

PROVIDING PROCEDURAL CONTEXT: A BRIEF OUTLINE OF THE CIVIL TRIAL PROCESS

BY JUDITH GIERS

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Make the next left, then go three blocks, slow down because it's a speed trap, then turn right at the light and you are there! Where?

This is what it feels like to be a law student. We give the students detailed directions, but we often don't tell them from where we are starting. Without procedural context, our directions are just like the directions above. Useless. We tell our students the ruling from a case without describing the procedural setting of the case. We tell our students not to worry about procedure, then we wonder why they don't understand standards of review. Or sometimes we do describe the procedural setting of the case—"this was an appeal from the denial of a proffered jury instruction"—in a way that no first-year law student is likely to understand.

For better or worse, legal writing instructors must teach procedure. We often ask our students to evaluate whether a particular fictional client can overcome a motion for summary judgment on a given claim. In order to answer such a question the student must be able to understand the difference between being able to win the lawsuit and being able to present sufficient facts to get to a jury. The difference here is all about procedure. If we don't explain to the students the differing standards of proof related to different phases of the trial process, they will never fully understand why they can survive summary judgment, but still lose the case.

For these reasons, I developed this brief outline of the civil trial process. I use this almost daily in class. When we are discussing a case, the first thing we do is identify where the various issues on appeal arose in the trial process. When we are discussing a fact pattern for one of our problems, we look for where we are in the trial process. My students say that this outline helps them understand their civil

procedure classes. I hope that is true. But I know this outline helps them to understand the procedural context of the cases and fact patterns we use in legal research and writing, and that is important, not only to their grade in my class, but to their development as lawyers.

Basic Civil (Not Criminal) Trial Process

1. Prefiling

a. Problem occurs

Jane Doe has a serious problem—perhaps a business deal falls through, she is involved in an accident, or grandma dies with large estate and no will.

b. Independent efforts at resolution fail

Jane tries to work out her problem herself, but is not successful.

c. Client contacts lawyer

Jane calls a lawyer (you), comes in to meet with you, decides she likes you, and asks you to help her solve the problem.

d. Informal discovery of facts

You investigate the facts by reading documents Jane provides, viewing evidence (e.g., going to the scene of the accident), talking informally with witnesses who will talk to you, etc.

e. Evaluation of potential claims

You review the known facts and research the law related to claims that might be available given those facts. You evaluate whether the claim is strong enough to make it worth going through the expense, risk, and strain of litigation. You notify Jane of your decision about whether the case is worth pursuing. If you decide to take the case, you and Jane sign an engagement agreement laying out the terms of your relationship.

f. Pleadings (complaints/answers) drafted and filed

You draft the complaint according to local pleading rules. The complaint, in very general terms, alleges the facts that Jane (now "plaintiff") says happened and what Jane thinks the defendant should be required to do about it. For instance, the complaint could ask for damages (that is, money) or for the defendant to perform some act

(like give back grandma's antique clock). The complaint is personally given to the defendant. This is called service of process. The defendant has a set amount of time to respond to the complaint. The defendant may file an answer that admits or denies each allegation in the complaint and says why plaintiff (Jane) shouldn't win, *or* the defendant can file a motion against the complaint (see below). If the defendant does nothing, the plaintiff will win by default and a "default judgment" will be entered. The case would end there unless the defendant moves to lift the default or appeals.

2. Postfiling/Pretrial

a. Motions against complaint

Sometimes there are legal reasons to ask the court to throw out the complaint or make the plaintiff fix it. For example, if the complaint is filed too late or the court has no jurisdiction over the defendant, the defendant can move to have it dismissed. If the plaintiff's complaint is so vague that you can't figure out what she is complaining about, the defendant can move to make the complaint "more definite and certain." These motions attack basic legal requirements (like jurisdiction or the timeliness of the complaint) or problems with the form of the complaint (like it is too vague); these motions should *not* attack the truth of the plaintiff's allegations (the defendant can do that later). If the court dismisses a case in response to a motion of this sort, the case is over and the court's decision to dismiss the case is appealable. If a motion of this sort is denied, normally no appeal is allowed yet and the case goes forward for trial.

b. Formal discovery of facts

This part of the process is called "discovery." At this stage, the trial court rules provide various ways for lawyers to get a look at the evidence the other side has. For example, you can question, under oath, the party on the other side and their witnesses (depositions), you can ask written questions of the other side (interrogatories), and you can ask for copies of documents and records of the other side (requests for production). These various discovery methods are all regulated by court rules. If the parties have a dispute about whether a particular thing is "discoverable," they can file discovery motions that ask the court to

decide the dispute. These are called discovery motions. Courts hate discovery motions and you should do everything in your power to work out discovery problems with the other side without the assistance of the court.

c. Motions for summary judgment

Once discovery is over, both sides should know almost everything there is to know about the case. At this point, either side can move for summary judgment. When you move for summary judgment, you are asking the court to decide the case before having a trial. To get summary judgment, you have to show that there is no genuine dispute about what the material facts¹ are, and the undisputed facts show that your side wins under the law. You have to show that there is no dispute about the facts because the purpose of a trial is to resolve disputed facts. This is usually done by a jury, after all the evidence has been presented. If you have disputed facts, then you need to have a trial and you can't get summary judgment. If one side files a motion for summary judgment, the other side must respond with an explanation of why summary judgment should not be given. Summary judgment motions are all written, although there is usually an opportunity for a hearing in which the lawyers for the parties are allowed to argue their positions and answer any questions the judge may have about the motion. If summary judgment is allowed (granted) that ends the case. Because the case is over, the other side can appeal the summary judgment decision to the appellate court. If summary judgment is denied, the case then moves forward for trial, so no appeal is allowed.

d. Motions about admissibility of evidence, and other trial issues

When you know the case is moving forward for trial, you need to think about what trial issues are likely to arise during trial. The most common issues relate to the admissibility of evidence. If you know there is going to be a dispute about the admissibility of some of the evidence, you can ask the trial court to decide that issue before trial by filing a "motion in limine." Having evidence issues

¹ Material facts are facts that make a difference to the outcome of a case.

decided ahead of trial usually makes the trial go more smoothly. Lots of other issues can also come up right before the trial (e.g., should the courtroom be closed during part of the testimony or should certain evidence be allowed to come in by videotape?). Most of these issues can be resolved using a pretrial motion. Normally, a party cannot appeal a court's decision to allow or deny this type of pretrial motion because the issues being decided normally do not make or break a case, and certainly do not officially end the case, as would a motion for summary judgment.

3. Trial

a. Jury selection

This is the very beginning of a trial. Here the lawyers get to ask questions of the pool of potential jurors and weed them out for all sorts of reasons, although not for illegal reasons. Issues regarding how a jury was chosen can arise on appeal. A common issue is whether one side used illegal reasons for eliminating a particular juror (e.g., it is illegal to remove a juror based on his or her race). If you think the other side is eliminating jurors (called "striking") for illegal reasons, you must voice an objection on the record in order to preserve the issue for appeal.

b. Opening statements

Opening statements are just the lawyers' overviews of their cases for the jury or the judge. Very few legal issues arise during opening statements.

c. Plaintiff's case-in-chief

This is when you, Jane's lawyer, present her case. You introduce evidence through witnesses; the witnesses, under oath, tell the jury what happened. The lawyers on the other side can object to evidence they think is inadmissible. If an objection is made on the record, the issue is preserved for appeal.

d. Motions for judgment as a matter of law (sometimes called "directed verdict")

At the end of the plaintiff's case, the defendant should move for judgment as a matter of law. This motion allows the defendant to raise certain issues on appeal that, without this motion, are otherwise

not available. Failure to make this motion now is often legal malpractice.

e. Defendant's case-in-chief

This is when the defendant presents his or her case. Once again, evidence is introduced through witnesses. The plaintiff's lawyer can object to evidence he or she thinks is inadmissible. If an objection is made on the record, the issue is preserved for appeal.

f. Jury instruction conference

This is a very important phase of trial that you never see on TV. Sometime near the end of the trial, the judge will call all the lawyers together and have a conference about jury instructions. Jury instructions are, quite simply, the law put into layperson's terms so that the jury can apply the law to the facts to reach a verdict. In this conference, the judge will decide exactly how the jury instructions will be worded. In some routine cases, preprinted jury instructions can be used, but often at least a few jury instructions must be drafted by the court, with help from the lawyers. There are often major disputes about how exactly a jury instruction should be worded so that it accurately conveys the law to the jury. Disputes about how jury instructions are worded are common issues on appeal. If you argue for a particular wording and don't get it, you can appeal that after the trial is over.

g. Closing arguments

Here, each lawyer argue his or her case to the jury, explaining why the jury should find for his or her client based on the facts produced at trial and the law. Most lawyers try to weave the jury instructions into their argument so that the jury will see how the law that the judge is about to give them (see h. below) relates to the facts of the case.

h. Jury instructions given orally to jury by judge

Here, the judge just reads the jury instructions to the jury. The jury is not allowed to ask questions at this stage. Very rarely, the jury is allowed to ask written questions of the judge later, and sometimes the judge will answer a question. This is why the wording of the jury instructions is so important—there is usually no opportunity to clear up ambiguities.

i. Case submitted to jury and jury deliberates and reaches a verdict

j. Verdict delivered

The jury returns to the courtroom once it has reached a verdict. The verdict is usually read out to everyone in the courtroom by the foreperson of the jury.

k. Judgment entered

The court will enter into official court records a judgment reflecting the jury's verdict and awarding the relief the jury awarded. The date that judgment is entered is critical for the two posttrial motions in 1. below and for the filing of the notice of appeal.

Posttrial motions:

l. **Motion for judgment notwithstanding the verdict (JNOV) and motion for new trial**

Within a short time after entry of judgment (usually 10 days), the losing party may file a motion for judgment notwithstanding the verdict or a motion for new trial, or both. These motions are attempts to get the trial court to realize and admit that a serious error was made at trial and to either grant judgment for the losing party in spite of the jury's verdict or grant the losing party a new trial. The granting of a motion JNOV is appealable. The granting of a new trial motion is appealable in Oregon, but is *not* appealable in the federal system.

4. Appeal

a. Notice of appeal

A notice of appeal is filed with the intermediate appellate court, usually called the court of appeals, within 30 days of entry of judgment.

b. Appellant's brief filed

The appellant (the party who lost at trial and is appealing) must write a brief explaining the legal error the trial court made and why that error harmed (prejudiced) the appellant during the trial. The error claimed must have been "preserved" at the trial. The appellant preserves an error by pointing out the error to the trial court as it is making the error. By and large, the appellant doesn't get to complain about errors that were not pointed out to the trial court.

c. Respondent's brief filed

The respondent (the party who won below) must write a brief responding to the arguments made in the appellant's brief. The respondent must explain why the appellant is wrong about the claimed errors by the trial court, or must explain that any error made did not harm the appellant.

d. Appellant's reply brief filed

The appellant gets to write a shorter brief to reply to the arguments raised in the respondent's brief.

e. Oral argument

Both sides get a chance to argue their positions before the appellate court, usually to a panel of three judges from the appellate court. Those three judges normally decide the case for the whole court without involving the other judges. In Oregon, each side usually gets 30 minutes to argue a civil case. In the federal system, a party may get 10 or 15 minutes or 20 minutes in an important case, or no oral argument in a run-of-the-mill case. The purpose of oral argument is to allow the judges a chance to ask questions about legal arguments. The lawyers' purpose is to answer those questions and highlight the best, most important points in their briefs.

f. Case taken under advisement or submission

This step can take many months. After hearing arguments, the court will go back and think about them. The court will look closely at whether errors were preserved (see b. above). If you argued that the trial court made a legal error (e.g., the trial court gave a jury instruction that did not properly reflect the law), then the appellate court will look at that question with no deference to the trial court. This is called "de novo" review. If you argued that the trial court made more of a judgment-call type error, such as letting in certain evidence even though you argued that it was unduly gruesome, the appellate court will look at that question while giving substantial deference to the trial judge, who was there and saw the evidence as it was coming in. These differences in the way the appellate court looks at certain kinds of questions are the result of different "standards of review." A standard of review is simply the particular way that an appellate court will look

at a particular question. There are many different standards of review. (One of your jobs as you write an appellate brief is to figure out what the standard of review is for the issue you raise.)

g. Written decision (opinion) issued

Once the appellate court has agreed on a decision in the case, an opinion will be written reflecting that decision. The case will be affirmed (this is the appellate court saying the trial court was right) or reversed (this is the appellate court saying the trial court was wrong). Sometimes a reversal includes a remand for trial or retrial (telling the trial court to go ahead and try the case). Sometimes a reversal does not include a remand—that means the respondent wins the entire case. Occasionally, cases are affirmed without opinion. That just means that the appellate court thinks the trial court did not make a mistake and it isn't worth writing about it.

h. Petition for review/petition for certiorari in supreme court

If you lose at the intermediate appellate court, you can try to appeal to the highest appellate court, usually called the supreme court. Most supreme courts have discretionary review authority. That means the judges on those courts get to decide which cases they want to review. So, the first step at the supreme court level is to convince the court to take your case. You file a brief for that purpose, showing why your case is important enough for the judges on the supreme court to take time to look at it.

i. Opposition to petition for review/certiorari (optional)

Of course, your opponent doesn't want the supreme court to take your case, so he or she may file a responding brief explaining why the court should not take the case.

j. Review allowed or denied by court

Once the petition and any opposition are filed, the court will decide whether to take the case. There is no oral argument on this issue.

k. If review allowed

If review is allowed, the court will issue a briefing schedule to the parties and the case will proceed in similar fashion to the court of appeals process described above in 4a–4h.

This is a very generalized overview of the trial process. There are all sorts of other things that can happen to make a case proceed in a different fashion. But this is how most cases make their way through the civil litigation process. Parties can settle their differences at any point in this process using mediation or arbitration. These alternative forms of dispute resolution are becoming very popular.

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