERSON [X] DOCUMENT(S) or OBJECT(S)

TO:

John Misenheimer
Charlotte Fire Dept.
509 Savannah Street
Charlotte, North Carolina 28226-5451

YOU ARE HEREBY COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE	COURTROOM
Federal Courthouse 1018 East Trade Street Charlotte, North Carolina 28226-1201	Courtroom No. 4
	DATE AND TIME June 10, 1996 10:00 A.M.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): *

June 10

Fire inspection report and all other documents concerning your investigation of the fire at the home of Bryson Wesser, 115 Pipestem Drive, Charlotte, North Carolina, on January 3, 1996.

[ ] *See additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

U.S. MAGISTRATE OR CLERK OF COURT	DATE
J. P. McGraw	May 20, 1996
(BY) DEPUTY CLERK Barbara J. Montgomery	

This subpoena is issued upon application of the:

[X] Plaintiff [ ] Defendant [ ] U.S. Attorney

QUESTIONS MAY BE ADDRESSED TO:
Leigh J. Heyward
Heyward and Wilson
401 East Trade St.
Charlotte, North Carolina 28226-1114
ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER

*If not applicable, enter "none".

have been known to eject people because their attire does not reflect proper respect for the courtroom. Witnesses' clothes affect the way they are perceived by the jury, another important consideration.

PREPARATION OF EXHIBITS

As you organized the documents for trial preparation using the chart of essential elements, you listed the exhibits that the attorney-paralegal team will use at trial. Go back through the documents and complete the organization of the exhibits. Be sure that you have not overlooked any exhibits. You may need to expand the chart to show which exhibits will be used to establish which points at trial. Your goal is to compose a complete list of exhibits. After you have a tentative list, review it with the attorneys on your team to ensure that the list is complete.

By now the attorney-paralegal team has probably decided on the numbering scheme to use to keep track of the documents. As discussed previously, the exhibits are assigned a number in the document retrieval system that the team develops.

Assemble all the exhibits in the order that they will be introduced at trial. The next step is to make sure that sufficient numbers of copies of each exhibit are made. Generally, you need one copy for the attorneys on your team, one copy for each attorney representing the other parties, one copy for the judge, and often one copy for the judge's law clerk. Check local court rules for any special rules regarding the number of copies needed. The court may require one copy for the judge and one working copy that may be used by the judge's law clerk.

SIDEBAR Preparing the copies for trial can be a massive undertaking. Paralegals should arrange for sufficient clerical support to get all the copies made. After the copies are made, double-check to ensure that all exhibits are put back in their proper order.

PREPARATION OF DEMONSTRATIVE EVIDENCE

As discussed in Chapter 3, demonstrative evidence consists of charts and other visual aids to explain the facts and assist in the presentation of evidence. For instance, a chart of Mr. Wesser's house may show the location of his bedroom and the areas affected by the fire. Suppose that one of the expert witnesses has prepared drawings of electrical design that would be useful for the jury to understand the alleged defects in the wiring of the electric blanket. You may enlarge the drawings so that the jury can look at them while the expert witness points to areas in the design that were defective. This will make the expert's testimony much more comprehensible to the jury.

Paralegals may be responsible for preparation of demonstrative evidence. This can involve preparing simple charts yourself, or employing graphic artists

for more complex drawings. You also may need to make arrangements with a graphics company to enlarge certain drawings if the copy machines at your office do not have the capacity. Start well ahead of time so that you do not have to spend the day before the trial on the telephone trying to locate a graphic artist who does not mind staying up all night to complete the charts you need.

SIDEBAR Before trial, it may be helpful for the attorneys to present the demonstrative evidence to persons not involved in the lawsuit in order to test its effectiveness.

JURY INVESTIGATION

As discussed more fully in Chapter 11, on the first day of trial, the attorneys pick a jury from the pool of jurors selected at random for that session of court. From the jury pool, the attorneys want to select the persons whom they think will view their clients' version of the facts most favorably.

The more you know about the persons in the jury pool, the more accurately you can gauge how they will react to your client's version of the facts. This is the purpose of jury investigation—to gather information about the potential jurors in order to analyze them and try to determine which persons you want to sit on the jury in your client's case. Useful information may include where the persons live, where they work, clubs to which they belong, religious beliefs, and so forth.

Many factors determine how much jury investigation the attorney-paralegal team is able to conduct. One factor is whether the clerk of court releases a list of the jury pool before the court session begins. If the list is released several weeks in advance, the attorney-paralegal team has the opportunity to conduct a thorough investigation. There is, however, another important factor that can limit the scope of the jury investigation: your client's budget. Detailed jury investigation can be expensive. Firms are available that will gather facts on the members of the jury pool, and some consultants can even arrange a mock jury—that is, a jury composed of persons similar to those in the jury pool. The attorneys then can conduct a mock trial to see how the jury decides the case and why, which may suggest what arguments are likely to be most effective at trial.

Some law firms hire psychologists to help them determine the best characteristics for a potential juror for a particular trial, a procedure known as developing a jury profile. This, too, can be expensive.

Unfortunately, many clients cannot afford such an elaborate approach. There are many other, less expensive ways to gather information about jurors that paralegals may use. You may check public records such as tax listings to find out general information about the potential jurors' property holdings. Some courts use juror questionnaires, which are available to the attorneys before trial. These generally contain basic information about the potential juror, such as occupation, marital status, and so on. See Figure 9–9, which illustrates a juror questionnaire used in the Western District of Texas.

FIGURE 9–9 D-1. Juror Questionnaire

D-1. Juror Questionnaire

JUROR QUALIFICATION QUESTIONNAIRE
(Please answer Each Question in BLACK Ink)

NAME: _____
LAST NAME FIRST NAME MIDDLE INITIAL

PLACE OF BIRTH: _____ AGE ____ HOW LONG HAVE YOU LIVED IN THIS STATE? _____ NAME OF THE COUNTY IN WHICH YOU RESIDE: _____

MARITAL STATUS (Check [/] One): SINGLE [ ] MARRIED [ ] WIDOWED [ ] SEPARATED [ ] DIVORCED [ ]

NUMBER OF CHILDREN: _____ AGES _____

EMPLOYMENT INFORMATION:

If employed, your occupation or business: _____

If retired, occupation before retirement: _____

Spouse's occupation: _____

Are you a salaried employee of the U.S. Government? YES[ ] NO[ ] The following are exemptions (if you qualify, please check one of the following) (a) Members on active duty in the armed forces of the United States [ ] (b) Members of Fire or Police Department of any state [ ] (c) Public officers in the Executive, Legislative, or Judicial Branches of the Government of the United States or any state who are actively engaged in the performance of official duty [ ]. 28 U.S.C. § 1863(6).	Have you or your spouse ever been employed by a law enforcement agency? YES [ ] NO [ ] If your answer is yes, give agency and dates of employment: _____ _____ If, under 28 U.S.C. § 1863 (5)(B), you are volunteer safety personnel, upon individual request you may be excused from jury service. Do you wish to claim this as an excuse? YES [ ] NO [ ]

PERSONAL INFORMATION: (Information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual's qualifications for jury service [28 U.S.C. § 1862])

SEX: MALE [ ] FEMALE [ ] RACE: WHITE [ ] BLACK [ ] ASIAN [ ] NATIVE AMERICAN [ ] OTHER [ ]
ARE YOU HISPANIC? YES [ ] NO [ ]

EDUCATION: GRADE SCHOOL [ ] HIGH SCHOOL [ ] COLLEGE [ ] POST COLLEGE [ ]

Do you have any physical or mental infirmity which would impair your capacity to serve as juror?

YES [ ] NO [ ] If yes, please give nature of infirmity. _____
_____
_____

FIGURE 9–9 (Continued)

Have you or any member of your immediate family, to the best of your knowledge, been the subject of any audit or other tax investigation by the Internal Revenue Service? YES [ ] NO [ ]
If yes, please describe:_____

_____

Have you ever been charged with any criminal offense other than a traffic ticket?

YES [ ] NO [ ]

If yes is checked,, indicate the type of case:_____

Are any charges now pending against you for a state or federal crime punishable by imprisonment for more than one year?

YES [ ] NO [ ]

Have you been convicted of a state or federal crime punishable by imprisonment for more than one year?

YES [ ] NO [ ]

If yes is checked, were your civil rights restored? YES [ ] NO [ ]

CIVIL SUITS:

Have you ever filed or been filed against for discrimination? YES [ ] NO [ ]

If yes, give the date and nature of claim:_____

Have you ever been a plaintiff for defendant in a lawsuit? YES [ ] NO [ ]

If yes, give the type of case:_____

Have you ever been a witness in court? YES [ ] NO [ ]

If yes, give the type of case:_____

Have you ever served on a jury? YES [ ] NO [ ]

Please check all of the following which apply:

Grand Jury [ ] Petit Jury [ ] Criminal Case [ ] Civil Case [ ]

Have you ever had any specialized training in any of the following?

Check all that apply: Legal [ ] Paralegal[ ] Medical[ ] Banking [ ] Finance[ ] Engineering[ ]

QUALIFICATIONS FOR JURY SERVICE Please check [/] whether or not you:	YES	NO
Are a citizen of the United States		
Are 18 years of age or older		
Have resided for a period of one (1)year within this Judicial District (Counties in this district are: Atascosa, Bandera, Bexar, Comal, Dimmit, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Medina, Real, & Wilson) Are able to read, write, and understand the English language		
Are able to speak the English language		

Although jury investigation can prove helpful, it must be done discreetly. If a potential juror finds out that your law firm is compiling information and feels that this is intrusive, this can hurt your client at trial.

ETHICS BLOCK

As trial preparation continues, paralegals must talk to many people involved with the case. There are important rules regarding communications with both persons represented by counsel and persons who are unrepresented. Model Rule 4.2 and Model Code DR 7-104 provide that a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to represented by another lawyer in the matter, unless the lawyer has the consent of the other party's lawyer or is authorized by law to communicate with the other party. A lawyer is not prohibited from discussing with an opposing party a matter unrelated to the matter in controversy between the parties.

When you work as a paralegal, you may receive a phone call from the opposing party to a lawsuit. If you know that the party is represented by counsel, you must advise the party that you cannot talk without the prior consent of that party's attorney. If you are uncertain whether the party has an attorney, check with your supervising attorney before you talk with the party.

Model Rule 4.3 and Model Code DR 7-104 provide that if the interests of unrepresented persons have a "reasonable possibility of being in conflict with the interest" of the attorney's client, the attorney can give no advice to the unrepresented persons except to advise them to secure their own attorney. The lawyer has a duty to inform these unrepresented persons that the lawyer is not disinterested in the matter.

SUMMARY

In order to ensure that everything is ready for trial, a paralegal needs to know when the trial will be held. Sometimes the trial is scheduled for a particular date and time, but sometimes you know only the session or term of court in which the case will be heard. For instance, a judge may have thirty cases on the court calendar for a two-week session of civil (noncriminal) court. The judge will hear as many cases as possible during this period. Even if your case number is near the end of the list, you must be ready when the session opens; cases tend to settle quickly when they appear on a trial calendar.

A trial calendar is the court's schedule for cases to be tried. It is sometimes called the docket or trial list. The court may publish the calendar in publications to which attorneys in the area subscribe or may mail copies of the calendar to attorneys. Sometimes attorneys pick up the calendar in the office of the clerk of court. Sometimes, particularly in federal court where one judge is assigned to the case throughout the litigation process, the judge sets a trial date during a pretrial conference.

When a case is not scheduled for a date certain, the attorney may request that the case be given a specific date for trial. This is called a peremptory setting.

A peremptory setting is appropriate when important witnesses have to travel long distances to attend the trial or when other extraordinary circumstances exist.

The attorney-paralegal team should make every effort to be ready to try the case when it is scheduled. If this is impossible, the attorney may request a continuance—that is, a postponement. Of course, opposing counsel may contest the continuance. Whether the continuance is granted depends on many factors, such as the judge involved, how many times the case has been continued before, and the reason for the request.

Often trial attorneys have more than one case scheduled for trial at a given time. It is possible for attorneys to try more than one case in a day if at least one involves a simple matter, such as an uncontested divorce. Otherwise, one of the cases will have to be continued. Local and state court rules usually provide a scheme for deciding which types of cases take precedence. For example, a trial in federal court usually takes precedence over a trial in state court.

Paralegals are often given the task of organizing the file for trial. Depending on the complexity of the case and the preferences of the attorneys who will try it, there are variations in how the file may be arranged. Organizing the file generally involves preparing an outline of the case, organizing the documents into subfiles, and developing an effective method to retrieve the documents.

In outlining the case, remember that the plaintiff 's objective is to prove the essential elements of every claim asserted. The defendant's objective is to show that the plaintiff has not established all the essential elements. A good guide for outlining is your chart of essential elements. The chart should have beneath each element a list of the evidence that will be used to prove that element. A review of the chart will reveal any weaknesses in the evidence and alert the attorney-paralegal team to try to gather more. As you review the file, you can add to the list other evidence that has accumulated. For each exhibit to be used at trial, note which witness will be called on to authenticate it. Add references in discovery materials that address each of the essential elements.

An important part of preparing the file for trial is summarizing lengthy documents so that the important parts are obvious. You may already have prepared digests of depositions. Summarize other lengthy documents such as expert witness reports and discovery materials other than depositions. As you summarize documents, the headings and subheadings for your outline become clear.

It is generally necessary to divide large files into subfiles to make the documents accessible at trial. You may already have some subfiles, but you may need to rearrange some of them. You may have subfiles for particular subjects, time periods, or witnesses. Try to fit every document into an appropriate subfile. A computer search of key terms can aid you.

The next step is to prepare indices and document retrieval systems so that you can find the documents readily. Be sure that every document has been assigned a number. This is usually done as the documents are received throughout the

litigation. A number gives ready identification. Numbers, however, do not tell you a document's content. This is why indices are necessary.

Begin developing an index by identifying index headings. Look at your outline to determine the important headings. There are two primary methods for preparing written indices. One is the manual index card system. Here you prepare an index card for each document, citing the document locator number, short description of the content, date of the document, and author. At the top of each card, write the key word or category number assigned to the document. If the document is important for more than one category, assign more than one number to it. Arrange the cards by categories, and index the documents according to topics on the cards.

A computer document retrieval system also requires assignment of subject codes, which are entered in the computer. Other basic information about the documents is also entered, such as date, document number, and author. After the pertinent information is entered in the computer, a computer search can identify all the documents under a particular topic, and you can prepare the index.

Some attorneys like to use trial notebooks to organize information for trial. A trial notebook is a binder with tabbed dividers, and in each tabbed section are the documents needed for that portion of the trial—from jury selection to closing argument. Some attorneys prefer to put all the documents to be used at trial in the notebook if there is space. An alternative is to keep the documents in subfiles for ready access and to use the trial notebook as an outline of the trial. The notebook will have, among other things, outlines of questions to ask witnesses, pertinent legal research, and outlines of opening and closing arguments.

An important pretrial task is to review the file to ensure that all documents required at trial are ready. One important document is the trial brief, sometimes called a trial memorandum or memorandum of law. The format and length of the trial brief may differ, depending on local rules and dictates of the presiding judge. A commonly used format, however, includes the following sections: cover or title sheet, statement of facts, questions presented, argument, and conclusion. The attorneys usually write the legal argument, but paralegals may help prepare drafts of other parts of the brief, such as the statement of facts. Paralegal tasks also may include shepardizing cases and checking case citations.

In certain types of cases, the court may require the submission of standard court forms to relate financial or other information. In a child-support case, for instance, the parties may be required to submit affidavits of income and expenses. Check state and local rules to see what forms are required.

Paralegals help to prepare witnesses for trial. First inform the witnesses of the trial date and let them know that they will be subpoenaed. Paralegals can prepare the subpoenas for attorney review, make sure that the subpoenas are properly served, and then file the subpoenas with the court. All witnesses should be subpoenaed so that the court can compel their attendance, if necessary.

Paralegals may help attorneys prepare lists of questions to ask witnesses at trial. The attorneys review the questions with the witnesses before trial, and paralegals may arrange the meetings. Paralegals may sit in on the meetings to

observe the witnesses and offer suggestions on how the witnesses can give more effective testimony.

There are some general guidelines for all witnesses to follow. Witnesses should always tell the truth, never answer a question until they understand the question, give no more information than is necessary, quit talking as soon as the attorney objects to a question and not resume talking until the judge rules on the objection, and review their depositions before trial.

Paralegals help prepare the exhibits for trial by arranging the exhibits in the order they will be presented and numbering them and by ensuring that sufficient copies are available for trial. Paralegals also should prepare a list of all the exhibits.

Paralegals help prepare demonstrative evidence for trial. Paralegals may prepare some charts themselves and arrange for graphic artists to prepare others. Paralegals also may need to arrange for enlargements of some charts.

Paralegals also aid in jury investigation. The purpose of jury investigation is to find out background information about the potential jurors so that the attorneys can select jurors most sympathetic to their clients' versions of the facts. The scope of jury investigation depends upon when the list of potential jurors is available. If the list is not available until the day before trial, little investigation can be done.

The client's litigation budget may determine the extent of investigation. Consultants are available to gather information, prepare jury profiles, and even stage mock jury trials to see how the jurors will react to the evidence presented. This is expensive. If the client cannot afford this, paralegals may perform simple investigation such as checking public records to get a general idea of the jurors' background. Jury investigation should be discreet because jurors may be offended.

REVIEW QUESTIONS

1. Which of the following statements are true?
   a. Subpoenas should be served only on the most important witnesses.
   b. Subpoenas are filed with the clerk of court after they are served.
   c. Some state courts allow the attorney, rather than the clerk of court, to issue subpoenas.
   d. all of the above
   e. b and c only
2. Which of the following aids in document retrieval?
   a. computer search for key terms
   b. indices of subfiles
   c. review of discovery materials
   d. all of the above
   e. a and b only
3. Trial notebooks may contain which of the following?
   a. copies of pleadings
   b. outlines of questions to ask witnesses

c. research memos
d. all of the above
e. a and b only

4. Which of the following are other names for court calendars?
   a. docket
   b. pretrial conferences
   c. trial list
   d. all of the above
   e. a and c only
5. Which of the following are factors that influence how much jury investigation the attorney-paralegal team is able to conduct?
   a. the client's budget
   b. how long before the trial the clerk of court releases the jury list
   c. whether juror questionnaires are available before trial
   d. all of the above
   e. b and c only
6. T F A trial brief is sometimes called a trial memorandum.
7. T F One goal of case review is to detect any weaknesses in proof.
8. T F Trial briefs follow a rigid format that may not be altered even by local court rules.
9. T F A paralegal task related to trial briefs may be to check case citations.
10. T F A consideration in preparing for trial is how to authenticate documents to be introduced.

PRACTICAL APPLICATIONS

1. The Wesser case is on the court's calendar for the session that begins two weeks from now. There are thirty cases on the calendar that are scheduled to be reached before the Wesser case. This session of court lasts two weeks. Should you go ahead and inform the witnesses of the tentative trial date?
2. Ms. Heyward checks her personal calendar and sees that she has reserved a beach cottage for the vacation she scheduled which, unfortunately, is for the same two weeks as the upcoming court session. Is the court likely to grant a continuance so that she can take her vacation?
3. What should you do to ensure that the witnesses will come to the trial as requested?

CASE ANALYSIS

Read the excerpt from *Getter v. Wal-Mart Stores, Inc.*, 829 F. Supp. 1237 (D. Kan. 1993) and answer the questions following the excerpt.

MEMORANDUM AND ORDER

VRATIL, District Judge.

Plaintiff brought this diversity action alleging personal injuries due to a slip and fall at defendant's store in Atchison, Kansas. A jury trial from February 2 to

February 4, 1993, resulted in a verdict for defendant. Plaintiff seeks a new trial, asserting that the court erred in (1) admitting the opinion testimony of Emma Jean Bramble and Cynthia Gee; (2) submitting Jury Instruction No. 11; (3) allowing defendant's counsel to inquire into whether plaintiff had taken measures to prevent pregnancy; (4) not striking juror John Agin for cause; and (5) excluding plaintiff's expert witness Keith Vidal. Plaintiff also contends that the jury's verdict is against the weight of the evidence, and that the cumulative effect of the foregoing errors resulted in unfair prejudice to plaintiff.

Motions for new trial are committed to the sound discretion of the trial court. *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984); *Brownlow v. Aman,* 740 F.2d 1476, 1491 (10th Cir.1984). Moreover, the court should "exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *McDonough,* 464 U.S. at 553, 103 S.Ct. at 848. . . .

Plaintiff also argues that the court erred in refusing to strike prospective juror John Agin for cause. During voir dire Mr. Agin disclosed that his wife was an employee of defendant and that he and his wife owned stock in defendant Wal-Mart Stores, Inc. Plaintiff moved to strike Mr. Agin for cause. The court thoroughly questioned Mr. Agin whether he could be a fair and impartial juror in the case, and the court was more than satisfied—by virtue of his demeanor, his responses, and the emphatic, clear tone of his statements—that Mr. Agin could and would serve as an unbiased juror. The determination of a challenge for cause is within the sound discretion of the trial court. *Hopkins v. County of Laramie,* 730 F.2d 603, 605 (10th Cir.1984). The court does not believe that it abused its discretion in refusing to strike Mr. Agin for cause.

The remaining arguments raised by plaintiff were addressed by the court in its prior written rulings or at trial. The court finds nothing that would warrant a new trial. The court believes that its rulings were not erroneous and that it did not prejudice plaintiff's substantial rights at trial. The court also finds that the jury's verdict was supported by overwhelming evidence. As a result, even if the trial court erred in the foregoing respects, such error did not materially prejudice plaintiff's right to a fair trial and plaintiff's motion should therefore be denied.

IT IS THEREFORE ORDERED that *Plaintiff's Motion for New Trial* (Doc. # 93) should be and hereby is overruled.

1. This was a tort action filed in federal court. For what type of injury did the plaintiff seek to recover damages?
2. In whose favor did the jury return a verdict?
3. What type of motion was before the court in this decision?
4. One ground for the motion for a new trial was the court's refusal to strike a prospective juror. In this case, it appears that there was no investigation of the jury prior to trial. Why did the plaintiff contend that juror John Agin could not be an unbiased juror?
5. Why did the judge find that John Agin could serve as an unbiased juror?
6. Although this question is not addressed in the court's decision, do you think that the judge would have allowed Mr. Agin to be a juror if a pretrial investigation had disclosed his connections with Wal-Mart?

ENDNOTES

1 This form is used in New York. Forms vary among different states.
2 If you do not fully understand these terms, refer to Chapter 11, in which they are explained.