

LITIGATION & Trial Practice

SIXTH EDITION



WILLIAM M. HART
RODERICK D. BLANCHARD

LITIGATION AND TRIAL PRACTICE

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WEST LEGAL STUDIES

Litigation and Trial Practice, Sixth Edition
by William M. Hart and Roderick D. Blanchard

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For more information contact Delmar Learning,
5 Maxwell Drive, Clifton Park, NY
12065-2919

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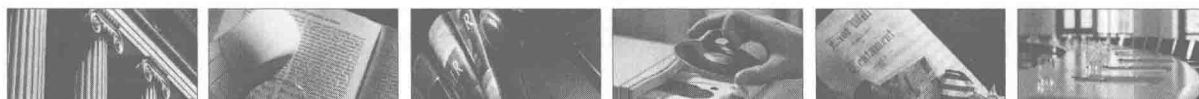
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LITIGATION AND TRIAL PRACTICE

SIXTH EDITION

WEST LEGAL STUDIES



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PREFACE



Introduction

Litigation and Trial Practice prepares paralegal students to work with lawyers as members of a litigation team. The book describes and explains the civil justice system. It explains how courts are organized, how they function, what lawyers do to make the system work, what paralegals may do, and how they should do it. The authors' premise is that, in addition to litigation rules and procedures, paralegals should understand why the system works the way it does. Otherwise, paralegals feel like outsiders—wondering what is happening and why. Outsiders are reluctant to take initiative and make suggestions. Paralegals who do not understand why the system functions as it does tend to make more mistakes and are less efficient. The book develops each subject by starting with the basics and building from there. It assumes the reader has little knowledge about courts, lawyers, and civil litigation. *Litigation and Trial Practice* is also an authoritative reference book. Although specifically written for paralegals, *Litigation and Trial Practice* can help anyone who works with lawyers and courts to be more effective, including persons in insurance claims work, court personnel, and legal secretaries who want to understand the reasons that underlie their work.

Development of *Litigation and Trial Practice*

The first edition of *Litigation and Trial Practice* was printed more than twenty-five years ago. It adopted a pragmatic approach to teaching civil litigation. The book's proven approach has been retained. Even so, this edition has been completely rewritten and reorganized to accommodate the dramatic changes in federal procedure that occurred about the time the fourth edition was published. This edition is even more comprehensive, providing more examples and more forms.

Organization

Litigation and Trial Practice begins by explaining that state and federal governments provide courts to resolve private disputes to keep people from using self-help, such as violence, as a remedy for perceived wrongs. Of course, people do not have to use courts to resolve their disputes, but courts are available when other civilized means are inadequate. The text explains the basic principles that guide courts, and that determine and limit their authority. Chapters 1 and 8 are important preview chapters. Chapter 1 provides an overview of litigation. Chapter 8 provides an overview on gathering evidence. These chapters prepare students for the detailed presentations that follow.

Lawyers are officers of the courts in which they practice. They must honor and protect the courts. At the same time, lawyers are advisers and represent their clients. Chapter 2 explains attorneys' dual roles. It discusses legal ethics problems that may confront paralegals and makes suggestions for avoiding problems. Chapter 3 explains how courts are organized, how they function, jurisdictional requirements, how courts obtain jurisdiction, and why courts can handle only certain kinds of disputes. The discussion is comprehensive, complemented with numerous examples and illustrative documents. Chapters 4 and 5 explain causes of action, remedies, and affirmative defenses. Building on the prior chapters, Chapter 6 describes the procedures for placing claims in suit and raising defenses. The role, preparation, and use of all pleadings are covered in detail so that students can understand them, prepare them, and use them.

Causes of action and affirmative defenses, as pled, determine what facts are material to a case. Therefore, the initial chapters prepare students to understand the importance of *material facts* and the need for *relevant evidence* to prove those facts. They prepare students to understand the role of evidence. Chapter 7 is a discussion about evidence and the exclusionary rules of evidence. It explains what evidence is, why certain kinds of evidence are subject to objection and exclusion, and the exceptions. The discussion is not a mere recitation of the rules of evidence. Chapter 8 is an overview of the processes for gathering evidence. It explains the importance of obtaining "the best evidence" and preserving evidence. Chapters 9–16 explain the various methods of obtaining evidence, including investigation, interrogatories, oral depositions, inspections, medical examinations, and requests for admissions. A separate chapter is devoted to each phase of discovery. Each chapter carefully describes the procedure and explains the paralegal's role. Each chapter contains helpful examples, illustrative documents, and appropriate responses to discovery requests. The text discusses the relative value and effectiveness of discovery procedures for various situations. It discusses the importance of coordinating discovery procedures with a party's investigation.

Chapter 17 covers motions of all kinds, including summary judgment motions. Again, the role of motions is explained, procedures are explained, examples and illustrative documents are provided. Many attorneys could benefit from the discussion and materials. The chapter prepares paralegals to understand and work with motions.

Chapter 18 is unique for a paralegal book. It explains and illustrates legal analysis, which is the foundation for a trial strategy. This is important because a trial strategy guides a lawyer's preparation for trial and her or his presentation of evidence. Of course, it is not enough merely to present the available evidence. The evidence must be presented in a manner that keeps it interesting, believable, persuasive, and memorable. *Litigation and Trial Practice* shows how a thorough legal analysis, starting with the pleadings, identifies the evidence a party needs. It examines the many choices lawyers must

make for presenting evidence. It considers how a litigation team can anticipate and meet an opponent's evidence and plan alternative solutions. The teaching points in Chapter 18 may be applied to the hypothetical case or any case the instructor finds useful.

Chapter 19 explains the structure of a civil trial, from the preliminary conference with the judge through polling the jury and entering judgment. Each step is explained with an emphasis on the paralegal's role. Chapter 20 discusses judgments, entry of judgments, and enforcement of judgments, including executing on judgments and using supplementary proceedings. To round out the process, Chapter 21 covers appeals and what paralegals may do to assist with an appeal, such as organizing the record and reviewing the transcript to support the statement of facts. Chapter 22 provides a thorough discussion of settlements and releases along with illustrative documents.

Chapter 23 provides a comprehensive explanation about alternative dispute resolution procedures and what paralegals may do in the field. Paralegals who understand civil litigation can assume major roles in mediation and arbitration matters. Some casualty insurance companies are asking laypersons to handle intercompany arbitrations in an effort to adjust losses efficiently and economically. The construction industry is turning to arbitration to resolve disputes between owners and contractors, between contractors, and between contractors and suppliers. For many years, labor disputes have been resolved in arbitration and mediation by persons who are not lawyers. A person does not have to be a lawyer to be a mediator or arbitrator or to represent a person or company in arbitration, unless the case is already in litigation. Then the arbitrators and advocates must be lawyers, because the parties are entitled to have rules of law and legal standards applied.

Litigation and Trial Practice is comprehensive and detailed because it is a paralegal reference book as well as a textbook. It is very basic with "how-to" explanations about the law and procedures. At the same time, it attempts to relate court procedures to the substantive law. It discusses legal theory and explains why the law functions as it does. If an instructor finds some sections contain material offered in the school's other courses, she or he may skip or de-emphasize those portions. Instructors may focus on sections they deem most important in light of the time available. Down the road, some students will read the sections that time did not permit them to cover in class.

Features

The sixth edition has been updated, somewhat condensed, made more technology friendly, and more readable. Like the fifth edition, it includes an interesting hypothetical case at the beginning. The hypothetical case is based on an actual case that went to a state supreme court. The hypothetical case is carefully integrated into the text to expand the student's opportunities to apply and learn the material. Instructors will find that it contains an incredible number of procedural steps, which take students from basic principles to an appeal and settlement. The hypothetical case is fully developed and provides a basis for study assignments. Other features include the following:

- Each chapter begins with an outline providing an overview.
- Key terms and phrases are boldface, cited in the Marginal Glossary, listed at the end of the chapter, and defined in the end-of-book Glossary.

- Example documents and forms complement the text discussions.
- A chapter summary reviews important learning points.
- Chapter review questions help students to determine whether they have grasped the material.
- Case assignments at the end of each chapter give students an opportunity to apply the information from the chapter and preceding chapters to the hypothetical case. The case and assignments are an ongoing story with subplots. It may also be used as the basis for independent work and tests.
- *Litigation and Trial Practice* avoids esoteric discussions about legal issues and problems in the law.
- The Glossary is very comprehensive.

New to This Edition

Litigation and Trial Practice has been updated and edited to be more concise.

- Each chapter is more specific about a paralegal's role on the litigation team.
- Court organization has been moved to the beginning of Chapter 3 to provide a frame of reference for subsequent discussions.
- Juries had been covered in a separate chapter; that subject is now part of the court organization chapter, and the juror's role is discussed in the chapter on trials.
- The chapter on motions brings together all types of motions, including motions for summary judgment.
- The chapter on expert witnesses now follows the chapter on investigations to better explain all the ways in which litigants can use experts.
- The discussion on jurisdiction is expanded and illustrations have been added.
- A discussion about the preparation and use of trial notebooks has been added.
- The discussion on fact briefs is greatly modified and integrated into the materials on trial preparation.
- A valuable discussion about trial strategy has been added to trial preparation.
- The hypothetical case now appears at the beginning of the text and is augmented and integrated into the text.
- The hypothetical case provides the basis for specific Case Assignments at the end of each chapter.
- Most discussions about rules and procedures are now augmented with more examples, illustrative documents, and exhibits. The text is slightly longer because of the many additions.
- Major examples are clearly delineated in the text.
- The discussion concerning mediation and arbitration is expanded to provide clarification about what paralegals may do.
- Technology Notes have been added to many chapters to inform students about technologies relevant to civil litigation and the use of the Internet.

How to Use This Text

Litigation and Trial Practice is designed to give students the big picture while explaining in detail most aspects of civil litigation. It does this in an evolutionary manner. Each chapter builds on the prior chapters. Subjects build on one another. The text was written to be self-sufficient. Little, if any, outside reading should be necessary. Chapters 1 and 8 are overviews. Students should read them, but not necessarily study them. They prepare students to understand the material that follows. Students should read the hypothetical case at the beginning of the course. Hopefully, it will catch their interest and be a catalyst for questions and discussion. It provides a frame of reference for class discussion.

Supplemental Teaching Materials

- The **Instructor's Manual with Test Bank** is available on-line at www.westlegalstudies.com in the Instructor's Lounge under Resource. Written by the author of the text the *Instructor's Manual* contains educational objectives, lecture notes, key terms, answers to review questions, "Using the Hypothetical Case", Web links, additional discussion questions, and a test bank.
- **Online Companion™**—The Online Companion™ Web site can be found at www.westlegalstudies.com in the Resource section of the Web site. The Online Companion™ contains the following:
 - Study Notes
 - Chapter Outlines
 - Web Links
 - Key Terms
 - Supplemental Activities
- **Web Page**—Come visit our Web site at www.westlegalstudies.com, where you will find valuable information specific to this book such as hot links and sample materials to download, as well as other West Legal Studies products.
- **Westlaw®**—West's on-line computerized legal research system offers students "hands-on" experience with a system commonly used in law offices. Qualified adopters can receive ten free hours of WESTLAW®. WESTLAW® can be accessed with Macintosh and IBM PC and compatibles. A modem is required.

Please note the Internet resources are of a time-sensitive nature and URL addresses may often change or be deleted.

Contact us at westlegalstudies@delmar.com

Authors

Roderick Blanchard, senior author, has specialized in civil litigation since 1960. Over the years, Mr. Blanchard has tried hundreds of civil actions of all kinds, including automobile accidents, airplane accidents, construction site accidents, defective products, electric utility power line accidents, natural gas accidents, fire losses, medical malpractice, accounting malpractice, engineer malpractice, insurance agent malpractice, attorney malpractice, employment discrimination, sexual harassment, sexual transmission of disease, insurance coverage, business breach of contract, divorce, child custody, and even a few probate matters. One hundred thirty-four of those cases reached the appellate courts—both federal and state. He wrote numerous briefs and argued those cases in both the trial courts and appellate courts.

Mr. Blanchard's interest in paralegal programs began more than twenty-five years ago when the University of Minnesota asked him to teach a civil litigation course for a new paralegal program. He was impressed by the students' enthusiasm and talents. He began to appreciate how much paralegals could help lawyers to be better lawyers. Although his firm employed some investigators, it did not have any certified paralegals. Soon, the firm began to hire trained paralegals. Some of the paralegals came to the firm directly from colleges. Some had prior experience in other fields, such as nursing and accounting. Some came from other law firms. As his law firm grew, its paralegal staff grew even faster. Lawyers who worked with paralegals were more efficient. Mr. Blanchard became increasingly dependent on paralegals to keep on top of his case load. They quickly became part of the firm's litigation teams. The firm now has twenty-plus paralegals to assist seventy-plus lawyers.

Litigation and Trial Practice is a product of his years of experience with litigation and working with paralegals. The paralegals in Mr. Blanchard's law firm told him how much they appreciated the fact that lawyers in his office made the effort to explain *why* they did things the way they did. Because the paralegals understood the reasons why they were asked to handle matters in a certain way, they found it easy to adapt to office procedures and to work with the kinds of documents and forms the firm used. The firm's paralegals did not feel like outsiders who were looking in. They understood what to do, how to do it, and why. That has become the theme of *Litigation and Trial Practice*.

The new coauthor, Bill Hart, devotes his practice to appellate law, focusing on insurance coverage and general litigation matters. He has been voted a Minnesota Superlawyer and is currently listed in the top 100 of Minnesota Superlawyers and in the top 10 of Minnesota's appellate practitioners. He is also a frequent lecturer on appellate practice and procedure.

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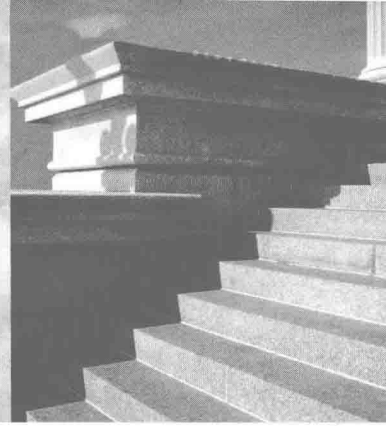
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College of Saint Mary
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Ruth S. Stevens
Davenport University—Grand Rapids
Grand Rapids, Michigan

A PERSONAL NOTE



A paraprofessional career in law should be interesting, fulfilling, and, on occasion, exciting. As you prepare to assume responsibilities that, historically, were reserved to lawyers, give some consideration to the attitude with which you will approach those responsibilities. I have a few suggestions that may help you to obtain the benefits a paralegal career has to offer.

You should be proud of your association with the legal profession and the judicial system. Conduct yourself as a professional person. Dress appropriately. Be courteous to all persons with whom you come in contact, especially when dealing with an adverse party or opposing lawyer. Strive to develop a reputation for reliability and candor. Keep appointments. Be on time. Avoid creating time conflicts. Use a calendar to schedule appointments and deadlines. By being timely, you will do the best job possible.

Recognize that each matter you handle is very important to someone, even when the work seems routine to you. Some matters you will handle will be very personal in nature. Avoid the temptation to make “innocent” disclosures about the cases you are handling. Guard against making accidental disclosures. When you handle an assignment for a client, demonstrate the same interest and concern that you would want for your own important matters.

Be thoughtful and innovative, but be careful not to exceed your authority. Look for ways to work effectively and efficiently. Keep copies of documents you prepare. When you work on other assignments, they will help you to do the job better and faster. One of the surest ways to gain satisfaction, if not enjoyment, from your work is to strive for excellence. There is always satisfaction in doing a job well—whether or not anyone else happens to notice. Even a tedious task can be made more interesting by approaching it with the intent of doing it as well as you can.

Lawyers and all others who serve the judicial system depend on effective communications, both oral and written. Strive to be precise in your statements and questions. Develop a concern for using words correctly. Be alert to the meaning of words you use in your correspondence and reports. Use the language of the profession. Legal terminology will help you to be precise in your thinking and effective in your communication. Organize your thoughts before you write your letters, reports, and

memoranda. Prepare your reports while the information is fresh and clear in your mind. Learn to use short, specific questions when you make inquiries of witnesses and clients.

As you work on assignments, try to keep in mind the whole picture and the ultimate objective. Strive to be objective in analyzing facts. It is all too easy to become oversold on a client's claim or defense. Lawyers and paralegals must avoid deluding themselves about the client's cause while serving the client. A client is better served by objective advisers than by fervent "yes-persons."

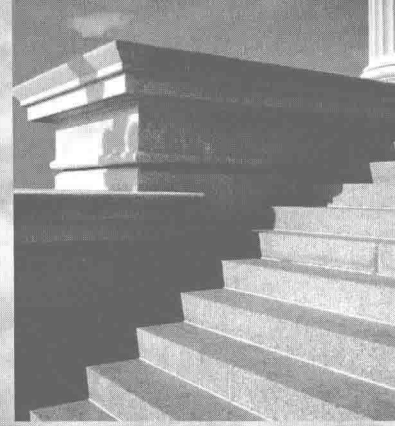
Ask questions about assignments. Determine how your tasks relate to the overall project. Learn from your mistakes, and do not become defensive because of past mistakes. Accept responsibility for what you have done, and for what you should have done but failed to do. Accept advice, corrections, and suggestions graciously. Usually, there is more than one way to perform a task. Be agreeable if the lawyers you work with prefer a method that is different from that which you learned or prefer.

Do not violate court rules or court orders or professional ethics. On occasion, your litigation team might be able to gain some advantage by disregarding professional responsibilities. Do not do so. Do not let anyone mislead you into a violation. No case, no client, no employer is important enough to justify sacrificing your own integrity and professional standing for his or her convenience. More often than not, the perpetrator's unprofessionalism is exposed to his or her detriment. The adversary system works well because each party has the opportunity and responsibility to present her or his own case. The process would collapse if it were not conducted by professionals in accordance with rules and standards based on fair play. Do not do anything to upset that delicate balance. Continue your education by attending seminars and reading professional articles relative to your work.

Roderick D. Blanchard

HYPOTHETICAL CASE STUDY

RASKIN V. HARPER



Introduction

The hypothetical case is based on a real case that reached the Minnesota Supreme Court. The names, places, dates, and a few of the facts have been changed. The case arose out of a car accident on a rural roadway. A pickup truck attempted to pass a slow-moving car. But while the pickup was passing, the car driver tried to make a left turn. The pickup's right front corner struck the car's left rear. There are issues concerning both drivers' negligence and causation. The driver of the car sustained serious personal injuries that lead to his death. After he died, a trustee was appointed to bring a wrongful-death action against the pickup driver.

The driver of the pickup had purchased it from a lawyer. At the time of the sale, the lawyer (seller) could not find his certificate of title. Both parties thought the buyer could not register the pickup without the certificate. For that reason, the lawyer agreed in writing to retain insurance on the pickup until he could find the certificate and give it to the buyer. Unfortunately, the lawyer neglected to look for it. The buyer notified the seller about the accident. The seller reported it to his automobile liability insurance company. But the insurer had canceled the policy. The seller's adult son had told the insurance agent that the pickup had been sold and asked the agent to transfer the coverage to another family vehicle. The seller complained that the agent should not have terminated coverage without talking to him first. In the meantime, the trustee, seller, and pickup driver entered into a hybrid settlement agreement to authorize the trustee to pursue a malpractice claim against the insurance agent. Eventually, the agent prevailed on a summary judgment. The case was appealed to the Minnesota Court of Appeals, which affirmed. The trustee petitioned to the Minnesota Supreme Court for review. The petition was denied. See *Redmond, as trustee for the heirs and next of kin of Wayne Russell Nolte vs. Frank Brandt and State Farm Mutual Automobile Insurance Company*, 1995 WL 479609 (Minn. App.).

Carefully read the hypothetical case now, before you begin your study of the text. Do not be concerned if you do not understand some of the words or if the circumstances are confusing. Keep the case in mind and use it as a frame of reference for applying the text. Case Assignments at the end of each chapter ask you to assist parties with aspects of the litigation. Sometimes the assignments will require you to use information from a prior chapter as well.

Hypothetical Case

Raskin v. Harper

John Griffin

John Griffin is a lawyer. He is married and has two adult sons who live in his home. He owned several vehicles, which were used by family members. In 1998 he bought a used 1995 GMC pickup truck from a lien holder who had obtained it through a repossession. Mr. Griffin contacted his insurance agent, Frederick Burns. Burns is the owner and sole proprietor of the Burns Insurance Agency, which is not incorporated. Burns had provided the coverage on Griffin's other vehicles. Griffin asked Burns to provide \$100,000 of liability insurance on the pickup. Agent Burns placed the coverage with the Security Insurance Company. Security sent the insurance policy to Griffin. It provided the coverage he had requested. Griffin's adult son, Carl Griffin, became the pickup's principal driver. Mr. Griffin and Carl treated the pickup as though it belonged to Carl. Carl bought the gasoline and paid for minor repairs, but Mr. Griffin paid for the insurance.

William Nordby

William Nordby was born in 1932. He was married and had an adult married daughter, Laura Raskin. He was a retired farmer. He owned a Chevette that from time to time lost engine power and died. Mr. Nordby had a mechanic look at it once, but the mechanic could not find the problem.

Sale of Pickup Truck

Carl decided he wanted a used Chevrolet Camaro instead of the pickup truck. He talked to his father about selling the pickup. Mr. Griffin agreed that Carl could sell the pickup and that he could use the proceeds to buy a used Camaro. A friend told Carl that Bradley Harper was looking for a pickup truck. Carl contacted Harper, and they were able to agree on a sale price of \$2,100. Carl told Mr. Griffin about the buyer and the proposed terms for the sale. Mr. Griffin could not find his certificate of title for the pickup to give to Harper. He was concerned that he might be liable for Harper's operation of the truck until he could transfer title to Harper. He concluded that he would keep the Security insurance policy on the pickup to protect himself.

John Griffin prepared a handwritten buy-sell agreement, which provided for the following:

SALE OF MOTOR VEHICLE

Seller: 333 Bittersweet Lane
Mitchell, Iowa

Buyer: Bradley Harper
Goodthunder, Minnesota

I, Bradley Harper, hereby purchase from M. John Griffin a 1995 GMC pickup, Sierra Classic 1500 Series, today, April 6, 2000, for Two Thousand One Hundred Dollars (\$2,100.00). The purchaser has inspected the vehicle and is purchasing the vehicle "as is," without warranty.

The seller does not have the certificate of title as of today. The seller shall use his best efforts to obtain said title as soon as possible. Seller shall keep insurance on said vehicle until title is obtained.

Dated this 6th of April, 2000.

/s/ Carl Griffin, Seller

/s/ Bradley D. Harper, Purchaser

On April 6, 2000, Carl Griffin met with Bradley Harper at their friend's house. They went over the terms of the written proposal and agreed that it was correct. Both men signed the sale-of-motor-vehicle agreement on April 6, 2000. Harper paid the full purchase price in cash. Harper took possession of the pickup on April 10, Carl used the sale proceeds to buy a used Camaro.

Bradley Harper

Mr. Harper was born in 1973. He is single. He is self-employed with an annual income of \$23,000. He had lost the use of both legs because of injuries sustained in a 1996 automobile accident. He is a paraplegic. He modified the pickup to include hand controls and a new stereo system. Harper operated the pickup as his own, but he did not buy insurance. As modified, the pickup had a fair market value of \$3,500.

Insurance

On April 10, 2000, Carl Griffin informed the Burns Agency that his father had sold the pickup and that they had purchased a Chevrolet Camaro to replace it. Carl asked for insurance coverage for the Camaro. An insurance secretary at the Burns Agency completed the necessary documents to cancel the policy on the pickup and transfer the unearned premium to a new policy for the Camaro. The secretary sent the documents to the Security Insurance Company, which placed coverage on the Camaro and terminated coverage on the pickup. The Griffins received a credit for the unused premium on the pickup. The credit was applied to the insurance on the Camaro.