The Big Picture

What's behind the door?

When I was in the early stages of brainstorming what would eventually become **Self Rep Edge**, I asked a friend of mine, whom I knew had represented themselves several times: "*What kinds of things would you want from an online self-help legal product that would actually be helpful?*"

After a moment of thought, his answer was swift and sure:

"Kent! People just wanna know what's behind the DOOR!"

This resonated deeply with me because I went to law school late in life, so I remember well what it's like to have no idea 'what's behind the door'.

With this in mind, let's start with the basics.

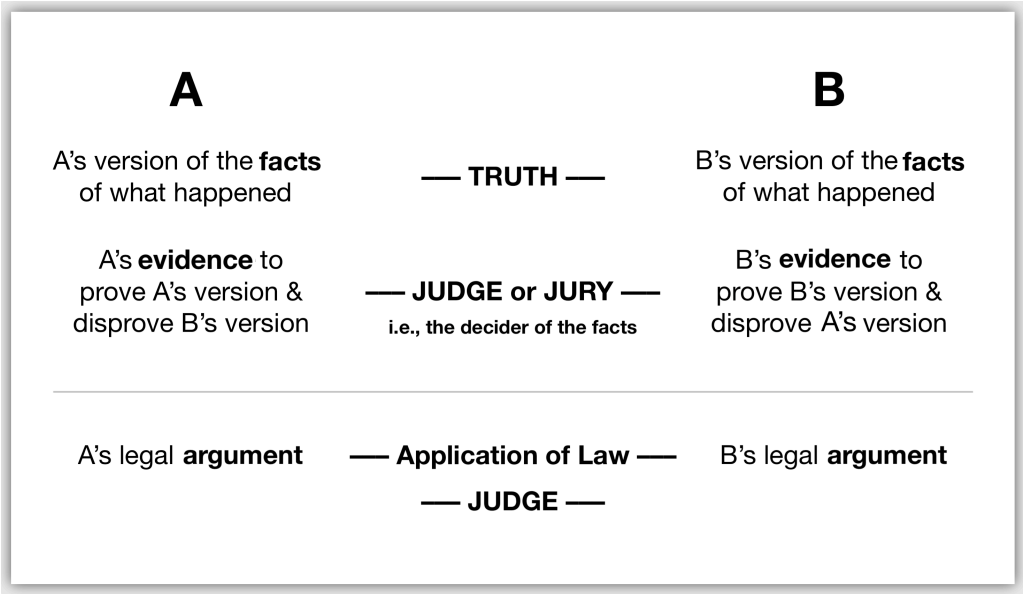
Am I in a 'legal dispute'?

If A believes that B owes them money—or, A believes B must *do* something or *not* do something—and B disagrees with A, this is a **dispute**.

If A claims that B is required to do these things **under the law**, then A and B are in a **legal dispute**.

The **structure** of a legal dispute is no different than any other dispute.

This diagram illustrates the **simplicity** of the structure of a legal dispute:



If this seems complicated, it's not.

For example, if you've **ever had an argument** in your life, you're already half-way there.

> ***Consider the above diagram while plugging in the following easily relatable situation...***

The Case of the Missing Piece of Birthday Cake: The Facts

Sibling A had a birthday recently.

Parent 1 bought Sibling A a birthday cake to celebrate.

Sibling A alleges that Sibling B ate the last piece of birthday cake, even though it wasn't Sibling B's birthday.

Sibling B alleges that they did *not* eat the last piece of cake—that it was actually Scruffy the dog that ate it.

Sibling A v. Sibling B: The Trial (Parent 2 is the 'judge' assigned to the case)

Sibling A compiles all their evidence to prove that Sibling B ate the last piece of cake—and that Scruffy did not—and **presents their evidence** to Parent 2.

Sibling B compiles all their evidence to prove that they did not eat the last piece of cake—that Scruffy ate it—and **presents their evidence** to Parent 2.

Under the Rules of the Household, the rule that governs this situation is that whoever's birthday it was gets the last piece of cake.

Parent 2 considers all the **evidence** from both siblings and makes their decision concerning the **facts of what happened**, then **applies the Rules of the Household** accordingly.

If Parent 2 agrees with **Sibling A** (that Sibling B ate the last piece of cake), then the **remedy** is—under the Rules of the Household—that Sibling B has to do all of Sibling A's chores for the week.

If Parent 2 agrees with **Sibling B** (that Scruffy the dog ate the last piece of cake), then Sibling A gets nothing—that's the rule.

Fact Arguments vs. Legal Arguments

Notice that the crux of the birthday cake dispute was over the **facts of what happened**, where the siblings used **evidence** to prove that their version of the facts was the correct version.

However, if the dispute was *not* over the facts of what happened, meaning Sibling A and Sibling B both *agreed* that Sibling B ate the last piece of cake. Yet, they disagree over **how or whether the Rule of the Household should apply** in this particular case.

For example, let's say that Sibling B didn't have *any* of the birthday cake before taking the last piece. They only took the last piece because otherwise they wouldn't have had any at all. Sibling B may make a **'legal argument'** that this constitutes an **exception** to the rule that would otherwise apply.

In this case, Sibling A and Sibling B would both make their 'legal arguments', and Parent 2 would decide the outcome considering the undisputed facts and how or whether the Rule of the Household should apply.

We have all seen everyday disputes like this one and many others, such as disputes over a play in football, tennis, or any other game or sport.

It's All About 'Formalities' & 'Structure'

The principal differences between all the different kinds of possible disputes that can arise in the world are: (1) the **rules that govern** the particular dispute, and (2) the **level of formalities required**.

For example, the **rules of baseball** govern disputes over a play in baseball; the **rules of contract law** govern disputes over a contract. And, the **level of formalities required** in a dispute between siblings over a piece of birthday cake are different from the **level of formalities required** in a multi-million-dollar civil lawsuit.

Nevertheless, **the underlying structure of any dispute is the same**.

The key to understanding a legal dispute is understanding its **structure**. The legal dispute resolution process—whether inside of court or outside of court—is **rigidly structured**.

Therefore, when you are managing and preparing your own legal dispute, your approach should also be **rigidly structured**.

What's a 'DIY Legal Warrior'?

A DIY Legal Warrior is anyone involved in a legal dispute who wants to **take charge** and **manage** their own case—with or without a lawyer.

True DIY Legal Warriors do this by first learning two **essential fundamental skills**:

- **How to do a legal analysis**
- **A 'Big Picture' understanding of the legal dispute resolution process**

Armed with this strong foundation of legal knowledge, the DIY Legal Warrior is now **empowered** to take the next steps as needed, depending on their particular situation.

> ***YOU*** are the one with something substantial at stake
>
> ***YOU*** know the facts of your case better than anyone
>
> ***YOU*** can easily learn the fundamentals with Self Rep Edge
>
> ***YOU*** can manage your own case (with or w/out a lawyer)
>
> Therefore, ***YOU*** should ***HIRE YOURSELF***

Why is it essential to know how to do a legal analysis?

Legal analysis is the most central part of any legal dispute.

Knowing how to do a legal analysis when involved in a legal dispute is as **essential** as knowing how to throw the ball, catch the ball, and hit the ball when playing in a baseball game.

The good news is that just like you don't have to go to a fancy baseball camp to learn the fundamental skills of baseball, **you don't need to go to law school** to learn how to do a legal analysis.

Self Rep Edge **demystifies** the process of doing a legal analysis.

Once you possess this **essential skill**, you can manage and prepare your own case far more efficiently and effectively—with or without help from a lawyer

Why is it essential to have 'a Big Picture understanding of the entire dispute resolution process'?

Although knowing how to throw, catch, and hit the ball is **essential** when playing baseball, it's **still not enough**.

To play baseball, you must **also** know: how the game is played, how the outcome is determined, what is a strikeout, how to run the bases, etc.

You may be really good at hitting the ball, but what do you do now?

You may be really good at catching the ball, but now that you have it, what do you do with it?

Facing a legal dispute is very much the same.

You may be able to analyze the facts, evidence, and law with precision and skill, but you **also** need to understand the legal dispute resolution 'game' (i.e., the process).

Having a Big Picture understanding of the dispute resolution process means understanding the entire 'game':

- objectively **analyzing** and determining your strengths and weakness
- using your analysis to build your strongest **argument**
- preparing for **settlement** negotiations
- understanding available **out-of-court dispute resolution** options
- **court system** procedure—including the pleadings phase, discovery phase, trial phase, motions practice—and the best strategies for each

Even if your case has only the **slightest** chance of going to trial, it is essential to have a Big Picture understanding of the **entire** process, so you know how each step fits within the process overall.

This way, you can determine your **goals** more clearly, know the **next best steps** to take, and **strategize** more effectively to achieve your goals.

The following guide teaches you how the 'game' is played, so you can step up to the plate with **confidence**.

Let's get started.

The following guide is an in-depth summary of the **Self Rep Edge Video Series**.

I did my best to make this guide into something readable and effective as a learning tool. The goal is to help you understand legal concepts and terms most efficiently.

However, if you truly want to learn these skills and feel you need **more** to help you reach that goal, the Self Rep Edge Video Series and accompanying Legal Dispute Workbook make learning these skills much, much easier (and more enjoyable).

This is because the video series uses examples and relatable hypotheticals throughout (along with 200+ colorful, vibrant illustrations), which helps explain everything in a manner that is easy-to-follow and easy-to-understand.

And, the accompanying workbook helps you visualize and understand the structure of each important task, which is really what it's all about—**structure**.

So, if you feel learning from the videos and workbook would be a helpful addition to the following *DIY Legal Warrior's Guide*, check out **selfrepedge.com** for more.

All the best in your pursuits,

Kent Giltz JD, LLM Questions or comments? **kent@selfrepedge.com**

DIY Legal Warrior's Guide

*The following **guide** shows you:*

- *How to do a legal **analysis***
- *How to build legal and factual **arguments***
- *How to prepare for **settlement***
- *A Big Picture understanding of the **court system** process*

Table of Contents:

I. ANALYSIS

1. FACTS

The first major step in analyzing your case is to lay out all the facts of the situation—in an **organized and structured** manner.

This is because the entire legal process is rigidly structured, therefore your approach to every task should also be rigidly structured, beginning with laying out the facts.

(Note: Laying out the facts is an ongoing work-in-progress, to be updated regularly, as you learn more about your case)

Create a Facts Outline dividing the facts into 4 categories:

- Background Facts
- Timeline Facts
- My Losses/Damages
- Opponent's Losses/Damages

Background facts are the foundational facts that help frame your story and give it overall context. Imagine you are telling your story to someone who doesn't know anything about it. This will help with creating documents in the future.

Examples: Who are the parties; what, if any, is the prior relationship, place of residence, when the events at issue took place; or, if it's a business, the type of business, where it is located; and, any other background fact that helps frame your story.

Timeline facts are the specific, individual actions and events that led directly to your current legal dispute, organized in a detailed, step-by-step, chronological timeline, from beginning to end.

Begin laying out the timeline facts using only **your allegations** that answer the question "What happened next?" in chronological order, from beginning to end.

Think short sentences, fine point, piece-by-piece—as opposed to the way you might tell your story to a friend.

Next, fit into your timeline—as best you can for now—what you know, believe, or assume are your **opponent's allegations**.

> *Laying out the allegations of both parties offers a more complete picture of what the dispute is about, allowing you to analyze the strengths and weaknesses of your case more accurately, which in turn, helps build your strongest argument.*

Add to your timeline your **counter-allegations** that attack your opponent's allegations.

Add any observations, opinions, guesses, or impressions you had at the time, or may have now, concerning the events.

Add to your timeline the **evidence** you have now, or that may become available later, that helps prove your allegations are true.

For many, but not necessarily all of the facts, indicate **when** the action happened. Date, day of the week, time of day, exact time.

Damages are generally what the litigation is about.

The term 'damages' is a broadly used term in civil lawsuits that refers to any kind of losses suffered by a party, allegedly caused by their opponent.

List all the damages that **either** party may plausibly claim they suffered, as a result of the actions of the opposing side, either directly or indirectly.

For help with brainstorming and identifying various types of damages in broad areas of law, you may try a search for "list all types of [area of law] damages." (Ex. contract law)

2. RESEARCH

The next major step in analyzing your case is to **research and find the law** that governs the **legal issues** presented from the facts of your case.

Before beginning your research, however, it may be helpful to review certain important **fundamentals of the legal system** in the US to give you a better idea of what types of laws are on the books, how they are organized, and where they are located.

Fundamentals of the legal system in the United States

Types of laws on the books:

- statutes
- case law
* local ordinances/municipal codes
- regulations
- constitutions

How these laws are created

Each of the fifty states and the federal government, which includes Washington DC, has its own **court system**, is its own **jurisdiction**, and has its own sets of **laws**.

These laws are created by each jurisdiction's **three branches of government**:

- the legislative branch
- the judicial branch
- the executive branch

Statutes are created by the legislative branch.

The elected legislature votes to create new law called statutes. Federal and state statutes are located in their respective code books.

Case law is created by the judicial branch.

The basic structure of any given judicial branch in the United States includes:

- trial courts
- intermediate appeals courts
- highest appeals court

When a party to a lawsuit does not agree with the outcome in the final judgment of a **trial court**, that party may **appeal** all or part of the trial court's decision to the **intermediate appeals court** in the same jurisdiction.

The intermediate appeals court hears the arguments from both sides concerning the issues on appeal, then may write and publish their decisions in their **written court opinions**.

If a party to an appeal in the intermediate appeals court does not agree with the decision made there, then that party may appeal the intermediate appeals court's decision to the **highest appeals court** in the same jurisdiction.

Likewise, the highest appeals court may write and publish their decisions in their **written court opinions**.

New, novel decisions made by an appeals court in their published written court opinions become **case law** that the lower courts in the same jurisdiction must follow.

Local ordinances, or municipal codes, are created by city or county governments.

Similar to statutes, these laws are organized in the municipal code of the local jurisdiction.

Regulations are created by the executive branch.

Although the executive branch is not technically a law-making branch, the elected legislature nevertheless creates specific **government agencies** to be **administered** by the executive branch, which is thereby given the authority to create a body of law, per government agency, known as **regulations**.

Constitutions are amended by the respective State or federal legislatures.

State constitutions are the **supreme law** of the respective states, and the US Constitution is the supreme law of the whole United States.

Research: Initial Steps

Now that you have reviewed some key fundamentals of the legal system in the United States and the types of laws that are on the books, you may now be in a strong position to **research and locate the rules of law** that govern the legal issues presented from the facts of your case.

Initial steps in doing legal research include:

- determine your personal **goals** of the litigation
- narrow down the **body of law**
- narrow down the **area of law**
- determine the **statute of limitations**
- determine the **legal issues** presented from the facts
- compile **search words/phrases** to begin your research

Goals

Pinpointing your goals now helps make your research more efficient by narrowing the scope and purpose of your research.

Body of Law

Narrow to either state law or federal law. (Note: Some issues may involve both)

If state law, which state? If federal law, which circuit?

Area of Law

First, determine the major area of law that governs your legal issues.

Then, narrow down to the specific area(s) of law.

Pinpointing the specific area of law helps narrow your research and give it focus.

Statute of Limitations

The Statute of Limitations is a legally prescribed time limit for when a plaintiff may file their complaint to initiate a lawsuit, per area of law and per jurisdiction.

Once you know the statute of limitations time period for when the plaintiff may file their complaint, next is determining the **"From Date"** – which is the date from which the statute of limitations period begins. This generally is when the injury/loss/harm (damages) occurred, or when the plaintiff first knew, or should have known, that their injury/loss/harm occurred.

Legal Issues

Next is determining the legal issues presented from the facts of your case, and creating an **issue statement** for each.

Note that any given set of facts in a legal dispute presents one or more legal issues.

When parties in a legal dispute disagree with what the result of their dispute should be, they often look to the court to answer that question for them.

Your issue statement is therefore, in effect, **your question for the court**.

Your issue statement may have the following structure:

> *Under the governing law, what should the result be, when certain circumstances exist?*

To begin building your **preliminary** issue statement, you may simply turn your goal statement into a question for the court.

Note that this step is developing your preliminary issue statement, which may be updated and fine-tuned as you learn more about the facts of your case and the law that governs your legal issue(s).

Search Words/Phrases

Next is determining key search words/phrases to begin your research.

These may be derived from your preliminary issue statement, and/or other important facts of the case.

Begin Legal Research

Although there is no single way to begin your legal research, probably the most common approach is to first gain a broad understanding of your legal issue in what are referred to as **Secondary Sources**.

Secondary sources are considered secondary because they are not the actual law, as opposed to Primary Sources, which are the actual law—including statutes, case law, local ordinances, regulations, and constitutions.

Secondary Sources **describe and discuss** the primary law, and may be any source that offers a reasonably in-depth, easy-to-understand explanation of the particular law or legal principle.

The idea is to start with a broad, general understanding of the area of law, then narrow down like a funnel (using your common sense, life experience, and the process of elimination) to the specific area of law—and, ultimately to the actual **Primary Law** (whether statutes, case law, regulations, local ordinances, and/or constitutional law) that governs the legal issue(s) in your case.

3. ELEMENTS

The next major step in analyzing your case is to **break each rule down** into its **elements**, then add the facts and evidence of both sides and evaluate the strengths and weaknesses of your case.

What are the 'elements' of a rule of law?

All rules of law have at least one **element**.

Elements are the individual circumstances listed in a rule that may be separated and analyzed independently to determine whether or not the rule applies.

For example, a fictitious local ordinance:

What are the individual circumstances listed in this rule that may be separated and analyzed independently to determine whether or not the rule applies?

Orange County Municipal Code § 123.4

No unmarried person under 21 years of age is permitted on the beach after sunset. Violators are subject to a $100 fine.

Section 123.4 states that a person must be: *(1) unmarried, (2) under 21, (3) on the beach, (4) after sunset*, for this rule to apply.

Each of these four individual circumstances, which are the elements listed in this rule, must be proved by the county before it may establish that a particular beach-goer violated this ordinance.

Elements are either "**And**" elements (i.e., **conjunctive** elements), "**Or**" elements (i.e., **disjunctive** elements), **Exceptions**, or **Factors**.

> **"And" elements** are elements that are **required** to be proved by the party who wants the rule to apply, in order for it to apply.
>
> **"Or" elements**, on the other hand, are elements that, if proved, are possibly sufficient to satisfy the rule, but not necessarily required.
>
> An **Exception** is a circumstance that if proved to exist may negate the application of the underlying rule.
>
> **Factors** are individual circumstances listed in a rule that are not required to be proved. Rather, they are relevant circumstances for the court to consider in determining whether or not the rule should apply.

Create an Elements Outline

For each rule that governs your legal issues, separate from the rule the **elements**, **exceptions**, or **factors**, and list them one-by-one.

Then, objectively **analyze** each element separately, by adding to each element/exception/factor the facts and evidence of both sides that may help to either prove or disprove each element/exception/factor.

The party that wants the rule to apply must prove each of the required (ie, "And") elements, or provide sufficient evidence to the factors to be considered by the court. The party that does not want the rule to apply wants to disprove the elements or factors (or prove that the exception applies).

To objectively analyze and evaluate whether or not a particular rule applies in a particular case, each element must be analyzed separately, by thoroughly examining the allegations being made by both sides, with the **evidence** that both parties may use to either prove or disprove the truth of those allegations.

What is EVIDENCE?

Evidence is anything that tends to prove that what you are alleging is true, or anything that tends to disprove what your opponent is alleging.

Evidence may include documents, photos, recorded communications, written contracts, business records, or any other tangible items; plus, witness testimony, including your own testimony.

Under **each element/exception/factor** listed on your outline, add three sub-sections:

- My facts and evidence
- Opponent's facts and evidence
- My counter evidence

Under **My facts and evidence:**

Add your **allegations** that, if true, would help to either prove or disprove the element, depending on which side you are on.

Then, add any **evidence** that tends to prove that your allegations are true.

> *Note that you cannot be too persistent when considering what evidence may be used to help build your factual arguments and to prove the truth of your allegations. Now is the time to **brainstorm all possibilities** and be **creative**.*

Next, add under each what you know, believe, assume, or guess **your opponent may allege**, plus any evidence you believe your opponent may use to prove their allegations.

> *In other words, it is essential to **step into the shoes** of your opponent and brainstorm from their perspective to determine how your opponent may attempt to prove or disprove the same elements, exceptions, or factors.*

Next, list any evidence you may have to **counter** your opponent's allegations and evidence.

> *The goal is to discredit, or at least minimize the strength of your opponent's evidence by using your evidence to show that their evidence is wrong, irrelevant, misapplied, weak, or unimportant.*

Evaluate Each Element Independently

Now that you have added—as best you can for now—the facts and evidence of both sides that may help to either prove or disprove each element/exception/factor, the next step is to objectively **evaluate** the **strengths and weaknesses** of each element, by answering the following question:

> *What is the **percentage likelihood** that the party that wants the rule to apply would successfully **prove** each element, based on the facts and evidence of both sides that you know about now or believe may exist later, to an impartial judge or jury in a future hypothetical trial?*
>
> **What does it mean to 'prove' something in civil court?**
>
> For most civil lawsuits, an element has been proved if it satisfies the standard of proof known as "**by a preponderance of the evidence**"—also referred to as "more likely than not"—to a reasonable and impartial judge or jury.
>
> By a preponderance of the evidence means that a judge or jury, after weighing the facts and evidence of both sides concerning each element, must be **more than 50% sure** that the element has been proved. This is the predominant standard of proof in civil court cases.

On your Elements Outline, next to each element/exception/factor, write the approximate **percentage likelihood**, (e.g., 0%, 25%, 50%, 75%, 100%) – based on the facts and evidence used in your analysis – that the element would be proved in a hypothetical future trial.

> *Note that case evaluation is, of course, not an exact science. Nevertheless, an honest evaluation helps you **objectively and carefully consider the strengths and weaknesses** of your case, and helps you determine which elements to focus on when preparing and building your **strongest argument**.*

4. ARGUMENT

The next step is to create your **argument summary statement(s)**.

Your argument summary statement is **derived from the results of your objective analysis**. Therefore, you may choose to begin by simply turning your issue statement into a **definitive conclusion.**

You are no longer asking the court a question—you are now affirmatively stating your **answer** to that question.

Your **argument summary statement**, in effect, tells the court and your opponent: You have determined what are the **legal issues**; you have done the necessary **research** concerning those legal issues; you have objectively **analyzed** the facts and evidence of both sides with the governing law; and, you have reached a **definitive conclusion** that the court should reach also.

Create an Argument Outline

The ultimate goal here is to create your preliminary **argument summary statement(s)**, to be fine-tuned as you learn more about the evidence and your case overall.

On your **argument outline**, list each **legal issue** separately.

Under each legal issue, add three components that comprise your argument summary statement:

- citations for the **rules of law** that govern your legal issue
- your **conclusive statement**
- your **key fact allegations** that, if proved, would support your conclusion

Note: Your **argument summary statement** should be viewed as a work-in-progress to be perfected over time, and is **central to every aspect** of the litigation going forward.

II. SETTLEMENT

5. SETTLEMENT PREPARATION

Now that you have objectively **analyzed** your case and concluded with your **argument summary statement**, the next major step may be to reach out to the opposing side and attempt to **settle**.

Civil legal disputes may be settled by the parties themselves at any time – from immediately after the dispute arises, throughout the entire course of the litigation, up to immediately before a trial verdict.

Before agreeing to a settlement, however, be sure to consider whether all important **evidence** is known; and, if you are claiming damages, also consider whether the full extent of your **damages** is known. Otherwise, any civil legal dispute may be settled early in the process, if both sides are willing to seek a fair resolution and work out a satisfactory agreement.

Create a Settlement Preparation Chart: Part 1 and Part 2

The goal here is to **prepare** for settlement negotiations by **first** creating a general framework to help develop an effective strategy before entering into a settlement discussion.

For **Part 1**, list the following five headings:

- Best Possible Outcome
- Target Point
- Fair Point
- Walkaway Point
- Worst Possible Outcome

For **Part 2**, list the following three headings:

- My Underlying Interests
- Opponent's Underlying Interests
- Creative Solutions (including potential win-win's)

Part 1

• The **Best Possible Outcome** is the fullest extent of what the law would allow in a hypothetical future trial, if the court ruled in your favor. (Note that for some cases, such as a personal injury case, the maximum dollar amount may be reasonably estimated, or an injunctive relief case, where the relief sought may be maximized)

To determine the Best Possible outcome – analyze the **facts** of the case; determine the **legal issues** presented from those facts; determine the **law** that governs those legal issues; then, determine the **remedy** that would apply under that governing law.

> *Note that entering the calculations for **both parties**, as best you can, may help you determine ahead of time what your opponent may be planning as well.*

• The **Target Point** represents approximately 75% of the Best Possible outcome.

Note that civil lawsuit settlements are generally considered successful if the amount of the settlement for their side represents approximately 75% of their Best Possible outcome, even if they have a very strong case.

The 25% taken off the top from the Best Possible outcome generally represents the value of eliminating the **risk and uncertainty** of going to trial and avoiding the **high cost** of continuing the litigation.

Therefore, setting your Target Point at approximately 75% of your Best Possible outcome is generally considered a **reasonable** Target Point.

The Target Point is something that both parties may aim for in a settlement, but both parties generally may not simultaneously reach their Target Points, because they will almost always conflict.

Therefore, one or both parties will likely need to accept something less than their Target Point in order to reach a settlement.

• The **Fair Point** is based on this program's "50/50 Rule."

To illustrate the "50/50 Rule," imagine Party A and Party B are in a lawsuit, where $100,000 is at stake.

Before going to trial, however, both parties **thoroughly and objectively analyze the facts and evidence of both sides** with the governing law.

If through their analysis, both parties determine that each party has about a 50% chance of winning at trial, and because there is $100,000 at stake in the lawsuit, both parties determine that settling their case for $50,000 may be a fair settlement. (50% x 100,000 = 50,000)

Therefore, the Fair Point for both Party A and Party B, **based on their own objective analysis**, would be $50,000.

Although there is no way for a party to know for sure what their percentage chance of winning at trial is, a **reasonably accurate estimation** of the Fair Point may nevertheless be achieved through a careful, objective analysis of the facts, evidence, and law—and, by putting yourself into the shoes of a reasonable and impartial judge or jury, who hears all the evidence from both sides.

> *Note that the numbers 50/50 in the "50/50 Rule" are for illustrative purposes only; the actual numbers, of course, depend on the individual case. A party may determine that they have a 70%, 30%, or 90% chance of winning—or, any other number.*

• The **Walkaway Point** represents the least favorable outcome that a party would agree to before walking away from a settlement negotiation.

• The **Worst Possible Outcome** in a hypothetical future trial generally mirrors the opposing side's Best Possible outcome.

*Note that dollar values are not required to complete the Preparation Chart, because **not all civil lawsuits are about money**. Therefore, with a little creativity, the same principles outlined above may also be applied to an injunctive relief case, or any other case **not** involving monetary remedies.*

Part 2

Next is determining any **Underlying Interests** that may be motivating the actions of each party, then developing **Creative Solutions** that directly address those underlying interests, to potentially settle your dispute in a manner that may be preferable compared to the results of a trial verdict—and, may even create a **win-win** for both parties.

To discover **Creative Solutions**, first brainstorm and create a list of **underlying interests** for both parties, by answering questions such as: What underlying interests may be motivating the actions of either party? Is there more to this story beyond what is being expressed on the surface?

Note that underlying interests often exist for parties who have had some kind of **prior relationship** before the current dispute arose.

However, even where parties in a legal dispute have **no prior relationship**, underlying interests may still exist.

Considering the underlying interests of both parties that may exist, brainstorm and develop **creative solutions** that may become part of a settlement discussion.

6. DEMAND LETTER

Now that you have worked through the preparation chart and developed potential creative solutions, you may now be in a strong position to engage directly with your opponent and attempt to **settle**.

The settlement process generally begins with one side sending a **demand letter** to their opponent, who in turn **responds** to that letter.

A demand letter is a formal letter written by someone **demanding some type of action** from their opponent that they believe they are entitled to under the law.

The demand is usually for a payment of money, but it may also be for their opponent to do something or to refrain from doing something.

A demand letter is generally written **after an actual legal dispute arises** and the positions of both sides concerning the dispute are known.

A demand letter is **often the beginning of the end** of a legal dispute.

The **sender** of a demand letter sets forth their positions and states their demands.

The **recipient** of the letter may agree with all, some, or no part of those demands, but the demand letter and the response may nevertheless promote further discussions that may eventually lead to a **settlement**.

The **style** of a demand letter and the written response to a demand letter is generally business-formal.

The letter should generally be **efficiently structured and well-organized**. Consider using headings to label each section within the body of the letter.

The **writing style** may be plain language, simple sentences, focused, and to the point.

Both the demand letter and the written response to a demand letter should be **persuasive**. Meaning, your letter should convey a **sound, well-reasoned argument** using your version of the facts, your analysis, and your conclusion.

Your letter may be more effective if written in a **professional, respectful** tone—and, not include personal attacks or irrelevant commentary.

Create a Demand Letter Outline

The Demand Letter Basic Components are like **building blocks**.

Note that there is **no single way** to write a demand letter, or the response to a demand letter. Every situation is different, and different ideas exist about what should or should not be included in a demand letter, or response.

When writing a demand letter, always consider the **unique circumstances** of your dispute and your **personal strategy**.

The following is merely a **general guide** to writing a demand letter.

Basic Components of a Demand Letter

Introduction

Begin with stating up front the **purpose** of your letter, plus any background facts that may help frame your story.

Timeline of Facts and Events

Next, explain to your opponent exactly what happened, from your perspective, by walking them through a detailed—yet, focused and to-the-point—**timeline of facts and events** from beginning to end that led to your dispute.

Your timeline should generally include all key fact allegations in your **argument summary statement**.

Remember that your key fact **allegations** are those facts that, if proved, **would satisfy the elements** of the rules that govern the legal issues in your case. Those key facts are therefore central to your timeline. This lets your opponent know that you understand the legal issues and the governing law, and that you have a **sound, well-reasoned argument** that justifies your demand.

Finally, you may include in your timeline **any communications** you may have had with your opponent to date concerning attempts to resolve your dispute.

Discussion of Damages

Although you may have already discussed **damages** in your timeline, you may include a separate section in your letter that describes in detail the full extent of your damages—and, further confirm that your damages were caused by your opponent's actions, either directly or indirectly, by someone or something that was under their control.

Legal Argument

Depending on your **unique circumstances** and your **personal strategy**, you may choose to walk your opponent through your **legal argument**, which explains why you are entitled to your demand under the law.

You may choose to cite specific **legal authority**, or simply refer to **general principles of law**.

Itemized List of Damages and Total Demand

Create an itemized list of your **damages**, then calculate your bottom-line **total demand**.

State Firm Consequences

You may choose to state **firm consequences** in the event your opponent does not respond or rejects your demand entirely without including any counteroffers or alternative suggestions.

Firm consequences may include setting a **time limit** for your opponent to respond, after which you will move forward in filing your complaint with the court.

Suggest Alternative Resolution Methods

Depending on your circumstances and your strategy, you may consider suggesting **alternative resolution methods**, such as arranging a formal negotiation or mediation, or you may include both—meaning, you may choose to state firm consequences and also suggest alternative methods.

Notify to Preserve Evidence

Consider putting your opponent on notice that they are required to preserve all evidence until the matter is resolved.

Attach Evidence

Finally, list any **evidence** that you may have referenced in the body of your letter that you choose to include as attachments. Note that if a particular piece of evidence is central to your argument, you may consider attaching that evidence. Otherwise, just like the rest of your letter, whether or not to attach evidence is based on your circumstances and your strategy.

Responding to a Demand Letter

The written **response to a demand letter** is generally also business-formal, efficiently structured, well-organized, professional, and respectful.

Your response letter lets your opponent know that you have thoroughly considered the serious points that they have made in their demand letter, you have analyzed the situation completely, and you are **confident in your position**.

An effective response letter is one that forces your opponent to **question the strength of their argument**, which may encourage them to **back down** from their bottom-line total demand.

An effective response letter, in part, critically examines the contents of their opponent's demand letter and **exposes its weaknesses** in any or all of **three** principal areas, depending on the situation.

(1) **Deny Causation**. Meaning, your position may be that nothing you did, and nothing that was done under your control, neither directly nor indirectly, caused your opponent's damages.

(2) **Deny the Extent of their Damages**. Your position may be that your opponent was not damaged to the extent they are claiming, or maybe that they were not damaged at all.

(3) **Deny Your Liability Under the Law**. Your position may be that you are not legally liable for any damages they are claiming, by showing that their legal analysis is flawed in some way.

Basic Components of a Response to a Demand Letter

The **Basic Components of the Response** to a Demand Letter may begin with stating the purpose of your letter.

If your response includes **attacking your opponent's version of the facts**, then take each important allegation they got wrong and list them one by one. You may number them, quote the allegation made in their letter, then explain why they are wrong.

Your primary focus may be attacking your opponent's key fact allegations that, if proved, would satisfy the elements of the rules that govern your case.

Although every situation is unique, you may choose to attack your opponent's allegations concerning the extent of their **damages**, and/or their allegations claiming that you were the direct or indirect cause of their damages.

If your response includes attacking your opponent's **legal argument** in order to deny your liability for their alleged damages under the law, you may attack their legal argument in several ways.

One way is to show that because certain key **facts are wrong** in their letter, the elements of the governing law cannot be satisfied.

Another way of attacking your opponent's **legal analysis** is by showing how they misread, misunderstood, or misapplied the law.

You may also show that their legal analysis ignores a particular rule or an **exception** to a rule, which if applied, would excuse you from liability.

The goal of attacking your opponent's legal argument is to reveal its flaws and **conclusively deny your liability** to them under the law for their claimed damages.

You may consider **requesting any evidence** that your opponent referenced or implied exists in their letter, but for some reason, they did not attach it to their letter.

Depending on your situation, consider the possibility of matching your opponent's threats of legal action with threats of **legal action** of your own, pointing out any **viable counterclaims** against them that you may potentially bring.

You may support your **counterclaim demands** with facts and evidence, showing the damages that your opponent caused you, for which they are liable under the law, then itemizing those damages and calculating your own bottom-line total demand.

Now that your response letter has potentially encouraged your opponent to back down and question the strength of their argument, you may choose to either reject their demand entirely, make a counteroffer, or tell them you are delaying your counteroffer until the evidence you have requested is provided.

Depending on your circumstances and your strategy, you may choose to suggest a **creative solution and/or an alternative resolution method**, such as a formal negotiation or mediation.

Finally, list any **evidence** referenced in the body of your letter that you choose to include as an attachment, **depending on your situation and your strategy**.

7. NEGOTIATION

If the demand letter and follow-up letters do not resolve your dispute, the next step may be to arrange a formal **negotiation**.

Formal negotiation is where the parties agree to meet and discuss **settlement**—either the parties by themselves, the parties along with their attorneys, or only their attorneys do the negotiating.

Preparing for Negotiation

The key to a successful negotiation is **preparation**.

Preparing for a formal negotiation is **as important as preparing for a courtroom trial**. This is because, in part, if you reach an agreement with your opponent, that agreement results in a binding contract, which generally has the same effect as an order from the court.

Therefore, the side that arrives **most prepared** for the negotiation gives themselves the best opportunity to get the results they want.

The first step in preparing for a negotiation may be to carefully review and understand, as best you can up to this point, **your analysis**—including the legal issues in your case; the rules that govern those legal issues; the elements, exceptions, or factors of each rule; your fact arguments, considering the evidence of both sides; and/or, your legal arguments.

Poring over the legal issues, rules, facts, and evidence, in preparation for a formal negotiation, may help you discover important **points to highlight** during the negotiation, and also better understand the points your opponent may assert in their argument.

Next is to review where you and your opponent stand in the settlement process to date. What important items have been **agreed upon**; what important items are **close to agreement**; and, what important items **remain contentious** and unresolved.

Next may be to plan your personal strategy for the upcoming negotiation.

Consider the **Competitive** approach versus **Collaborative** approach:

- What is your personal preference generally?
- What is your preference, based on the overall circumstances currently?
- Do you plan to mostly listen, or do most of the talking?
- Do you plan to state your positions up front and attempt to guide the discussion, or ask them their positions first and let them lead the discussion?
- Do you plan to come across no-nonsense and unyielding, or easygoing and informal?

There is **no single, best approach** to negotiating with an opponent in a civil legal dispute; it generally depends on taste, the personalities of both sides, the nature of the relationship, what is at stake in the dispute, and the unique circumstances of the dispute.

You may create a **notebook** specifically for the negotiation, including items such as: document evidence, photos, research notes, and other notes you may have taken along the way, copies of the demand letter and follow-up letters, and/or anything else you can package together for easy access during the negotiation.

> *Note that a formal negotiation generally only works **if both sides truly want to settle**. Settlement usually means getting less than your target point; but, if creative solutions are on the table, a **win-win** resolution may be possible.*

Settling early through negotiation avoids the **high cost** of further litigation and eliminates the **risk and uncertainty** of going to trial. Settling your dispute on your own means that you and your opponent are in **total control of the outcome**, rather than leaving it up to a judge or jury.

8. MEDIATION

Mediation is essentially the same as Formal Negotiation, except rather than the parties meeting and discussing settlement on their own, an impartial **Mediator** facilitates the negotiation between the parties and assists them in reaching an agreement.

The parties are generally situated in separate rooms, and the **mediator goes back and forth** between them, relaying offers, counteroffers, and other communications.

The Mediator does not decide the outcome of the settlement; the **parties decide the outcome for themselves**. Therefore, parties to a mediation may walk away without an agreement at any time.

Mediation may be done before or after a lawsuit is filed with the court.

Mediation may be initiated by the parties themselves, or if the case is already in the court system, it may be initiated by the judge assigned to the case—where, **in some cases**, attending a mediation is mandatory.

If the mediation is initiated by the parties themselves, they will generally hire a private, professional **mediator**, whom both sides agree on and share the costs.

A professional mediator is typically a former litigation attorney and/or a former judge, who is knowledgeable about the law, legal issues, and legal disputes in general; and, who often has substantial trial experience, which makes them well-qualified to help the parties understand their legal and factual arguments, their chances of success at trial, and **what a fair settlement may look like** under the circumstances.

Preparing for Mediation

As with formal negotiation, the key to a successful mediation is **preparation**.

You may pore through your analysis, and commit the bulk of it to memory in preparation for an upcoming mediation, so you may easily discuss your argument with the mediator and be a competent advocate for yourself.

You may likewise commit to memory the general framework and parameters you set for yourself on the **Preparation Chart**, and any **Creative Solutions** you may have developed to address the parties' underlying interests.

Mediation Brief

Preparation for a mediation may also include writing and submitting a **mediation brief** to the mediator—or to the judge, if the mediation is being hosted by the court.

A mediation brief is generally a formal document addressed to the mediator, written primarily to explain the legal issues involved in your dispute and your positions concerning those legal issues.

A mediation brief **persuasively tells the mediator** why your version of the facts is the correct version, and/or why your legal analysis and your legal argument is superior to your opponent's—and therefore, why you are the party who would prevail, if your case went to trial.

The **Mediation Brief Basic Components** serve as a general guide to help with writing a mediation brief.

> *Note that the mediator may have special requirements concerning the format and contents of your brief; therefore, the mediator is your ultimate guide.*

A **mediation brief** generally includes an **introduction**, plus any background facts that may help frame your story and give it overall context. This includes letting your mediator know: Who you are, who is your opponent, and what, if any, is your previous relationship with them.

You may also inform the mediator the **history of your dispute**, from when the dispute first arose up to the time of writing your brief.

The history of your dispute may include any **actions taken** between you and your opponent toward resolving your dispute to date—whether through letters, emails, phone calls, formal negotiation, and/or if the case has already entered the court system, at what stage of the litigation is the dispute currently.

Next, you may inform the mediator the **facts of what happened**, from beginning to end, in a detailed, yet succinct **timeline of facts and events**, from your perspective.

You may include all key fact allegations in your **argument summary statement**, structured in a clear and concise timeline, including references to any **evidence** that you are relying on to prove your key fact allegations.

Next, you may explain to the mediator your legal **analysis** and your legal **argument**, so they know exactly what are the **legal issues** that govern your case, what is the law that governs those issues, and why, if your allegations are proved, you would prevail in a future trial under the law.

Next, if you are claiming **damages**, you may explain to the mediator the full extent of your damages, and confirm that your opponent **caused** your damages.

Or, if you are contesting your **opponent's damages**, you may explain your reasoning and the evidence you have for challenging their damages claim.

Next, you may inform the mediator what important issues have **already been resolved**, what issues may be **close to agreement** but not yet resolved, and what issues **remain contentious**.

You may also inform your mediator of any potential **creative solutions** that you may have developed to address the underlying interests of both parties.

Finally, you may create a list of any attached **evidence** referenced in your brief.

9. ARBITRATION

Arbitration is an additional method of resolving your legal dispute without going to trial.

However, unlike negotiation and mediation, arbitration is **not a settlement procedure**. Arbitration has more in common with a regular civil court trial than a formal negotiation or mediation.

Key differences between an arbitration proceeding and a trial court proceeding include:

- in a trial court, a **judge or jury** decides your case; in an arbitration, a single **arbitrator**, or a panel of arbitrators, decide your case.
- regular trial courts **select the judge for you**, after your case is filed with the court; parties to an arbitration, on the other hand, generally **select the arbitrators themselves**.
- Like trial courts, **final decisions** in arbitration, called arbitration awards, are generally binding on the parties, and once an arbitration award is filed with the court, it becomes enforceable through the court.
- Unlike regular trial court decisions, however, arbitration awards generally cannot be appealed.

Arbitration is nevertheless **similar to a trial court proceeding** in its basic process. Meaning, parties may deliver opening and closing statements; witnesses may be called and questioned by the parties; and, each party may present their evidence.

The **principal advantages** of an arbitration compared to a trial include: the arbitration process is generally more simplified and efficient; disputes are generally resolved relatively quickly; and, many of the rules, such as evidence rules may be relaxed and flexible.

Parties in a legal dispute **may voluntarily agree** to resolve their case through arbitration. However, sometimes the parties may not have a choice...

Mandatory Arbitration

Mandatory arbitration generally happens either when there is a law that requires their dispute to enter arbitration, or when there is a contractual relationship between the parties that includes an arbitration clause.

An **arbitration clause** is language within a contract that requires all disputes arising from that contractual relationship to be resolved through arbitration only.

For example, Person A agrees to a contract with Company Z, which includes an arbitration clause.

If Person A later wants to sue Company Z—other than in certain rare circumstances—Person A will generally only be able to resolve their dispute with Company Z through an arbitration, not through a regular trial court.

Judicial Arbitration

Note that if your case is already in the court system, it may be subject to **judicial arbitration**, meaning that arbitration in certain cases is required and hosted by the court.

Unlike an ordinary arbitration procedure, however, parties to a judicial arbitration are not generally required to accept the final decision of the arbitrator.

Therefore, if you have a reason to believe that you may do substantially better in a regular trial court, then you may refuse the arbitrator's decision and take your case to trial.

Arbitration Brief

The **Basic Components of an Arbitration Brief** may include:

- an **introduction** and some **background facts** that may help frame your story
- informing the arbitrator what is the specific **arbitration award you are requesting**, which generally equals the full extent of the remedy you are entitled to under the governing law
- your detailed, yet succinct **timeline of facts and events** that led to your current dispute
- a summary of your **legal argument** for each issue
- an explanation of any **damages** you are claiming, including causation, and/or an explanation of why you are challenging the extent of damages claimed by your opponent
- a **list of any witnesses** you plan to call during the arbitration
- a **list of any exhibit evidence** you plan to present during the arbitration.

III. COURT SYSTEM

10. JURISDICTION

If all attempts to resolve your dispute outside of court have been **exhausted**, the next step may be for the plaintiff to file their complaint with the court.

Filing a complaint with the court officially enters the dispute into the court system, which consequently requires both parties to abide by the **rules of court and the rules of civil procedure**.

For example, if a plaintiff does not file their complaint with the proper court, the rules of civil procedure generally allow their complaint to be **dismissed** for lack of jurisdiction. This is because a court may not hear and decide a case unless it has the authority to do so. More specifically, the **court must have proper jurisdiction**.

Two types of jurisdiction are required for a court to properly hear and decide a particular case: subject matter jurisdiction and personal jurisdiction.

Subject Matter Jurisdiction

Subject matter jurisdiction refers to a court's authority to hear and decide a particular type of case.

Note that subject matter jurisdiction pertains to more than just federal court versus state court. It also pertains to specialized courts, such as family court, probate court, and others—where a case may be dismissed if not filed in the proper specialized court.

Questionnaire

The following Subject Matter Jurisdiction Questionnaire consists of five yes or no questions—based on rules of civil procedure—that help determine whether either a state court or a federal

court; only a federal court; or, only a state court, has subject matter jurisdiction over a particular case.
Note that because almost any type of case may be heard in a state court, the principal determination is whether a case may be heard in a federal court.

Two types of cases may be heard in **either** a state court **or** a federal court—one is based on what is referred to as diversity jurisdiction, and the other is based on what is referred to as federal question jurisdiction.

Diversity Jurisdiction has two criteria:

First, the parties on opposing sides must be **domiciled in a different state** from each other – meaning, no plaintiff may be domiciled in the same state as any defendant.

An individual person's **domicile** is generally where they permanently live at the time the complaint is filed; an individual may have only one domicile at any given time.

The domicile for a corporation is the state where its headquarters are located, and also the state where it was incorporated. Therefore, a corporation may have up to two domiciles.

The domicile for a general partnership business and some other organizations includes the domicile of all general partners or members. Therefore, a general partnership business may potentially be domiciled in all fifty states if it had fifty general partners who each lived in a different state.

Second, the total value of what the plaintiff is seeking in their complaint must exceed $75,000.

Federal question jurisdiction is where the legal issues in the plaintiff's complaint are primarily governed by federal law – meaning, a federal statute and/or the U.S. Constitution.

Cases that may **only** be heard in a **federal** court include cases that primarily involve bankruptcy, copyright, patent, maritime, or federal tax law.

Cases that may **only** be heard in a **state** court, even if diversity jurisdiction exists, include cases that primarily involve domestic relations or family law – such as, divorce, child custody, paternity, and guardianships.

Questions

1. Is the plaintiff domiciled in a different state than all defendants?
2. Is the dollar amount or value of plaintiff's claims more than $75,000?
3. Is the plaintiff's complaint based primarily on federal law?
4. Is this a bankruptcy, copyright, patent, maritime, or fed tax case?
5. Is this a domestic relations / family law case?

Answer Key

Either a state court or a federal court *has subject matter jurisdiction if either:*

- *both 1 and 2 are "Yes" and both 4 and 5 are "No"*
  OR
- *3 is "Yes" and 4 is "No"*

Only a federal court *has jurisdiction if:*

- *4 is "Yes"*

Only a state court *has jurisdiction if:*

- *either 1 OR 2 is "No" and both 3 and 4 are "No"*
  OR
- *5 is "Yes"*

Personal jurisdiction

Personal jurisdiction refers to a **court's legal authority** to make a binding judgement against a particular defendant.

Questionnaire

The Personal Jurisdiction Questionnaire consists of six Yes or No questions, **based on rules of civil procedure**, which helps determine if a court in a particular state—whether a state court or a federal court within that state—has personal jurisdiction over a particular defendant.

Questions

1. Is the defendant domiciled in the same state as this court?
2. Did the actions that led to the dispute take place in this state?
3. Was the defendant served with plaintiff's complaint while the defendant was present in this state?
4. Did the defendant consent to this state's personal jurisdiction by contract?
5. Did the defendant consent to this state's personal jurisdiction by answering the plaintiff's complaint without objection to personal jurisdiction?
6. Does the defendant conduct regular business in this state?

If **any** of the six questions are answered Yes, then the state in question probably has personal jurisdiction over the defendant.

If **all** of the questions are answered No, the state probably does not have personal jurisdiction over the defendant.

Proper Venue

Next is to determine which county court within the state is the **proper venue** to hear and decide the case.

Meaning, in **addition** to having proper jurisdiction—both subject matter jurisdiction and personal jurisdiction—a court **must also** be the proper venue.

Proper venue is generally the county courthouse that is in the same county where:

- any of the defendants live
- defendant's business is located, or
- the events that led to the dispute took place

11. PLEADINGS

Now that you have...

- **analyzed** the legal issues presented from the facts of your case,
- exhausted all attempts to **settle** with your opponent, and
- determined which court or courts have proper **jurisdiction** and are the proper **venue** to hear and decide your case...

...your case may now be ready to **enter the court system** and begin the **pleadings phase**.

The **pleadings phase** is when all parties in the lawsuit draft, file, and serve their respective pleading documents.

The purpose of each party's pleading document is to **notify the court and all other parties** in the case of each party's positions, legal claims, and/or defenses.

Complaint

A Complaint is a type of pleading document that initiates a lawsuit and is the first document filed in the pleadings phase.

The plaintiff's Complaint against the defendant sets forth the initial legal claims that **form the basis of the lawsuit**.

Answer

An **Answer** pleading is made in response to the plaintiff's Complaint, and sets forth the defendant's positions, legal claims, and/or affirmative defenses.

Additional Pleadings

The plaintiff's Complaint and the defendant's Answer are often the full extent of the pleadings phase.

However, depending on the facts of the case, the defendant may include with their Answer another type of pleading, often called a **Counter-Claim**, against the plaintiff, which is, in effect, the defendant's complaint against the plaintiff. The plaintiff would, in turn, file an Answer in response to the defendant's Counter-Claim.

The defendant may also include two other types of pleadings:

- A **Cross-Claim**, often called a Cross-Complaint, which is the defendant's complaint against another defendant in the case
- A **Third-Party Complaint**, which is the defendant's complaint against a third-party, meaning an individual or organization that was not named in the plaintiff's Complaint

Both the co-defendant and the third-party in this scenario would then file an Answer to the defendant's Cross-Claim, and an Answer to the defendant's Third-Party Complaint, respectively.

The complaints and/or affirmative defenses made in all of these pleadings create the overall framework and limitations for the entire lawsuit, and are generally the **full extent of what may be asserted** in the lawsuit, by all parties.

Procedure Requirements

The **first step** before drafting a Complaint is to determine the **procedure requirements** for starting a civil lawsuit in the court where it's being filed, which may be different compared to other courts.

This means knowing precisely what papers must be **filed** with the court, and what papers must be **served** on all opponents, including relevant **deadlines** and timing requirements.

Custom-made legal documents must be **formatted properly** according to the rules of the particular court.

Drafting a Complaint

Next is to **organize** the body of the complaint.

Although the required contents in the body of a Complaint are similar between civil courts, the plaintiff should nevertheless determine what are the **specific required contents** for the type of complaint being filed under the rules of the court and the state.

Complaint Basic Components

The first basic component of a Complaint is an **introductory statement** that tells the reader what is in the body of the complaint.

Next, under a heading for **Jurisdiction and Venue**, the plaintiff tells the court and the other parties why this court, given the facts and the law, is the proper jurisdiction and proper venue to hear and decide this case.

Under a **Parties** heading, the plaintiff identifies the parties' full names, where each individual resides, and/or where each organization is located.

Under a **Fact Summary** heading, the plaintiff includes some background facts, such as when and where the events at issue took place, and some basic facts concerning what led to the dispute.

Cause(s) of Action — or Counts

> Next, the most central part of a Complaint are the **causes of action**, also called **counts**.
>
> A **cause of action** is the legal basis that gives the plaintiff the right to sue the defendant under the law, along with a set of fact allegations asserted by the plaintiff that, if proved, would satisfy the required elements of that cause of action, and therefore entitle the plaintiff to a particular relief that is ordered by the court against the defendant.
>
> Note that all civil complaints **must have at least one** cause of action, but may include many more, depending on the facts of the case and the governing law, as well as the plaintiff's circumstances and litigation strategy.
>
> Under each cause of action, the plaintiff lists a set of **key fact allegations** that, if proved, would satisfy all the required elements of each cause of action.

Next, under the **Prayer for Relief** heading, often called the **Wherefore Clause**, the plaintiff includes a statement requesting relief for the damages they allegedly suffered.

Finally, the plaintiff, depending on the type of case, generally must notify the court if the plaintiff is demanding a **jury trial**, as opposed to a **bench trial**, which is a trial with no jury.

> *Note that although **evidence** is generally not required to be attached to a complaint, some courts may require evidence to be attached in certain cases.*

The Complaint is then **signed** and may also need to be **verified**, depending on the rules of the court.

Filing and Serving a Complaint

The next step is to **file** the Complaint with the court, thereby officially entering the dispute into the court system, and **serve** the Complaint on all parties in the case.

Note that specific requirements concerning service and proof of service may vary depending on the type of document being served, the particular jurisdiction, and/or the individual courthouse.

Defendant's Response to a Complaint

The **defendant** has a few options to consider.

Their first option is to do nothing. Meaning, the defendant has the option to ignore the summons and do nothing at all.

However, ignoring a summons and a complaint essentially guarantees a **default** judgment against the defendant for the reasonable value of the plaintiff's claim.

A **default judgment** is generally made without the court ever hearing the defendant's case, seeing any of the evidence, nor considering the merits of the plaintiff's causes of action.

A better option may be for the defendant to **prepare an Answer pleading**, by closely examining the plaintiff's cause(s) of action in their Complaint, then laying out all the **facts** of the situation, **researching** the governing law, **evaluating** each element, considering the **evidence** of both sides, then concluding with an **argument summary statement**.

Once the defendant has analyzed the causes of action in the plaintiff's Complaint, the defendant may choose to either draft, file, and serve an Answer pleading; or, if the facts and law support it, the defendant may instead choose to file a **Pre-Answer Motion**, meaning a motion that is generally filed first, before filing the Answer pleading.

What is a Motion?

A **Motion** is a formal request made by a party in a lawsuit asking the judge to decide on an issue in the case and/or make a particular order.

The purpose of filing a Pre-Answer Motion is generally to request that the judge either require the plaintiff to amend their Complaint, or to dismiss the plaintiff's complaint altogether.

Common Pre-Answer Motions

• **Motion for a More Definite Statement**, which is a request for the judge to require that the plaintiff re-word some portion of their complaint that may be too vague or too confusing for the defendant to know how to respond, then re-file their amended complaint

• **Motion to Strike**, which is a request for the judge to require that the plaintiff delete some portion of their complaint deemed redundant, immaterial, impertinent, or scandalous, then re-file their amended complaint

• **Motion to Dismiss**, which is a request for the judge to dismiss all or part of the plaintiff's complaint, so either the entire case or part of the case is over completely, or the judge may allow the plaintiff an opportunity to amend and re-file their complaint.

Common legal bases for a **Motion to Dismiss** include:

- the statute of limitations has passed
- Insufficient service of process
- the court does not have subject matter jurisdiction over this type of case; or, the court does not have personal jurisdiction over the defendant; or, the court is not the proper venue
- the **Complaint fails to state a claim for which relief can be granted:**

To determine whether a defendant has legal grounds for this type of Motion, the defendant may research the cause of action in the plaintiff's Complaint to determine whether or not that cause of action is based on a rule of law that gives the plaintiff the right to sue the defendant.

The defendant may then research the law to determine what are the required elements for that cause of action and list them one by one. Then, closely examine the Complaint to determine whether or not the plaintiff alleged sufficient facts that, if proved, would satisfy each element.

Answer Pleading

If the defendant chooses to draft, file, and serve an **Answer** pleading, they may first **check the rules of the court and of the state** to determine exactly what papers need to be filed when responding to a Complaint; what must be included in the body of an Answer pleading; and, whether or not a pre-printed Answer form is available.

The **purpose** of an Answer pleading is for the defendant to set forth their positions in the case.

The defendant may generally respond to a plaintiff's Complaint in their Answer pleading in **two basic ways**.

General Denial

In some jurisdictions, and under certain conditions, the defendant may have the option to simply make a **general denial** in their Answer.

A general denial is where the defendant denies all allegations in the complaint in a single statement. For example: "The defendant denies all allegations made in the plaintiff's complaint."

Respond to Each Allegation

The defendant may be required to **respond to each individual allegation** made in the plaintiff's complaint, by either:

- **admitting** that the allegation is true
- **denying** that the allegation is true, or
- stating that the defendant **does not have enough information to either admit or deny** the truth of the allegation.

If the allegations made in the plaintiff's Complaint are numbered, the defendant generally must respond to each allegation directly, according to its number, as listed in the plaintiff's Complaint.

Where a numbered allegation actually contains two or more separable allegations, the defendant responds to each individual allegation separately.

Affirmative Defenses

The defendant generally must assert in their Answer pleading any or all viable **affirmative defenses** against the plaintiff's cause of action.

What is an Affirmative Defense?

An affirmative defense is generally a **complete or partial defense** against a cause of action.

> *Note that an affirmative defense is not used to disprove any of the required elements. Rather, an affirmative defense argues that **even if** the plaintiff proves all of the required elements of their cause of action, the defendant is still not liable.*

To assert an affirmative defense, the defendant should first **examine** the plaintiff's cause of action, then **research** the law to determine all viable affirmative defenses that may be available against that cause of action.

> *Note that there is generally no limit to the number of viable affirmative defenses that may be asserted against a particular cause of action.*
>
> *A defendant may therefore generally be **over-inclusive** when asserting affirmative defenses because if an available affirmative defense is not asserted in their Answer, it may be considered **waived**. Meaning, the defendant would not be able to assert it later in the lawsuit.*

In their Answer pleading, the defendant may assert their affirmative defense(s) by alleging facts that, if proved, would satisfy the required elements of that affirmative defense.

Additional Pleadings

In addition to filing an Answer pleading, when responding to a complaint, a defendant may also consider filing **additional pleadings** along with their Answer.

Meaning, a defendant may assert a new claim against the plaintiff through a **Counter-Claim**; a defendant may assert a claim against a co-defendant through a **Cross-Claim**; and, a defendant may assert a new claim against a third-party, through a **Third-Party Complaint**.

Counter-Claim

A defendant may file a **Counter-Claim** against the plaintiff.

A Counter-Claim is **not a defense** against the plaintiff's cause of action. Rather, a Counter-Claim is a **brand new claim** brought by the defendant against the plaintiff, along with their Answer pleading, which stands alone, and is therefore a claim that may have been brought in a separate lawsuit.

In other words, a Counter-Claim is, in effect, the **defendant's complaint** against the plaintiff, and is therefore pled in the same manner as a plaintiff's causes of action.

Therefore, in a Counter-Claim pleading, the defendant **must allege sufficient facts** that, if proved, would satisfy all the required elements of their Counter-Claim.

A defendant's Counter-Claim may or may not relate to the underlying events that gave rise to the plaintiff's causes of action.

Note, however, that if the defendant's Counter-Claim does arise from the same underlying events in the plaintiff's Complaint, then that Counter-Claim must be brought in the current lawsuit, or risk not being able to bring that claim later in a separate lawsuit.

If, on the other hand, the defendant's Counter-Claim does not arise from the same underlying events in the plaintiff's Complaint, then the defendant has the option to either bring that claim in the current lawsuit or wait and bring it later in a separate lawsuit.

Cross-Claim

A defendant may also consider filing a **Cross-Claim**, which is a new claim brought by the defendant against a co-defendant in the case.

Unlike a Counter-Claim, a Cross-Claim must relate to the same underlying events that gave rise to the plaintiff's cause of action.

Cross-claims are generally asserted where the defendant believes that a co-defendant is the true party liable for the damages that the defendant is being sued.

Third-Party Complaint

An additional pleading that the defendant may consider filing is a **Third-Party Complaint**, which is a new complaint against an individual or entity not named in the original Complaint.

Similar to a Cross-Claim, a Third-Party Complaint is generally filed where the defendant believes that it's actually a third party that is the true party liable for the damages in which the defendant is being sued.

Similar to a Cross-Claim, a Third-Party Complaint must also relate to the same underlying events in the plaintiff's Complaint.

Filing a Third-Party Complaint brings that third-party into the current lawsuit as a third-party defendant.

Basic Components of an Answer Pleading

The Basic Components of an Answer Pleading generally include an introductory statement stating the purpose of the document.

An Answer pleading generally includes either a general denial—if appropriate under the rules and circumstances—or, a direct response to each individual allegation set forth in the plaintiff's complaint.

The defendant may enter each numbered allegation made in the plaintiff's complaint, one by one, then either: **admit** the truth of the allegation; **deny** the truth of the allegation; or, state that they **do not have enough information** to either admit or deny the truth of the allegation.

The defendant may outline all of the **affirmative defenses** they plan to assert in their Answer pleading, including a heading with the name of the affirmative defense and a set of allegations sufficient to show that the affirmative defense should apply.

This same outline may be developed for any additional pleadings that may be filed, including: a Counter-Claim; Cross-Claim; or, Third-Party Complaint.

Note that each of these pleadings generally includes a Prayer for Relief, which asks the court for the specific verdict that the defendant is seeking.

Plaintiff's Reply to Defendant's Answer

A party may also be required under the rules—or, ordered by the judge—to draft, file, and serve a **Reply** in response to an Answer pleading.

Note that the basic components for each of these pleadings, as outlined above, serve only as a general guide, not as a template. The information outlined may then be transferred to either a pre-printed pleading form, if available, or to a custom-made legal document, then organized, proofread, and finalized, before filing and serving on all parties.

12. MOTIONS

Motions Practice is one of the four major parts of a lawsuit.

Motions Practice is the process of filing and opposing motions.

Motions are formal requests, made by parties in a lawsuit, **asking the judge to take some kind of action** concerning a wide range of issues, which may arise at any time throughout the entire course of the lawsuit—from immediately after the plaintiff files and serves their complaint, up to and even after a trial verdict.

In other words, motions are an available tool for any party in a lawsuit to use, whenever that party wants the judge to do something that may help them.

Range of Possible Motions

The different types of Motions that may be filed are essentially unlimited, and may range from **simplistic** with minimal or even zero impact on the underlying case, to **complex** with substantial or even total impact on the underlying case.

For example, different types of motions may include where a party wants the judge to **extend a particular deadline** or reschedule an upcoming event.

Or, a party may want the judge to issue an order to **compel their opponent to produce certain evidence** that the opponent has so far refused to provide.

Or, a party may want the judge to **make a final ruling** on the case itself—either in whole or in part—before, during, or even after trial.

Motions Practice: The Process

Motions Practice begins when one party in a lawsuit, called the "**moving party**," files and serves their **Motion** papers, which notify all other parties in the case and the judge of: the motion itself, the specific request being made, the legal and/or factual basis for the request, and the reasons why it should be granted.

If the moving party's motion request is opposed by another party in the lawsuit—called the "**non-moving party**"—the non-moving party would, in turn, file and serve their **Opposition** papers, which contain the non-moving party's legal and/or factual reasoning why the moving party's motion should be denied.

The moving party may then file and serve a **Reply** to that Opposition, which generally counters the specific points made in the non-moving party's Opposition.

If required, the moving party and the non-moving party attend a **court hearing** before the judge to argue their positions on the particular motion. The judge then makes a decision to **either** grant the motion in favor of the moving party, deny the motion in favor of the non-moving party, or grant some parts of the motion and deny other parts of the motion.

Motions: Governing Law

Note that the body of law that governs the principal legal issues in nearly all types of motions is **procedure law**, which governs the actions of all parties and judges within the bounds of a particular lawsuit; and, motion requests are based on issues that arise exclusively within the bounds of a lawsuit.

The body of procedure law is generally comprised of the **rules of civil procedure** and the **rules of court**, per jurisdiction.

Other types of law that may govern the issues in a motion include the rules of evidence, case law, and the substantive law that governs the underlying legal issues in the lawsuit.

Preparing a Motion

The **initial steps** that a party may take **before** drafting and filing their motion include determining their **goal**.

What specific action does the party want the judge to take, and what type of motion would they need to file in order to achieve that goal?

Next is to determine whether the particular type of motion is **timely**.

Meaning, has the allowable time limit to file and serve the particular type of motion expired?

Next is to determine whether the motion would likely be **opposed** by the opposing side.

Meaning, is the issue that forms the basis of the motion **in dispute**?

For example, the moving party may determine that their opponent would not oppose a motion requesting the judge to extend a particular deadline or reschedule an upcoming event.

On the other hand, the moving party may determine that their opponent would likely oppose a motion requesting the judge to order them to produce certain evidence.

If a party determines that their motion would likely be opposed, the next step may be to reach out to their opponent and **attempt to settle** the issue in dispute on their own, thereby avoiding motions practice on the issue altogether.

As with any other type of alternative dispute resolution, this generally involves both parties giving up some part of what they ultimately want in exchange for settling the matter on their own.

If a party determines that their would-be motion would likely be opposed by the opposing side and no agreement to resolve the issue is reached, the next step may be to **analyze the legal issues** presented in the motion.

Note that analyzing the legal issues in a motion is done in the **same manner** as analyzing the legal issues in the underlying case.

Meaning, the party may lay out all the **facts** of the situation—including what the opposing side would likely allege in their Opposition to the Motion, determine the **legal issues** presented from those facts, **research** and find the law that governs those legal issues, **evaluate** the strengths and weaknesses of the motion given the facts, evidence, and law, then conclude with an a**rgument summary statement** for each legal issue in the motion.

Once a party has analyzed their would-be motion, the next step is to determine the **specific requirements** for drafting, filing, and serving the particular type of motion, including **formatting and content** requirements, and whether or not a **court hearing** is required for the particular type of motion.

Form books and practice guides, which are generally available at a law library, may provide templates for various types of motions in major areas of law, and may include specific requirements under the rules of the jurisdiction, general tips for drafting the particular type of motion, and any deadlines and other timing requirements for filing and serving the motion.

Depending on the type of motion, the court may also require that the parties make a sincere attempt to resolve their dispute on their own before the moving party files their motion.

This requirement is often referred to as a **meet and confer** requirement.

Once the procedural requirements for the particular type of motion have been determined, the next step may be to do a **cost-benefit analysis**.

Meaning, the party may fully consider whether the potential benefits that may result if the motion is granted outweigh the potential time and expense of filing and arguing the motion, including the percentage chance that the motion would be granted or denied.

If the potential benefits outweigh the potential costs, the next step may be to outline the **basic components of a written motion**.

Basic Components of a Written Motion

Note that because the range of possible motions that a party may file in any given lawsuit is **essentially unlimited**, and may vary significantly in their purpose and complexity, the Basic Components of a Written Motion, as listed below, may be more than necessary for some motions and less than necessary for other motions.

With this in mind, the basic components of a typical written motion generally include an **Introduction**, which may serve as a **notice** to all parties and the judge of the motion itself; the date, time, and location of a pre-scheduled court hearing on the motion; the purpose of the motion, including the specific action being requested by the moving party and the principal rules of law and/or other grounds that justify the motion being granted.

A motion generally includes a **summary of key facts**, which may include any **background facts** as needed to put the issues addressed in the motion into context, and a **timeline of facts** and events from beginning to end that led directly to the moving party's filing of their motion.

Each key fact allegation made in the body of the motion may also require **citations to evidence** that supports each allegation.

The evidence is generally attached directly to the motion and presented in a manner that is in accordance with the rules of the particular court.

Supporting evidence attached to a motion may include an affidavit or declaration—which is a written, sworn, first-hand account by the moving party themselves, their attorney, and/or other witnesses concerning the allegations made in the moving party's motion.

Additional types of evidence that may be attached to a motion include pleadings, discovery documents, letters, contracts, emails, photos, or any other evidence that may support the moving party's allegations.

A motion may also include a **legal argument**, which persuasively outlines step-by-step why an analysis of the facts, evidence, and governing law justifies the court granting the motion.

Once a party has outlined the contents of their motion, that party may transfer the information to a formal legal document, formatted according to the rules, then organized, proofread, and finalized before filing their motion with the court and serving the motion on all parties in the lawsuit, **within the prescribed time limits** for filing and serving the particular type of motion.

Preparing an Opposition to a Motion

Once the non-moving party has been served with the moving party's motion, the initial steps before drafting and filing an **Opposition** include determining and examining what is the specific request being made by the moving party.

Next is to determine their **goal**: what does the non-moving party want the judge to do concerning the moving party's request?

If the non-moving party does not disagree with the request being made in the motion, and/or the non-moving party has no intention of opposing it, they may do nothing and allow the judge to decide whether or not to grant the motion **without opposition**.

On the other hand, if the non-moving party opposes the motion request, and they are considering filing an Opposition to the motion, the non-moving party may next determine whether the motion was filed and served in a timely manner under the rules.

If the motion was timely, next is to determine what are the **prescribed time limits** for filing and serving an Opposition to the motion.

If the parties have so far made no attempt to resolve the issue in the motion on their own, the non-moving party may choose to reach out to the moving party and attempt to settle the issue.

Once all attempts to settle the issue have been exhausted, the next step may be to **analyze** the motion.

Meaning, the non-moving party may: lay out all the **facts** of the situation from their perspective; determine the legal **issues** addressed in the motion, plus any additional issues presented from the facts that were not raised in the motion; **research** the governing law, including the law that the moving party is relying on to support their legal arguments, and any other rules of law that may help counter those arguments, and/or that may support the non-moving party's argument that the motion should be denied; **evaluate** the strengths and weaknesses of their Opposition, given the facts, evidence, and law; and, conclude with an **argument summary statement** for each issue.

Next is to determine the jurisdiction's **requirements** for drafting, filing, and serving an Opposition to this particular type of motion.

The non-moving party may then do a **cost-benefit analysis**.

Meaning, the party may fully consider whether the potential benefits that may result if the moving party's motion is denied outweigh the potential time and expense of filing and arguing their opposition, including the percentage chance that the moving party's motion would be granted or denied.

If the potential benefits outweigh the potential costs, the next step may be to outline the **basic components of a written Opposition**.

Basic Components of an Opposition to a Motion

The basic components of an Opposition generally include: an **introduction** summarizing the non-moving party's positions, a specific request that the motion be denied, and the principal rules of law and/or other grounds that justify the motion being denied.

A **summary of facts** from the non-moving party's perspective, including a timeline of key facts and events that led directly to the issues in the moving party's motion, which may need to be supported by attached evidence—with a citation to the evidence for each key fact allegation made in the Opposition.

The Opposition generally includes a **legal argument**, which persuasively states that an analysis of the facts, evidence, and governing law justifies the court denying the motion.

Once the non-moving party has outlined the contents of their Opposition, they may transfer the information to a formal legal document, formatted according to the rules, then organized, proofread, and finalized before filing their Opposition with the court and serving it on all parties in the lawsuit, within the prescribed time limits.

The Moving Party's Reply to an Opposition

Once the moving party has been served with the non-moving party's Opposition, the moving party may then file a **Reply** to that Opposition.

The moving party's Reply is generally not used to rehash the same arguments made in their motion, but rather the Reply is used to directly **counter**—with facts, evidence, and law—the specific points made in the non-moving party's Opposition.

The moving party's Reply must likewise be filed and served within the **time limits** prescribed by the rules of the jurisdiction.

13. DISCOVERY

The next major part of a lawsuit is the **Discovery Phase**, which generally begins immediately after the Pleadings Phase.

Discovery is where the parties gather all the information and evidence they need to build their case, from other parties in the lawsuit, and also from non-parties, such as eyewitnesses or organizations such as a bank or a medical office.

Discovery Rules

The formal Discovery process is **governed by**:

- the **rules of civil procedure** for the jurisdiction
- the state and local **rules of court**
- **specific orders** issued by the judge assigned to the case

The **purpose** of the discovery rules is to facilitate the formal information and evidence gathering process between the parties, i.e. discovery, in a manner that allows the parties to gather all of the information and evidence they need that is:

- **relevant** to the issues in the case
- what they are **entitled to** under the law

For example, the discovery rules allow a party in a lawsuit to:

- send their opponent a list of **written questions** concerning the issues in the case, to which their opponent is generally required to respond, by answering the question and/or by objecting to the question
- send their opponent a list of **affirmative statements** about their case, the truth of which their opponent generally must either admit, deny, or state their objection to the request
- require their opponent, or a non-party, to **produce tangible evidence**, or to permit the inspection of tangible evidence, that is relevant to the issues in the case
- require their opponent, or a non-party, to **provide oral or written testimony**, in-person and under oath, concerning their knowledge of the issues in the case

The **discovery rules**, in part, generally prescribe a set of **initial steps** that the parties must take in order to begin the discovery process.

Discovery Process: Initial Steps

The first step is generally where the parties and the judge attend a **case management conference** to discuss the issues in their case and other concerns related to the litigation.

The case management conference generally lays out the **issues** in the case that remain unresolved; each party's **positions** on those issues; whether or not the parties are **close to settlement**; and any other specific needs of the case—considering the types of issues, the complexity of the issues, and what is at stake in the lawsuit overall.

The **case management conference** helps the judge and the parties develop a sensible plan going forward, up to the start of trial.

Discovery Process: Disputes

Parties in a lawsuit generally carry out the back-and-forth process of requesting and responding to discovery requests **on their own**—meaning, with minimal direct involvement from the judge.

If a dispute arises between the parties over a particular discovery issue, and they cannot resolve the issue on their own, the judge generally steps in **upon a filed motion** and resolves the issue for them.

The Purpose of Discovery

The ultimate **goal of discovery** is for the parties to learn everything they are entitled to know about the facts and evidence related to their case and to develop a **list of all the evidence** that they plan to present during trial.

The formal discovery process is designed, in part, to **prevent any surprises** at trial. Meaning, by the close of discovery and before the trial begins, the parties should generally know exactly what evidence they intend to present at trial and exactly what evidence their opponent intends to present at trial.

This is why **parties often settle** their case after the close of discovery and before the trial phase begins, because with all the evidence known, the parties are able to evaluate the strengths and weaknesses of their case more accurately, which may lead to settlement.

Discovery Process: 'Procedural Track' and 'Substantive Track'

Two principal focuses for a party to maintain during the discovery phase include:

- gathering the **evidence they need** to build their case
- doing this by **following the rules**

This means the discovery process generally involves two separate tracks working in tandem:

- the **procedural** track (following the rules)
- the **substantive** track (gathering the evidence they need to build their case)

The **procedural track** is about **following the discovery rules** that govern every aspect of the formal discovery process, including:

- **what** the parties may or must do
- **how** they must do it
- **when** they must do it

Discovery rules are generally contained within:

- the **rules of civil procedure** for the jurisdiction
- the **state and local rules of court**
- **specific orders** issued by the judge assigned to the case

*The **rules of evidence** also apply to the discovery process concerning what evidence is or is not discoverable.*

The **substantive track** is about determining **what evidence a party needs** to either prove or disprove the elements of the underlying substantive issues in the case.

Create a Discovery Chart

The **goal** of the Discovery Chart overall is to determine:

- **what evidence** needs to be discovered
- **how** it will be discovered
- what evidence will be **presented at trial**

Set Up the 'Procedural Track'

You may begin the discovery process by first setting up the procedural track, by **collecting all the rules that govern the discovery process** in the respective state and the local court, such as:

- the state's **Code of Civil Procedure**
- the **state's Rules of Court**
- the **local Rules of Court**
- the state's **Evidence Code**

Set Up the 'Substantive Track'

The **substantive track** may be viewed as an **ongoing work-in-progress** that will continue to be updated through the entire discovery process and into the trial preparation phase.

First, add a separate chart for **each issue** in the case.

Then, list the **elements of the rules** that govern each issue.

Make a note which party has the **burden to prove** all the elements of the cause of action and affirmative defense.

For each element, add any **key fact allegations** that help prove or disprove the elements.

Then, add to each element what you know, believe, or assume are your **opponent's key fact allegations** that may help them prove or disprove the elements.

Then, add to each element any **counter-allegations** to help disprove your opponent's allegations.

Next, isolate **each individual allegation**, and describe what **evidence** you may use to help prove the truth of each allegation, and what evidence your opponent may use to help prove the truth of each of their allegations.

> *Note that if one evidence is used to prove or disprove more than one allegation, then that evidence should be listed more than once, meaning it should be listed with each corresponding allegation.*

Next, for each piece of evidence, including your **opponent's evidence**, indicate whether or not that evidence is currently in your possession or under your control.

Any evidence listed that is not currently in your possession or under your control is evidence that needs to be **discovered**.

For each evidence that needs to be discovered, note which of the available **discovery tools** you may potentially use to obtain that evidence.

These **tools** include:

- Informal Investigations
- Interrogatories
- Request for Production or Inspection
- Request for Admissions
- Depositions
- Physical or Mental Examinations
- Non-party requests.

Informal Investigations

Many types of information and evidence may potentially be gathered through **informal investigations**.

Meaning, discovery requests that are not subject to the formal discovery rules, and may generally be done by any party, on their own, at any time.

Note that although nothing generally prevents a party from making these types of requests on their own, an informal investigation is not without its limits, because a party, or a non-party individual or a non-party entity, who are on the receiving end of these types of informal requests, are generally under no obligation to respond adequately, or to respond at all.

Attempts to discover information and evidence informally may nevertheless be helpful in many situations because of the time and cost savings, compared to the formal discovery process and using the **formal discovery tools** as prescribed by the rules.

Interrogatories

Interrogatories are a set of properly written questions that are related to the issues in the case, sent to the opposing side, who must respond, under oath, to each question with their written answer and/or objection.

Requests for Production or Inspection

A Requests for Production or Inspection requires the opposing party to produce and/or allow the inspection of tangible items related to the issues in the case that are in their possession or under their control, and/or to object to that request.

Request for Admissions

A Request for Admissions is a set of properly written affirmative statements that are related to the issues in the case, sent to the opposing side, who must respond by admitting to or denying the truth of each statement, and/or objecting to the request.

Deposition

A deposition is an in-person question and answer session, done under oath, between a party and their opponent—who is generally required to respond (or potentially object) to each question.

Physical or mental examinations

In some cases, and under certain circumstances, a party may be permitted to require their opponent to submit to a physical or mental examination conducted by a qualified expert.

Non-party requests

Requests to discover information and evidence from a non-party, include to either produce or allow the inspection of certain tangible items, or to answer questions under oath in a deposition.

Note that although each discovery tool functions in its own particular way, ***more than one discovery tool*** *may be used along with any other tool to gather a single piece of evidence.*

For example, any of the question and answer tools—Interrogatories, Request for Admissions, and Depositions—may also be used, in conjunction with a Request for Production or Inspection, to discover information about that tangible evidence.

You may **continuously update your Discovery Chart** throughout the discovery phase and into the trial preparation phase as more information is learned and evidence is gathered—by adding, deleting, and/or updating the allegations and evidence listed in the chart, and indicating when the evidence being discovered is now **in your possession or under your control**.

The **ultimate goal** of the discovery chart is for the party to determine **what evidence will be presented at trial**—which is used to prove or disprove the truth of each party's allegations.

Discovery Process: Developing a Plan

Now that you have selected all the discovery tools that you may want to use to obtain each piece of evidence that needs to be discovered, the next step is to **develop a plan** to discover that evidence.

First, check all the discovery rule sources to determine the specific requirements for each discovery tool that you plan to use, each of which has its own special requirements, then create your own **Rules Guide** to serve as a quick reference as you plan your discovery.

Your **discovery plan overall** factors in:

- all the **evidence** you need to discover
- the **allegations** you need to prove or disprove with that evidence
- the **rules** you need to follow in order to properly obtain that evidence

Discovery Process: Responding to Discovery Requests

Before responding to discovery requests, check all the discovery rule sources to determine the specific **requirements** for responding to each discovery tool used by your opponent. Then, create your own **Rules Guide** to serve as a quick reference while you plan your responses.

Knowing at the outset the rules for both **propounding** discovery—meaning, initiating discovery requests through the discovery tools—and **responding** to discovery requests initiated by your opponent helps you to effectively and efficiently plan, develop, and draft your formal discovery **requests and responses**.

Note that making use of any of the available discovery tools to gather evidence is **optional**. Parties are required to respond to discovery requests, but they are not required to serve discovery requests on their opponents.

Therefore, a party may choose to use all, some, or none of these tools, **depending on their circumstances and the needs of their case**.
A party may have gathered all the information and evidence they need:

- from their opponent's pleadings
- from any pre-answer motions and/or opposition papers filed
- from any initial disclosures of information and evidence that the parties were required to produce at the start of discovery
- from their own informal investigations

On the other hand, a party may feel confident that they have all the information and evidence they need for trial, when evidence may in fact exist that may potentially be helpful or harmful to their case that the party does not yet know about.

If a party chooses not to make use of any of the discovery tools before the close of discovery, that party **risks not knowing everything** they could know about the facts and evidence of their case until it is too late.

In other words, in addition to a party making use of the available discovery tools to gather information and evidence not yet in their possession or under their control that the party **already knows exists**, the discovery tools may also be used to gather information and evidence of which **the party is so far unaware**.

Discovery Process: Potential Disputes

A **fundamental dispute that arises during the discovery phase** is where a party makes a formal discovery request for certain evidence from their opponent, who in turn does not want to provide that evidence because they believe that the evidence requested is protected—meaning, they believe they are not required to provide that evidence to their opponent under the law.

When a party does not want to provide evidence requested by their opponent, the first step is generally for that party to respond to the request with their **written objection**, including the legal grounds for the objection.

Common legal grounds for **objecting to a discovery request** include:

- the request is too vague, overbroad, or ambiguous
- the evidence requested is not relevant to the issues in the case
- the request is not reasonably calculated to lead to evidence that may be admissible at trial
- the evidence requested is an invasion of their privacy
- fulfilling the request would be too costly or unduly burdensome, compared to the value of that evidence to the opposing side
- the information or evidence is considered **privileged**

> **Privileged information** includes confidential communications between: attorney and client, spouses, or doctor and patient. Privileged information may also include a party's work-product—meaning, work that was created by the party, and/or their attorney, in preparation for the lawsuit, such as a party's confidential notes, opinions, strategies, and/or planning of the case.

If the opposing side disagrees with the reasons for the objection, and continues to demand the evidence requested, the next step is generally for the parties to **meet and confer** to discuss the matter and attempt to resolve the dispute on their own.

If the parties fail to resolve the dispute on their own, the next step may be for the party requesting the evidence to timely file a **motion to compel discovery**, and/or for the party objecting to the request to timely file a **motion for a protective order** against that discovery request.

Motion to Compel Discovery

A **Motion to Compel Discovery** asks the judge to order their opponent to provide the evidence requested.

A motion to compel is generally filed where the requesting party believes their opponent's objection is without legal merit, and/or made improperly or in bad faith.

In deciding a motion to compel, the judge considers whether the discovery request is: relevant to the issues in the case, not privileged under the law, and/or whether the requesting party's need for the evidence in question outweighs the harmful impact that the evidence may have on the non-moving party—including whether providing that evidence would be too costly, or unduly burdensome, considering the circumstances and the needs of the case.

Motion for a Protective Order

A **Motion for a Protective Order** asks the judge to order the requesting party to cease all further requests for that evidence, and/or to set limits on what evidence may or may not be discovered.

A Motion for a Protective Order may be granted if the judge finds sufficient reason to protect the moving party from a discovery request that is found to be **unreasonable under the circumstances**.

In making their decision, the **judge may consider** whether the evidence requested is irrelevant, privileged, and/or whether the harmful impact of providing that evidence to their opponent outweighs the requesting party's need for that evidence to build their case.

Discovery Process: Reducing Objections

A party may be able to reduce the number and/or effectiveness of discovery objections asserted by their opponent by first closely **examining the various potential discovery objections** that may be asserted, then crafting their requests accordingly.

Discovery requests that are narrow in focus, relevant to the issues in the case, and made exclusively in good faith in preparation for trial may invite fewer consequential objections, and therefore limit the need for costly and/or time-consuming discovery motions.

Additionally, it is also important to note that not only are parties in a lawsuit permitted to respond to a discovery request by **objecting** to that request, they generally **must do so in a timely manner and with adequate specificity** in order to **preserve their objection in the record** for later, if needed.

Meaning, if a party does not object to a discovery request in their response to that request, or in an otherwise timely manner under the law—such as, if a party answers their opponent's interrogatory question, or admits to the truth of a statement, or produces or allows the inspection of certain evidence, any of which without objection—then, that party may have **waived their right** to object to that discovery request and/or to the use of that evidence before, during, or after trial on appeal.

Motion In Limine

A common type of motion that is generally filed after the close of discovery and before trial is called a **Motion In Limine**.

A Motion In Limine asks the judge to **prevent certain evidence** from being presented—or even mentioned at all—by the opposing side during the upcoming trial in the presence of the jury.

The party filing a **motion in limine** generally argues that the evidence they are seeking to exclude is inadmissible and/or the prejudicial impact of that evidence on the moving party's case outweighs any legitimate value that it may have on the non-moving party's case.

And, often because of the nature of that evidence, the moving party's argument includes that the **mere mention of it** in the presence of the jury would be so prejudicial to the moving party that it would unfairly do irreparable harm, even if the moving party objected to the presentation of that evidence during trial, and even if their objection was sustained by the judge.

Meaning, even if the judge agrees with the objection and the evidence is excluded **during** trial—it would nevertheless be too late, the jury would already have heard the evidence, and even if the judge instructed the jurors to disregard that evidence, the harm would already have been done.

If a party chooses to file this type of motion, they must do so in a timely manner under the rules to allow time for the non-moving party to oppose the motion and for the judge to decide on the motion, all before the start of trial.

Motion for Summary Judgment

Another type of motion that is often filed after the close of discovery is a **Motion for Summary Judgment**.

A Motion for Summary Judgment **asks the judge to make a final ruling on one or more of the issues in the case without the need for a trial**,

This often happens where, after the close of discovery, when all the information and evidence that each party is entitled to is generally known, one or both parties may determine that there is no dispute over any of the material facts in the case, and therefore a trial is unnecessary.

This is because the **principal purpose of a trial** is for the fact-finder—whether a judge in a bench trial or a jury in a jury trial—to hear all the evidence as presented from both sides, and **decide on the facts of what happened** in the case based on that evidence.

Once the facts of the case are decided by the fact-finder at trial, the judge then decides whether and how the governing law should apply to those facts, as determined by the fact-finder.

In other words, if the material facts of what happened in the case are not in dispute between the parties, the fact-finder serves no purpose, there is no need for a trial, where the only dispute that remains is over **whether and how the governing law should apply to those undisputed facts**.

This situation is grounds for either party to file a Motion for Summary Judgment, asking the judge to make a final ruling on the case as a **matter of law**—meaning, by deciding whether and how the governing law should apply to those undisputed facts.

14. TRIAL

The next major part of a lawsuit is the **trial phase**.

The trial phase primarily involves **planning and preparing** for trial.

The trial itself is generally in **eight steps**:

- jury selection (if it's a jury trial)
- plaintiff's opening statement
- defendant's opening statement
- plaintiff's presentation of their evidence
- defendant's presentation of their evidence
- plaintiff's closing argument
- defendant's closing argument
- the jury's deliberation and verdict

The **purpose of trial** is for the fact-finder—whether a judge or jury—to decide the important, consequential facts of the case—as instructed by the judge—based on the evidence as presented during trial by both parties.

Therefore, the **principal task** of both parties is to carefully plan and prepare the presentation of their evidence to the fact-finder during trial.

Create a Case Outline

A general **Case Outline** lays out the **issues** to be decided at trial, the **elements** for each issue, the fact **allegations** of both parties, and the **evidence** each party will use to help prove the truth of their allegations.

Plan and Prepare for Trial

Because trial is, in effect, a culmination of everything that has transpired in the litigation to date, your **first step** in planning and preparing for trial may be to **compile and carefully review** all information, records, evidence, and documents associated with the substantive aspects of the litigation, from the initial case analysis through discovery.

Develop a Case Theme

Once everything about the case has been compiled and thoroughly reviewed, the next step may be to develop your **Case Theme**.

A Case Theme is a **succinct, yet comprehensive** statement that captures the essence of what the case is all about, from the party's perspective.

A Case Theme serves a **dual purpose**:

- to help a party narrow their focus in planning and preparing their case for trial
- to paint a picture in the mind of the fact-finder that the party wants them to see, expressed in their opening statement and/or closing argument

A case theme should generally be **relatable and believable**—designed to **encourage empathy and understanding** in the fact-finder.

A case theme should also be something the party's **evidence can support**.

A case theme should generally **not seem too far-fetched nor too difficult** for the fact-finder to imagine, which may invite skepticism.

Organize Your Evidence

Next is to organize and carefully **examine each piece of evidence.**

Each piece of **evidence that a party presents at trial** may be divided into two basic categories:

- Witness evidence
- Exhibit evidence

Witness Evidence

Witness evidence is a person's **sworn testimony**.

There are **three basic types** of witnesses:

- a **Fact Witness** whose testimony relates to their personal knowledge of certain facts and events at issue in the case
- an **Impeachment Witness** is a witness whose testimony relates to their knowledge concerning the credibility of another witness, and/or the reliability of another witness's testimony
- an **Expert Witness** is a witness whose testimony relates to their opinion and assessment of certain facts at issue in the case, as a qualified expert. The purpose of an expert witness's testimony is to help the fact-finder understand and decide facts where expertise is generally required.

Exhibit Evidence

Exhibit evidence includes tangible items, such as: documents, photos, emails, texts, electronically stored information, audio or video recordings, diagrams, and any other tangible item.

Create a List of All Evidence

Mark each evidence as either witness evidence or exhibit evidence.

For **witness evidence**, enter the name of the witness and the type of witness.

For **exhibit evidence**, enter a description of the exhibit and the witness or witnesses associated with that exhibit—meaning, all witnesses with knowledge about that exhibit evidence that is sufficient enough where either party may ask that witness questions about that evidence at trial.

Admissibility Issues

Next, indicate for each evidence whether there is a potential **admissibility issue** concerning that evidence—meaning, whether that evidence may potentially be objected to and/or deemed inadmissible by the judge at trial.

For evidence to be presented at trial, that evidence must be considered **admissible**.

For evidence to be admissible, it generally must be **relevant** to an issue in the case.

For evidence to be relevant, it generally must tend to prove, or disprove, either directly or indirectly, an **allegation of consequence** in the case.

An allegation is of consequence **if the truth of which matters to the fact-finder**, even if only slightly, in deciding whether or not an element has been proved.

Note that although admissible evidence must be relevant, **not all relevant evidence is admissible**.

Relevant evidence may generally be deemed **inadmissible** by the judge where the value of that evidence to the party seeking to present that evidence is substantially outweighed by other factors, including:

- if the evidence is highly **prejudicial** to the opposing side
- if the evidence **confuses** the issues or is **misleading** to the fact-finder
- if the evidence is unnecessarily **repetitive**, **cumulative**, or **too time-consuming**, compared to its value in the case
- if the evidence is considered **privileged** under the rules, such as communications between attorney and client, or a party's work product

- if the evidence concerns the opposing party's **character**, to help prove that the party acted in accordance with previous actions in similar situations

To prepare for potential disputes concerning the admissibility of evidence, research the state's **Rules of Evidence**, then carefully review the rules to determine what constitutes inadmissible evidence in the state.

After reviewing the rules, indicate for each piece of evidence whether or not an **admissibility issue** may potentially arise.

For each piece of evidence that either party may present at trial, and that may potentially be objected to by either party, enter the **type of objection** that may potentially be asserted, the **rules that govern** that objection, and your **legal argument** as to why the evidence is, or is not, admissible.

Plan the Presentation of Your Evidence

Now that you have organized and examined each piece of evidence, the next step may be to **plan and prepare the presentation** of your evidence for trial.

List all the witnesses you may call during trial, all the witnesses your opponent may call during trial, and the exhibit or exhibits associated with each witness—meaning, the exhibits about which you and/or your opponent may ask that witness questions.

Note that for **exhibit evidence** to be admissible at trial, that evidence must first be **authenticated**.

Exhibit evidence is generally authenticated by a witness with sufficient knowledge about that exhibit testifying that the exhibit is what the party claims it to be.

Once authenticated, the party may then request the judge to enter that exhibit evidence into the record, and proceed to ask the witness questions about that evidence.

To authenticate and have evidence admitted during trial, the parties must generally follow a **few basic steps**, per the rules of the court.

Note that some types of exhibit evidence are **self-authenticating**. For example, an article that includes the name of the website or periodical and the date it was published, a witness is generally not required to prove that this exhibit is what the party claims it to be; this item would generally be considered self-authenticating.

Parties may also **stipulate** that certain evidence is authentic—meaning, the parties agree in advance of trial that the evidence is what the party claims it to be, so there is no need to authenticate that evidence during trial.

> *Note: Confirm the required **steps for admitting evidence** under the state and/or local rules, then keep a written list of those steps as a reminder during trial.*

For each witness, list the elements about which that witness will be called to testify, whether by you or your opponent.

Prepare for Witness Questioning at Trial

> Prepare your witness questioning **for each element**.
>
> There are **two basic types** of witness questioning:
>
> - direct examination
> - cross-examination

Direct examination is where a party calls their own witness to the witness stand and asks them a series of open-ended questions related to the issues in the case, in order to elicit testimony from their witness to help prove that their version of the story of what happened is the correct version.

When a party's direct examination of their witness is complete, the opposing party may then ask their own questions of the same witness – this type of questioning by the opposing party is a **cross-examination**.

Cross-examination is a series of questions generally designed to challenge the credibility and accuracy of the witness's testimony in the preceding direct examination.

Cross-examination questions must generally be **kept within the scope** of the direct examination, unless the questioning relates to the credibility of that witness.

The principal difference between direct examination and cross-examination is the use of **leading questions**.

Leading questions are generally not permitted in a direct examination. Leading questions are, however, permitted in a cross-examination.

A leading question is a question that **suggests the answer within the question** itself.

> *Note that any question asked by either party during their direct and/or cross-examination is **subject to an objection** by the opposing side.*

Common objections to witness examination questions:

- **leading questions** in a direct examination
- **outside the scope** of direct in a cross-examination
- the question is **irrelevant** to any issues in the case
- the question is too **vague** or improperly asks the witness to **speculate** or to give their **opinion**
- the question calls for **hearsay**—which is an out-of-court statement, made by a non-party and not under oath, that is being used by the party to prove the truth of what is asserted in that out-of-court statement by the non-party.

> *The principal reason for the rule against allowing **hearsay** to be presented as evidence at trial is because lawmakers believe that principles of fairness requires that the question be asked directly of the person who made the statement, not of a witness who heard the statement being made; this way, the fact-finder may better assess the veracity of that statement.*

Note that Objections during trial serve an additional purpose, which is to **preserve the record**. Meaning, when a party objects to the admissibility of their opponent's evidence during trial, that party is also **preserving their right to appeal** the judge's ruling on that evidence, if that ruling is adverse to the party making the objection.

Therefore, it is common practice for a party to **err on the side of objecting** to the presentation of any objectionable evidence during trial.

Create a list of potential objections that either party may assert during trial, which helps prepare for the examination questions for each witness, and also to use as an aid during trial.

Now that you have planned and prepared the presentation of your evidence for trial, you may now be ready to outline your Opening Statement and your Closing Argument.

Opening Statement

An **Opening Statement**:

- introduces the party's case to the fact-finder
- tells the fact-finder who they are
- explains their version of the story of what happened
- describes the evidence that will be presented and what that evidence will show
- makes clear the specific verdict they are seeking

An effective Opening Statement is generally **persuasive**, straightforward, easy-to-follow, and easy-to-understand.

An opening statement is an **opportunity** for the party to create a lasting, positive first impression of the party's credibility, and of the party's case overall.

A party is generally **not** permitted in their Opening Statement to:

- argue why their version of the story is the correct version
- explain why their evidence is stronger than their opponent's evidence
- discuss any evidence that has already been excluded pre-trial by the judge

Basic Components of an Opening Statement may include:

- an **introduction** that tells the fact-finder about the party—who they are, any background facts that may help the fact-finder understand their story
- **brief summary of their story** and what led to the lawsuit

• **case theme** that sums up the heart of what this case is all about, from the party's perspective
• a sufficiently detailed, chronological **timeline of facts** and events, including key facts that, if true, would prove, or disprove, each element
• **brief description of the evidence** that the party will present, and what that evidence will show to the fact-finder

> *Note that the party may also create a list for themselves of any **harmful facts** that their opponent may highlight in the presentation of their case, which the party **may consider preemptively addressing** in their opening statement, either directly or indirectly, depending on the situation.*

• **concluding summary** of their version of the story, what the evidence will prove overall, and a request for the specific verdict the party is seeking

Closing Argument

Closing arguments are made after both parties have presented all their evidence to the fact-finder, summarizes the party's case overall, and argues why the facts, evidence, and law, combined with the burden of proof requirement, show that the only reasonable conclusion for the fact-finder to reach is the verdict the party is seeking.

An effective closing argument is generally persuasive, straightforward, easy-to-follow, and easy-to-understand.

Note that the **principal difference** between a party's opening statement and their closing argument is that the party is generally **permitted** in their closing argument to **argue** why their version of the story is the correct version, and to explain why their evidence is stronger than their opponent's evidence.

The parties generally may not, however, discuss in their closing argument any evidence that was excluded pre-trial by the judge, deemed inadmissible by the judge during trial, or was otherwise not presented by either party during the presentation of their evidence.

Basic Components of a Closing Argument:

- an introduction that summarizes the case overall
- a review of the issues that the fact-finder is being asked by the court to decide
- the party's argument summary statement for each issue, including an analysis of the facts, evidence, and law, and why the conclusion of that analysis results in the party's favor
- a detailed discussion of the damages being claimed by either party
- an explanation of the burden of proof requirement in a jury trial
- a brief conclusion, including the specific verdict the party is seeking

Trial Brief

Now that you have outlined your opening statement and closing argument, next may be to draft your **trial brief**.

Note that a trial brief may or may not be required, depending on the type of case, the type of trial, and/or the judge's discretion.

A trial brief is generally written for the **judge's benefit**, in readying the judge for trial.

A trial brief is generally drafted as a legal document, according to the same formatting requirements per jurisdiction as other legal documents drafted in the course of the litigation, then filed with the court and served on all parties in the case.

A trial brief generally informs the judge what are the **issues** in the case left to be decided at trial, the **facts** of what happened from the party's perspective, the **law that governs** the legal issues, and the party's

factual and/or **legal argument** why the facts and law support the verdict the party is seeking.

A trial brief is an **opportunity** for the party to discuss their point of view concerning the facts and law **directly with the judge**, and to **persuade** the judge to agree with their perspective.

Trial briefs are also an opportunity for a party to address any evidence **admissibility issues** that may arise during trial, and to make their legal argument in advance of trial why certain evidence should or should not be admissible.

Basic Components of a Trial Brief:

- an introduction summarizing the history of the case
- background facts that may help frame the story
- a timeline of key facts, from the party's perspective
- a statement of the issues that remain for trial
- the party's persuasive legal argument, with a separate heading followed by an analysis of the facts and governing law for each issue; – a brief discussion concerning why the opposing side's legal argument is flawed
- legal arguments concerning the admissibility of certain evidence
- a conclusion that summarizes the party's strongest points and why the party should prevail

Jury Selection

Now that you have drafted your trial brief, your next step may be to plan for jury selection.

Jury selection, also called “voir dire," is where a group of potential jurors are asked questions by the judge and/or the parties, designed to narrow this group to a final panel of jurors. The jury selection process is generally governed by the rules of court and any specific rules set by the judge.

This group of potential jurors may be **narrowed** where:

- the judge may **excuse** potential jurors after determining that it may be impracticable for them to fulfill their required duties
- the parties may **challenge for cause**—meaning, the parties may request the judge to excuse certain potential jurors, whom they have reason to believe would not be fair or impartial, or for other legitimate reasons
- the parties may also have a limited number of **peremptory challenges**—meaning, the parties may be permitted to have a certain number of potential jurors excused for any reason

Create a Jury Selection Worksheet

First, enter the specific procedural rules set by the judge and/or the rules of court concerning jury selection.

Next, create a list of any facts or evidence in the case that **may elicit strong emotions or opinions** from potential jurors, then formulate questions to ask potential jurors that relate to those facts or evidence, which are designed to reveal potential bias, whether favorable or unfavorable to you.

The ultimate goal for both the judge and the parties is to select a jury whom they believe will be f**air and impartial** – who will listen to all the evidence as presented, remain open-minded throughout the trial, and allow both sides the same opportunity to prove their case.

CONCLUSION

If you read all the way through this guide, congratulations! You are now officially a **DIY Legal Warrior** and deserve high praise.

We highly recommend taking the next step and ***creating your Self Rep Edge account***, which includes: the Self Rep Edge Video Series, Legal Dispute Workbook, Case Management system, and Ask Judge Gavel—our in-house AI legal assistant.

SelfRepEdge.com *is your* ***HOME BASE*** *to manage and prepare your legal dispute.*