



**LITIGATION, INSURANCE AND  
TORT LIABILITY (LITL) PROGRAM**

**NOVEMBER 12, 2024 | 2:00 PM - 3:30 PM  
VIRTUAL EVENT**

**LITIGATION BASICS  
PART TWO**

## Session 2:

More Concepts and Definitions, Discovery Tools and Their Use in Motions, Expert Discovery, Alternative Dispute Resolution, Pros and Cons of Settling vs. Going to Trial, and the Appellate Process

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# Recap of Part I

## Civil Litigation Overview

To **litigate** means to conduct or defend a lawsuit. The person who starts the lawsuit is the **plaintiff**, and the person being sued is the **defendant**. There can be multiple plaintiffs or defendants.

Together, they are called the **parties** in a lawsuit.

(Sadly, there's no cake, confetti, or DJ – just plaintiffs, defendants, impatient judges, and lots of paperwork!)



# Recap of Part I

## Phases of a Civil lawsuit

Phase	Tasks
Pre-suit	Investigate; form strategies; assemble evidence; explore settlement; choose forum
Preparation	Pleadings; discovery; motion practice; pretrial practice
Trial	Presentation of evidence; verdict; post-verdict motions; judgment
Post-Judgment	Appeals; collections procedures

# More Concepts and Definitions

## Pre-suit Phase: Investigation and Fact Gathering

A certain minimum level of factual information is necessary merely to be able to file a lawsuit. This includes knowing the names and residences of the people you are suing and understanding **“who did what & to whom”** to describe the dispute accurately.

Ethical rules and FRCP, Rule 11(b) mandate that a lawyer signing a complaint must have a reasonable basis for believing that the claims are well grounded in both fact and law.

# More Concepts and Definitions

## Pre-suit Phase: Prerequisites to Suit

Injured parties cannot always launch a lawsuit at will, particularly when the target is a government agency. Historically, the government had **sovereign immunity**, meaning it couldn't be sued.

Although this immunity has largely been removed, statutes still require notice of claim before suing a government agency. Prerequisites for suing the federal government are found in the **Federal Tort Claims Act**, while in California, the **Government Claims Act** applies.



# More Concepts and Definitions

## Pre-suit Phase: Settlement Negotiations

Litigation is expensive, time-consuming, and emotionally taxing, and it disrupts the parties' regular activities. Therefore, if there's any chance of settlement, it should be pursued before filing suit, unless there are strategic reasons not to.

A **demand letter** from the Claimant/Plaintiff is a common way to initiate settlement discussions.

# More Concepts and Definitions

## Preparation: Pleadings and Substantive Claims

The words **cause of action** and **claim** are used interchangeably. A **cause of action** is a civil wrongdoing recognized by law as grounds for a lawsuit. Every cause of action is composed of a number of **elements**. Each of these elements is essentially a **factual dispute**. To win, you must show that the **facts** meet all **elements** required to prove that cause of action.

### **The Conundrum of Facts vs. Rules:**

Which rules apply depends on the facts, and which facts matter depends on the rules. Take a deep breath!



## Cause of Action in Tort Cases

Negligence	Intentional Torts	Nuisance	Defamation
<p>DUTY</p> <p>Breach of Duty</p> <ul style="list-style-type: none"> <li>Reasonableness of Conduct</li> </ul> <p>Causation</p> <ul style="list-style-type: none"> <li>Actual</li> <li>Proximate: Foreseeability, intervening/superseding causes</li> </ul> <p>Harm/Damages</p>	<p>Assault</p> <ul style="list-style-type: none"> <li>Intent</li> <li>Apprehension of harm</li> <li>Ability to carry out threat</li> </ul> <p>Battery</p> <ul style="list-style-type: none"> <li>Intent</li> <li>Harmful/Offensive contact</li> </ul> <p>False Imprisonment</p> <ul style="list-style-type: none"> <li>Intent</li> <li>Confinement</li> <li>Knowledge of Confine</li> </ul>	<p>Substantial interference</p> <p>Effects on Plaintiff's use of land</p> <p>Interest in Land</p>	<p>Harm to Plaintiff's reputation</p> <p>Intent of Defendant</p> <p>Status of Plaintiff (Public official or public figure)</p> <p>Publication</p> <p>Falsity</p>

## Constitutional Torts: Federal Claims

Source in Bill of Rights	Scope of Constitutional Right
First Amendment	Prohibition against “retaliation” for protected conduct and speech
Fourth Amendment	Prohibition of “Unreasonable Searches & Seizures” Requirement of Arrest based on “probable cause”
Eighth Amendment	Prohibition Against “Excessive” Bails or Fines Prohibition Against “Cruel and Unusual” Punishments
Fourteenth Amendment	Prohibition Against Deprivation of “Privileges or Immunities” of U.S. Citizens Right to “Equal Protection” of the Laws Right to “Due Process” (Notice and Opportunity to Be Heard)

# More Concepts and Definitions

## Sources of Law: Where Do all These Elements and Rules Come From Anyway?

Law come from two main sources: **statutes**, which are laws passed by Congress or state legislatures, and **case law**, which consists of rules established by judges through decisions in previous cases.

**Case law**—judges' opinions from actual lawsuits—is published in large collections called **reporters**. These reporters exist for each state, federal courts, and major regions of the country

# More Concepts and Definitions

## How to read a case citation

All citations to cases follow this format

Name of case	Volume number	Name of reporter	Page number	Court Name	Date
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**Example: *Brock v. Carrion, Ltd.*, 332 F. Supp. 2d 1320, 1323-24 (E.D. Cal. 2004)**

This citation tells us that the case of **Brock v. Carrion, Ltd.** can be found in **Volume 332** of the **Federal Supplement** on **page 1320**. The decision was rendered in the **Eastern District of California** in **2004**.

# Discovery Tools & Their Use In Motions

## Middle Phase

**Discovery** is the unglamorous phase of litigation where factual aspects of a case are developed by obtaining **evidence**.

Ultimately, trials are decided on the basis of evidence. Thus, discovery is where the real work is done; this phase also allows attorneys to anticipate the case's likely result.

## Tree Falling in the Woods:

For a lawyer, unless there is observable and admissible evidence of something's existence, it does not exist.



# Discovery Tools & Their Use In Motions

## Summary of Discovery Tools

Depositions

Written Interrogatories

Request for Production of Documents and Things

Requests for Admissions

Discovery of Expert Opinion

Independent Medical Examinations

# Discovery Tools & Their Use In Motions

## Requests for Admissions

Lawsuits contain a lot of unexciting but nevertheless important items of proof. To streamline the process, a party can request another party admit or deny a fact in advance of trial, eliminating the need for any further proof.

*Establishing genuineness:*

Request for Admission No. 1: Admit that the documents attached as Exhibits 3 through 31 are true and correct copies of receipts reflecting actual amounts paid by Plaintiff for medical expenses incurred due to the injuries Plaintiff attributes to Defendant's conduct.

# Discovery Tools & Their Use In Motions

## Depositions: Subject Matter Depositions (“PMQ/PMK Depos”)

Federal and state rules permits the deposition of an entity, such as a corporation or government agency, on specific topics without naming an individual. The entity must designate **a person most knowledgeable/qualified** about the subjects in the deposition notice.

The representatives’ testimony is **binding on the entity**. Such depositions typically provide insight into the entity’s structure, procedures, and operations.



# Expert Discovery

## Expert Opinions

**Expert witnesses** are individuals with proven expertise in a specialized field relevant to a case, such as medicine. Typically, each party hires and compensates its own experts.

Parties who anticipate offering expert testimony at trial must make **disclosures** concerning that testimony



# Expert Discovery

## Some Key Differences

	California	Federal
<b>Timing of Expert Disclosure</b>	Per Code of Civil Procedure (based on trial date)	Per the Case's Scheduling Order
<b>Expert Reports</b>	Not required	Required, includes a full statement of all opinions, the basis for each opinion, data considered, exhibits, qualifications/cv, and list of prior testimony
<b>Communications and Draft Reports</b>	No protection for draft reports, and communications between attorneys and experts are be discoverable	draft reports and communications between attorneys and experts are protected from disclosure, with limited exceptions (e.g., facts, data, and assumptions provided by the attorney).

# Alternative Dispute Resolution

## What is it?

Alternative dispute resolution (ADR) includes all methods of resolving disputes that provide individuals with their “day in court” while reducing the time, costs, and the trauma associated with a trial.

# Alternative Dispute Resolution

## Common Methods

Method	Key Elements
Arbitration	<ul style="list-style-type: none"><li>• Most often used in labor/management, construction contract, consumer protection, and medical malpractice disputes</li><li>• Can be binding or nonbinding, private or court-connected</li><li>• A quasi-formal adjudicatory process in which a neutral third-party arbitrator assesses each side's position and makes a decision after an adversarial hearing. Attorneys represent each party, with relaxed evidence rules and no witnesses; however, documents may be submitted</li></ul>
Mediation	<ul style="list-style-type: none"><li>• Has wide applicability in general civil cases</li><li>• Mediator does not issue a written decision</li><li>• A flexible, informal, and nonbinding process in which a neutral third-party mediator facilitates communication between parties in a confidential session to help them reach a voluntary settlement</li></ul>
Settlement Conference	<ul style="list-style-type: none"><li>• Also has wide applicability in civil cases</li><li>• A conference hosted by a judge or magistrate, held under court rules, where opposing counsel meet to discuss and explore settlement options</li></ul>

# Pros v. Cons of Going to Trial v. Settling

Years of paperwork, depositions, and hassling with opposing counsel, to finally have a trial. What kind of system is this?

Trials (and litigation in general) can be lengthy, costly, emotionally taxing, and carry the risk of an unpredictable outcome. They are also public.

Settlement is faster, certain, confidential, and could result in a lower payout.



# Appellate Process

## Overview of Decision-Making

Trial court judges and juries primarily evaluate conflicting evidence and factual claims. Appellate judges, however, typically defer to the lower courts' findings of fact and focus on questions of law and legal interpretation, and they arguably have less discretion than trial courts. Trial courts possess considerable discretion in applying laws (subject to appeal).

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