

## “Legal Studies”.

In Section 1 of this course you will cover these topics:

- The Paralegal Profession
- Ethics, Regulation And Professional Responsibility
- The Paralegal Workplace
- Technology And The Paralegal

### **Topic : The Paralegal Profession**

#### **Topic Objective:**

At the end of this topic student would be able to:

- Understand Minimum Qualifications That a Paralegal Should Meet
- Learn Role of the Paralegal In The Legal System
- Study Planning To Become Paralegals or Legal Assistants
- Understand the difference between the job of a legal secretary, legal administrator, or legal assistant manager, and that of a paralegal

#### **Definition/Overview:**

**Paralegal Profession:** A person qualified by education, training, or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible.

#### **Key Points:**

##### **1. Minimum Qualifications That a Paralegal Should Meet**

At present, there is no standardized definition of the term paralegal or of the requirements to become a paralegal. At best, minimum qualifications can be determined by consulting the American Bar Association (ABA) and the American Association for Paralegal Education (AAfPE) requirements and recommendations for paralegal education. Thus, a paralegal must complete an education program that includes generalized (e.g. English Composition, U.S.

History) and specialized (Legal Research, Civil Litigation) knowledge. Practical experience is also a key component of paralegal education. Faculty should be qualified based on teaching experience and knowledge of subject matter taught as well as practical experience working with paralegals in the field.

## **2. Role of the Paralegal In The Legal System**

Paralegals assist lawyers in private law firms with tasks such as interviewing clients and witnesses, drafting correspondence and pleadings, performing legal research and preparing financial records of the firm.

- Paralegals may also work assisting attorneys in government offices or agencies.
- Paralegals may also be found working in corporate legal departments.

## **3. Planning To Become Paralegals or Legal Assistants**

In some instances, education will help a student discover an area of special interest for purposes of selecting a career path. Generally speaking, the better the education and skill development of the paralegal, the greater the job opportunities and compensation. Finally, given that the law impacts every aspect of our society, those engaged in providing legal services must be adequately educated and well versed in the skills required of the professional.

## **4. Difference between the job of a legal secretary, legal administrator, or legal assistant manager, and that of a paralegal**

A legal secretary's duties are usually limited to clerical tasks such as word processing or transcription of dictated documents. A legal administrator or legal assistant manager supervises or manages the paralegals in a large law firm. While a paralegal may perform the duties of both, he also engages in substantive legal work that would otherwise have to be performed by an attorney. Typically, paralegals perform the following functions under the supervision of an attorney: meet and interview clients and witnesses, investigate claims, prepare pleadings and documents, conduct legal research and assist at trial. As such, substantive legal work is billable to clients, while clerical and administrative work is not.

### **5. Satisfying the court that one is qualified as a paralegal and not as a legal secretary**

One way of satisfying the court is simply by performing substantive legal work demonstrating the knowledge, training and skills of the paralegal. Another way of establishing the credentials of a paralegal is use of a designation awarded by one of the paralegal professional organizations.

### **6. The advantage in obtaining the PACE or the CLA designation**

The paralegal who obtains the PACE or CLA designation has the advantage of establishing his or her abilities, education and training simply by use of the designation following his or her name. Just as the designation M.D. tells the world an individual meets the qualifications of a doctor, PACE or CLA tells the world that the paralegal meets the high professional, educational and ethical standards set by the professional association.

### **7. Educational plan makes the most sense for you**

Students can honestly assess their skills, financial abilities and time constraints. For example, a student with a Bachelors degree looking to change her career may only be able to attend evening classes to complete a certificate program.

### **8. A paralegal demonstrates the qualification for employment as a paralegal**

A paralegal can demonstrate her qualifications for employment through the preparation of her resume which lists her educational and academic achievements as well as her work experiences. Also important to establishing qualifications is how she conducts herself during the interview, including how she responds to questions and the questions she asks of the interviewer. Finally, the paralegal who maintains a portfolio of work demonstrates her skills and is prepared to share those documents with a potential employer at the interview will effectively display her skills.

### **9. An employer, such as the U.S. Attorneys Office, requires a four-year degree for those seeking a paralegal position**

Employers often use minimum educational qualifications to screen out applicants that are not qualified for the position. In particular, a four year degree indicates a higher level of knowledge and dedication on the part of the individual.

### **10. Assess your personal skills and professional goals for a career as a Paralegal**

An honest assessment and plan would cover areas the student needs improvement (usually written and oral communication) and areas the student has no knowledge (legal research).

### **11. Assessing your interests and skills helps in choosing a career path**

Assessing your interests and skills helps in narrowing the choices for your career path. The goal is for students to follow their interests and skills on a career path that will be rewarding personally and financially. For example, a student with a particular interest in assisting the elderly may want to consider focusing on elder law or estate planning areas of practice.

### **12. Skills required to be a paralegal and their importance**

The following list of skills are required:

- Written and spoken communication skills inasmuch as the practice of law depends on language.
- Resourcefulness to solve problems and difficulties that arise in the law firm.
- Commitment to complete the tasks assigned in the allotted time frame.
- Analytical or critical thinking skills to analyze factual and legal issues.
- Interpersonal skills which allow you to get along with others, even when they may be difficult, and maintain ones own positive attitude.
- Computer skills to use and take advantage of the time savings assistance of technology.
- Organizational skills to maintain order and efficiency in the fast-paced environment of a law office.
- Cultural sensitivity toward colleagues and clients.
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### **13. Good English writing and speaking skills are important for the paralegal**

The legal profession is entirely dependent on the written and spoken word. For the paralegal abilities to perform essential functions of interviewing clients and witnesses and preparing documents and pleadings are require good English speaking and writing skills. Also, in many cases the only contact we have is through the written word or telephone conversations, thus, the quality of speech and written word can enhance or detract from the reputation of the paralegal and the law firm.

### **14. Advantages a person can have when entering the paralegal profession later in life**

A person entering the paralegal profession later in life has several advantages. First, he has job experience which, coupled with a paralegal education, may yield a highly desirable paralegal. (nurse paralegal, engineer combined with paralegal might work well in a construction litigation law firm) Second, he may be more certain of his preferences thus being more certain of his career path. Third, he has established some of the employment skills such as commitment, resourcefulness, etc in his prior position.

#### **Example/Case Study:**

#### **Missouri v. Jenkins, 491 U.S. 274 (1989)**

**Facts:** Attorneys, who had won the underlying racial segregation lawsuit against the State of Missouri and its school districts, sought counsel fees in accordance with 1988 of the federal civil rights act. The State and school districts did not oppose the award of counsel fees as they are mandatory under the statute. The State did challenge the calculation of fees charged for services provided by paralegals. State argued that the cost to the law firm should be used to calculate the fees for a paralegals services rather than the going market rate.

**Procedure:** District Court awarded attorneys fees and costs including fees for services provided by paralegals based on the market rate for paralegals in the community in which the lawsuit was brought. The Court of Appeals affirmed. State of Missouri appeals to the Supreme Court.

**Issue:** Whether the calculation of fees for services provided by a paralegal should be based on the market rate within the community?

**Holding:** Judgement affirmed.

**Rationale:** There is no dispute that lawyers, who successfully prosecute claims under the Civil Rights Act, are entitled to receive attorneys fees and costs associated with the litigation from the defendant found liable under the Act. There is no dispute that attorneys fees are calculated based on the market rate for services of attorneys in their community with similar experience and skill. There is no dispute that the fee calculated for associate attorneys, which like a paralegal may bear no rationale relationship to the actual cost to the law firm of the associate attorneys salary, are based upon the market rate for associate attorneys in the community.

The State argues that the law firm receives a windfall when it collects the market rate (\$35 per hour) rather than being compensated based on the actual cost of the paralegals services (salary plus benefits or approximately \$15.00 per hour). The court notes that this argument has never been applied to the calculation of associate attorney fees.

Paralegals provide valuable services assisting attorneys in the prosecution of civil rights litigation. These services must be properly compensated. The court should look to the standard of the community as to how services for paralegals are billed to clients. If the legal community bills separately, then the paralegals efforts should be compensated in the same manner for purposes of 1988 fees and at the market rate. To do otherwise would financially penalize law firms that accept Civil Rights cases.

**Topic : Ethics, Regulation And Professional Responsibility**

**Topic Objective:**

At the end of this topic student would be able to:

- Understand the general theory for regulating the practice of law and its application

- Learn about the Non-lawyers can represent clients
- Study the Unauthorized practice of law statutes protect the public
- Understand Privileged Communications
- Learn about the Ethical Wall Protects Client
- Understand how is a paralegal the agent of the client?

### **Definition/Overview:**

**Regulation:** Regulation refers to "controlling human or societal behavior by rules or restrictions." Regulation can take many forms: legal restrictions promulgated by a government authority, self-regulation, social regulation (e.g. norms), co-regulation and market regulation. One can consider regulation as actions of conduct imposing sanctions (such as a fine). This action of administrative law, or implementing regulatory law, may be contrasted with statutory or case law.

**Professional responsibility:** Professional responsibility is the area of legal practice that encompasses the duties of attorneys to act in a professional manner, obey the law, avoid conflicts of interest, and put the interests of clients ahead of their own interests.

**Ethics:** Ethics is a word for a philosophy that encompasses proper conduct and good living. It is significantly broader than the common conception of ethics as the analyzing of right and wrong.

### **Key Points:**

#### **1. The general theory for regulating the practice of law and its application**

The practice of law is regulated to protect the public from incompetent and unscrupulous practitioners. This theory is applied through statutes for (1) licensing, which determine minimum qualifications for those who practice law and (2) punishing the unauthorized practice of law.

#### **2. Just giving advice is potentially the unauthorized practice of law**

When advice is given that impacts the legal rights and obligations of a client it is the unauthorized practice of law. However innocent the intention or simple the question, where

the answer has the potential to affect rights and duties it will be the unauthorized practice of law.

### **3. Regulation of the paralegal profession assure the public of quality legal services**

Like regulation of lawyers and other professions, regulation of the paralegal professional would set minimum standards that all within the profession must achieve. Further, regulation would protect the public from incompetent and unscrupulous providers of legal services. However, regulation may add a layer of unnecessary governmental regulation in an area where paralegals are indirectly governed through the regulation of their supervising attorney.

### **4. Non-lawyers can represent clients**

Non-lawyers may represent clients where specific statutory authorization exists. For example, statutes permit non-lawyers to represent clients in Social Security Disability claims.

### **5. The paralegal can avoid UPL**

A paralegal may do a number of things to avoid UPL. First, know what behaviors represent UPL (filling out forms, setting fees, appearing in court, giving advice). Second, have an awareness of the types of situations where UPL may arise (keeping clients happy by answering their questions, filling out forms). Third, always identify yourself as a paralegal and educate the client as to what you can and cannot do. Fourth, always defer to the supervising attorney and follow through with the promised call back from either the attorney or you to keep the client informed and happy.

### **6. Unauthorized practice of law statutes protect the public**

These statutes generally make the unauthorized practice of law a crime punishable with fines and/or imprisonment. These statutes serve to protect the public from incompetent providers of legal services.

## **7. Familiar with the ABA Model Rules of Professional Conduct for Paralegals**

Paralegals should be familiar with the ABA Model Rules because most states use them as a guide for the adoption of their rules of professional responsibility governing the conduct of attorneys and the paralegals they supervise.

## **8. ABA Model Guidelines for the Utilization of Legal Assistant Services define the role of the paralegal in the law office**

These non-mandatory guidelines suggest how attorneys should interact with, train, supervise and compensate paralegals. An attorney may delegate to a paralegal any substantive legal task that is normally performed by an attorney and that is not specifically forbidden by statute, court rule, or the ABA model rules, so long as the paralegal is properly supervised.

## **9. Violations by a paralegal and rules of the national paralegal associations have the same impact as the violation of ethical rules of attorneys on the right to practice**

No. The ethics rules applicable to attorneys have the force of law behind them and may result in disciplinary proceedings and sanctions. Sanctions range from an informal reprimand of the attorney to disbarment, ending the attorney's career. The ethics rules of the national paralegal associations do not have the force of law behind them but demand the voluntary compliance of their members. Violation may result in removal from the membership rolls or loss of professional designation, neither of these have the impact to end one's career. Realistically, unethical behavior of the paralegal that affects the supervising attorney's license can result in his reprimand and the paralegal's continued employment.

## **10. Would a paralegal dating a client have a conflict of interest caused by compromising influences and loyalties?**

While there is no specific prohibition against a client having a personal relationship with a paralegal, such a relationship can negatively affect independent professional judgment. By way of example, the client dating the paralegal may receive more favorable treatment than others. And should the relationship turn sour, the same client may receive less favorable treatment. This violates the duty of loyalty.

### **11. Privileged Communications**

Certain types of communication have been classified as privileged or protected from disclosure to encourage the free exchange of information between the speakers. We want to encourage clients to disclose all information to attorneys, no matter how embarrassing, so the attorney may properly evaluate the situation and give the best advice. If clients fear that unfavorable information will be communicated to others, that their reputations will be affected, they will be less inclined to reveal the good and the bad about their situation.

### **12. Under what circumstances might a paralegal have a conflict of interest in taking a new job in a law firm?**

The paralegal may have personal knowledge (from prior employment or personal experiences) of individuals whose interests are directly adverse to the new law firm's clients.

### **13. Ethical Wall Protects Client**

The ethical wall serves to separate the paralegal or attorney with the conflict from contact with a case file where the information known, if revealed, could have an adverse effect upon the former client.

### **14. Chinese wall**

The Chinese wall is another name for the ethical wall. The name should bring to mind the Great Wall of China and symbolize the impenetrable nature of the ethical wall.

### **15. Dangers in Paralegals Moonlighting**

One ethical concern for the paralegal who moonlights is proper attorney supervision. Another is the potential for conflict of interest to arise, particularly if the paralegal has no mechanism in place to check for conflicts.

### **16. Conflict Of Interest under the Model Rules of Professional Conduct**

Under Model Rule 1.7 a lawyer shall not represent a client if the representation of that client that will be directly adverse to another client, unless the lawyer reasonably believes the

representation will not adversely affect the relationship with the other client and each client consents after consultation.

**17. Does a client have an attorney-client privilege regarding information given to a paralegal during the preparation of a case?**

Yes. The work product doctrine extends the attorney-client privilege to materials prepared by an attorney or his agents (the paralegal) in anticipation of the litigation or the trial itself.

**18. What duty does a paralegal owe to the supervising attorney?**

Under the ABA Model Guidelines for the Utilization of Paralegal Services, the paralegal is the agent of the attorney and owes the common law duties of agent to principal also known as the fiduciary duty. This includes the duty to exercise reasonable care, skill and diligence and the duty of loyalty.

**19. How is a paralegal the agent of the client?**

The attorney is the agent of the client. The paralegal, as agent of the attorney, is also the sub-agent of the client. The paralegal performs substantive legal functions assigned to her by the attorney. When performing these tasks, the paralegal directly benefits her principal/employer, the supervising attorney and the client.

**20. With whom does the ultimate decision rest on conflict of interests?**

The initial evaluation should be made by the attorney. However, under Rule 1.7 of the ABA Model Rules of Professional Conduct, the ultimate decision may lie with the clients. Under the rule, the attorney who faces a conflict of interest, but reasonably believes the representation will not adversely affect the relationship with the other client may go forward with the representation. The lawyer must advise both clients of the existence and significance of the conflict. If each client consents the conflict of interest is waived and the attorney may continue to representation both clients.

**21. Under what circumstances must a lawyer or paralegal refuse employment?**

A lawyer or paralegal must refuse employment if where there is a conflict with the paralegals or lawyers own interest. Where the personal interests of the lawyer or paralegal would

conflict to the extent that his/her independent judgment is affected, representation must be refused. Representation should also be refused where the matter is outside the scope of the knowledge, training and experience of the lawyer and paralegal.

## **22. What is required to invoke the attorney-client privilege?**

Either the attorney or the client may affirmatively raise the privilege claiming the information sought is protected as it represents confidential attorney-client communications.

## **23. What is covered under the work product doctrine?**

The work product doctrine includes written materials prepared by attorneys in representation of a client usually in anticipation of trial. It also includes communication with non-lawyers (paralegals, secretaries) who assist the attorney in the representation of the client.

## **24. Should a paralegal be considered an other representative under the Federal Rules of Civil Procedure, Rule 26? Why or why not?**

Yes. The scope and goals of discovery should be applied and balanced against the desire to maintain client confidentiality. There is no reason to treat the work product of the paralegal any differently than that of the attorney or any one else who may have information necessary to make pretrial discovery fair and complete.

## **25. What is the audit privilege?**

The audit privilege has been recognized in some jurisdictions to encourage businesses to fairly and accurately audit their operations so as to discover and correct improprieties. The privilege, in order to encourage self-policing, prohibits prosecution or liability based on audits performed for these purposes.

### **Example/Case Study:**

**Tegman v. Accident and Medical Investigations, 30 P.3d 8 (Wash. Ct. App. 2001).**

**Facts:** Paralegal employed to process claims for Investigative firm. Paralegals duties included settling cases, handling fees and giving advice to clients. All of these duties were performed by paralegal at a time when she knew or had reason to know that she was not

being supervised by an attorney. Furthermore, when she left her employment she did nothing to advise her clients of the situation in the Investigative firm. Former clients sued the Investigative firm and paralegal for damages they sustained.

**Procedure:** Trial court found the paralegal liable to the former clients for their damages. Paralegal appeals.

**Issue:** Whether a paralegal, who is not supervised by an attorney, can be held to the same standard of conduct as the attorney and be liable for damages?

**Holding:** Judgment affirmed.

**Rationale:** Where a paralegal is not properly supervised and knows or has reason to know she is not being supervised, her actions in continuing to handle matters for the client equate to the unauthorized practice of law. Where, as here, the paralegal practices law, she will be held to the same standard of care as a lawyer. In this case, the standard required the paralegal to notify the clients of the following things which she failed to do:

1. Serious problems concerning the accessibility of files to persons who had no right to see them
2. Client settlements were processed through a personal account rather than an attorney trust account
3. Non-lawyers were representing the client interests, entering settlement agreements and collecting contingent fees, all of which is prohibited
4. Non-lawyers were engaged in the unauthorized practice of law

It is because of these failures on the part of the unsupervised paralegal that the clients were damaged. As such the paralegal will be held liable.

**Rubin v. Enns, 23 S.W.3d 382 (Tex.App. 2000)****1. Does the courts rebuttable presumption test work? Would another test work better?**

For this case the rebuttable presumption does work to balance the interests of the client with the mobility of our present day work force. Long gone are the days where one works for the same employer for fifty years, receiving a gold watch upon retirement. To address this mobility and protect the confidential communications of former clients, the court looks for adequate efforts on the part of the paralegal and the law firm to prevent disclosure whether inadvertent or intentional.

**2. Using the courts rebuttable presumption test, would there be some temptation on the part of the second law firm to obtain confidential information that the paralegal learned at the first law firm?**

Temptation will always be part of the equation in the evaluation the effectiveness of erecting an ethical wall around an employee. Here the law firm had a clear policy in place that appeared to be enforced in such as a way as to avoid that temptation.

**3. Do the ethics standards of the American Bar Association and paralegal associations adequately address ethical conflicts that paralegals face? Discuss.**

The ethics standards are just that, standards of ethical behavior. It is up to courts and practioners to establish successful programs to achieve those standards. The law firm in this case did have a written policy which it enforced.

**Rubin v. Enns, 23 S.W.3d 382 (Tex. App. 2000).**

**Facts:** Paralegal changes employment from one law firm to another. The change takes place during a significant legal dispute and results in the paralegal moving from working for plaintiffs counsel to working for defendants counsel.

**Procedure:** Plaintiff files writ of mandamus requesting that defense counsel be disqualified from continuing to represent defendant because of paralegals conflict of interest. Trial court denies writ. Plaintiff appeals.

**Issue:** Whether a law firm should be disqualified from representing one side of a lawsuit because it has hired a legal assistant who formerly worked for the law firm on the other side?

**Holding:** No. Judgment affirmed.

**Rationale:** There are two presumptions about those non-lawyers who change their employment. One is that they obtained confidential information in their former position. This presumption is conclusive and can not be overcome. The second presumption is that the confidential information will be shared with the new employer. This presumption may be overcome with proof that the new employer (1) instructed the paralegal not to work on any matter she worked on in her former employment and (2) erected an ethical wall or some other reasonable steps to prevent the paralegal from coming in contact with cases, clients, information or others who work on cases that conflict with the prior employment. In this case, there was sufficient evidence to show that the second law firm had taken both precautions and in fact had gone further to ensure that the paralegal would have no contact.

### **Topic : The Paralegal Workplace**

#### **Topic Objective:**

At the end of this topic student would be able to:

- Understand the different forms of practice arrangements used by lawyers?
- Learn about the advantages and disadvantages of working for a lawyer in a solo practice?
- Understand the working in a specialty practice be less stressful than working in a general practice?
- Why is accurate timekeeping important to the paralegal and the law firm?

#### **Definition/Overview:**

**Paralegal Workplace:** Paralegal workplace is defined as the official workspace arrangement of paralegals. The typical practice forms are solo practice, small or shared office arrangements, partnerships and large offices. Practices may also be arranged based upon the type of law practiced specialty or general practice.

**Key Points:****1. Different forms of practice arrangements by lawyers**

The typical practice forms are solo practice, small or shared office arrangements, partnerships and large offices. Practices may also be arranged based upon the type of law practiced specialty or general practice.

**2. Advantages and Disadvantages of working for a lawyer in a solo practice**

The paralegal in the solo practice will be expected to take on a wide range of responsibilities (answering phones to preparing pleadings) as well as be familiar with a wide range of practice areas (adoption to zoning). This is both an advantage and disadvantage. For those who enjoy a variety of responsibilities and interests it is the place to be. For those who have difficulty balancing multiple tasks and prefer a single focus the solo practice may not be the right fit. Ethical considerations include supervision when the attorney is in court, away on vacation or ill. The temptation to give advice or participate in the unauthorized practice of law is a problem. Most solo practitioners will have a professional relationship with another attorney to serve as a back-up attorney. Another concern would be in the office with a practice limited to a particular area, the paralegal may have more knowledge than other professionals and be tempted to give legal advice.

**3. Advantages and disadvantages of working in a small multi lawyer office or partnership**

In a small office or partnership the paralegal may not be called upon to handle the wide variety of tasks and practice areas of the solo practitioner. The paralegal may be able to focus on a specific practice area of the supervising attorney and not be involved with administrative tasks. The disadvantage is being the single paralegal working for more than one attorney, which is typical in the small firm. The paralegal may be conflicted in determining which attorneys work takes priority.

**4. Advantages and disadvantages of working in large offices or firms**

Large firms like corporations tend to be departmentalized according to practice area, support staff and administrative tasks. The paralegal may be focused on one of these areas and find

her responsibilities narrowly defined. The paralegal will likely work for one attorney. This allows the paralegal to focus on a particular area (practice or administrative) which can be an advantage or disadvantage depending on the individual. The paralegal may have little contact with clients and managing personal. Her reputation with clients and management may be determined by reputation of the supervising attorney.

#### **5. Working in a specialty practice can be less stressful than working in a general practice**

It will depend on the individual. A specialty practice allows one to focus on a particular area of law. This may lead to less stress over staying up to date and providing clients with the best representation in that area. It could lead to more stress in not being able to handle all matters on behalf of a client. Stress may be related to others seeking the paralegal's advice since she probably knows more about that area of law than other practitioners in the community.

#### **6. Advantages and disadvantages of working in a corporate legal department**

A corporate legal department allows the paralegal the opportunity of serving the needs of one client. Although there will likely be multiple areas of practice, the paralegal should anticipate most matters being related to business law.

#### **7. Significance of a nurse paralegal**

A nurse paralegal is invaluable to the firm that handles personal injury or medical malpractice law suits. The nurse paralegal has the capacity to decipher medical records and determine the relevant facts related to causes of action in negligence.

#### **8. Additional costs of a paralegal incur in a large-city practice in contrast to a small-town practice.**

In a large city practice the paralegal may encounter additional wage taxes, commuting costs (public transit or gas, tolls, parking and wear and tear on an automobile), wardrobe, and lunch. These represent hard costs or those costs which can be calculated. There are also soft costs such as the frustration of traffic jams or late trains, the time spent commuting and the inability to leave the office for an hour to attend an event at a child's school.

**9. A paralegal that specializes in one legal field be at a greater risk for unauthorized practice of law.**

The paralegal that specializes in one legal field will generally have more knowledge than other attorneys who never or occasionally practice in that area. Armed with this knowledge, the paralegal is often approached by clients and attorneys to assist or give opinions. The paralegal might be inclined to do so as it promotes good client relations or greases the wheels of the referral business. However, this would represent the unauthorized practice of law.

**10. Potential employment opportunities, for paralegals with networking**

Networking helps locate reliable practitioners who focus on areas of law other than that to which the paralegal may be exposed. This exposure can lead to referral business, as well as be a source of practical information for the paralegal.

**11. Interviews conducted by paralegals and privilege**

So long as the information exchanged between the paralegal and the client is related to the representation of the client, the interview is confidential in accordance with the attorney-client privilege and attorney work product doctrine.

**12. Importance of Conflict check**

A conflict check is required to prevent the law firm from representing both parties in a lawsuit. Representing both parties would violate the duty of loyalty owed by an agent to his principal.

**13. Importance of a conflict check before employment at a new law firm.**

The paralegal and the new law firm should conduct a check to determine whether the paralegal should be prevented from working on some cases. Because of prior professional relationships with clients, a paralegal may have knowledge that is adverse to the interests of the clients of the new law firm. This conflict must be determined and prevented as early as possible by use of an ethical wall.

**14. Importance of the ethical wall.**

An ethical wall is required to screen or prevent a member of the law firm from representation of a client whose interests are in opposition to the interests of a former client.

**15. Important steps that should be taken to insure a proper ethical screen**

The steps can include a warning to the member of the law firm with the conflict to avoid communication with the attorneys working on the case. A warning that the case should not be discussed in the presence of the member of the firm with the conflict is also appropriate. Setting up separate file and computer storage so the conflicted member of the firm has no access to the file, is also recommended.

**16. Importance of accurate timekeeping for a paralegal and the law firm**

Time keeping is critical to the law firm and the paralegal to ensure the law firm is compensated for the services rendered to clients. Time keeping serves as a basis of client billing in hourly fee cases, measures employee productivity and serves as a cost/benefit analysis in contingent fee cases.

**17. Importance of a retainer**

A retainer is a payment made by the client to the law firm at the inception of the representation. Generally, a retainer may be used to offset fees for services as they are earned by the law firm or the retainer may be used to pay costs advanced on behalf of the client. The funds belong to the client until they are earned by the law firm. Any unearned portion must be refunded to the client.

**18. IOLTA account and the reason behind maintaining IOLTA accounts**

These are accounts that hold or aggregate small deposits of the attorneys clients (the funds belong to the client) into one account. The amount is usually so small that setting up an individual account is impractical. By aggregating the multiple small escrow or trust monies, the account earns interest. This interest is not credited to the attorney or the clients. Instead the interest earned is forwarded to a court designated agency, like the legal aid society.

### **19. Purpose and significance of making a court accounting**

Court accounting is required in cases where fiduciaries handle the financial affairs of others. The purpose is court oversight of the handling of the financial affairs and ensures the compliance of the fiduciary with the requirements of good faith and fair dealing. For example, an executor (or power of attorney) must account to the court for the management of the financial affairs of the decedent (or principal) for the time the assets were entrusted to him. This is particularly true when there is a minor involved and the court will oversee these matters to protect the minor.

### **20. The objective of maintaining a Uniform System of Accounts**

A Uniform System of Accounts requires that all entities maintain financial records in a similar manner. The purpose is to make the financial records of the entity, whether an individual, a partnership, a for-profit or not-for-profit business, easily understood, examined and evaluated.

### **21. Importance of Resume with five year mission**

A dream resume should serve to focus the student on the position she hopes to achieve as a result of education and experience. It should also demonstrate the skills which must be developed to get that position. Thus, the dream resume can assist in the career and education path choices.

### **24. Assessing interests and skills in preparing a personal resume**

Assessing interests and skills can focus the paralegal on the job for which he or she is best suited. It can also help to prepare the resume for the job the paralegal hopes to obtain.

#### **Example/Case Study:**

#### **Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831 (Tex. 1994).**

**Facts** Paralegal leaves old law firm to work for new law firm. New and old law firms represent opposing parties in the enforcement of the judgment entered in a collection law suit. Paralegal returns to work for the old law firm after working just three weeks with the new law firm.

**Procedure** New law firm filed a petition to disqualify the old law firm from continuing to represent opposing party in the underlying law suit.

**Issue** Whether the old law firm must be disqualified from ongoing litigation because it rehired a paralegal who worked for opposing counsel for three weeks?

**Holding** No, disqualification is not mandatory. Matter is remanded to the trial court to conduct further proceedings to determine if the old law firm conducted reasonable measures to ensure against the breach of confidentiality and conflict of interest.

**Rationale** This case is one of first impression for the court. Previously, the court has held attorneys to a strict standard when there is a change of employment that may present a conflict of interest. Both the state and ABA ethics committees require that attorneys take steps to make certain their non-lawyer employees comply with the rules of ethical conduct. As such, the same rules concerning change of employment and conflicts of interest should apply to lawyers and non-lawyers alike. For a paralegal changing employment there exists a conclusive presumption that she obtained confidential information from and about clients in her former employment. The presumption that this information will be shared is rebuttable. The new law firm must caution the paralegal not to disclose information obtained in her prior employment. Further, the paralegal should be instructed not to work on any matter which she encountered in her former employment or which she has information related to the representation of clients by the former employer. The firm should take other reasonable steps necessary to ensure the paralegal does not work on matters that she worked on in her former employment. These steps may include use of an ethical wall, screening, and restricting access to paper and computer files.

Additional factors the court may consider when determining whether the practical effect of screening has been achieved include: The nature of the relationship between the former and current representation. The time that has elapsed between the former and current representation the size of the law firm The number of individuals in the law firm presumed to have confidential information. The nature of the involvement in the former and the current matters. The timing and nature of efforts to reduce risk of disclosure of confidential information

**Ramirez v. Plough, Inc., 15 Cal.App.4<sup>th</sup> 1110, 12 Cal.Rptr.2d 423 (1992).**

**1. How does this case illustrate the cultural differences of clients?**

This case addresses the language diversity present within the U.S. This case demonstrates the severity of the consequences that result from language barriers.

**2. Are the views and conduct of the parent in this case the same as you have and would have taken?**

This calls for individual assessment and judgment by the student of herself and the situation. Expect differing answers, from condemnation to understanding of the actions of the parent with language barriers.

**3. What ethical obligations does the paralegal have to be sure the client who does not speak the same language understands the advice given? Does it matter if it is medical directions as in this case, or legal advice?**

The paralegal must exercise the highest degree of care in ensuring that the information communicated to the client is understood accurately. A misunderstanding of medical advice could result in serious illness or death. A misunderstanding of legal advice can result in loss of rights, privileges, fines, penalties or imprisonment. Neither set of results is attractive and both can be devastating to the client.

**4. Does a law firm have a higher duty to a non-English speaking client than a drug company, such as the defendant in this case, does in selling a product?**

The attorneys relationship with the client is a fiduciary relationship, and thereby possesses a greater duty than that of a manufacturer to a consumer.

**5. Does the law firm have a duty to explain cultural differences in the American legal system and its procedures to non-English speaking, non-native born clients?**

Yes.

**Ramirez v. Plough, Inc., 15 Cal.App.4<sup>th</sup>1110, 12 Cal.Rptr.2d 423 (1992).**

**Facts** Medical studies suggest a connection between a life threatening illness (Reyes Syndrome) and the ingestion of aspirin during a viral infection like chicken pox. As a result, drug manufacturer places appropriate warning in English on label and package insert of its childrens aspirin. Non-English speaking or reading Mother gives sick child aspirin. Child later becomes sick.

**Procedure** Mother files lawsuit against drug manufacturer for damages sustained by child. Drug manufacturers motion for summary judgment, stating there is no duty to warn in a foreign language, was granted by trial court. Mother appeals.

**Issue** Whether a drug manufacturer has a duty to print warnings contained on product labels in languages other than English?

**Holding** No, there is no affirmative duty to warn in languages other than English. However, under certain circumstances, the standard of care may require the warning be in languages other than English. Summary judgment overturned with instructions for trial to be conducted in accordance with the findings of the appellate court.

**Rationale** There are 148 languages spoken in the United States and while many would like English to be the official language, it is not. It may be a staggering burden to require manufacturers to warn in every language. However, it may appropriate to require warnings in languages other than English. In addition to the cost, other circumstances should be considered, nature of the product, to whom (what communities) the product is marketed, actual or relative size of the market speaking a particular foreign language.

In this case drug manufacturer knew the Hispanics were a significant portion of the market and that many Hispanics maintain their language rather than adopting English.

The question is one of foreseeability; i.e., whether the drug manufacturer could reasonably foresee the purchase by of its product by Hispanics and the result of warning in English only? Under certain circumstances, where the harm is foreseeable, the duty to warn will be imposed. As insufficient evidence as to foreseeability was presented in the motion for summary judgment, the matter is remanded for further proceedings.

## **Topic : Technology And The Paralegal**

### **Topic Objective:**

At the end of this topic student would be able to:

- To understand how can the computer and the Internet increase a paralegals productivity?
- To learn about the advantages of internet in a paralegals office
- Understand the ethical issues that arise in the use of hot spots or public access points.

### **Definition/Overview:**

**Technology and the Paralegal:** Technology and the paralegal is defined as the reliance on computer technology to complete tasks of varying difficulty, the speed with which computers can complete these tasks enhancing productivity and saving time.

### **Key Points:**

#### **1. Computer and the Internet increase a paralegals productivity**

The computer and the Internet allow the paralegal to perform tasks more efficiently. For example, searching for addresses and telephone numbers of witnesses on the Internet may be performed more quickly than struggling with multiple telephone directories. Similarly, preparation and revisions of document via a word processing program can save time, especially where the supervising attorney makes revisions to the electronic document.

#### **2. Computer Hardware usage and importance**

Computer hardware is the tangible physical parts of a computer system that require a power source; for example, the monitor, printer and central processing unit.

#### **3. What is the danger in using the word processing feature track changes?**

With track changes the danger exists that the document may be shipped electronically to the court or the opposing legal team with the revisions still visible. This would allow the opposing legal team an opportunity to see the thought process of the legal team and violate the attorney-client privilege or more specifically, the attorney work product doctrine.

**4. What are applications software programs? Give an example.**

Applications software is a computer program that performs specific generic tasks such as word processing and spreadsheet programs.

**5. What are the advantages of using office suite programs?**

Office Suite programs combine several software applications into one bundled package. The advantage is that the programs may be linked such that data entry of client information into one program (billing) will place it in all of the programs (conflicts, contact, and calendar).

**6. How can database programs be used to avoid ethical issues?**

Database programs are typically used to conduct conflicts of interest searches when new clients are interviewed. A simple search of the potential defendants identified by the new client can be quickly and easily accomplished and the potential conflict avoided at the earliest opportunity.

**7. How can legal office management programs help to prevent malpractice?**

A good legal office management program and a staff that uses it properly can avoid malpractice by keeping track of crucial dates like the statute of limitations, court imposed deadlines and court appearances. Missing the statute of limitations is a significant malpractice risk. Missing court deadlines and appearances is also a risk.

**8. What is meant by the paperless office? What changes in law office administration have encouraged this?**

The paperless office is one in which documents are created, revised, sent, received and stored electronically. Reliance on computer technology to complete tasks of varying difficulty, the speed with which computers can complete these tasks and the reduction in costs over the years have all contributed to the switch to paperless offices. Storage issues and the omnipresence of the computer in areas of work processing and accounting functions have also led to the change over.

**9. What is the function of a network server?**

The network server is the central station on the network which serves as a central repository for files, controls access to those files and to peripheral devices. The network server may also serve the security functions of virus detection, firewalls, encryption and password protection to files.

**10. Why is making a back-up an essential function in a law office?**

Backing up data regularly is an essential function to prevent loss of critical files and office data in the event of a disaster such as a flood, fire, earthquake or tornado. However, backing up is also a security function, if files become corrupted or the system is infected with a virus, information and files can easily be restored if a current back up exists.

**11. What is the advantage to the legal team in having a wide area wireless network?**

The advantage of a wide area wireless network is the sharing of information with the speed of electronic transmission rather than physically delivering them or being physically present to review or revise a document. The wide area network allows the legal team to work from anywhere in the world, home, an airport, the court house or the office.

**12. How has the availability of high speed Internet impacted the use of the Internet in the law office?**

High speed Internet has allowed for the speedy transmission of large electronic files from one location to another, thus allowing members of the legal team to work from remote locations. High speed Internet service has also enabled the courts to permit electronic filing of pleadings saving the law firm time in physically traveling to the court house for filing. High speed Internet has also given paralegals the ability to obtain information and forms quickly.

**13. What is an Internet browser? How is this different from Windows Explorer?**

An Internet browser is a software program that connects a computer workstation to the Internet. Windows explorer is a software program that allows the user to examine and manage the systems and files contained on their individual work station.

**14. How reliable are forms and documents obtained over the Internet?**

Reliability is a function of the source and how frequently it updates the information available on its website. For example, forms from the IRS are likely to be reliable as the site is frequently updated whereas forms obtained from a county court house may not be.

**15. What advantages does knowing how to use the Internet provide the paralegal in the law office?**

The paralegal will have an advantage in performing factual research by using Internet services like Google and Ask. The paralegal may also be able to find forms that the law office does not maintain either from the agency itself or another law firm. Paralegals who perform legal research will be better equipped to complete those tasks with familiarity with online legal research services like WestLaw and Lexis.

**16. What are the limitations of using a website to attract new clients to your state?**

The answer to this question will vary as it may be controlled by rules of professional conduct as relates to advertising. However, it should be noted that one who is not licensed in a particular state should not be advertising his services as an attorney.

**17. Do cross-jurisdictional boundary websites present any problems for the law firm using the Internet?**

As above, the advertising may be controlled by rules of professional conduct and whether the attorney is licensed to practice in the jurisdictions in which he advertises.

**18. What are some ways in which using an Internet browser can assist the paralegal working on a file or a case? How are URLs used in conducting Internet searches?**

Most Internet Browsers feature a search engine which can assist the paralegal in locating records, witnesses or even definitions of medical terms. URLs represent the address of a particular web page. Uniform Resource Locators send the researching paralegal to a particular web site to find the information requested in a search. For example, a search may be done requesting information on Stage III breast cancer and the paralegal may be sent to [www.webmd.com](http://www.webmd.com)

**19. What copyright issues must a paralegal consider in using the Internet in preparing documents and reports?**

Information must be properly cited when used or the paralegal may face claims of plagiarism. The paralegal must be aware of copy righted materials and the appropriate uses of same.

**20. How can authenticity of information obtained on the Internet be validated? Explain the issues in downloading information.**

In part authenticity is a function of the site from which information is obtained. Some sites are known for their accuracy or the user may have a subscription to services provided (e. g. WestLaw). Others sites may be free of charge (LoisLaw) but their coverage may be limited. Still others maybe considered reliable as they represent the official site for an agency (e. g. the Supreme Court). In any event, it is imperative to be aware of the site from which the information is obtained.

**21. What is the purpose of a firewall? What are the implications to the law office of not having a firewall?**

A firewall is designed to limit computer access to particular individuals or limit an individuals access to certain sources. Without a firewall anyone can access the file server and obtain access to confidential client files. For the legal team a firewall can be helpful when there is a conflict of interest that requires the construction of an ethical wall. On the other hand, a firewall can inhibit the ability to access the file served from remote location.

**22. What is a computer virus and what should a paralegal do to protect the firm against computer viruses?**

Computer viruses are programs designed to damage computer networks, individual work stations, programs and/or files. To protect the firm, anti-virus software should be maintained and regularly updated to detect and eliminate viruses.

**23. Should encryption software be used regularly in transmitting files electronically? Why?**

Encryption software should be used when transmitting confidential client files over the Internet to protect client information from disclosure and tampering.

**24. Why should the legal team want to use encryption when transmitting documents?**

Use of encryption software in transmitting documents is an important way of protecting client confidential information from inadvertent disclosure and tampering.

**25. What is a wireless access point? How could this be used in the law firm?**

Wireless access points are essentially receivers of radio signals that convert them so they can be transmitted over a connecting wire to a computer or other connection to the Internet. This allows the computers in law office to be connected to one another, the file server and the Internet without wires and cables. It also allows connection anywhere in the world where a wireless access point exists.

**26. What ethical issues arise in the use of hot spots or public access points?**

Public access points give rise to concerns about maintaining client confidentiality.

In Section 2 of this course you will cover these topics:

- Sources Of American Law
- The Court System And Alternative Dispute Resolution
- Civil Litigation
- Administrative Law

**Topic : Sources Of American Law**

**Topic Objective:**

At the end of this topic student would be able to:

- Understand what functions does the law serve? And which of these functions are most important
- Learn about the importance of language of the U.S. Constitution its application and its original meaning, or should it be applied in a more expansive sense.

- Understand the Equal Protection Clause

### **Definition/Overview:**

**Sources of American Law:** Sources of American Law is defined as in the United States, the law is derived from four sources. These four sources are constitutional law, statutory law, administrative regulations, and the common law (which includes case law). The most important source of law is the United States Constitution. All other law falls under, and is subordinate to, that document. No law may contradict the Constitution. For example, if Congress enacts a statute that conflicts with the Constitution, the Supreme Court may find that law unconstitutional, and declare it invalid. Notably, a statute does not disappear automatically merely because it has been found unconstitutional; it must be deleted by a subsequent statute. Many federal and state statutes have remained on the books for decades after they were ruled to be unconstitutional. However, under the principle of stare decisis, no sensible lower court will enforce an unconstitutional statute, and any court that does so will be reversed by the Supreme Court. Conversely, any court that refuses to enforce a constitutional statute (where such constitutionality has been expressly established in prior cases) will risk reversal by the Supreme Court.

### **Key Points:**

#### **1. Define the law. Is this an easy concept to define? Why?**

The law can best be defined as a set of rule designed to (a) regulate the conduct of members of our society, (b) protect members of society from unwanted interference and (c) forbid certain undesirable behaviors. The law is not an easy concept to define because it has come to include a wide range of goals and ideas.

#### **2. What functions does the law serve? Which of these functions do you think is the most important?**

Functions of the law include (a) keeping the peace, (b) shaping moral standards, (c) promoting social justice, (d) maintaining the status quo, (e) facilitating orderly change, (f) facilitating planning, and (g) providing a basis for compromise.

The most important function of the law will vary by individual student and may also be a function of current events. For example, immediately following the September 11 attacks the focus of our nation was on the goal of keeping peace and protecting the homeland. Numerous statutes were enacted under those conditions that conflict with other functions of the law. By contrast during the unrest of the 1960s the most important function of the law was perceived to be social justice.

**3. Is the law always fair? Give an example of where you think the law was applied unfairly.**

No, the law is not always fair. Two defendants, involved in commission of the same crime and charged with the same offense may be tried separately. These two trials heard by two different juries may result in different verdicts; one guilty, the other not guilty. The human element and the potential for error can yield unfair results.

**4. Should the language of the U.S. Constitution be applied in its original meaning, or should it be applied in a more expansive sense? Explain.**

The answer will vary for each student based on his/her opinion on Constitutional interpretation. Look for each student to select from, strict construction, original intent or living document, and support that selection with a well reasoned argument.

**5. What is the power of the legislative branch of government? What is a statute?**

Congress is the legislative branch of the government. It consists of two components; (1) the House of Representatives, where the number of representatives from each state is based on the states population and (2) the Senate, where each state is equally represented by 2 senators. The Congress enacts laws to promote the goals established in the Constitution; this would include regulating commerce, coining money, etc. A statute is a written law enacted by the Congress.

**6. Do you think the U.S. Supreme Court makes law when it interprets the U.S. Constitution? Explain.**

Yes. The Supreme Court makes case law when it decides cases interpreting the U.S. Constitution. Each decision is then relied upon by citizens and the government in determining

whether their future actions are legal. For example, the Court determined that separate schools for black and white children violated the Constitution. This decision caused desegregation and integration of schools throughout the nation.

### **7. What is the doctrine of stare decisis? Why is this doctrine important?**

The doctrine of stare decisis requires that past court decisions become guidance or precedent for future cases. Lower courts must follow the precedent set by higher courts. Adherence to the doctrine of stare decisis is important because it promotes uniformity and predictability in our legal system.

### **8. What does the doctrine of federalism provide?**

The doctrine of federalism provides for a sharing of power between one central government and the individual member states that make up the central government. At our founding, there were 13 separate colonies which recognized and agreed to the benefits a centralized government provided in certain areas, such as national defense and negotiating treaties with foreign governments. The creation of a central government to handle these functions did not usurp the sovereignty of the individual colonies to deal with local concerns occurring within their borders.

### **9. What does the doctrine of separation of powers provide? Can you give any examples where the separation of powers of the three branches of government is blurred?**

The doctrine of the separation of powers provides that the power of the central government would be divided between three co-equal branches of government; executive, legislative and judicial. Each branch was given responsibility for a particular task with some overlap in certain areas to prevent any one branch of the government or person from becoming too powerful. The President has the authority to negotiate and enter treaties with foreign governments. However, the Senate has the authority to adopt the negotiated treaty to make it the law of the United States.

**10. What does the doctrine of checks and balances provide? Can you give any examples where on branch of the government checks the power of another branch of the government?**

The doctrine of checks and balances is closely related to the doctrine of separation of powers. Each branch of the government, while delegated specific powers, does not have the right to exercise those powers unchecked. The laws enacted by the legislative branch must be signed or vetoed by the President, once signed the law is enforced by the executive branch, the judiciary, if called upon, will examine those laws and their enforcement to determine whether the actions of the legislative and executive branches were Constitutional.

**11. What does the Supremacy Clause provide? What would be the consequences if the Supremacy Clause did not exist? Explain.**

The Supremacy Clause provides the Constitution, treaties, federal laws and regulations are the supreme law of the land. To the extent state and local laws conflict with federal law, they are preempted and the federal law controls. Without the Supremacy Clause the very existence of the federal government would be challenged. The potential for 51 enactments in areas of shared power would be cause for confusion and lack of cohesive governance.

**12. What does the Commerce Clause of the U.S. Constitution do? Explain.**

The Commerce Clause authorizes the Congress to regulate trade with other nations, between the states and with the Indian nations. The goal was to promote a uniform and fair method of controlling commerce and trade, particularly with foreign and Indian nations. There was concern that if a dispute arose between traders of two different colonies it was likely that the legal system of either state would not be fair in dealing with the citizen of a different state. Hence, the inclusion of between the states.

**13. The First Amendment to the U.S. Constitution contains the Freedom of Speech Clause. Explain the difference between fully protected speech, partially protected speech and unprotected speech.**

The First Amendment protects right of individuals to speak freely under certain circumstances. Fully protected speech is political speech whether oral, written or symbolic and the government may not prohibit or regulate it. An example of fully protected speech is

flag burning. Limited protected speech is speech which the government may not prohibit but may limit as to time, place and manner. There are two categories of limited protected speech. Offensive speech or speech which offends society may be regulated. For example, the FCC regulates of language and content of radio and television programs. Second, commercial speech such as advertising cannot be prohibited but may be restricted as to placement for safety or aesthetic reasons. Unprotected speech is speech which may be prohibited or banned by the government. Common examples of unprotected speech include yelling fire! in a crowded place, fighting words, defamation, obscenity and pornography. An area that is difficult to define is obscenity, what may be obscene to one may be acceptable to another.

**14. The U.S. Constitution guarantees freedom of religion. Explain the difference between the Establishment Clause and the Free Exercise Clause. Can you give an example of a legitimate government restriction of a possible religious practice?**

The Establishment clause prohibits the federal government from establishing a state religion. It is frequently interpreted to prohibit the government from promoting one religion over another. The Free Exercise clause prohibits the federal government from interfering with the rights of the individual to worship as he desires. A legitimate government restriction would be the prohibition of human sacrifice in the ancient Druid religion.

**15. What is the difference between substantive due process and procedural due process?**

Substantive due process requires that laws enacted by the government be clear on their face and not overly broad. Procedural Due Process requires government give notice and hearing to the individual of any legal action taken against her.

**16. What does the Equal Protection Clause provide? Explain the differences between the (a) strict scrutiny test, (b) intermediate scrutiny test and (c) rational basis test.**

The Equal Protection Clause prohibits state local and federal governments from denying any person equal protection of the law. The clause was intended to attack laws which classify and treat similarly-situated persons differently. The Supreme Court has addressed equal protection, what has come to be known as anti-discrimination provision of the Constitution, by setting up three tests. First, strict scrutiny is applicable where a regulation classifies individuals based upon a suspect class (race) and generally will be found unconstitutional. An

example would be granting a federal tax benefit to one race simply because they are of that race. This law would be found to violate Equal Protection. Second, intermediate scrutiny is applicable where a regulation affects a protected class (age or sex). These laws will not violate Equal Protection so long as they are reasonably related to a legitimate government purpose. For example, requiring government engineers to be men violates Equal Protection. However, requiring those who serve in active duty in law enforcement to be under a particular age may pass the test if age has a significant impact on the ability to perform the duties of law enforcement. Finally, the rational basis is applicable to laws which impact classes other than suspect and protected. These laws will be permissible where there is a justifiable reason for the law. For example, subsidies to farmer may be questions under Equal Protection. Farmers are neither a suspect nor protected class. Therefore, so long as there is a justifiable reason for the subsidy it will not violate the Equal Protection clause.

### **Topic : The Court System And Alternative Dispute Resolution**

#### **Topic Objective:**

At the end of this topic student would be able to:

- Understand the difference between state limited-jurisdiction courts and general jurisdiction courts.
- Learn about the function of state intermediate courts and highest state courts Explain.
- Understand the function of U.S. District Courts? How many are there?
- Learn about the difference between a federal courts jurisdiction to hear a case based on (a) federal question jurisdiction and (b) diversity of citizenship jurisdiction.

#### **Definition/Overview:**

**The Court System:** The Court System of the United States federal courts comprises the Judiciary Branch of government organized under the Constitution and laws of the federal government of the United States. See also United States federal judge.

**Alternative Dispute Resolution:** Alternative dispute resolution (ADR) (also known as External Dispute Resolution in some countries, such as Australia) includes dispute resolution processes and techniques that fall outside of the government judicial process. Despite historic resistance to ADR by both parties and their advocates, ADR has gained widespread

acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried. The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute

### **Key Points:**

#### **1. Describe the difference between state limited-jurisdiction courts and general jurisdiction courts.**

Trial courts are those where testimony is heard by and evidence presented to a jury or fact finder which then decides the outcome of the dispute. Jurisdiction is the authority of a court to hear and decide a dispute. Courts authorized to hear particular types of disputes are said to have limited jurisdiction. For example, the Domestic Relations court is authorized to hear disputes related to divorce. All other cases, not within the jurisdiction of the limited jurisdiction courts, are the courts of general jurisdiction. Examples include personal injury and breach of contract.

#### **2. What is the function of state intermediate courts and highest state courts? Explain.**

Most states have an intermediate court of appeals where litigants who are unhappy with the results in the trial court have the right to appeal the decision. This court reviews the record of the proceedings at trial to determine if any errors were made that require correction. No new testimony or evidence is presented to the appellate court. The parties usually present briefs setting forth in detail the errors made at trial and the legal arguments for overturning the actions of the trial court. The parties may also present oral argument to the panel of judges assigned to hear the appeal.

Each state has a highest appellate court usually called the supreme court. This court may hear appeals from intermediate courts of appeal. Appeals to this court are usually by permission, meaning the court has discretion to decide whether it wants to consider a case or not. No new evidence or testimony is presented. The parties submit legal briefs and participate in oral argument.

**3. List the special federal courts and describe the types of cases each of these courts can hear.**

The U.S. Tax Court hears cases involving federal tax law. The U.S. Court of Federal Claims hears cases brought against the United States. The U.S. Court of International Trade hears cases involving tariffs and international commercial disputes. The U.S. Bankruptcy Court hears cases involving federal bankruptcy laws.

**4. What is the function of U.S. District Courts? How many are there?**

The U.S. District Courts are federal court systems trial courts where evidence and testimony are presented to resolve disputes. Every state has at least one federal district court; more populated states have more than one. Presently there are 96 federal district courts

**5. What is the function of U.S. Court of Appeals? How many U.S. Courts of Appeals are there? How does the Court of Appeals for the Federal Circuit differ from the other U.S. Courts of Appeal?**

The U.S. Court of Appeals is the intermediate appellate court of the federal court system which hears appeals from the district courts within its circuit. There are 13 circuits or geographic areas. The Court of Appeals for the Federal Circuit is a special appellate court authorized to review decisions of the following courts only: Court of Federal Claims, the Patent and Trademark Office, and the Court of International Trade.

**6. What is the function of the U.S. Supreme Court? How many justices does the Supreme Court have? How does the chief justice differ from associate justices?**

The U.S. Supreme Court is the highest appellate court in the federal court system. It hears appeals from the Court of Appeals and in certain instances appeals directly from the district courts and state courts. Appeal to the Supreme Court is granted by writ of certiorari in which the Court decides which cases it will consider.

The U.S. Supreme Court is composed of nine justices. One of the justices is called the Chief Justice and handles the administrative functions of the court. Each justice has one vote in resolving a case before it.

**7. Explain the difference between the following types of decisions by the U.S. Supreme Court: (a) unanimous decision, (b) majority decision, (c) plurality decision and (4) tie decision. Which types of decisions establish precedent? What are concurring opinions and dissenting opinions?**

A unanimous decision occurs when all voting justices agree as to the outcome of the case and the reasoning therefore. Unanimous decisions are precedent for future cases. Majority decisions occur when a majority of the voting justices agree as to the outcome of the case and the reasoning therefore. Majority decisions are also precedent for future cases. A plurality decision occurs when a majority of the voting justices agree as to the outcome but disagree as to the reasoning. Plurality decisions resolve the dispute before the Court but have no value as precedent. A tie decision means the Court has been unable to resolve the dispute and the decision of the lower court stands. A tie decision has no value. Justices who agree with the outcome of the dispute but for different reasons will often write a separate opinion called a concurring opinion explaining their rationale. A justice who disagrees with the outcome may write a dissenting opinion describing the reason for his disagreement with the ruling of the majority. While these opinions have no value as precedent, many times they become persuasive authority for future cases.

**8. Explain the difference between a federal courts jurisdiction to hear a case based on (a) federal question jurisdiction and (b) diversity of citizenship jurisdiction.**

Federal district courts (trial courts) have limited jurisdiction to hear cases. Federal questions jurisdiction refers to the authority of the federal court to resolve disputes arising under the Constitution, laws and treaties of the United States. Diversity jurisdiction refers to disputes involving an amount in controversy which exceeds \$75,000 and citizens of different states, or a citizen of a state and a citizen of a foreign country, or a citizen of a state and a foreign country, where the foreign country is the plaintiff. In diversity law suits the court is not limited to resolving questions arising under federal law but may hear any dispute, including those involving uniquely state claims.

**9. Explain the differences between subject-matter jurisdiction and *in personam* jurisdiction. Explain the difference between *in rem* jurisdiction and *quasi in rem* jurisdiction.**

Subject matter jurisdiction requires the court to have jurisdiction over the subject matter of the dispute. Subject matter usually refers to limited or general jurisdiction of the court. The courts of general jurisdiction lack subject matter jurisdiction to hear a divorce proceeding. *In personam* or personal jurisdiction requires the court to have jurisdiction over the parties to the lawsuit. The court acquires jurisdiction over the plaintiff because the plaintiff agrees to be subject to the courts jurisdiction simply by filing a lawsuit with that court. The court obtains jurisdiction over the defendant when defendant resides within the geographical boundary of the courts jurisdiction and may be served a summons there, because of a long arm statute or sufficient contacts. *In rem* jurisdiction gives the court authority to hear and decide a case involving property located within the geographic boundaries of the state. *Quasi in rem* jurisdiction occurs when a plaintiff obtains a judgment against a defendant in one state and seeks to enforce the judgment in another state where the defendant owns property.

**10. What is a long-arm statute? What is the purpose of a long-arm statute?**

A long arm statute is a state statute that causes a defendant to be subject to the jurisdiction of that states court. A typical example is a long arm statute related to driving on the highways of a state. Simply by using the roadways, a driver agrees to be subject to the states jurisdiction for any violation or accident that he is involved in on those roads. The purpose is to promote the resolution of disputes with out of state defendants without requiring the state or a plaintiff to travel to another state.

**11. What is venue? When can a change of venue be granted?**

Venue refers to the selection of a particular court to hear a dispute. Typically the plaintiff will conduct a jurisdiction analysis which determines that more than one court has subject matter and personal jurisdiction to resolve the dispute. Of the various courts that may have jurisdiction over a dispute, venue refers to the one where it is best to file the complaint. Usually the place where the incident occurred but the decision may also be influenced by the reputation of the judges and jury awards within that jurisdiction, the typical members of the jury pool, and the speed with which matters go to trial.

**12. What is the difference between judicial dispute resolution and nonjudicial alternative dispute resolution? Why would one be preferred over the other, and who would have a preference?**

Judicial dispute resolution refers to the traditional methods of legally resolving disputes by using the court system. Nonjudicial alternative dispute resolution is a manner of resolving disputes without using the courts. Alternative dispute resolution (ADR) may be selected because it can be private, it may be conducted on a less formal basis, saves on legal fees and be concluded more quickly. Businesses frequently use ADR because of the cost savings and the speed with which disputes can be resolved. Child custody matters are typically resolved through ADR because of the privacy and the less confrontational methods available being better for the children.

**13. Define arbitration. Describe how the process of arbitration works. What is an award?**

In arbitration the parties select a neutral third party (arbitrator) to hear and decide their dispute. Arbitration may be mandatory, as required by an arbitration clause in a contract or it may be voluntary, where the parties agree to submit a dispute to arbitration. Less expensive than trial, arbitration is completed more quickly than a trial and arbitrators are usually knowledgeable in the area of law involved in the dispute.

Generally the person desiring to participate in arbitration or enforce an existing the arbitration clause will send a written notice to the other party. Both parties select one arbitrator. Those two then select a third who is agreeable to the parties. A date, time and location for conducting the hearing is then set. The arbitration hearing is similar to a trial wherein each party will be permitted to present testimony and evidence to support his position and refute the opponents position.

Upon conclusion of the hearing the arbitrators will issue a decision (who wins) and award (amount of damages) resolving the dispute. The parties will have agreed in advance whether they will be bound by the decision and award. Sometimes the decision and award will be non-binding. In that event the parties have the right to appeal the decision and award of the arbitrators. They then proceed to trial before a judge as though the arbitration never took place. If no appeal is taken, the award is enforced as though it is a judgment of the court.

**14. Describe the difference between mediation and conciliation. How do these differ from arbitration?**

Mediation is form of negotiation where the parties to the dispute agree to use a neutral third party (mediator) to assist them in reaching a settlement. The mediator does not issue a decision or award but instead acts as a intermediary between the parties, conveying their positions, pointing out strengths and weaknesses of each sides position and giving her opinion as to a reasonable settlement.

By contrast in conciliation the neutral third party (conciliator) helps the parties reach a resolution of their dispute but does not offer his opinion of how the dispute should be resolved.

**15. Describe mini-trial and fact-finding.**

A mini trial can occur in two ways. One is a voluntary private proceeding where attorneys present an abridged version of their case to representatives authorized to settle the case on behalf of each party. Another is to use a neutral third party who presides over the trial and renders an opinion which may or may not be binding depending on the rules the parties have agreed should govern the proceeding. A mini trial gives each side the opportunity to assess their own, as well as their opponents case, the strengths and weaknesses, producing a realistic assessment success. Fact finding refers to the process where a neutral third party is hired to investigate the facts surrounding a dispute and report her findings. Usually fact finding involves some highly technical area (engineering defect) outside the scope of knowledge and training of the attorneys. The opinion of the fact finder may be used to assess the likelihood of success as trial.

**Topic : Civil Litigation****Topic Objective:**

At the end of this topic student would be able to:

- Understand what is civil litigation? What remedy or remedies are sought by the plaintiff in civil litigation.
- Learn about statutes of limitations. And the purpose they serve

Understand how is a jury selected for a case , and the meaning of voirdire and trier of fact .

### **Definition/Overview:**

**Civil Litigation:** Civil litigation, as opposed to criminal litigation, refers to that branch of law dealing with disputes between individuals and/or organizations, in which compensation may be awarded to the victim. For instance, if a car crash victim claims damages against the driver for loss or injury sustained in an accident, this will be a civil litigation case

### **Key Points:**

#### **1. Define plaintiff. Define defendant.**

The plaintiff is the person who has been harmed and seeks to be compensated or made whole by filing a lawsuit. The defendant is the person who is alleged to have committed the wrong and if found liable will be required to compensate the plaintiff

#### **2. What is civil litigation?What remedy or remedies are sought by the plaintiff in civil litigation?**

Civil litigation is legal action to resolve disputes between parties. The plaintiff sues the defendant to recover monetary damages or equitable relief to right a wrong committed by the defendant. Monetary damages are designed to compensate the plaintiff for the loss he has sustained. Where the loss can not be calculated equitable relief may be issued to stop a defendant from pursuing a certain course of action

#### **3. What are pleadings? Describe the following pleadings: (a) complaint, (b) answer, (c)cross-complaint, and (d) reply.**

Pleadings are paperwork filed with the court to begin and respond to a lawsuit. Theyinclude a complaint, answer, cross-complaint and reply.

A complaint is filed by the plaintiff to begin the lawsuit. It states the names of the parties, describes the facts which give rise to the dispute, the legal theory which entitles the plaintiff to relief and the relief the plaintiff desires.

An answer is the defendant's response to the complaint. In it the defendant responds to each paragraph (averment) of the complaint by either admitting or denying the plaintiff's statement. The answer must also include any affirmative defenses the defendant may have.

The cross-complaint is filed by the defendant and usually included in the answer to the complaint. It includes any claim the defendant may have against the plaintiff.

The reply is plaintiff's response to that cross-complaint. It is similar in form to an answer.

#### **4. What is a summons? Describe service of process.**

A summons is an order of the court issued at the time the complaint is filed that advises the defendant he has been sued. It also tells the defendant he must respond to the complaint or lose important rights, to seek the advice of counsel, and usually lists the lawyer referral service or legal aid society within the court's jurisdiction. The summons is served upon the defendant with the complaint.

Service of process is the manner in which a legal document is delivered to a defendant. With a complaint and summons, the court wants to be sure that the defendant has received adequate notice of the institution of a lawsuit. For initial pleadings, the best service of process is to personally deliver a copy of the complaint and summons to the defendant.

#### **5. What is intervention? What is consolidation?**

Intervention occurs when other persons, who have an interest in the lawsuit, seek the court's permission to become parties to the lawsuit. Consolidation is where plaintiffs with similar claims against the same defendant may join their cases together for purposes of judicial economy.

#### **6. Explain statutes of limitations. What purpose do they serve?**

The statute of limitation is the time period during which a plaintiff may bring a claim against a defendant. The time period will vary depending on the type of dispute. The time period usually begins at the moment the plaintiff has the right to seek a remedy from a defendant. This can be the time an accident occurs or the time when the plaintiff knows or should know that the defendant's actions caused her harm. Failure to bring the lawsuit in the

time permitted by law will bar/stop/end the plaintiffs right of recovery. The purpose is to encourage the prompt filing and resolution of disputes. It also serves to protect defendants from stale claims.

**7. What is the process of discovery? What purposes does discovery serve? Explain.**

Discovery is the process, during litigation but prior to trial, in which the parties use various tools to learn the facts of the case from each other and witnesses. Discovery serves a number of purposes such as preventing trial by surprise, allowing parties to prepare thoroughly for trial, preserving evidence, saving time at trial and promoting settlement of cases. With the free exchange of information the parties are in a better position to prepare for trial and to evaluate the claims and defenses. This allows trial to run smoothly or in many instances the proper and early evaluation may lead to early settlement of the case.

**8. Describe the following types of discovery: (a) deposition, (b) interrogatories, (c) production of documents and (d) physical and mental examination.**

Depositions are oral testimony under oath of a party or a witness prior to trial recorded by a court stenographer and occasionally video recorded. Depositions are used to preserve evidence when a witness may not be available at trial. Depositions are also used for impeachment of witnesses at trial. Interrogatories are written questions directed from one party to the lawsuit to another party and require written answers under oath.

Production of documents is a written request from one party to a lawsuit to another party to the lawsuit to make available for review and copying documents relevant to the lawsuit. This could include medical records, invoices and employment records.

Physical and mental examinations are requested when the physical or mental condition of a party is part of the dispute. The opponent will be permitted to have mental or physical condition examined by its own physician to determine the extent of the injuries.

**9. Describe the differences between the following pretrial motions: (a) motion to dismiss, (b) motion for judgment on the pleadings and (c) motion for summary judgment.**

A motion to dismiss is filed by a defendant before filing an answer stating that the plaintiff has failed to set forth a claim for which relief can be granted. The basis of the claim is that

even if all the facts that the plaintiff has pleaded are true, there is no recognizable legal claim. If the motion to dismiss is granted the lawsuit will be concluded. However, it is more likely that the plaintiff will be given an opportunity to amend his complaint so it does state a legally recognizable claim. If motion to dismiss is denied, defendant must file his answer to the complaint.

A motion for judgment on the pleadings may be filed by either plaintiff or defendant once the pleadings are complete. The motion says to the judge, looking only at the pleadings, there are no disputed material facts; all that is required is to apply the law to the facts and resolve the dispute. If the motion is granted the lawsuit is concluded. If the motion is denied the lawsuit continues. A motion for summary judgment is very similar to a motion for judgment on the pleadings. The primary difference has to do with the timing of the filing and the materials that the court may consider in support of the motion. Anytime during the litigation, but usually during discovery or shortly before trial begins, either party may file the motion for summary judgment. This motion says to the judge, looking at all the facts, those in the pleadings, discovery materials, and affidavits, there are no disputed material facts; all that is required is to apply the law to those facts and resolve the dispute. If the motion is granted the lawsuit is concluded. If the motion is denied, the lawsuit continues.

#### **10. What is a settlement conference? What is its purpose?**

A settlement conference is sometimes referred to as pretrial hearing, pretrial conference or settlement conference. It is usually conducted in the judge's chambers with the goal of settling the case rather than going to trial. If the parties are unable to settle the case they proceed to determine how the trial will be conducted.

#### **11. How is a jury selected for a case? What is *voir dire*? What does trier of fact mean?**

Jury selection begins with a large pool of potential jurors selected from voter registration or drivers license records. Potential jurors are screened using a written questionnaire that asks general questions about their background, employment, education, age and experience in the legal system.

Jury selection continues with the *voir dire* process. To empanel a jury, potential jurors are screened for a particular trial by the judge and attorneys. The goal is to seat a jury that will

hear and decide impartially the dispute. The questions asked in *voir dire* are designed to uncover any bias or prejudice a potential juror may have that would impact on their ability to decide the case fairly. Jurors are dismissed for cause or on preemptory challenge. Once selected the jury will be instructed on how it will conduct itself during trial. The trier of fact is the one, whether jury or judge, who listens to the evidence and decides which testimony, is more likely to be true.

**12. Describe the following phases of trial: (a) opening statements, (b) plaintiffs case, (c) defendants case, (d) rebuttal and rejoinder and (e) closing argument.**

During opening statements each party's attorney is given a chance to address the jury at the beginning of the trial. The purpose is to describe for the jury what the trial is about and what each party plans to prove during the trial.

The plaintiff's case is the opportunity for the plaintiff to present its testimony and evidence to the jury. The plaintiff has the burden of proving to the jury by a preponderance of evidence that the events happened in a particular way. Witnesses are subject to direct examination and cross examination.

The defendant's case is defendant's opportunity to present evidence to refute the plaintiff's rendition of the facts. The defendant has the burden of proving to the jury by a preponderance of evidence any affirmative defenses and claims against the plaintiff. The same procedure of direct and cross examination is used during the defendant's case.

After defense rests their case, plaintiff has the opportunity for rebuttal, that is, to rebut the defendant's case by presenting new testimony to respond to the defendant's claims. Following rebuttal, defense has a similar opportunity, called rejoinder, to present testimony.

During closing arguments each attorney will address the jury to persuade them to decide in his client's favor. This usually includes a thank you to the jurors for their service, a recap of the facts and testimony and dramatic statement from counsel pointing out strengths in his case and weaknesses of the opponent's case.

**13. What are jury instructions? Explain. What is a verdict? What is a judgment?**

Following the closing argument, the judge will instruct the jury in the law. These instructions describe the law applicable to the case and the standard the jury must use in deciding the case. Then, the judge charges the jury to decide or render a verdict. The verdict is the decision of the jury and on its own has no force. Once the jury renders or announces its verdict in court, the judge then enters judgment on the verdict. The judgment is written record of the finding that the defendant is liable and responsible for paying damages to the plaintiff.

**14. What is an appeal? Define appellant (petitioner) and appellee (respondent).**

Either party may be dissatisfied with the findings of the court. Either party may appeal the decision of the trial court stating that some error was made at trial that must be corrected. An appeal is made by filing a notice of appeal within the appropriate time frame to the proper appellate court. The appellant or petitioner is the party filing the appeal. The appellee or respondent is the party responding to the appeal

**15. Describe the following possible decisions by an appellate court: (a) affirm, (b) reverse and (c) reverse and remand.**

When the appellate court affirms the trial court it says there was no error made at trial. When it reverses the trial court it determines an error was made. To reverse and remand means an error was made and further proceedings must be conducted to correct that error.

**Topic : Administrative Law****Topic Objective:**

At the end of this topic student would be able to:

- Understand what is an administrative agency and who creates administrative agencies
- Learn about the differences between general government regulation and specific government regulation.
- Understand the difference between substantive rules, interpretative rules and statements of policy.
-

**Definition/Overview:**

**Administrative law:** Administrative law is the body of law that governs the activities of administrative agencies of government. Government agency action can include rulemaking, adjudication, or the enforcement of a specific regulatory agenda. Administrative law is considered a branch of public law. As a body of law, administrative law deals with the decision-making of administrative units of government (e.g., tribunals, boards or commissions) that are part of a national regulatory scheme in such areas as police law, international trade, manufacturing, the environment, taxation, broadcasting, immigration and transport. Administrative law expanded greatly during the twentieth century, as legislative bodies worldwide created more government agencies to regulate the increasingly complex social, economic and political spheres of human interaction.

**Key Points:****1. What is an administrative agency? Who creates administrative agencies?**

An administrative agency is an organization created by federal or state legislative or executive branches of the government. Agencies consist of professionals who are expert in a particular field and thereby the best qualified to interpret statutes which regulate and control that industry or field.

**2. What is the purpose of an administrative agency? Explain.**

The goal of the agency is to have experts interpret and apply statutes in highly technical areas, such as environmental protection and automobile safety. Agencies accomplish this goal by issuing rules and adopting regulations to enforce and interpret the statutory law they are responsible for. Regulations can include both substantive law (issues) and procedural law (how to file a claim).

**3. Describe the difference between general government regulation and specific government regulation. Give an example of each.**

General government regulation is that regulation which applies to business and industry generally. Specific government regulation refers to those agencies created to monitor specific regulated industries. The National Labor Relations Board oversees the use of labor and

employees throughout the national, specifically the organization of unions, minimum wage, maximum hours and child labor. By contrast, The Federal Communication Commission regulates the radio and television industries only.

**4. What is the Department of Homeland Security? Who created this agency? What are its main purposes?**

Following the attacks of September 11, 2001, the President, by Executive Order, created the Office of Homeland Security. Shortly thereafter, Congress passed the Homeland Security Act of 2002 which authorized the creation of a cabinet level Department of Homeland Security. The main purpose of the agency is to prevent domestic terror attacks, reduce vulnerability to terror attacks, minimize the harm caused by such attacks and assist in the recovery if a terror attack occurs.

**5. What is the Administrative Procedure Act (APA)? What are its functions?**

The Administrative Procedure Act was enacted by Congress to define the procedures an agency must follow in conducting its business. It includes requirements of notice and hearing for agency action, rules for conducting adjudications and procedures for rule making. The goal is to make the operations of agencies transparent.

**6. Describe the difference between substantive rules, interpretative rules and statements of policy.**

Substantive rules are regulations which have the force of law. Those covered by them must adhere to them or suffer the consequences such as fines, penalties and imprisonment.

Interpretive rules are rulings of the agency which explain existing statutory language.

Interpretive rules create no new law but explain existing law. Statements of policy announce a future course of action the agency seeks to pursue and do not have the force of law.

**7. What is an administrative subpoena? Describe situations where administrative searches are permitted. Are warrantless administrative searches ever allowed? Explain.**

An administrative subpoena, like a judicial subpoena, is an order from the agency directing recipient to disclose, produce or make available the information requested.

Administrative searches may be critical to the regulation of certain industries and compliance with agency regulations. Agency inspections are searches subject to the limitations of by the Fourth Amendment and are considered reasonable where the party agrees to the inspection or the inspection is conducted based on a validly issued search warrant. Warrantless searches are permissible in emergency situations, in certain businesses due to the nature of the industry (firearms) and in hazardous industries because of the nature of the business (coal mines, nuclear power plants).

**8. What is an Administrative Law Judge (ALJ)? What does and ALJ do? What is an order?**

An administrative law judge (ALJ) conducts proceedings or hearings on behalf of the agency. He hears cases involving the rules and regulations of the administrative agency only. Hearings are conducted in much the same manner as a trial with both the agency and the respondent having the right to counsel and to present evidence and testimony which the ALJ hears. Following the hearing, the ALJ will issue an order which decides the case and sets forth the reasons for the decision. The order is final so long as no appeal is filed

**9. Are administrative agency actions subject to judicial review? If so, what requirements must be met? What does the final order rule provide?**

Yes, actions of the agency are subject to review. Appeals may be heard by the agency or the federal court depending on the requirements set out in the Administrative Procedures Act or the regulations governing the agency. Generally the following conditions must be met for judicial review of agency action: (a) case must be ripe for review, (b) exhaustion of all administrative remedies and (c) decision of agency must be final. The final order rule requires that there be no other relief available from the agency, in essence leaving the litigant with no other recourse than the court.

**10. Describe what the following federal statutes provide: (a) Freedom of Information Act, (b) Government in the Sunshine Act, (c) Equal Access to Justice Act and (d) Privacy Act.**

The Freedom of Information Act was enacted by Congress to allow the public access to documents in possession of federal agencies. The Act also requires agencies to publish their procedures, rules, regulations, interpretations and other information in the *Federal Register*.

The Government in the Sunshine Act was enacted to open agency meetings to the public.

The Equal Access to Justice Act was enacted to protect persons from harassment by federal agencies. Any person subjected to unjustified agency action may sue the agency and recover damages including attorneys fees and costs. However, the agency action must be proven to be outrageous.

The Privacy Act permits agencies to maintain information about an individual but only that information which is relevant to and necessary to accomplish an agency purpose. Individuals do have the right to access and correct their files.

**11. Describe the Food and Drug Administration (FDA). What does it regulate? Give some examples.**

The Food and Drug Administration (FDA) is a federal agency charged with regulation of food, drugs, cosmetics and medicinal devices. Areas of regulation include testing, approval, manufacture, distribution and sale of the covered goods. The FDA has power to issue search warrants, inspect, seize, recall and condemn goods, and issue injunctions and criminal penalties for violations. The FDA regulates food by prohibiting the shipment, distribution or sale of putrid or unfit food. It also regulates labeling of food. The FDA is responsible for the testing, manufacture, distribution and sale of drugs. As for cosmetics, the FDA requires labeling and removes products that have unsubstantiated claims (regrowthair). Finally, the FDA regulates medical devices such as pacemakers, surgical equipment and other health devices.

**12. Describe the Equal Opportunity Employment Commission (EEOC). What does it regulate?**

The Congress enacted a set of laws designed to eliminate discrimination in employment based on race, sex, age, religion; i.e. to guaranty equal employment opportunity to all. Along with the legislation, Congress created the Equal Opportunity Employment Commission (EEOC), an agency with the power to enforce the antidiscrimination legislation. The EEOC is authorized to investigate claims of discrimination, interpret statutes, encourage conciliation between an employee and employer and file suit against a violating employer.

**13. Describe the Consumer Product Safety Commission (CPSC). What does it regulate? Give some examples.**

The Congress enacted the Consumer Product Safety Act to protect consumers from harmful or dangerous consumer goods. The Consumer Product Safety Commission (CPSC) is the agency charged with the responsibility to enforce the act through adoption of rules and regulations interpreting the statute. The CPSC conducts research into safety of products (car crash tests), regulates potentially dangerous products (safety warnings on ladders), issues safety standards (requirement that no child under 12 years old or 100 pounds sit in the front seat of a car with front impact airbags), recalls products and requires a manufacturer to take corrective measures with regard to defective products.

**14. Describe the Federal Trade Commission (FTC). What does it regulate? Give some examples.**

Congress enacted legislation to ensure sellers of goods were not using unfair or deceptive trade practices when dealing with consumers. The Federal Trade Commission (FTC) can bring charges against a business for using unfair trade practices. The result is usually a cease and desist order, corrective advertising and a refund to consumers misled.

**15. Describe the Environmental Protection Agency (EPA). What does it regulate? Give some examples.**

Congress enacted statutes to protect air, water, land and wildlife from pollution and authorized the creation of the Environmental Protection Agency (EPA) to coordinate the many provisions dealing with environmental protection. The EPA does so through rule

making, regulations and adjudications. Some examples of the work of the EPA include the requirement of an environmental impact statement for all federal legislation that will impact on the quality of the human environment, regulation of air and water standard for emissions, manufacturer of toxic substances, disposal of hazardous wastes and protection of endangered species.

In Section 3 of this course you will cover these topics:

- Interviewing And Investigation Skills
- Traditional, Computer, And Internet Legal Research
- Legal Writing And Critical Legal Thinking
- Torts

### **Topic : Interviewing And Investigation Skills**

#### **Topic Objective:**

At the end of this topic student would be able to:

- Understand what are the legal and ethical issues involved for the paralegal when the potential client says they just want a quick answer to the question,
- Learn about what is a screening interview and the potential ethical and malpractice issues
- Understand the ethical and/or legal implication of not advising a party that you are a paralegal and not a lawyer?

#### **Definition/Overview:**

**Interviewing and Investigation Skills:** Any communication that affects the rights and obligations of the client or potential client can be interpreted as legal advice which the paralegal may not give. Your state may make this an ethical violation or a crime.

#### **Key Points:**

**1. What are the legal and ethical issues involved for the paralegal when the potential client says they just want a quick answer to the question, Do I have a case? Explain fully including references to your state statute.**

The legal and ethical issue for the paralegal is the unauthorized practice of law. Any communication that affects the rights and obligations of the client or potential client can be

interpreted as legal advice which the paralegal may not give. Your state may make this an ethical violation or a crime.

## **2. What is a screening interview? What are the potential ethical and malpractice issues?**

A screening interview seeks to determine whether there is a fit between the attorney and the needs of the client. In many instances referral or word of mouth may serve as a first level screening; that is, someone perceives a good fit between lawyer, client and his dispute. Sometimes screening may result from telephone contact. Most often screening will be conducted by the paralegal meeting with and obtaining preliminary information from the client.

The paralegal must make clear her role as a paralegal, the limitations on what she can do and what the potential client can expect to happen after the screening interview. Further, a delicate balance must be maintained. The paralegal will need to obtain enough information to assist the attorney in deciding whether to take on the case but not too much to create an implied attorney-client relationship.

## **3. How is the implied attorney client relationship created? What are the critical issues for the law firm this relationship establishes?**

The implied attorney client relationship arises when too much information is taken from a client in the initial contact. Courts have held the client has a right to believe the attorney has accepted representation thus leading to the creation of the implied attorney client relationship. The client can expect confidentiality and conflict of interest rules will be observed by the law firm. Particularly problematic are situations where the statute of limitations is close to expiring. If the implied relationship comes into effect, the attorney must take action and file a lawsuit within the statute of limitations or suffer the consequences of attorney malpractice.

## **4. Does the attorney have a duty to keep the name of clients confidential? Explain the ethical rules that apply.**

Yes, the attorney has a duty to maintain as confidential the identities of those who consult with him whether or not they retain his services. This duty is analogous to the duty to keep the communications of client confidential. Just as individuals expect what is said to be

maintained confidentially, they also have a right to seek the advice of counsel without fear that fact of seeking that legal advice will be disclosed.

**5. What are the ethical and/or legal implication of not advising a party that you are a paralegal and not a lawyer?**

There is the potential for the unauthorized practice of law. There is also the potential that the client will be misled as to the skills and services the paralegal is able to provide. Again this misleading impression can result in the unauthorized practice of law.

**6. What is the difference between listening and hearing? Explain.**

We often hear the words that someone is saying but fail to listen to the meaning. I feel great. The words mean one is feeling great but the tone, inflection and body language may indicate the opposite is true. Skills of a good listener include focusing on the speaker and blocking out distractions, not assuming facts or finishing sentences of the speaker, not making judgments or reacting emotionally and listening with an open mind.

**7. How can stereotypes prevent hearing what is said in an interview?**

Stereotypes represent preconceived notions and judgments we have about others. These types of judgments can inhibit the ability of the interviewer to listen with an open mind.

**8. What effect do cultural issues play in the interview process? Explain.**

Different cultures place different values on men, women, eye contact, crying and other nonverbal messages. To the extent the interviewer is ignorant of these differences, he may misinterpret what is being said or may make the client uncomfortable, in either event the free exchange on information is negatively impacted.

**9. What are the strategic reasons for using leading questions and using open ended questions? Give an example of when each would be better used than the other type.**

Leading questions are used to suggest an answer. Open ended questions offer the interviewee the opportunity to tell his story or describe what he saw. The leading question may be used as a short cut to direct the witness to a particular time and place (You were on your way to work on October 10, 2006) or it may be used on cross examination to suggest an answer (You saw

the defendant speed through the intersection). An open ended question will ask where were you going, what did you see, giving the witness an opportunity to describe the events.

**10. In representing a client, is it acceptable or required to ignore an ethical or moral consideration? Explain giving an example and reason for breaching each.**

Each student will provide varying answers as to moral considerations. Some may say they are unable to ignore their moral obligations. Others may say that must ignore their moral obligations to best serve the interests of the client. This is particularly true in representing criminal defendants. All should say that while morals are a moving target, varying from one individual to the next, ethics require them to conduct themselves in a particular manner. For example, paralegals must maintain as confidential the information communicated to them by a client. However, where the client discloses information about the future commission of crime, the legal team has an ethical obligation to breach the duty of confidentiality and advise the appropriate law enforcement authorities. Here the safety of others outweighs the duty of confidentiality.

**11. Explain fully the ultimate reason for conducting a thorough investigation of a case. What ethical issues dictate how an investigation is to be conducted?**

Before advising a client on the appropriate remedy for their dispute, the law firm must investigate the claim. One goal of investigation is to confirm from independent sources what really happened. Investigation will also determine the existence of facts necessary to establish legal claims, as well as disclose the potential defenses. Failure of the law firm to confirm the existence of facts necessary to support a legal claim can result in filing a frivolous lawsuit, sanctions from the court for doing so and a malpractice claim from the client. The rules of professional responsibility require an attorney to use reasonable skill and diligence when representing the interests of the client. A thorough investigation is part of that duty.

**12. How can the Internet be used effectively to conduct an investigation of a case? Explain using examples of traditional methods that could also be used.**

The Internet has made available at our fingertips information that we might otherwise not have access to. For example, one can search telephone directories all across the nation via the

Internet. Year ago, a trip to a library that kept telephone directories for other states would be required, if you could find such a library in your community.

**13. Using the Facts in the *Palsgraf* case in Appendix A, prepare a list of witnesses who might be called in the case. Prepare an interview checklist for each witness.**

Witnesses: Miss Palsgraf

the train attendants i.e. one who pushed and one who pulled

the two men running to get the train

anyone who saw what happened

any healthcare providers concerning treatment of Miss Palsgraf

a representative of the train company to ask about the policy for those running to catch a train and treatment of packages all these witnesses would be questioned as to name, address and contact information, a description of what they saw

**14. Using the Facts in the *Palsgraf* case in Appendix A, prepare an investigative checklist including a list of the evidence that should be gathered in the case, including a list and description of any photographs needed.**

Evidence: the remains of the package, if any

The scale

Medical records

Records of any investigation, whether by law enforcement or the railroad company

Photographs of the platform from all vantage points; where victim was standing, where explosion occurred, where package was dropped

A reconstructed scale model of the train platform showing the train, scale, locations of victim, train attendants, gentlemen running for train, where pushed and where package dropped.

**15. In conducting an interview, when would it be appropriate to dress in Friday casual attire?**

Casual dress may be appropriate when going to inspect the site of an accident or interview witnesses in their homes. Casual dress may be appropriate in the law firm, depending on the client and the nature of the relationship the legal team has with the client.

**16. Why is it important to visit the site of the accident in a motor vehicle case being prepared for trial?**

It is important to see the site of the accident to have a better understanding of what the conditions were at the time of the accident. What obstructions are there, what are the road conditions, difficulty in seeing traffic controls devices, etc. One important consideration is to go at or about the same time of day and under the same weather conditions as both can impact on the appearance of the scene. Also there is the chance of encountering a witness, the jogger out for his regular run who might have witnessed the accident.

**17. Under what circumstances might it be advisable for someone else in the firm to handle an interview with a client or witness?**

When the paralegal has a strong emotional or moral consideration that will prevent her from objectively listening to the client or witness, another individual should conduct the interview. Similarly, if there is a cultural reason that the client or witness may not speak freely to the paralegal, perhaps another individual would be more appropriate to conduct the interview.

**18. Why would someone feel a moral obligation not to answer questions in an interview?**

Morally, some may not want to provide information that would hurt a family member.

**19. Why would a law firm hire an expert witness and not call that person as a witness at trial?**

Law firms often hire experts to be a part of the legal team. These experts are engaged to educate the legal team about highly technical areas like the conductivity of electricity. As a member of the legal team the information shared with the expert is protected by the work

product doctrine. This expert can educate the legal team and evaluate the claim keeping all the information confidential.

**20. How useful is the Freedom of Information Act in obtaining state or local government documents? Explain.**

The Freedom of Information Act applies to information maintained by the federal government and its agencies. It would not be helpful in acquiring information from state and local governments. However, many states have enacted similar legislation.

**21. Can a client restrict the use of information obtained as part of the investigation in preparation for trial even if doing so will have adverse consequences in the opinion of the attorney? Why or why not?**

The client, with the advice of counsel, gets to make the decisions in the furtherance of the representation. This authority of the client may conflict with what the attorney sees as being in the client's best interest. It is difficult for the legal team to remember as times but it is the client's case. The more difficult issue would be where there is an legal or ethical obligation to disclose the information and the client refuses. In that event, the attorney must persuade the client of the obligation to disclose. If unsuccessful, the attorney may have to resign from the representation.

**22. What are the issues and potential problems in using a trial notebook?**

A trial notebook is a traditional paper format for handling information needed at trial. Is it usually a simple notebook with sections for witnesses, exhibits, trial briefs, pleadings and research. For larger cases a single notebook may not be enough and a box file may be need. In either event the storage of a large amount of materials and the time to sort through when documents are needed in a hurry can be a downside of this form of organization.

**23. How does the use of case management software improve the effectiveness of the legal team? Who has the ultimate responsibility for the management of the case file when using case management software?**

Case and practice management software serve a number of purposes. They allow each member of the legal team to have access to the information from office and remote

locations. As all documents are scanned into an electronic format and stored on the computer they can be retrieved by a search engine. Most programs also include practice management features like attorney and paralegal time record keeping and billing, calendaring, conflict checking, contact management.

The ultimate responsibility continues to lie with the attorney.

### **Topic : Traditional, Computer, And Internet Legal Research**

#### **Topic Objective:**

At the end of this topic student would be able to:

- Why does a paralegal have to be familiar with both traditional and electronic research tools and methods?
- Why is knowledge of the underlying law in an area important in constructing a question for online research?
- How does the use of connectors help in conducting online research? Give an example.
- Why must researchers clearly understand the question they are being asked to research? How can they be certain they do?

#### **Definition/Overview:**

**Traditional, Computer, and Internet legal Research:** Traditional, Computer, and Internet legal Research is the study about the trend toward electronic research, the paralegal should be familiar with traditional research method for a number of reasons. Not every law office has access to the latest computer resources. Sometimes computer resources will not be available. Finally, use of traditional research methods develops a beginning researchers vocabulary and the most effective computer research uses words effectively.

#### **Key Points:**

##### **1. Why does a paralegal have to be familiar with both traditional and electronic research tools and methods?**

Computers are everywhere and have changed the delivery of legal services. This is particularly true in the area of legal research where volumes of printed material can be

searched in seconds. Even with the trend toward electronic research, the paralegal should be familiar with traditional research method for a number of reasons. Not every law office has access to the latest computer resources. Sometimes computer resources will not be available. Finally, use of traditional research methods develops a beginning researchers vocabulary and the most effective computer research uses words effectively.

## **2. Why does the paralegal have to know how quickly changes in statutory and case law are updated by online and traditional primary and secondary sources?**

The legal team is obligated to present the current state of the law to the court under the Duty of Candor. Therefore it becomes important to know how current the statutory and caselaw is that one is relying upon, whether it remains good law or has been recently changed.

## **3. Why is knowledge of the underlying law in an area important in constructing a question for online research?**

Knowledge of the underlying law will assist the researcher in effectively selecting words and terms to include in search queries.

## **4. How can a researcher be certain that a case that seems to be on point is still the current caselaw?**

Research requires a researcher to update her results. This can be accomplished with traditional sources such as Shepards or it may be conducted online. Many online services have a feature (red, yellow green) which appears in the upper corner of the documents first screen. This tells the researcher whether the item remains good law or has been called into doubt. The researcher can further investigate via the online service.

## **5. Why should secondary sources not be relied upon in citing binding authority?**

Secondary authority is not the law. Secondary authority explains the law and is useful to learn about a particular area of the law. It is written by others who interpret the law and therefore cannot be relied on a binding authority.

**6. Why would a researcher use a traditional paper resource before using an online research tool?**

A traditional paper resource may assist the researcher in understanding the area of law and developing words to use in a search query.

**7. How does the use of connectors help in conducting online research? Give an example.**

Terms and connectors tell the computer to search for documents containing a combination of words. It makes the search more effective by limited the number of documents that will satisfy the query. For example, using the word AUTOMOBILE alone will probable yield a response from the search engine that there are too many documents that satisfy the query. Using the combination NEGLIGENCE AND AUTOMOBILE AND PASSENGER BUT NOT DRIVER will yield cases about auto accidents in which the passenger was injured or negligent.

**8. Why might an identical search query return different results?**

The reason for different results may be based on the database the search engine is searching. Another reason is the way in which the search engine conducts the search.

**9. Why must researchers clearly understand the question they are being asked to research? How can they be certain they do?**

It is easy to misunderstand the request made by the supervising attorney. It is just as easy for the supervising attorney to fail to make his request clear. The best method is to restate orally or in writing what the research request is. The idea is to get both the attorney and the paralegal to focus on the request.

**10. Under the theory of *stare decisis*, on which courts would the decisions of a court have binding effect? Would a decision in a case be binding on future cases if the decision was only available in the clerks office?**

Binding authority flows downward from the highest appellate court to the intermediate appellate courts and trial courts. Likewise, decisions of the intermediate appellate courts are

binding on the trial courts. No, in order for the decision of a court to be binding on other courts it must be authorized by the court for publication.

**11. Would your answer be the same if the decision was available in the clerk's office at first but then available in printed form or on line at a later date? When would the decision become effective as precedent?**

Once released for publication the opinion has value as precedent for other courts.

**12. Where is the law found?**

The law is found in constitutions, statutes, administrative regulation and case decisions.

**13. Who makes the law under the United States system?**

Sources of law in the United States are the U.S. Constitution, statutes enacted by the Congress, executive orders issued and treaties entered by the President, administrative rules, regulations and adjudications of Administrative Agencies and case decisions of the various courts. Both the federal and state governments are sources of law.

**14. What is meant by a bicameral legislature?**

Bicameral refers to the two (2) legislative bodies that enacted legislation in the Congress, namely; the House of Representatives and the Senate.

**15. In legal research what is meant by primary source?**

A primary source is the law itself. Constitutions, statutes, administrative rules and regulations and case law are all primary sources of law.

**16. What is a treatise? Is it a primary source? Explain.**

A treatise is a scholarly writing often used as a text book in law school that provides a broad overview of a particular area of law (e.g. *Prosser on Torts*). A treatise is a secondary source since it contains an interpretation or explanation of the law rather than the law itself.

**17. What is a headnote in legal research? Is it a primary source? Explain.**

A headnote is commentary prepared by the publisher of case decisions. Headnotes appear before the text of the court opinion and usually contain a synopsis of the case and legal principles which the case resolves. Headnotes are not the law but represent another person's interpretation of what the court said. They can be used as a finding tool to lead the researcher to helpful law. Using headnotes can lead to taking the court's opinion out of context and inaccurately representing the state of the law. This violates the ethical obligation of the legal team to be truthful toward the judge.

**18. What are dicta? What is its effect on other courts? Explain.**

Dicta are statements of the court contained in its written opinion. However, these statements have little or nothing to do with the court's reasoning for decision in the case. Dicta can be used as a persuasive authority but has no binding effect since it is not related to the legal dispute resolved by the court.

**19. Of what weight do courts give secondary sources? Explain fully.**

Secondary sources are not binding on the court. They can be used to persuade the court. In some instances, the court may not have considered a legal issue before. The secondary source can be used to persuade the court of the way in which the dispute should be resolved. Another way of using secondary authority is to persuade the court to consider a previously decided matter in another way. Often the argument is made that the weight of authority (treatises, law review articles, legal encyclopedias and even other jurisdictions) have reviewed the issue and decided it differently.

**20. Why are finding tools important to the legal researcher? Give an example of how a finding tool might be used.**

Finding tools are secondary sources that aid researchers in finding caselaw and statutes. Typically arranged alphabetically by topic, digests are useful in researching for case law. Digests and other research materials usually contain indexes to further aid research. An example would be using the Popular Name Index to locate statutes and cases by their popular names such as Miranda or American with Disabilities Act.

**21. On which courts would the decisions of a court have binding effect under the theory of *stare decisis*?**

Binding authority flows downward from the highest appellate court to the intermediate appellate courts and trial courts. Likewise, decisions of the intermediate appellate courts are binding on the trial courts.

**22. Would a decision in a case be binding on future cases if the decision was only available in the clerks office?**

No, in order for the decision of a court to be binding on other courts it must be authorized by the court for publication.

**23. Would your answer be the same if the decision was available in the clerks office at first but then available in printed form or online at a later date? When would the decision become effective as precedent?**

Yes, once released for publication the opinion has value as precedent for other courts.

**24. Do unpublished opinions have precedential effect?**

Most jurisdictions hold that opinions must be published to have effect as precedent. The problem becomes how to treat cases that are not authorized for publication but are posted on the Internet via the courts official web site or a legal search engine like WestLaw. Guidance on the value of these opinions will come from the court issuing the opinion and the court one wishes to use it as precedent in.

**25. Using the facts from the *Palsgraf* case in Appendix A, prepare a search query using connectors to locate law or a similar case in your jurisdiction. Run the search using an online legal research service, if available.**

The result will vary by student. A typical query might be Negligence and foreseeability or negligence and causation and foreseeability

## Topic : Legal Writing And Critical Legal Thinking

### Topic Objective:

At the end of this topic student would be able to:

- Understand critical legal thinking
- Learn about the material facts
- Understand the immaterial fact
- Study memorandum of law and court

### Definition/Overview:

**Legal writing:** Legal writing is a type of technical writing used by legislators, lawyers, judges, and others in law to express legal analysis and legal rights and duties.

### Key Points:

#### 1. What is critical legal thinking? Explain and give an example.

Critical legal thinking involves the ability to recognize the material facts, identify the relevant legal principles and apply the law to the facts to reach a conclusion to the dispute.

Critical legal thinking defines and describes the thought process that allows attorneys and paralegals to meet with a client and determine whether there is a legally recognized claim. For example, a client reveals she was on her daily walk when a neighbors pit bull jumped a fence and bit her. She has a torn Achilles tendon, which will take four months to heal and may result in permanent damage. She has puncture wounds which will heal but leave scars. Doing some legal research will disclose that owners of dogs are responsible for injuries caused by the dog unless the dog was teased. Additional investigation reveals the dog was not teased but was mistreated by the owner, being left out on hot days with no water or shade. Applying the law to the facts, it is likely the client will be able to sue the dog owner and recover for her injuries.

## **2. Why is it important to have all the material facts before beginning the research to prepare a memorandum of law?**

Understanding all the facts enables the paralegal or lawyer to review court cases and statutes to determine which may be applicable to the clients case.

## **3. What is meant by material facts? Give an example of a material fact.**

Facts are those things which actually occurred, not what one thinks may have happened.

Material facts are those facts, which, if changed, would affect the outcome of the case. In the example above the breed of the dog may be a material fact; vicious dogs may have different rules apply to them. Another material fact may be whether the dog was restrained and if the restraint failed. This fact may change the liability of the owner.

## **4. What is meant by an immaterial fact? Give an example.**

Immaterial facts are facts that have no bearing on the outcome of the case. In the example above, the color of the dog and the clothing worn by the client would be immaterial facts.

## **5. What is the goal of legal writing?**

The goal of legal writing will often depend on the type of document being written and the audience to whom it is directed. Skilled legal writing states facts accurately, explains the law, and persuades the reader to resolve a dispute in a particular manner. The writing style should be concise and clear.

## **6. Why should headnotes not be used in legal writing?**

A headnote is commentary prepared by the publisher of case decisions. Headnotes appear before the text of the court opinion and usually contain a synopsis of the case and legal principles which the case resolves. Headnotes are not the law but represent another persons interpretation of what the court said. Using headnotes can lead to taking the courts opinion out of context and inaccurately representing the state of the law. This violates the ethical obligation of the legal team to be truthful toward the judge.

**7. How important is it to Shepardize the cases in a memorandum of law or brief? When should this be done? Why?**

Updating research results is vital to the legal team and part of the ethical duty of candor to the court. The attorney must present the current state of the law. That means the research results should be Shepardized or updated before the brief is submitted to the court. The research one relies on should be checked before appearing in court, as well.

**8. How are the memorandum of law and court brief similar? How are they different? Explain fully.**

Both documents present the facts and legal issues facing a client. The memorandum of law is a document prepared for use in the law firm. It should present law which both supports and hurts the clients position. The memo should be written in an objective fashion with the purpose being to evaluate the legal basis and likely success of the clients claim. The brief is written advocacy of the clients position. The brief is written to present the clients arguments to the court and to persuade the court to decide in the clients favor.

**9. Contrast and compare the fact situation in the opening scenario and the Alaskan case law case of *Whiting v. State* found in the Chapter. What are the similarities and what are the points that could be used to argue the law does not apply?**

Both situations involve the question of what is the necessary behavior to determine that one was operating a motor vehicle while under the influence of alcohol. The situations differ significantly however in the *Whiting* involved a boat rather than an automobile. In *Whiting*, the boat had been moved while in the opening scenario there is no evidence that the car was moved.

**10. How does the general duty to inform the court preserve the integrity of the judicial process? (*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238).**

The integrity of the court and its rulings are dependant on the truthfulness of the litigants and attorneys that appear before it. The effectiveness of the court to promote the rule of law is dependent on the publics perception that the court is fair, does not apply the wrong law and is not a place where fraud is the basis of decision making. Thus, the duty of candor facilitates these goals, instilling confidence in the honesty of the system.

**11. Are sanctions against attorneys for failing to observe a duty of candor to the court an appropriate remedy? (*Beam v. IPCO Corp.*, 838 F.2d 242 (7<sup>th</sup> Cir. 1998)).**

Sanctions are an appropriate remedy when attorneys violate the duty of candor. However, sanctions should be carefully and cautiously imposed. Where an attorney makes a unique argument, seeking to change the course the courts are on, sanctions may not be appropriate. Change and justice are at the heart of the legal system. To impose sanctions may silence the creative arguments made to change the way the court considers and decides issues. So long as there exists a basis in the law or a colorable argument, sanctions should not be imposed.

**12. What are the relevant facts in the *Palsgraf v. LIRR* case found in Appendix A? What facts are interesting but not relevant facts? Create a computer search query using the facts in the *Palsgraf* case and search the case law of your jurisdiction using these relevant facts. Prepare a short brief of the latest case you find, including proper *Bluebook* and *ALWD* citation format.**

The relevant facts include the location and size of the scale, where Ms. Palsgraf was standing, the package and its contents, the location of the explosion, the activities of the train attendants in helping passengers onto a moving train and the policies of the railroad company for packages and loading moving trains. The weather and precise time of the incident are not relevant.

Search queries, results and briefs will vary by student and jurisdiction. The expectation is that students will do research on the requirement of foreseeability as relates to causation.

**13. What question should a paralegal ask before preparing a memo of law or a brief?**

The paralegal should make certain she understands the assignment. This includes understanding the legal issue the supervising attorney has assigned, for whom the document will be written and any limitations such as time or due date.

**14. Why should both sides of a case be presented in an office memo of law?**

The memorandum of law is used by the law firm to evaluate the basis and likelihood of success of a client's claim. As such is the case, it is important to understand the law which helps the client and anticipate the defenses that may be presented by opposing counsel. This

memo will be the starting point for other documents prepared for the court. Also law firms often maintain a database of legal research for future reference. The well researched and objectively presented memo can save a great deal of time for similar disputes the law firm takes on in the future.

**15. Why would an attorney request that all parallel citations be listed for each case listed in a memo of law?**

Many courts require the inclusion of parallel citations in a brief submitted to the court. Obtaining those parallel cites while doing the office memo will save time when the legal team is under pressure to complete a brief for the court.

**16. How would knowing the intended audience influence the writing of a memo of law or a legal brief?**

Knowing the audience will determine the style of writing. When writing for the court or opposing counsel, the paralegal can use legal terms without fear of confusing the reader. For a client, the paralegal must explain concepts rather than rely on legal terms. For example, the term assumption of the risk is a concept an attorney or judge would understand but a client would not. For the client an explanation of the concept will be more appropriate.

**17. What level of confidentiality should be attached to the preparation and handling of a memo of law? Why?**

The preparation of a memo of law expresses the thought processes of the attorney and legal team with regard to the legal claims of the client. It should be held in the highest confidential terms. When in the law library, you never know who is sitting next to you or may overhear your conversation. It is important to protect the clients confidential communication and the attorneys thought process in resolving the dispute.

**Topic : Torts**

**Topic Objective:**

At the end of this topic student would be able to:

- Understand the meaning of tort.

- Learn about negligence. And the elements that must be proven to find negligence. To understand duty of care and breach of duty of care.
- Learn about the doctrine of strict liability.

### **Definition/Overview:**

**Tort law:** Tort law is the name given to a body of law that addresses, and provides remedies for, civil wrongs not arising out of contractual obligations. A person who suffers legal damages may be able to use tort law to receive compensation from someone who is legally responsible, or "liable," for those injuries. Generally speaking, tort law defines what constitutes a legal injury and establishes the circumstances under which one person may be held liable for another's injury. Torts cover intentional acts and accidents.

### **Key Points:**

#### **1. Define the word *tort*.**

Tort is a French word meaning wrong. It has come to refer to all wrongs other than criminal behavior. Tort lawsuits seek damages to compensate a victim for wrongs done to his person or property. Remedies for tort lawsuits include monetary damages to compensate for medical expenses, lost wages, pain and suffering; punitive damages to punish the wrongdoer for outrageous conduct, and; injunctions and equitable remedies to stop or prevent behavior.

#### **2. What is an intentional tort?**

Intentional torts are wrongs committed with the intention to do some act and that act results in injury to a victim.

#### **3. Describe the intentional torts of assault and battery.**

Assault is the intentional tort that results from behavior which threatens immediate harm or offensive contact. It includes any action that arouses a reasonable apprehension of imminent harm. No physical contact is required, just the threat of immediate harm.

The intentional tort of battery is the unauthorized and harmful offensive contact of another. Battery requires a physical touching and includes touching by use of an object. There is no requirement that the victim be the intended target of the actor.

**4. Define false imprisonment. What do merchant protection statutes provide? What requirements must be met to be protected by a merchant protection statute?**

False imprisonment is the intentional confinement or restraint of another without authority, justification or consent. It may be accomplished by the use of physical barriers or by threat of force.

Merchant protection statutes permit shopkeepers to detain suspected shoplifters for purposes of self help and investigation, without fear of legal claims for false imprisonment. In order for the merchant protection statutes to be applicable the merchant must have reasonable grounds for suspecting shoplifting occurred, the suspect must be detained for a reasonable time and the investigation must be conducted in a reasonable manner.

**5. Describe the following intentional torts: (a) defamation of character, (b) misappropriation of the right to publicity; (c) invasion of the right to privacy, and; (d) intentional infliction of emotional distress.**

Defamation of character recognizes and protects the value of an individual's reputation. It requires proof that the defendant made an untruthful statement about the plaintiff and that the statement was published to a third party. In this context, published means either an oral or written statement made to a third party repeating the untruthful statement about the plaintiff. Opinion is not defamation. Truth is always a defense to defamation. Public officials and public figures must also prove that publication of an untrue statement was done with malice.

Misappropriation of the right to publicity refers to an attempt by one to take and use, without permission and for commercial purposes the name, likeness or identity of another living person.

Invasion of the right to privacy is the tort which recognizes the right of the individual to be free from unwarranted or undesired publicity.

Intentional infliction of emotional distress occurs when a person whose extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. The behavior must be so extreme as to go beyond the bounds of decency or be regarded as intolerable behavior in a civilized society. The mental distress suffered must be severe and in some states be accompanied by physical manifestation of the distress.

**6. What is negligence? What elements must be proven to find negligence? Describe duty of care and breach of duty of care.**

Negligence is a theory of tort law that states a person is liable for harm that is a foreseeable consequence of her actions. Four elements must be proven to find negligence, namely: (a) duty of care, (b) breach of the duty of care, (c) injury to the victim and (d) the duty breached must have caused the injury to the victim.

The duty of care is the obligation we all owe to others to not be the cause of unreasonable harm or risk of harm. The duty is based on the reasonable person standard or what the objective careful and conscientious person would have done in the same circumstances.

The breach of duty of care states, once a duty of care is owed from the defendant to the plaintiff, negligence arises where the defendant failed to exercise the care required. The breach of duty can be an act or a failure to act.

**7. For a plaintiff to win a tort lawsuit, must the plaintiff have suffered injury? Explain.**

Yes. Injury to the plaintiff is a required element of negligence. The breach of a duty of care does not give rise to a law suit unless the plaintiff has been harmed.

**8. What is the difference between causation in fact (actual cause) and proximate cause (legal cause)?**

Causation is the legal term for the requirement that the duty breached caused the injury suffered by the plaintiff. There are two types of causation: causation in fact and proximate cause. Causation in fact requires that the duty breached be the actual cause of the harm suffered by the plaintiff. Proximate cause asks whether the injury was a foreseeable consequence of the defendants breached duty.

**9. Describe the following special negligence doctrines: (a) professional malpractice; (b) negligence *per se*; (c) *res ipsa loquitur*, and; (d) negligent infliction of emotional distress.**

Professional malpractice refers to negligence of professionals, like doctors, attorneys and accountants, in providing their services.

Negligence *per se* is a tort where violation of a statute constitutes breach of the duty of care. The statute represents the duty of care where it was enacted to prevent the type of harm suffered and the plaintiff was within the class of persons intended to be protected by the statute. Violation of the statute (duty) then represents breach of the duty of care.

Res ipsa loquitur arises in situations where the defendant is in control of and has superior knowledge of events surrounding injury. In these situations when an injury occurs, the occurrence raises a presumption of negligence on the part of the defendant. The plaintiff must prove defendant had exclusive control of instrument or situation causing injury and injury would not have occurred but for someones negligence.

Negligent infliction of emotional distress is a tort permitting recovery to a plaintiff injured when she witnesses a relative being killed or injured by the defendant. As a result of witnessing such events the plaintiff must have suffered severe emotional distress.

**10. Describe Good Samaritan laws. What public policy do these laws serve?**

Good Samaritan laws are state statutes that relieve medical professionals from liability for ordinary negligence when they stop to render aid to victims in emergency situations. These laws are designed to encourage those with proper medical training to stop and render aid to those in distress.

**11. Define the following parties: (a) invitees; (b) licensees, and; (d) trespassers. Describe the liability of landowners and tenants to each of these persons.**

Invitees are those individuals who are invited onto the land for benefit of both the land owner and the invitee. A typical example would be a diner eating in a restaurant.

Licensees are those who are on premises for their own benefit with the owners consent.

Landowners and tenants owe the duty of ordinary care to both invitees and licensees. That is, what a reasonable person would do in similar circumstances (shovel snow and de-ice walkway).

Trespassers are those without permission to enter land and are owed the duty to not willfully be injured by the landowner (no booby traps).

**12. Describe the following two defenses to negligence: (a) superseding event and (b) assumption of the risk.**

A superseding event is an event which is unforeseen and serves to cut off liability of ordinary negligence.

Assumption of the risk occurs when a plaintiff has knowledge of the specific risks associated with an activity and goes forward with the activity anyway. Accepting the risk cuts off liability of ordinary negligence.

**13. Describe the differences between contributory negligence and comparative negligence. Give an example of each.**

Contributory negligence is a doctrine that serves to deny the plaintiff recovery if his own negligence contributed to his injury. The harshness of the doctrine is tempered by the defendant possessing the last clear chance to avoid the accident. In that event, plaintiff's contributory negligence will not deny his recovery.

Comparative negligence is similar in that it seeks to address the responsibility of the plaintiff for his own negligence. However, the results under this doctrine do not deny plaintiff recovery. Instead, the jury assigns a percentage of liability to the defendant and to the plaintiff. The damages awarded are then reduced by the plaintiff's percentage of liability. Some states deny plaintiff recovery if her liability exceeds 50%.

If a jury awarded \$100,000 in damages and assigned 80% liability to defendant and 20% to plaintiff, under contributory negligence the plaintiff receives nothing. Under comparative negligence the plaintiff receives \$80,000.

**14. Describe the doctrine of strict liability. To what type of lawsuit does the doctrine of strict liability apply? Describe how strict liability differs from negligence.**

Strict liability is a theory of recovery that applies to sellers of goods. It simply requires that a seller who sells to a consumer a product which is in a dangerous condition is responsible for harm which results from the consumer's use of the dangerous product. The two major differences from traditional negligence are (1) the plaintiff is relieved from establishing the breach of duty of care and (2) liability extends from the seller through the chain of

distribution all the way back to the manufacturer of the product. Products liability lawsuits are based on strict liability theory.

**15. Describe the following types of product defects and give an example of each: (a) defect in manufacture; (b) failure to warn; (c) defect in design, and; (d) defect in packaging.**

Defect in manufacture requires a showing that the product was improperly assembled, or improperly tested, or inadequately checked for quality. An example would be a child's pull toy where the wheels fall off.

Failure to warn applies to products which are inherently dangerous because of the task they are designed to perform. Manufacturers must warn about these products' dangerous attributes. Warnings must be proper and conspicuous. An example would be the warning label contained on cleaning products. Defect in design refers to a defect that occurs when a product is improperly designed. For example, a car with seats that break away from the car frame upon impact in a collision is a defect in design. Defect in packaging refers to the duty to design safe packages that are tamper proof or if tampered with, the tampering can be easily detected. For example, the safety seal on cough syrup.

[WWW.BSSVE.IN](http://WWW.BSSVE.IN)