PART ONE

The Role of the Appraiser

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CHAPTER 1

Anatomy of a Lawsuit

Purpose of This Chapter Few things are more embarrassing to the business appraiser than sitting through a meeting with counsel and not understanding a single word. Experts need to learn the language of litigation and the steps involved in getting a suit to court. This is the first step to finding the work. Once you understand the flow of litigation, you will be prepared to be a better service provider because you will know what can be contributed to each phase of the process. Knowing the obstacles faced by counsel in getting the suit to court (or delaying the day of trial), you as an expert will have a sense of the total picture, the effort, and the costs involved. When you understand each step of the process, you will be in a position to offer appropriate assistance where the input of an expert on appraisal issues can affect outcome.

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The most challenging aspect of litigation support services is getting hired early in the process. Not only does this assist the appraiser in finding the work in the assignment that can give the appraisal the most impact, it prevents wasted time in trying to correct events that could have benefited from the appraiser's input. As you go through these materials, note the role of the appraiser in each step of the process.

WHERE TO FILE THE ACTION

Lawyers often have a choice of forums in which to bring an action, depending on the nature of the claim, the activities of the parties, and the location of the business or of the parties. The decision to file in a particular court can determine which Rules of Evidence and Procedure apply, the length of time to trial, and the handling of pretrial matters. It is an important strategic decision made by the plaintiff's counsel. Unless the state court is located in a major metropolitan area or in an area with a strong tax base, the general perception is that federal courts are more sophisticated in handling business disputes. Often, these courtrooms will have access to state-of-the-art technology. Federal courts may accept electronic filings, and preliminary matters will be handled by special masters, who can assist the case in moving more rapidly to trial.

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Role of the Appraiser The appraiser should review with retaining counsel the nature of the evidence on value that the expert will present, and the potential need to bring pretrial motions for items such as site visits and document access. The expert should also discuss whether his or her testimony has been previously admitted in evidence in state or federal court (and therefore would have established credibility), and whether the expert's communication skills would lend themselves toward a more sophisticated presentation, or whether he or she is more comfortable communicating with "just plain folks." As with all decisions beyond the opinion of value, the final call remains with counsel, who is evaluating these points as they will affect other aspects of the case.

Suits can be brought in federal court if there is *federal question jurisdiction*—if federal law creates the cause of action or if the plaintiff's right to relief depends on the interpretation of a substantial question of federal law. Antitrust cases, cases dealing with regulations on interstate commerce, or securities fraud cases would be common lawsuits where appraisers would perform services, and these cases would have federal question jurisdiction.

The suit can also be filed in federal court if there is *diversity*

jurisdiction—a dispute between entities from different states, or involving a foreign corporation[1] or individual (assuming the relief to be pled is above the jurisdictional limit—another area where the appraiser's advice should be sought by counsel). The rules for diversity jurisdiction require a determination of the *domicile* of each party, and diversity must be complete—that is, no one plaintiff can be a citizen of the same state as any one defendant. In the case of a class action, the named plaintiff's domicile is determinative of the diversity of the parties.[2]

Once Federal jurisdiction has been established, claims brought by defendants may be included in the federal suit, even though they might not have qualified for federal jurisdiction if the claim had been brought separately. Judicial economy and the desire to avoid inconsistent results prompt this *ancillary jurisdiction*. There are exceptions to this rule, and these generally pertain to the filing of optional claims, or claims far removed from the issues pled in the complaint.

To exploit the perceived benefits of a home-town advantage, the plaintiff's counsel may choose to bring a claim in state court even when federal jurisdiction is available. In that case, the defendant's counsel may request removal to federal court. Again, the appraiser can have input to counsel on the nature of the evidence and whether it would be better presented in a home-town court or in federal court. If removal is granted, the case will be heard in the federal district court for the district and division that includes the locale where the state action was pending.

If the action is destined for state court, jurisdiction still comes into play in determining *which* state should have jurisdiction. There is a divergence among the states on standards of proof, the way claims are defined, and the remedies that are available, as well as with interpretation of evidence and procedural rules. From the perspective of the parties, there can be an advantage to a defendant in defending the case where the company is a significant part of a local economy, and an advantage to a plaintiff in keeping a suit in a state where the defendant is an out-of-area competitor with few community ties.

A judgment rendered in one state is enforceable in other states—entitled to *full faith and credit*—but enforceability of U.S. judgments in other nations is governed by treaty, letters of agreement, and other instruments of diplomacy.

Under the modern tests, to be sued in a particular state, the

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defendant must be determined to have *minimum contacts* with that state. In the business context, this will generally mean that the defendant conducts systematic and continuous business in the state or solicits business through an organized plan—such as advertising by mail or through the media. The possibility of litigation or claims arising from the contact with the state must also be *reasonably foreseeable*, and a business is subject to jurisdiction in its state of incorporation whether or not the business conducts any other business activity there.

Role of the Appraiser In these matters, the appraiser should perform economic and industry analysis that would argue for or against minimum contacts with the jurisdiction and the foreseeability of suit. The appraiser's knowledge of the particular type of business and the national economy can provide information to counsel that can be used to argue for or against jurisdiction in a particular state. The most difficult calls are where the business puts a product into the marketplace that is then resold or incorporated into other products—in such instances, industry knowledge can help decide the question.

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Once the issue of jurisdiction is decided, the question moves to one of venue. *Venue* is the locality within the jurisdiction where the case may be tried—it is usually of more significance in the state court suit, where the obvious distinction will be the demographics of a potential jury. Again, the communication skills of the expert witness and the type of audience to which the expert can best relate should be discussed with counsel when venue is being considered, as well as whether the expert has been accepted as a qualified witness in any courts. Motions for change of venue can be brought by the defendant on the grounds that substantial events giving rise to the issues in the complaint occurred in other venues, or that another venue might be more convenient to the parties and witnesses. Particularly where an inspection of the business would assist the court in determining the issues, a defendant could argue to change venue to the location of its main facility.

THE PARTIES AND THE CLAIMS

The *complaint* is the first document in what can become an extensive pleadings file.[3] An appraiser who is hired sufficiently in advance of its filing can affect the manner in which the valuation issues are described and the types of relief that are claimed. This improves the chances that the complaint will match later offers of proof by the expert at trial.

You may have seen complaints that have been published in connection with infamous lawsuits, or read some pleadings available on Web sites such as Court TV, which has filings on high-profile cases. The typical complaint won't bear much resemblance to these—the filings on a high-profile case are written more for the press than the clerk's office. A typical complaint is a short and unembellished statement of the ultimate facts that give rise to a claim for relief. It will include the following:

- The identity of all plaintiffs and defendants
- The grounds for jurisdiction and venue[4]
- A summary of the facts giving rise to the claim[5]
- A demand for the relief that the plaintiff seeks—which may be pled in the alternative

Special matters such as fraud, mistake, the occurrence or frustration of conditions precedent or gross negligence are pled *with particularity*—that is, in detail. If punitive damages are sought, many jurisdictions require that a hearing be held, and that a preliminary finding of their appropriate inclusion in the pleadings precede including those allegations in the complaint.

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Role of the Appraiser The appraiser can have input with counsel on whether the acts of the defendant are, in a business context, sufficiently outrageous as to give rise to a claim for punitive damages.[6] In doing so, the appraiser will focus on the effect on the business of the conduct and whether it was a reasonably anticipated result.

In advising on issues such as what claims to bring and the parties who might have liability, appraisers are cautioned against advising throwing everything against the wall and taking to trial anything that sticks. All courts have penalties for frivolous lawsuits,[7] and costs imposed for bringing a baseless claim can sometimes be divided between the plaintiff and plaintiff's counsel. Judges and juries do not enjoy having their time wasted by claims that cannot be proven.

The complaint is filed, and then served upon the defendants in accordance with the rules of the jurisdiction. Should a defendant fail to respond within the time limit set forth in the Rules of Procedure, a default is entered. Unless the defendant succeeds in having it set aside upon a showing of good cause, the defendant can present no evidence. A defendant will generally respond to a complaint by filing either an *answer* or a *motion to dismiss* (the motion may also be incorporated into the answer, depending on the rules of pleading in the jurisdiction).

A motion to dismiss will focus on nonfactual issues of the claim, and is usually argued without the presentation of evidence. It therefore offers little occasion for input by the appraiser. Such a motion typically focuses on one or more of these aspects:

- Lack of subject matter or personal jurisdiction
- An argument that venue is improper
- Defects in the service of process
- Failure to state the elements of a claim
- Failure to join necessary parties
- Insufficient recitation of facts to allow defendant to respond

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The court will rule on the motion, and the plaintiff may need to amend the complaint before the action can proceed. The defendant may also file a *motion for more definite statement*. This is directed to the facts alleged in the complaint and it requests additional information before a response is filed. Defendant may reiterate the arguments from the motion to dismiss or the motion for more definite statement in the answer and affirmative defenses.

Role of the Appraiser Whether retained by plaintiff or defense counsel, the appraiser should be familiar with the answer and affirmative

defenses, as the parties may try to establish their existence or nonexistence through the appraiser's testimony.

Persons not originally part of the suit may be brought in on some occasions. Intervention may occur when a person not a party to the suit seeks to become a party in order to protect an interest that may be impaired as a result of the suit. In a dissenting shareholder action, for example, other shareholders may attempt to intervene and have their rights adjudicated. Through *interpleader*, a party who may be in the middle of a situation may force other parties into court to decide an issue—often who holds an asset or which of several parties rightfully claim ownership of interest. Intellectual property rights and domestic disputes are cases where the appraiser might see interpleader. Third-party claims are another level of pleading that can allow a defendant to assert claims, including those for indemnity, contribution, and subrogation.

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Role of the Appraiser If the appraiser is retained by defense counsel, the nature of the issues may prompt the appraiser to suggest other parties who belong in the suit. For example, in an action for negligent performance of appraisal services, the appraiser could determine whether other consultants contributing to the report would be appropriate third-party defendants. In an action for breach of a construction contract, the appraiser could review company financials on the project to determine if the performance of subcontractors or design professionals contributed to the losses claimed by the plaintiff.

Third-party practice involves a defendant's bringing claims against a third party—putting the defendant also in the status of a plaintiff as regards the third party. The labeling of third-party pleadings can approach the incomprehensible: A defendant who asserts a third-party claim, a claim against plaintiff, and a claim against another defendant might be referred to in pleadings as defendant/third party plaintiff/counter claimant/cross claimant.

The parties may also counterclaim (defendant suing plaintiff

for relief, or a third party suing defendant or plaintiff), or cross claim (defendants or third parties suing one another). The appraiser is wise to chart out the claims so that the relief sought by each party against each party can be clearly understood. This is definitely one of those situations when you can't tell the players without a program!

In the answer, the defendant will respond to the allegations of the complaint, often by referring to the complaint's numbered paragraphs. As with the complaint, the answer will be terse as the defendant admits or denies each statement, sometimes giving defenses to the allegations.

Several motions can be brought that ask the court to rule on the claims and resolve issues prior to trial. A motion judgment on the pleadings can be filed by any party after the case is *at issue*—after the final responsive pleading has been filed. It asks the court to look at the issues raised in the pleadings and decide the case without further proof.

A *motion for summary judgment* can also be filed by any party. It asks the court to look at the pleadings to the discovery and determine if there is a genuine issue of fact to be tried. The parties can also move for partial summary judgment, deciding selected issues in the case. Summary judgment motions are accompanied by the proofs in support of the argument—affidavits of the parties, deposition transcripts, and responses to discovery. The moving party has the burden of proof to demonstrate that there is "no material issue of law or fact" precluding the court's entry of judgment on the issue. The opposing party has the opportunity to respond and present proofs that refute the motion. There is a substantial time period between the filing of the motion and the filing of a response, which may allow the opposing party to take additional depositions to gather information in opposition to the motion. If the local rules provide for argument of the motion, the proofs of the opposing party will be filed in advance of the hearing.

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Role of the Appraiser If appraisal issues or entitlement to damages are involved, the appraiser can consult with counsel on the valuation and business realities. Even if the motion does not deal directly with

those issues, it can preview the movant's theory of the case, and what the movant (and sometimes the opponent) perceives as the strongest arguments. And the court's ruling on the motion can preview the judge's opinions on the case. For these reasons, sometimes these motions are brought even when counsel knows they cannot be won.

TAKING THE CASE THROUGH TRIAL

The right to jury trial is not an absolute. Some types of cases—most notably dissolutions of marriage—are nearly always decided via the bench trial; demands for equitable relief (such as specific performance, injunctions and declaratory relief) are also decided in bench trials. A demand for jury trial can be made in the complaint, or by any defendant at the time the answer is filed. Some states allow for a later demand to be filed. Federal practice requires that a demand for jury trial be filed within ten days of the last pleading directed to a legal issue.

Judges control the parties' progress to trial through discovery schedules and case management orders. In most cases, a pretrial order will be issued. This order will set the final deadlines for production of documents, supplementation of responses, and declaration and deposition of witnesses. It will also specify the dates for the declaration of experts and for providing expert reports. For too many lawyers, it is the issuance of the pretrial order that prompts their retention of an expert in business appraisal.

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Role of the Appraiser You must comply without exception to any requirements that pertain to you in the pretrial order. If you are retained after the deadlines are fixed, review them before taking the assignment. If you cannot meet the deadlines, decline the assignment. Confer with counsel regarding any exhibits you will need to illustrate your testimony, as they will have to be produced in advance of trial. Particularly if these exhibits are summaries, maintain a file with all the supporting documents for each exhibit.

The pretrial order will also require the parties to meet and discuss settlement. Advise retaining counsel that your appraisal should, if at all possible, be completed before a settlement conference so that it can be included in an analysis of the "best day" and "worst day" at trial.[8] If the reports of appraisers testifying for other parties are available, review and comment to retaining counsel on these prior to the mediation.

Prior to the trial period, the counsel will attend the docket call. This is a cattle call for all cases that are scheduled for the weeks or months of the trial period.[9] The oldest cases on the court's docket are given priority, as are cases that are entitled to priority as a matter of law or due process—including criminal cases and eminent domain proceedings. At the docket call counsel will confirm that the team is ready for trial, and counsel is given its ranking on the docket. Sometimes counsel is given a standby date when trial will begin.

Role of the Appraiser Contact retaining counsel the day of the docket call and arrange your schedule to be available during the trial period.

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In most cases, the counsel will prepare and fill pretrial briefs or a pretrial stipulation. Both of these filings will contain a recitation of the facts of the case; the pretrial stipulation will separate the facts into those that are undisputed and those for which a decision is requested from the trier of fact. The pretrial stipulation will also list the witnesses and exhibits, as well as issues of law to be decided during the trial.

Role of the Appraiser Consult with counsel on the description of the business and the nature of the damages, to make sure your testimony will be consistent with the representations in the pretrial brief or the stipulation. Read the brief or stipulation to determine that there is no new information presented that will affect your opinion—particularly in exhibits that you might not have seen. Discuss with counsel the anticipated testimony of any listed witnesses that

might be relevant to your opinion. Do what you can to avoid surprise.

AT TRIAL

Unless the case is a bench trial, the jury selection process begins the first day of the trial with the interview of the venire. The *venire* is a pool of potential jurors, who are interviewed by the attorneys or the judge; sometimes questionnaires or juror profile forms are completed by the members of the venire for background information. This is *voir dire*.

Each party can exercise a predetermined number of *peremptory challenges*[10]—challenges without cause that allow counsel to act on individual perceptions of bias of the potential juror. Potential jurors can also be excluded for *cause*—being related to parties in the case or participating in a similar lawsuit that might impair their ability to consider only the facts presented. All members of the venire are present for this questioning; it is their first impression of the case and of counsel.

The questioning is intended to screen the beliefs and attitudes of the potential jurors, such as these:

- Age
- Education
- Employment history
- Marital and family history
- Hobbies and interests
- Organization membership and volunteer activities
- Prior jury duty
- Life experiences related to the case on trial[11]

Counsel notes the profile of each juror as well as the reactions of the jurors during questioning, and whether the attorney is able to establish a rapport (since the lawyer is able to question each prospective juror for fewer than five minutes, this is an imprecise gauge even in the hands of a skilled trial attorney).

At the conclusion of voir dire, each party exercises its peremp-

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tory challenges. Often there are more jurors that counsel would prefer to see off the jury than can be removed through the use of the challenges.

Role of the Appraiser Prior to your testimony, discuss with counsel the backgrounds of the jurors and any impressions counsel gained from the jurors while watching the proceedings.

In large or high-profile cases, the parties may hire jury consultants or even a *shadow jury* to assist with the presentation of the case. A shadow jury will listen to the presentations (sometimes even sitting in the back of the courtroom) and discuss their impressions with counsel. Although there is a wide range of opinions on whether these are effective aids for trial lawyers, a testifying expert should practice presenting her opinions and underlying facts to people who typify members of the venire. Most courts no longer automatically excuse any citizen called for jury duty unless they have a physical or mental disability, are self-employed, or are a stay-at-home parent of young children. Therefore, there is no typical juror. Your goal as an expert witness is to be able to communicate the essential concepts to people with little formal business training, and to develop a natural, credible style that will allow people with significant education to focus on your position rather than substituting their own experience. In a bench trial, knowing the background of the judge prior to taking the bench and the types of cases that the division has been hearing will allow the appraiser to determine how much background information may be needed in valuation terms and methodology.

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Once the jury has been seated, there will be a preliminary instruction given to the jurors and counsel will present opening argument. In a bench trial, opening argument may be dispensed with and the court may rely on the pretrial briefs.

Role of the Appraiser Opening arguments allude to the proof that each party will present and describe the nature of the damages sought. Be familiar with the content of the opening arguments, particularly

if you will be responsible for presenting some of the evidence that they have previewed.

The party with the burden of proof (the plaintiff or petitioner) presents first and last. The opening statement of the plaintiff will be followed by the opening statements of the defendants. Presentation of plaintiff's *direct evidence* will follow. Each witness will give direct testimony; there may also be cross-examination, redirect, and recross. At some point, the expert witnesses will testify—in most cases, this will be after one or more fact witnesses have set the stage with details of the incidents that form the basis for the claim.

The presentation of the defendant's direct evidence will follow, including the presentation of testimony by defendant's expert witnesses. Plaintiff then begins the rebuttal case. The purpose of rebuttal is to respond to the evidence presented by the defendant—not to present additional information for the plaintiff's case in chief. The court may also allow *surrebuttal* by defendants. Resist any suggestion from retaining counsel that your testimony be "saved" for rebuttal or surrebuttal—if the damages or appraisal information is new evidence on rebuttal, chances are that the court won't admit it into evidence. Counsel may sometimes attempt to add an expert on rebuttal or surrebuttal to bolster weak expert testimony during presentation of the case in chief. Opposing parties usually respond that this testimony would be duplicative, and the attempt to present such testimony often underscores the fact that the first expert witness did an inadequate job. Learn when to let well enough alone.

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Role of the Appraiser This is where the appraiser's main impact will be felt—by giving competent and credible courtroom testimony. Be well prepared on your report and on any issues of other reports on which you may be questioned. In addition, know the testimony of other witnesses who may have given evidence on issues that could affect your opinions.[12]

The testifying expert has two functions—to present evidence for the trier of fact and to make a complete record in case of appeal. Pay

particular attention to the standard of value for the case and make sure it is clearly recited. Make sure the essentials of your appraisal process and your qualifications go on the record. Be precise with the "magic words" that will appear in the jury instructions, and recite them confidently during your testimony.

Closing arguments follow when both parties have rested their case. The plaintiff will close first, and, after defendant's closing, will be permitted a final short address to the jury.

Role of the Appraiser This is the last opportunity for your numbers to reach the jury's ear. Review with counsel how the appraisal conclusion will be described and any terms that should be repeated to the jury to emphasize the reliability of your conclusion.

At this point, the jury is champing at the bit to get back to the jury room. Jurors have been admonished not to discuss the case during the presentation of the testimony, and at last their stored-up opinions can have vent. Unfortunately, before the jurors are sent to deliberate, they must listen to a long set of directives—the jury instructions. These are paragraphs read by the court that address the matters of law in the case and include directives on these topics:

- Credibility of witnesses
- The elements of the claims
- Causation
- Burdens of proof
- Measure of damages
- Standards of value
- Contributory or comparative negligence

The proposed content of instructions is organized and prepared in advance of trial. In most jurisdictions, jury instructions are refined immediately following the close of evidence during a *charging conference*. This is a proceeding out of the presence of the jury during which counsel reviews its proposed instructions with the court, and the instructions are accepted, modified, or substituted with other language.

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The result is a complete set of instructions read aloud to the jury, and sometimes given to the jury to take into the jury room as a reference during deliberations.

Role of the Appraiser Be aware of jury instruction content prior to testimony and take care to match your use of technical terms with those used in the instructions. Although some consultants would take the position that the expert could assist in drafting the instructions, it is the opinion of this author that doing so is a bad idea in most cases. The source of most instructions is case law, which the appraiser is in a poor position to interpret. If counsel proposes to use appraisal texts to define a standard of value, the appraiser can assist in selecting the correct portions of those texts. Otherwise, the appraiser should read both the proposed instructions and the set ultimately approved by the court, and stay out of the way for the rest of the process.

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Once the jury has been instructed, it will retire to consider its verdict. Although jurors might request that some testimony be read to them from depositions or the trial transcript (if available), no new testimony or evidence can be presented even if the jury has questions. Therefore, there is little the appraiser can do at this point.

In a bench trial, closing arguments and the deliberation process can occur days or weeks after the conclusion of the evidence. Often, closings are presented in written form after the trial transcript has been produced, and the court's ruling will be issued in writing (sometimes drafted by the winning party with instruction from the court).

Role of the Appraiser As with a spoken closing, this is the final opportunity to present the damage testimony to the trier of fact. In a closing brief the appraiser should assist counsel in describing both the appraisal conclusion and the underlying process with technical precision and in a concise format.

MOTIONS BEFORE AND DURING TRIAL

The pretrial order will often set deadlines for pretrial motions. These are a range of motions directed toward the evidence already in the court file, or evidence that counsel anticipates will be presented.

The most common pretrial motion that will affect the appraiser is the *motion in limine*. This motion is used to exclude possibly inadmissible evidence. From the appraiser's standpoint, this might be one of the places where a qualifications or a methodology challenge would be presented to the court. These motions are argued by counsel without the presentation of any evidence at the hearing other than that which has already been taken—often, excerpts of deposition testimony will accompany the motion or be read during the argument.

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Role of the Appraiser If you are the subject of a motion in limine, there's nothing you can do except review the status of your receivable. If retaining counsel brings such a motion directed at another expert, you can identify the portions of the deposition testimony that would demonstrate the unreliability or irrelevance of the testimony.

During trial, counsel may bring a variety of motions that attempt to shortcut proceedings. Since these motions generally involve legal argument and standards of proof, we recommend that the appraiser just stay out of the way. Your main job as appraiser is to have done complete and competent work so that your testimony will not negatively affect the outcome of these motions, and to avoid conduct that might result in mistrial.

Some of these motions are briefly discussed here:

- *Motion for judgment as a matter of law,* also known as *a motion for directed verdict.* This motion is made by a party after the opposing party's evidence has had full hearing. A defendant can bring the motion after the close of plaintiff's case but before the defendant has presented any evidence; a plaintiff will bring the motion at the close of defendant's case. In a jury trial, the court will look to whether the jury could reasonably find for the non-moving party. In a bench trial, the court will consider entering judgment as a matter of law—

determining that the party has failed to meet a burden of proof.

- *Nonsuit.* In jury trials, this motion is brought by the defendant at the close of the plaintiff's proof. It is analogous to the motion to dismiss sometimes brought at the start of the case and asks the court to rule that the plaintiff's case is legally insufficient.
- *Mistrial.* The judge is asked to end the trial prior to the rendering of a verdict because of a major defect in procedure or an occurrence during the trial. If the motion is granted, the case will be retried with all proofs re-presented to a different jury. For example, if a juror dies or becomes unable to continue and there are no alternates available, the court may declare mistrial. A mistrial may also be granted if there is serious prejudice to a party through the presentation of prejudicial testimony, juror misconduct, or inappropriate tactics by counsel. If a juror performs independent investigation and reports findings to the other jurors, this type of prejudice can be argued. Another cause of mistrial can be witnesses communicating with jurors—including expert witnesses. Limit your out-of-court contact with jurors to a nod and "good morning." Never discuss the case, the parties, the issues, or the judge in the hallway, bathroom, or public area where a juror may be present.

After the verdict from the trier of fact (whether the case is tried before a jury or proceeds as a bench trial), motions are brought requesting that the court alter the outcome. Some of these motions are discussed next:

- *Motion for new trial.* This is a request that a new trial be held on some or all of the contested factual issues. A new trial can be granted where counsel's argument to the jury was improper, or where there is newly discovered evidence.
- *Motion to alter or amend judgment.* This motion is brought in an attempt to correct errors of law.
- *Motion for judgment notwithstanding the verdict.* The court is asked to rule that a reasonable jury could not have reached the announced verdict.
- *Motion for remittitur.* The court is asked to order a new trial

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because the damages are excessive when related to the evidence. If the plaintiff consents to the remittitur, there is no new trial and the damages award is reduced as stated in the motion.

- *Motion for adittitur.* The companion to a remittur, a motion for addittitur requests the court to order a new trial for the purpose of increasing the amount of the verdict.

POSTVERDICT: COLLECTION OF JUDGMENTS AND AWARD OF COSTS

When the dust has settled, cost issues are next considered. Attorney's fees are not awarded unless specified by contract, or unless the cause of action entitles the parties to recover fees (generally set forth in a statute). If fees are recoverable, the parties will either agree on the amount of the fees or the court will decide the attorney's fee award after an evidentiary proceeding.

In most cases, the prevailing party will be entitled to a recovery of costs.[13] Recoverable costs will be listed in the Rules of Procedure or otherwise codified in the jurisdiction. Recoverable costs will include some portion of the expert witness fees—most notably those fees related to trial testimony and, if the deposition was used in court, some portion of the deposition fees.

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Role of the Appraiser Keep detailed records of time that you have billed hourly so that counsel can have this information ready for presentation at a cost hearing. If you were retained by the nonprevailing party, you can review the charges of the appraiser to determine if the fees are reasonable, both for the amount of the fee and the work performed for the amount charged.

Unless the defendant writes a check for the judgment, counsel will proceed to identify assets through discovery in aid of execution. This will include depositions, interrogatories and additional requests for production. Often counsel will have to attempt to recover assets

whose title may have been transferred from the defendant in an attempt to avoid their being subject to the judgment.

Role of the Appraiser If your assignment has given you insight into the accounting practices of the business or the nature of the corporate assets, you can assist plaintiff's counsel in identifying assets that may be available to satisfy a judgment. However, since this work can involve forensic accounting, make certain that your skills are suitable for this work. Many appraisers prefer not to consult on collection matters because it can increase the scope of research during the appraisal process beyond what is required for the valuation. This increases both the fees and client expectations of delivery of performance beyond appraisal services.

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Appellate Proceedings

When a notice of appeal is filed within the time limits established by the Rules of Appellate Procedure, the next phase of the dispute begins. In the appeal, the appellate court will be limited to a review of the record that was created during the pretrial proceedings and at trial. Counsel will prepare briefs and may present oral argument. A written decision will be rendered by the appellate court, and this will sometimes include a lengthy opinion reviewing the issues, the argument, and the rationale behind the decision of the appellate court.

An appeal bond is usually required to secure the adversary's cost if the judgment is affirmed. If the appealing party had a monetary judgment rendered against it at trial, a *supersedeas bond* is required to prevent collection of the judgment during the pendency of the appeal.

The right of appeal is a creature of statute in most states. Although there is generally an automatic right to a first-level appeal (from the trial court to the appellate court), further appellate review—from the appellate court to the court of last resort in the jurisdiction—is not automatic. Often the next level of appellate court can only be reached by a demonstration that there is a significant public

issue, the interpretation of a statutory or constitutional right, or a divergence among the lower appellate courts.

Any appraiser involvement would be on the initial appeal. Since the appellate court is limited to the record, the appraiser's assistance would be in the review of expert testimony and providing summaries of the testimony for inclusion in the written briefs or the presentation of oral argument.

NOTES

1. In this context, *foreign corporation* is intended to refer to a company that is not incorporated in the United States. The reader of pleadings or case law is cautioned that the term *foreign* corporation can also refer in those documents to corporations that are not incorporated under the laws of a particular state—sometimes described as *domestic corporations*.
2. Attorneys experienced in class actions generally prefer to have them filed in federal court. The federal court system is more experienced in the handling of these complex and time-consuming cases, and in some federal district courts complex litigation and class actions are placed in the division of one judge who has developed an efficient system for dealing with the claims.
3. It is a common rookie mistake to confuse pleadings and discovery. Pleadings are directed to the court, and deal with formal written statements on the existence or denial of claims and the related legal grounds. Discovery is directed to the parties, and deals with facts that support or negate the claims or defenses. Typically, all pleadings are part of the court file; discovery in many jurisdictions becomes part of the court file only if it is in support of some motion, argument, or pleading. In many cases, providing all discovery responses to the court would create a storage and time problem for court administrators. Therefore, if you travel to the courthouse to review a file, don't assume you are seeing all that has taken place in the case.
4. A minimal jurisdictional amount will be pled in the complaint. In general, lawyers simply recite that the amount of damages exceeds this minimum; it is unusual for the actual amount of dam-

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ages sought to appear in the complaint. At this stage of the pleadings, the amount of damages is generally undetermined. If the appraiser is asked for an amount, and the intent is to include this amount in the complaint, the appraiser may be dealing with inexperienced counsel or an uncontrolled client.

5. The plaintiff may have a variety of causes of action that can be brought, and each cause of action will have different elements. Some of these are discussed in the following chapter. The appraiser can review the facts given to date and discuss with retaining counsel whether the elements seem to be present for a particular cause of action.
6. A common standard is whether the conduct of a defendant is "willful, wanton, or grossly negligent" sufficient to give rise to a claim for punitive damages.
7. See, e.g., F.R.C.P. 11.
8. Appraisers are often asked to provide these "best day/worst day" numbers. This is a bad idea. Too many other aspects of the case are unknown to the appraiser, including court rulings on the legal issues, the credibility of the witnesses, and the ability of the opposing party to prove its claims or defenses. Don't be a guarantor for someone else's work.
9. Unless the case is given a *special setting*—a guaranteed time period when it will be heard—cases are overscheduled for the times when the court is to be presiding at trials. Often, cases are confirmed for a trial docket that, if they were all to be tried, will take three or four times as many days as the court has set aside for trial. This allows for cases to roll off the trial docket as a result of settlement or continuances granted by the court. Cases that are not reached during the trial period are carried over to the next docket period.
10. These are sometimes called *strikes*.
11. Mauet, *Trial Techniques*, 5th ed. (New York: Aspen Publishers, Inc., 1999), pp. 43–44.
12. Often at trial, counsel will invoke "The Rule." This refers to the court's exclusion of witnesses from the courtroom until they have been "excused"—meaning that their testimony has finished. As a general principle, the exclusion does not apply to expert witnesses, but you should confirm with counsel that it is appropri-

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ate for you to discuss the evidence given by witnesses who have been presented prior to your testimony. See the discussion of Rule 615 in Chapter 8, *infra*.

13. This also applies to defendants where the plaintiff was not awarded damages. In some cases—particularly where there have been counterclaims—it can be difficult to determine which party has "prevailed." The court will consider the nature of the claims and the relative successes of the parties at the fees and cost hearings.

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