K. Currier • T. Eimermann • M. Smith

Introduction to Paralegal Studies

A Critical Thinking Approach

EIGHTH EDITION

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Introduction to Paralegal Studies

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A Critical Thinking Approach

Eighth Edition

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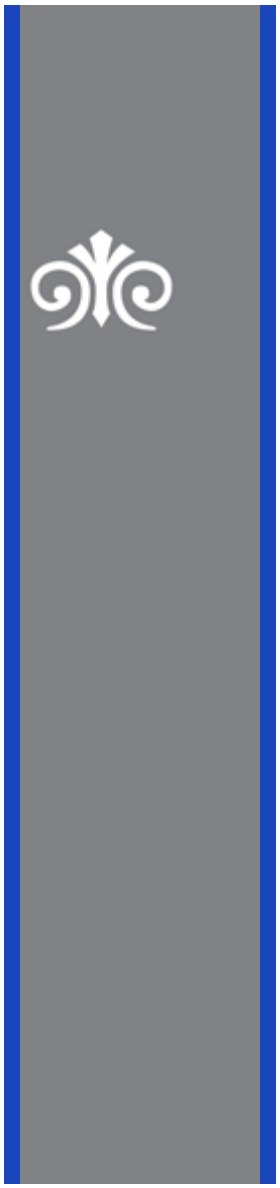

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for their understanding and suppor t

About the Authors

Katherine A. Currier, J.D., served as the Elms College Paralegal and Legal Studies program director for many years. She developed and taught many law-related courses, including Legal Reasoning, Research, and Writing; Introduction to Legal Studies I and II; Law Office Computer Literacy; Law Office Applications; Interviewing, Counseling, and Negotiating; and Law and Literature. In addition to the three texts she has coauthored with Professor Eimermann, Professor Currier has publications in the areas of legal ethics as applied to paralegals and law office computing.

Professor Currier has been actively involved in the development of undergraduate legal education at both the regional and the national levels, particularly through her work with the American Association for Paralegal Education (AAfPE) and the American Bar Association (ABA) Approval Commission on Paralegals. Professor Currier served on the national board of AAfPE, first as its parliamentarian and then later as the elected representative of four-year paralegal programs. She served many years as the AAfPE publications chair, charged with the final responsibility for overseeing the *Journal of Paralegal Education and Practice* and *The Educator*. Professor Currier frequently speaks at both the AAfPE Northeast regional meetings and the annual AAfPE conferences on topics as diverse as the use of computer shareware, paralegals and the unauthorized practice of law, creative teaching techniques, and conducting legal research on the Internet. Professor Currier also chaired the American Bar Association Approval Commission on Paralegals, the body charged with conducting site visits of paralegal programs that are seeking their initial ABA approval or reapproval. She also served on the Board of

Directors of the International Assembly for Collegiate Business Education (IACBE), an organization dedicated to promoting excellence in business education.

Prior to teaching at Elms College, Professor Currier taught at Suffolk Law School and Western New England College School of Law. She graduated *magna cum laude* with her B.A. in Political Science from Carleton College, with her M.A. in Political Philosophy from the University of California, Berkeley, and with her J.D. from Northeastern University Law School.

Thomas E. Eimermann is an Emeritus Professor of Political Science and former Director of the Legal Studies program he established at Illinois State University.

In addition to having been President of the American Association of Paralegal Education, he has served on the Certification Board of the National Association of Legal Assistants. He has also been a member of the Illinois State Bar Association's Committee on the Delivery of Legal Services; and a member of the Hearing Board of the Illinois Attorney Registration and Disciplinary Comision. As a consultant for the Illinois Department of Corrections, he developed a training program for Inmate law clerks.

He has authored or coauthored multiple editions of several other paralegal-related textbooks.

Michelle M. Smith, J.D., is an Associate Professor at Washburn University and serves as the Legal Program Coordinator in the Criminal Justice and Legal Studies Department. She has taught a variety of legal studies classes since 2016, including Intro to Paralegal; Intro to Law; Legal Research I and II; Legal Writing; Criminal Law; Intro to Contracts, Wills and Estates; Interviewing and Investigation; Law and Literature; and Legal Studies Capstone. She has also supervised and mentored students participating in the Washburn Honors Program.

Professor Smith remains an active faculty member, regularly serving on university and departmental committees, some of which have included faculty search committees, faculty tenure committees, large grant committees, and online task force committees. She has also served on the Faculty Senate and the Honors Advisory Board.

She is a member of the Academy of Criminal Justice Sciences and has served as an Executive Counselor for the Law and Public Policy section. She has spoken on the regional and national level on topics relating to the law and criminal justice.

In addition to this text, Professor Smith has coauthored textbook chapters about ineffective assistance of counsel and victimization of boys. She coauthored a journal article on the ineffective assistance of counsel in *Lee v. United States* and authored an article on the need for diversity in state appellate courts, highlighting the scarcity of former public defenders on the bench.

Prior to teaching, Professor Smith worked as a research attorney from 1998-2014 in the Kansas Appellate Courts, serving in chambers for Judge M. Kay Royse, Justice Carol A. Beier, Justice Fred N. Six, and (now) Chief Justice Marla J. Luckert. In addition, she served as the Kansas Supreme Court Motions Attorney from 2014-2016. She earned her B.A. in English from the University of Alabama in Huntsville and her J.D. from Washburn University School of Law.

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Preface

New to This Edition

This eighth edition keeps pace with many new developments in the law and the paralegal profession. We have added new topics, expanded others, and incorporated discussions of recent court decisions. We have also included new Legal Reasoning Exercises, Discussion Questions, and Review Questions. This edition contains an enhanced discussion of the following topics:

- the expansion of non-lawyers' ability to provide limited legal services directly to the public;
- the role of *stare decisis* and the place of precedent in our legal system;
- the expanded use of Presidential executive orders;
- the importance of the U.S. Supreme Court's use of the shadow docket;
- the takeover of online versus book-based legal research; and
- the increasing role of artificial intelligence, both in legal research and in law office management.

There is also one minor organizational change. We moved Legal Ethics, which had been in Part 1, Paralegals and the American Legal System, to Part 4, Paralegals and the Work World, so that students could first gain a basic understanding of the legal system and the role of attorneys and paralegals in it before tackling the often thorny issue of legal ethics.

Approach

As the subtitle of this book indicates, it applies a critical thinking approach to paralegal studies. Paralegal studies focus on the functions and duties of paralegals in the American legal system. The critical thinking approach to paralegal studies places great emphasis on the development of analytical thinking skills.

We use this critical thinking approach because we believe it is the best way for students to learn the fundamental principles of law. By learning how to read and interpret statutes, cases, regulations, and court documents, students will be better able to learn how to perform paralegal duties in a variety of specialty areas. Therefore, this book emphasizes careful reading for detail, analytical thinking, and the written presentation of arguments.

Another key element of this critical thinking approach is the interactive nature of the book. We have included Hypothetical Cases, Discussion Questions, Legal Reasoning Exercises, Practice Tips, and Ethics Alerts to stimulate students to think about and discuss the underlying assumptions behind various aspects of the law and the ramifications of different approaches to legal problems. We purposely dispersed these items throughout the chapters for two reasons: so that the students would be encouraged to think about them while the material is fresh from recent reading, and to make them readily available for instructors to use as springboards for classroom discussion. While we did relegate the Review Questions to the end of each chapter, we have labeled them with the pages they cover so instructors can easily assign just part of a chapter with its accompanying review questions.

Organization of the Book

Part 1, Paralegals and the American Legal System, introduces students to the study of law, the organization of the legal system, and the role of paralegals in that system. It includes the classification of different types of paralegals and what they do, as well as coverage of the issues of paralegal education, registration, certification, and licensure. Chapters in this section also cover such topics as sources

of the law, the different ways in which law is classified, the structure of the courts, and the various stages involved in litigation and alternative dispute resolution.

Part 2, Substance of the Law, introduces readers to the basic concepts involved in the areas of torts, criminal law, criminal procedure, and contracts and the Uniform Commercial Code. It also provides an overview of specialized practice areas, such as business law, employment and labor law, debt collection and bankruptcy, administrative law, immigration, real estate, intellectual property, estate planning and probate, and family law. Part 3, Legal Analysis and Research, contains chapters that build the critical thinking skills students need for reading and analyzing the law. Chapters 11 and 12 cover finding and interpreting statutory law and court opinions. Chapter 13 discusses basic legal research tools with an emphasis on online research and the risks and benefits of AI, and Chapter 14 shows students how to apply research findings to specific legal problems. Chapter 14 also discusses how to use the IRAC approach to legal analysis and how to report research findings in a legal memorandum.

Whereas Part 3 builds skills for finding and analyzing the law, Part 4, Paralegals and the Work World, builds skills related to gathering and managing relevant factual information. Chapter 15 covers the main topics of legal ethics, including client confidentiality, conflict of interest, and the unauthorized practice of law. Chapter 16 focuses on interviewing, while Chapter 17 covers the gathering, preservation, and use of different types of evidence. Chapter 18 introduces readers to case management and the various types of computer programs that attorneys and paralegals can use to manage case information.

Key Features

The many features that set this book apart are

- Chapter Objectives
- Discussion Questions integrated into each chapter
- Legal Reasoning Exercises

- Marginal definitions of key terms
- Practice Tips
- Ethics Alerts
- NetNotes
- Review Questions
- An appendix on the fundamentals of good writing
- A glossary that includes definitions for all bold-faced words and phrases found in the text

Because this book stresses the critical thinking approach, we illustrate our points with hypothetical situations and real case decisions that students will understand and to which they can relate. Discussion Questions and Legal Reasoning Exercises force the students to synthesize and analyze the material, rather than simply regurgitating an answer. The Practice Tips help connect theoretical textbook learning to the reality of the work world. They also provide checklists and other "words of wisdom" regarding practical paralegal tasks. By bringing the text to life, the Discussion Questions, Legal Reasoning Exercises, and Practice Tips all help maintain students' attention and aid in students' retention of the material.

Ethics Alert boxes are placed throughout the text to draw attention to the ethical issues involved in various aspects of the law. These boxes warn students of actions that would be considered unethical; they also give advice on how to act appropriately. NetNotes provide students with handy links to key Internet resources.

Because so much of learning the law involves mastering legal vocabulary, we have included marginal notes containing key definitions. The end-of-chapter Review Questions also help students reinforce basic concepts for students.

Of special note are the appendices. Appendix A contains the U.S. Constitution. Appendix B provides students with a convenient and easy-to-understand primer on the basics of grammar, including verb tense, pronoun agreement, placement of modifiers, punctuation, and style. A useful summary of all the NetNotes found in the text is available on Casebook Connect's Resources page.

An Instructor's Manual that includes suggested answers for all the Discussion Questions, Review Questions, and Legal Reasoning Exercises, as well as teaching tips, is available to help teachers make the most effective use of this book. Also available are a PowerPoint presentation to assist with classroom lectures and an electronic test bank. Instructors can download these materials on Casebook Connect's Resources page and the Aspen website.

Relationship to the Authors' Other Texts

Those familiar with *Introduction to Law for Paralegals: A Critical Thinking Approach*, and *The Study of Law: A Critical Thinking Approach*, will recognize many similarities to this text. All three books emphasize the critical thinking approach to understanding the law. All three include Discussion Questions, NetNotes, references to ethical questions, and either Legal Reasoning or Critical Thinking Exercises. Topics such as sources of law, classification of the law, structure of the court system, overviews of civil and criminal litigation, torts, contracts, property, and criminal law, and analysis of statutes and cases are covered in all three books.

These books differ in terms of their intended audiences. *The Study of Law* is directed at a more general-education/pre-law audience, and includes a chapter on Constitutional Law not contained in the other two texts. Both the *Introduction to Law for Paralegals* and this text are specifically directed at paralegals. Whereas *Introduction to Law for Paralegals* goes into more detail in its coverage of substantive areas of the law and includes excerpts from actual court opinions, this text provides greater coverage of the role of the paralegal and the types of skills involved in researching, interviewing, investigating, and computerizing case management.

Special Thanks

Naturally, we owe a great deal of thanks to the many students, educators, paralegals, and attorneys who contributed ideas for this

book. Special recognition should go to Victoria Joseph for her contribution to the criminal law chapter. We would also like to thank the staff at Aspen Publishers for the excellent support we have received on the books we have done with them.

Finally, we also want to thank our spouses and children for their continued support and understanding of our professional activities.

Katherine A. Currier
Thomas E. Eimermann
Michelle M. Smith

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Introduction to Paralegal Studies

1

PART

Paralegals and the American Legal System

Chapter 1

Introduction to the Study of Law and the Paralegal Profession

[P]aralegals are capable of carrying out many tasks, under the supervision of an attorney, that might otherwise be performed by a lawyer.
Justice William Brennan

Chapter Objectives

After reading this chapter, you should be able to:

- Give a commonly accepted definition of paralegal.
- Compare the educational requirements for becoming a lawyer with those of becoming a paralegal.
- List the major professional organizations that have an impact on paralegal education and practice.
- Describe the various tasks that paralegals typically perform.
- Define *stare decisis* and explain why it is important.
- Apply the terms analogous and distinguishable to a fact pattern.
- Explain why the study of law involves more than simply memorizing rules.

INTRODUCTION

The purpose of this text is to help you understand the American legal system and how paralegals and lawyers work within it. People often turn to the legal system for help in planning their affairs. For example, a group of entrepreneurs may seek legal advice regarding the best way to organize a new business, or a young, married couple may come to a lawyer for help with the purchase of their first home. Sometimes, however, people become involved with the legal system because they are in trouble. Perhaps they are facing criminal charges or have been injured in an automobile accident. Their stories illustrate how society has developed a set of rules to help people resolve conflicts they cannot resolve on their own.

Take a few minutes to read the following fact situations involving a distressed grandfather and a harassed student. We will be using their stories, and those of others, throughout this text to help you understand how the legal system works.

Case 1: The Distr essed Grandfather

Appr oximately one year ago, Donald Drak e and his six-y ear-old grandson, Philip, wer e w alking down a residential road on their wa y home fr om visiting one of Philip 's friends. Philip was walking on the sidewalk appr oximately 30 feet in fr ont of Mr. Drak e. Sudden ly, a car sped past, seemingly out of contr ol, jumped the curb, and hit Philip. Mr. Drak e ran to Philip 's side, but it w as too late . Philip had bee n killed instantly . The driv er of the car , Ms . Wilma Small, was unhur t. Based on skid marks and testimony fr om both Ms. Small and Mr. Drak e, the police inv estigation fo llowing the accident determined that ex c essiv e speed was the cause of the accident.

Mr. Dra ke said that at the time of the accident, his only concern was for the welfar e o f his grandson because he h imself was cle ar of the danger . Na turally , Mr. Drak e suff er ed a gr eat deal of mental pain and shoc k fr om seeing his grandson killed. While being driv en home fr om the accident, he suff er ed a hear t attack that necessitated a lengthy hospital sta y.

One year later , he still does no t feel completely reco ver ed and often suff ers fr om nightmar es reliving the accident and his grandson 's death. F ollowing the advice of trusted friends, he decided to mak e an appointment at the law office of Darr ow and Br yan to see if he could sue M s. Small to reco ver for his hospital bills, for his pain and suff ering, and for his emotional distr ess.

Case 2: The Harassed Student

W anda Smith, a 20-y ear-old college student, was walki ng past a construction site on campus when se veral of the construction work ers began to whistle and mak e catcalls.

Wanda did not appreciate being treated as a sex object and greatly resented the way in which these construction workers were behaving. To avoid the construction site, she started taking a longer route to campus, regularly making her late for her contracts class.

After talking it over with a few of her friends, Wanda decided to talk to one of the lawyers at Darrow and Bryan to see if she could take legal action. She did not want other women to have to undergo similar treatment and wondered if she could collect damages for mental suffering.

Keep these two stories in mind as you read this chapter and our explanation of how one goes about becoming a paralegal, how paralegals differ from lawyers, and the types of work paralegals typically do.

A. PARALEGALS AND LAWYERS

While this book focuses on paralegals, you cannot understand or fully appreciate the role of paralegals without also knowing some basic things about lawyers. The terms **lawyer** and **attorney** are generally used interchangeably to refer to a person who has been officially licensed to practice law. However, in some contexts, people use "lawyer" to refer to a person who is authorized to practice law and "attorney" to refer to a job title. Thus, an organizational chart may carry titles such as attorney, associate attorney, enforcement attorney, District Attorney, United States Attorney, or Attorney General.

Lawyer
A person who has been officially licensed to practice law in a state or federal jurisdiction. Also referred to as an attorney.

Attorney
A lawyer; a person licensed by a court to practice law. This term is often used to refer to a job title.

In the late 1960s, the terms "paralegal" and "legal assistant" began to be used to refer to persons who assist lawyers in ways that go beyond the duties of traditional legal secretaries and file clerks. Because the term **paralegal** is the most common and the most generic, it is the term most often employed in this book.

Paralegal
A person who assists a lawyer and, working under a lawyer's supervision, does tasks that, absent the paralegal, the lawyer would do. A paralegal cannot give legal advice or appear in court, nor can they set legal fees.

The **American Bar Association (ABA)**, the largest national organization for lawyers, defines a paralegal as:

> a person, qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible. [1]

American Bar Association (ABA) ***americanbar.org***
A national voluntary organization of lawyers.

Over half of the states have also developed some form of definition for the term "paralegal." None of the states requires adherence to its definition for employment. Other definitions of paralegal have also been developed by NALA: The Paralegal Association and the National Federation of Paralegal Associations (NFPA). Each association is discussed later in this chapter.

There are differences among these definitions, but all suggest that paralegals perform many of the same tasks normally performed by lawyers. They gather and analyze facts relevant to legal disputes, perform legal research, draft legal documents, prepare witnesses and evidence for presentation at legal proceedings, and even represent clients in some types of administrative hearings. However, even

though paralegals carry out many of the same tasks performed by lawyers, paralegals are not licensed to practice law. Therefore, they can perform many of these tasks only when working under the supervision of a lawyer. In addition, even then, they are not allowed to give direct legal advice to clients, to represent clients in most types of judicial proceedings, or to set legal fees. [2]

As Karen Decrescenzo explains in her Paralegal Profile, paralegals who are employed by the government, such as in municipal law offices, work in a wide variety of legal areas.

PARALEGAL PROFILE

Karen Decrescenzo

Principal Paralegal/Legal Intern Coordinator
Office of the City Attorney, Civil Division

I work in the office that services all of the legal needs for the city of San Diego. We have approximately 80 attorneys and 20 paralegals.

The attorneys and paralegals in our office work on a wide variety of legal issues. Cases can range from allegations of civil rights violations, to trip and falls, to First Amendment issues regarding sign ordinances, to collections, condemnations, contract disputes—really, anything about which a city can sue or be sued. Working in so many different areas means that the paralegals are called upon to engage in a lot of legal research and writing. Our paralegals particularly enjoy

working on temporary restraining orders to protect city employees who receive threats from the public, as the paralegals are able to appear in court for the preliminary injunctions, being careful, of course, to announce who they are and why they are there. As anyone who works for a governmental office can tell you, it's not about the money; it's about doing interesting, challenging, and rewarding work.

My advice to students is to say that I cannot stress strongly enough the huge benefits to be gained from joining paralegal associations. It is never too early to join. Students should become active in any clubs on their campus and investigate student membership in their local paralegal association. Through that networking, they will form relationships that will support and enrich them throughout their careers.

DISCUSSION QUESTION

1. Look up the definition for the term "paralegal" on both the NALA (*nala.org*) and NFPA (*paralegals.org*) websites. How do they differ from each other? How do they differ from the ABA's definition? Why do you think they are different?

B. PARALEGALS AND OTHER LAW-RELATED PROFESSIONALS

Traditional paralegals work as employees or independent contractors and are supervised directly by attorneys. Paralegal employers can be found within law firms, corporate in-house law departments, governmental agencies, and nonprofits.

Although the majority of paralegals work in private law firms, corporations also hire paralegals to work in their legal offices to do a variety of jobs in areas such as contracts and negotiations, compliance, intellectual property, project management, and corporate governance. Paralegals also work as courthouse clerks, investigators,

office managers, legal technology specialists, and directors of nonprofits. Indeed, an exciting area of job growth is developing within nontraditional work settings. Here, we see paralegals taking the skills they have honed and applying them to a variety of non-paralegal but still law-related occupations. These include work as investigators, law librarians, claims representatives, risk management professionals, compliance officers, legal technology specialists, sales representatives for legal software vendors, contract negotiators, and office managers. Even though these positions do not carry the title of paralegal, they require similar skills and aptitudes: namely, an ability to communicate effectively, both orally and in writing; analytical reasoning skills; top-notch research capabilities; and a sense of professionalism.

When paralegals work as independent contractors rather than as employees of law firms or corporations, they may be referred to as freelance paralegals. Freelance paralegals are similar to traditional paralegals in that they also work under the supervision of a lawyer. However, the lawyer supervising the paralegal may differ from one case to the next. Freelance paralegals typically have worked for several years in a more traditional role to gain expertise in an area of the law before becoming independent contractors. Some freelance paralegals are self-employed. Others work for specialized staffing agencies that provide law firms with qualified paralegals to work on a temporary basis, often on unusually large or complex cases.

In her Paralegal Profile, you can read about how Jennifer Lerner used her paralegal training both as a freelance paralegal and in a very nontraditional job setting.

PARALEGAL PROFILE

Jennifer Lerner

Freelance Paralegal

Although I worked in a personal injury firm while attending school for my paralegal degree, when I graduated, I found I could make more money if I contracted my services than if I remained an employee. Freelance work also enables me to decide what types of duties I want to accept and allows me to work from my home.

I like the variety that can come at you at any time and the unpredictability. I love working with the law because the whole concept of how conflicts arise and then how people go about getting rid of conflict is fascinating. Working as a paralegal teaches you a lot about people. We are in a people business, and what we do changes the lives of people.

I have also worked on a part-time basis to use my paralegal skills in an unusual way. A maritime company was interested in hiring someone to research regulations, to prepare documents for ships coming into port, to ensure that crew members have all required paper work, and to communicate with ships at sea. Even though the company did not start out looking for someone with paralegal skills, during the interview process it became evident that those skills were exactly what they needed, and I got the job.

While traditional paralegals must work under the supervision of a lawyer, some states are developing programs for nonlawyers to provide limited legal services directly to the public. The titles for these

professionals vary from one state to another, as do the duties that they perform. These programs, developed in response to a growing recognition that there is a tremendous access to justice gap in America,[3] allow nonlawyers to provide certain legal services directly to those who cannot afford a lawyer. Generally, these programs require nonlawyer applicants to meet certain educational or experiential requirements and to take an exam covering their potential area of expertise, as well as legal ethics. And as do attorneys, these nonlawyer advocates may also have to pass a character and fitness investigation and meet continuing education requirements. Most commonly, the areas in which they are allowed to practice involve family law and landlord-tenant issues. These licensed nonlawyers go by various names, such as Legal Paraprofessional (LP) or Licensed Paralegal Practitioner (LPP). As of 2024, seven states had adopted programs allowing for limited licensure of nonlawyers: Arizona, Colorado, Minnesota, New Hampshire, New Mexico, Oregon, and Utah. The hope is that licensed legal paraprofessionals will be able to deliver services at one-quarter to one-half of the rates charged by attorneys.[4]

This expanding role for nonlawyers is controversial, but advocates argue that **legal aid lawyers** and lawyers providing ***pro bono* legal services** have not been able to fully serve the needs of indigent clients who cannot afford the cost of needed legal services. On the other hand, many opponents are concerned about the quality of services nonlawyers could provide and the enforcement of the ethical duties that go with such representation.

Legal aid lawyer
A lawyer who works for a nonprofit or government-funded program to provide free or low-cost legal services.

***Pro bono* legal services**
Free legal services provided to those who cannot pay.

DISCUSSION QUESTIONS

2. In what areas of the law do you think there would be a role for nonlawyers trained to provide limited legal services?

3. Do you think there are any situations in which nonlawyers, working either independently or under supervision, should be allowed to give legal advice?

Qualifications	Paralegal	Lawyer
Undergraduate education	None required in general (However, an associate's degree is rapidly becoming the minimum acceptable degree for employment; many employers require a bachelor's degree.)	Bachelor's degree [5]
Specialized education	None required (Some employers give preference to graduates of ABA-approved paralegal programs.)	Usually a degree from an ABA-accredited law school [6]
Testing	None required (Some employers give preference to those who pass a voluntary exam administered by one of the national paralegal associations.)	Passage of a state bar exam (Most exams have multistate and state-specific questions.)
License and morals check	None required	Must be licensed

Figure 1-1 Paralegal versus Lawyer Qualifications

C. PARALEGAL EDUCATION

There are significant differences in the qualifications for becoming a paralegal or a lawyer. Figure 1-1 summarizes those differences. Becoming a licensed lawyer generally involves attaining a bachelor's degree, a graduate legal education (normally three years if attending full-time, or four years part-time), passing a state bar exam, and passing a morals or character check. In some states, to be authorized

to practice law, lawyers must also join their state bar association and fulfill annual continuing education requirements.

In contrast, nothing prevents a person with no college credits and no paralegal training from being hired to work as a paralegal. This is true because currently there are no minimum legal requirements that must be satisfied to be able to work as a paralegal. Nor are there any informal standards universally accepted by all lawyers who hire paralegals. However, as we will discuss below, both lawyer and paralegal organizations have developed recommended educational and credentialing standards.

1. Basic Qualifications

To be an effective paralegal, one must have a great deal of specific knowledge, whether gained through formal education or on-the-job training. In addition to a sound grasp of both substantive and procedural law, an effective paralegal should possess certain intellectual and personality traits.

Because the law is complex and often ambiguous, paralegals must be able to think analytically and logically so that they can recognize and evaluate relevant facts and legal concepts. Paralegals must then be able to effectively communicate their conclusions both verbally and, what is particularly important, in clear, concise prose.

Certain personality traits are also important for success in this field. At times paralegals work closely with lawyers, clients, and members of the public. Therefore, paralegals should be congenial and diplomatic and present a good professional image. At other times, however, they must work long, solitary hours drafting, organizing, or digesting legal documents. These activities require patience, persistence, and the ability to work with minimal supervision. Paralegals should function well in stressful conditions because they live in a world of deadlines and often have conflicting demands placed on their time by lawyers.

Perhaps the most important characteristics for success in the paralegal field are ingenuity and good judgment. The best paralegals

are innovative and resourceful. Once they understand the nature of the problem, they develop their own solutions. Because they exercise good judgment, they know when to proceed independently and when to bring matters to the attention of their supervising lawyers.

In her Paralegal Profile, Susan Wozniak discusses some of those important traits for a successful paralegal career.

PARALEGAL PROFILE

Susan Wozniak

Paralegal
City of Champaign Legal Department

I am employed as a paralegal for the city of Champaign, Illinois. My primary focus is the administration of the city of Champaign municipal court system. The purpose of this system is to prosecute individuals accused of violating the city of Champaign municipal code. I am responsible for these cases from start to finish. Variety is what makes my position so enjoyable and challenging at the same time. The skill to navigate these varied environments has taken years to acquire.

To be a successful paralegal, a person must be organized, a self-starter, and able to prioritize all the different tasks assigned. It is also very important to stay current with technology as well as the areas of law that affect your practice. Joining professional associations is a

good way to meet other paralegals and people who work in the legal field—while obtaining the latest information on continuing education options and changes in the law.

2. Formal Paralegal Education

Before 1970 there were no formal educational programs for paralegals; the necessary skills were learned exclusively through on-the-job training. Many lawyers simply gave their secretaries a variety of paralegal tasks, along with their own instructions as to how they were to be done.

In the early 1970s paralegal programs were developed in response to the need for formal paralegal training. In 1974 the ABA established the first Guidelines for the Approval of Paralegal Education Programs to help establish appropriate standards for paralegal educators and to assist potential students and employers in judging the quality of different paralegal programs. To date, the ABA remains the only official body to have a formal process for approving paralegal programs. In larger urban areas, some employers prefer paralegals who have graduated from an ABA-approved paralegal program, although this is rarely a requirement.

PRACTICE TIP

Sometimes supervising lawyers do not fully understand the type of education you have received. Therefore, you may need to let your supervisor know the full range of responsibilities you are capable of handling.

In 1981, educators from a variety of paralegal programs formed the **American Association for Paralegal Education (AAfPE)**. This

national organization was chartered to promote high standards for paralegal education, provide a forum for professional improvement for paralegal educators, and promote research and dissemination of information regarding the paralegal profession and paralegal education. Its membership includes approximately 400 educational institutions offering programs at the community college, baccalaureate, and postgraduate levels.

American Association for Paralegal Education (AAfPE) ***aafpe.org***
A national organization of paralegal programs that promotes high standards for paralegal education.

Discussion Question

4. What are the benefits of having formal paralegal training rather than only receiving on-the-job training? Does having formal paralegal training mean that there is no need for on-the-job training? Why or why not?

D. PARALEGAL PROFESSIONAL ASSOCIATIONS

There are two major, national, not-for-profit professional associations dedicated to meeting the needs of working paralegals. They are the **National Federation of Paralegal Associations (NFPA)**, formed in 1974 as a federation of local paralegal groups, and **NALA: The Paralegal Association (NALA)**, formed in 1975 as a direct membership organization for paralegals with local chapter affiliates.

National Federation of Paralegal Associations (NFPA) ***paralegals.org***
A national association of paralegal associations advancing the paralegal profession.

NALA: The Paralegal Association (NALA) ***nala.org***

A national association of paralegals advancing paralegals through certification and professional development.

Both organizations seek to promote the paralegal profession and monitor activities of courts, bar associations, and legislatures that might affect their members' interests. Each association has developed its own formal set of ethical guidelines, which their members are pledged to follow.

While the existence of competing organizations demonstrates the diversity of the profession, some observers fear that paralegals may be losing political influence because they lack a single organization to speak with one voice for the entire paralegal profession. Because each organization has its own traditions and "personality," it is highly unlikely that they will merge any time in the near future.

PRACTICE TIP

Join your local paralegal association.

NFPA and NALA are the two most prominent national paralegal organizations, but there are a variety of other paralegal associations at the national, state, and local levels. Membership in these other associations may be general or may be limited to a particular type of paralegal, such as paralegal managers, corporate paralegals, plaintiff paralegals, defense paralegals, or freelance paralegals. One notable example is the **International Paralegal Management Association (IPMA)**, an influential organization representing paralegal managers in large law firms and corporate law departments.

International Paralegal Management Association (IPMA) ***theipma.org***

A national association of paralegal managers.

Now would be a good time to find out which paralegal associations are strong in your community and whether they have a special membership rate for students. Joining a paralegal association will give you the opportunity to meet working paralegals and to participate in the association's benefits by, for example, attending seminars and being listed in their job bank.

In her Paralegal Profile, Laurie Roselle, who works in one of the largest law firms in the world, describes the importance of professional associations and maintaining a "can-do" attitude.

PARALEGAL PROFILE

Laurie Roselle

Director of Legal Services
Clifford Chance US LLP

I work at Clifford Chance US LLP, one of the largest law firms in the world. We have offices in 37 countries. I work in the New York office. My official title is Director of Legal Services.

I don't think I have ever had a typical day. I generally get to the office by 7 A.M. with a "To Do" list of about five items. By 9 P.M. when I've only finished one, I declare it a victory and head home, usually by hired car so I can work and bill for another hour before arriving home.

The International Paralegal Management Association (IPMA) is a great source of information and networking for the paralegal

management piece of my job. Their annual conference is always well done and timely on issues directly impacting the paralegals I supervise. The Association of Legal Administrators (ALA) is an excellent group for networking and information on a wide variety of topics that cover the myriad of other items for which I am responsible. The ALA annual conference makes me giddy like a kid in a candy shop, as there are so many sessions to attend. For real estate it is all about "location, location, location," and for networking, it is all about IPMA/ALA for me.

My advice to students thinking about a career as a paralegal is to embrace technology and never say "never." The attitude you bring to the table is what an employer is looking for . . . they can teach you the legal skills, but they cannot teach you attitude. If you don't have a "can-do" attitude, legal is not the field for you. Lawyers do not want to hear the reasons why you cannot do something. They want to hear that it has been done.

E. REGISTRATION, CERTIFICATION, AND LICENSURE

Although many employers hire only paralegals who have completed an ABA-approved or other well-established paralegal education program, the lack of formal licensing requirements allows for situations in which people with no formal training or experience can be hired and given the job title of paralegal. This situation often leads to a great deal of variation among paralegals in terms of background and quality, and that in turn is seen by many as harming the image of the profession, and potentially harming the public. To ensure a certain level of professionalism, some states have developed regulatory processes to ensure a basic standard of competence through registration, certification, or licensure.

1. Registration

Registration is a process by which individuals or organizations have their names placed on an official list kept by some private organization or governmental agency. Depending on the purpose of the registration process, placing one's name on this list is either voluntary or mandatory. A few states have adopted voluntary paralegal registration programs, whereby any person who is qualified by education, training, or work experience and who works under the supervision of a lawyer performing delegated, substantive work for which that lawyer is responsible may register as a paralegal.

Registration

The process by which individuals or organizations have their names placed on an official list kept by some private organization or governmental agency.

2. Certification

When special qualifications are established as a requirement for registration, the system moves from registration to certification (see Figure 1-2). **Certification** refers to the formal recognition by an organization that an individual has met some predetermined set of qualifications, which typically includes meeting educational requirements and passing an exam. Only those who meet these criteria are allowed to claim the title that goes with the designated status, but a person without such certification is not legally restricted from working in that occupational area. The advantage of certification is that potential employers and clients know that the individual has met certain standards. Therefore, presumably they are more likely to employ this individual than someone who is not certified.

Certified

The status of being formally recognized by a governmental or nongovernmental organization for having met special criteria, such as fulfilling educational requirements and passing an exam, established by that organization.

A few states, along with the two major paralegal organizations discussed above, provide a method by which paralegals can become **certified**, which includes passing an exam and maintaining continuing education. Once certified by NFPA, paralegals are authorized to use "CORE Registered Paralegal" (CRP®) or "PACE Registered Paralegal" (RP®) after their name. Similarly, those who have completed the requirements of NALA's voluntary certification program can used the registered trademarks "Certified Paralegal" (CP®) or "Advanced Certified Paralegal" (ACP®). These certification programs are all voluntary in that certification is not a legal requirement for working in the paralegal field. However, in some regions of the country, employers are more likely to employ someone who is certified than someone who is not.

It is important to distinguish between being certified by a state agency, such as a state bar association, or a voluntary organization, such as NALA or NFPA, and being **certificated**. Graduates of a formal paralegal program that offers a certificate of completion, whether instead of or in addition to awarding a degree, can be appropriately called "certificated paralegals," but they are not certified paralegals.

Certificated
The status of having received a certificate documenting that the person has successfully completed an educational paralegal program.

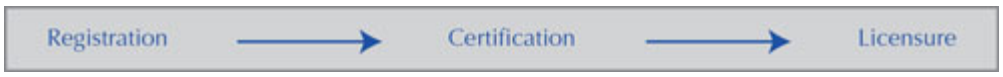

Figure 1-2 Increasing Levels of Regulation

ETHICS ALERT

Paralegals must always remember that as part of the legal profession, they are required to maintain demanding ethical

standar ds. The following thr ee points ar e of special impor tance to paralegals:

1. P aralegals ar e not lawy ers and ther efor e cannot giv e legal advice, sign cour t documents, or appear in cour t on beh alf of a client. To do so is the unauthoriz ed practice of law , which is a crime in most states.
2. Lawy ers and their staff must respect the confidentiality of the client- att orne y relat ionship. You must tr eat anything you learn in the law firm as confidential and not discuss it with any one outside the firm—e ven your spouse or other family member .
3. Clients expect their lawy ers and staff to be loyal to them. Ther efo re, if you cha nge emplo yers, you must aler t your new emplo yer to any cases with which you wer e inv olv ed while working for your former firm. Not to do so means running the risk of cr eating a conflict of inter est for the firm.

As you read thr ough the m aterials in this book, watch for potential ethical issues posed in the readings or chapter questions.

3. Licensing

Licensing ref ers to the pr ocess by which go vernmental agencies establish standar ds and then pr ohibit those who ha ve not met those standar ds fr om working in that occupational field. Thus a person who has not been admitted t o the bar

Licensing
Go vernmental permission t o engage in a pr of ession.

is p rohibited fr om practicing law because he or she is not a licensed lawy er. Based on the pr evailing definitions of what constitutes the

unauthorized practice of law, paralegals can perform a variety of legal tasks without a license to practice law, so long as they work under the supervision of a licensed lawyer. Some have argued, however, that a separate system of licensing should be established for paralegals in the same way that nurses are licensed separately from doctors. Opponents of licensure argue that licensing is not needed, as the state can hold the supervising lawyers responsible for ensuring the quality of the work done by their paralegals, as well as their ethical behavior.

While full licensing of paralegals has not been adopted by any state, as mentioned above, several states have adopted limited licensure as a way of addressing concerns that access to lawyers is a significant problem, especially for low-income and disadvantaged people. In addition to those states that have already adopted a type of licensing for nonlawyers who can provide limited legal services without the supervision of a lawyer, additional states have formed task forces to examine this type of limited licensure.

DISCUSSION QUESTIONS

5. Florida has a registered paralegal program whereas North Carolina has opted for a certification program. You can review the FAQs (Frequently Asked Questions) for Florida's registration at *floridabar.org/about/paralegal/frp-program/* and North Carolina's certification at *nccertifiedparalegal.go v/for-paralegals/frequently-asked-questions/*. Which program do you like better and why? In general, do you think registration, certification, or licensure programs will best serve paralegals and the public?

6. Occupational licensing requirements vary from state to state to protect the public. In some professions licensing requirements may be necessary to protect the public, but others may be anticompetitive. What are some of the pros and cons of licensing nonlawyers to provide limited legal services?

7. Does your state offer registration, certification, or limited licensure? If so, describe your system. If not, compare the criteria for

the NFPA and NALA certifications.

F. WHAT PARALEGALS DO

Earlier in this chapter, we said that when working under the supervision of a lawyer, paralegals can do just about anything related to the practice of law except give legal advice to clients, represent clients in most types of judicial proceedings, and set fees. In a landmark U.S. Supreme Court case dealing with the awarding of fees for paralegal work, Justice William Brennan noted that

> paralegals are capable of carrying out many tasks, under the supervision of an attorney, that might otherwise be performed by a lawyer and billed at a higher rate. Such work might include, for example, factual investigation, including locating and interviewing witnesses; assistance with depositions, interrogatories, and document production; compilation of statistical and financial data; checking legal citations and drafting correspondence. Much of this work lies in a gray area of tasks that might appropriately be performed either by an attorney or a paralegal. [7]

The tasks listed by Justice Brennan involve communication with clients, research, drafting, and case management. To perform these duties effectively, paralegals need not only a thorough understanding of the legal system, but also sound critical thinking skills. These skills include:

- gathering and analyzing facts;
- conducting legal research to identify the appropriate legal rules;
- applying the legal rules to the facts; and
- acting on the results.

Take a moment to reread the two hypothetical cases we introduced at the beginning of this chapter, as we will be using them to illustrate these four basic steps when analyzing a legal situation.

1. Gathering and Analyzing Facts

The answer to any legal question depends on the specific facts of the individual case. Even a minor change in the facts may alter the outcome of the case. Lawyers say that a case is **fact bound**.

Fact bound

The principle that even a minor change in facts can change the outcome of a case.

Just as a medical doctor cannot give a competent medical diagnosis without a thorough examination of the patient, a lawyer cannot render legal advice without a complete understanding of all of the relevant facts. In some areas of the law, such as those dealing with negligence of landlords and tenants, the legal outcome is particularly tied to the specific facts. For example, assume a stranger approaches a lawyer at a party with questions such as, "My landlord is trying to evict me. Can he do that?" or "My husband is trying to get custody of my kids. Will he succeed?" It would be impossible for the lawyer to answer without gathering a lot more information and personally reviewing key documents.

Paralegals often assist in the fact-gathering process by participating in or conducting interviews, summarizing those interviews, and reading and summarizing relevant documents. For example, when Donald Drake and Wanda Smith came to the law office of Darrow and Bryan to seek advice, they were each interviewed by Pat Harper, a lawyer with the firm. Chris Kendall, one of the firm's senior paralegals, also sat in on the interviews to help take notes and to become familiar with the facts of the cases.

While the client will supply many of the important facts in the case, a lawyer can never rely solely on the client's perception of those facts. Invariably clients will overlook some facts, while allowing their personal prejudices and self-interest to color their perception of other facts. The paralegal can play an important role in interviewing both the client and other witnesses and then accurately recording the

results of those interviews. A paralegal may also draft documents to gather information from the opposing party or witnesses.

2. Conducting Legal Research to Identify the Appropriate Legal Rules

After meeting with the clients, the first thing that attorney Harper needed to determine was whether either client had a basis for proceeding with a lawsuit. If a client does not have a valid **cause of action** (i.e., a claim that, based on the law and facts, would be sufficient to support a lawsuit), then the client's case will be dismissed before it even goes to trial. For example, in Wanda Smith's case, she was clearly upset and disturbed by what had happened to her. However, that does not mean she has a legal remedy. Her lawyers will have to prove not only that the construction workers harassed and upset her, but also that these actions violated some law. It is important to understand that not every problem is a problem for which the courts will supply a remedy.

Cause of action
A claim that, based on the law and the facts, is sufficient to support a lawsuit.

NETNOTE

It is important to stay current with the changes in the law. You can find the latest legal news by going to various Internet sites including *reuters.com/legal/* or *news.bloomberglaw.com*.

Thus, the second stage of legal analysis involves the identification of the specific provisions of the law that are applicable to the client's

situation. Because there are so many laws at the federal, state, and local levels, and because the law covers such a wide variety of topics, it is impossible for any lawyer to know everything there is to know about the law. Furthermore, because the law is constantly changing, one's legal knowledge must be continually updated. Therefore, even lawyers who specialize and strive to keep current by reading legal newspapers, journals, and bar publications on a daily basis may still need to do legal research. Law books and online computer databases are the tools of the trade for the legal profession.

Legal research is a very time-consuming process, and lawyers often rely on paralegals to assist them in locating and summarizing the relevant statutes and cases they need to properly interpret the current status of the law. Because attorney Harper has not recently handled a similar case, paralegal Kendall was assigned in Ms. Smith's case to research the law on sexual harassment and in Mr. Drake's case to see what law existed regarding the right to sue for emotional distress. We will discuss legal research in greater detail in Part III of this text.

Legal research
The process of finding the law.

3. Applying the Rules to the Facts

Even after a lawyer or paralegal has found the applicable legal rule through legal research, the job is far from completed. Because each client's problem is unique, simply knowing a general rule will not answer the problem in question. These general rules must be applied to the client's specific facts. We call this process **legal reasoning**.

Legal reasoning
The application of legal rules to a client's specific factual situation; also known as **legal analysis**.

Often this is a very straightforward process. For example, assume that your firm is representing a husband seeking a divorce. He wants

to know if the court will take into consideration the years his wife worked as a stay-at-home mother when it decides on the appropriate division of the marital assets. Through legal research, you find a state statute that requires the court to take into account homemaker services when dividing marital property. In this case, assuming that your client's wife did indeed perform homemaking services, applying the law to your client's facts is very straightforward, and your supervising lawyer would report to the husband that, unfortunately for him, the court will take into account her years as a homemaker when dividing the marital assets. At other times, this process is much less clear-cut, and the result in a client's case may depend on how the courts have handled similar situations in the past.

This is because our legal system is based on a doctrine known as ***stare decisis*** (literally, "the decision stands"). Following *stare decisis* means that if a court has decided one way on a particular issue in the past, in all likelihood it and other courts in the same jurisdiction will decide the same way on that issue in future cases given a similar set of facts. The doctrine of *stare decisis* is what gives our system its stability and predictability. As we will see, however, *stare decisis* also gives the courts enough flexibility to allow for change as the needs of our society change.

Stare decisis

The doctrine stating that, normally, once a court has decided one way on a particular issue in the past, it and other courts in the same jurisdiction will decide the same way on that issue in future cases, given a similar set of facts, unless they can be convinced of the need for change.

To find out how similar situations have been handled in the past, a lawyer or paralegal will examine prior court decisions, **precedent**, and then apply them to the client's situation. If the facts of the client's situation and a prior court decision are similar (i.e., they are **analogous**), it is likely that the result in the client's case will be similar to the result reached in the prior case. If the facts are significantly

different (i.e., **distinguishable**), it is likely that the result in the client's case will not be the same as the result reached in the prior case.

Precedent
One or more prior court decisions.

Analogous cases
Cases that involve similar facts and rules of law.

Distinguishable cases
Cases that involve dissimilar facts or rules of law.

Unfortunately for Wanda Smith, Kendall's research indicated that she did not appear to have a legal basis for suing the construction workers. If Ms. Smith had been employed as one of the construction workers and her boss had been harassing her, she would have had the basis for suing the company. However, as a mere passerby, she lacked such protection. Her facts combined with the law do not give her a right to sue.

Prior to the enactment of state and federal statutes giving protection to workers against sexual discrimination, Ms. Smith would not have been able to sue even if her employer had been the one to harass her. But as societal values change, the law usually changes as well. In recent years, our society has become more sensitive to issues of gender equality, and new laws have developed to provide new protections. Societal values change, and the law evolves to respond to those changes.

DISCUSSION QUESTIONS

8. Why do you suppose there are certain types of harm, such as the humiliation Wanda Smith felt when the construction workers whistled at her, that courts will not help individuals resolve?

9. Do you think it is right that employees can go to court and sue their bosses for sexual harassment? Why? If the harasser were a coworker instead of a boss, how would you view the situation?

With regard to Donald Drake's case, Kendall's research proved more promising. In one case a mother who saw her young child killed by a negligent driver was allowed to recover for the emotional distress the accident caused her. However, five years later, in another decision involving a similar situation, a female bystander who happened to witness the death of a young boy was not allowed to recover for her emotional distress.

In assessing the strength of Mr. Drake's case, attorney Harper must decide whether the courts would treat a grandfather as they did the mother or as they did the bystander. Take a few minutes to list as many arguments as you can muster for each side of the debate. The most important part of legal reasoning is seeking factual similarities and differences between prior decisions and your client's case and then explaining why you think those similarities or differences matter. In that process, you will find that you and your classmates often differ as to the "right" answer.

In actuality, there is no "right" answer, only better or worse arguments for your client. A judge may be the final arbiter as to what the answer is in a particular case, but even then it is not the "right" answer in any cosmic sense. Any decision about what the law should be is a choice between competing values. This is why some cases go to trial instead of settling—that is, because the two litigants have differing viewpoints as to which of two competing values is the most important. The important point to remember is that your goal is to learn how to develop arguments that will help persuade the other side that your answer is more correct than theirs.

PRACTICE TIP

Artificial intelligence (AI) is now available to assist you with many of the tasks described in this section. AI is rapidly evolving and growing more powerful. Many view it as a threat and as a possible replacement for paralegals and even attorneys. However, others view it as a huge advantage in that it can

aut omate many other wise tedious, time-consuming tasks, fr eeing legal pr of essionals t o work mor e efficiently , ther eb y fr eeing up time for mor e challenging assignments. Our tip? F eel empower ed, not thr eatened b y AI.

4. Acting on the Results

Thr oughout this pr ocess, lawy ers and paralegals must commit their thoughts to writing. At some point the y will tak e informal, working notes fo r their own use. At other times the y will mak e mor e formal repor ts that ar e designed to be read by colleagues, clients, opposing lawy ers, or judges. You will be intr oduced to various examples of these mor e specializ ed forms of **legal writing** thr oughout the text.

Legal writing

Examples of legal writing include case briefs, law office memoranda, and documents filed with the cour t.

Case briefs summariz e specific cour t decisions. Lawy ers and paralegals use case briefs to help them analyz e cour t decisions and pr epar e legal memoranda and appellate briefs. A **law office memorandum** is an unbiased analysis of a client' s case for use within the law firm. It ser ves as a means of fairly evaluating the likelihood of the client' s winning should the case go to cour t. Th is type of memorandum is often followed by a letter written to the client advising the client as to what action should be tak en. An **appellate brief** is written to persuade an appeals cour t of the merits of the client' s case. These documen ts will be discussed mor e thor oughly at various points thr oughout this text.

After a lawy er has thor oughly analyz ed the application of the law to the client' s situation and has advised the client as to the options available under the law , the lawy er and client ma y agr ee to tak e some action on the client' s behalf. These actions might include tr ying to settle the case without ha ving to resor t to **litigation** (i.e ., w ithout

having to rely on the courts to resolve the dispute). For example, the lawyers for the two sides might be able to negotiate a compromise either with or without the help of a neutral third party, such as a mediator.

Litigation

A lawsuit; a controversy to be settled in a court.

If litigation cannot be avoided, the lawyer may represent the client in a civil lawsuit. In these situations the lawyer is responsible for submitting court documents called **pleadings** to initiate the lawsuit. Prior to trial, the lawyer will also conduct **discovery** to find out as much about the case as possible from witnesses and the parties on the opposite side. If the case does proceed to trial, the lawyer will also be responsible for conducting direct and cross-examinations of witnesses and making appropriate arguments to the judge and the jury. Paralegals often assist in all these stages, from drafting pleadings to preparing witnesses and evidence for trial.

Pleadings

The papers that begin a lawsuit; generally, the complaint and the answer.

Discovery

The modern pretrial procedure by which one party gains information from the adverse party.

In Donald Drake's case, attorney Harper concluded that, although victory was not assured, there were good grounds for a lawsuit. Because Mr. Drake was anxious to proceed, Harper directed Kendall to begin preparing the documents needed to officially begin the lawsuit. After carefully reviewing these documents, Harper signed them and directed Kendall to file them at the local courthouse.

ETHICS ALERT

Although paralegals can draft legal documents, the documents cannot be filed with the court until a lawyer has reviewed, approved, and signed them.

As the case progresses, the paralegal can serve as a link between lawyer and client. Once the lawyer has established the client-lawyer relationship, paralegals can and do play a very important role in maintaining effective communications between lawyer and client. For example, whereas many lawyers are notorious for being too busy to return phone calls to their clients, paralegals are usually far more accessible. If they are properly prepared, paralegals can relay important information about the case from client to attorney, and vice versa. Due to their specialized training, paralegals can help explain legal procedures to clients, and they can communicate effectively with other lawyers and court officials.

ETHICS ALERT

When talking with clients, keep in mind that everything that is said must be kept confidential. Also, there may be times when you are alone with a client and the client will ask you for legal advice. Remember that only the lawyer can give that advice. For you to do so would be the unauthorized practice of law.

Legal Reasoning Exercise

1. Imagine that you are interning in Harper's law firm. She has asked you to give her your thoughts on Drake's case. Specifically, Harper wants you to list all the ways in which you think Donald Drake's case is similar to that of the mother who saw her child injured. Then list all the ways in which you think Drake's case could be likened to that of the bystander. Finally, give Harper your evaluation as to why you think that a court would see Drake's case as more similar to that of the mother or to that of the bystander. Also, let her know if you think there are additional facts that you would want to gather before making a final recommendation.

PRACTICE TIP

Everything you read in this book is *wrong*! Or at least it might be. Remember that law keeps changing, and it also varies from state to state. Further, there are exceptions to many rules.

NETNOTE

As you may have noticed by reading the marginal definitions, all of the major associations mentioned in Chapter 1 have websites. Take a few minutes to visit each.

American Association for Paralegal Education (AAfPE): *aafpe.org*

American Bar Association (ABA):
abanet.org

National Federation of Paralegal Associations (NFPA):
paralegals.org

NALA: The Paralegal Association:
nala.org

International Paralegal Management Association (IPMA):
theipma.org

SUMMARY

Over the past 50 years, the paralegal profession has grown rapidly, and paralegals are now found in a variety of legal settings. In this chapter, we have discussed what paralegals do and how their work relates to other legal professionals.

We have also examined how paralegals are educated and credentialed. Lawyer and paralegal associations are working to further develop educational and testing standards. These efforts include the ABA paralegal program approval process, the NALA certification program, the NFPA Advanced Proficiency and CORE Competency exams, as well as state certification, registration, and licensure.

The most common legal work environments are private practice arrangements, but paralegals can also be found in the legal departments of businesses, nonprofits, and governmental agencies. Graduates of paralegal programs may also find that the skills they learned are applicable to a wide variety of law-related occupations.

To achieve success as a paralegal, you will need to develop strong critical thinking skills that include the ability to analyze the facts, identify the appropriate legal rules, apply the legal rules to the facts, report the results, and take actions on behalf of the client. Although we have presented each stage in a linear fashion, the reality is that these various stages are intertwined. Legal reasoning often reveals

the need to do more research. In the process of reporting your findings, you may discover flaws in your analysis. Thinking, researching, and writing are inseparable.

Do not be dismayed if you are sometimes overwhelmed by the complexity and sheer volume of legal concepts and materials. Learning law is a lot like learning a foreign language. Although many of these terms may be new to you now, they will become increasingly familiar to you as you progress through the text. In the end, you will be amazed at how these diverse pieces end up fitting into a logical and effective system.

REVIEW QUESTIONS

Pages 3 through 8

1. What is the definition of a paralegal?
2. What is a freelance paralegal?
3. Why are some states developing programs for nonlawyers to provide limited legal services directly to the public?

Pages 8 through 12

4. What are the requirements for becoming a lawyer?
5. What are the requirements for becoming a paralegal?
6. When did formal paralegal education begin?
7. What role does the ABA play in paralegal education?
8. What are the names of the two major paralegal associations?

Pages 13 through 15

9. What is involved in the process of registration?
10. What are the major differences between certification and licensure?
11. Who has the right to use the designation CRP; the designation CP?
12. What are the three ethical issues of which paralegals must be particularly aware?

Pages 15 through 22

13. What are some of the basic tasks that most traditional paralegals perform?
14. What is a cause of action? What does it mean to say that a person does not have a valid cause of action? 15. What is legal reasoning?
16. What is the doctrine of *stare decisis*, and why is it important?
17. Why is it important to know whether your client's facts are analogous to or distinguishable from those in prior court decisions?
18. Why does law change? Should it?
19. Why is there no one "right" answer to a legal problem?
20. Should it be the lawyer or the paralegal who signs a client letter that analyzes the law? Why?
21. Why does the study of law involve more than simply memorizing rules?

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1 Adopted by the ABA House of Delegates, February 2020.

2 As we will discuss more fully later in this chapter, this is starting to change with some states developing programs that provide for limited licensure of nonlawyers. This change is in response to the growing recognition that many cannot afford the services of an attorney, especially in the areas of family and landlord-tenant disputes.

3 For example, it is estimated that of the more than 120,000 cases filed in New Hampshire's circuit court system every year, only 15% of the litigants are represented by an attorney. Advocates: Signing SB 361 Allows Paralegals to Represent Clients in Some Cases (June 17, 2024) at *indepthnh.org/2024/06/17/advocates-signing-sb-361-allows-paralegals-to-represent-clients-in-some-cases/*.

4 Daniel M. Taubman, Licensed Paralegals Changing the Face of the Legal Profession (2024) at *judicialwci.colorado.gov/licensed-paralegals-changing-the-face-of-the-legal-profession*.

5 A few non-ABA accredited law schools will accept students without a bachelor's degree who have a minimum number of undergraduate credits.

6 A few states have provisions that allow someone without a law school degree but with extensive law office experience to take that state's bar exam.

7 Missouri v. Jenkins, 491 U.S. 274, 288, n.10 (1989).

Chapter 2

Functions and Sources of Law

We hold these truths to be self-evident . . .
Declaration of Independence

Chapter Objectives

After reading this chapter, you should be able to:

- Define "law" and explain its role in our modern society.
- Describe the two main functions of the U.S. Constitution.
- Explain what federalism is and how it affects our legal system.
- Explain the rationale behind our system of checks and balances.
- Contrast statutory with administrative law and executive orders and memoranda.
- Compare enacted law to the common law.
- Describe the "hierarchy of the law."

INTRODUCTION

No modern society can exist without a strong legal system, and when a person has a problem or is trying to avoid a problem, that person frequently turns to lawyers and the legal system for help. While there may be a great deal of debate over the wisdom and appropriateness of a particular law (as there is, for example, over laws relating to the ownership and licensing of handguns or legalizing the recreational use of marijuana), there is general agreement that laws themselves are necessary. In this chapter, we examine who actually makes our **laws** and the format that these laws take.

Laws

Rules of conduct promulgated and enforced by a government.

Most people recall something from high school civics class about the three branches of government and that the legislature makes the law, the executive branch enforces the law, and the courts interpret the law. The truth is that the legislative, executive, and judicial

branches are all involved in making the law. The legislature creates statutes, executive agencies promulgate regulations, and the judicial branch issues court decisions.

To help illustrate the application of constitutional, statutory, and administrative laws, we will be referring to the following case involving a pregnant waitress, Diane Jackson, who has brought a problem to lawyer Harper, a lawyer with the law firm of Darrow and Bryan. As you read the chapter, think about the nature of Diane's problem, and the extent to which the law may, or may not, provide a remedy for her.

Case 3: The Pregnant Waitress

Diane Jacksons had been employed by the Western Rib Eye Restaurant for the past three years. Throughout that time, her work record had been exemplary. Customers often spoke to the manager to tell him how Ms. Jackson's service and personality contributed to their especially enjoyable dining experience at the restaurant.

Six months ago, Ms. Jackson, who is not married, found out that she was pregnant. When she approached her manager, Ben Fischer, to discuss arrangements for a maternity leave, instead of the favorable reception she had expected, Fischer reached over, patted her stomach, and said, "Well, I guess we can't have you working for us any longer." Fischer then grabbed her by the arm and escorted her out of the restaurant. Ms. Jackson protested and asked to be allowed to collect her personal belongings from her locker, but the manager just laughed and said she was "history." When Ms. Jackson began to cry, he softened his demeanor a little and said, "Look, we simply can't have a pregnant lady working here. It just wouldn't be good for business."

Although she has been actively looking, Ms. Jackson has not yet been able to find suitable employment.

When a client presents a problem to a lawyer, the lawyer will seek to identify which laws are relevant to solving the problem and what steps need to be taken to utilize those laws on the client's behalf. However, as we indicated in Chapter 1, not every problem can be resolved by the legal system. To better appreciate why this is so, we need to study the function of law, the history of the American legal system, and the sources of U.S. laws. You also need to understand the sources of law to do legal research and analysis.

As you read about the different sources of law, answer the following questions related to this case:

- Does Diane Jackson have a constitutional claim against her employer?
- Does she have a statutory claim against her employer?
- Does she have an administrative claim against her employer?
- Is there a provision in the common law that gives the waitress a claim against her employer?

A. FUNCTIONS OF LAW

It is our laws—rules of conduct promulgated and enforced by the government—that define the types of conduct that are either prohibited or required. For example, a criminal code usually prohibits the unauthorized taking of property that belongs to someone else. Tax laws require that certain types of individuals or corporations give part of their income to the government. The laws can apply to the behavior of individuals, businesses, and even governments themselves. Thus, municipalities may be prohibited from dumping raw sewage into lakes and rivers and the police prohibited from conducting unreasonable searches and seizures.

To be considered laws, these rules of conduct must be promulgated and enforced by the appropriate governmental bodies.

For example, only the U.S. Congress can make federal statutory law, and only a state's highest court can authoritatively interpret the meaning of that state's laws.

These rules of conduct also carry with them certain sanctions that can be imposed on those who fail to follow them. When individuals violate a section of the criminal law, they may be fined, sent to prison, or in some cases even suffer loss of life. Persons who are found liable under the civil law may be forced to pay various penalties or damage awards or to perform some action, such as carrying out the terms of a contract. Police who conduct illegal searches and seizures may be denied the right to use in court any evidence they find and may even be forced to pay damages to the injured parties.

There may be a great deal of debate over the wisdom and appropriateness of a particular law (as there is, for example, over the ownership of handguns), but there is general agreement that laws themselves are necessary. Some of these laws, such as restrictions on abortion, gambling, and pornography, are heavily influenced by the religious and moral beliefs of various groups in our society, whereas others, such as traffic regulations, have no moral content at all. In either case, laws help to provide the type of order and predictability that are essential elements of our modern society.

DISCUSSION QUESTION

1. Do you agree with the statement "Laws are necessary"?

B. SOURCES OF LAW

We will begin our discussion of the sources of law with a look at **constitutional law**, our most fundamental source of law. Take a few minutes now to turn to Appendix A at the back of this book to see how the U.S. Constitution is organized.

Constitutional law

A body of principles and rules that are either explicitly stated in, or inferred from, the constitutions of the United States and those of the individual states.

1. Constitutional Law

The term "constitutional law" refers to the principles and rules that are either explicitly stated in, or inferred from, government constitutions. At the federal level, it is the U.S. Constitution, and at the state level, it is the constitution of each of the 50 states.

Constitutions are usually written by specially selected delegates to a "constitutional convention." The text that is agreed upon by these delegates then has to be "ratified" (approved) by either a direct vote of the people or by some representative body.[1] A constitution also includes the steps required to amend it.[2]

a. U.S. Constitution

The United States was the first nation to adopt a written constitution. It provides the framework within which all our laws are made. The first major function of the U.S. Constitution is to establish the organizational structure of the government and the allocation of those governmental powers. Its second major function is to protect individual rights from governmental overreaching. These two functions are summarized in Figure 2-1.

1) Establish the Organization of Government
   a. Federal Government: Three Branches (Separation of Powers; Checks and Balances)
      i. Legislative (Article I)
      ii. Executive (Article II)
      iii. Judicial (Article III)
   b. Division of Power between the Federal and State Governments: Federalism (Tenth Amendment)
2) Protect Individual Rights from Governmental Overreaching (Bill of Rights)

Figure 2-1 Functions of the U.S. Constitution

(1) Organization of Government

As to the first major function, establishing an organizational structure for the government on the national level, the Constitution divides governmental powers among the legislative (Article I), executive (Article II), and judicial branches (Article III). This is commonly referred to as the **separation of powers**, but it is more accurate to describe this as a system of shared powers exercised by separate branches of government. Because they share power, each branch of government has the ability to limit the actions of the other branches.

Separation of powers

The division of governmental power among the legislative, executive, and judicial branches.

In the Federalist Papers, James Madison explained that this system of **checks and balances** is designed to guard against "a gradual concentration of the several powers in the same department." For example, under the Constitution, Congress has the power to make laws, but the president has the power to veto them. The executive branch is responsible for administering the law, but it cannot spend money to do so unless Congress provides for the appropriate funding in the budget. And although the president appoints federal judges, those appointments do not become final unless the Senate votes to confirm.

Checks and balances

Division among the three branches of the federal government so that each one acts as a check on the power of the other two, thereby maintaining a balance of power among the branches.

The check and balance most relevant to the legal system is the **power of judicial review**. The U.S. Constitution and its amendments

constitute the "supreme law of the land," and based on the concept of judicial review, it is left up to the courts to determine what the Constitution means and whether laws passed by the legislative branch are constitutional or whether the law is valid.

Power of judicial review

A court's power to review statutes to decide if they conform to the federal or a state constitution.

It could be argued that because the U.S. Constitution established three coequal branches, each branch should be free to interpret the Constitution as it sees fit. However, there are times in which there is disagreement among the three branches about the interpretation of the Constitution, and in those situations, someone has to have the final say.

In *Marbury v. Madison*,[3] the U.S. Supreme Court claimed this power for the courts. The Court held that it was inherent in the nature of a court's work to resolve conflicting interpretations of the law before it can carry out its assigned task of applying the law. If a court determines that a statute does not conform to the Constitution, then the statute is invalid and the court cannot enforce it. The Court stated:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.[4]

Over the years, the U.S. Supreme Court has used this power of judicial review to invalidate a number of federal and state laws that it found to be in conflict with the U.S. Constitution. Some of the most controversial applications of judicial review include decisions involving racial segregation, abortion, gun control, and same-sex marriage.

Whenever the courts use their power of judicial review and find a governmental action unconstitutional, the legislative and executive branches are powerless to reverse that particular decision. Legislatures do have some other options, however. First, they can sometimes enact new laws to accomplish their intended goal if they can do so without violating the constitutional provisions in questions. Alternatively, they can start the difficult process of amending the Constitution to more explicitly allow them to do what they want to accomplish their goal with a differently worded statute or propose a constitutional amendment. And at the federal level, as vacancies occur, the president can appoint new justices who may interpret the constitution differently.

The U.S. Constitution also divides governmental power between the national government and the states. This division of power between the national government and the states is referred to as **federalism**. Certain powers are explicitly granted to the federal government. All others are reserved to the states and the people. We will discuss this federal-state division of power more fully in the next chapter.

Federalism

A system of government in which the authority to govern is split between a single, nationwide central government and several regional governments that control specific geographical areas.

(2) Protection of Individual Rights

The second major function of the Constitution is to protect individual rights from governmental overreaching. Because the first Congress perceived a lack of such protection in the Constitution, as soon as it was ratified, the members began work on the first ten amendments, commonly known as the **Bill of Rights**. These amendments include protections for freedom of speech and press, freedom of religion, a privilege against self-incrimination, the right to a lawyer and a trial by jury, and safeguards against unreasonable searches and seizures, among others.

Bill of Rights

The first ten amendments to the U.S. Constitution.

At the time the Bill of Rights was written, the major concern of the drafters was overreaching by the federal government, not the state governments. Therefore, they wrote the amendments specifically to limit only the federal government's power. For example, the First Amendment states "Congress shall make no law . . . abridging the freedom of speech." During the Civil War, however, it became clear that the states could also be guilty of infringing on the rights of their citizens and the Thirteenth (banning slavery), Fourteenth (guaranteeing due process and equal protection), and Fifteenth Amendments (giving the right to vote to all males) were added with language that made it clear that they applied to the states.

Gradually, in a series of cases, the U.S. Supreme Court interpreted the Fourteenth Amendment's prohibition against states depriving any person of "life, liberty, or property, without due process of law" as meaning that many of the rights contained within the Bill of Rights also apply to the states. This is known as the **doctrine of incorporation**, and it means that the first ten amendments, along with the Fourteenth Amendment, serve to prevent state or federal government officials from interfering with civil rights and liberties.

Doctrine of incorporation

In constitutional law, the application of the Fourteenth Amendment's due process protections to incorporate the provisions of the Bill of Rights and make them applicable to the states.

Notice that the Constitution's Bill of Rights limits the actions of the federal and state governments, but not those of ordinary individuals. So while the First Amendment protects your freedom of religion from governmental interference and the Fourth Amendment protects against unreasonable searches by agents of the government, neither provides protection from the actions of a private employer or a nosy neighbor. This is known as the **state action requirement**.

State action requirement

A requirement that a defendant cannot be charged with a violation of constitutional rights unless the defendant was acting as an agent of a governmental entity.

Therefore, in our opening scenario involving the pregnant waitress, as we will discuss in the next section, the restaurant manager may have violated a federal statute prohibiting sex discrimination. However, as a private citizen, the manager personally cannot be charged with violating any of Ms. Jackson's constitutional rights.

PRACTICE TIP

In areas having to do with individual rights, sometimes a state constitution will give more protection than the U.S. Constitution.

DISCUSSION QUESTIONS

2. Arguably, if Congress passes a statute, it means that the majority of both the House of Representatives and the Senate believed that it was not in conflict with the Constitution. Why should the decision of the people's elected representatives be overridden by unelected, appointed judges?

3. When public opinion is split on a controversial issue, what are the appropriate roles for the legislative, executive, and judicial branches?

b. State Constitutions

Each of the 50 states also has a written constitution that defines the organization and powers of its government. Most also include an

equiv alent of the federal Bill of Rights. The supr eme cour t, or highest cour t, of a sta te is the fina l arbiter of what its state constitution means, so long as the state constitution does not confli ct with the federal constitution.

Sometimes state constitutions pr o vide mor e pr otection of individual rights than does the federal constitution. F or example, in the state of W ashingt on, par ents of student athletes sued their childr en's school district, which had adopted a policy of random and suspicionless drug testing of all student athletes. The par ents ar gued that this violated the students' rights under the W ashingt on Constitution. Thir teen years earlier , the U.S. Supr eme Cour t had ruled that a similar policy in Or egon violated neither the Or egon nor the U.S. Constitution. [5] In the W ash ingt on case, howe ver, the W ashingt on Supr eme Cour t held in 2008 that the policy violated the student athletes' rights under the W ashingt on Constitution. [6] Hence, student athletes in Or egon ar e subject to random drug tests because their priv acy rights ar e not pr otec ted by either their state or the federal constitution; but in the neighboring state of W ashingt on, student athletes *cannot* be for ced to under go simila r drug testing because their priv acy rights ar e pr otected under their state 's constitution.

NE TNO TE

You can read the full texts of the Declaration of Indepen dence, the Constitutio n, and the Bill of Rights at the National Ar chiv es website: *ar chiv es.go v /founding-docs.*

2. Statutor y Law

As explained abo ve, federal and state constitutions delineate the general frame work within which the go vernment must operate.

Although these documents do list some major substantive and procedural rights, they were not designed to contain the types of detailed laws and regulations we need to operate in today's complex society. Rather, the federal and state constitutions specifically delegate the power to make these laws to the legislative branches of government. The laws that these legislative bodies make are usually referred to as **statutes** or codes.

Statute

A law enacted by a state legislature or by Congress.

At the federal level, the U.S. Congress is the source of statutory law. The process of creating a statute starts with the introduction of a bill in either the House of Representatives or the Senate.[7] Bills are assigned to an appropriate committee. The committee often conducts hearings on the bill's merit and then votes on whether it should be brought to the full House for consideration. For the bill to become law, the Constitution requires a majority vote of both the House and the Senate, and the language of the Senate and House bills must be identical. If it is not, then a conference committee made up of members of both houses is formed to try to work out language agreeable to a majority of both chambers. If the conference committee is able to find language that is agreeable to a majority of both the House and Senate, then the bill is sent to the president. If the president signs the bill, a new statute will have been created. If the president does not want to see the bill become law, the president can veto the proposed law. Congress can override a presidential veto with a vote of at least two-thirds of both chambers.

At the state level, legislatures also create statutory law. In addition, a variety of local bodies, such as city councils and village boards, enact **ordinances**, a subcategory of statutory law.

Ordinance

A law enacted by a local government; a subcategory of statutory law.

These statutes and ordinances lay down general rules that govern future conduct. They are general in the sense that they apply to broad categories of people rather than to specific individuals. Furthermore, the requirements they impose generally cannot be applied to actions taken *before* the law went into effect. Because a law typically cannot be passed retroactively, it is often passed stating the date on which the law will be enforceable.

The formulation of such future-oriented rules is a difficult task because legislatures cannot foresee all the possible circumstances that might arise. Statutes therefore often contain general prohibitions that are somewhat ambiguous and open to differing interpretations. Ambiguity in statutes can also result from sloppy draftsmanship or be intentionally inserted to avoid creating conflicts among the legislation's supporters.

An example of the ambiguity contained in statutes can be found in the following excerpt from Title VII of the 1964 Civil Rights Act. It states:

> It shall be an unlawful employment practice for an employer (1) to . . . discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin. [8]

Recall the situation of Diane Jackson, mentioned at the beginning of the chapter. Was the restaurant manager discriminating against Ms. Jackson because of her sex when he fired her for being pregnant? The statute clearly states that employers cannot discriminate on the basis of sex, but it is not clear what types of actions should be considered sex discrimination. After the enactment of Title VII, some people argued that pregnancy discrimination should be considered a form of sex discrimination because only women can become pregnant. Others argued that it should not be considered sex discrimination because the differential treatment is based on the condition of being pregnant rather than on the employee's sex. Although only women can become pregnant, the employer was legitimately differentiating between two different types of women—

those who were pregnant and those who were not—rather than discriminating between women and men.

As with ambiguities in constitutional provisions, when disagreements such as this arise over the meaning of a statute, a court must resolve the ambiguity. Thus, in *General Elec. Co. v. Gilbert*,[9] the U.S. Supreme Court was called upon to determine if discrimination based on pregnancy was a form of sex discrimination under Title VII. The Supreme Court ruled in *Gilbert* that Title VII allowed employers to discriminate based on pregnancy.

The Supreme Court's interpretation would have left Ms. Jackson without a remedy under the statute. However, luckily for her, if the legislative branch disagrees with the interpretation a court gives to one of its statutes, Congress can always introduce new legislation that amends the original statute to make clear that a different result or interpretation was intended. If this new legislation passes, the court's interpretation is superseded by the new statute. In this instance, Congress reacted by amending the statute to include pregnancy discrimination in the definition of sex discrimination.[10] Thus, under the amended statute, it was unlawful for Ms. Jackson's employer to fire her based on her pregnancy.

Note, however, the difference between interpreting a statute and determining that it is unconstitutional. Whereas the legislative branch can amend one of its statutes to override a judicial interpretation, the courts retain the final authority with respect to deciding whether it is constitutional.

3. Administrative Law

Administrative law can be found at both the state and federal levels. At the federal level, it is created most often by agencies, through rules and regulations. It can also be created through presidential executive orders or memoranda. A similar structure exists at the state level.

Administrative law
Rules and regulations created by administrative agencies.

a. Administrative Agencies

Administrative agencies can be created by Congress or by state legislatures. On the federal level, Congress creates administrative agencies through an **enabling act**

Enabling act
A statute establishing and setting out the powers of an administrative agency.

that sets out the limits to the powers of the agency being created. Administrative law is similar to statutory law, in that it lays down rules designed to regulate future conduct. However, these rules are usually drawn more narrowly and directed to a more specialized group. Often the legislative branch intentionally leaves it to the executive branch and to independent regulatory agencies to "fill in the details" of a law within a general structure set down by the legislature. Through the process of filling in these details, the executive branch is actually making the law.

NETNOTE

You can find a listing of the U.S. departments and agencies at *usa.gov/federal-agencies.*

For example, assume that a taxpayer wins $50 in the lottery. Must she pay taxes on it? The Internal Revenue Code, a federal statute, provides that she must pay tax on income, but it only includes general categories of income. The Internal Revenue Service (IRS), a federal agency, has developed **regulations** that define in much more detail what the word "income" means. Without the IRS, Congress would be forced to make constant revisions in the federal tax laws and would

be hard-pressed to see that they were enforced. Other examples of federal agencies include the Occupational Safety and Health Administration (OSHA), which oversees the federal statute requiring safe working conditions, and the Environmental Protection Agency (EPA), which oversees the federal statute governing the environment.

Regulation
A law promulgated by an administrative agency.

At both the federal and state levels, administrative agencies begin the process of creating or amending regulations through what is known as a "notice and comment" period. First, the administrative agency gives notice of its intent by publishing the proposed changes in the *Federal Register* (or its state equivalent). Second, interested parties have a set time in which to inform the agency of their support, opposition, or suggestions for change. At the close of this "comment" period, the agency formally promulgates the regulation through its publication in the *Federal Register* (or its state equivalent).

PRACTICE TIP

Your understanding of a statute may be incomplete without also checking for related regulations. For example, policies such as the right of the police to conduct breathalyzer tests may be set by state statutes. However, how those policies are to be implemented (e.g., how a breathalyzer test is to be conducted) may be set by administrative regulations.

Just as the courts are drawn into the lawmaking process when they must interpret constitutions and statutes, so, too, are they called on to be the final arbiters of the meaning of administrative regulations. If someone disagrees with the administrative

interpr etation of a statute, the dissatisfied par ty can go to cour t to challenge the agency 's interpr etation. The cour t must suppor t the agency 's interpr etation unless the cour t determines that the regulation is outside the authorization Congr ess ga ve to the administrativ e agency or that the regulation is unconstitutional. To determine whe ther the agency has stepped out of the boun ds cr eated for it by Congr ess, the cour t will examine the enabling act for the agency . The cour t will als o seek to determine the underlying legislativ e inte nt of the statute that the agency is atte mpting to interpr et thr ough its r egulations.

Returning once again to the case of the pr egnant waitr ess, Harper ma y de cide to sue Ms. Jacks on 's emplo yer for sexual harassment. A sexual harassm ent case would be based on the same fede ral statute, Title VII, discussed abo ve. Th e statute mak es no specific refer ence to sexual harassment. The Equal Emplo yment Oppor tunity Commission (EEOC), howe ver, acting under authority giv en it in the statute, has declar ed that acts of sex ual harassment ar e a form of sex discrimination. One of its administrativ e r egulations states:

> Unwelcome sexual adv ances, requests for sexual fa vors, and other verbal or physical conduct of a sexual natur e const itute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual' s emplo yment, (2) submission to or rejection of such conduct by an individual is used as the basis for emplo ym ent decisions aff ec ting such individual, or (3) such conduct has the purpose or eff ect of unr easonably inter fering with an individual' s wo rk per forman ce or cr eating an intimidating, hostile, or off ensiv e working envir onment. [11]

Note how much mor e specific the wor ding of the regulation is compar ed t o the wor ding of the statute.

Recall that Ms. Jackson alleged that the manager patted her on the st omach as he was firin g her for being pr egnant. Do you think that is sufficie nt to suppor t a claim of sexual harassmen t? Is ther e any language in the r egulation that could suppor t such a claim?

In addition to their power to promulgate regulations, and as part of their enforcement powers, most agencies have investigatory and adjudicative powers. For example, if Ms. Jackson wants to pursue her claim of sexual harassment, Title VII mandates that she first take her complaint to the EEOC or a comparable state agency. The agency will investigate her case and, if it deems it appropriate, will hold a hearing to determine the truth of her claims. If she or her employer is not satisfied with the results they obtain at the agency, they can then take the case to court. Ultimately, the court would be the final arbiter of whether Ms. Jackson's situation fits the agency definition of sexual harassment.

Because administrative agencies combine the legislative, executive, and judicial functions, they are sometimes referred to as the **fourth branch of government**. This combination of powers, not mentioned in the Constitution, has led some to argue that the very existence of administrative agencies endangers the traditional separation of powers. In a recent U.S. Supreme Court decision, the majority of the Court seemed to share that concern when it emphasized that if there is a dispute as to the meaning of a federal statute, it is ultimately up to the courts, and not an administrative agency, to determine that meaning. [12]

Fourth branch of government
Administrative agencies.

b. Executive Orders and Memoranda

Executive orders and **executive memoranda** are also forms of administrative law. They are policy directives issued by the president (or, at the state level, by governors) that direct government employees as to how they should implement either statutes passed by the legislature, rules and regulations enacted by administrative agencies, or executive powers listed in the federal or state constitution. [13]

Executive order

An official policy directive issued by the president for the federal government, or by the governor of a state, which directs government employees as to how they should implement a law. At the federal level, executive orders are published in the *Federal Register*.

The terms "executive order" and "executive memorandum" are often used interchangeably, the primary difference being that executive orders are published in the *Federal Register* and executive memoranda are not. Perhaps the most famous example of such an executive action was President Abraham Lincoln's Emancipation Proclamation. Other notable historical examples include President Franklin Delano Roosevelt's detention of Japanese citizens in internment camps during World War II; President John Kennedy's prohibition of discrimination in federally funded housing; President Richard Nixon's freezing of all prices, rents, wages, and salaries to stop inflation; President George W. Bush's creation of the U.S. Department of Homeland Security after the September 11 terrorist attacks; President Barack Obama's deferral of deportation proceedings for a set number of years for illegal immigrants who met specified criteria; and President Donald Trump's phasing out of this deferral of deportation policy. In particular, in his second term, President Trump made more use of the power of executive orders and memoranda than any other modern-day president. One immediate response was the filing of a record number of lawsuits challenging many of those orders. As with the rules and regulations issued by administrative agencies, courts can find that executive orders or memoranda are unconstitutional or are outside the authorization given by Congress.

Executive memorandum

An official policy directive issued by the president for the federal government, or by the governor of a state, which directs government employees as to how they should implement a law.

DISCUSSION QUESTIONS

4. Why do you think presidents create executive orders and memoranda? Should there be a limit to their number?

5. The first sentence of Article II of the U.S. Constitution states that the "executive Power shall be vested in a President of the United States of America." Do you think this gives the President the power to make significant policy changes without involving Congress? If not, then do you think the current mechanisms for challenging presidential orders and memoranda are sufficient to maintain our system of checks and balances?

4. Common Law

Constitutions, statutes, and administrative regulations are classified as enacted law because they are written documents that have been formally authorized by governmental entities. As we have noted above, courts play a vital role in interpreting constitutions and the laws created by legislatures and agencies. At times, however, no constitutional, statutory, or administrative regulations govern a situation. When that happens, courts must look to their own earlier opinions, known as the **common law**. Therefore, courts have three roles to play:

Common law

Law created by the courts. The body of law that has evolved from judicial decisions in cases that do not involve constitutional, statutory, or administrative regulation interpretation.

- to determine the constitutionality of a statute or executive action;
- to interpret ambiguous statutes and regulations; and
- when no written law exists, to create the common law.

The common law consists of legal principles that have evolved through the years from the analysis of prior court decisions. Ultimately, these principles can be traced to medieval England, although they have been modified through the years by various state

courts up through modern times. When a legal dispute involves a subject that is not adequately covered by the other types of law, the judge applies the principles of the common law. In other words, in the absence of pronouncements from the Constitution or a legislative or administrative body, the judge looks to earlier decisions by other judges in similar circumstances.

When the United States was established, the English common law formed the foundation of our legal system. Unless there is a good reason for doing otherwise, judges are expected to follow the legal rules laid down in prior decisions. This was how the doctrine of ***stare decisis*** developed. Once courts had determined the law in an area, other courts followed that rule unless a court thought that there was a good reason to change it.

Stare decisis

The doctrine stating that normally once a court has decided one way on a particular issue, it and other courts in the same jurisdiction will decide the same way on that issue in future cases given similar facts unless they can be convinced of the need for change.

Today, there are areas of state law that are still totally governed by the common law, such as most matters dealing with torts. However, over the years, many areas of the common law have been enacted into statutes. This process of converting the common law into statutory form is known as the **codification of the common law**. Sometimes, however, instead of following the common law, a statute will differ from that approach. When the common law is changed through legislation, the statute is said to be in **derogation of the common law**.

Codification of the common law

The process of legislative enactment of areas of the law previously governed solely by the common law.

Derogation of the common law

A term referring to legislation that changes the common law.

In addition to the common law created by law courts discussed above, another part of our common law heritage involves the use of **equity** courts. Law courts had the power to settle disputes by requiring one party to compensate the other with money damages. But there are times when money is not what the litigants want. Rather, they would like the court to order the other party to do something, such as living up to contractual obligations, or to cease doing something, such as having loud parties in the wee hours of the morning. In response to this need, the English created equity courts.

Equity
A principle that allows judges to take actions such as issuing injunctions and ordering specific performance when the law would otherwise limit their decisions to monetary awards.

Equity powers include a judge's ability to issue an **injunction** or to order **specific performance**. An injunction is a court order requiring someone to act or to refrain from acting. Specific performance requires that a party fulfill his or her contractual obligations. In the 1800s most states merged their law and equity courts. Therefore, today judges have the power to give either monetary awards or equitable relief or both, as they deem appropriate.

Injunction
A court order requiring a party to perform a specific act or to cease doing a specific act.

Specific performance
A requirement that a party fulfill his or her contractual obligations.

DISCUSSION QUESTION

6. For each of the following, which source of law—a constitution, a statute, an administrative regulation, or a court opinion—would be best able to handle the problem, and why? Before answering, keep in mind that constitutional provisions generally cover the most general,

basic rights, such as freedom of speech. Statutes are more detailed and administrative regulations are even more specific, often going into great detail as to what is to be regulated. Statutes and regulations are forward looking; that is, legislatures enact statutes and administrative agencies issue regulations with an eye to what they expect to happen in the future. On the other hand, court decisions are designed to address something that has already happened; by their nature, they are very fact specific.

a. A requirement that all motorcycle riders wear helmets.

b. A rule making a bar owner liable for any injuries caused by a patron to whom the bar sold drinks.

c. A rule that all semi-trailer s traveling on interstate highways use conca ve mud flaps.

d. A requirement that employers not discriminate on the basis of religion or sexual orientation.

e. A requirement that no more than a certain percentage of a known pollutant be released by factory smokestacks.

f. A question as to whether a person not wearing a seat belt should be able to recover for injuries that person sustained in an automobile accident that was not her or his fault.

g. A law prohibiting the government from interfering with an individual's right to own an assault weapon.

5. The Hierarchy of Laws

In this chapter, you have seen that our laws come in different formats: constitutions, statutes, administrative regulations, executive orders and memoranda, and court decisions. In analyzing Ms. Jackson's situation, we found that statutory and administrative laws, as well as court decisions, would affect her legal situation.

Constitutional law is at the top of the established "hierarchy of law." In fact, the U.S. Constitution provides that it and the laws made pursuant to it are the "Supreme Law of the Land." With their power of

judicial review, the courts are the final arbiters of what the Constitution means.

Discussion Question

7. The U.S. Supreme Court is the final arbiter of what the Constitution means. But as the membership on the Supreme Court changes, its interpretation may also change. Consider two examples. First, in 1896 in *Plessy v. Ferguson*,[14] the Court ruled that segregation laws did not violate the U.S. Constitution as long as racially segregated facilities were equal in quality, giving rise to the doctrine of "separate but equal." Fifty-eight years later, in *Brown v. Board of Education,* [15] the Court overruled *Plessy* on the basis that racially segregated facilities can never be equal. Second, in relation to a woman's right to an abortion, in 1973, in *Roe v. Wade,* [16] the Court held that the Fourteenth Amendment of the U.S. Constitution granted women the absolute right to an abortion in the first trimester and a limited right thereafter. Fifty years later, in *Dobbs v. Jackson Women's Health Organization,* [17] the Court overruled *Roe*, finding that it had been wrongly decided because there was no universal right to an abortion in 1868 when the Fourteenth Amendment was ratified, thereby ending the protections given to pregnant women in *Roe*.

- **a.** How does this ability of the Court to change its interpretation of the Constitution relate to the theory of *stare decisis* and the importance of precedent?
- **b.** What does it mean for the doctrine of *stare decisis* and the stability of our legal system if courts can overrule precedent not because facts or values have changed but because the court views the prior decision as having been wrongly decided?

Most legal problems, however, do not involve constitutional issues unless an argument arises over the underlying constitutional validity of a statute or administrative regulation. Instead, most legal situations involve the application and interpretation of state and federal statutes, along with any relevant administrative regulations.

If a statute contains any ambiguities, lawyers look to relevant court decisions for assistance in interpreting the statutory language. Therefore, the courts have a great deal of power in their role as interpreters of enacted law.

As noted earlier, always keep in mind the crucial difference between court decisions that interpret the meaning of statutory language and those that strike down a statute because it conflicts with provisions of the federal or state constitution. Whereas the legislative branch can amend one of its statutes to clarify its intent and thus override a judicial interpretation, the courts retain the final authority with respect to deciding whether a statute is constitutional. When the courts declare a statute unconstitutional, the legislature's only recourse is to seek to amend the constitution or to wait for a change in court membership. This important difference is outlined in Figure 2-2.

Judicial Statutory Interpretation	Versus	Judicial Constitutional Determination
Congress enacts a statute; the terms are unclear.		**Congress enacts a statute; the terms are clear, but its constitutionality is questionable.**
Example: Statute: It shall be an unlawful employment practice for an employer to discriminate because of such individual's sex. Court interpretation: Pregnancy discrimination is not a form of sex discrimination.		**Example:** Statute: It shall be a criminal offense to desecrate the U.S. flag. Court determination: The statute is not constitutional, as it violates the First Amendment's right to free speech.
If the legislature disagrees with the court's interpretation, it can amend the statute.		**Even if the legislature disagrees with the court's decision regarding the constitutionality of the statute, it is bound by that decision.**
Example: Congress amends the statute to add a definition of sex		**Example:** Congress can do nothing short of working toward a constitutional amendment.

Judicial Statutory Interpretation	Versus	Judicial Constitutional Determination
discrimination that includes pregnancy discrimination.		

Figure 2-2 Judicial Statutory Interpretation versus Determination of Constitutionality

It is only when no applicable constitutional or statutory provision governs the situation that the courts will apply court-made common law. Today most areas of the law are governed by statutes, but the common law still has a role to play, most notably in the areas of property, tort, and contract law.

Legal Reasoning Exercises

1. Assume that Congress enacted a statute making it a federal crime for "anyone" to kidnap children and take them across state lines. Assume further that the U.S. Supreme Court decided that the word "anyone" did not include a parent. If it wanted to do so, could Congress amend the statute to say that the word "anyone" does include parents? Why?

2. Assume that Congress enacted a statute making rape a federal crime. Assume further that the U.S. Supreme Court declared the statute to be unconstitutional because it exceeded congressional power under the Commerce and Equal Protection clauses. If it wanted to do so, could the executive branch prosecute individuals for violating the statute? In other words, does Congress or the Supreme Court have the final word on what is constitutional? Why?

SUMMARY

Although our laws come from different sources, they all establish rules of conduct that can be enforced by the governments that enacted them. They play an important role in managing conflict and insuring the rule of law in modern democratic societies. In this chapter, we have looked at four sources of law: constitutions, statutes, administrative regulations, and the common law.

Our country was the first to adopt a written constitution, and it is our federal constitution that provides the framework within which all our laws are made. Similarly, states' constitutions provide the legal basis for their governments to act.

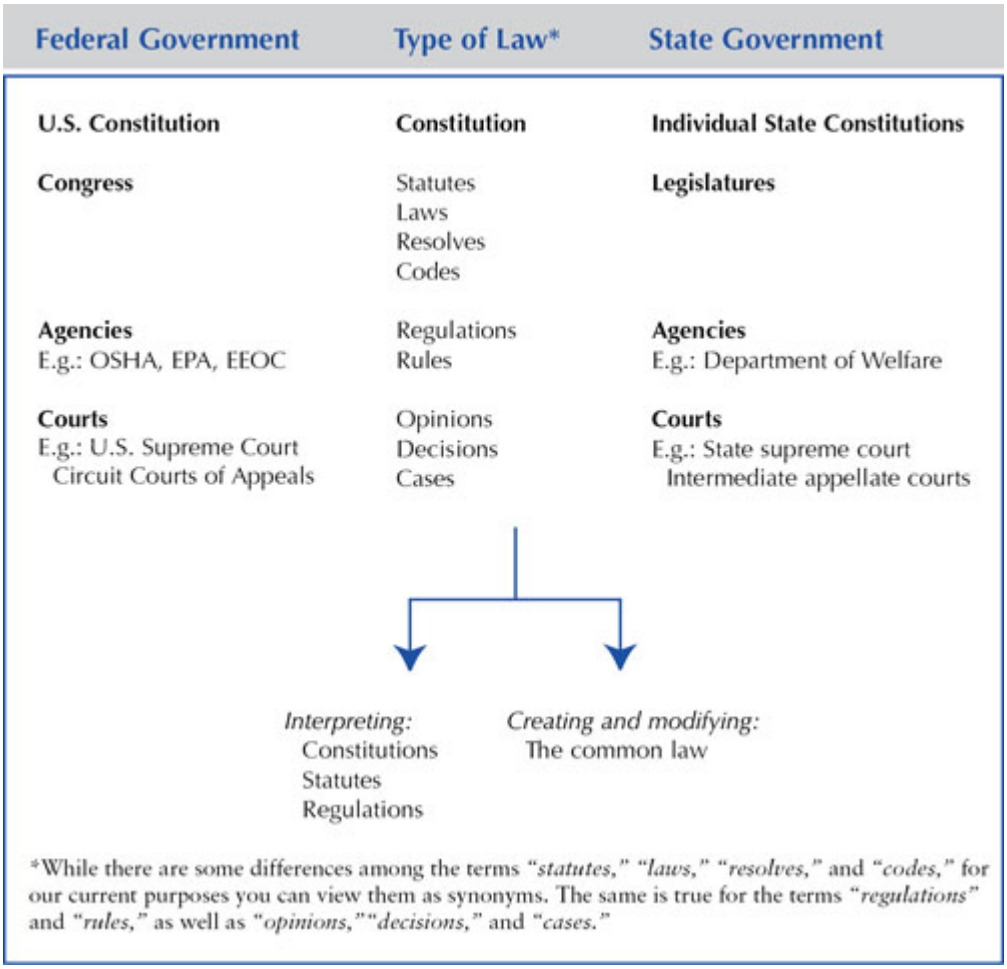

Figure 2-3 Sources of Law

Even though traditionally we say that the legislature makes the law, the executive branch enforces the law, and the courts interpret the law, the truth is that the legislative, executive, and judicial branches, as well as administrative agencies, are all involved in making law. Legislatures create law by enacting statutes; agencies create law by promulgating regulations; the executive branch creates laws through executive orders and memoranda; and appellate courts create law through their written opinions, known as "court decisions."

The example with which we began this chapter provides a good illustration of how statutory, regulatory, and court-made law work together. Congress enacted a statute that prohibited "sex discrimination." Because this phrase is so broad, the EEOC, an administrative agency, has issued regulations that more clearly define some types of sex discrimination, such as sexual harassment. Even the most detailed regulation cannot cover every individual case, however. Therefore, the courts are constantly called on to interpret the meanings of both statutes and regulations. In the case of women such as Diane Jackson, the U.S. Supreme Court determined that the federal statute prohibiting sex discrimination did not cover pregnancy. Because the Court based its ruling on its interpretation of the statute, not on any constitutional authority, Congress was able to reverse this result by enacting a statute that more explicitly prohibits discrimination based on pregnancy.

Where no constitution, statute, or administrative regulation applies, the courts rely on the common law to resolve the problem. But it is in their role as interpreters of constitutional, statutory, and administrative provisions that courts have the greatest power: By interpreting the law, the courts end up creating the law. Figure 2-3 summarizes the major sources of law.

REVIEW QUESTIONS

Pages 25 through 31

1. What are the two primary functions of the U.S. Constitution?

2. Read the excerpts from the U.S. Constitution and the Bill of Rights located in Appendix A. Then answer the following questions:
   a. Which article deals specifically with the legislature? With the executive? With the judiciary? (This may seem like trivia necessary only for *Jeopardy* contestants, but lawyers often refer to Article I, Article II, or Article III powers.)
   b. Which amendment states that the powers not specifically delegated to the federal government are reserved to the states?
   c. Make a list of the rights protected by the first ten amendments (Bill of Rights).
3. What is the doctrine of separation of powers, and how does it relate to our system of checks and balances?
4. What is the power of judicial review, and why is it so important to our legal system?
5. What is the doctrine of incorporation, and why is it important for understanding our rights under the U.S. Constitution?
6. John is upset with his neighbor because on weekends the neighbor plays loud music, disturbing John's sleep. John is so angry that he wants to sue his neighbor for violating his federal constitutional right to privacy. Why will John not be able to win his lawsuit?
7. Are the protections provided by state constitutions the same as those given by the U.S. Constitution? Why might that matter?

Pages 32 through 37

8. Why do constitutions and statutes frequently include ambiguous language?
9. How do courts become involved in the legislative process?
10. How are statutes and administrative regulations similar? How do they differ?
11. What is an enabling act?

12. Why are administrative agencies referred to as the fourth branch of government?
13. How are administrative regulations and executive orders and executive memoranda similar? How do they differ?
14. Can executive orders and executive memoranda be reviewed by the courts?

Pages 37 through 38

15. What is the common law?
16. What is the doctrine of *stare decisis* and why is it important to our legal system?
17. What does it mean to say the common law has been codified? That a statute is in derogation of the common law?
18. Why were equity courts created, and what special powers were they given?

Pages 38 through 41

19. Who has the final say as to what a statute means: the legislature or the courts?
20. Who has the final say as to the constitutionality of a statute, the legislature or the courts?

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1 The U.S. Constitution had to be ratified by conventions of at least nine states. Most state constitutions require ratification by a majority vote of the general electorate.

2 Article V of the U.S. Constitution requires that amendments be proposed by two-thirds of both houses (the House of Representatives and the Senate), or by a special convention called at the request of the legislatures of two-thirds of the states. Three-fourths of the state legislatures or conventions must then ratify the proposed amendment.

3 5 U.S. (1 Cranch) 137 (1803).

4 Id. at 177-78.

5 Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995).

6 York v. Wahkiakum School District No. 200, 178 P.3d 995 (Wash. 2008).

7 The exception to this is for bills raising revenues, which must originate in the House.

8 42 U.S.C. §2000e-2(a) (2025).

9 429 U.S. 125 (1976).

10 Bennett Amendment, 42 U.S.C. §2000e(k) (2025).

11 29 C.F.R. §1604.11 (2025).
12 Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).
13 The U.S. Constitution, Article II, Section 1, states, “The executive Power shall be vested in a President of the United States of America.”
14 163 U.S. 537 (1896).
15 347 U.S. 483 (1954).
16 410 U.S. 113 (1973).
17 597 U.S. 215 (2022).

Chapter 3

Classification of the Law

Logically , e v er ything ought to come first.
Jean-Jacques Rousseau

Chapter Objectives

After reading this chapter, you should be able to:

- Explain what it means to say that Congress has limited powers.
- Identify areas of the law that could be federal only, state only, or both.
- Describe the basic differences between civil and criminal law.
- Distinguish substantive from procedural law.

INTRODUCTION

In this chapter, we will discuss the most common ways in which lawyers have traditionally categorized law: federal versus state, criminal versus civil, and substantive versus procedural. Keep in mind, however, that although it is necessary to categorize a client's legal problem to help the client, you should not fall into the trap of seeing a client as only a set of legal problems that can be neatly sorted into predefined categories. There is a person behind every legal problem.

In Chapter 2, we explained how law is made not only by legislatures, but also by administrative agencies, executive orders and memoranda, and the courts. Based on its source, we classified law in terms of constitutional, statutory, administrative, or common law, or law made by executive orders or memoranda. You can also classify law based on whether it involves:

1. state or federal law (every state, as well as the federal government, has its own laws);
2. civil or criminal law (**civil law** deals with harm against an individual—for example, a broken contract—whereas **criminal law** deals with harm against society as a whole—as when violence leads to someone's death); and

3. substantive or procedural law (**substantive law** defines our legal rights and duties—for example, the duty to obey speed limits and the right of freedom of speech—whereas **procedural law** is comprised of the rules that govern how the legal system operates).

Civil law

Law that deals with harm to an individual.

Criminal law

Law that deals with harm to society as a whole.

These categories are not mutually exclusive. A client's situation may involve both federal and state laws, both civil and criminal issues, and procedural as well as substantive questions. For example, the victim of a battery could sue the attacker for civil damages at the same time the state is prosecuting the attacker on a criminal charge. Figure 3-1 illustrates how these categories relate to each other. At this point, do not be concerned about understanding all of the terms listed in the chart. As the chapter proceeds, we will discuss each term in more detail.

To illustrate key points in this chapter, we will be making frequent references to events surrounding the aftermath of the Boston Marathon bombing.

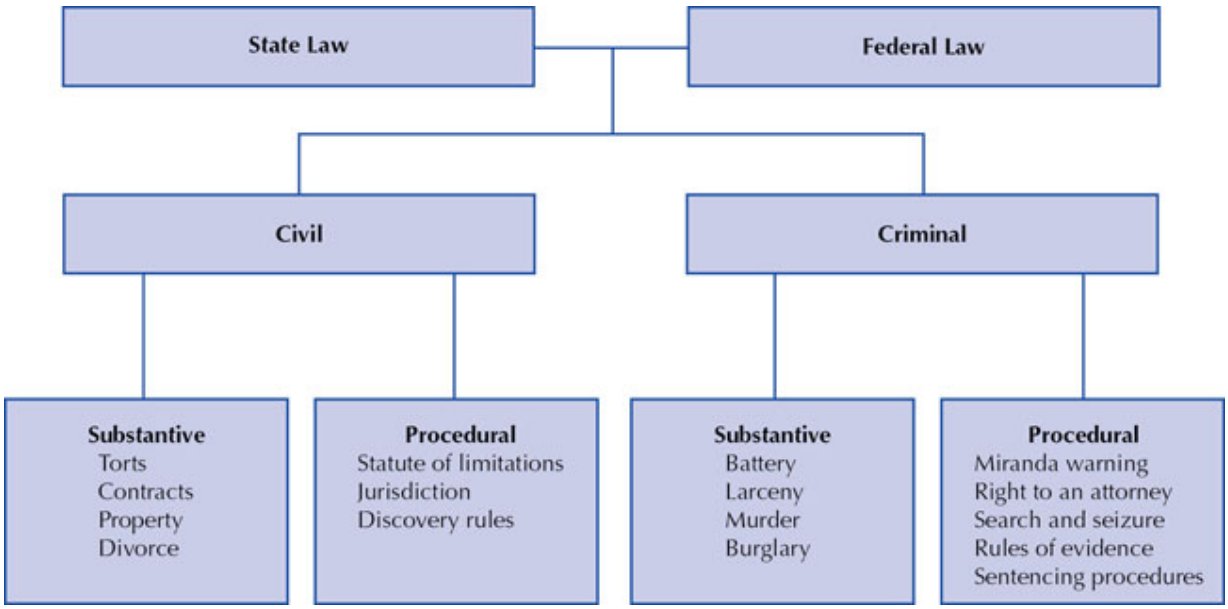

Figure 3-1 How Lawyers Classify the Law

Case 4: The Boston Marathon Bombings

On April 15, 2013, two bombs were detonated near the finish line of the annual Boston Marathon, killing three and injuring more than 200 runners and spectators. The government alleged that the attack was carried out by 26-year-old Tamerlan Tsarnaev and his 19-year-old brother, Dzhokhar Tsarnaev. In the ensuring manhunt, Tamerlan was killed, but Dzhokhar was captured and charged with committing a host of crimes.

As you read about the different ways that the law can be classified, think about how you might answer the following questions:

- Should Dzhokhar have been charged with state or federal crimes, or both? What are the implications of bringing federal versus state charges?
- How could the victims go about trying to receive compensation for the injuries they suffered?

- What procedural issues might the Tarnaev case raise?

A. FEDERAL VERSUS STATE LAW

In the previous chapter, we noted how the U.S. Constitution created a system of government, known as **federalism**, in which the power to make various types of laws is divided between the federal government in Washington, D.C., and the 50 state governments. Each of the 50 states, along with the federal government, has its own legal system. Each determines how its court system will be organized and what laws it will enforce. Although the laws of one state are often similar to the laws of another, each state ultimately decides for itself what those laws will be. A client's problem may involve state law, federal law, or both state and federal law.

Federalism
A system of government in which the authority to govern is split between a single, nationwide central government and several regional governments that control specific geographical areas.

1. Federal Law

Federal law is involved if the situation concerns any of the following:

1. a U.S. Constitutional issue (such as whether a branch of the federal government has exceeded its delegated powers, or whether an individual's freedoms guaranteed by the Bill of Rights have been violated);
2. a federal statute (such as the Internal Revenue Code or the Civil Rights Act of 1964); or
3. a regulation of a federal agency (such as the Internal Revenue Service or the Environmental Protection Agency).

When a client's problem is covered by one of these three areas, you will hear lawyers referring to this as raising a federal issue or a

federal question. As we will see later in Chapter 5, on civil litigation, the raising of a federal question is one basis for establishing jurisdiction in the federal courts.

Federal question

A legal question involving the application of federal law.

While states have "inherent power" to take actions designed to advance the health, welfare, safety, and morals of the people, the federal government is limited to those powers that are delegated to it in the U.S. Constitution. Therefore, for example, Congress has the power to enact legislation regarding taxation, but not a national divorce law.

However, even though the federal government is limited to the powers that are delegated to it in the Constitution, these powers are quite sweeping. Take a moment to look at Article I, Section 8 of the U.S. Constitution (in Appendix A). The government can lay and collect taxes, regulate currency, fix weights and measures, establish post offices, raise armies, and declare war, just to name a few. In addition, several constitutional amendments such as the Fourteenth Amendment have provisions enabling Congress to pass legislation necessary to enforce those specific amendments.

Congress also has the ability to enact laws that are "necessary and proper" to carry out its delegated powers. The last clause in Article I, Section 8, states: "[And] to make all Laws, which shall be necessary and proper for carrying into Execution the foregoing Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

This is commonly called the **doctrine of implied powers**. For example, even though the Constitution did not explicitly delegate to Congress the power to create a national bank, in the 1819 case of *McCulloch v. Maryland*,[1] the U.S. Supreme Court determined that its ability to do so was implied because the Constitution had expressly delegated to Congress the power to collect taxes and borrow money.

Doctrine of implied powers

Powers not stated in the Constitution but that are necessary for Congress to carry out other, expressly granted powers.

One of the most expansive federal powers involves the application of the Commerce Clause. Article I, Section 8, provides that "Congress shall have power to regulate commerce . . . among the several states." On its face, this seems quite straightforward, that is, whenever something crosses state lines, the federal government, rather than the individual states, should be the appropriate source of authority so as to create a uniform system. For example, if a river flows through several states, the federal government should be able to impose uniform limits as to what can be dumped into the river, as what is dumped in one state will inevitably flow into and affect the next. However, it is not always clear when something will have an impact on interstate commerce, especially when an activity is carried out entirely within just one state.

In the landmark case of *Wickard v. Filburn*, the U.S. Supreme Court interpreted the Commerce Clause as giving the federal government the power to regulate not only the movement of things that cross state lines but also any activity that has an effect on interstate commerce.[2] In that case, a farmer had harvested more wheat than allowed under a federal statute. He argued that the wheat was to be used solely on his farm and so its production would have no impact on interstate commerce. The Court disagreed. "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[3] Since setting this standard, the Supreme Court has grappled many times with whether a particular action has a great enough effect upon interstate commerce to justify federal regulation.

For example, in the 1960s, Congress relied upon those powers when it enacted the 1964 Civil Rights Act, making it unlawful to discriminate on the basis of race, color, religion, sex, or national origin. As the provisions were challenged, the Supreme Court continued to uphold the right of Congress to legislate through a broad reading of the Commerce Clause. In *Heart of Atlanta Motel, Inc. v. United States,*

a motel in Georgia refused to rent rooms to Black patrons, in direct violation of the Civil Rights of Act of 1964, which banned racial discrimination in public accommodations. The motel argued that by depriving places of public accommodation of the right to choose with whom they wished to do business, Congress had exceeded its Commerce Clause powers. The U.S. Supreme Court held that the statute was within the scope of the Commerce Clause because the existence of racially discriminatory practices made it more difficult for minorities to travel from one state to another, and this had a negative impact on the free flow of interstate commerce. [4]

Beginning in the 1990s, the Supreme Court began to interpret the Commerce Clause less expansively. In 1990 Congress enacted a statute making it a crime to possess or discharge a gun in a school zone. Five years later, in *United States v. Lopez*,[5] the U.S. Supreme Court ruled that the statute was unconstitutional because it "exceeded Congress' power to legislate under the Commerce Clause," as the presence or absence of guns in schools had no economic impact on interstate commerce. Therefore, the decision as to whether to create a gun-free school zone was the sort of intrastate activity that states, but not the federal government, could regulate.

In addition, any fundamental right given by the U.S. Constitution, and especially the first ten amendments along with the Fourteenth Amendment, provide a source of federal law. Many of these rights involve protections for those accused of a crime such as the right to remain silent and to have an attorney. One right not explicitly stated in the Constitution but recognized by the U.S. Supreme Court is the right to privacy. For example, in *Griswold v. Connecticut*,[6] the Court ruled that a Connecticut statute prohibiting contraception devices was unconstitutional when applied to married couples. Seven years later, the Court extended that right to unmarried people. [7] Prior to these decisions, many states had banned contraceptives, prohibiting physicians and other medical personnel from prescribing, or even discussing, contraceptive methods with their patients. Then in 1973, in the landmark decision of *Roe v. Wade*, the Court concluded that a Texas anti-abortion statute violated that same right of privacy.[8] This

was followed by other cases in which the Court recognized a right to same-sex sexual intimacy in *Lawrence v. Texas*,[9] and the right to same-sex marriage in *Obergefell v. Hodges*.[10] This expansion of federal control over family planning decisions and interpersonal relationships ended in 2022, when the Supreme Court overturned *Roe v. Wade* and held that the Constitution does not confer a right to abortion, returning to the states the power to regulate abortions.[11] Therefore, abortion regulation is no longer a matter of federal law but rather of individual state laws.

Finally, in recent years, although the reach of general federal administrative law has decreased, the extent and impact of presidential executive orders has dramatically increased. The traditional role of executive orders has been fairly limited to giving directives to agencies. But in his second term, President Trump used executive orders to cover a wide range of topics including such diverse areas as renaming the Gulf of Mexico the Gulf of America, imposing tariffs on imported goods, deporting illegal immigrants, dismantling the Department of Education, and ordering the defunding of various charitable organizations as well as public broadcasting. Many of these orders were challenged in court as some saw them as exceeding the limits of legitimate constitutional executive powers.

Discussion Question

1. Do you think the decision to ban or allow abortion is something that is best decided by the U.S. Supreme Court, Congress, state supreme courts, state legislators, or voters? What are the benefits and drawbacks of each approach?

2. State Law

Whereas the federal government must trace all of its powers back to a specific constitutional authorization, the states are allowed to make any laws they deem appropriate for the health, welfare, safety, and morals of their citizens, so long as those laws are not prohibited by

the U.S. Constitution. [12] Typical examples of areas covered by state law are criminal behavior (from murder and rape to burglary and fraud), contracts, torts, property, and family matters. Figure 3-2 compares federal and state legislation.

Although much of the law from one state to the next is quite similar, the states are free to create their own unique laws. Where one state may choose to create a state lottery, another may not; where one state may choose to allow no-fault divorces, another may not.

Some see this diversity as one of the great strengths of our political system. They argue that it encourages experimentation and innovation by allowing the residents of Georgia, for example, to establish rules of conduct that differ from those established by the residents of Nevada. Critics, on the other hand, point to the problems it creates for interstate business and travel—for example, forcing large corporations and other out-of-state parties to hire local lawyers and making it difficult for a lawyer to move a practice from one state to another. They also point out that states are sometimes reluctant to impose needed regulations (in areas such as environmental protection and worker safety) for fear that the affected businesses will move to another state with fewer restrictions.

As we become an ever more interdependent nation, however, state laws are tending to become more and more uniform, especially in the area of commercial law. Businesses with dealings in more than one state would rather not have to worry about adhering to a multiplicity of state laws. Therefore, most states have voluntarily moved to adopt uniform laws in areas such as commercial sales.

	Federal	State
Who enacts	Congress	State legislature
Limitations on legislative powers	Must be found in the Constitution: Article I, Section 8 delegated power Implied power Effect on interstate commerce Amendment enabling provision	Essentially none, so long as not prohibited by the U.S. Constitution and related to the welfare of its citizens
Examples	Income taxes Creation of a national bank Regulation of interstate train travel The Americans with Disabilities Act	Divorce laws Laws governing gambling Landlord/tenant law

Figure 3-2 A Comparison of Federal and State Legislation

While state legislatures enact statutes that can affect everyone in the state, local governmental units can enact laws (usually referred to as "ordinances") that have a more localized effect. Local governments are considered to be part of the state government, and can only make laws when they have been specifically authorized to do so by the state legislature.

3. The Supremacy Clause and Preemption

The federal and state governments often pass laws that overlap. So long as state laws do not interfere with the enforcement of federal laws, states are usually free to pass additional regulations or protections for their citizens.

For example, the Civil Rights Act of 1964 is a federal statute prohibiting employers from discriminating on the basis of race, sex, color, religion, or national origin. State or local governments may pass

laws prohibiting such discrimination as well. For example, a state could add to the list of prohibited types of discrimination, such as also prohibiting discrimination based on height or weight. This would be permitted because the state statute would not interfere with the enforcement of federal law. A state, however, could not pass a statute allowing discrimination based on religion because that would be in direct conflict with federal law.

There are a few areas where this type of overlapping of federal and state law is not allowed. This is because the U.S. Constitution includes a **Supremacy Clause** that gives the federal government the power to prohibit states from passing any law in certain areas. This is known as **preemption**. For example, it would make sense that only the federal government could pass laws regulating railroad safety, such as maximum train speed and train length, preempting any type of state or local government regulation of trains. In addition to federal statutes preempting state law, at times the U.S. Supreme Court has determined that there are areas that should be reserved for federal control. For example, in *Obergefell v. Hodges,* the U.S. Supreme Court determined that same-sex marriage is a fundamental right under the Fourteenth Amendment and the Equal Protection Clause.[13] Prior to *Obergefell*, some states passed laws allowing same-sex marriage and others passed laws prohibiting it. Once the U.S. Supreme Court determined that same-sex marriage is a fundamental right under the U.S. Constitution, the state laws prohibiting same-sex marriage became invalid because they conflicted with the U.S. Constitution. States may, however, still legislate regarding marriage where their laws do not conflict with federal law, such as the requirement to obtain a marriage license.

Supremacy Clause

A clause in the U.S. Constitution that dictates if there is a conflict between federal law and state law, federal law takes precedence.

Preemption

The power of the federal government to prevent the states from passing conflicting laws, and sometimes even to prohibit states from

passing any laws on a par ticular subject.

4. Application of F ederal v ersus State Law

As mentioned abo ve, if ther e is no conflict, both federal and state go vernments can pass laws co vering the same general ar ea of the law . Th e Bost on bombing case described at the beginning of this chapter illustrates a situation in which an action can violate both federal and state laws. In thi nking about that case, criminal char ges for m ur der ar e the first thing that comes to most people 's minds, and mur der is traditionally an ar ea co ver ed by state criminal law . Indeed, Massachusetts authorities char ged Dzhokhar Tsarnae v with violating a number of Massachusetts state laws, including mur der . Howe ver, federal author ities also char ged him with a number of federal off enses, inclu ding the use of a weapon of mass destruc tion. [14] One consequence of Tsarnae v being char ged with federal crimes is that the federal char ges also carr ied the possibility of the dea th penalty , something not a vailable to Massachusetts state pr osecut ors, as Massachusetts does not ha ve the death penalty .

Note that being char ged with both state and federal crimes does not raise double jeopar dy concerns. **Double jeopardy** is a constitutional pr ohibition against being tried twice for the same crime. The cour ts ha ve interpr eted "same crime " to ref er to a violation of the same section of the same criminal code.

Double jeopardy
A constitutional pr ohibition against being tried twice for the same crime.

5. Recap

As we ha ve seen, a legal pr oblem could be go verned by federal law , state law , or both. K eep the following thr ee possibilities in mind:

First, there are some areas in which only the states can legislate—areas reserved to the states—such as divorce.

Second, there are some areas in which both the states and Congress can legislate—such as criminal behavior that crosses state lines.

Third, there are a few areas in which only Congress can legislate—areas of total preemption—such as certain safety issues involving trains traveling across state lines.

DISCUSSION QUESTIONS

2. Can you think of any areas of the law that are not now regulated on a federal level but should be? Conversely, can you think of any areas of the law that should be left solely to state and local governments? If so, what are they, and why do you think the federal government should not be involved?

3. In 1970, the U.S. Congress passed the Controlled Substance Act (CSA), making it unlawful to manufacture, distribute, dispense, or possess any Schedule I substance. From then on, marijuana, or cannabis, has been a Schedule I substance, considered to have no acceptable medical use and a high potential for abuse. By 2024, a majority of states had legalized marijuana for medical use or for recreational purposes. How should our federal legal system resolve this conflict between federal and state laws?

Legal Reasoning Exercise

1. For each situation, determine whether you think the law involved is federal, state, or both.

   a. A person is liable for slander if that person intentionally says that someone is a thief when she knows it is not true.

   b. To be valid, a contract for the sale of real estate must be in writing.

c. Trucks traveling on interstate highways must be equipped with conca ve mud flaps.

d. No employer with ten or more employees may discriminate on the basis of race, color, religion, sex, or national origin.

e. A manufacturer of inherently dangerous products will be liable for any defective product that causes injury.

B. CRIMINAL VERSUS CIVIL LAW

Another major classification within the law is the division between criminal law and civil law. Both provide mechanisms for addressing violations of the law, but they differ regarding the procedures you must use and the types of sanctions or remedies that are available. In this section, we will first compare criminal and civil law. Next, we will take a quick look at the major substantive areas of criminal and civil law. We cover substantive civil law in more depth in Chapters 6, 9, and 10 and criminal law in Chapter 7.

1. A Comparison of Criminal and Civil Law

Some of the major differences between criminal and civil law are listed in Figure 3-3, on page 55. When you are analyzing a fact pattern, it is important to be able to differentiate between criminal and civil law and to understand the different procedures entailed in each. Keep in mind, however, that a single event can become the basis for actions in both the criminal and the civil courts. For example, the victim of a battery could sue the attacker for civil damages at the same time the state is prosecuting the attacker on a criminal charge. The driver of an automobile involved in a traffic accident may receive a traffic ticket from the police and at the same time be sued by someone else involved in the accident.

While the Boston bombing case that started this chapter dealt mostly with criminal activities, civil lawsuits by the victims and their families were also a possibility. However, very few civil lawsuits were actually filed, partly because there was no reasonable expectation that Tsarnaev had the funds to pay for the harm he caused, and also, there was no evidence to suggest that anyone else was to blame based on theories such as failure to maintain adequate security.

a. *Double Jeopardy and* Res Judicata

Just as being charged with a state and a federal crime does not constitute double jeopardy, charging a person with a criminal violation and suing that person civilly also does not constitute double jeopardy.

Civil law has a principle similar to double jeopardy, ***res judicata***, which precludes trying a civil case more than once.

Res judicata
Occurs when a civil case has a final judgment and is no longer subject to appeal; at that point, the case cannot be relitigated between the original parties.

b. Type of Harm

Civil law is invoked when one individual harms another. When an individual violates a part of the criminal law, society considers itself the offended party and takes an active role in the sanctioning process. Thus, if Peter Jones burglarizes Sam Smith's home, criminal law views that act as an offense against society itself, rather than simply as a matter between Smith and Jones.

But what determines when an act such as burglarizing someone's home is a wrong against society as a whole? It is up to the legislative branch of government to decide when the consequences of certain acts are viewed as grave enough to classify the act as a crime against the state. Thus, when the legislature perceives that a

par ticular act, such as drunk driving, has that br oader imp act, it can criminaliz e such beha vior .

c. Names of the P ar ties and the "Pr osecut or" of the Claim

The per son who brings a civil suit (also known as a "civil ac tion" or a "civil lawsuit") is known as the **plaintiff** , an d the pers on sued is called the **defendant** . F or example, recall the situ ation inv olving the pr egnant waitr ess pr esented at the beginning of Chapter 2. If D iane Jackson wer e to sue the rest aurant, she would be the pla intiff. Both the corporation that owns the W estern Rib Eye Restaurant and the restaurant ma nager would pr obably be named as d ef endants. Although civil suits ar e usually between individuals, a go vernmental unit (f ederal, state, or local) can become a plaintiff in a civil suit.

Plaintiff
A person who initiates a lawsuit.

Defendant
In a lawsuit, the person who is sued; in a criminal case, the person who is being char ged with a crime.

In a criminal ca se, the go vernmental unit that brings the ch ar ge is the **prosecutor** , and the accus ed is the def endant. F or example, in the Bost on bombi ng case, the federal case would be cited as *United States v. Tsarnae v* and the Massachusetts state case as *Commonwealth v. Tsarnae v.* Go vernmental lawy ers pr osecute the accused par ty (the def endant), and the victim is a witness, not a par ty to the action.

Prosecutor
The att orne y r esponsible for pr esenting the go vernment' s e vidence against a criminal def endant.

d. Standar d of Pr oof

Because of the serious consequences of violating criminal laws, the stan dar d o f pr oof is diff er ent fr om that used in civil cases. On the criminal side, the pr osecution is requir ed to pr o v e its case **be y ond a reasonable doubt** . Judges usually explain the "be y ond a reasonable doubt" standar d t o jur ors as the degr ee

Be y ond a reasonable doubt

The standar d of pr oof used in criminal trials. The e vidence pr esented must be so conclusiv e and complete that no r easonable doubts regar ding the facts r emain.

of doubt that causes a reasonable person to refrain from acting. The pr oof must be so conclusiv e and complete that all reasonable doubts regar ding the facts ar e r emo ved fr om the jur ors' minds.

	Civil	Criminal
Principle governing relitigation	*Res judicata*	Double jeopardy
Type of harm	Private injury	Harm to society
Names of the parties	Plaintiff/defendant	State*/defendant
"Prosecutor" of the claim	Usually an individual; sometimes the government	Government
Standard of proof	Preponderance of the evidence	Beyond a reasonable doubt
Judgment	Liable/not liable	Guilty/not guilty
Sanctions/remedies	Damages/injunction	Imprisonment/fines/death
Source of law	Common law/statutes	Statutes

*The state may also be referred to as "the Commonwealth" or "the People." Although the state is the named party, it is actually a government employee, the prosecutor (also known as the "district attorney," "state's attorney," or "attorney general"), who brings the lawsuit as the state's representative.

Figure 3-3 A Comparison of Civil and Criminal Law

In most civil actions, the plaintiff need only meet the **preponderance of the evidence** standard. A preponderance of the evidence is usually understood to mean that the facts asserted are more likely to be true than not true. One study showed that judges equate "beyond a reasonable doubt" with a median probability of approximately 8.8 out of 10. Jurors averaged approximately 8.6 out of 10. The judges interpreted preponderance of the evidence as a median probability of 5.4 out of 10. For jurors, the median was 7.1 out of 10.[15] These results indicate that although judges and jurors may disagree as to the precise meaning of the standards, they agree that the criminal law requires a greater degree of proof before its sanctions can be applied.

Preponderance of the evidence

The standard of proof most commonly used in civil trials. The evidence presented must prove that it is more likely than not the defendant committed the wrong.

There are a few occasions in which a higher, **"clear and convincing** evidence" standard, is used in civil actions. Examples include situations in which someone is being denied an important government benefit or is facing involuntary commitment to a mental institution. This standard is also used when a court has to determine whether to terminate a parent's rights. Generally, the state must prove the parent is "unfit" by clear and convincing evidence.

Clear and convincing

The standard of proof used in some civil trials. The evidence presented must be greater than a preponderance of the evidence, but less than beyond a reasonable doubt.

DISCUSSION QUESTIONS

4. What do you think of the differences between judges' and jurors' definitions of "beyond a reasonable doubt" and a

"preponderance of the evidence"? Do you think this causes any problems for our legal system?

5. Think about the different standards of proof: beyond a reasonable doubt, preponderance of the evidence, and clear and convincing evidence.

- **a.** What factors do you think should be considered in determining which standard should be applied?
- **b.** Specifically, do you think that preponderance of the evidence is the appropriate standard when determining whether to terminate the parental rights of an "unfit" parent? Why?

6. On June 12, 1994, Nicole Brown Simpson and Ron Goldman were murdered in Los Angeles. The State of California charged Nicole Brown Simpson's ex-husband, O. J. Simpson, with the murders. After a lengthy trial, the jury found him not guilty. After the trial, the families of Nicole Brown Simpson and Ron Goldman sued O. J. Simpson for damages in civil court. O. J. Simpson was found responsible. Why did the two cases, on the same facts, have different results? Does this undermine our justice system? Why or why not?

e. Judgment

The result of the court's actions in a civil suit is a finding of liability or no liability. Do not use the term *guilty* when referring to a civil defendant. Only in a criminal case do we say that the defendant was found guilty or not guilty.

f. Sanctions/Remedies

The typical remedy in a civil case is either **damages**, where the defendant pays the plaintiff for the harm that he or she has done, or an **injunction**, where the court orders the defendant to take some specific action or to cease acting in a specific way. For example, a restaurant libeled by a newspaper might ask for damages to pay for lost business and an injunction ordering the paper to print a retraction. In the case of the waitress, Diane Jackson, she might ask

to be paid for the time she has been out of work (damages) and request a court order requiring the restaurant to rehire her (an injunction).

Damages
Monetary compensation, including compensatory, punitive, and nominal damages.

Injunction
A court order requiring a party to perform a specific act or to cease doing a specific act.

Whereas the focus of civil law is on redressing the losses of the plaintiff, in criminal law the sanctions are designed to punish the offender and deter not only the offender but future offenders as well. If a court of law determines that a provision of criminal law has been violated, it may impose two broad types of sanctions—loss of liberty and financial penalty. The loss of liberty can range from receiving unsupervised probation to spending a few days in the county jail to serving several years in a state penitentiary to receiving the death penalty. The fines assessed as part of the criminal process become the property of the state rather than the victim. Only occasionally will a negotiated settlement with a criminal defendant contain some provisions for restitution for the victim. Usually, if the victim wishes to receive money from the criminal defendant to compensate her for the harm done to her, she must hire a lawyer and initiate a civil suit.

g. Sources of Law

A final difference relates to the sources of criminal and civil law. Criminal law is almost entirely statutory, while civil law is rooted in the common law (court-made law). Gradually, however, this distinction is being eroded as more and more areas of the civil law are becoming controlled by statutory law.

h. Recap

Common ways of differentiating criminal from civil law include the following: In a civil case, the harm is to an individual, while in a criminal case, the action is said to harm society itself; in a civil case, the parties are labeled the plaintiff and the defendant, whereas in a criminal case, they are the state and the defendant; the government prosecutes criminal cases, while individual plaintiffs initiate civil cases; in a criminal case, the government must prove its case beyond a reasonable doubt, whereas in a civil case, the plaintiff must prove his or her case by a preponderance of the evidence; a finding of guilt in a criminal case results in a fine or imprisonment, while a finding of liability in a civil case results in a monetary award or an injunction; and the source of law for civil cases is both court-made law and statutes, whereas almost all criminal law is based in statutes.

2. Criminal Law

Murder, robbery, and arson are examples of criminal behavior. However, it is much easier to list types of criminal behavior than it is to define the difference between criminal and civil law. As mentioned earlier, usually it is said that a criminal act harms not just the victim, but also society as a whole. That definition does not get us very far. What is a wrong against society as a whole? One way of viewing that is to say that the act hurts not only the individual victim, but also society as a whole because the act's consequences are so grave as to cause concern to the rest of the population. When the legislature perceives that a particular act such as arson has that broader impact, it enacts a statute outlining the elements of the crime and its punishment.

a. Types of Crimes

Serious crimes, such as murder, rape, armed robbery, and aggravated assault, are classified as felonies, and they generally

involve a punishment that can include a year or more in a state prison. Misdemeanors include such lesser charges as disorderly conduct and criminal damage to property. When incarceration is called for in these cases, it usually is for less than one year and is served in a county jail. As mentioned above, in most jurisdictions criminal law is entirely statutory, and the legislature determines whether a given act is to be considered a felony or a misdemeanor.

b. Establishing a Prima Facie *Case*

For a person to be convicted in a criminal trial, the prosecution must establish that the defendant committed an act defined as being illegal in the criminal code. This involves proving that the accused both possessed the requisite bad intent (called ***mens rea***) and the requisite bad behavior (called ***actus reus***). Different acts—killing someone, burning down a building, robbing a store—can give rise to different crimes. It is also true that the same act accompanied by different types of intent can give rise to different crimes. For example, the act of killing could be categorized as murder or manslaughter, depending on the defendant's state of mind when he or she committed the act.

Mens rea
Bad intent.

Actus reus
Bad act.

At the trial, the prosecution must first present a ***prima facie* case**, one that establishes the elements of the crime, the requisite bad intent and bad behavior. A *prima facie* case contains enough evidence to support a finding of guilty if the defense presents no contrary evidence. If the prosecution fails to present a *prima facie* case, the judge must issue a not guilty verdict without the defense even presenting its case.

Prima facie case

What the prosecutor or plaintiff must be able to prove for the case to go to the jury—that is, the elements of the prosecution's case or the plaintiff's cause of action.

Practice Tip

Even though we sometimes talk about civil versus criminal law, keep in mind that the same facts may give rise to both civil and criminal lawsuits. If a potential defendant in a civil case has been convicted at a criminal trial, it will be easier for the plaintiff to win a civil case. However, even if the defendant was acquitted at the criminal trial, because of the different standards of proof and evidentiary requirements the plaintiff may still win in a civil case.

Legal Reasoning Exercise

2. Take a moment to read the following Massachusetts statute regarding larceny.

> Whoever steals . . . and with intent to steal . . . the property of another . . . shall be guilty of larceny . . . .[16]

a. Assume that Alan got into a car, knowing that it was not his, "hot-wired" it, and then drove off in it. Is he guilty of violating the statute? Why?

b. Assume that Bill approached a car that he intended to steal but was scared away by a passerby. Is he guilty of violating the statute? Why?

c. Assume that Charles got into a car, thinking he was getting into his friend's car, and "hot-wired" it, but he only

meant t o borr ow it. Is he guilty of violating the statute? Why?

c. Def enses

If th e pr osecution does pr es ent a *prima facie* cas e, the def e nse then has the oppor tunity to pr esent evidence that either contradicts that pr esented by the pr osecut or or establishes a legally recogniz ed justification. This evidence could inv olv e witnesses who contradict the testimony of pr osecution witnesses or evidence that establishes an alibi, self-def ense, or an insanity def ense.

Ther e ar e essentially two ty pes of criminal **defense s**. The first type jus tifies the act. The se cond type negates the requisite *mens rea.* An example of the first type of def ense, which justifies the act, is self-def ense. The def endant admits killing the victim but ar gues that he or she had no choice. Ex amples of the second type of def ense, which negates the requisite intent, ar e insanity , infancy , and int oxication. Ea ch of these de fenses has as its pr emise th e fact that the def endant was incapable of forming the requisite intent to commit the crime.

Defense
In a criminal case, a fact or legal ar gument that would r elie v e the def endant of guilt.

After th e def ense has pr esented its evidence, the pr osecution has a chance to respond with rebuttal witnesses to attack these def enses and r eestablish the cr edibility of its own witnesses.

3. Civil Law

Civil law inv olv es priv ate actions br ought by individuals to addr ess per ceiv ed wr ongs. In this section, we will discuss what is necessar y to p rove a civ il *prima facie* cas e, the def enses to a civ il suit, the damages that a plaintiff can r eco v er, and the main ar eas of civil law .

a. Establishing a Prima F acie *Case*

Just as the pr osecution has the bur den of establishing a *prima facie* cas e in a criminal case, so too does the plaintiff shar e a similar bur den in a civil case. The plaintiff has the bur den of pr ovi ng that the various elemen ts listed in his or her complaint show the plaintiff has a valid **cause of action** . A cause of action is a claim that based on the law and the facts is sufficien t to demand judicial action. The plaintiff must pr ove these elements by a pr eponderance of the evidence, which means it is mor e lik ely than not that the def endant committed the wr ong.

Cause of action

A claim that based on the law and the facts is sufficient t o suppor t a lawsuit. If the plaintiff does not state a v alid cause of action in the complaint, the cour t will dismiss it.

For exa mple, assume that a car and a truck collide at an intersection. The driv er of th e car is injur ed and wants to sue the truck dr iv er, alleging that the truck driv er ran a red light. Th e car driv er will be the plaintiff, and his cause of action will be based on the law of negligence (acting unr easonably under the cir cumstances) and the facts of what happened at the intersection. To succeed in a lawsuit, the plai ntiff will ha ve to pr esent evidence that it is mor e lik ely than not that the truck driv er was negligent. If the plaintiff/driv er is able to do so, then he has satisfied his *prima facie* cas e. Ever y ar ea of civil law has its own requir ed elemen ts that constitute the plaintiff 's *prima facie* cas e. Later in this chapter , as you read about tor ts, con tracts, and pr oper ty law , note the requir ements of each for the plaintiff to pr ove a *prima facie* case.

b. Def enses

The def endant/truck driv er can respond first by tr ying to negate the plai ntiff 's case. P erhaps the def endant has a witness who will testify that the light was gr een for the truck driv er and red for the

plaintiff. In addition to attempting to negate the plaintiff's case, the defendant can present evidence that would negate or reduce the defendant's liability, known as **affirmative defenses**. In effect, the defendant is saying this: Even if you are right and I did something wrong, I have a good excuse or a reason why my liability should be reduced.

Affirmative defense

A defense whereby the defendant offers new evidence to avoid judgment.

For example, in the accident mentioned above, the truck driver might ask the car driver's passenger to testify that the car driver was not being as attentive to his driving as he should have been. This behavior could have contributed to the accident, thereby decreasing the defendant's share of the liability.

It is very important to keep these two approaches separate: First, the defendant tries to negate the plaintiff's case. Second, the defendant raises defenses that could limit his liability even if the plaintiff's version of the law and facts is true.

Depending on the area of law, different defenses will be available. For example, it might be a valid defense to a contract claim that the defendant was only 15 years old when he signed the contract. However, being 15 years old may not be a defense to an intentional tort, such as battery.

In some cases, statutes or constitutions protect certain classes of people or institutions from being sued by granting them either full or partial immunity. One of the oldest and most important forms of immunity is **sovereign immunity**. Historically, the doctrine of sovereign immunity prohibited injured parties from suing the government unless the government gave its consent. This protection can be traced back to the concept of the divine right of kings and the idea that "the king can do no wrong." Later in this book, we also discuss the related concepts of spousal and parental immunity.

Sovereign immunity

The pr ohibition against suing the go vernment without the go vernment' s consent.

c. Damages

If a cour t determines that the plaintiff should reco ver, the issue of damages (monetar y compensation) arises. Ther e ar e thr ee types of damages: compensat or y, punitiv e, and nominal. **Compensator y damages** ar e intended to compensate the plaintiff for the harm done to h er or him. In a tor t action inv olving harm to a person, that might mean the cost of medical bi lls, lost wages, and pain and suff ering. **Punitiv e dama ges** ar e des igned to punish the de fendant and typically ar e awar ded only for intention al tor ts when the cour t deem s that the **tor tfeasor** (the person who committed the tor t) deser ves additional punishment be yond just compensating the plaintiff for the harm done to h im or her . Finally , **nominal damages** ar e awar ded when the law has been violated, but the pla intiff cannot pr o ve any monetar y harm. As mentioned earlier , in addition to or instead of damages, the cour t might issue an injunction, an or der to the def endant telling the def endant t o do a specific act or t o cease doing a specific act.

Compensator y damages
Mone y awar ded t o a plaintiff in pa yment for his or her actual losses.

Punitiv e damages
Mone y awar ded t o a plaintiff in cases of intentional t or ts t o punish the def endant and ser ve as a warning t o others.

Tor tfeasor
A person who commits a t or t.

Nominal damages
A t ok en sum awar ded when liability has been found, but monetar y damages cannot be shown.

d. Ar eas of Civil Law

Civil law covers a very broad range of subjects, including adoption, admiralty, bankruptcy, corporations, divorce, employment, environmental protections, intellectual property, personal injury, probate, and real estate law. It is helpful to think of civil law as falling into three main categories: making deals, owning property, and protecting people and property from harm. The most basic principles of each are covered in the standard law school courses of contracts, property, and torts, respectively. The various specialty fields listed above all involve applications of the principles taught in these three courses.

(1) Contract law

Contract law involves identifying the elements of a valid contract and the procedures used to enforce those agreements. A **contract** is a written or verbal agreement that is legally enforceable, supported by consideration. Therefore, contract law deals with two-sided agreements or bargains. I agree to sell you my diamond ring, and you agree to give me $500 in return. We have struck a bargain, entered into a contract. If something should go wrong—if I refuse to hand over the ring or you refuse to give me the money—we would find our actions governed by contract law.

Contract
A legally enforceable written or verbal agreement, supported by consideration.

For a contract to be valid, there must be an offer, an acceptance of the offer, and **consideration**; that is, something of value must be exchanged. It is the consideration that differentiates a contract from a gift. Common defenses to a contract action include breach by the other side and incapacity to contract, as when one party is underage. Questions raised in contract law include the following:

Consideration
Something of value exchanged to form the basis of a contract.

- When does a contract become enforceable?
- What is the difference between an offer and an invitation to negotiate?
- Under what circumstances can a mistake justify ending a contract?

We cover the answers to these and other contract questions in Chapter 9 .

(2) Property law

Property law is an area of the law that deals with the ownership and use of property. It covers topics such as the difference between **real property**, land and objects permanently attached to land, and **personal property**, all other property; the acquisition and disposition of property; and the use of property. Questions raised in property law involve issues such as:

Property law
Law dealing with ownership of things, tangible and intangible, and land

Real property
Land and items growing on or permanently attached to that land.

Personal property
All property that is not real property.

- Should a room air conditioner be treated as real or personal property?
- What types of materials can be copyrighted and what types of inventions can be patented?
- Under what circumstances can the government take private property for government use?

We discuss these and additional property law topics in Chapter 10 .

(3) Tort law

Issues of **tort law** arise when one person harms another person or that person's property. A tort is defined as a private wrong (other than a breach of contract) in which a person is harmed because of another's failure to carry out a legal duty. Through the common law the courts have defined legal duties as occasionally including the affirmative obligation to act to protect others. More commonly, courts require that everyone refrain from taking actions that inflict harm on others. Torts are traditionally categorized as intentional, negligent, or the result of strict liability. Questions raised in tort law include the following:

Tort law
Law that involves harm to a person or a person's property.

- How do negligence laws vary from state to state?
- What is the difference between intentional torts and negligence?
- What remedies are available?

As the name indicates, an **intentional tort** occurs when someone deliberately harms a person or that person's property. If one of your classmates deliberately hits you, your classmate has committed the intentional tort known as battery. Battery is the intentional, harmful, or offensive physical contact by one person with another person. Libel, slander, invasion of privacy, and false imprisonment are other examples of intentional torts.

Intentional tort
A tort committed by one who intends to do the act that creates the harm.

The most common category of tort law is that of **negligence**, the failure to act as a reasonably prudent and careful person is expected to act under the circumstances. This is known as the "reasonable person standard."

Negligence

The failur e t o act r easonably under the cir cumstances.

> ***ETHICS ALER T***
>
> You ar e walking along the beach and see a young child dr owning. No one else is in sight. Should the law requir e you to try to sa ve the child? Should it matter if you ar e an off-duty lif eguar d?

Case 5: Mr . Whipple

Mr . Whi pple owns a gr ocer y stor e. A cust omer br eaks a bottle of apple juice and pr omptly repor ts it to Mr . Wh ipple. Nonetheless, M r. Whipple fails to ha v e the br ok en bottl e and spilled juice cleaned up. Another 20 minutes later , another cust omer slips on the wet floor , br eaking her leg.

Mr . Whi pple ma y be found lia ble for negligence. Clearly , he did not intend for the cust omer to slip and br eak her leg. Ther efor e, ther e was no in tentional tor t. But a jur y m ight find that a reasonable stor e owner would ha v e or der ed the spill cleaned up within the 20 minutes after learning of it.

F or a plaintiff t o pr o v e negligence, he or she must show that

1. the def endant owed the plaintiff a duty of car e;
2. the def endant br eached that duty; and
3. the br each caused
4. the plaintiff harm.

These four basic prerequisites (elements) in a negligence case are known as duty, breach, causation, and harm. In the case just mentioned Mr. Whipple had a duty to act as a reasonable store owner would under the circumstances. The circumstances were a broken bottle of apple juice about which Mr. Whipple was informed and a 20-minute period in which he did nothing. If the jurors believe Mr. Whipple breached his duty to act as a reasonable store owner, then they will find liability if they also think that breach caused the customer harm.

As the store owner, Mr. Whipple would, of course, try to defend himself through rebutting the plaintiff's evidence. Perhaps it had been only 2 and not 20 minutes since he learned of the spill. In addition, he might try to raise an affirmative defense. As mentioned previously, an affirmative defense is a defense whereby the defendant offers new evidence to avoid or limit the judgment. The two main affirmative defenses to negligence are **contributory negligence** and **assumption of the risk**. Contributory negligence means that the plaintiff was also negligent, and through that negligence contributed to his or her own injury. In Mr. Whipple's case, perhaps the customer was in a hurry and was not looking where she was going. Assumption of the risk means that the plaintiff voluntarily and knowingly subjected himself or herself to a known danger. Perhaps the customer saw the spilled juice but chose to walk through it anyway. In many states, assumption of the risk is no longer a separate defense to negligence, as it has been subsumed under the more general category of contributory negligence.

Contributory negligence

Negligence by the plaintiff that contributed to his or her injury. Normally, any finding of contributory negligence acts as a complete bar to a plaintiff's recovery.

Assumption of the risk

Voluntarily and knowingly subjecting oneself to danger.

Historically, any showing of contributory negligence or assumption of the risk meant that the plaintiff could recover nothing from the defendant even if the defendant's actions were much more culpable than those of the plaintiff. Only three states currently continue to allow this pure contributory negligence defense. Instead, most states use some variation of the **comparative negligence**

Comparative negligence
A method for measuring the relative negligence of the plaintiff and the defendant, with a commensurate decrease in the compensation for the injuries.

defense. Under comparative negligence, instead of the plaintiff's own negligence relieving the defendant of liability, the jury compares the negligence of the plaintiff to that of the defendant and apportions the responsibility. The plaintiff's recovery is reduced by his or her degree of negligence.

The third category of tort law is called **strict liability**. In some cases, persons or corporations can be held liable for injuries that resulted from their actions, even when their actions were reasonable under the circumstances and they did not intend to harm anyone. The doctrine of strict liability holds that persons who engage in activities that are inherently dangerous are responsible for any injury that results, even though they carried out the activities in the safest and most prudent way possible. For example, someone who uses explosives or who keeps wild animals is liable for all resulting injuries, even if that person used the utmost care. In recent years, many courts have held manufacturers and sellers to be strictly liable when a defective product the defendant manufactured or sold caused harm to the user or consumer, even when the user or consumer could not show that the manufacturer's negligence caused the defect.

Strict liability
Liability without a showing of fault.

We discuss tort law in greater detail in Chapter 6.

3. For each question, decide whether the facts raise an issue of t or t, contract, or pr oper ty law , or mor e than one ar ea of law .

a. You buy a new car . Two da ys later , as you ar e driving, the brak es fail and you go off the road, hitting a telepho ne pole. L uckily y ou ar e unhur t, but the car is badly damaged.

b. You ren t an apar tment. One night, as you ar e lea ving the building thr ough the central stair wa y, the railing giv es wa y and y ou fall, br eaking y our leg.

c. You agr ee to pur chase a bicy cle fr om your neighbor for $50. Th e next da y, your neighbor decides not to sell you the bik e.

d. You put in an off er for a house. A week later , you ha ve a pest inspection and disco ver that the house is inf ested with activ e termites.

e. You ar e riding your bicy cle in the middle of the afternoon on a dedicated bik e path. While you ar e ridi ng, someone runs over to you and pushes you and your bik e, causing y ou t o crash.

4. For each of th e following situations, decide if you think liability should be found base d on an intentional tor t, neglig ence, or strict liability , or whether no liability should be found.

a. Sally was angr y with Mar tha. One night after lea ving class, she deliberately dr ove her car int o the side of Mar tha 's car .

b. One night after lea ving class, Sally was in a hurr y. When she arriv ed at the st op sign at the student parking lot entrance to Main Str eet, she did a "r olling st op." Mar tha was driving by on M ain Str eet. Sally 's car hit the side of Mar th a's car .

c. One night after lea ving class, Sally got int o her brand-new Do dge van. When she arriv ed at the st op sign at the student parking lot entrance to Main Str eet, she pr essed on

the brak es, but nothing happened. Mar tha was driving by on Main Str eet. Sally 's v an hit the side of Mar tha 's car .

d. One night after lea ving clas s, Sally got int o her car . When she arriv ed at the st op sign at the student parki ng entrance to Main Str eet, she suddenly got a tr emendous cramp in her s ide and momentarily lost contr ol of her c ar. Mar tha was driving by on Main Str eet. Sally 's car hit the side of Mar tha 's car .

C. SUBST ANTIVE VERSUS PROCEDURAL L AW

Finally , law can also be classified as either substantiv e or pr ocedural. **Substantiv e law** ref ers to the laws that define our rights and duties. It defines what actions will violate criminal law and what our obligations ar e in civil law . F or example, substantiv e law in cludes the statutes that go vern the lega l speed limits, the cir cumstances under which s omeone can be convicted of r obber y, and when a contract is enfor ceable. **Procedural law** , on the other hand, deals with how the legal sy stem operates. F or example, it specifies such things as which types of cases ha ve to be filed in which cour ts and what has to be included in those cour t doc uments. It defines the pr ocedur es the police must follow in conduct ing a sear ch or interr ogating a suspect. F ur ther examples ar e included in Figur e 3-4 .

Substantiv e law
Law that cr eates rights and duties.

Procedural law
Law that r egulates how the legal system operates.

Ever y case is founded in s ubstantiv e law , and lawy ers must determine what their client' s obligations and liabilities ar e. Howe ver, the y mu st be equally awar e of the pr ocedural aspects of the case. F or example, even if the substantiv e law is on the client' s side, the case

may be lost if a claim is not filed within the time prescribed in the **statute of limitations**, a limitation imposed by the legal system on how much time a plaintiff has before he or she can no longer bring suit. Those limitations vary given the type of case involved. A plaintiff could also lose if the complaint, the initial document that starts a lawsuit, fails to include all the required information.

Statute of limitations

The law that sets the length of time from when something happens to when a lawsuit must be filed before the right to bring it is lost.

We have all heard of the criminal who was set free due to a "technicality." These rules of criminal procedure have their roots in the Constitution and are intended to protect the innocent from the overreaching of possibly overzealous law enforcement officials. These rules govern everything from the way in which the arresting police officer must inform a suspect of his or her rights to how evidence is introduced at trial. For example, in the Boston bombing case, one of the first procedural issues that arose was the question of whether it was proper for federal agents to question Dzhokhar Tsarnaev for 16 hours before reading him his Miranda rights. [17]

	Substantive	Procedural
Definition	Creates rights and duties	Regulates how the legal system operates
Civil Law Examples	*Requirements of an enforceable contract. *Negligence is acting unreasonably. *A gift requires offer, acceptance, and delivery.	*The statute of limitations for tort actions is usually two years. *A complaint must state the grounds for the lawsuit. *Only claims worth up to a certain dollar amount can be filed in small claims court.
Criminal Law Examples	*Murder is the unlawful killing of a human being. *Burglary is the breaking and entering of a dwelling at nighttime. *Self-defense is the justified use of force	*A person cannot be tried twice for the same crime. *The necessity for a search warrant.*Requirement to read a suspect Miranda rights.

	Substantiv e	Procedural
	to pr otect oneself or others.	

Figure 3-4 A Comparison of Substantiv e and Pr ocedural Law

We discuss civil pr ocedur e in mor e detail in Chapter 5, and criminal pr ocedur e in mor e depth in Chapter 8 .

Legal Reasoning Ex ercise

5. Re view the hypothetical cas e of the pr egnant waitr ess that began Chapter 2. H ow would you categoriz e Diane 's legal pr oblems?

SUMMAR Y

In this chapter , we ha ve seen how lawy ers categoriz e law as either state or federal, civil or crimi nal, and substantiv e or pr ocedural. The first categor y, state or federal, arises because the United States operates under a system of federalism. Under our federal system, go vernmental authority is split between the national go vernment and the 50 state go vernments. Some ar eas of the law , such as div or ce, ar e res er ved ex clusiv ely to the states; some ar e reser ved to the federal go vernment; and so me ar e shar ed by the states and the federal go vernm ent. If you ar e in doubt as to which law app lies, check state law first. F ederal law will be inv olv ed only if the U.S. Constitution, a federal statute, a federal regulation, or an ex ecutiv e or der is inv olv ed.

Civil law inv olv es harm to an individual, wher eas criminal law deals with harms to society as a whole. In both criminal and civil cases, the par ty with the bur den of pr oof must first establish a *prima*

facie case. Once that is established, the other side is given the opportunity to negate the *prima facie* case or to raise affirmative defenses. Although the law has become increasingly specialized, the main areas of civil law are contracts, property, and torts. Tort law can be further subdivided into those involving intentional acts, those based on negligent behavior, and those that result from an imposition of strict liability.

Finally, substantive law defines our rights and duties. Procedural law deals with how the legal system operates.

REVIEW QUESTIONS

Pages 45 through 53

1. What are the three major ways in which lawyers categorize the law?
2. What is federalism?
3. True or false: Every state must have the same laws regarding divorce. Why?
4. What does it mean to say that the federal government is a government of limited powers?
5. Do you think Congress could (not should) enact a national divorce statute? Why?
6. Why are some areas of the law preempted by the federal government?

Pages 54 through 57

7. Name at least four ways in which civil law differs from criminal law.
8. When is the burden of proof "beyond a reasonable doubt" and when is it a "preponderance of the evidence"? What is the difference between them?
9. In a civil case, if a jury is evenly split, leaning equally toward the plaintiff's and the defendant's views of the facts, who will win, the plaintiff or the defendant? Why?

Pages 57 through 61

10. What two basic elements must be established for the government to prove the *prima facie* case in a criminal case?
11. Why can the same act constitute several different crimes?
12. What are the two basic defenses to a criminal action?
13. In a criminal case, does the government or the defendant present its case first? Why?
14. What is the general definition of a civil cause of action?
15. In a civil case, does the plaintiff or the defendant present its case first? Why?
16. What are the three types of damages available in a civil case?
17. In addition to damages, what might a plaintiff seek in a civil case?

Pages 61 through 65

18. What must be present for a contract to be valid?
19. What is the basic difference between a contract and a gift?
20. What is the difference between real property and personal property?
21. What are the three main areas of tort law?
22. Give the general definition of negligence and list the elements necessary to prove a *prima facie* case.
23. What are the main defenses to negligence?

Pages 65 through 67

24. What is the difference between substantive and procedural law?
25. What is the function of a statute of limitations?

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1 17 U.S. (4 Wheat.) 316 (1819).
2 317 U.S. 111 (1942).
3 Id. at 125.
4 Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964).
5 United States v. Lopez, 514 U.S. 549 (1995).
6 381 U.S. 479 (1965).
7 Eisenstadt v. Baird, 405 U.S. 438 (1972).

8 410 U.S. 113 (1973).

9 539 U.S. 558 (2003).

10 576 U.S. 644 (2015).

11 Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

12 The Tenth Amendment to the U.S. Constitution declares that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

13 Obergefell v. Hodges, 576 U.S. 644 (2015).

14 18 USCA §2332a (West 2025). Under federal law, the type of bomb that Tsarnaev used would qualify as a "weapon of mass destruction," so long as its use also affected interstate commerce. This latter requirement was easily satisfied, as the annual Boston Marathon attracts runners and fans from all over the United States, and even the world. Their travel across state lines, as well as their spending millions of dollars at local hotels, restaurants, and stores, has a direct impact on interstate commerce.

15 Simon & Mahan, *Quantifying Burdens of Proofs*, 5 L. & Soc'y. Rev. 319 (1971).

16 Mass. Gen. Laws ch. 266, §30(1) (2025).

17 The government argued that it was appropriate and not a violation of Tsarnaev's rights under a "public safety" exception.

Chapter 4

Cour ts

Trial cour ts search for truth and appellate cour ts search for error .

Unknown

Chapter Objectives

After reading this chapter, you should be able to:

- Categorize courts as either trial or appellate.
- Distinguish between questions of law and questions of fact.
- List the major courts in the federal system.
- Describe a typical state court system.
- Explain the concept of jurisdiction.

INTRODUCTION

Now that we have identified the functions, sources, and classifications of law, we turn our attention to the manner in which the judicial system enforces the law. Although the law provides rules about how people should behave in different types of situations, these rules are not self-enforcing. It is to the courts and the judicial system that we must turn for interpretation and enforcement of the law.

A **court** is a unit of the judicial branch of government that has authority to decide legal disputes. However, depending on the nature of the dispute, only certain courts will have jurisdiction to hear the case. **Jurisdiction** refers to the power of a court to hear a particular type of case or to hear cases within a specific geographic area.

Court
A unit of the judicial branch of government that has authority to decide legal disputes.

Jurisdiction
The power of a court to hear particular types of cases or to hear cases within a specific geographic area.

We will begin by describing how courts are classified as either trial or appellate and either federal or state, but before we do so, please read over Case 6.

As you read this chapter, think about:

- the differing roles of the trial and appellate courts, and
- if you were Jones's lawyer, on what grounds do you think you would base an appeal of his conviction?

Case 6: Alibi to a Murder

Frederick Jones could not believe it when he was arrested for murder, because he thought he had an ironclad alibi.

At his trial, an elderly gentleman testified that he saw Jones near the scene of the murder shortly after it took place. At one point in the trial, over the objection of the defendant's lawyer, the prosecutor showed the jury bloody and gruesome pictures of the deceased victim.

Jones testified that not only did he *not* commit the murder, but that he was attending an out-of-town wedding at the time the murder was supposed to have taken place. Ten witnesses then took the stand in succession and testified that they had been at the wedding and seen the defendant there.

At the end of the trial, the jury convicted Jones. As he had so many witnesses testifying as to his whereabouts on the night of the murder, Jones could not understand how the jury could possibly have found him guilty, so he wants his lawyer to appeal his case.

A. TRIAL VERSUS APPELLATE COURTS

One major way of classifying courts is in terms of whether they are trial or appellate courts. Most court cases begin in a **trial court**.[1]

Sometimes the losing party is able to appeal what it sees as an error of law (but not of fact) to the appropriate **appellate court**. In this section, we discuss the differences between trial and appellate courts and between questions of fact and questions of law.

Trial courts
Courts that determine the facts and apply the law to the facts.

Appellate courts
Courts that determine whether lower courts have made errors of law.

1. Trial Courts

Trial courts are said to be courts of **original jurisdiction** because trial courts are where actions are initiated and heard for the first time. In addition to conducting trials, much of a trial court's time is spent in far less dramatic proceedings, such as receiving plea agreements and ratifying out-of-court settlements. When a trial is held, the lawyers present witness testimony and other evidence. After considering the evidence and the lawyers' arguments, trial courts have two functions.

Original jurisdiction
The authority of a court to hear a case when it is initiated, as opposed to appellate jurisdiction.

First, they must determine whose version of the facts is most credible. Second, they must apply the law to those facts to reach a decision. Therefore, trial courts must determine both questions of fact and questions of law.

Questions of fact relate to the determination of what took place: who, what, when, where, and how. **Questions of law** relate to how the law is interpreted and applied and include such issues as how a statute is to be interpreted and whether a specific piece of evidence is admissible.

Questions of fact

Questions relating to what happened: who, what, when, where, and how.

Questions of law

Questions relating to the interpretation or application of the law.

In most cases that go to trial, the meaning of the law is clear but the facts themselves are very much in dispute. For example, under the criminal codes of most states, it is a violation of the law for a person to forcibly take some one else's property without the owner's permission—a crime called robbery. When someone is tried for robbery, the trial usually focuses on such factual questions as the identification of the alleged robber and the ownership of the property taken.

Although the primary focus of most trials is on factual issues, legal issues are involved as well. In the example cited above, the judge may have to interpret what the word "forcibly" means. The judge will also have to decide if certain testimony or evidence is admissible. These are questions of law. If the judge decides that the testimony or evidence is not admissible, then the trial proceeds without it. Also, if the judge rules that a search was illegal or that disputed pictures are too prejudicial, then the objects discovered in that search or the pictures are not admitted as evidence. Based on the evidence that has been allowed, the jury then resolves the questions of fact.

Consider the following example. In most states, it is a crime for someone other than a physician, pharmacist, or other authorized medical person to sell or distribute narcotic drugs. When someone is on trial for selling narcotics, the prosecution must present evidence that shows the accused did in fact sell a substance that fits the legal definition of a prohibited narcotic drug. These are issues of fact. The evidence often consists of an undercover police agent testifying that the accused sold the agent a substance that laboratory reports identify as a narcotic.

It is possible, however, that the defendant might admit to selling the drug, but then claim **entrapment**. The entrapment doctrine prohibits law enforcement officers from instigating criminal acts to lure an otherwise innocent person into committing a crime. One question of fact relating to the entrapment defense is whether the defendant ever committed such a criminal act or thought of committing such an act before. However, in addition to the factual questions, and depending on the circumstances of a given case, a legal issue of what constitutes entrapment could arise. For example, assume that government agents supplied the defendant with a drug and then later arrested him for selling the very same drug to another government agent. Here, no one would be disputing what happened (the facts). But an appellate court could be asked to decide whether such actions legally qualify as entrapment. In *Hampton v. United States*,[2] the U.S. Supreme Court held that so long as the defendant is predisposed to commit the crime, it is not entrapment when government agents supply the defendant with a drug and then later arrest him for selling the very same drug to another government agent.

Entrapment
A defense requiring proof that the defendant would not have committed the crime but for police trickery.

It is not always easy to determine if something is a question of fact or a question of law. Because appellate courts will rule only on issues involving questions of law, appellate judges determine what they will treat as a question of law. To illustrate the nature of the problem, let us consider the situation presented in Case 6, set out at the beginning of the chapter. Do you think there is any basis for launching an appeal in Jones's case? Remember that a losing party can only appeal questions of law.

It is a question of fact whether on the night of the murder, Jones was present at the scene of the murder (as testified to by one elderly witness) or out of town attending a wedding (as testified to by ten

other witnesses). Therefore, his whereabouts on the night of the murder cannot form the basis for an appeal.

On the other hand, it is a question of law as to whether the judge should have allowed the jury to see pictures of the victim's bloody corpse. It can be argued that viewing those pictures was so inflammatory as to prejudice the jury. Therefore, showing the pictures could form the basis of an appeal. Keep in mind that this does not mean that Jones would win at the appellate level. It simply means that he will be given the opportunity to argue his case to the appellate court.

Legal Reasoning Exercises

1. Because it is not always easy to know whether something is a question of fact or a question of law, there have been cases when the issue on appeal was whether something was a question of fact or a question of law. That question is itself a question of law. To see how that can happen, assume that there was a negligence trial in which a grocer was sued when a customer slipped and fell. The customer testified that she slipped on a banana peel in the produce section. The grocery store owner testified that when he came to the assistance of the customer, there was no peel on the floor. One of the store employees also testified that he had mopped the floor in that area just five minutes before the accident, and that there were no banana peels on the floor. Nonetheless, the jury found the store liable. Can the store appeal on the grounds that it was telling the truth and the customer was lying? No. Why? Because that is a question of fact, and factual determinations generally cannot be appealed. But can the store appeal on the grounds that the jury should not have found that it acted negligently because even if there were a banana peel, such hazards are to be expected in the produce section, and the store had done all it could to make the

area safe? Is that issue—that is, whether the store acted as a reasonable store should—a question of fact or a question of law?

In the following cases, do you think the losing party has a valid basis for appeal? Why?

a. A prosecutor commented on a defendant's failure to take the stand in his own defense. His lawyer argued that this violated his client's constitutional right to remain silent. The defendant was convicted.

b. The prosecutor introduced evidence showing that the defendant purposely set fire to his neighbor's garage. This included testimony by the fire chief and a forensic scientist who examined the remains of the burned building. The defendant took the stand and claimed that the fire was an accident. The jury convicted the defendant of intentionally starting the fire.

c. John signed a will in front of two witnesses. The will made no provision for his son, Jimmy. When John died, Jimmy contested the will, arguing that his father was not of sound mind. At the trial, the two witnesses present at the signing testified that John had been legally competent when he signed the will. The court found that the will was valid.

d. June was walking her miniature poodle, Suzy, in her front yard. Suddenly a German Shepher d leaped over the fence and bit Suzy several times, killing her. June was distraught and sued the owner of the German Shepher d for $30,000 for her pain and suffering. The trial judge dismissed the case, stating that as Suzy was property, the most June could recover was the cost of a new dog.

In a **jury trial,** questions of fact are determined by the jury, while questions of law are determined by the judge. If it is a **bench trial** rather than a jury trial, the judge will decide the factual questions as well as the legal ones.

Bench trial
A trial conducted without a jur y.

2. Appellate Cour ts

Appellate cour ts, usually working in a panel of thr ee or mor e judges, review alleged trial cour t err ors (and, in some cases, the actions of administrativ e agencies) to determine whether the law was corr ectly interpr eted and applied. When the person who loses in a trial cour t is able to appeal the decision to an appellate cour t, that par ty (the one filing the appeal) is called the **appellant or the petitioner** . The par ty who wo n in the trial cour t is called the **appellee or the respondent** . It is impo rtant to note that m ost states and the federal g overnment pr ovide for only one appeal as a matter of right. Addition al appeals ar e usually at the discr etion of the higher cour t.

Appellant or petitioner
The par ty in a case who has initiated an appeal.

Appellee or respondent
The par ty in a case against whom an appeal has been filed.

a. Questions of Law

Unlik e trial cou rts, appellate cour ts do not hear testimony . The y rely on the written recor d of what occurr ed in the trial to determine whether the trial cour t made an err or regar ding the law . The y do so because when conducting a r eview , appellate cour ts limit themselv es to "l egal" as opposed to "factu al" issues that ar e specifically raised by the par ty who is bringing the appeal. Ther efor e, you can appeal a lower cour t decision only when you raise a valid legal issue. Appellate cour ts will not reconsider the facts; the y will consider only whether the trial cour t made an err or of law . Legal issues can arise in thr ee wa ys:

- The y can inv olv e interpr etation of the meaning of the laws that underlie the cause of action (e.g., whether entrapment had occurr ed).
- The y can inv olv e the manner in which the trial was conducted. Examples include whether a par ticular piece of e vidence should be ex cluded because it is the pr oduct of an illegal sear ch and seizur e, whether the plaintiff 's lawy er should be allowed to pursue a cer tain line of ques tioning, whether the judge should pr esent a par ticular set of in structions to the jur y, or wh ether pr ejudicial publicity has tainted the def endant' s trial.
- The y ca n inv olv e challenges to the constitutionality of the law that is being applied. F or example, homeless persons could ar gue that a law banning sleeping in public places is itself unconstitutional. [3]

D ISCUSSION Q UESTION

1. Situ Wil kinson fled to the United States in 2003 after police in his hom e countr y beat, robbed, and thr eated to kill him. Ten years later he had a son, who suff ers fr om a serious medical condition and relies on Situ for emotional and financial suppor t. When Situ was detained for a traffic violatio n, it was disco ver ed that he was in the countr y illegally and was scheduled for remo val. His att orne y ar gued that Sit u's remo val would cause his son "ex ceptional and extr emely unusual har dsh ip." The immigration judge denied his request and the Thir d Cir cuit dismissed his appeal, stating that it had no power to review the case as the determination of whether his situation pr esented an "ex ceptional and extr emely unusual har dship " was a question of fact, not of law .

a. Do you think the determination that Situ' s situation did not cr eate an "ex ceptional and extr emely unusual har dship " was a question of law , a question of fact, or a mix ed question of law and fact?

b. Why should it matter? [4]

b. Reversible Errors

There is one limited exception to the rule that appellate courts review only questions of law. Occasionally, the courts will review a case when it is alleged that no "reasonable" jury could have reached the verdict they did. This is extremely rare, however, as normally appellate courts will accept a jury's determination as to which witnesses and evidence were most credible.

In Case 6 at the beginning of the chapter, Jones' s lawyer may try to appeal on the facts of the case rather than the law. Jones had ten witnesses testify that Jones was at a wedding and the prosecutor had only one witness testify that Jones was at the scene of the crime. In this instance, the appeals court is likely to find that because the prosecutor had a witness testify as to Jones' s whereabouts, that the jury was within its purview to find that the prosecutor's one witness was simply more credible than the defendant' s ten witnesses.

If the appellate court determines that no legal error occurred, the court will **affirm** the lower court's decision. In addition, if a legal error occurred but the court determines that it was minor and did not affect the result, the court labels it a **harmless error** and allows the decision to stand. However, if the court finds that a significant legal error was made in the way that the trial was conducted, it will usually cancel the original outcome by **reversing** the trial court's decision. It may also **remand** the case, returning it to the trial court for further consideration.

Affirm
When the higher court agrees with what the lower court has done.

Harmless error
A trial court error that is not sufficient to warrant reversing the decision.

Reverse

A decision is reversed when the litigants appeal the lower court decision and the higher court disagrees with the decision of a lower court.

Remand
When an appellate court sends a case back to the trial court for a new trial or another action.

In criminal cases, when a court reverses a conviction and remands the case, it does not necessarily mean that the defendant will go free, as the government then has the option of retrying the case. However, if the basis for the reversal was the appellate court ruling that a key piece of evidence was inadmissible, the government may choose not to retry the defendant because it may feel that its case is too weak without the excluded evidence.

If the government chooses to proceed with a new trial, this does not violate the constitutional provision regarding **double jeopardy**. Double jeopardy occurs when a person is tried more than once for the same criminal offense. The Fifth and Fourteenth Amendments to the U.S. Constitution prohibit various forms of double jeopardy. However, when a defendant voluntarily appeals a conviction, he or she waives the right not to be retried for the same crime.

c. The Structure of Appellate Decisions

Appellate court judges reach their decisions by majority vote. Someone from the majority writes the **majority opinion** explaining the court's decision and how that decision was reached. In cases where the decision is not unanimous, judges may also write concurring or dissenting opinions to explain the nature of their disagreements. In a **concurring opinion**, the judge agrees with the result reached by the majority, but not with its reasoning. In a **dissenting opinion**, the judge disagrees with the result and with the reasoning.

Majority opinion
An opinion in which a majority of the court joins.

Concurring opinion
An opinion that agrees with the majority's result but disagrees with its reasoning.

Dissenting opinion
An opinion that disagrees with the majority's decision and its reasoning.

3. Recap

In summary, there are several major differences between trial and appellate courts. As we noted in Chapter 3, at the trial-court level, the parties are called the plaintiff and the defendant in a civil case and the state and the defendant in a criminal case. At the appellate-court level, the party who lost in the trial court is called either the appellant or the petitioner and the party who won is called either the appellee or the respondent. In the trial court, the jury decides the facts and the judge determines the law. In a bench trial, the judge serves as both the finder of fact and determiner of the law. In the appellate court, a panel of three or more judges decides questions of law based on the lawyers' briefs (written arguments) and oral arguments. No witnesses give testimony in appellate court, and there are no juries. The judges merely review the trial transcript and the written briefs from the lawyers. Sometimes oral arguments from the opposing lawyers are heard, during which the judges have an opportunity to pose questions. Lower-level appellate judges usually work in rotating panels of three, whereas in the upper-level appellate courts, all the judges jointly decide each case.

Most of these differences are directly related to the most important distinction between trial and appellate courts: Trial courts determine the facts and apply the law to those facts; appellate courts deal only with questions of law. Three basic types of legal questions can arise at the appellate level. First are those that relate to the meaning of the underlying legal cause of action or defense, such as what qualifies as entrapment. Second, legal issues can arise that

ha ve nothing to do with the underlying legal claim, but rather relate to how the trial was conducted. Finally , one of the par ties can ar gue that the law being applied is unconstitutional, as when a doct or challenges an abor tion law . Figur e 4-1 summariz es the diff er ences between trial and appellate cour ts.

	Trial Court	Appellate Court
Parties' names	Plaintiff/defendant State/defendant	Appellant/appellee or petitioner/respondent
Decision maker	Judge and sometimes a jury	Majority vote of three or more judges
Attorney arguments	Yes	Yes
Witness testimony	Yes	No
Evidence introduced	Yes	No
Questions of fact decided	Yes	No
Questions of law decided	Yes	Yes

Figure 4-1 A Comparison of T rial and Appellate Cour ts

D ISCUSSION Q UESTIONS

2. Do you think it is a good or a bad idea that only questions of law can be appealed?

3. Can you think of a situation when an appellate judge m ight reverse and remand a case? How about when a judge might reverse but not r emand a case?

B. FEDERAL AND ST ATE COUR T SY STEMS

Trial and appellate cour ts exist in both the federal and the state cour t systems. At first glance, the federal and state judicial systems of this countr y pr esen t a confusing mixtur e of titles and functions. In lar ge

part, this is because there are actually 51 different court systems (the federal system, plus one for each state). To complicate matters, the same types of courts often have different names. For example, the basic trial court is called the court of common pleas in Pennsylvania, the district court in Minnesota, the circuit court in Illinois, the superior court in California, and the supreme court in New York. Although New York uses the "supreme court" designation for its trial courts, most states reserve that title for their highest appellate court.

It is in the state courts where most legal business is conducted. However, we begin our discussion with an examination of the federal court system because it is uniform throughout the country. Although the diversity among state court systems prevents us from covering them in any detail, we will point out some of the common patterns. For example, most state courts follow the federal pattern of being organized on three levels: the trial courts, the intermediate appellate courts, and one appellate court of last resort.

1. The Federal System

The structure for the federal court system is set forth in the U.S. Constitution. Article III, Section 1, provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Those **inferior courts** are the district courts and courts of appeals. Congress established the first inferior courts through the Judiciary Act of 1789. That act provided for 13 districts and three circuits. Over the years, Congress has increased the number of both district and federal circuits. Figure 4-2 shows how cases flow through these three types of federal **constitutional courts:**

Inferior courts
In the federal system, all courts other than the U.S. Supreme Court.

Constitutional courts
A court established by Article III of the U.S. Constitution.

- **U.S. District Courts:** These trial courts are organized into 94 different districts located throughout the 50 states, the District of Columbia, and U.S. territories. (See Figure 4-3, which shows district court boundaries.)

U.S. district courts
The general jurisdiction trial courts in the federal system.

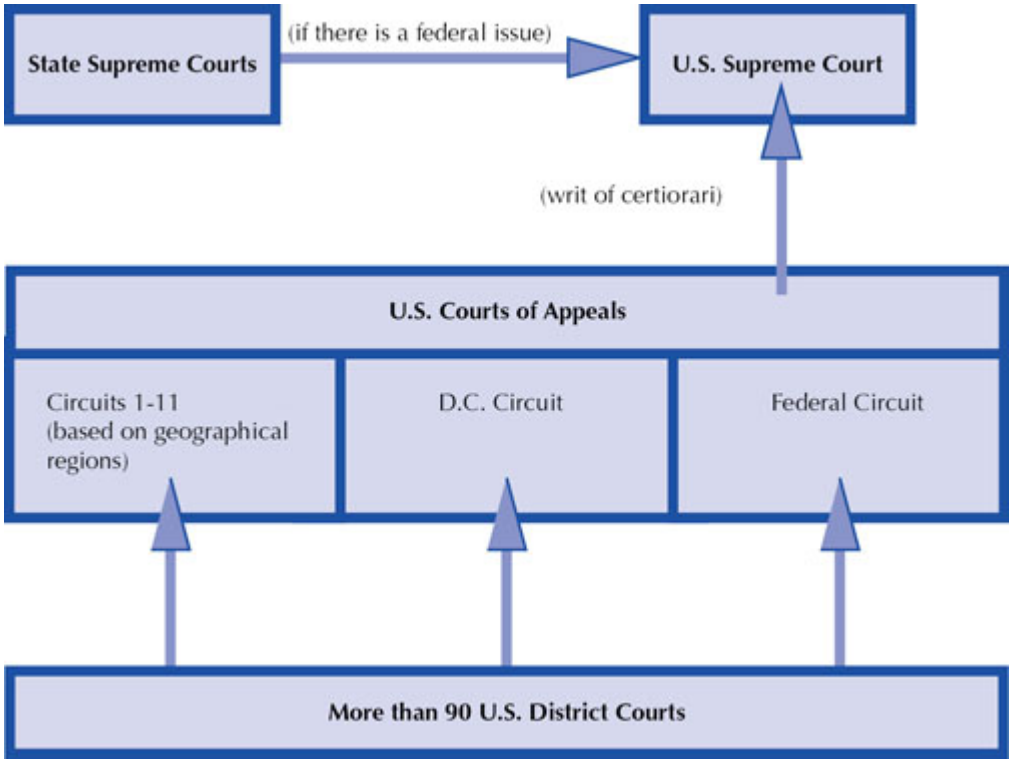

Figure 4-2 The Federal Court System

- **U.S. courts of appeals:** These first-level appellate courts are organized into 12 regional circuits and hear appeals from the district courts located within the circuit. They also hear appeals from decisions of federal administrative agencies. (Figure 4-3 also shows circuit court boundaries.)

U.S. Courts of Appeals
The intermediate appellate courts in the federal system.

- **U.S. Supreme Court:** This is the highest court in the federal system. At its discretion, and within certain guidelines established by Congress, it hears a limited number of the cases involving the most important constitutional issues and conflicts among the circuits. In addition to reviewing decisions of the U.S. courts of appeals, it can review decisions of state courts if they involve important questions about the Constitution or federal law.

U.S. Supreme Court

The highest federal appellate court, consisting of nine appointed members.

Article II of the Constitution gives the president the power to appoint the judges who serve on these federal courts. But before an appointment can become final, the Senate must confirm it. Article III, Section 1, provides that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." This means that "constitutional" judges are guaranteed lifetime tenure unless they resign or are impeached and convicted. It also means they are protected from any salary reductions.

a. U.S. District Courts

The U.S. district courts are the trial courts in the federal system. Within limits set by Congress and the Constitution, the district courts have jurisdiction to hear nearly all categories of federal cases, including both civil and criminal matters. There are 94 federal district courts, with at least one for each state.

The number of judges assigned to each district varies from two to 28 depending on the caseload of the district. Usually, cases are heard by a single judge or a judge and a jury. In criminal cases, the default is a jury trial unless the defendant requests a bench trial. In civil cases, a

bench trial is the default. One of the parties must request a jury in the pleadings or else the right to a jury is waived.

The district court judges are assisted by **magistrate judges**. The magistrate judges supervise court calendars, hear procedural motions, issue **subpoenas**, hear minor criminal offense matters, and conduct civil pretrial hearings. In some district courts, the magistrate judges, with the consent of the parties involved, conduct trials and enter judgments in civil cases. They are selected by a majority of the active judges in each district for full-time terms of eight years or part-time terms of four years. They can be removed for cause.

Magistrate judge
A court official who exercises limited judicial powers such as issuing subpoenas, conducting preliminary hearings, and ruling on procedural motions.

Subpoena
A court order requiring a person to appear to testify at a trial or deposition.

b. U.S. Courts of Appeals (Circuit Courts)

If a litigant wants to appeal a district court decision, the appeal must be filed with the U.S. court of appeals for the circuit within which the district court operates. For example, cases from California district courts are appealed to the Court of Appeals for the Ninth Circuit.

Note: The large numerals indicate the Courts of Appeals, and the broken lines represent jurisdiction boundaries of district courts.
Source: Administrative Office of the U.S. Courts.

Figure 4-3 District and Circuit Court Boundaries

Each of the 12 regular circuits has from 6 to 29 judges. In the federal courts of appeals, cases are usually heard by a panel of three judges randomly selected from that circuit's active members. Decisions are based on a majority vote of the judges on the panel. Occasionally, all the judges sit together and decide a case **en banc**. This happens most frequently when the losing party in a case already decided by a panel of the court requests a rehearing before the full membership of the court.

En banc
When an appellate court that normally sits in panels sits as a whole.

c. U.S. Supreme Court

Sitting at the top of the federal judicial system is the U.S. Supreme Court. The Court is composed of nine justices, who hear all appeals

as a group. It is interesting to note that the Judiciary Act of 1789, mentioned above, provided for a Supreme Court with one chief justice and five associate justices. As with the number of courts, the number of Supreme Court justices has also changed over the years as the volume of the Court's work has increased.

A case seldom goes any further than a circuit court of appeals or state supreme court, as the U.S. Supreme Court has the power to choose which cases it wants to hear from among the thousands of cases brought to it every year. Most of the cases come to the Court as a petition for a **writ of *certiorari***.[5] In this petition, the losing party does not argue the merits of the case but rather asks the Supreme Court to review the case. At least four of the nine justices must agree to grant *cert* before the case will be placed on the Court's docket. If there are not at least four votes to review, it is simply announced that *cert* was denied, without any further explanation. The denial of *cert* does not mean that the Court agrees with the lower court's decision. It simply means that the Court does not want to hear that case. The Supreme Court usually hears no more than 80 of the approximately 7,000 to 8,000 case requests that it receives each year.

Writ of *certiorari*
A means of gaining appellate review; in the U.S. Supreme Court, the writ is discretionary and will be issued to another court to review a federal question if four of the nine justices vote to hear the case.

While still pending in the appellate courts, each year the Supreme Court rules on an additional 100 or more emergency applications from the trial courts. The Court decides these cases without oral argument and the decisions are typically unsigned and unexplained, thereby setting precedent without explanation. This is often referred to as the **shadow docket**. Historically the shadow docket had been used most often in death penalty cases. In the past ten years, the pace and breadth of the cases decided has greatly accelerated. The attorneys can file briefs containing their arguments, but unlike regular court opinions, the Court's order does not contain the reasoning normally found in their opinions.

Shadow dock et

Emer gency applications fr om trial cour ts t o the U.S. Supr eme Cour t that ar e decided without oral ar gument and ar e unsigned and unexplained.

Unlik e the U.S. cour ts of appe als, wher e cases ar e typically hear d by a panel of thr ee judges, the U.S. Supr eme Cour t alwa ys considers cases en banc. Unless ther e is a vacancy on the Cour t or a justice has chosen not to par ticipate in the decision in a case, [6] all nine justices vote on ever y case the Cour t hears. With the ex ception of th e decision to review or not review a case, the outcome is decided by a majority of th e ju stices par ticipating. In situations wher e ther e is a tie vote, the lower cour t's decision is left unchanged.

NE TNO TE

The official website of the federal judiciar y is *uscour ts.go v.* It contains links to the U.S. Supr eme Cour t, the U.S. cour ts of appeals, the U.S. district cour ts, and the U.S. bankruptcy cour ts. The U.S. Supr eme Cour t's site, at *supr eme cour t.go v* contains helpful information on the Cour t's pr ocedur es, and biogr aphies and pictur es of the curr ent Justices.

D ISCUSSION Q UESTIONS

4. One cri ticism of the incr eased use of the shadow dock et is that it is being used in contr oversial cases wher e the ju stices ar e making decisions without oral ar guments, written opinions, or even pr olonged discussions among themselv es. In addition, without a written opinion, lower cour ts ma y be left without an understanding of the hold ing of the case and w hat pr ecedent is being established. Both

Democrats and Republicans have expressed concern on the expanded use of the shadow docket. What are some of the benefits of a shadow docket? What are some of the concerns about the shadow docket? Should there be limits on the types of cases heard on the shadow docket? Why or why not?

5. Revelations that both Justice Clarence Thomas and Justice Samuel Alito had received free luxury trips and other "gifts" from billionaire conservative donors led to the Supreme Court adopting for the first time a formal code of ethics. The Code states that justices "should refrain from financial dealings that exploit the judicial position or involve the Justice in frequent transactions [with] persons likely to come before the Court." The Code also states that a "Justice should disqualify himself or herself in a proceeding in which the Justice's impartiality might reasonably be questioned."[7]

- **a.** The Code does not contain any enforcement mechanism. Should federal judges be allowed to determine for themselves whether or not they have a conflict of interest?
- **b.** What are the pros and cons of allowing the judiciary to continue its own oversight of ethical issues involving federal judges versus having an outside body, such as a Congressional committee or administrative agency, oversee the Court's code of ethics?

Figure 4-4 The U.S. Supreme Court. Seated from left are Justices Sonia Sotomayor (2009), Clarence Thomas (1991), Chief Justice John G. Roberts, Jr. (2005), Justices Samuel A. Alito (2006), and Elena Kagan (2010). Standing from left are Justices Amy Coney Barrett (2019), Neil M. Gorsuch (2017), Brett M. Kavanaugh (2018), and Ketanji Brown Jackson (2022).

d. Other Federal Courts

In addition to the Article III constitutional courts, there are also several highly specialized **legislative courts** that Congress has created using its Article I powers. These legislative courts include, among others, the bankruptcy courts, U.S. Court of Military Appeals, the U.S. Tax Court, and the U.S. Court of Federal Claims.

Legislative courts
Courts created under Congress' Article I powers.

For example, Congress was able to establish the bankruptcy courts because Article I, Section 8 grants Congress the power to "establish ... uniform Laws on the subject of Bankruptcies throughout

the United States," and to do what is "necessary and proper" to accomplish that goal. Because the bankruptcy court is an Article I and not an Article III court, its judges do not enjoy lifetime tenure and instead are appointed for 14-year terms. Also, Article I court jurisdiction is more limited than that of Article III courts. In the case of the bankruptcy court, that limitation is to hearing all "core" proceedings arising under the federal Bankruptcy Code. However, what is "core" is not always clear. For example, if litigants in a bankruptcy case raise related state law claims, such as fraud, questions as to the scope of the court's jurisdiction occur. The U.S. Supreme Court has determined that with regard to state law claims, such as common law fraud, a bankruptcy court can make recommendations but not enter a final judgment.[8]

One federal court that until recently was fairly unknown is the Court of International Trade. Established by Congress in 1980, the court came into the limelight in 2024 when it ruled that President Trump's worldwide tariffs, imposed through executive order, were unconstitutional. The court stated that setting tariffs exceeded the president's authority, as only Congress has the power to enact tariffs.

2. State Court Systems

Many important cases and significant constitutional issues are decided in the federal courts, but it is in state courts where over 90% of all legal business occurs. While paralegals may have some opportunities to work with federal courts, most will spend their time operating within state court systems.

PRACTICE TIP

Find the time to take a walking tour of your local courts. Note the location of the clerk's offices, the courtrooms, and the nearest law library.

Rather than attempting to describe each of these 51 court systems, we will review some general patterns and leave it to you to search out the details for your specific state. Organizational charts of state court systems can generally be found on each state's official government website.

Most states have court systems that are very similar to the federal system, with three basic types of courts: trial, first-level appellate, and one appellate court of last resort. Figure 4-5 shows the organization of a typical state court system. Note how closely it parallels Figure 4-2, showing the core of the federal court system. The path for appeals in most state court systems is from the trial court to an intermediate appellate court (if one exists), and then, usually only at the court's discretion, to the state's highest appellate court (usually called the supreme court).

Starting at the bottom of Figure 4-5, you can see that states can have either **general jurisdiction** or **limited jurisdiction** trial courts.[9] The former can hear any type of case, not specifically reserved for the federal courts. General jurisdiction courts typically carry a name such as circuit court, district court, county court, or superior court. Many states also have a confusing variety of specialized courts with limited jurisdiction. These courts hear a narrow range of cases on a specific subject (such as probate, domestic relations, or traffic) and sometimes even overlap regarding the types of cases they can hear. For example, in Massachusetts, both the probate court and the superior court can hear divorce cases.

General jurisdiction

A court's power to hear any type of case arising within its geographical area.

Limited jurisdiction

A court's power to hear only specialized cases.

States maintain either one or two levels of appellate courts. The larger states have generally gone to a two-tiered system like that in operation at the federal level. The intermediate-level appellate courts usually sit in panels, while the court of last resort sits en banc. On some matters appeals to the highest court are discretionary, whereas on others they are a matter of right. A few states have established separate courts to handle criminal versus civil appeals at the intermediate or highest level. Finally, as noted earlier in this chapter, even the name of the highest-level appellate court varies from state to state. While most states identify their highest court as the state supreme court, in New York and Maryland it is called the court of appeals.

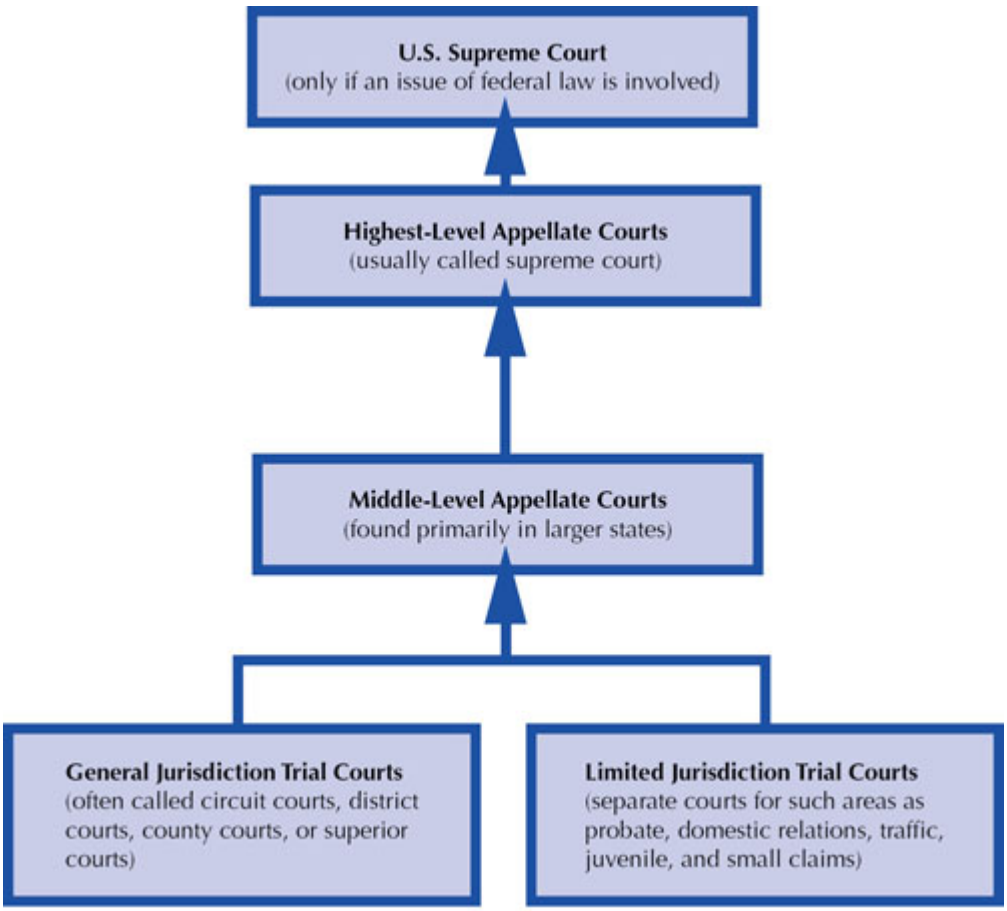

Figure 4-5 Organization of a Typical State Court System

In most cases, a state's top appellate court issues the final judgment because cases can be appealed to the U.S. Supreme Court only if they raise a federal issue. For example, in criminal cases, state courts must accord the due process rights guaranteed by the U.S. Constitution. This can involve resolving issues regarding the right to counsel, the admissibility of evidence resulting from an allegedly illegal search, jury selection procedures, and so on. If the defendant thinks these constitutional rights have been violated, she or he may be able to appeal the case to the federal courts on the basis that a federal issue is involved. Whenever a federal law or a provision of the U.S. Constitution is involved, the federal courts have the right to make the final determination as to what that law or constitutional provision means. But remember that a criminal defendant has no right to appeal his or her conviction in a state court to a federal court unless such federal issues are raised. Under the principles of federalism, the state courts are the final arbiters as to the meaning of state statutes and state constitutional provisions.

Unlike federal judges, state court judges are selected in a variety of ways. They are appointed by the state's chief executive or the state legislature in only a few states. In others, they are selected in either partisan or nonpartisan elections. While some see the appointment of judges as undermining the democratic process, others fear that elected judges may be influenced by those who make large contributions to their election campaigns.

Partially in response to this disagreement about whether it is best to appoint or elect judges, some states have developed a modified system that has become known as merit selection, or the Missouri plan. Under that type of plan, a special panel of lawyers and lay persons is convened, and they nominate a few candidates for a vacancy. The governor then appoints from among this select group. A year or two later, the person who was appointed goes before the general electorate in a special retention election. In such an election,

the candidate runs unopposed and the voters are asked simply whether that judge should be retained.

Some states also use justices of the peace, court commissioners, or magistrates in their court systems. Although they are not judges, state laws authorize these individuals to exercise limited judicial powers in specified types of cases. For example, they may handle criminal arraignments or hear small claims or probate cases. In a few states, they do not need to be licensed lawyers. They may be either elected or appointed.

DISCUSSION QUESTIONS

6. Why do you think the Framers of the Constitution chose to give federal judges lifetime tenure and protect them from salary reductions?

- **a.** Explain whether you think that was a wise decision.
- **b.** Do you think term limits should be established for all federal judges or for the nine U.S. Supreme Court justices? If so, what do you think those limits should be?

7. Do you think judges should be elected or appointed? Why or why not? If appointed, what do you think the criteria should be?

8. How are state and local judges selected where you live? In what way do you think the selection process is better or worse than the federal system of judicial selection?

3. Choice of State or Federal Court

As you have seen, there are 50 state court systems in operation in the United States, in addition to the federal court system. Choosing the right court requires knowing which court has jurisdiction over the case. That is, a lawyer must select a court that has the power to hear the case. The first decision is whether to select a state or federal court.

State courts generally have the power to hear any type of case, state or federal. The only time state courts are prohibited from

hearing cases involving federal law is when Congress has expressly included that limitation in a federal statute.

As to whether the federal courts have jurisdiction, you will recall from Chapter 3 that the federal government is a government of limited powers. Just as Congress can legislate only if the Constitution has given it the power to do so, federal courts can hear cases only if the Constitution has given them the power to do so. Article III, Section 2 of the Constitution describes the jurisdiction of the federal courts in terms of (1) the nature of the subject matter of the case, and (2) the parties involved. Figure 4-6 lists the requirements for federal court jurisdiction.

Two of the grounds for federal court jurisdiction require particular emphasis, as they account for the bulk of federal cases. The federal courts have jurisdiction when the case involves

- a federal question, or
- diversity of citizenship.

Based on the subject matter (federal question):

Any case involving the interpretation or application of

1. the U.S. Constitution,
2. a federal law or regulation,
3. a treaty, or
4. admiralty and maritime laws.

Based on the parties involved:

Any case or controversy in law and equity in which

1. the case affects ambassadors or other public ministers and counsels,
2. the United States is a party to the suit,
3. the controversy is between two or more states,
4. the controversy is between a state and citizens of another state,*

5. the parties are citizens of different states (known as diversity jurisdiction),
6. the controversy is between citizens of the same state claiming lands under grants of different states, or
7. the controversy is between (a) a state or the citizens thereof and (b) foreign states, citizens, or subjects.*

Based on the amount of money involved:

In addition to the constitutional requirements stated above, Congress has the power to add a minimum dollar value to suits between citizens of different states. The current federal statute states that the amount in controversy in diversity actions must exceed $75,000 to qualify for original federal jurisdiction.

*The Eleventh Amendment modified this to exclude situations where the suit was commenced or prosecuted against a state by an individual.

Figure 4-6 Jurisdiction of Federal Courts

A federal question is involved when there is an issue dealing with a federal statute, a federal regulation, or the U.S. Constitution. **Diversity of citizenship** occurs when the plaintiff and the defendant are residents of different states. Congress has limited jurisdiction in diversity cases to those where the amount of money involved in the case exceeds $75,000.

Federal question
A legal issue involving the application of a federal law.

Diversity of citizenship
A situation where the opposing parties are from different states and the amount in controversy exceeds $75,000.

That federal courts have jurisdiction over cases involving federal law seems obvious. But why should federal courts have jurisdiction over matters relating to state law simply because the litigants are from differing states and the amount in controversy exceeds $75,000? Traditionally, it has been argued that diversity jurisdiction is necessary to protect out-of-state litigants from the biases they would suffer in state court. Today, however, many disagree as to whether there is a continuing need for diversity jurisdiction.

While it might seem as though it should be relatively easy to decide whether there are valid grounds for finding federal jurisdiction based on the case involving either a federal question or citizens of differing states, this is not always so. In fact, before the parties can resolve the underlying legal issues, they often have to litigate whether a state or federal court is the proper forum.

Questions of diversity jurisdiction can be particularly troubling. For the litigants to be able to proceed in federal court, there must be complete diversity of citizenship. This means that no plaintiff can be from the same state as any of the defendants. If they are, then they must proceed in state court.

For example, in a widely publicized breach of contract dispute involving Facebook, the plaintiffs, New York residents, filed suit against Mark Zuckerberg, the founder of Facebook, in New York state court. New York was Zuckerberg's legal residence while in college. However, since then he had moved to California where he owned property, registered his automobile, and paid taxes. Zuckerberg was able to remove the case to federal court on the grounds of diversity by showing he was no longer a New York resident. [10]

Sometimes only one court is authorized to hear the type of case in question. That is known as **exclusive jurisdiction**. When more than one court is authorized to hear the same type of case, they each have **concurrent jurisdiction**. For example, if a case involves state law and is between citizens of different states, then the state and federal courts would have concurrent jurisdiction. In those situations where both the state and the federal courts have jurisdiction, the plaintiff makes the initial decision as to which court to use. However, as

illustrated by the Zuckerberg case, when the plaintiff selects a state court and the federal courts also have jurisdiction, the defendant may be able to **remove** the case to federal court.

Exclusive jurisdiction

When only one court has the power to hear a case.

Concurrent jurisdiction

When more than one court has jurisdiction to hear a case.

Removal

The transfer of a case from one state court to another, or from a state court to a federal court.

It is very important to understand that deciding whether to go to state or federal court is not the same as deciding whether the court will apply state or federal law to the case. See Figure 4-7. For example, in a negligence case, a federal court might have jurisdiction based on the diversity of citizenship of the parties. However, the federal court must follow state negligence law in deciding the case. If the case involves an area of unsettled state law, the federal court must base its decision on its best guess as to what the state's highest court would do if faced with the same situation. Because the federal court is only guessing at what the state court would do, the federal court's decision is binding on the current litigants but is not binding on the state courts. Therefore, no matter how the federal court decides the case, it will still be open to the state courts to change the law in that area the next time a litigant brings a case on the same issue to the state courts. Likewise, when a state court hears a case involving a federal matter, it must follow the guidance of the federal courts.

Does a State or Federal **Court** Have **Jurisdiction**?	Does State or Federal **Law Apply**?
Federal court—federal question jurisdiction **Federal court**—diversity jurisdiction	**Federal law**—(1) issues arising from the U.S. Constitution, (2) federal

	statutes, or (3) federal agency regulations. **State law**
State courts—generally have jurisdiction over **any type of case** unless Congress has provided for exclusive federal jurisdiction.	**State law or federal law**

Figure 4-7 Two Separate Questions: State or Federal Court *and* State or Federal Law?

PRACTICE TIP

When dealing with court personnel, remember that sometimes a few kind words and a professional attitude will get you the assistance you need.

DISCUSSION QUESTION

9. As the federal courts face an increasingly heavy workload, many have argued that it is time to either raise the required amount in controversy or eliminate diversity jurisdiction entirely. The requirement that the amount in controversy exceed $75,000 is to help ensure that federal courts are not inundated with cases of minimal importance. In 1789, Congress set the amount at $500, but over the years, it has increased it to the present-day $75,000. Would you be in favor of such changes?

Legal Reasoning Exercise

3. For each of these situations determine whether you think the matter should be heard in state or federal *court*. Also decide whether you think a court would apply state or federal *law*.

a. A wife wants to divorce her husband.

b. Martha, a Massachusetts resident, wants to sue Susan, a Massachusetts resident, for $80,000 based on breach of contract.

c. Sam, a Massachusetts resident, wants to sue Jill, a Vermont resident, for $80,000 based on breach of contract.

d. A teacher in a public school wants to challenge a state law requiring all teachers to start each day of class with a minute of silent prayer.

C. COURT PERSONNEL

It takes many different participants to make the judicial system work effectively. Court personnel include not only the judges who preside over the court proceedings and lawyers appearing before them, but also court clerks, court reporters, and bailiffs.

The trial court judge is, of course, one of the most powerful members of the judicial system. Within the limits of the law, the judge decides whether to dismiss a case before it reaches trial, the extent of pretrial discovery, and the amount of time the lawyers will have to prepare their cases. Once the trial is under way, the judge acts as the presiding officer, rules on objections, and determines when recesses will occur. If a jury is involved, the judge supervises its selection, removes jury members from the courtroom at key times to protect them from improper influences, and instructs them on the meaning of the law they are to apply. When a jury is not involved, the judge also acts as the fact-finder and decides whether the defendant is guilty (in criminal cases) or liable (in civil cases). In criminal cases the judge is also responsible for sentencing the convicted defendant. If the

litigants want to contest a trial judge 's findings, the y must pr esent their ar guments t o appellate judges.

Lawy ers pla y the most visible role in cour t pr oceedings. In addition to being adv ocates for their clients, lawy ers ar e officers of the cou rt. As such, the y ar e responsible for maintaining pr oper decorum in the cour troom and acting within the ethical restraints imposed on them b y the cour ts and their pr of ession.

Cour t clerks ar e responsib le for keeping the cour t files in pr oper condition and ensuring that the various motions filed by lawy ers and the acti ons tak en by judges ar e pr operly recor ded. A head clerk of the cour ts is usually responsible for running the central recor ds section of the cour thouse; his or her assistants ar e assigned to sit in on the actual cour troom pr oceedings.

The **cour t repor ter** prepar es verbatim transcripts of cour troom pr oceedings. Most repor ters use a stenotype machine rather than shor thand. Because it is expensiv e, the y pr epar e a written transcript only if the case is being appealed.

Bailiffs ar e responsible for maintaining or der in the cour trooms. The y ar e also responsible for watching over the juries whe n the y ar e in recess or w hen the y ha ve been sequester ed. When a jur y is sequester ed, the members sle ep at a hotel and ar e kept iso lated fr om the public and their families to pr event them fr om being exposed to pr ejudicial publicity , thr eats, bribes, or any other impr oper influences.

Finally , sheriffs and marshals also ser ve as officers of the cour t. The y ser ve summonses and other cour t documents, collect mone y as requir ed by cour t judgme nts, and other wise help in carr ying out the cour t's or ders.

D. THE ROLE OF THE COUR TS IN INTERPRE TING AND APPL YING THE L AW

As par t of their judicial duties, both trial and appellate cour t judges apply the lawt o the facts in the cases befor e them. Howe ver, befor e the y can apply the law , judges must determ ine the law' s scope and

meaning. When the law contains ambiguous language, judges must choose between competing interpr etations.

Because the y ha ve this power to interpr et and apply the law , thr oughout our hist or y judges , especially those on the U.S. Supr eme Cour t, ha ve pla yed a major ro le in determining what the g overnment can and cannot do. Often this has inv olv ed contr oversial issues of public policy . F or example , in 1896 the Cour t interpr eted the F our teenth Amendment as allowing "separate but equal" tr eatment to justify racial segr egation. It was not until 1954 that the Supr eme Cour t reinterpr eted the F our teenth Amendment and in *Br own v. Boar d of Education* rejected the doctrine of "s eparate but equal, " thus star ting a national civil rights r evolution.

Those unhapp y with a par ticular decision often criticiz e the judges for "making law" rather than applying it. Howe ver, the truth is that whene ver a judge chooses a par ticular interpr etation of a law , that judge is, in fact, " making the law ."

SUMMAR Y

In this chapter , we ha ve seen that although the U.S. legal system ma y seem to inv olv e a confusing mix of names and functions, all cour ts can be classified in two wa ys:

1. The y ar e either trial or appellate cour ts. Some trial cou rts ha ve only limited jurisdiction; for example, the y only hear cases in which less than a cer tain amount of mone y is in dispute.
2. The y ar e par t of either the f ederal or a state system.

The federal cour t system and most state cour t systems ar e based on a thr ee-tier model. At the b ott om ar e the trial cour ts, wh ich decide both factual and legal issues. Abo ve the trial cour ts, you will generally find an intermediate appellate cour t. At the top of e ver y system is the highest appellate cour t. Appellate cour ts decide questions of law only . In the federal system, the trial cour ts ar e called district cour ts,

the intermediate appellate courts are called courts of appeals, and the highest court is the U.S. Supreme Court.

The power of a particular court to hear certain types of cases is known as its jurisdiction. The U.S. Constitution limits all federal courts' jurisdiction by allowing them to hear only the types of cases listed under Article III, Section 2. The two most common grounds for federal court jurisdiction are federal question and diversity of citizenship.

The judges who sit on these various courts are selected through a variety of different methods. While federal constitutional judges are appointed by the president with the advice and consent of the Senate, some state court judges are appointed, some are chosen by the electorate in elections, and others are chosen through a modified appointment process followed by an election.

Lawyers are considered to be "officers of the court" and are critical to the effective operation of the adversary system of justice. Other key court personnel include court clerks, court reporters, bailiffs, sheriffs, and marshals.

Due to the degree of ambiguity contained in constitutions, statutes, administrative regulations, and the common law, judges have a great deal of discretion when it comes to interpreting and applying the law in the cases that come before them. In exercising this discretion, it can be fairly said that they are "making law."

REVIEW QUESTIONS

Pages 69 through 76

1. What are the two basic functions of trial courts?
2. What is the difference between questions of law and questions of fact? Why is it important to know the difference?
3. Give an example of a question of fact that might arise during a murder trial. Give an example of a question of law that might arise in that same trial.
4. What is the difference between a bench trial and a jury trial?

5. What will an appellate court usually do if it finds that the trial court made a harmless error?
6. What is the difference between reversing and remanding a case?
7. How do majority, dissenting, and concurring opinions differ from each other?
8. List the major differences between trial and appellate courts.

Pages 76 through 83

9. In the federal court system what are the names given to
   a. the highest appellate court,
   b. the intermediate appellate courts, and
   c. the trial courts?
10. Look at the map in Figure 4-3. How many district courts are there in your state? In which circuit is your state located? Which other states are in your circuit?
11. If you hear that *cert* has been denied in a case, what does that mean?
12. In the federal system, what are the "inferior courts"?

Pages 83 through 90

13. Describe a typical state court system. How is your state court system similar to or different from the "typical" state system?
14. True or false: In every state, the highest appellate court is called the supreme court.
15. How are state judges selected? How does that differ from how federal judges are selected?
16. Jurisdiction refers to the power a court has to hear a case. Define each of the following types of jurisdiction:
   a. general jurisdiction
   b. limited jurisdiction
   c. original jurisdiction
   d. appellate jurisdiction
   e. exclusive jurisdiction
   f. concurrent jurisdiction

17. What are the two major grounds for gaining federal court jurisdiction?
18. Other than judges and lawyers, what other court personnel are you likely to encounter in a courtroom? What are their functions?
19. What does it mean to say that judges sometimes "make the law"?

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[1]The primary exception to this pattern occurs when a dispute is adjudicated in an administrative agency and then appealed to the courts. In very rare circumstances, a case can be filed directly with the U.S. Supreme Court under its original jurisdiction.

[2]425 U.S. 484 (1976).

[3]Grants Pass v. Johnson, 144 S. Ct. 2202 (2024), the U.S. Supreme Court found that the law was constitutional as homelessness is not a status protected by the Eighth Amendment's prohibition on cruel and unusual punishment.

[4]This Discussion Question is based on Wilkinson v. Garland, 601 U.S. 209 (2024).

[5]In this process, the party seeking review of a lower court decision petitions (asks) the court to issue a writ of *certiorari*. This writ is an order to the lower court to send a certified record of the case to the Supreme Court so that the Court can be "be informed about" the previous proceedings.

[6]Justices might recuse themselves because of a potential conflict of interest or for medical or personal reasons.

[7]Code of Conduct for Justices of the Supreme Court of the United States (adopted Nov. 13, 2023), *supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf* (last visited Aug. 7, 2024).

[8]See Stern v. Marshall, 564 U.S. 462 (2011).

[9]In some states, below the trial courts shown in Figure 4-5 is a system of inferior courts with names such as justice of the peace, city, and magistrate courts. Those courts are not courts of record. This means that no permanent record is kept of the testimony, lawyers' remarks, or judges' rulings. The absence of a record eliminates the possibility of an appeal and requires the losing party to initiate a completely new trial in a higher-level trial court if that party wishes to have the matter reconsidered.

[10]Ceglia v. Zuckerberg, 772 F. Supp. 2d 453 (W.D. N.Y. 2011).

Chapter 5

Civil Litigation and Its Alternatives

Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough.

Abraham Lincoln

Chapter Objectiv es

After reading this chapter , y ou should be able to:

- Explain the adv antages and disadv antages of litigation, mediation, and arbitration.
- Describe the thr ee basic stages of litigation.
- Explain the impor tance of subject matter and personal jurisdiction.
- Discuss the functions of the complaint, answer , and summons.
- Compar e and contrast a motion t o dismiss with a summar y judgment motion.
- List the main methods used in disco ver y, including electr onic disco ver y.
- List the steps in a typical trial.

INTRODUC TION

Litigation is the pr ocess of using the cour ts to settle disputes. In this chapter , we pr ovide an o ver view of the litigation pr ocess, including the pr ocedural steps inv olv ed in initiating, tr ying, and appealing civil cases. Litigation can be a ver y expensiv e, str essful, and lengthy pr ocess. The par ty that loses a lawsuit rar ely pa ys the legal fees of the pr evailing par ty. Because of this, most civil litigation cases settle. [1] **Settlement** can occur prior to the filing of the lawsuit, any time prior to trial, during trial, or even after trial. Because of the time, expense, and uncer tainty of the litigation pr ocess, various alternativ es to litigation, such as arbitration and mediation, ar e commonly used. The alternativ e app roaches ar e known collectiv ely as **alternativ e dis pute resolution (ADR)** .

Settlement

The resolution of a dispute between parties independent of the rendering of a final decision by a trial or appellate court.

Alternative dispute resolution (ADR)
Techniques for resolving conflicts that are alternatives to full-scale litigation. The two most common of these are arbitration and mediation.

To help illustrate the procedures used in litigation and its alternatives to settle civil disputes, we will again refer to the hypothetical situations involving Donald Drake (first discussed in Chapter 1) and Diane Jackson (introduced in Chapter 2). You will recall that Mr. Drake witnessed the death of his grandson, Philip, when he was struck by the car driven by Wilma Small. Ms. Diane Jackson was the waitress who was fired when she announced to her boss that she was pregnant.

Case 1: The Distressed Grandfather (Continued)

After researching the law and gathering additional facts, attorney Harper met with Mr. Drake a second time to discuss their various options, including proceeding with a lawsuit or first trying an alternative method for resolving his case.

Case 3: The Pregnant Waitress (Continued)

In a second meeting with Ms. Jackson, attorney Harper asked her whether she had belonged to a union and, if so, the terms of any collective agreement with her employer. Ms. Jackson recalled that some money had been taken out of her paycheck every pay period, but did not know if it was just for

taxes or also covered union dues. She said she would find out and report back to attorney Harper.

A. ALTERNATIVE DISPUTE RESOLUTION

We begin with a discussion of ADR techniques because they are designed to be used either prior to or instead of litigation. You should keep in mind, however, that in real life, actions may not proceed in such a straightforward manner. Although informal negotiations may begin the moment a dispute arises, there is no set order in which the parties are required to proceed. They may decide to file a complaint immediately, initiating the litigation process, but then suspend their litigation efforts while trying to resolve the dispute through arbitration or mediation. Should those efforts fail, the parties may then pick up where they left off in the litigation process. A variation of ADR may be required prior to trial in some jurisdictions. At other times, however, the parties may turn first to an ADR process and then proceed with initiating a lawsuit only if that process fails. Finally, parties may have signed a contract agreeing to the sole remedy of arbitration long before a dispute arises. Therefore, as you read this chapter, keep in mind that the various forms of ADR, including informal negotiations, mediation, and arbitration, can occur at any time, from before formal litigation has begun to well after a lawsuit has been filed and the litigation process is underway.

In comparison to litigation, ADR is designed to resolve conflicts more rapidly and at a lower cost. It can take many forms, ranging from very informal negotiations, which usually begin as soon as a dispute arises and may not end until the final appeal has been filed, to the more formal approaches of mediation and arbitration, which require the involvement of a neutral third party as either a mediator or arbiter.

The main difference between mediation and arbitration is that in mediation, the third party acts as a facilitator who tries to help the

par ties reach their own resol ution. In arbitration, the thir d par ty is a decision mak er who acts much as a judge would at a bench trial.

NE TNO TE

If you ar e inte rested in learning mor e about various forms of ADR, ther e ar e se veral web sites you can visit, including the American Arbit ration Associa tion , the Me diation Information an d Resour ce Center , the ABA Sectio n on Dispute Resolution, and the College of Commer cial Arbitrat ors . The ABA Journal online has a list of ADR blogs .

1. Mediation

In **mediation** , a neut ral thir d par ty attempts to guide the disputants towar d a compr omise that is voluntarily accepted by both sides. Mediation is based on the pr emise that the best solution is one that the par ties themselv es de vise, rather

Mediation
An ADR mechanism wher eb y a neutral thir d par ty assists the par ties in r eaching a mutually agr eeable, v oluntar y compr omise.

than ha ving one imposed on them. The mediation pr ocess is designed to help the opposing par ties view themselv es as collaborat ors working towar d a compr omised solution rather than as combatants out t o " win " at any cost.

The mediat or helps the dispu tants identify the issues that divide them and explor e potential solutions that would be acceptable to both par ties. If the mediation is successful, the mediat or will draft a written agr eement for the par ties to sign. Once signed, this

agr eement becomes a cour t-enfor ceable contract. If the y do not reach an agr eement, the par ties can simply walk awa y fr om the mediation and seek other appr oaches t o r esolving their diff er ences.

While m ediation is normally seen as a pr ocess inv olving v oluntar y cooperation between the par ties, many states ar e now imposing "mandat or y me diation " in selected types of disputes, such as those inv olving issues of child cust ody . It is mandat or y in the sense that both par ties ar e requir ed to engage in a formal mediation pr ocess befor e a cour t will hear the case. If the mediation pr oces s fails, the par ties can continue with the cour t pr oceedings.

Generally , som e types of cases ar e better suited for mediation than ot hers. M ediation is par ticularly useful in situations wher e the par ties will ha v e to deal with each other in the futur e, such as child visitation issues after a div or ce or a dispute between neighbors. In these s ituations, it is hoped that the mediation pr ocess w ill not only resolv e the curr ent situation, but also impr o v e the par ticipants' interpersonal a nd conflict management skills as the y continue to deal with each other in the futur e.

Some situation s do not lend themselv es to mediation, such as those in v olving domestic violence. Not only ma y the contact during mediation bet ween the abuser and the victim result in fur ther violence following the mediat ion session, but the victim ma y per ceiv e the mediation session itself as another form of abuse. F ur ther , as mediation works best when the par ties ar e of fairly equal bar gaining power , it is not as eff ectiv e in situations of abuse, wher e the victims often per ceiv e themselv es as powerless against the abuser .

D ISCUSSION Q UESTION

1. Mediation is often used in child cust ody cases. What ar e fact ors that would mak e a child cust ody mediation mor e s uccessful? Less successful?

2. Arbitration

Unlik e mediation, in **arbitration** , th e neutral thir d par ty ha s the authority to render binding de cisions e ven if the par ties do not agr ee with that result. Wher eas a m ediat or is a facilitat or, an arbit rat or pla ys a ro le mor e similar to that of a judge. Arbitrat ors follow a much simpler set of pr ocedur es than do judges, howe ver, and arbitration usually does not requir e as much time or expense as litigation. Generally spea king, both par ties must agr ee in adv ance to accept the arbitrat or's dec ision, and a dissatisfied par ty ma y not challenge it in cour t ex cept on ver y limited g rounds, such as ar guing that the awar d was obtained b y fraud.

Arbitration

An ADR mechanism wher eb y the par ties submit their disagr eement to a thir d par ty, whose decision is binding.

The business community str ongly suppor ts arbitration because it is viewe d as a faster and less expensiv e means of settling disputes that arise in the course of doing business. It is a common practice for businesses to include arbitration clauses in their contracts. Under these clauses, the par ties ar e legally bound to ref er disputes o ver the interpr etation of a contract to arbitration rather than tak e them to cour t. In addition to sa ving time and mone y, arbitration ofte n allows a company to settle a dispute without attracting the public attention that ma y accompany a lawsuit because arbitration decisions often include a confidentiality clause.

Arbitration doe s ha ve its critics. Many complain that arbitration is acquiring too many of the dis adv antages of litigation regar ding cost and time spent, without retaining the benefits of litigation (i.e., the ability to use disco ver y to unco ver facts known only to the other par ty and the possibility of appealing an unfa vorable decision).

In the field of labor law , arb itration is often used as a wa y of avoiding strik es . Spor ts fans ar e familiar with the role that arbitration has pla yed in determining the salaries of baseball pla yers. Public emplo yees ar e often requir ed to use arbitration when state law pr ohibits them fr om striking.

As mentioned above, arbitrators are not required to apply the same procedures and rules of evidence that judges must use, something that professional football player Adrian Peterson learned when he attempted to challenge an arbitration ruling that upheld the decision by the National Football League (NFL) to suspend and fine him. The NFL had acted after Peterson was charged with "reckless or negligent injury to a child" in connection with his allegedly having beaten his four-year-old son with a switch. After the arbitrator upheld the league's decision, Peterson sued in federal court, alleging that the charge against him and the arbitrator's ruling violated the Due Process Clause of the U.S. Constitution. He based his argument on the fact that the NFL had applied a new disciplinary rule to him that had not been in effect at the time of the incident with his son. In rejecting these claims, the Court of Appeals emphasized that the NFL Players' Association had agreed to the arbitration procedures, and that the statute governing labor arbitration did not allow rulings to be vacated on grounds of lack of "fundamental fairness."[2]

As it turns out, the pregnant waitress, Ms. Jackson, was not a member of a union. If she had been, then there would have been a collective bargaining agreement with her employer, and it is likely that she could have filed a formal grievance. The union representative would then have attempted to negotiate a resolution of her dispute with management. If those negotiations were not successful, most likely the collective bargaining agreement would have included a mandatory arbitration clause that would require Ms. Jackson to submit her grievance to arbitration.

Some employers require that their employees sign an agreement that provides that all employment disputes will be resolved through arbitration. Although Ms. Jackson did not sign such an agreement, in *Epic Systems Corp. v. Lewis*,[3] the U.S. Supreme Court upheld the validity of such compulsory arbitration clauses.

DISCUSSION QUESTION

2. In some jurisdictions, court-ordered mediation involves a three-person panel that renders a decision at the end of the mediation. The parties to the litigation can either agree to the decision or proceed to trial. If the party that did not agree to the mediation ends up with a verdict 20% or more in the opposing party's favor, they are required to pay the other party's lawyer fees. What are the advantages to this system? The disadvantages? Why do you think arbitration does not use this method?

3. Role of Paralegals in ADR

Because arbitrators and mediators do not have to be lawyers, experienced paralegals may be able to qualify for such positions if they have the right mix of formal training and experience in the substantive field in which they wish to work. Some states, such as Texas, have extensive programs to train mediators in many areas in which disputes can arise between individuals. In Texas, nonlawyer mediators are frequently used, but in some states, it is much less common for nonlawyers to be used as mediators.

Even if paralegals are not working as mediators, their assistance in mediations is often critical. Their involvement in ADR closely parallels the functions that paralegals serve in traditional litigation. They assist in gathering and preparing information that will be presented to the mediator or arbitrator. They help make administrative arrangements for the ADR proceedings and schedule expert and lay witnesses. They also prepare clients and other witnesses for what to expect in the ADR process. Following a decision, they will often prepare documents required as part of the settlement.

Case 1: The Distressed Grandfather (Continued)

Generally, attorney Harper prefers to use a form of ADR whenever possible, as it may save her clients time, stress, and expense. Also, if there is a chance for an ongoing relationship between the parties, mediation, because it is less adversarial than litigation or arbitration, may help to preserve that relationship.

However, Ms. Small's lawyer has indicated that his client is not interested in using ADR. It is his position that because Mr. Drake was not Philip's parent, there is no legal basis for making Ms. Small responsible for his injuries. [4] Attorney Harper informed Mr. Drake that they have no choice, if they want to proceed, except to turn to the court system and litigation.

DISCUSSION QUESTIONS

3. If you were involved in a dispute, which ADR method would you prefer, and why?

4. Do you think either mediation or arbitration would be appropriate to resolve Mr. Drake's case? Why or why not?

When ADR methods fail, the parties may decide to proceed to litigation. The process of litigation is the subject of the next section.

B. LITIGATION

Specific rules govern the litigation process. Both the federal and state courts have published their particular rules under names such as the Federal Rules of Civil Procedure, the Federal Rules of Evidence, Massachusetts Rules of Civil Procedure, and Illinois Criminal Law and Criminal Procedure. Most state rules are quite similar to those used in the federal courts.

PRACTICE TIP

Keep a copy of your state's rules of civil procedure and rules of evidence, along with the federal rules. Add to this set any local trial court rules. These can all be found at *uscourts.gov/rules-policies/current-rules-practice-procedure*.

In both federal and state courts, litigation has three basic stages: pretrial, trial, and appeal. Take a few moments to study Figure 5-1, which provides an overview of the litigation process. Refer to it as you proceed with the remainder of this chapter to help you keep track of the various stages.

1. The Pretrial Stage

Before litigation can begin, the lawyer must handle some preliminary matters:

- whether a legal basis for the suit exists,
- who should be sued,
- in which court the case should be brought,
- whether the statute of limitations has expired, and
- whether any administrative agency must be consulted before filing suit.

Once those issues have been resolved and a determination to sue has been made, the lawsuit enters the pleadings stage. The **pleadings** are the documents that each side files with the court and serves on the other side to commence the lawsuit. To narrow the issues, either party may file **pretrial motions**. Finally, the parties will engage in **discovery**, an attempt by both sides to gather as much information as possible. The end result of this process may be a negotiated settlement, a court determination to dismiss the suit, or a decision to proceed to the trial stage.

Pleadings

The documents that begin a lawsuit—generally , the complaint and the answer .

Pretrial motion

A motion br ought befor e the beginning of a trial, either t o eliminate the necessity for a trial or t o limit the information that can be pr esented at the trial.

Disco ver y

The modern pr etrial pr ocedur e b y which one par ty gains information fr om the adv erse par ty.

a. Pr eliminar y Matters

The dec isions as to these pr eliminar y matters ar e not alwa ys easy to mak e and ma y inv olv e extensiv e factual and legal resear ch to determine the best course of action. P aralegals ar e often assigned the task of locating and analyzing statutes, cour t rules, and cases that ar e rele vant to these decisions. In addition, the y ma y be called upon to engage in factual in vestigation, such as tracing corporate ownership or locating par ties and witnesses t o the suit.

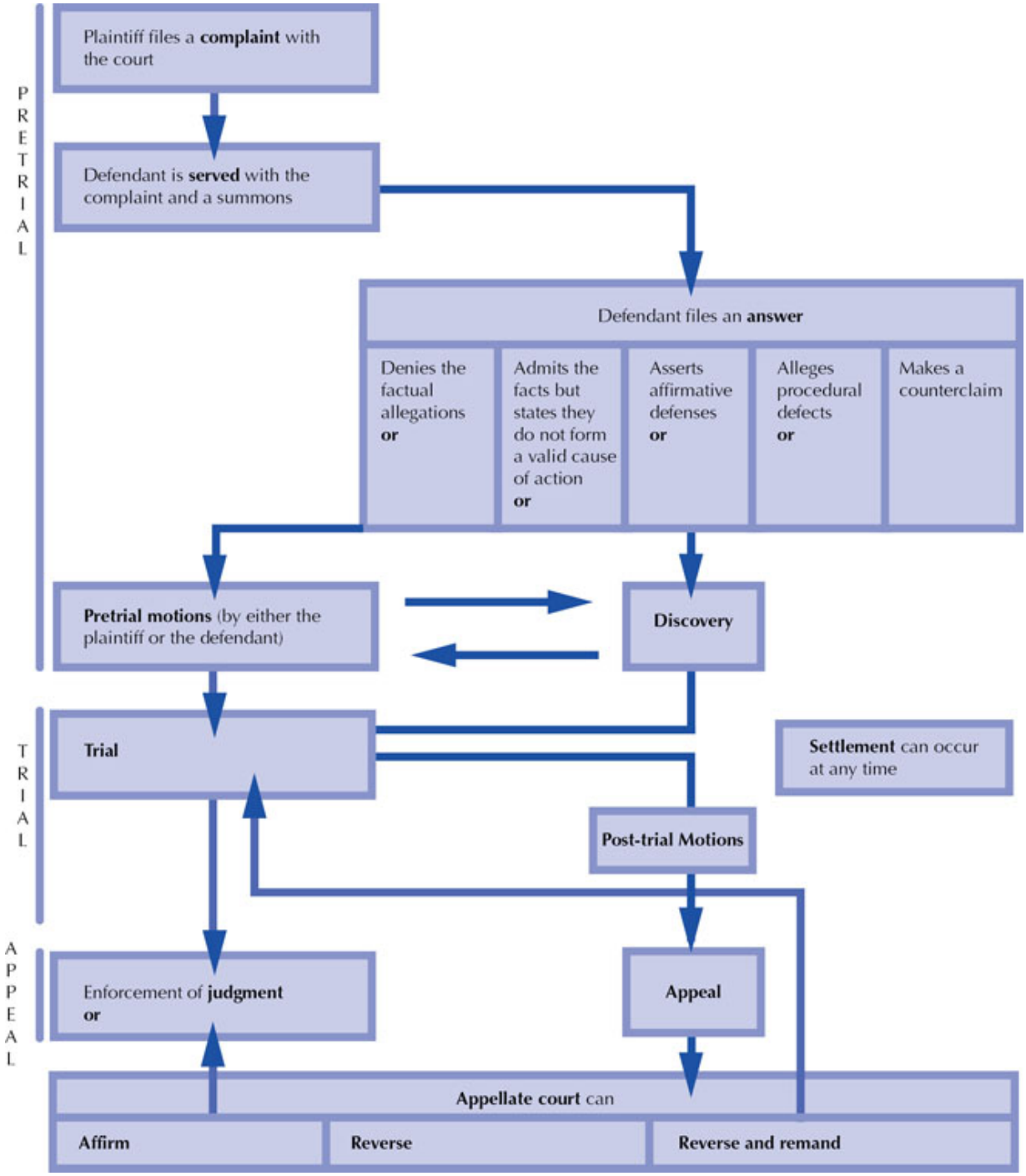

Figure 5-1 Civil Procedure

PRACTICE TIP

A paralegal generally performs several tasks at the beginning of any lawsuit, including the following:

- Collecting contact information for the client and all potential litigants so that a conflict of interest check can be performed to ensure that no one at the law firm has represented or spoken to any of the other litigants;
- Sending a fee agreement that delineates the scope of engagement and the agreed-upon fee; [5]
- Setting up a **tickler system** to list and monitor all of the deadlines in the case, including statutes of limitations;
- Creating a file to collect all recording/tickler deadlines, evidence, records, pleadings, correspondence, pleadings, and discovery;
- Creating a trial notebook; and
- Creating a settlement brochure (as an option). Prior to the filling of any complaint, the lawyer may request a settlement brochure evaluating the case and delineating the liability and damages of the opposing party. Presented as a story, it explains why the plaintiff is likely to win the lawsuit. Settlement brochures can be written; however, they can also be provided in video form, sometimes referred to as a "legal settlement documentary."

Tickler system
A calendaring system that records key dates and important deadlines.

(1) Legal grounds for the suit

As you will recall from Chapter 1, not every problem is a legal problem for which the courts can provide a remedy. Therefore, before a lawyer can initiate a lawsuit, the lawyer must be convinced that the client has a valid cause of action—that is, based on the law and the facts, the client's claim is sufficient to support a lawsuit. This

determination involves answering two questions affirmatively. First, does the lawyer believe that there are sufficient credible facts to support the plaintiff's position? Second, does the lawyer believe that there is a valid legal theory to support the claim?

In determining whether a client's position is supported by credible facts, lawyers must review relevant documents and interview witnesses. In some practice areas, including workers' compensation and family law, lawyers will ask for access to the client's social media accounts. They may assign a paralegal to do much of the background research needed to determine whether there are credible facts and a valid legal theory to support the claim.

ETHICS ALERT

If lawyers file lawsuits without first conducting a reasonable investigation regarding the facts of the case, they may be subject to court-imposed sanctions. For example, under Rule 11 of the Federal Rules of Civil Procedure, if a judge determines that a lawyer has not conducted a reasonable inquiry into the facts and law or has filed suit for an improper purpose, then the judge may impose monetary sanctions on the lawyer and on the parties that lawyer represents. If a party is represented by a lawyer, Rule 11 also requires that the lawyer sign the pleadings, written motions, and other papers. Paralegals are never authorized to sign these documents.

DISCUSSION QUESTION

5. In Mr. Drake's case, assume that Massachusetts courts have allowed mothers and fathers to recover in situations similar to that experienced by Mr. Drake but have never spoken about whether they would extend the rule to allow recovery by grandparents. Several

other states, however, that have directly confronted this issue have ruled against grandparents. The most common reason for not allowing recovery is the fear that to do so would encourage people to bring too many potentially frivolous lawsuits. With that as the legal precedent, do you think Mr. Drake's attorney should feel any concern in signing her name to the complaint? Why or why not?

Even if there are legal grounds for proceeding with a lawsuit, not all legal solutions are worth the cost. For example, no matter which side wins, both parties usually remain responsible for paying their own lawyer's fees. Therefore, lawyers should speak to their clients about the amount that they can expect to recover if they win the lawsuit, minus any expenses and lawyer fees. Clients should also be told that there is never a guarantee that they will win their claim, no matter how strong their case appears to be. Even when clients pay their lawyers on a contingency fee basis so that the lawyers recover a percentage of the award plus costs, plaintiffs may end up losing money if the costs outweigh their portion of the award.

PRACTICE TIP

Recommendation 1: Once the lawyer has identified the cause of action, looking at your state's Pattern Jury Instructions can help you understand what your supervising lawyer will need to prove to win the lawsuit. Then it is helpful to create a list of those elements and what evidence is needed to prove them.

Recommendation 2: Whenever you interview a potential witness, type up the witness' statement and ask the witness to sign it, thereby increasing the likelihood that the witness' testimony at trial will be consistent with that in the initial interview. If a witness is not willing to sign, then it may be necessary to do additional research to support the client's claim.

Recommendation 3: Facts can change as a case develops. A story usually has two sides, and when clients first meet with a lawyer, they usually only present one—theirs. If at some point it becomes clear that the facts do not support the client's claim, the lawyer may direct that the client be sent a disengagement letter.

(2) Parties to the suit

Lawsuits can involve just one plaintiff and one defendant or multiple plaintiffs and defendants. Determining the appropriate parties is one of the first issues that must be resolved before the lawsuit can proceed. The client should provide the lawyer with the names of all of the other potential litigants. Paralegals are often tasked with confirming the legal names of the defendants. If the defendant is a corporation, it is critical to look up the legal corporate name. The secretary of state of each state maintains a website that allows you to search the legal names of a business incorporated or doing business in that state.

(a) Standing You cannot sue someone simply because you do not like something they did or said. To sue, you must be able to establish you were personally affected by something the defendant did. This requirement is referred to as **standing**. It is designed to keep courts from deciding abstract issues or rendering advisory opinions.[6] By requiring the parties to have a vested interest in the outcome, courts benefit from hearing litigants who will vigorously argue their positions.

Standing
The principle that courts cannot decide abstract issues or render advisory opinions; rather, they are limited to deciding cases that involve litigants who are personally affected by the court's decision.

Why limit lawsuits to people who have been hurt? One reason is that they're likely to marshal the strongest arguments. It brings to mind the old line about the role of the chicken and the pig in furnishing your breakfast: The chicken is involved, but the pig is *committed.* Let chickens file lawsuits against bacon-and-egg combos, and they may lack the motivation to do a good job. [7]

Because of this requirement of standing, persons and organizations cannot file lawsuits simply because they do not approve of a certain governmental policy or some corporation's building project. For example, only persons who have been sentenced to death can challenge the death penalty. If the court determines that the parties do not have standing, it simply dismisses the case without making a determination on the merits.

A classic example of how the requirement of standing affects who can sue occurred in conjunction with the litigation that led up to the famous case of *Brown v. Board of Education.* [8] Although the National Association for the Advancement of Colored People (NAACP) was opposed to the Kansas policy of segregating its public school system, it had no standing on its own to challenge the constitutionality of that policy. Before it could proceed, the organization had to recruit an African American child who was actually turned away when she attempted to enter an all-White school located in her neighborhood. [9] Eventually, the NAACP was able to find 13 parents and their children who were willing to serve as plaintiffs in the case.

(b) Legal competence The lawyer must also be certain that the parties to a lawsuit are legally capable of suing and being sued. For example, in many states a minor must sue or be sued through a named guardian or "next friend." A **guardian** is someone who has the legal right and duty to take care of another person's property when that person is a child or is otherwise incompetent. A **next friend** is not the legal guardian but is a responsible party that the court recognizes as a legitimate representative. Allowing suit by such representatives is an exception to the requirement of standing mentioned above. The guardian or next friend is not suing in his or her own right, but rather as a representative for the child or incompetent person.

Guardian

A person appointed by the court to manage the affairs or property of a person who is incompetent due to age or some other reason.

Next friend

A person who represents the interests of someone in court without being that person's legal guardian.

(c) Class action lawsuits **Class action lawsuits** allow multiple individuals to come together in a single lawsuit to sue the same defendant for the same type of injury. Class actions promote efficiency by allowing testimony to be heard and issues to be resolved in one large trial rather than repeatedly in a series of individual trials. Also, the use of class actions may allow plaintiffs with individually small claims a chance to recover. Usually, it is not economically feasible for a single plaintiff to pay the legal fees necessary to recover a small amount of damages, but it becomes worthwhile for a lawyer to take the case on a contingency basis when the damages of hundreds or even thousands of plaintiffs are consolidated.

Class action lawsuit

A lawsuit brought by a person as a representative for a group of people who have been similarly injured.

Before a class action can proceed, the court must certify that it meets two basic requirements:

1. there must be questions of law or fact common to the class, and
2. the claims of the named class members must be typical of the claims of the class as a whole.

Defendants can object to the validity of proceeding with a class action lawsuit by arguing that either or both of those two requirements are missing. For example, Wal-Mart challenged the validity of a class action brought on behalf of 1.5 million of its

employees and former employees. The U.S. Supreme Court agreed with Wal-Mart that the class was too diverse to qualify for class action status.[10] Although they all claimed Wal-Mart had discriminated against them on the basis of their sex, the Court noted that the class members "held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed."[11]

Five years later a group of 3,000 Tyson Foods Inc. employees sued, seeking overtime wages for time they had to spend donning and doffing protective gear, required as part of their job. The Court allowed them to proceed with their class action suit. The Court distinguished *Wal-Mart* on the basis that in *Wal-Mart* the employees were not similarly situated whereas the employees at Tyson Foods were—they worked in the same facility, did similar work, and were paid under the same policy.[12]

DISCUSSION QUESTION

6. Do you agree with the Supreme Court's decision in *Wal-Mart*? Is it fair that Wal-Mart will not have to answer to the thousands of women whose individual claims are too small to justify the costs of litigation? If the individual women had been able to proceed with a lawsuit, would it have promoted the best use of judicial resources for Wal-Mart to have to defend 1.5 million lawsuits instead of just one large class action suit?

(d) Selecting the appropriate defendants After having determined who are the appropriate plaintiff or plaintiffs, the lawyer must decide who should be named as defendants. Naturally, the lawyer will choose to sue the person who caused his or her client harm. However, the most logical person to sue may not be worth suing because he or she may not have money to pay the damages that a court might award. This is referred to as being **judgment proof**. If there is more than one possible defendant, the plaintiff will want to

make sure to include the one with the deepest pockets, that is, the most assets.

Judgment proof
When a defendant does not have sufficient money or other assets to pay a judgment.

For example, under a theory known as ***respondeat superior***, an employer can sometimes be held responsible for the acts of its employees. Because employers usually have more money than employees, persons injured by an employee will frequently also sue the employer. Similarly, in an automobile accident case,

Respondeat superior
The tort theory that an employer can be sued for the negligent acts of its employees.

the plaintiff may sue the manufacturer of the auto or the governmental unit responsible for maintaining the roadway.

There are times when a plaintiff cannot sue one potential defendant without including the others as well. This is known as **compulsory joinder**. For example, in a dispute involving a piece of property with three owners, all three would have to be made part of the lawsuit. Where such rules do not apply, the plaintiff may be selective in deciding who should be included in the suit. The defendant, however, may later file a motion to add a defendant that the plaintiff left out.

Compulsory joinder
When a person must be brought into a lawsuit as either a plaintiff or a defendant.

(3) Selection of the court

Unless the parties signed a contract that predetermined jurisdiction, the last preliminary issue requires the plaintiff's lawyer to

decide in which court to file the lawsuit. From your readings in Chapter 4, you know that lawsuits begin in a trial court and not an appellate court, but which trial court? That will depend on which trial courts have jurisdiction over the type of case that the lawyer will be filing. Recall that **jurisdiction** relates to the power of a particular court to hear a case brought before it. In some cases, the lawyer may have the option of selecting among several different courts and must evaluate the advantages and disadvantages of using one versus the other.

Jurisdiction

The power of a court to hear a case.

Once it is determined which court has jurisdiction to hear the case, a related issue is the question of **venue**, which determines the specific geographical location of the court that will hear the case. Jurisdiction and venue are related, in that they both deal with which court will hear the case, but they are very different. Once jurisdiction is determined, venue simply relates to which of several courts that have jurisdiction geographically is the most appropriate one. For example, assume that two people signed a contract in Ann Arbor, Michigan. Jurisdiction would be determined by the type of case, the law underpinning the case, and the parties to the contract. Once jurisdiction was established (in this case the state court), then the appropriate geographical area would be selected. In this example, that would likely be the county in which the contract was signed.

Venue

When the court with the power to hear the case has multiple locations, the proper location for the case to be filed and heard.

In determining whether jurisdiction exists, you must consider both **subject matter jurisdiction** and personal jurisdiction. If a court does not have both subject matter jurisdiction and personal jurisdiction, it cannot hear the case.

Subject matter jurisdiction

The power of a court to hear a particular type of case.

(a) Subject matter jurisdiction As the term implies, **subject matter jurisdiction** is determined by the subject matter of the case—that is, by the type of law that is involved. Generally, federal courts can hear only cases relating to federal law (such as federal constitutional or statutory issues) or cases in which the plaintiff and defendant are from different states and the amount in dispute exceeds $75,000. Rule 8 of the Federal Rules of Civil Procedure requires that the lawyer filing a complaint include "a statement indicating why the federal court has jurisdiction to hear the case."

Unless barred by a specific federal statute, generally state courts can hear any type of case. Therefore, cases involving diversity of citizenship and more than $75,000 can usually be started in either federal or state court. In deciding which court to choose, a lawyer will consider matters such as filing requirements, deadline dates, the current backlog of cases, discovery procedures, the rules of evidence, and the personalities of the judges. The convenience of the physical location of the court may also be a factor.

Case 1: The Distressed Grandfather (Continued)

Mr. Drake's case involves negligence, a matter of state law. Therefore, as the accident happened in Massachusetts, attorney Harper could bring her lawsuit in a Massachusetts state trial court. However, even though Mr. Drake's case does not involve federal law, if the amount in dispute exceeds $75,000, she would also have the option of bringing it in federal court. She could do this under diversity jurisdiction, based on Mr. Drake being a resident of Massachusetts and Ms. Small, the defendant, being a resident of New Hampshire. Therefore, in Mr. Drake's case, the federal and state courts have concurrent jurisdiction. Attorney

Harper is free to choose the forum that is most advantageous to her case.

If she elects to sue using a Massachusetts state court, naturally the court will apply Massachusetts law. However, even if she brings the case in federal court, because jurisdiction is based on diversity of citizenship and the accident happened in Massachusetts, the federal court will also apply Massachusetts state law, not federal law.

(b) Personal jurisdiction **Personal jurisdiction** relates to the court's power to force a person to appear before it—hence the name personal jurisdiction. Generally, for a state court to have personal jurisdiction over a defendant, the defendant must be a resident of that state, be served with process within the state, consent to the lawsuit, or have some **minimum contacts** with it. For example, a state court would have jurisdiction over a nonresident defendant who caused an automobile accident within that state's borders.

Personal jurisdiction
The power of a court to force a person to appear before it.

Minimum contacts
A constitutional fairness requirement that a defendant have at least a certain minimum level of contact with a state before the state courts can have jurisdiction over the defendant.

States exercise this jurisdiction over nonresidents through **long-arm statutes**. Typically, such statutes allow the states to exercise jurisdiction if the subject matter of the lawsuit is a tort the defendant committed within the state, a contract the defendant entered into within the state, or a harm the defendant caused as a result of business conducted within the state. Each of these activities would satisfy the minimum contacts requirement, so long as exercising jurisdiction does not offend "traditional notions of fair play and substantial justice."

Long-arm statute

A statute that gives state courts jurisdiction over nonresidents who have a sufficient connection with the state.

Because Mr. Drake's accident happened in Massachusetts, the accident supplies the minimum contacts that Massachusetts courts need to hear the lawsuit. Mr. Drake may sue Ms. Small in Massachusetts.

To better understand this concept of personal jurisdiction, just for a moment assume that the situation had been different, as illustrated in Figure 5-2. Assume that Mr. Drake, a Massachusetts resident, had been vacationing in Maine when the accident happened, and assume that Ms. Small, a New Hampshire resident, was also vacationing in Maine. Then the issue of personal jurisdiction would be much more complicated. As he lives in Massachusetts, Mr. Drake would like to commence his lawsuit there. Under these revised facts, however, Ms. Small has had no contact with Massachusetts, and as at least minimum contacts are required, Mr. Drake would not be allowed to sue her in Massachusetts. He could sue her in New Hampshire because, as a resident of that state, the New Hampshire courts would have jurisdiction over Ms. Small. He could also sue her in Maine, as the accident in that state provides the minimum contacts necessary to satisfy personal jurisdiction.

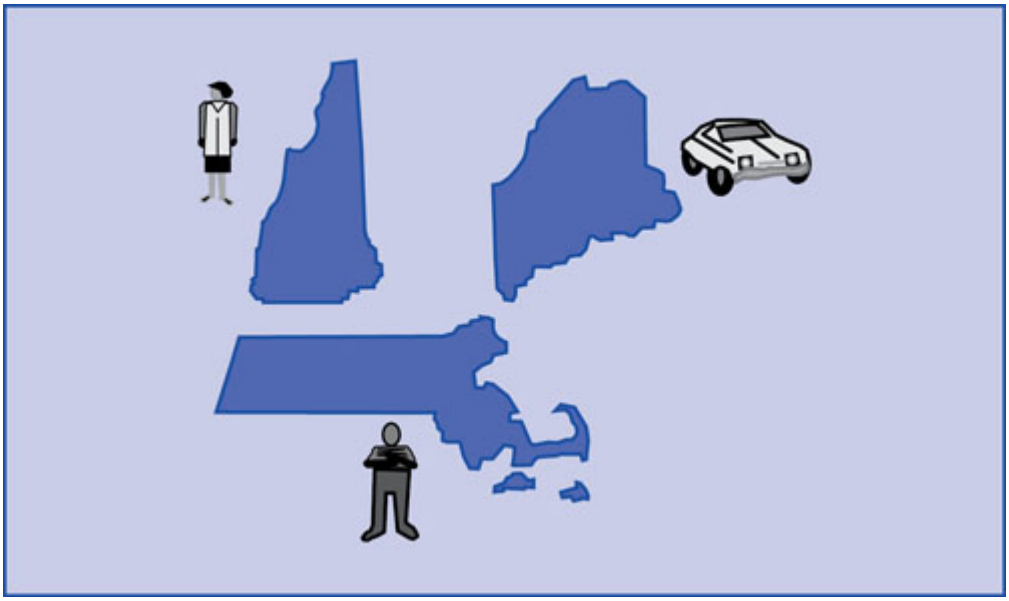

Figure 5-2 Personal Jurisdiction

NETNOTE

On the Internet, you can find all sorts of useful information about the courts—everything from their fax numbers to the location of a specific courthouse. To find the address of any state court, a good place to start is at the home page for the National Center for State Courts, *ncsc.org*. The center maintains a complete listing for all 50 states. For information on federal courts, you can visit either the federal judiciary home page or the Federal Judicial Center home page. Finally, the U.S. Supreme Court has its own website, *Supremecourt.gov*.

Legal Reasoning Exercises

1. Assume that Mary was injured in an automobile accident while vacationing in California. Joe was driving the car that hit her. Mary is a resident of Michigan. Joe is a resident of Florida. In which state(s) may Mary bring suit? Why?

2. Four Seasons Campground rents campground spaces in New Jersey, the state in which it is also incorporated. John Haas, a resident of Pennsylvania, learned about the campsite on its website and decided that he wanted to lease campground space for the next summer. Because the website did not allow for such seasonal purchases to be made online, Haas drove to New Jersey, where he signed a contract. Later that year, while he was at his leased campsite, a branch fell from a tree, striking Haas on his head and causing him to fall into a brick fireplace, and then to the ground. When he sued the campground in Pennsylvania for the injuries he suffered, the campground filed a motion to have the case dismissed for lack of personal jurisdiction. How do you think the court ruled, and why?

(4) Statutes of limitations

A **statute of limitations** sets a time limit within which a person can sue. Once that specified time has passed, the person is forever barred from suing. Such statutes vary depending on the type of situation involved. Some statutes of limitations set very short deadlines. For example, a person complaining of discrimination at work has only 180 days to bring a complaint. Other statutes of limitations, such as that for murder, are essentially without limit. Typically, persons have two years from the date of a negligent act to file a lawsuit. Mr. Drake is fortunate in that he sought legal advice well within the time frame allowed by the statute of limitations.

Statute of limitations

The law that sets the length of time fr om when something happens to when a lawsuit must be filed befor e the right t o bring it is lost.

P RAC TICE T IP

Accepting a case a f ew da ys befor e the statute of limitations runs out can be risky . Many lawy ers will write a non-engagement letter t o such a potential client, letting them know that the y ar e *not* taking the case, that the potential client might ha ve a legal remedy , and that the potential client will need t o act quickly t o secur e another lawy er on their behalf.

NE TNO TE

The common statutes of limitations in your state can be found at *statelaws.findlaw .com* . C lick on your state and then click on the link for "Statutes of Limitations. "

(5) Exhaustion of administrativ e remedies

If a person 's cl aim inv olv es matters coming under the juris diction of an administ rativ e agency , the plaintiff might ha ve to consult that agency befor e being allowed to sue in a cour t of la w. Such a requir ement is known as the **exhaustion of administrativ e remedies** . The purpose behind this rule is to giv e the administrativ e agency a chance t o r esolv e the pr oblem befor e the par ties r esor t t o a lawsuit.

Exhaustion of administrativ e remedies

The r equir ement that r elief be sought fr om an administrativ e agency befor e pr oceeding t o cour t.

Once a person has filed a complaint with an administrativ e agency , that agency usually tries to resolv e the issue by getting the par ties to reach a mutually agr eeable resolution. If thos e effor ts ar e not successful , the pr ocess m ay pr oceed to a formal hear ing. Such a hearing is similar to a trial, bu t the rules ar e relax ed. Instead of a trial cour t judge, an administrativ e law judge o versees the pr oceeding. Usually ther e is no requir ement that the rules of evidence be strictly followed. Some administrativ e agencies also allow for paralegals and others who ar e not licensed lawy ers to repr esent people in these administrativ e hearings. Often, the hearing officer 's decision resolv es the dispute. Howe ver, if one of the par ties is dissatisfied with the decision, depending on the agency , that par ty ma y ha ve the option either to appea l the decision to a higher body within the agency itself, to appe al the decision to a co ur t, or to star t the whole pr ocess anew with a lawsuit.

P RAC TICE T IP

Especially in emplo yment cases, e ven befor e seeking an administrativ e r emedy , ther e ma y be a contractual or union pr ocedur e that must be followed, or else y our client ma y be pr ecluded fr om pursuing a r emedy in cour t.

Case 3: The Pr egnant W aitr ess (Continued)

In empl oyment discrimination cases, ther e is a requir eme nt that an emplo yee who has experienced discrimination at work

first complain to the state or federal agency that handles such claims before being allowed to proceed with a lawsuit. Therefore, Ms. Jackson's attorney instructed her to file a complaint with the local agency handling employment discrimination claims.

After Ms. Jackson filed her complaint, the state agency conducted an investigation that led it to conclude that there was probable cause to believe she had been fired because of unlawful sex discrimination. After an unsuccessful attempt to resolve the dispute through informal negotiations with the restaurant owner, the agency issued a right-to-sue letter that authorized Ms. Jackson to proceed with a lawsuit.

Case 1: The Distressed Grandfather (Continued)

Mr. Drake's case against Ms. Small does not raise any administrative law issues. Therefore, Mr. Drake's lawyer did not need to involve an administrative agency prior to proceeding to litigation. However, separate from Mr. Drake's claims against her, Ms. Small may find herself before an administrative agency if the police determine the accident was her fault. For example, she might have to argue before a state licensing agency that her driver's license should not be revoked.

b. Pleadings

The pleadings are the documents that each side files with the court and serves on the other side to commence the lawsuit. Their purpose is to narrow and focus the issues involved. Pleadings begin with a **caption**. The caption must include the names of the parties, the name of the court, the title of the action, the docket or file number, and the name of the pleading.

Caption

The heading section of a pleading that contains the names of the parties, the name of the court, the title of the action, the docket or file number, and the name of the pleading.

Exhibit 5-1 shows what the caption would look like in Mr. Drake's case. First, the caption would identify Donald Mr. Drake as the plaintiff and Wilma Ms. Small as the defendant. It would also indicate that the case is being filed in the U.S. District Court for the District of Massachusetts and would leave space for the eventual docket number to be entered by the court clerk. The court assigns the number at the time the lawyer files the complaint.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action, File Number _____

Donald Drake, Plaintiff	}	
v.	}	COMPLAINT
Wilma Small, Defendant	}	

Exhibit 5-1 Caption

Case 1: The Distressed Grandfather (Continued)

After reviewing the facts and the jurisdictional questions involved, attorney Harper has determined that the best court in which to proceed with Mr. Drake's case is federal district court.

She directs paralegal Kendall to assist with initiating the lawsuit by drafting a complaint.

(1) The complaint

The initial document the plaintiff files is logically called a **complaint** because the plaintiff is the person starting the lawsuit, and hence complaining of some behavior. A complaint states the allegations that form the basis of the plaintiff's case.

Complaint
The pleading that begins a lawsuit.

PRACTICE TIP

Find the specific caption that is required for each of the courts with which you frequently file pleadings. Then use your word processor to create some standard captions.

Note that the complaint contains all of the following:

- a caption listing the names of the parties, the name of the court, the title of the action, and space for the docket file number to be provided by the court;
- all claims and defenses in numbered paragraphs that can be admitted or denied by the defendant(s);
- the basis for jurisdiction;
- the legal grounds for the case;
- the type of relief sought; and
- a request for a jury trial unless the plaintiff wants to waive the right to a jury trial.

The requirements for the format and the contents of a federal complaint are spelled out in the Federal Rules of Civil Procedure. A complaint must contain allegations as to why the case falls within the court's jurisdiction, the grounds that form the basis of the plaintiff's case, and the relief desired. If the complaint is to be filed with a state court, the requirements are in the Rules of Civil Procedure for that state.

The body of the complaint consists of the allegations of facts that constitute the cause of action. The federal rules allow for **notice pleading**; that is, the complaint must identify the transaction from which the plaintiff's claim arises. In many states, however, the facts being pleaded must be "ultimate" facts, as opposed to conclusions of law.

Notice pleading
A method adopted by the federal rules in which the plaintiff simply informs the defendant of the claim and the general basis for it.

Case 1: The Distressed Grandfather (Continued)

In Mr. Drake's case, at a minimum, the complaint must include a statement indicating why he believes the federal district court has jurisdiction, a statement showing why he has a valid claim against Ms. Small, and finally what relief he would like the court to grant him. After considering all of these issues, Kendall drafted the complaint that appears in Exhibit 5-2. Locate each of these items in the complaint.

This sample complaint has only one **count**, or basis for the lawsuit: the negligence of Ms. Small. If the facts were different, however, the plaintiff could have alleged more than one basis for his lawsuit. For example, in Mr. Drake's case, if he did not know whether Ms. Small was simply being careless or had actually intended to hit

Philip expressly to cause Mr. Drake's suffering, the complaint could include a count for the intentional infliction of emotional distress, as well as one for negligence. This is known as **pleading in the alternative**.

Count
In a complaint, one cause of action.

Pleading in the alternative
Including more than one count in a complaint; the counts do not need to be consistent.

DISCUSSION QUESTION

7. Does it seem fair to you that plaintiffs should be allowed to plead in the alternative? Why or why not?

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action, File Number _____

Donald Drake, Plaintiff	}	
	}	
v.	}	COMPLAINT
	}	
Wilma Small, Defendant	}	

1. The plaintiff, Donald Drake, is a natural person residing at 56 Bancroft Way, Springfield, Massachusetts.

2. The defendant, Wilma Small, is a natural person residing at 106 Hemingway Lane, Keene, New Hampshire.

3. Jurisdiction of this court is founded on diversity of citizenship. Plaintiff is a citizen of Massachusetts, and defendant is a citizen of New Hampshire. The matter in controversy exceeds, exclusive of interest and costs, the sum of seventy-five thousand dollars.

4. On September 1, 2025, while the plaintiff was walking on the sidewalk along a public way called Bishop Street in Springfield, Massachusetts, the defendant negligently drove a motor vehicle onto the sidewalk where the plaintiff's grandson, Philip Drake, was walking approximately thirty feet ahead of the plaintiff.

5. As a result of the defendant's negligence, the plaintiff's grandson was struck by the defendant's motor vehicle and instantly killed. The plaintiff viewed the entire accident.

6. As a direct result of viewing the death of his grandson, the plaintiff suffered a heart attack, great physical pain, mental suffering, and expenses for medical attention and hospitalization in the sum of one million dollars.

WHEREFORE the plaintiff demands judgment against the defendant in the sum of one million dollars, interest, and costs.

Plaintiff demands trial by jury.

Dated: _____ _____

Pat Harper BBO#098467
333 Main St. Springfield, MA
01009413-787-9999

Exhibit 5-2 Complaint

If a paralegal has drafted the complaint, the supervising lawyer must carefully review and sign it. In some states, there is a final requirement that the client verify the complaint. A **verification**

consists of an affidavit signed by the client indicating that he or she has read the complaint and that its contents are correct.

Verification

An affidavit signed by the client indicating that he or she has read the complaint and that its contents are correct.

Finally, the lawyer or paralegal will file the complaint with the court, which officially begins the lawsuit. Traditionally, filing pleadings and other legal documents involved delivering a hard copy to the court clerk's office during regular business hours. However, through **electronic filing, or e-filing,** the federal courts and many state courts now allow, or even require, pleadings and other documents to be submitted electronically.

Electronic filing (e-filing)

The filing of court documents over the Internet as electronic files.

In the federal courts, it is the **Case Management/Electronic Case Files (CM/ECF)** system that allows for the filing of electronic documents and the maintenance of the case docket. The CM/ECF system uses standard computer hardware, an Internet connection, and a browser, and requires that documents be submitted in **Portable Document Format (PDF)**. In addition to allowing lawyers to file their documents over the Internet 24 hours a day, seven days a week, additional benefits include the reduction of paper, photocopy, postage, and courier costs, and the ability to receive e-mail notices in CM/ECF cases.

Case Management/Electronic Case Files (CM/ECF)

A comprehensive case management system developed for the federal courts, allowing them to receive electronic filings and to maintain case files accessible via the Internet.

Portable Document Format (PDF)

A format that allows a document to be captured and electronic versions to be sent, viewed, and printed consistently across multiple

de vices and platforms. F ederal cour ts r equir e all documents t o be filed in PDF format.

(2) The summons

Befor e a cour t will hear a lawsuit, def endants must receiv e a **notice** that a suit has been filed against them. Cour ts requir e such **ser vice** for reasons of basic fairne ss. Befor e a cour t will hea r a lawsuit, it must be convinced that the def endant has receiv ed pr oper notice that the suit has been filed against him or her . A **summons** is a formal notice to def endants named in a lawsuit informing them that a suit has been filed against them and specifying what the y must do to respond to the allegations contained in the complaint. A separate summons is made for each def endant, and each summons must ha v e a cop y of the complaint attached.

Notice
Being informed of some act done or about t o be done.

Ser vice
The deliv er y of a pleading, subpoena, or other paper in a lawsuit t o another par ty .

Summons
A notice informing the def endant of the lawsuit and r equiring the def endant t o r espond or risk losing the suit.

E THICS ALER T

Although paralegals ma y draft pleadings, the y ma y *not* sign them. To do so would constitute the unauthoriz ed practice of law (ULP).

Case 1: The Distr essed Grandfather (Continued)

In addition to the complaint, paralegal Kendall pr epar ed the summons shown in Exhibit 5-3. This would be ser ved along with a cop y of the complaint to notify the def endant, Ms. Small, of the natur e of the claim.

UNI TED ST ATES DISTRIC T COUR T FOR THE DISTRIC T OF M ASSA CHUSE TTS

Civil Action, File Number _____

Donald Drak e, Plaintiff	}	
	}	
v .	}	SUMMONS
	}	
Wilma Small, Def endant	}	

To the abo ve-named Def endant:

You ar e her eb y summoned and requir ed to ser ve upon Pat Harper plaintiff 's att orne y, whose addr ess is 333 Main St., Springfield, M A 01009 an answer to the complai nt which is her ewith ser ved upon you, within 20 da ys after ser vice of this summons upo n you, ex clusiv e of the da y of ser vice. If you fail to do so, ju dgment by default will be tak en against you for the relief demanded in this complaint.

Witness _____ Esq,
at _____ the _____ da y of
_____ 20 _____.

_____
Clerk of Court

(Seal of Court)

This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Exhibit 5-3 Summons

Traditionally, the plaintiff's lawyer arranges to have a copy of the complaint and the summons hand-delivered to a defendant via a **process server**. On some occasions, proper notice could be satisfied by mailing the summons to the defendant's last known address, publishing copies of it in newspapers of general circulation, or delivering it to a corporation's authorized agent. Registered agents can be found in the corporation's articles of incorporation on the secretary of state's website and should be noted and retained in the file when searching for the legal name of the corporation. Some jurisdictions also allow for electronic service in limited circumstances.

Process server
A person authorized by law to serve legal papers on defendants.

(3) The answer

Upon receiving the summons, the defendant has a designated time within which to file a formal answer to the complaint. This document is called an **answer** because it contains the defendant's answers to the charges laid out in the complaint. In addition, if the plaintiff had not asked for a jury trial and the defendant wanted one, the defendant would have to ask for a jury trial in the answer. Otherwise, the right to a jury trial would be considered waived.

Answer

Def endant' s r eply t o the complaint. It ma y contain statements of denial, admission, or lack of knowledge and affirmativ e def enses.

P RAC TICE T IP

Y ou can sear ch online t o find sheriffs and others who can per form ser vice of pr ocess, but it is much mor e efficient t o k eep a curr ent list in y our addr ess book or computer database.

When reviewing the complaint, notice that each paragraph is number ed, and each alleges only one per tinent fact or con cept. In the answer , the def endant will respond to each of the number ed paragraphs and can choose a combination of responses fr om among the following alternativ es:

- deny the facts that the plaintiff sa ys t ook place,
- admit the facts but asser t that those facts do not pr o vide the plaintiff with a legal r emedy ,
- claim that additional facts giv e rise t o an **affirmativ e defense** ,

  Affirmativ e defense

  A def en se wher eb y the def endant off ers new evidence to a void judgment.

- asser t that the complaint contains pr ocedural def ects,
- bring a claim o f one 's own against either the plaintiff or an other def endant, and
- tak e no action.

These options ar e not mutually ex clusiv e.

(a) D eny the fa cts that the pl aintiff sa ys took place Ms . Sm all will naturally deny as many of the complaint' s allegations as sh e can. She

must be careful, however, to deny only those allegations that she truly intends to dispute. As to the other matters, she must either admit their validity or state that she is without the knowledge to form a belief as to the truth or falsity of these statements.

(b) Admit the facts but assert that those facts do not provide the plaintiff with a legal remedy As suggested earlier, under Massachusetts law it is unclear whether grandfathers can sue for the emotional distress they experience when seeing a grandchild harmed. Therefore, Ms. Small may want to take advantage of the second option, arguing that even if the facts as alleged are true, they do not form a basis for a lawsuit.

(c) Claim that additional facts give rise to an affirmative defense In her answer Ms. Small will also include any affirmative defense that she thinks may reduce or even eliminate her liability. In this case there does not appear to be any such defense, but let us assume the facts were different. Assume that instead of walking down the sidewalk Mr. Drake was driving his car. Assume further that just as he was approaching an intersection, the light turned from green to yellow. He might have had time to stop, but he chose to proceed through the intersection. Ms. Small, speeding toward him from his right, ran her red light and struck his car, killing Philip in the passenger seat. Clearly, Ms. Small was negligent, and Mr. Drake would want to sue her. However, Ms. Small might feel that Mr. Drake was also negligent given these changed facts. Therefore, in her answer Ms. Small would allege the affirmative defense of contributory negligence.

(d) Assert that there are procedural defects in the complaint This option is usually raised through a separate motion. A motion is simply a request made to the court asking for a court ruling on a particular matter. The assertion that the complaint is defective will be discussed later with regard to pretrial motions.

(e) Bring a claim of one's own against either the plaintiff or another defendant The two basic and most common pleadings are

the complaint and answer, but there are other options as well, including a **counterclaim** (a countersuit by the defendant against the plaintiff), a **cross-claim** (a suit by one defendant against another defendant), and a **third-party claim** (a suit by a defendant against someone not originally part of the lawsuit).

Counterclaim

A claim by the defendant against the plaintiff.

Cross-claim

A claim by one defendant against another defendant or by one plaintiff against another plaintiff.

Third-party claim

A claim by a defendant against someone in addition to the persons the plaintiff has already sued.

Figure 5-3 diagrams one example of how these various pleadings might be used in litigation. Here plaintiff Smith sued two defendants, Jones and Brown, by filing a complaint against them. Defendant Jones responded with an answer to the complaint and an additional counterclaim against the plaintiff. Defendant Brown filed an answer to the complaint, a cross-claim against defendant Jones, and a third-party claim against Jim Jackson, someone whom the plaintiff had not named as a defendant in the original complaint.

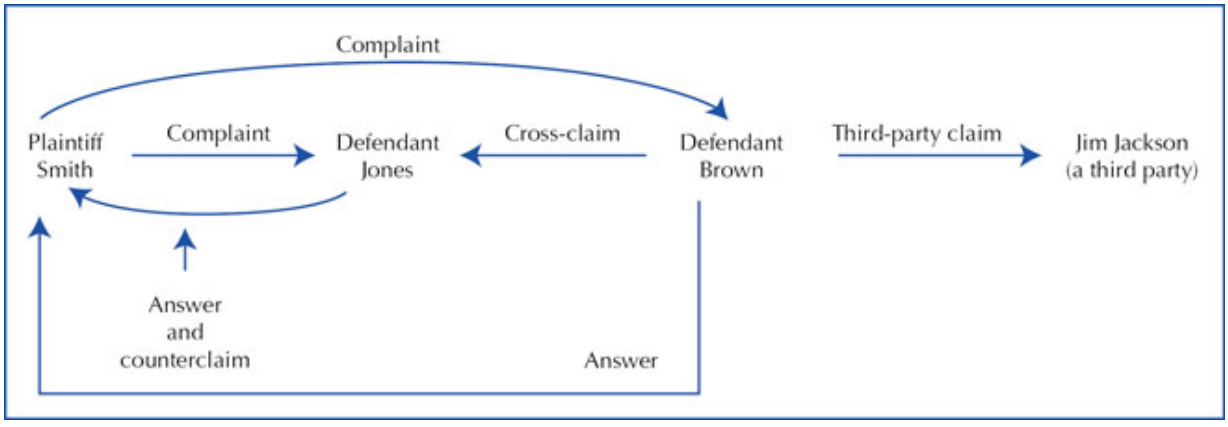

Figure 5-3 Pleadings

In Mr. Drake's case, it does not appear that Ms. Small has any basis for a counter claim. Let us suppose, however, the same altered facts laid out above, in which both Mr. Drake and Ms. Small were driving their own vehicles. If Ms. Small had been injured, in addition to alleging that she does not owe Mr. Drake any money because of his contributory negligence, she might countersue Mr. Drake to try to recover some money from him to compensate her for her own injuries.

(f) Take no action A sixth alternative is simply not to respond at all—that is, not to file any documents with the court. The failure to take any action is viewed as an admission of the allegations contained in the complaint, however, and creates a situation in which the plaintiff can seek a **default judgment**. In a default judgment, the judge awards the judgment against the party who fails to appear in court to contest the matter. While the plaintiff must still convince the judge that the claim is legitimate, the defendant has no right to challenge the evidence presented or to present contrary evidence. Although it is possible to have a default judgment set aside, it is a very difficult task.

Default judgment
A judgment entered against a party who fails to complete a required step, such as answering the complaint.

Ms. Small's answer might look like Exhibit 5-4.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 25-483

Donald Drake, Plaintiff	}	
	}	
v.	}	ANSWER
	}	
Wilma Small, Defendant	}	

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted, as there is no right to recover for the injuries suffered by a grandparent upon seeing the negligently caused death of a grandchild.

Second Defense

1. The defendant has no knowledge as to the allegations in paragraph 1.

2. The defendant has no knowledge as to the allegations in paragraph 2.

3. The defendant admits the allegation in paragraph 3.

4. The defendant admits that the plaintiff was walking on a sidewalk along a public way called Bishop Street in Springfield, Massachusetts, on September 1, 2025. The defendant denies the allegation of negligence contained in paragraph 4. The defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 4.

5. The defendant denies the allegation of negligence contained in paragraph 5. The defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 5.

6. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in

paragraph 6.

Dated: _____ _____

William Smith
886 State St.
Keene, NH 03431
603-787-1111

Exhibit 5-4 Answer

c. Pretrial Motions to End Part or All of the Litigation

Sometimes the parties feel they have grounds for having the lawsuit dismissed without a trial. Therefore, in addition to or instead of filing an answer, the defendant may file a motion asking that the court immediately dismiss the case. A **motion** is a written request directed to the court. Under the federal rules, there are two basic motions that can end part or all of a lawsuit: Rule 12 motions, known as motions to dismiss, and Rule 56 motions, known as motions for summary judgment.

Motion
A request made to the court.

PRACTICE TIP

When going to court, bring clean printouts of all cases that the judge may want to see.

(1) Rule 12 motions to dismiss

Rule 12 outlines the basic types of pretrial motions, as well as how they are presented to the court. This rule offers seven options, such as arguing that the court lacks jurisdiction over the subject matter or over the defendant. But probably the most important of the Rule 12 motions is the sixth, commonly referred to as a **12(b)(6) motion**. This motion states that the plaintiff has failed "to state a claim upon which relief can be granted." If the defendant can convince the court that she has a solid foundation for such a motion, then the court will dismiss the complaint. This means that there will be no trial.

Rule 12(b)(6) motion

A request that the court find the plaintiff has failed to state a valid claim and dismiss the complaint.

In Mr. Drake's case, that would mean that no judge or jury will ever hear about the accident or about Mr. Drake's injuries. Ms. Small's lawyer might very well file such a motion, arguing that, in Massachusetts, trial courts have no right to grant relief to a grandfather who suffers injury upon seeing a grandchild negligently killed.

(2) Rule 56 motions for summary judgment

Another method that lawyers may use to try to end a case before trial is through filing a **Rule 56 motion**, better known generally as a **summary judgment motion.** A lawyer's objective in filing a summary judgment motion is generally the same as that in filing a 12(b)(6) motion—to resolve the case without the need for a trial.

Rule 56 motion (summary judgment motion)

A request that the court grant judgment in favor of the moving party because there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. It is similar to a 12(b)(6) motion except that the court also considers matters outside the pleadings.

One major difference between the two motions is that when faced with a 12(b)(6) motion, the court must make a determination based only on the facts as alleged in the complaint, and it must assume that those facts are true for purposes of deciding the motion. (If the court denies the motion, all parties treat the facts as once again being in dispute.)

In a summary judgment motion, however, the court will consider additional evidence as presented in documents other than the pleadings, such as depositions, answers to interrogatories, admissions on file, and affidavits. Rule 56 provides that if those documents show that

- there is no genuine issue as to any material fact and
- the moving party is entitled to a judgment as a matter of law,
- then the court will grant the motion and enter judgment for the moving party.

Plaintiffs as well as defendants can bring summary judgment motions. The purpose of a trial is to determine the facts. If the facts are already known, there is no need for a trial, and either side can ask the court to determine that there is no need for a trial and to declare it the winner.

Summary judgment motions can also relate to just part of the case. If a judge grants a partial summary judgment, a trial will be held, but only on the issues still in dispute. For example, assume that during her deposition, Ms. Small broke down and admitted that her speeding caused the accident. The court might grant a partial summary judgment in favor of Mr. Drake on the issue of liability but still hold a trial on the issue of what caused his heart attack: a combination of old age and poor eating habits or seeing his grandson die in the accident.

To summarize, the most fundamental difference between Rule 12(b)(6) motions and summary judgment motions is that Rule 12(b)(6) motions are based on just the complaint and the law. Summary judgment motions are based on the complaint, the law, and something else. To illustrate, assume in Mr. Drake's case that case law held that grandparents cannot sue in a situation such as his. If

his com plaint stated that he was Philip 's grandfather , Ms. Small' s lawy er could bring a 12(b)(6) motion ar guing that the case should be dismissed. If, howe ver, the complaint had not included his relationship to Philip, Ms. Sm all' s lawy er could send him a request for admissions. If Mr. Drak e adm itted that he was Philip 's grandfather , Ms. Small' s lawy er could file a summar y judgment motion based on the com plaint, the law , and a cop y of his response in the request for admissions.

(3) Appealing a summar y judgment or motion to dismiss

A cour t's decision to grant a motion to dismiss or a su mmar y judgment is consider ed a fina l decision, and as such is appealable. If the losing par ty convinces the appellate cour t to reverse the trial cour t's decisio n, the case wi ll then be returned to the trial cour t so that the par ties can pr oceed with the litigation. Ha ving an appellate cour t reverse the decision to grant a motion to dismiss or a summar y judgment motion does not mean that the pr evailing par ty will ha ve won on the me rits. All the pr evailing par ty will ha ve won is the right to pr oceed with the litigation.

Case 1: The Distr essed Grandfather (Continued)

Ms. Small' s lawy er filed a sum mar y judgment motion on the gr ounds that Ms. Small owed Mr. Drak e, a grandfather , no duty of car e. The trial cour t granted this motion. Attorne y Harper appealed this decision and convinced the appellate cour t to reverse the trial cour t's decision.

By getting the appellate cour t to reverse the summar y judgment moti on, Mr. Drak e has not yet won his case. He has

won the right to continue with the lawsuit from the point at which the motion for summary judgment was granted.

Legal Reasoning Exercise

3. You are a trial court judge. In each case, would you allow a motion to dismiss, grant summary judgment, or order the case to proceed to trial?

a. The law in your state is that a pet owner cannot recover for the emotional distress she suffers from seeing her pet injured or killed. Sam, a German Shepherd, bit Suzy, a toy poodle, killing her. Suzy's owner, Sarah, sued Sam's owner for the emotional distress she suffered in seeing her dog killed. In the complaint, it stated that Suzy was a dog.

b. Assume the same facts as in a., but also assume that in the complaint, Sarah's lawyer did not indicate that Suzy was a dog, merely stating that Sarah suffered emotional distress when she saw Suzy killed. In an answer to a request for admissions, however, Sarah admitted that Suzy was a dog.

c. The law in your state is that landowners owe a duty of reasonable care to those invited onto their land, but no duty toward trespassers. Tom went onto John's land. Tom tripped over some garden tools that John had left lying outside on his lawn. Tom sued John for the injuries he suffered. In the complaint, Tom admitted that when he was injured, he was trespassing on John's land.

d. Assume the same facts as in c., but also assume that in Tom's complaint, there was no mention of his being a trespasser. When deposed, Tom admitted that he was injured while trespassing on John's land.

e. Assume the same facts as in c., but also assume that in Tom's complaint, there was no mention of his being a

trespasser. When deposed, Tom denied that he was trespassing, and in fact, claimed that he had been invited to John's house to enjoy an evening of playing cards. At his deposition, John denied that he had invited Tom to his house.

f. The law in your state is that an owner of a wild animal is strictly liable for any injuries caused by that animal. Sam kept a pet monkey. One day when his best friend, Jim, came over to his house for lunch, the pet monkey unexpectedly and suddenly attacked Jim, severely injuring him. Everyone agrees to the facts. The only issue is the appropriate amount of money to award Jim to compensate him for his injuries.

d. Discovery

Once the defendant files an answer, each side frequently begins using various **discovery** devices to find out more about the strengths and weaknesses of the other side's case. The purpose of discovery is to help each side find out as much information as possible so that each can fairly evaluate the case and prepare for trial or settlement. The parties seek to discover information about the identification of witnesses, the nature of the testimony that such witnesses can be expected to provide, and the contents of relevant contracts, medical reports, and so forth. Such information is acquired through various discovery tools, including interrogatories, depositions, requests for admissions, motions to produce documents, and motions for physical and mental exams. In addition to making trials run more efficiently, discovery often makes it more likely that the parties can reach an out-of-court settlement.

(1) Interrogatories

Interrogatories are written questions sent by one party in a lawsuit to another party to obtain written answers in return. **Interrogatories** are used to help locate potential witnesses, establish dates,

determine a person's medical or financial condition, and inquire about the existence of documentary evidence. Lawyers frequently ask their paralegals to draft interrogatories. A sample of the types of questions that paralegal Kendall might draft in Mr. Drake's case can be found in Exhibit 5-5.

Interrogatories
Written questions sent by one side to the opposing side, answered under oath.

Note that interrogatories are only sent to parties and may not be served on nonparties. Also, courts usually limit the number of interrogatories that can be sent.

When a law office receives interrogatories directed to its client, the client usually is instructed to write out the answers as fully as possible. A lawyer may then edit these answers and prepare the formal responses, which will be returned to the other party's lawyer. When answers to a firm's interrogatories are received from the other party, a paralegal may help in analyzing and organizing them.

A major advantage of interrogatories is that they are relatively inexpensive to prepare. A major disadvantage is that the answers can be closely reviewed by that person's lawyer or paralegal before they are returned to the party submitting the questions. Other disadvantages include restrictions on the number of interrogatories allowed and on not being able to ask timely follow-up questions.

DISCUSSION QUESTION

8. In addition to the questions raised in the sample interrogatory shown in Exhibit 5-5, what other types of information do you think Kendall attempted to gather through the interrogatories?

(2) Depositions

If a lawyer would like to ask questions of a nonparty, such as the doctor who treated Mr. Drake, or would like to ask questions of either

a par ty or a nonpar ty in person, that lawy er will consider taking a deposition. A **deposition** is sworn testim ony that is ta ken outside the cour troom without a judge being pr esent. Although a judge is not pr esent, ther e is a cour t repor ter who administers the oath and recor ds the testimony . The fo rmat of a deposition is simila r to that of a tr ial, in that one lawy er questions the witness and the opposing lawy er h as an oppor tunity to mak e objections and cr oss-examine the witness.

Deposition

The pr etrial oral questioning of a witness under oath.

UNI TED ST ATES DISTRIC T COUR T FOR THE DISTRIC T OF M ASSA CHUSE TTS

Civil Action No. 25-483

Donald Drak e, Plaintiff	}	
v.	}	PL AIN TIFF'S IN TERROGA TORIES
Wilma Small, Def endant	}	TO WILM A SM ALL

[The in terr ogat ories star t with fairly standar d boile rplate language. Lawy ers use the wor d "boilerplate " to ref er to standar d language foun d in a par ticular type of legal document. In the case of interr ogat ories, the boilerplate language at the beginning sets out basic information such as to whom the interr ogat or y answers ar e to be returned, the deadline for their return, and instructions for answering the interr ogat ories. This language is then followed b y the specific questions.]

1. State y our full name, age, full addr ess, and telephone number .

2. At the time of the events ref err ed to in paragraphs 4 and 5 of the complaint, did y ou ha ve a v alid driv er 's license?

3. Has your driver's license ever been suspended or revoked, and if so, state

a. When and where it was suspended or revoked;
b. The grounds upon which the license was suspended or revoked.

. . . .

15. During the 24 hours preceding the events referred to in paragraphs 4 and 5 of the complaint, had you consume d any medicines, drugs, or alcoholic beverages of any type, and if so, state

a. The type and amount consumed;
b. The length of time over which the substance was consumed;
c. The names, addresses, and telephone numbers of every person who has knowledge as to your consumption of the substance.

. . . .

Dated: _____ _____

Pat Harper
333 Main St.
Springfield, MA 01009
413-787-9999

Exhibit 5-5 Interrogatories

Depositions can be used to preserve the testimony of a witness when that witness may not be available for the trial (as in the case of a physician), or when the lawyer wants to ensure that the story of the individual being deposed can not be changed. Because a person can be subpoenaed to be deposed, a statement may be obtained from a witness otherwise unwilling to talk to the lawyer or to an investigator. A lawyer is responsible for asking the questions during a deposition.

PRACTICE TIP

Psychological games can often be played regarding the scheduling and holding of depositions. These tactics can involve everything from where the deposition is held to how the room is arranged. If you notice this happening, help your lawyer and client take control. For example, if the chair your client is to sit in has no arms or is otherwise uncomfortable, suggest that the seating arrangement be changed.

NETNOTE

You can find a variety of videos of depositions online from "famous" to "crazy." There are a number of sites that provide information about common basic deposition questions, how to answer tricky questions, and primers. The short YouTube video "2pac interview by judge" is actually a series of clips of Tupac Shakur answering questions in a 1995 deposition and it provides an excellent example of maintaining composure during a deposition and a few examples of the lawyer providing instructions to assist his client.

The advantages of a deposition over interrogatories are that the deposing lawyer is not limited in the number of questions he or she can ask, the **deponent's** answers are usually more spontaneous, the deposing lawyer can view the demeanor of the person answering the questions, and under certain circumstances, the answers may be used later in a court trial. Because the answers can be used to contradict the deponent's testimony at trial or to show

inconsistencies, lawyers often advise their clients to give honest but not lengthy answers and to treat the deposition questions as they would if they were being questioned while in front of a jury. The major disadvantages are the time and cost involved.

Deponent
The person who is being asked questions at a deposition.

At a minimum, a deposition requires the time and presence of both lawyers, a court reporter, and the deponent. Without a special court order, federal rules limit the number of depositions to ten.

Case 1: The Distressed Grandfather (Continued)

The lawyer representing Ms. Smith arranged for a deposition of Dr. Gary Booth, one of the doctors who treated Mr. Drake after his heart attack.

(3) Requests for admissions

A **request for admissions** is a written document that lists statements regarding specific facts for the other party to admit or deny. Once admitted, a matter cannot be contested. The purpose of the request for admissions is to clarify what is not in dispute, and therefore what will not need to be resolved through a trial. Paralegals frequently draft requests for admissions.

Request for admissions
A document that lists statements regarding specific items for the other party to admit or deny.

(4) Requests for documents and physical examinations

The motion to produce documents is used to obtain documents in the possession of one of the parties. Documents in the possession of third parties can be obtained through a ***subpoena duces tecum***. The motion for a physical examination is usually used in personal injury cases or other situations where the health of one of the parties is at issue.

Subpoena duces tecum
A court order that a person who is not a party to litigation appear at a trial or deposition and bring requested documents.

(5) Electronic discovery

Electronic discovery (or e-discovery) consists of any information stored in electronic form, such as e-mails, voicemails, texts, spreadsheets, documents, social media postings, video, photographs, or location data. E-discovery is no different than for any other discoverable information, but often the sheer amount of it means that producing it can be more challenging.

Electronic discovery (e-discovery)
Information found in electronic form, such as e-mails, voicemails, text messages, photographs, spreadsheets, documents, social media postings, and location data.

Failing to request electronic discovery may be grounds for a malpractice lawsuit or an ethics violation. Consider the relatively routine automobile accident case. Liability seems clear—the defendant ran a red light. However, at issue is the amount of damages that the plaintiff suffered. She claims to have ongoing pain and an inability to return to work. But what if, in an e-mail to a friend, she describes spending last weekend water skiing, or better yet, posts a picture of herself doing so on her Facebook page? Finding that e-mail or Facebook post could make the difference between winning and losing the case.

PRACTICE TIP

E-Discovery: The Paralegal Perspective

by Suzanne A. Wells, Paralegal
Morrison Mahoney LLP
Springfield, Massachusetts

1. **Meet and Confer Conference:** Do not underestimate the importance of the initial meet and confer conference, which is designed to save time, money, and effort. To prepare an attorney for the conference, review the complaint and any information the parties have shared regarding the people involved and the types of documents available. Create a memorandum listing search terms, the format in which documents will be produced, names of people involved, and time frames. Also confer with the client (get permission first) and list the storage devices available to be searched. Using the memorandum you have prepared, the attorney will only need to circle what is agreed upon in order for the e-discovery process to move to the next step: searching the storage devices.
2. **Document Everything:** This is a good practice for a paralegal no matter what the task, but especially in e-discovery. Paralegals should not perform the actual searches, as the individuals who execute the searches may be required to testify. Instead, paralegals should document the searches done by the user of the storage device or the network administrator. To document the searches, create a table identifying the date, the time, the storage device, the search terms, the number of results, and the number of results that were relevant. Update the table as the searches are performed so the information is accurate. Months later, if opposing counsel contends that documents are missing or a search was not

performed on a particular storage device; the table will help to determine if a second search needs to be conducted. The table will also assist the paralegal in writing an affidavit to the court to show that a good-faith effort was made to search and produce relevant information.

3. **Relevance Review:** Usually, the attorney will review the documents to determine what is relevant. However, if there are a substantial number of files, the attorney may ask the paralegal to narrow it down by categorizing the documents:
   a. definitely relevant: communications between the plaintiff and defendant,
   b. not relevant: for example, spam e-mail, such as advertisements that contain the plaintiff's first name, and
   c. possibly relevant: for example, reports to the company president about a similar situation to the one at issue in the lawsuit.

4. **Bates Stamping:** Bates stamp numbering is a useful tool when organizassigns a unique, individual number to each page so that out of the thousands of document pages, no two pages have the same number. This makes it easier to locate documents during depositions, hearings, and trials.

5. **E-discovery Companies:** For really complicated systems involving a variety of storage devices (networks, laptop, desktops, mobile phones, archived information, the cloud), the parties should consider hiring an e-discovery company. E-discovery companies have the technology to perform thorough searches quickly and efficiently, as well as special software to assist the attorneys and paralegals in reviewing each file for relevancy.

6. **Good-Faith Effort:** It is not possible to collect every electronically stored document. Opposing counsel will

> sa y the y want ever ything, but judges, exper ts, network administrat ors, and att orne ys, including opposing counsel, know it is not possible to pr oduce ever ything. The key is to mak e a good-faith effor t to obtain as much of the rele van t electr onica lly st or ed information as possible.

The gr eatest challenge facing those engaged in e-disco ver y is pr esented by the sheer volume of the electr onically st or ed data, which can be o ver whelming. Think about how a single e-m ail can be duplicated many times when the receiv er sends a reply to the sender or fo rwar ds the e-mail to others. Hence, a single e-mail can turn int o hundr eds of " documents. "

D ISCUSSION Q UESTION

9. What key wor ds and sear ch p arameters do you think would be impor tant when cr eating an algorithm to find e-disco verable material in the litigation against opioid manufactur ers and the Sackler family , the owners of Pur due Pharma, a pharmaceutical company whose main drug is Oxy contin, an opioid on which the Sacklers built their $13 billion for tune?

(6) Preser vation of potential e vidence

In addition to the ver y time-consuming pr ocess of reviewing and recor ding usef ul information found either in har d cop y or electr onic format, ther e is the pr oblem of simply getting the documents befor e the y ha ve been either shr edded or deleted. F ederal and state statutes sometimes requir e businesses to keep cer tain types of documents for a set period of time, but absent such a restriction, the documents being sought ma y be lost due to routine, good-faith oper ations of a document ma nagement sys tem. Sanctions ma y apply for willful alteration or destruction of **electronically stored information (ESI)**

once there is a reasonable belief that litigation may arise. It is therefore incumbent upon lawyers to inform their clients that as soon as there is a reasonable belief that litigation may be involved, they must preserve all documents, even those they would otherwise

Electronically stored information (ESI)

Information created, disbursed, or stored in an electronic format.

routinely delete. This is known as a **litigation hold**. If this is not done, and documents are altered or destroyed, such actions can be seen as **spoliation**, the willful destruction or alteration of relevant documents. Sanctions for spoliation can range from the court ordering additional discovery to setting monetary fines to, in extreme cases, instructing the jury that it can infer that the documents would have been harmful to the party that destroyed them or to dismissing the case altogether.

Litigation hold

A requirement that routine alteration or destruction of ESI must stop whenever there is a reasonable belief that litigation may arise.

Spoliation

The destruction or alteration of documents relevant to a case.

Once litigation commences, the lawyers must hold a **meet and confer conference**, at which they develop a proposed discovery plan. The plan may include a **claw-back provision**. Assuming that reasonable methods are used to protect confidential material, a claw-back provision gives the parties a way to retrieve confidential information that they may inadvertently give to the other side.

Meet and confer conference

In federal court, a mandated conference at which the parties must develop a discovery plan.

Claw-back provision

An agreement whereby privileged documents inadvertently produced can be retrieved.

After the parties and the court agree to a plan, the party required to produce ESI must review the thousands (or even millions!) of documents for relevancy and privilege. Sometimes these records are reviewed manually. Other times, because of the sheer volume of material, computer programs can be written to assist with the process. The relevant documents are then given to the requesting party.

(7) Enforcing discovery rights

The parties to a lawsuit are legally obligated to respond to discovery requests. If a party refuses to respond, the opposing lawyer can file a motion seeking a court order requiring the other side to comply with a valid discovery request. A plaintiff's failure to follow such a court order can result in one of the following sanctions: a prohibition against using certain evidence, a dismissal of some counts, and, on rare occasions, a **dismissal with prejudice** of the entire case. A dismissal with prejudice means that the case cannot be refiled.

Dismissal with prejudice
A court order that ends a lawsuit; the suit cannot be refiled by the same parties.

On the other hand, there are limits to the materials that each side must supply. If the judge is convinced that discovery attempts have gone beyond the bounds of reasonableness and amount to an undue burden or harassment, the judge can issue a protective order to allow the party to refuse to comply with certain types of discovery requests.

DISCUSSION QUESTION

10. If you were doing the discovery plan for Mr. Drake, what methods of discovery would you prefer? Why? Would your answer change if you were representing Ms. Small? Why or why not?

e. Settlement or Pr etrial Conf er ence

Due in par t to the information gained thr ough disco ver y, most cases settle ra ther than go to trial. Settlement is a possib ility at any time, even befor e the commencement of a lawsuit, but human natur e being w hat it is, it often seems to happen on the ver y eve of trial. One method for tr ying t o encourage settlement is the pr etrial conf er ence.

Pretrial conference s ar e informal sessions in which the opposing lawy ers meet (usually in the pr esence of the judge) to discuss the case befor e it goes to trial. Such conf er ences focus on the issues to be pr esented at the trial an d encourage the par ties to agr ee to matters that the y ar e not con testing. The y also mak e the trial mor e efficient and encourage out-of-cour t settlements. The hope is that as both sides learn mor e about the str engths and weaknesses of the case, the y will be mor e lik ely to agr ee on the pr obable outcome of a trial, and ther efor e reach a mutually agr eeable accommodation. Such accommodations ar e encouraged because the y ser ve the public inter est b y easing the pr essur e on an o verbur dened cour t system.

Pretrial conference
A meeting of the lawy ers and the judge t o discuss a case prior t o the beginning of the trial.

If the effor ts to settle fail, a trial date is set, and various matters related to how the trial will be conducted ma y be discussed. F or example, in a case inv olving sensitiv e material a lawy er m ay mak e a **motion *in limine***. A mot ion *in lim ine* is mad e to pr event ref er ence to specific information in the pr esence of the jur y. A lawy er might also file a motion requesting that the judge allow inquir y int o ce rtain ar eas during ***voir dir e***, the por tion of the trial durin g which potential jur ors ar e questioned t o determine whether the y ar e fit t o ser ve on a jur y.

Motion *in limine*
A r equest that the cour t or der that cer tain information not be mentioned in the pr esence of the jur y.

Voir dire

An examination of a prospective juror to see if he or she is fit to serve as a juror on a specific case.

2. The Trial

If the case is not settled, then it proceeds to trial. Even if you have never seen a trial in person, no doubt you have watched enough movies and television shows to have a general feeling for how a trial is conducted. You know that there are opening statements by lawyers, testimony by witnesses, closing statements, and verdicts.

While judges, and sometimes juries, play an indispensable role, lawyers play the most visible (and, many would argue, the most important) role during a trial. Under our **adversarial system**, the lawyers are responsible for presenting all of the relevant facts and arguments needed for a neutral judge or jury to reach a proper decision. It is the lawyer's responsibility to serve the client's interests, and the judge's role is limited to that of a neutral arbitrator of the rules. Within certain limits, it is the lawyer who determines what witnesses to call and what questions to ask.

Adversarial system
A system characterized by competing, opposing parties overseen by a neutral decision maker.

Although the majority of lawsuits filed never reach the trial stage, the results of those that are tried influence the results of future settlements. For example, some companies compile and publish reports of recently decided personal injury cases in different areas of the country. When parties learn of the amount of damages being awarded in similar cases, they may see the wisdom of settling their case out of court.

PRACTICE TIP

Trial-related paralegal tasks during the trial stage generally include the following:

- delivering all necessary documents, trial notebooks, and exhibits to the courtroom;
- making travel arrangements;
- arranging any special equipment needs;
- serving subpoenas on all necessary parties;
- assisting with *voir dire*;
- coordinating the attendance of clients and witnesses for testifying;
- handling all documents and exhibits;
- taking notes and observing;
- maintaining contact with the office, court personnel, and witnesses; and
- reviewing the case and presentations for opening and closing statements.

a. The Right to a Jury Trial

Under the Seventh Amendment to the U.S. Constitution, the right to a jury trial extends to most types of federal civil cases. In contrast, each state has defined for itself the extent to which juries are to be available in state courts. Generally, you will find juries provided for, either by statute or by constitution, in criminal cases and in contractual and tort matters exceeding a specific dollar limit. In all of these cases, the right to a jury trial is an affirmative right. It must be requested in the pleadings or it will be considered waived. In most states, you will not find juries in divorce and probate cases.

The basic function of the jury is to resolve the factual, as opposed to the legal, questions raised in the case. Generally, this comes down to deciding how much credibility to give to the often conflicting testimony of various witnesses. When damage awards are called for, the jury must decide how to measure pain and suffering in terms of

dollars and cents. In cases of a bench trial, where a jury is not used, the judge takes over the jury's function in addition to the normal duties of presiding over the trial and resolving the legal questions raised.

Under the common law, a jury consisted of 12 people. However, there is nothing that is constitutionally significant about that number, and 6-person juries have been used in civil cases at both the federal and the state levels. Furthermore, it is not unusual to select 1 or 2 extra jurors as alternates, especially where the trial is expected to last for more than a few days. These alternates sit in the jury box with their fellow jurors throughout the trial and are used as substitutes if regular jurors are unable to continue. An alternate does not participate in the deliberations, however, unless he or she has replaced one of the original jurors.

b. Jury Selection

The first formal step in a jury trial is the selection of individual jurors from a pool. The modern trend is to require almost everyone to serve as a juror. In the *voir dire* process of selecting individual jurors, potential jurors are questioned to determine whether they are fit to serve on the jury for that specific case. For example, a potential juror would be disqualified for having a personal relationship with a party in the case or with one of the lawyers involved. Potential jurors may also be disqualified if they have been exposed to high levels of prejudicial pretrial publicity or if they have been involved in similar lawsuits themselves.

Lawyers use two types of challenges when seeking to prevent specific individuals from serving as jurors. The first is a **challenge for cause**, used when a lawyer wants to convince the judge that something about the person's background or answers demonstrates some type of bias. If the judge agrees, the person will not be seated. The number of such challenges, whether raised or granted, is unlimited. In some well-publicized and highly controversial cases, lawyers have gone through hundreds of potential jurors before arriving at the final 12.

Challenge for cause
A method for excusing a prospective juror based on the juror's inability to serve in an unbiased manner.

The second type of challenge is a **peremptory challenge** that allows a lawyer to have a potential juror removed without giving a reason. Peremptory challenges are limited in number. In deciding whether to use one, lawyers must weigh the risk of having to accept a worse juror later if they have exhausted their limited supply of peremptory challenges.

Peremptory challenge
A method for excusing a prospective juror in which no reason need be given.

Although lawyers need not give a reason for why they used a peremptory challenge, they cannot dismiss jurors based on race. In *Batson v. Kentucky*, the U.S. Supreme Court held that to purposefully exclude members of the defendant's race is to deny defendants their equal protection rights.[13] Most recently, in *Flowers v. Mississippi*, the Supreme Court applied this principle to a case involving a Black defendant who had been criminally prosecuted for murder in six separate trials. At his sixth trial, he was found guilty and sentenced to death. He appealed, arguing that the state had engaged in racial discrimination when using its peremptory challenges. The Supreme Court set out what it viewed as the four critical facts that required reversal.

> First, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court. Second, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. Third, at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in

dramatically disparate questioning of black and white prospective jurors.[14] Fourth, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State. We need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not "motivated in substantial part by discriminatory intent." In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.[15]

PRACTICE TIP

Today, some professionals specialize in jury selection analysis. However, if your firm cannot afford such a professional, you can perform many of the same functions by sitting at the counsel table with your supervising lawyer and helping spot potential problems. Make sure to keep track of the peremptory challenges. There are apps that can assist with *voir dire*, or you can use a paper system. Write a table to add each juror as they are seated, and two numbered lists where you can record the peremptory challenges of each side.

DISCUSSION QUESTIONS

11. Many people argue that lawsuits have become too complex for the average juror. Do you think there are certain types of lawsuits

wher e the jur y should be co mposed only of exper ts in that field? Should jur y trials be eliminated entir ely in some ar eas of the law?

12. Jur y exper ts work under th e theor y that cer tain types of people will be lik ely to fa vor one side o ver the other . F or ex ample, in a medical malpr actice case, one person ma y lean towar d the doct or, wher eas other s will fa vor the patient. Can you think of any gr oups that you could characteriz e in this wa y? Do you think this is a valid appr oach t o choosing a jur y? E ven if v alid, should it be used?

13. In the Johnny Depp-Amber Hear d trial, the jur y was not sequester ed and walk ed past vocal Johnny Depp suppor ters as the y enter ed the cour thouse ever y da y. The judge ask ed them not to read or speak to their families abo ut the case. Do you belie ve that none of the jur ors read about the case, watched any social media, or spok e to any one about the case? In public cases lik e this, do you think that jur ors ar e able to come to a ver dict without thinking abou t how their ver dict will appear on social media?

14. In the United K ingdom, jur or s ar e not allowed to talk about the ver d ict after a trial. In the United States the y ar e not allowed to talk abo ut the pr oceedings du ring the trial, but after the trial the y can speak about it or even write a book. How might the diff er ent appr oaches influence how jur ors act during a trial?

c. Opening Statements

Once the jur y is selected, the lawy ers mak e opening statements, in which the y outline the evidence the y hope to pr esent. The plaintiff 's and def endant' s lawy ers state their theories of the case an d describe, fr om th eir respectiv e points of view , what allegedly took pl ace and to what the y expect the witness es to testify . The jur y is thus pr esented with a framework for viewing the upcoming testimony .

Because the plaintiff has the bur den of pr o ving his or her case, the plaintiff 's lawy er pr esents the first opening ar gument. In most cases, the def endant' s lawy er mak es an opening statement im mediately following that of the plaintif f's lawy er. At other times, th e def ense waits until the plaintiff 's lawy er has finished pr esenting the plaintiff 's witnesses and exhibits and the def ense is about t o pr esent its case.

PRACTICE TIP

When accompanying your supervising lawyer to court, you need to bring three essential items with you: (1) a list of the witnesses, along with their phone numbers (if a witness unexpectedly fails to appear, you can call and try to solve the problem); (2) a pin of the courthouse that you can send as a message to someone's phone or written directions to the courthouse and parking instructions that you can read over the phone to any missing witness; and (3) a cell phone.

d. Presentation of Evidence

After the opening statements, the plaintiff's lawyer presents evidence in the form of witness testimony and exhibits. The exhibits consist of such things as medical records, accident reports, videos, and photographs. Exhibits can only be introduced through witnesses. For example, accident reports are generally admitted through the officer who wrote the report. Specific rules of evidence dictate what types of evidence can be admitted and the manner in which witnesses can be questioned.

In considering evidence, it is essential to be aware of the difference between facts and opinions. When a witness testifies that he saw the defendant's automobile strike the plaintiff's car broadside, he is testifying about a fact he observed. But when that same witness says the defendant was driving too fast for the icy condition of the road, he is stating an opinion. Generally, only expert witnesses, such as doctors and police officers, can testify as to their opinions, which they have formed based on their expert knowledge.

In conducting the **direct examination** of a witness, a lawyer usually cannot ask leading questions. A **leading question** is one that suggests the answer. For example, "Wouldn't you say the defendant appeared to be very angry at that point in time?" is a leading question.

Direct examination

The questioning of your own witness.

Leading question

A question that suggests the answer; generally, leading questions may not be asked during direct examination of a witness.

Once the plaintiff's lawyer has completed questioning a witness, the defendant's lawyer may cross-examine that same witness. The **cross-examination** clarifies any potentially misleading statements or half-truths and sometimes attacks the credibility of the witness. For example, the defense lawyer may attempt to bring out possible biases or the inability of witnesses to have seen clearly what they claim to have seen. On cross-examination, a lawyer may ask leading questions; however, the lawyer may not ask questions on a new topic.

Cross-examination

The questioning of an opposing witness.

The defendant's cross-examination is then followed by redirect examination, where the plaintiff's lawyer has the opportunity to ask additional questions of the witness to rehabilitate the witness after the defense's attack on the witness's credibility. These questions cannot be used to raise new subjects or to explore topics that were not covered as part of the cross-examination. The redirect is then followed by an opportunity for recross-examination by the defendant's lawyer, but that must, in turn, be limited to topics raised during the redirect. At that point, the witness is finally excused, and the plaintiff's lawyer then proceeds to call the next witness.

Throughout the process of questioning witnesses and presenting evidence, the lawyers must keep in mind that appellate courts usually require them to raise appropriate objections at the proper times during the trial. Practically, a lawyer will often simply state, "Objection," at the point at which the opposing lawyer or a witness makes a remark, without stating the basis for the objection. If it is a common objection and the basis for it is obvious, the judge will rule

immediately . If the natur e of the objection is not immediately clear , the judge will ask the lawy er to explain the reasons for the objection befor e either sustaining or overruling it. In some situations, the judge ma y ha ve the jur y remo ved fr om the cour troom while the lawy ers mak e th eir ar guments about the objection. After the judge has made a ruling on the objection, the jur y will be returned to the cour troom, and the examination of the witness will continue. A lawy er cannot complain later to an appe llate co ur t about something that he or she did not complain about at the pr oper time t o the trial judge.

This requir ement places additional pr essur es on the trial lawy er. A car eless or incompetent lawy er can simultaneously destr oy the client' s chances to win at the trial le vel and to successfully appeal an adv erse decision. Lawy ers w ill mak e objections for the recor d, even when the y do not expect the trial judge to accept them. This is sometimes ca lled "pr otecting the recor d" or "making a recor d for appeal. "

After the plaintiff 's lawy er has finished calling witnesses and pr esenting evidence, the def ense has its oppor tunity . Befor e this occurs, it is not unusual for the def ense lawy er to mo ve for a **directed v erdict** . This motion requests that the judge end the trial at that point and find in fa vor of the def end ant on the basis that the plaintiff 's side failed to meet its obligation of pr esenting a *prima facie* case suppor ting its position. The judge will enter a dir ected v erdict if the judge conclude s that the plaintiff 's evidence is so weak that even consider ed in its most fa vorable light (without considering any rebuttal eviden ce fr om the def endant), it is not sufficient as a matter of law t o merit a v er dict in the plaintiff 's fa vor.

Directed v erdict

A v er dict or der ed b y a trial judge if the plaintiff fails t o pr esent a *prima facie* case or if the def endant fails t o pr esent a necessar y def ense.

Case 1: The Distr essed Grandfather (Continued)

Mr. Drake's lawyer made sure that she presented evidence on each element of negligence. Those four elements are duty, breach, cause, and harm.

It is the plaintiff's responsibility to present a *prima facie* case. If attorney Harper had inadvertently omitted one of the necessary elements, the court could not find a basis for the negligence claim, and a directed verdict in the defendant's favor would be appropriate.

If the court grants the motion for a directed verdict, the trial is over. However, it is very unusual for a judge to accept a motion for a directed verdict at this point in the trial.

Typically, the judge denies the motion, and the defense lawyer goes on to present his or her witnesses. The same process of direct, cross, redirect, and recross is used. The defense strategy involves presenting evidence that contradicts evidence presented by the plaintiff and possibly attempting to raise a legally accepted defense for that particular type of case.

Once the defendant's case is complete, the plaintiff can ask for a directed verdict on the basis that even if the defendant's evidence is taken in its most favorable light, it would be insufficient to rebut the plaintiff's case. If the judge denies this motion, as is usually the case, the plaintiff can present witnesses who will attempt to rebut the testimony and evidence presented by the defense. After that, either side can again renew its motion for a directed verdict. If these motions are again denied, both sides then give their closing arguments.

Discussion Questions

15. Do you agree with the rule that only experts should be allowed to state their opinions? Why should it matter if a witness who saw Ms. Small stumble just before she entered her car testifies that "Ms. Small was drunker than a skunk"?

16. One of the all-time famous leading questions is "So, when did you stop beating your wife?" What is the problem with asking a witness this type of question during direct examination?

17. Do you think that the party that goes first has an advantage or disadvantage at trial? Why?

e. Closing Arguments

Perhaps the most dramatic part of any trial is the closing arguments. Here, the lawyers review and interpret the evidence in its most favorable light and develop emotional appeals. Closing arguments are their final chance to persuade the jury. Although both the plaintiff and the defendant receive equal time, in some states the plaintiff has the advantage of splitting the time and speaking both first and last. The plaintiff is given this advantage because the plaintiff also has the burden of proving their case.

f. Jury Instructions

Before sending the jury members out to deliberate, it is the judge's responsibility to properly instruct them about the nature of their duties and the requirements of the law. The jury's duty is to determine the facts and then apply the requirements of the law to those facts. However, the jury is composed of a group of lay persons who do not know what the law requires. Therefore, it is the duty of the judge to explain the law in terms the jury can understand.

Rather than starting from scratch and risking reversal for failing to include some key element or for explaining some concept in a misleading way, judges frequently rely on **pattern jury instructions**. These are collections of instructions that have already been tested on appeal in other cases. The lawyers in the case also have the opportunity to submit instructions that they would like to see included. The judge then reviews their submissions and often discusses the issues with the lawyers in chambers before deciding which instructions to give.

Pattern jury instructions
A set of standardized jury instructions.

DISCUSSION QUESTION

18. In a seven-month trial on a complex corporate issue, the judge did not instruct the jury before or during the testimony. After the lawyers' presentations concluded, and before asking the jury to reach a verdict, he read to the jury the 81-page jury instructions, a process that took several hours. He refused to provide the jury a written copy of the jury instructions. This is an example of the language used in the jury instructions: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of supply and demand between the product itself and the substitutes for it." The defendant appealed, arguing that the jury instructions could not be understood by a reasonable jury.[16] Do you think that the appeal was successful? Why?

g. Jury Deliberations, Verdict, and Judgment

Once they have been properly instructed, the jurors retire to a special room where they deliberate in private until they reach their **verdict**, or they report they cannot reach a consensus and the judge declares a **mistrial**. In most cases, the jurors must come to a unanimous agreement regarding the verdict, although some states have provisions for less-than-unanimous verdicts in certain types of cases.

Verdict
The opinion of a jury on a question of fact.

Mistrial
A trial ended by the judge because of a major problem, such as a prejudicial statement by one of the lawyers.

Usually, evidence is presented at the trial regarding the question of liability and the amount of damages. If the jurors find that the defendant is liable, they next consider the amount of damages. In some cases, however, a bifurcated trial is held. During the first phase of such a trial, the jury hears testimony regarding liability and then deliberates on that issue alone. If the jury finds the defendant liable, the trial enters a second stage, in which the jury hears evidence about the nature of the damages. The jury then deliberates regarding the amount of damages to award.

Once a verdict is reached, the court enters its official **judgment** regarding the rights and obligations of the parties involved in the case, and the clerk enters it into the record. Usually, if the losing party does not appeal within a specified time period, the judgment automatically becomes effective. If the losing party does appeal, the court stays the judgment until the appellate court reaches its decision.

Judgment
The decision of the court regarding the claims of each side. It may be based on a jury's verdict.

h. Posttrial Motions

After the verdict has been announced, the losing party has a certain time period within which to file posttrial motions. The most common motions are a motion for judgment notwithstanding the verdict and a motion for a new trial.

The motion for a **judgment notwithstanding the verdict,** also known as a **judgment N.O.V.** (judgment *non obstante veredicto*), is a request to the judge to reverse the jury's decision on the basis that the evidence was legally insufficient to support its verdict. If the judge grants the motion, the case is over and the moving party has won.

Judgment notwithstanding the verdict (judgment N.O.V.)
A judgment that reverses the verdict of the jury when the verdict had no reasonable factual support or was contrary to law.

A lawyer usually bases the **motion for a new trial** on the assertion that some procedural error has tainted the outcome. The losing party might argue, for example, that some piece of evidence was admitted that should not have been admitted, or that someone made improper contact with a juror on the case. If the court grants the motion, the case has to be retried.

Motion for a new trial
A request that the court or der a rehearing of a lawsuit because irregularities, such as errors of the court or jury misconduct, make it probable that an impartial trial did not occur.

Both motions are frequently made but seldom granted. Nevertheless, they are important because they may be necessary to preserve the client's right to appeal to a higher court. The trial court must be given every possible opportunity to correct its own errors before the appellate courts intervene, a principle known as **exhaustion**.

Exhaustion
The requirement that appellate courts intervene only after the trial court has had an opportunity to correct its own errors.

3. The Appeal

"I'll take my case all the way to the Supreme Court" is a battle cry that has been echoed by many concerned litigants. No one likes to lose, and there are few lawyers who have not dreamed of arguing a case before the U.S. Supreme Court.

On the other hand, appeals consume time and money. The client's initial desire for appeal often pales because of the costs involved. Cases often settle after the verdict. In fact, they may settle for far less than the verdict because of the time and cost of the appellate process. In addition, the option to appeal may be very limited, or even nonexistent. If the lawyer did not make the correct objections during

the trial, or if the client's case did not involve any questions of law, there will be no basis for an appeal.

a. The Timing and Filing of the Appeal

A case cannot be appealed until a final judgment has been entered. A court can grant a final judgment after a jury verdict, but also after a motion to dismiss, a summary judgment motion, a motion for a directed verdict, or one of the posttrial motions. The party wishing to appeal must file a notice of appeal within a specified time period after the final judgment is entered.

The side bringing the appeal, the appellant, files an **appellate brief**, which explains the facts of the case, lists the relevant statutes and court cases, and then presents legal arguments for overturning the lower court's decision. Then the other side, the appellee, files its brief. Finally, the appellant has the opportunity to file a reply brief in response to the appellee's argument and to any new authorities cited in the appellee's brief.

Appellate brief
A formal written argument to an appellate court, in which a lawyer argues why that court should affirm or reverse a lower court's decision.

b. The Scope of the Review

When an appellate court considers a case, it does not conduct a new trial. It simply reviews the official record of the proceedings at the trial court. Moreover, it limits its review to specific appealable issues, for which the party appealing the case must have laid a proper foundation at the trial level.

As you know, appellate courts typically only consider legal issues. Recall that legal issues involve the interpretation and application of the law; factual issues involve the determination of whether a given event took place as alleged.

Sometimes, howe ver, appellate cour ts ar e ask ed to re view a trial cour t's findings of fact. When the y do so, it is on a ver y limited basis. Generally , appellate cour ts will resolv e conflicts in the testimony and questions of the cr edibility of the witnesses in fa vor of the trial judge 's position. The y cannot disr ega rd a trial cour t's findings of fact unless the y determine that the findings wer e **clearly erroneous** . Th is means not simply that the appellate cour t would ha ve found other wise, but that the appellate cour t is convinced that the trial cour t made a mistak e, as, for example, whe n the trial cour t did not base its findings on sufficient e vidence.

Clearly erroneous

The standar d used b y appellate cour ts when r eviewing a trial cour t's findings of fact.

Howe ver, when an appellate cour t re views legal issues, it giv es no def er ence to the trial cour t's findings but rather mak es its own independent re view . A legal issue might inv olv e review ing a trial judge 's interpr etation of a sta tute or legal document, such as a will or a lease. Similarly , questions about the natur e of the jur y ins tructions and the trial cour t's decision on the admissibility of evidence pr esent legal issues.

If th e appellate cour t decide s that the trial judge made a legal err or, it must d etermine whet her that err or was pr ejudicial or mer ely harmless. Err ors ar e defined as pr ejudicial when the y pr obably aff ected the results. **Harmless error s** ar e err ors so minor and peripheral that the y had no significant eff ect on the outcome. Only pr ejudicial err ors ar e consider ed t o be **re versible error s** .

Harmless error

A trial cour t err or that is not sufficient t o warrant r eversing the decision.

Re versible error

An err or made b y the trial judge that is sufficiently serious t o warrant re versing the trial cour t's decision.

Examples of harmless errors include (1) a mistake in the pleadings if the facts can be determined at trial; (2) errors in jury instructions, unless there is reason to believe that they actually misled the jury; and (3) the failure to strictly follow the rules of evidence in a bench trial, as it is assumed a judge is unlikely to be affected by incompetent evidence.

Finally, sometimes an appeal is based on a challenge to a trial judge's decision as to court procedure or how the case should be managed. Examples include permission to amend a complaint, denial of a request for a continuance, imposition of sanctions for filing an improper pleading, and the awarding of prejudgment interest. Because these types of decisions are generally left to the discretion of the trial judge, appellate courts review them using an abuse of discretion standard. They will reverse a trial court only if the appellant can prove the judge committed a clear error of judgment, lacked the authority to act, or acted with prejudice or malice.

c. Oral Arguments

Depending on the rules of the particular appellate court, the court may hear oral arguments on appeal. During oral arguments, the lawyers present their clients' positions. The court gives the lawyers a limited time to speak, often no more than 20 minutes, and the judges frequently interrupt the lawyers with questions. The purpose of the questioning is to probe weak points in the argument and to explore the implications of the lawyer's line of reasoning.

NETNOTE

The U.S. Supreme Court website makes available all oral arguments made before the Court in audio and transcript form at *supremecourt.gov/oral_arguments/oral_arguments.aspx*.

d. The Decision and Its Publication

With or without the benefit of oral argument, the judges study the matter until they reach a decision by majority vote. Usually, the case is assigned to one of the judges in the majority to prepare the official opinion of the court. The other judges on the court have the right to prepare either concurring or dissenting opinions. You will recall that in a concurring opinion, the judge agrees with the outcome but disagrees with the reasoning in the official opinion. In a dissenting opinion, the writer disagrees with both the outcome and the reasoning. The court's decision is then published in the appropriate **reporters**, law books that contain all of an appellate court's opinions.

Usually, the appellate decision is either to **affirm** the lower court's action or to **reverse** and **remand** (return) the case to the lower court for reconsideration. Sometimes, based on the nature of the case, a new trial is not needed to supplement the factual record. Then the judges may simply enter a final judgment based on the existing record.

Affirm
When a higher court agrees with what a lower court has done.

Reverse
When the litigants appeal a lower court decision and the higher court disagrees with the decision of the lower court.

Remand
When an appellate court sends a case back to the trial court for a new trial or other action.

e. Further Appeals

Depending on the court structure and the nature of the case, the party that loses at the appellate level may have the option of appealing to yet a higher-level appellate court. The general rule, however, is that there is only one right of appeal. A second appeal to a

higher court is usually discretionary rather than a matter of right. The judges on the higher appellate court choose to hear only the cases that they believe have the greatest judicial significance. For example, to have a case heard by the U.S. Supreme Court, the losing party must first petition the Court and request that it grant a writ of *certiorari*. In support of this request, the applicant will file a written brief. The purpose of the brief is not to argue the merits of the case, but rather to convince the Court to agree to hear the case. Common reasons are the importance of the case for others beyond the immediate litigants and the need to resolve conflicts among the circuits.

For example, for many years, the federal courts of appeals were reaching different results in sexual harassment cases. Some courts of appeals thought such situations were covered by Title VII but others disagreed. In a federal system, leaving such a conflict unresolved is obviously undesirable, as the outcome of a case would vary based on where it was brought. Eventually, the Supreme Court agreed to hear a case involving sexual harassment, and it resolved the issue by deciding that such situations are covered by Title VII. [17]

If the Court grants the petition for a writ of *certiorari*, the litigants will then file briefs arguing the merits of the case. However, the Court denies most petitions for *certiorari*.

Most state courts follow a similar procedure. If the higher appellate court accepts the appeal, the parties file new briefs and the process described above begins all over again.

PARALEGAL PROFILE

Carolyn Pitts

I work for the lead partner in a 13-attorney law firm in Central Illinois. While the attorneys in our firm practice in a wide range of legal matters, I work exclusively in litigation, which I really enjoy. I have a great deal of variety in my day-to-day activities. For instance, on any particular day, I might be researching and writing a memorandum, finding and speaking to an expert for a case, drafting an appellate court brief, or speaking with witnesses or potential clients. Under my supervising attorney's review, I write proposed opinion letters, correspondence to clients, and settlement demand letters. I draft complaints, read and summarize the medical records for a personal injury client, answer discovery requests, and write interrogatories and requests to produce to be sent to the opposing party. I help prepare for depositions by collating the appropriate documents and listing potential questions for the attorney to ask.

After my supervising attorney reviews my work, it sure feels good if he reads something I have written and offers no corrections or changes. I have even had the privilege of being the "second chair" with my attorney in several medical malpractice trials.

Litigation remains my favorite area of the law because I like the problem-solving aspects of it. There have been times when we have had to develop a new legal theory or adapt an existing concept to fit the particular factual circumstances of a case, and my attorney has enough confidence in my critical thinking skills to bring me in to brainstorm the theories with him, and then to find case law to support the theory. I find tremendous satisfaction in doing my part to "right the wrongs" of the world, even if it is for only one person at a time.

While computer skills are paramount, my view is that one of the often-overlooked attributes of a valued paralegal is curiosity. Asking "why" or "what if" at every stage of the case can have tremendous payback, both in keeping your skills relevant, as well as in assisting the attorney to achieve the best outcome for the client. It also pays to become involved in your local and national paralegal associations. I have learned so much from other paralegals and have made not only lasting connections but also friendships.

SUMMARY

When people have a dispute they cannot settle themselves, they typically turn to the courts to have a judge or jury settle it for them. This process of using the courts is referred to as litigation. Because it is such a complex, time-consuming, and expensive way of settling disputes, people are increasingly turning to various forms of ADR.

The most common types of ADR are arbitration and mediation. Increasing numbers of courts are requiring litigants to try different types of mediation before they allow a case to come to trial. Many business contracts include provisions for mandatory arbitration.

In some circumstances, it may be necessary to exhaust administrative remedies prior to filing a lawsuit. Adjudicatory hearings in administrative agencies follow the general outline of a civil trial, but they are less formal and do not involve as many due process protections. A hearing officer presides over the hearing, acting much as a judge would. Although it is relatively easy to get evidence admitted into the record, the hearing officer has a great deal of discretion over the weight given to that evidence. Once all avenues of appeal within an agency have been exhausted, a party can often seek review within the judicial system.

The three main stages of litigation are pretrial, trial, and posttrial. In the pretrial stage, the parties use pleadings, discovery, and pretrial conferences to identify the facts and the legal issues involved in the

dispute. The majority of cases are settled out of court during this stage.

At the trial stage, the parties present their evidence to either a judge or a jury. The rules of evidence dictate the form in which the evidence must be presented and what types of questions witnesses can be required to answer. Following the trial verdict, the losing party may challenge the trial court's decision in an appellate court.

REVIEW QUESTIONS

Pages 93 through 110

1. What are the most common forms of ADR, and how do they differ from each other?
2. What types of disputes are best suited to resolution through ADR? Which are least appropriate?
3. What do the proponents of ADR see as the advantages of ADR over traditional litigation?
4. What are the three basic stages of civil litigation?
5. What are five common tasks for a paralegal during the pretrial period?
6. What issues have to be considered in deciding who should be sued?
7. How does a class action lawsuit differ from one brought by and on behalf of one individual?
8. If someone says that a particular court does not have jurisdiction over a lawsuit, what is meant by that?
9. What is the difference between jurisdiction and venue?
10. What is the difference between subject matter jurisdiction and personal jurisdiction?
11. What is the purpose of requiring litigants to first exhaust their administrative remedies?
12. How does an administrative hearing differ from a civil trial?

Pages 110 through 118

13. What is the purpose of each of the following pleadings:

a. the complaint
b. the answer
c. a counter claim
d. a cross-claim
e. a third-party claim

14. Under the federal rules, what three items must be included in a complaint?
15. What is a caption?
16. Who must sign all pleadings? Why?
17. What is the purpose of a summons?
18. What are the advantages to e-filing?
19. What is the danger to the defendant in failing to answer a complaint?

Pages 119 through 121

20. What are the grounds for a 12(b)(6) motion, and what is its purpose?
21. What is the difference between a 12(b)(6) motion and a summary judgment motion?

Pages 121 through 129

22. What is the main goal of discovery?
23. What are interrogatories and depositions, and how do they differ?
24. Besides interrogatories and depositions, what are the main discovery tools available to the parties?
25. What is e-discovery, and what basic steps are followed in cases involving it?
26. What special challenges does e-discovery present?
27. What is the purpose of a pretrial conference?

Pages 129 through 136

28. What is the function of the jury?
29. What is a *voir dire*, and what is its purpose?
30. What are the differences between a challenge for cause and a peremptory challenge, and what is the function of each?

31. What are the limitations to a lawyer's right to use peremptory challenges?
32. What are five common tasks for paralegals during trial?
33. What do lawyers hope to accomplish in their opening statements?
34. Who presents evidence first, the plaintiff or the defendant? Why?
35. When can either side move for a directed verdict? What is the purpose of that motion?
36. What is the difference between a verdict and a judgment?
37. What is the difference between the motion for a judgment notwithstanding the verdict (judgment N.O.V.) and a motion for a new trial? Give an example of when each could be used.

Pages 137 through 141

38. Describe the limitations on a litigant's right to appeal.
39. What is the difference between a harmless error and a reversible error?

---

1 For a nuanced article on civil settlement rates, the American Judges Association has published a study, "A Profile of a Settlement" by John Barkai, Elizabeth Kent, and Pamela Martin, found at *http://aja.ncsc.dni.us/htdocs/publications.htm*.

2 NFLPA v. NFL, N. 15-1438 (August 4, 2016).

3 584 U.S. 497 (2018).

4 See the discussion of standing later this chapter on page 103.

5 Of course, if the firm chooses not to proceed, then the appropriate document to prepare would be a non-engagement letter. A non-engagement letter should include a sentence informing the client that to be able to continue pursuing the claim with another lawyer, the client should act immediately so as not to lose the right to sue.

6 The one exception occurs in some states where courts are authorized to respond to requests for advice from other governmental bodies.

7 Steve Chapman, No Decision Sometimes Best Decision, The Republican, June 22, 2004, at A9.

8 347 U.S. 483 (1954).

9 Paul E. Wilson, A Retrospective of *Brown v. Board of Education:* The Genesis of *Brown v. Board of Education*, 6. Kan. J.L. & Pub. Pol'y 7 (1996).

10 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

11 Id. at 359-60.

12 Tyson Foods v. Bouaphakeo, 577 U.S. 442 (2016).

13 Batson v. Kentucky, 476 U.S. 79 (1986).

14 One hundred forty-five questions were asked of the five Black prospective jurors and 12 questions were asked of the 11 White seated jurors.
15 Flowers, 588 U.S. 284 (2019).
16 Brooke Group, Ltd., v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
17 Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

2

PAR T
Substance of the Law

Chapter 6

Torts

The risk reasonably to be perceived defines the duty to be obeyed.
Justice Benjamin Cardozo

K. Currier • T. Eimermann • M. Smith

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A Critical Thinking Approach

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Introduction to Paralegal Studies

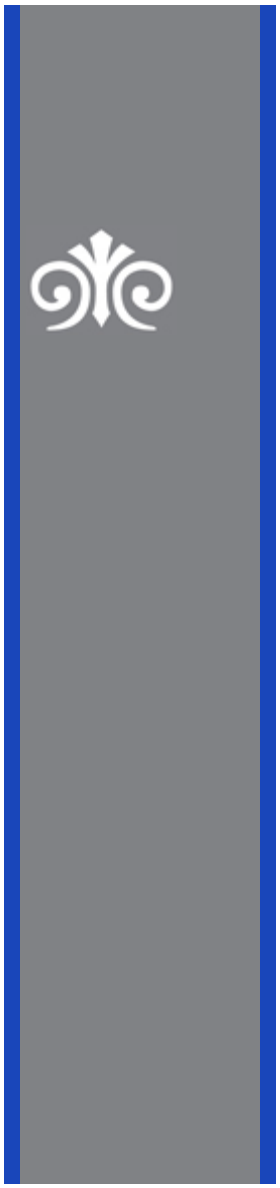
A Critical Thinking Approach

Eighth Edition

Katherine A. Currier
Professor Emeritus, Elms College

Thomas E. Eimermann
Emeritus Professor, Illinois State University

Michelle M. Smith
Associate Professor and Legal Program Coordinator, Washburn University



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To our spouses and children

for their understanding and suppor t

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About the Authors

Katherine A. Currier, J.D., served as the Elms College Paralegal and Legal Studies program director for many years. She developed and taught many law-related courses, including Legal Reasoning, Research, and Writing; Introduction to Legal Studies I and II; Law Office Computer Literacy; Law Office Applications; Interviewing, Counseling, and Negotiating; and Law and Literature. In addition to the three texts she has coauthored with Professor Eimermann, Professor Currier has publications in the areas of legal ethics as applied to paralegals and law office computing.

Professor Currier has been actively involved in the development of undergraduate legal education at both the regional and the national levels, particularly through her work with the American Association for Paralegal Education (AAfPE) and the American Bar Association (ABA) Approval Commission on Paralegals. Professor Currier served on the national board of AAfPE, first as its parliamentarian and then later as the elected representative of four-year paralegal programs. She served many years as the AAfPE publications chair, charged with the final responsibility for overseeing the *Journal of Paralegal Education and Practice* and *The Educator*. Professor Currier frequently speaks at both the AAfPE Northeast regional meetings and the annual AAfPE conferences on topics as diverse as the use of computer shareware, paralegals and the unauthorized practice of law, creative teaching techniques, and conducting legal research on the Internet. Professor Currier also chaired the American Bar Association Approval Commission on Paralegals, the body charged with conducting site visits of paralegal programs that are seeking their initial ABA approval or reapproval. She also served on the Board of

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Directors of the International Assembly for Collegiate Business Education (IACBE), an organization dedicated to promoting excellence in business education.

Prior to teaching at Elms College, Professor Currier taught at Suffolk Law School and Western New England College School of Law. She graduated *magna cum laude* with her B.A. in Political Science from Carleton College, with her M.A. in Political Philosophy from the University of California, Berkeley, and with her J.D. from Northeastern University Law School.

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Professor Smith remains an active faculty member, regularly serving on university and departmental committees, some of which have included faculty search committees, faculty tenure committees, large grant committees, and online task force committees. She has also served on the Faculty Senate and the Honors Advisory Board.

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In addition to this text, Professor Smith has coauthored textbook chapters about ineffective assistance of counsel and victimization of boys. She coauthored a journal article on the ineffective assistance of counsel in *Lee v. United States* and authored an article on the need for diversity in state appellate courts, highlighting the scarcity of former public defenders on the bench.

Prior to teaching, Professor Smith worked as a research attorney from 1998-2014 in the Kansas Appellate Courts, serving in chambers for Judge M. Kay Royse, Justice Carol A. Beier, Justice Fred N. Six, and (now) Chief Justice Marla J. Luckert. In addition, she served as the Kansas Supreme Court Motions Attorney from 2014-2016. She earned her B.A. in English from the University of Alabama in Huntsville and her J.D. from Washburn University School of Law.

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Preface

New to This Edition

This eighth edition keeps pace with many new developments in the law and the paralegal profession. We have added new topics, expanded others, and incorporated discussions of recent court decisions. We have also included new Legal Reasoning Exercises, Discussion Questions, and Review Questions. This edition contains an enhanced discussion of the following topics:

- the expansion of non-lawyers' ability to provide limited legal services directly to the public;
- the role of *stare decisis* and the place of precedent in our legal system;
- the expanded use of Presidential executive orders;
- the importance of the U.S. Supreme Court's use of the shadow docket;
- the takeover of online versus book-based legal research; and
- the increasing role of artificial intelligence, both in legal research and in law office management.

There is also one minor organizational change. We moved Legal Ethics, which had been in Part 1, Paralegals and the American Legal System, to Part 4, Paralegals and the Work World, so that students could first gain a basic understanding of the legal system and the role of attorneys and paralegals in it before tackling the often thorny issue of legal ethics.

Approach

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As the subtitle of this book indicates, it applies a critical thinking approach to paralegal studies. Paralegal studies focus on the functions and duties of paralegals in the American legal system. The critical thinking approach to paralegal studies places great emphasis on the development of analytical thinking skills.

We use this critical thinking approach because we believe it is the best way for students to learn the fundamental principles of law. By learning how to read and interpret statutes, cases, regulations, and court documents, students will be better able to learn how to perform paralegal duties in a variety of specialty areas. Therefore, this book emphasizes careful reading for detail, analytical thinking, and the written presentation of arguments.

Another key element of this critical thinking approach is the interactive nature of the book. We have included Hypothetical Cases, Discussion Questions, Legal Reasoning Exercises, Practice Tips, and Ethics Alerts to stimulate students to think about and discuss the underlying assumptions behind various aspects of the law and the ramifications of different approaches to legal problems. We purposely dispersed these items throughout the chapters for two reasons: so that the students would be encouraged to think about them while the material is fresh from recent reading, and to make them readily available for instructors to use as springboards for classroom discussion. While we did relegate the Review Questions to the end of each chapter, we have labeled them with the pages they cover so instructors can easily assign just part of a chapter with its accompanying review questions.

Organization of the Book

Part 1, Paralegals and the American Legal System, introduces students to the study of law, the organization of the legal system, and the role of paralegals in that system. It includes the classification of different types of paralegals and what they do, as well as coverage of the issues of paralegal education, registration, certification, and licensure. Chapters in this section also cover such topics as sources

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of the law, the different ways in which law is classified, the structure of the courts, and the various stages involved in litigation and alternative dispute resolution.

Part 2, Substance of the Law, introduces readers to the basic concepts involved in the areas of torts, criminal law, criminal procedure, and contracts and the Uniform Commercial Code. It also provides an overview of specialized practice areas, such as business law, employment and labor law, debt collection and bankruptcy, administrative law, immigration, real estate, intellectual property, estate planning and probate, and family law. Part 3, Legal Analysis and Research, contains chapters that build the critical thinking skills students need for reading and analyzing the law. Chapters 11 and 12 cover finding and interpreting statutory law and court opinions. Chapter 13 discusses basic legal research tools with an emphasis on online research and the risks and benefits of AI, and Chapter 14 shows students how to apply research findings to specific legal problems. Chapter 14 also discusses how to use the IRAC approach to legal analysis and how to report research findings in a legal memorandum.

Whereas Part 3 builds skills for finding and analyzing the law, Part 4, Paralegals and the Work World, builds skills related to gathering and managing relevant factual information. Chapter 15 covers the main topics of legal ethics, including client confidentiality, conflict of interest, and the unauthorized practice of law. Chapter 16 focuses on interviewing, while Chapter 17 covers the gathering, preservation, and use of different types of evidence. Chapter 18 introduces readers to case management and the various types of computer programs that attorneys and paralegals can use to manage case information.

Key Features

The many features that set this book apart are

- Chapter Objectives
- Discussion Questions integrated into each chapter
- Legal Reasoning Exercises

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- Mar ginal definitions of k ey terms
- Practice Tips
- Ethics Aler ts
- NetNotes
- Re view Questions
- An appendix on the fundamentals of good writing
- A glossar y that includes defin itions for all bold-faced wor ds and phrases found in the text

Because this book str esses the critical thinking appr oach, we illustrate our points with hypothetical situations and real case decisions that students will understand and to which the y can relate. Discussion Qu estions and Legal Reasoning Ex er cises for ce the students to synthesiz e and analyz e the material, rather than simply regur gitating an answer . The Practice Tips help connect theor etical textbook learni ng to the reality of the work world. The y also pr o vide checklists and other "wor ds of wisdom " regar ding practical paralegal tasks. By bringing the text to lif e, the Discussion Questions, Legal Reasoning Ex er cises, and Practice Tips all help maintain students' attention and aid in students' r etention of the material.

Ethics Aler t bo xes ar e pla ced thr oughout the text to draw attention to the ethical issues inv olv ed in v arious aspects of the law . These bo xes warn students of actions that would be consider ed unethical; the y also giv e advice on how to act appr opriately . NetNotes pr o vide students with handy links t o k ey Internet r esour ces.

Because so much of learning the law inv olv es mastering legal vocabular y, w e ha v e included mar ginal notes containing k ey definitions. The end-of-chapte r Re view Questions also help students reinfor ce basic concepts for students.

Of special note ar e the appendices. Appendix A contains the U.S. Constitution. Appendix B pr o vides students with a conv enient and easy-t o-understand primer on the basics of grammar , including v erb tense, pr onoun agr eement, pl acement of modifiers, punctu ation, and style. A useful summar y of all the NetNotes found in the text is a v ailable on Casebook Connect' s Resour ces page.

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An Instructor's Manual that includes suggested answers for all the Discussion Questions, Review Questions, and Legal Reasoning Exercises, as well as teaching tips, is available to help teachers make the most effective use of this book. Also available are a PowerPoint presentation to assist with classroom lectures and an electronic test bank. Instructors can download these materials on Casebook Connect's Resources page and the Aspen website.

Relationship to the Authors' Other Texts

Those familiar with *Introduction to Law for Paralegals: A Critical Thinking Approach*, and *The Study of Law: A Critical Thinking Approach*, will recognize many similarities to this text. All three books emphasize the critical thinking approach to understanding the law. All three include Discussion Questions, NetNotes, references to ethical questions, and either Legal Reasoning or Critical Thinking Exercises. Topics such as sources of law, classification of the law, structure of the court system, overviews of civil and criminal litigation, torts, contracts, property, and criminal law, and analysis of statutes and cases are covered in all three books.

These books differ in terms of their intended audiences. *The Study of Law* is directed at a more general-education/pre-law audience, and includes a chapter on Constitutional Law not contained in the other two texts. Both the *Introduction to Law for Paralegals* and this text are specifically directed at paralegals. Whereas *Introduction to Law for Paralegals* goes into more detail in its coverage of substantive areas of the law and includes excerpts from actual court opinions, this text provides greater coverage of the role of the paralegal and the types of skills involved in researching, interviewing, investigating, and computerizing case management.

Special Thanks

Naturally, we owe a great deal of thanks to the many students, educators, paralegals, and attorneys who contributed ideas for this

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Intr oduction to
P aralegal Studies

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1

PAR T

Paralegals and the American Legal System

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Chapter 1

Introduction to the Study of Law and the Paralegal Profession

[P]aralegals are capable of carrying out many tasks, under the supervision of an attorney, that might otherwise be performed by a lawyer.
Justice William Brennan

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Chapter Objectives

After reading this chapter, you should be able to:

- Give a commonly accepted definition of paralegal.
- Compare the educational requirements for becoming a lawyer with those of becoming a paralegal.
- List the major professional organizations that have an impact on paralegal education and practice.
- Describe the various tasks that paralegals typically perform.
- Define *stare decisis* and explain why it is important.
- Apply the terms analogous and distinguishable to a fact pattern.
- Explain why the study of law involves more than simply memorizing rules.

INTRODUCTION

The purpose of this text is to help you understand the American legal system and how paralegals and lawyers work within it. People often turn to the legal system for help in planning their affairs. For example, a group of entrepreneurs may seek legal advice regarding the best way to organize a new business, or a young, married couple may come to a lawyer for help with the purchase of their first home. Sometimes, however, people become involved with the legal system because they are in trouble. Perhaps they are facing criminal charges or have been injured in an automobile accident. Their stories illustrate how society has developed a set of rules to help people resolve conflicts they cannot resolve on their own.

Take a few minutes to read the following fact situations involving a distressed grandfather and a harassed student. We will be using their stories, and those of others, throughout this text to help you understand how the legal system works.

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Case 1: The Distr essed Grandfather

Appr oximately one year ago, Donald Drak e and his six-y ear-old grandson, Philip, wer e w alking down a residential road on their wa y home fr om visiting one of Philip 's friends. Philip was walking on the sidewalk appr oximately 30 feet in fr ont of Mr. Drak e. Sudden ly, a car sped past, seemingly out of contr ol, jumped the curb, and hit Philip. Mr. Drak e ran to Philip 's side, but it w as too late . Philip had bee n killed instantly . The driv er of the car , Ms . Wilma Small, was unhur t. Based on skid marks and testimony fr om both Ms. Small and Mr. Drak e, the police inv estigation fo llowing the accident determined that ex c essiv e speed was the cause of the accident.

Mr. Dra ke said that at the time of the accident, his only concern was for the welfar e of his grandson because he himself was cle ar of the danger . Na turally , Mr. Drak e suff er ed a gr eat deal of mental pain and shoc k fr om seeing his grandson killed. While being driv en home fr om the accident, he suff er ed a hear t attack that necessitated a lengthy hospital sta y.

One year later , he still does no t feel completely reco ver ed and often suff ers fr om nightmar es reliving the accident and his grandson 's death. F ollowing the advice of trusted friends, he decided to mak e an appointment at the law office of Darr ow and Br yan to see if he could sue M s. Small to reco ver for his hospital bills, for his pain and suff ering, and for his emotional distr ess.

Case 2: The Harassed Student

W anda Smith, a 20-y ear-old college student, was walki ng past a construction site on campus when se veral of the construction work ers began to whistle and mak e catcalls.

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Wanda did not appreciate being treated as a sex object and greatly resented the way in which these construction workers were behaving. To avoid the construction site, she started taking a longer route to campus, regularly making her late for her contracts class.

After talking it over with a few of her friends, Wanda decided to talk to one of the lawyers at Darrow and Bryan to see if she could take legal action. She did not want other women to have to undergo similar treatment and wondered if she could collect damages for mental suffering.

Keep these two stories in mind as you read this chapter and our explanation of how one goes about becoming a paralegal, how paralegals differ from lawyers, and the types of work paralegals typically do.

A. PARALEGALS AND LAWYERS

While this book focuses on paralegals, you cannot understand or fully appreciate the role of paralegals without also knowing some basic things about lawyers. The terms **lawyer** and **attorney** are generally used interchangeably to refer to a person who has been officially licensed to practice law. However, in some contexts, people use "lawyer" to refer to a person who is authorized to practice law and "attorney" to refer to a job title. Thus, an organizational chart may carry titles such as attorney, associate attorney, enforcement attorney, District Attorney, United States Attorney, or Attorney General.

Lawyer
A person who has been officially licensed to practice law in a state or federal jurisdiction. Also referred to as an attorney.

Attorney
A lawyer; a person licensed by a court to practice law. This term is often used to refer to a job title.

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In the late 1960s, the terms "paralegal" and "legal assistant" began to be used to refer to persons who assist lawyers in ways that go beyond the duties of traditional legal secretaries and file clerks. Because the term **paralegal** is the most common and the most generic, it is the term most often employed in this book.

Paralegal
A person who assists a lawyer and, working under a lawyer's supervision, does tasks that, absent the paralegal, the lawyer would do. A paralegal cannot give legal advice or appear in court, nor can they set legal fees.

The **American Bar Association (ABA)**, the largest national organization for lawyers, defines a paralegal as:

> a person, qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible. [1]

American Bar Association (ABA) ***americanbar.org***
A national voluntary organization of lawyers.

Over half of the states have also developed some form of definition for the term "paralegal." None of the states requires adherence to its definition for employment. Other definitions of paralegal have also been developed by NALA: The Paralegal Association and the National Federation of Paralegal Associations (NFPA). Each association is discussed later in this chapter.

There are differences among these definitions, but all suggest that paralegals perform many of the same tasks normally performed by lawyers. They gather and analyze facts relevant to legal disputes, perform legal research, draft legal documents, prepare witnesses and evidence for presentation at legal proceedings, and even represent clients in some types of administrative hearings. However, even

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though paralegals carry out many of the same tasks performed by lawyers, paralegals are not licensed to practice law. Therefore, they can perform many of these tasks only when working under the supervision of a lawyer. In addition, even then, they are not allowed to give direct legal advice to clients, to represent clients in most types of judicial proceedings, or to set legal fees. [2]

As Karen Decrescenzo explains in her Paralegal Profile, paralegals who are employed by the government, such as in municipal law offices, work in a wide variety of legal areas.

PARALEGAL PROFILE

Karen Decrescenzo

Principal Paralegal/Legal Intern Coordinator
Office of the City Attorney, Civil Division

I work in the office that services all of the legal needs for the city of San Diego. We have approximately 80 attorneys and 20 paralegals.

The attorneys and paralegals in our office work on a wide variety of legal issues. Cases can range from allegations of civil rights violations, to trip and falls, to First Amendment issues regarding sign ordinances, to collections, condemnations, contract disputes—really, anything about which a city can sue or be sued. Working in so many different areas means that the paralegals are called upon to engage in a lot of legal research and writing. Our paralegals particularly enjoy

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working on temporary restraining orders to protect city employees who receive threats from the public, as the paralegals are able to appear in court for the preliminary injunctions, being careful, of course, to announce who they are and why they are there. As anyone who works for a governmental office can tell you, it's not about the money; it's about doing interesting, challenging, and rewarding work.

My advice to students is to say that I cannot stress strongly enough the huge benefits to be gained from joining paralegal associations. It is never too early to join. Students should become active in any clubs on their campus and investigate student membership in their local paralegal association. Through that networking, they will form relationships that will support and enrich them throughout their careers.

DISCUSSION QUESTION

1. Look up the definition for the term "paralegal" on both the NALA (*nala.org*) and NFPA (*paralegals.org*) websites. How do they differ from each other? How do they differ from the ABA's definition? Why do you think they are different?

B. PARALEGALS AND OTHER LAW-RELATED PROFESSIONALS

Traditional paralegals work as employees or independent contractors and are supervised directly by attorneys. Paralegal employers can be found within law firms, corporate in-house law departments, governmental agencies, and nonprofits.

Although the majority of paralegals work in private law firms, corporations also hire paralegals to work in their legal offices to do a variety of jobs in areas such as contracts and negotiations, compliance, intellectual property, project management, and corporate governance. Paralegals also work as courthouse clerks, investigators,

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office managers, legal technology specialists, and directors of nonprofits. Indeed, an exciting area of job growth is developing within nontraditional work settings. Here, we see paralegals taking the skills they have honed and applying them to a variety of non-paralegal but still law-related occupations. These include work as investigators, law librarians, claims representatives, risk management professionals, compliance officers, legal technology specialists, sales representatives for legal software vendors, contract negotiators, and office managers. Even though these positions do not carry the title of paralegal, they require similar skills and aptitudes: namely, an ability to communicate effectively, both orally and in writing; analytical reasoning skills; top-notch research capabilities; and a sense of professionalism.

When paralegals work as independent contractors rather than as employees of law firms or corporations, they may be referred to as freelance paralegals. Freelance paralegals are similar to traditional paralegals in that they also work under the supervision of a lawyer. However, the lawyer supervising the paralegal may differ from one case to the next. Freelance paralegals typically have worked for several years in a more traditional role to gain expertise in an area of the law before becoming independent contractors. Some freelance paralegals are self-employed. Others work for specialized staffing agencies that provide law firms with qualified paralegals to work on a temporary basis, often on unusually large or complex cases.

In her Paralegal Profile, you can read about how Jennifer Lerner used her paralegal training both as a freelance paralegal and in a very nontraditional job setting.

PARALEGAL PROFILE

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Jennifer Lerner

Freelance Paralegal

Although I worked in a personal injury firm while attending school for my paralegal degree, when I graduated, I found I could make more money if I contracted my services than if I remained an employee. Freelance work also enables me to decide what types of duties I want to accept and allows me to work from my home.

I like the variety that can come at you at any time and the unpredictability. I love working with the law because the whole concept of how conflicts arise and then how people go about getting rid of conflict is fascinating. Working as a paralegal teaches you a lot about people. We are in a people business, and what we do changes the lives of people.

I have also worked on a part-time basis to use my paralegal skills in an unusual way. A maritime company was interested in hiring someone to research regulations, to prepare documents for ships coming into port, to ensure that crew members have all required paper work, and to communicate with ships at sea. Even though the company did not start out looking for someone with paralegal skills, during the interview process it became evident that those skills were exactly what they needed, and I got the job.

While traditional paralegals must work under the supervision of a lawyer, some states are developing programs for nonlawyers to provide limited legal services directly to the public. The titles for these

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professionals vary from one state to another, as do the duties that they perform. These programs, developed in response to a growing recognition that there is a tremendous access to justice gap in America,[3] allow nonlawyers to provide certain legal services directly to those who cannot afford a lawyer. Generally, these programs require nonlawyer applicants to meet certain educational or experiential requirements and to take an exam covering their potential area of expertise, as well as legal ethics. And as do attorneys, these nonlawyer advocates may also have to pass a character and fitness investigation and meet continuing education requirements. Most commonly, the areas in which they are allowed to practice involve family law and landlord-tenant issues. These licensed nonlawyers go by various names, such as Legal Paraprofessional (LP) or Licensed Paralegal Practitioner (LPP). As of 2024, seven states had adopted programs allowing for limited licensure of nonlawyers: Arizona, Colorado, Minnesota, New Hampshire, New Mexico, Oregon, and Utah. The hope is that licensed legal paraprofessionals will be able to deliver services at one-quarter to one-half of the rates charged by attorneys.[4]

This expanding role for nonlawyers is controversial, but advocates argue that **legal aid lawyers** and lawyers providing ***pro bono* legal services** have not been able to fully serve the needs of indigent clients who cannot afford the cost of needed legal services. On the other hand, many opponents are concerned about the quality of services nonlawyers could provide and the enforcement of the ethical duties that go with such representation.

Legal aid lawyer
A lawyer who works for a nonprofit or government-funded program to provide free or low-cost legal services.

***Pro bono* legal services**
Free legal services provided to those who cannot pay.

DISCUSSION QUESTIONS

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2. In what areas of the law do you think there would be a role for nonlawyers trained to provide limited legal services?

3. Do you think there are any situations in which nonlawyers, working either independently or under supervision, should be allowed to give legal advice?

Qualifications	Paralegal	Lawyer
Undergraduate education	None required in general (However, an associate's degree is rapidly becoming the minimum acceptable degree for employment; many employers require a bachelor's degree.)	Bachelor's degree [5]
Specialized education	None required (Some employers give preference to graduates of ABA-approved paralegal programs.)	Usually a degree from an ABA-accredited law school [6]
Testing	None required (Some employers give preference to those who pass a voluntary exam administered by one of the national paralegal associations.)	Passage of a state bar exam (Most exams have multistate and state-specific questions.)
License and morals check	None required	Must be licensed

Figure 1-1 Paralegal versus Lawyer Qualifications

C. PARALEGAL EDUCATION

There are significant differences in the qualifications for becoming a paralegal or a lawyer. Figure 1-1 summarizes those differences. Becoming a licensed lawyer generally involves attaining a bachelor's degree, a graduate legal education (normally three years if attending full-time, or four years part-time), passing a state bar exam, and passing a morals or character check. In some states, to be authorized

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to practice law, lawyers must also join their state bar association and fulfill annual continuing education requirements.

In contrast, nothing prevents a person with no college credits and no paralegal training from being hired to work as a paralegal. This is true because currently there are no minimum legal requirements that must be satisfied to be able to work as a paralegal. Nor are there any informal standards universally accepted by all lawyers who hire paralegals. However, as we will discuss below, both lawyer and paralegal organizations have developed recommended educational and credentialing standards.

1. Basic Qualifications

To be an effective paralegal, one must have a great deal of specific knowledge, whether gained through formal education or on-the-job training. In addition to a sound grasp of both substantive and procedural law, an effective paralegal should possess certain intellectual and personality traits.

Because the law is complex and often ambiguous, paralegals must be able to think analytically and logically so that they can recognize and evaluate relevant facts and legal concepts. Paralegals must then be able to effectively communicate their conclusions both verbally and, what is particularly important, in clear, concise prose.

Certain personality traits are also important for success in this field. At times paralegals work closely with lawyers, clients, and members of the public. Therefore, paralegals should be congenial and diplomatic and present a good professional image. At other times, however, they must work long, solitary hours drafting, organizing, or digesting legal documents. These activities require patience, persistence, and the ability to work with minimal supervision. Paralegals should function well in stressful conditions because they live in a world of deadlines and often have conflicting demands placed on their time by lawyers.

Perhaps the most important characteristics for success in the paralegal field are ingenuity and good judgment. The best paralegals

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are innovative and resourceful. Once they understand the nature of the problem, they develop their own solutions. Because they exercise good judgment, they know when to proceed independently and when to bring matters to the attention of their supervising lawyers.

In her Paralegal Profile, Susan Wozniak discusses some of those important traits for a successful paralegal career.

PARALEGAL PROFILE

Susan Wozniak

Paralegal
City of Champaign Legal Department

I am employed as a paralegal for the city of Champaign, Illinois. My primary focus is the administration of the city of Champaign municipal court system. The purpose of this system is to prosecute individuals accused of violating the city of Champaign municipal code. I am responsible for these cases from start to finish. Variety is what makes my position so enjoyable and challenging at the same time. The skill to navigate these varied environments has taken years to acquire.

To be a successful paralegal, a person must be organized, a self-starter, and able to prioritize all the different tasks assigned. It is also very important to stay current with technology as well as the areas of law that affect your practice. Joining professional associations is a

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good way to meet other paralegals and people who work in the legal field—while obtaining the latest information on continuing education options and changes in the law.

2. Formal Paralegal Education

Before 1970 there were no formal educational programs for paralegals; the necessary skills were learned exclusively through on-the-job training. Many lawyers simply gave their secretaries a variety of paralegal tasks, along with their own instructions as to how they were to be done.

In the early 1970s paralegal programs were developed in response to the need for formal paralegal training. In 1974 the ABA established the first Guidelines for the Approval of Paralegal Education Programs to help establish appropriate standards for paralegal educators and to assist potential students and employers in judging the quality of different paralegal programs. To date, the ABA remains the only official body to have a formal process for approving paralegal programs. In larger urban areas, some employers prefer paralegals who have graduated from an ABA-approved paralegal program, although this is rarely a requirement.

PRACTICE TIP

Sometimes supervising lawyers do not fully understand the type of education you have received. Therefore, you may need to let your supervisor know the full range of responsibilities you are capable of handling.

In 1981, educators from a variety of paralegal programs formed the **American Association for Paralegal Education (AAfPE)**. This

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national organization was chartered to promote high standards for paralegal education, provide a forum for professional improvement for paralegal educators, and promote research and dissemination of information regarding the paralegal profession and paralegal education. Its membership includes approximately 400 educational institutions offering programs at the community college, baccalaureate, and postgraduate levels.

American Association for Paralegal Education (AAfPE) ***aafpe.org***
A national organization of paralegal programs that promotes high standards for paralegal education.

Discussion Question

4. What are the benefits of having formal paralegal training rather than only receiving on-the-job training? Does having formal paralegal training mean that there is no need for on-the-job training? Why or why not?

D. PARALEGAL PROFESSIONAL ASSOCIATIONS

There are two major, national, not-for-profit professional associations dedicated to meeting the needs of working paralegals. They are the **National Federation of Paralegal Associations (NFPA)**, formed in 1974 as a federation of local paralegal groups, and **NALA: The Paralegal Association (NALA)**, formed in 1975 as a direct membership organization for paralegals with local chapter affiliates.

National Federation of Paralegal Associations (NFPA) ***paralegals.org***
A national association of paralegal associations advancing the paralegal profession.

NALA: The Paralegal Association (NALA) ***nala.org***

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A national association of paralegals advancing paralegals through certification and professional development.

Both organizations seek to promote the paralegal profession and monitor activities of courts, bar associations, and legislatures that might affect their members' interests. Each association has developed its own formal set of ethical guidelines, which their members are pledged to follow.

While the existence of competing organizations demonstrates the diversity of the profession, some observers fear that paralegals may be losing political influence because they lack a single organization to speak with one voice for the entire paralegal profession. Because each organization has its own traditions and "personality," it is highly unlikely that they will merge any time in the near future.

PRACTICE TIP

Join your local paralegal association.

NFPA and NALA are the two most prominent national paralegal organizations, but there are a variety of other paralegal associations at the national, state, and local levels. Membership in these other associations may be general or may be limited to a particular type of paralegal, such as paralegal managers, corporate paralegals, plaintiff paralegals, defense paralegals, or freelance paralegals. One notable example is the **International Paralegal Management Association (IPMA)**, an influential organization representing paralegal managers in large law firms and corporate law departments.

International Paralegal Management Association (IPMA) ***theipma.org***

A national association of paralegal managers.

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Now would be a good time to find out which paralegal associations are strong in your community and whether they have a special membership rate for students. Joining a paralegal association will give you the opportunity to meet working paralegals and to participate in the association's benefits by, for example, attending seminars and being listed in their job bank.

In her Paralegal Profile, Laurie Roselle, who works in one of the largest law firms in the world, describes the importance of professional associations and maintaining a "can-do" attitude.

PARALEGAL PROFILE

Laurie Roselle

Director of Legal Services
Clifford Chance US LLP

I work at Clifford Chance US LLP, one of the largest law firms in the world. We have offices in 37 countries. I work in the New York office. My official title is Director of Legal Services.

I don't think I have ever had a typical day. I generally get to the office by 7 A.M. with a "To Do" list of about five items. By 9 P.M. when I've only finished one, I declare it a victory and head home, usually by hired car so I can work and bill for another hour before arriving home.

The International Paralegal Management Association (IPMA) is a great source of information and networking for the paralegal

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management piece of my job. Their annual conference is always well done and timely on issues directly impacting the paralegals I supervise. The Association of Legal Administrators (ALA) is an excellent group for networking and information on a wide variety of topics that cover the myriad of other items for which I am responsible. The ALA annual conference makes me giddy like a kid in a candy shop, as there are so many sessions to attend. For real estate it is all about "location, location, location," and for networking, it is all about IPMA/ALA for me.

My advice to students thinking about a career as a paralegal is to embrace technology and never say "never." The attitude you bring to the table is what an employer is looking for . . . they can teach you the legal skills, but they cannot teach you attitude. If you don't have a "can-do" attitude, legal is not the field for you. Lawyers do not want to hear the reasons why you cannot do something. They want to hear that it has been done.

E. REGISTRATION, CERTIFICATION, AND LICENSURE

Although many employers hire only paralegals who have completed an ABA-approved or other well-established paralegal education program, the lack of formal licensing requirements allows for situations in which people with no formal training or experience can be hired and given the job title of paralegal. This situation often leads to a great deal of variation among paralegals in terms of background and quality, and that in turn is seen by many as harming the image of the profession, and potentially harming the public. To ensure a certain level of professionalism, some states have developed regulatory processes to ensure a basic standard of competence through registration, certification, or licensure.

1. Registration

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Registration is a process by which individuals or organizations have their names placed on an official list kept by some private organization or governmental agency. Depending on the purpose of the registration process, placing one's name on this list is either voluntary or mandatory. A few states have adopted voluntary paralegal registration programs, whereby any person who is qualified by education, training, or work experience and who works under the supervision of a lawyer performing delegated, substantive work for which that lawyer is responsible may register as a paralegal.

Registration
The process by which individuals or organizations have their names placed on an official list kept by some private or ganization or governmental agency.

2. Certification

When special qualifications are established as a requirement for registration, the system moves from registration to certification (see Figure 1-2). **Certification** refers to the formal recognition by an organization that an individual has met some predetermined set of qualifications, which typically includes meeting educational requirements and passing an exam. Only those who meet these criteria are allowed to claim the title that goes with the designated status, but a person without such certification is not legally restricted from working in that occupational area. The advantage of certification is that potential employers and clients know that the individual has met certain standards. Therefore, presumably they are more likely to employ this individual than someone who is not certified.

Certified
The status of being formally recognized by a governmental or nongovernmental or ganization for having met special criteria, such as fulfilling educational requirements and passing an exam, established by that or ganization.

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A few states, along with the two major paralegal organizations discussed above, provide a method by which paralegals can become **certified**, which includes passing an exam and maintaining continuing education. Once certified by NFPA, paralegals are authorized to use "CORE Registered Paralegal" (CRP®) or "PACE Registered Paralegal" (RP®) after their name. Similarly, those who have completed the requirements of NALA's voluntary certification program can used the registered trademarks "Certified Paralegal" (CP®) or "Advanced Certified Paralegal" (ACP®). These certification programs are all voluntary in that certification is not a legal requirement for working in the paralegal field. However, in some regions of the country, employers are more likely to employ someone who is certified than someone who is not.

It is important to distinguish between being certified by a state agency, such as a state bar association, or a voluntary organization, such as NALA or NFPA, and being **certificated**. Graduates of a formal paralegal program that offers a certificate of completion, whether instead of or in addition to awarding a degree, can be appropriately called "certificated paralegals," but they are not certified paralegals.

Certificated
The status of having received a certificate documenting that the person has successfully completed an educational paralegal program.

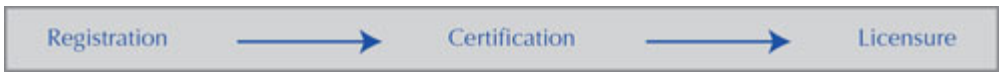

Figure 1-2 Increasing Levels of Regulation

ETHICS ALERT

Paralegals must always remember that as part of the legal profession, they are required to maintain demanding ethical

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standar ds. The following thr ee points ar e of special impor tance to paralegals:

1. P aralegals ar e not lawy ers and ther efor e cannot giv e legal advice, sign cour t documents, or appear in cour t on beh alf of a client. To do so is the unauthoriz ed practice of law , which is a crime in most states.
2. Lawy ers and their staff must respect the confidentiality of the client- att orne y relat ionship. You must tr eat anything you learn in the law firm as confidential and not discuss it with any one outside the firm—e ven your spouse or other family member .
3. Clients expect their lawy ers and staff to be loyal to them. Ther efo re, if you cha nge emplo yers, you must aler t your new emplo yer to any cases with which you wer e inv olv ed while working for your former firm. Not to do so means running the risk of cr eating a conflict of inter est for the firm.

As you read thr ough the m aterials in this book, watch for potential ethical issues posed in the readings or chapter questions.

3. Licensing

Licensing ref ers to the pr ocess by which go vernmental agencies establish standar ds and then pr ohibit those who ha ve not met those standar ds fr om working in that occupational field. Thus a person who has not been admitted t o the bar

Licensing
Go vernmental permission t o engage in a pr of ession.

is p rohibited fr om practicing law because he or she is not a licensed lawy er. Based on the pr evailing definitions of what constitutes the

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unauthorized practice of law, paralegals can perform a variety of legal tasks without a license to practice law, so long as they work under the supervision of a licensed lawyer. Some have argued, however, that a separate system of licensing should be established for paralegals in the same way that nurses are licensed separately from doctors. Opponents of licensure argue that licensing is not needed, as the state can hold the supervising lawyers responsible for ensuring the quality of the work done by their paralegals, as well as their ethical behavior.

While full licensing of paralegals has not been adopted by any state, as mentioned above, several states have adopted limited licensure as a way of addressing concerns that access to lawyers is a significant problem, especially for low-income and disadvantaged people. In addition to those states that have already adopted a type of licensing for nonlawyers who can provide limited legal services without the supervision of a lawyer, additional states have formed task forces to examine this type of limited licensure.

DISCUSSION QUESTIONS

5. Florida has a registered paralegal program whereas North Carolina has opted for a certification program. You can review the FAQs (Frequently Asked Questions) for Florida's registration at *floridabar.org/about/paralegal/frp-program/* and North Carolina's certification at *nccertifiedparalegal.gov/for-paralegals/frequently-asked-questions/*. Which program do you like better and why? In general, do you think registration, certification, or licensure programs will best serve paralegals and the public?

6. Occupational licensing requirements vary from state to state to protect the public. In some professions licensing requirements may be necessary to protect the public, but others may be anticompetitive. What are some of the pros and cons of licensing nonlawyers to provide limited legal services?

7. Does your state offer registration, certification, or limited licensure? If so, describe your system. If not, compare the criteria for

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the NFPA and NALA certifications.

F. WHAT PARALEGALS DO

Earlier in this chapter, we said that when working under the supervision of a lawyer, paralegals can do just about anything related to the practice of law except give legal advice to clients, represent clients in most types of judicial proceedings, and set fees. In a landmark U.S. Supreme Court case dealing with the awarding of fees for paralegal work, Justice William Brennan noted that

> paralegals are capable of carrying out many tasks, under the supervision of an attorney, that might otherwise be performed by a lawyer and billed at a higher rate. Such work might include, for example, factual investigation, including locating and interviewing witnesses; assistance with depositions, interrogatories, and document production; compilation of statistical and financial data; checking legal citations and drafting correspondence. Much of this work lies in a gray area of tasks that might appropriately be performed either by an attorney or a paralegal. [7]

The tasks listed by Justice Brennan involve communication with clients, research, drafting, and case management. To perform these duties effectively, paralegals need not only a thorough understanding of the legal system, but also sound critical thinking skills. These skills include:

- gathering and analyzing facts;
- conducting legal research to identify the appropriate legal rules;
- applying the legal rules to the facts; and
- acting on the results.

Take a moment to reread the two hypothetical cases we introduced at the beginning of this chapter, as we will be using them to illustrate these four basic steps when analyzing a legal situation.

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1. Gathering and Analyzing Facts

The answer to any legal question depends on the specific facts of the individual case. Even a minor change in the facts may alter the outcome of the case. Lawyers say that a case is **fact bound**.

Fact bound

The principle that even a minor change in facts can change the outcome of a case.

Just as a medical doctor cannot give a competent medical diagnosis without a thorough examination of the patient, a lawyer cannot render legal advice without a complete understanding of all of the relevant facts. In some areas of the law, such as those dealing with negligence of landlords and tenants, the legal outcome is particularly tied to the specific facts. For example, assume a stranger approaches a lawyer at a party with questions such as, "My landlord is trying to evict me. Can he do that?" or "My husband is trying to get custody of my kids. Will he succeed?" It would be impossible for the lawyer to answer without gathering a lot more information and personally reviewing key documents.

Paralegals often assist in the fact-gathering process by participating in or conducting interviews, summarizing those interviews, and reading and summarizing relevant documents. For example, when Donald Drake and Wanda Smith came to the law office of Darrow and Bryan to seek advice, they were each interviewed by Pat Harper, a lawyer with the firm. Chris Kendall, one of the firm's senior paralegals, also sat in on the interviews to help take notes and to become familiar with the facts of the cases.

While the client will supply many of the important facts in the case, a lawyer can never rely solely on the client's perception of those facts. Invariably clients will overlook some facts, while allowing their personal prejudices and self-interest to color their perception of other facts. The paralegal can play an important role in interviewing both the client and other witnesses and then accurately recording the

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results of those interviews. A paralegal may also draft documents to gather information from the opposing party or witnesses.

2. Conducting Legal Research to Identify the Appropriate Legal Rules

After meeting with the clients, the first thing that attorney Harper needed to determine was whether either client had a basis for proceeding with a lawsuit. If a client does not have a valid **cause of action** (i.e., a claim that, based on the law and facts, would be sufficient to support a lawsuit), then the client's case will be dismissed before it even goes to trial. For example, in Wanda Smith's case, she was clearly upset and disturbed by what had happened to her. However, that does not mean she has a legal remedy. Her lawyers will have to prove not only that the construction workers harassed and upset her, but also that these actions violated some law. It is important to understand that not every problem is a problem for which the courts will supply a remedy.

Cause of action
A claim that, based on the law and the facts, is sufficient to support a lawsuit.

NETNOTE

It is important to stay current with the changes in the law. You can find the latest legal news by going to various Internet sites including *reuters.com/legal/* or *news.bloomberglaw.com*.

Thus, the second stage of legal analysis involves the identification of the specific provisions of the law that are applicable to the client's

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situation. Because there are so many laws at the federal, state, and local levels, and because the law covers such a wide variety of topics, it is impossible for any lawyer to know everything there is to know about the law. Furthermore, because the law is constantly changing, one's legal knowledge must be continually updated. Therefore, even lawyers who specialize and strive to keep current by reading legal newspapers, journals, and bar publications on a daily basis may still need to do legal research. Law books and online computer databases are the tools of the trade for the legal profession.

Legal research is a very time-consuming process, and lawyers often rely on paralegals to assist them in locating and summarizing the relevant statutes and cases they need to properly interpret the current status of the law. Because attorney Harper has not recently handled a similar case, paralegal Kendall was assigned in Ms. Smith's case to research the law on sexual harassment and in Mr. Drake's case to see what law existed regarding the right to sue for emotional distress. We will discuss legal research in greater detail in Part III of this text.

Legal research
The process of finding the law.

3. Applying the Rules to the Facts

Even after a lawyer or paralegal has found the applicable legal rule through legal research, the job is far from completed. Because each client's problem is unique, simply knowing a general rule will not answer the problem in question. These general rules must be applied to the client's specific facts. We call this process **legal reasoning**.

Legal reasoning
The application of legal rules to a client's specific factual situation; also known as **legal analysis**.

Often this is a very straightforward process. For example, assume that your firm is representing a husband seeking a divorce. He wants

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to know if the court will take into consideration the years his wife worked as a stay-at-home mother when it decides on the appropriate division of the marital assets. Through legal research, you find a state statute that requires the court to take into account homemaker services when dividing marital property. In this case, assuming that your client's wife did indeed perform homemaking services, applying the law to your client's facts is very straightforward, and your supervising lawyer would report to the husband that, unfortunately for him, the court will take into account her years as a homemaker when dividing the marital assets. At other times, this process is much less clear-cut, and the result in a client's case may depend on how the courts have handled similar situations in the past.

This is because our legal system is based on a doctrine known as ***stare decisis*** (literally, "the decision stands"). Following *stare decisis* means that if a court has decided one way on a particular issue in the past, in all likelihood it and other courts in the same jurisdiction will decide the same way on that issue in future cases given a similar set of facts. The doctrine of *stare decisis* is what gives our system its stability and predictability. As we will see, however, *stare decisis* also gives the courts enough flexibility to allow for change as the needs of our society change.

Stare decisis

The doctrine stating that, normally, once a court has decided one way on a particular issue in the past, it and other courts in the same jurisdiction will decide the same way on that issue in future cases, given a similar set of facts, unless they can be convinced of the need for change.

To find out how similar situations have been handled in the past, a lawyer or paralegal will examine prior court decisions, **precedent**, and then apply them to the client's situation. If the facts of the client's situation and a prior court decision are similar (i.e., they are **analogous**), it is likely that the result in the client's case will be similar to the result reached in the prior case. If the facts are significantly

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different (i.e., **distinguishable**), it is likely that the result in the client's case will not be the same as the result reached in the prior case.

Precedent
One or more prior court decisions.

Analogous cases
Cases that involve similar facts and rules of law.

Distinguishable cases
Cases that involve dissimilar facts or rules of law.

Unfortunately for Wanda Smith, Kendall's research indicated that she did not appear to have a legal basis for suing the construction workers. If Ms. Smith had been employed as one of the construction workers and her boss had been harassing her, she would have had the basis for suing the company. However, as a mere passerby, she lacked such protection. Her facts combined with the law do not give her a right to sue.

Prior to the enactment of state and federal statutes giving protection to workers against sexual discrimination, Ms. Smith would not have been able to sue even if her employer had been the one to harass her. But as societal values change, the law usually changes as well. In recent years, our society has become more sensitive to issues of gender equality, and new laws have developed to provide new protections. Societal values change, and the law evolves to respond to those changes.

DISCUSSION QUESTIONS

8. Why do you suppose there are certain types of harm, such as the humiliation Wanda Smith felt when the construction workers whistled at her, that courts will not help individuals resolve?

9. Do you think it is right that employees can go to court and sue their bosses for sexual harassment? Why? If the harasser were a coworker instead of a boss, how would you view the situation?

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With regard to Donald Drake's case, Kendall's research proved more promising. In one case a mother who saw her young child killed by a negligent driver was allowed to recover for the emotional distress the accident caused her. However, five years later, in another decision involving a similar situation, a female bystander who happened to witness the death of a young boy was not allowed to recover for her emotional distress.

In assessing the strength of Mr. Drake's case, attorney Harper must decide whether the courts would treat a grandfather as they did the mother or as they did the bystander. Take a few minutes to list as many arguments as you can muster for each side of the debate. The most important part of legal reasoning is seeking factual similarities and differences between prior decisions and your client's case and then explaining why you think those similarities or differences matter. In that process, you will find that you and your classmates often differ as to the "right" answer.

In actuality, there is no "right" answer, only better or worse arguments for your client. A judge may be the final arbiter as to what the answer is in a particular case, but even then it is not the "right" answer in any cosmic sense. Any decision about what the law should be is a choice between competing values. This is why some cases go to trial instead of settling—that is, because the two litigants have differing viewpoints as to which of two competing values is the most important. The important point to remember is that your goal is to learn how to develop arguments that will help persuade the other side that your answer is more correct than theirs.

PRACTICE TIP

Artificial intelligence (AI) is now available to assist you with many of the tasks described in this section. AI is rapidly evolving and growing more powerful. Many view it as a threat and as a possible replacement for paralegals and even attorneys. However, others view it as a huge advantage in that it can

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aut omate many other wise tedious, time-consuming tasks, fr eeing legal pr of essionals t o work mor e efficiently , ther eb y fr eeing up time for mor e challenging assignments. Our tip? F eel empower ed, not thr eatened b y AI.

4. Acting on the Results

Thr oughout this pr ocess, lawy ers and paralegals must commit their thoughts to writing. At some point the y will tak e informal, working notes fo r their own use. At other times the y will mak e mor e formal repor ts that ar e designed to be read by colleagues, clients, opposing lawy ers, or judges. You will be intr oduced to various examples of these mor e specializ ed forms of **legal writing** thr oughout the text.

Legal writing

Examples of legal writing include case briefs, law office memoranda, and documents filed with the cour t.

Case briefs summariz e specific cour t decisions. Lawy ers and paralegals use case briefs to help them analyz e cour t decisions and pr epar e legal memoranda and appellate briefs. A **law office memorandum** is an unbiased analysis of a client' s case for use within the law firm. It ser ves as a means of fairly evaluating the likelihood of the client' s winning should the case go to cour t. Th is type of memorandum is often followed by a letter written to the client advising the client as to what action should be tak en. An **appellate brief** is written to persuade an appeals cour t of the merits of the client' s case. These documen ts will be discussed mor e thor oughly at various points thr oughout this text.

After a lawy er has thor oughly analyz ed the application of the law to the client' s situation and has advised the client as to the options available under the law , the lawy er and client ma y agr ee to tak e some action on the client' s behalf. These actions might include tr ying to settle the case without ha ving to resor t to **litigation** (i.e ., w ithout

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having to rely on the courts to resolve the dispute). For example, the lawyers for the two sides might be able to negotiate a compromise either with or without the help of a neutral third party, such as a mediator.

Litigation

A lawsuit; a controversy to be settled in a court.

If litigation cannot be avoided, the lawyer may represent the client in a civil lawsuit. In these situations the lawyer is responsible for submitting court documents called **pleadings** to initiate the lawsuit. Prior to trial, the lawyer will also conduct **discovery** to find out as much about the case as possible from witnesses and the parties on the opposite side. If the case does proceed to trial, the lawyer will also be responsible for conducting direct and cross-examinations of witnesses and making appropriate arguments to the judge and the jury. Paralegals often assist in all these stages, from drafting pleadings to preparing witnesses and evidence for trial.

Pleadings

The papers that begin a lawsuit; generally, the complaint and the answer.

Discovery

The modern pretrial procedure by which one party gains information from the adverse party.

In Donald Drake's case, attorney Harper concluded that, although victory was not assured, there were good grounds for a lawsuit. Because Mr. Drake was anxious to proceed, Harper directed Kendall to begin preparing the documents needed to officially begin the lawsuit. After carefully reviewing these documents, Harper signed them and directed Kendall to file them at the local courthouse.

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ETHICS ALERT

Although paralegals can draft legal documents, the documents cannot be filed with the court until a lawyer has reviewed, approved, and signed them.

As the case progresses, the paralegal can serve as a link between lawyer and client. Once the lawyer has established the client-lawyer relationship, paralegals can and do play a very important role in maintaining effective communications between lawyer and client. For example, whereas many lawyers are notorious for being too busy to return phone calls to their clients, paralegals are usually far more accessible. If they are properly prepared, paralegals can relay important information about the case from client to attorney, and vice versa. Due to their specialized training, paralegals can help explain legal procedures to clients, and they can communicate effectively with other lawyers and court officials.

ETHICS ALERT

When talking with clients, keep in mind that everything that is said must be kept confidential. Also, there may be times when you are alone with a client and the client will ask you for legal advice. Remember that only the lawyer can give that advice. For you to do so would be the unauthorized practice of law.

Legal Reasoning Exercise

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1. Imagine that you are interning in Harper's law firm. She has asked you to give her your thoughts on Drake's case. Specifically, Harper wants you to list all the ways in which you think Donald Drake's case is similar to that of the mother who saw her child injured. Then list all the ways in which you think Drake's case could be likened to that of the bystander. Finally, give Harper your evaluation as to why you think that a court would see Drake's case as more similar to that of the mother or to that of the bystander. Also, let her know if you think there are additional facts that you would want to gather before making a final recommendation.

PRACTICE TIP

Everything you read in this book is *wrong*! Or at least it might be. Remember that law keeps changing, and it also varies from state to state. Further, there are exceptions to many rules.

NETNOTE

As you may have noticed by reading the marginal definitions, all of the major associations mentioned in Chapter 1 have websites. Take a few minutes to visit each.

American Association for Paralegal Education (AAfPE): *aafpe.org*

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American Bar Association (ABA):
abanet.or g

National F ederation of P aralegal Associations (NFP A):
paralegals.or g

N AL A: The P aralegal Association:
nala.or g

International P aralegal Management Association (IPM A):
theipma.or g

SUMMAR Y

Ov er the past 50 years, the paralegal pr of ession has gr own rapidly , and par alegals ar e now found in a v ariety of legal settings. In this chapter , we ha v e discussed what paralegals do and how their work relates t o other legal pr of essionals.

W e ha v e also examined how paralegals ar e educated and cr edentialed. Lawy er and p aralegal associations ar e w orking to fur ther de v elo p educational and testing standar ds. The se effor ts include the ABA paralegal pr ogram appr o val pr ocess, the N AL A cer tification pr ogram, the N FP A Adv anced Pr oficiency and CORE Competency exams, as well as state cer tification, registration, and licensur e.

The most common legal work envir onments ar e priv ate practice arrangements, but paralegals can also be found in the legal depar tments of businesses, nonpr ofits, and go v ernmental agencies. Graduates of paralegal pr ograms ma y also find that the skills the y learned ar e applicable t o a wide v ariety of law-r elated occupations.

T o achie v e success as a paralegal, you will need to de v elop str ong critical thinking skills that include the ability to analyz e the facts, identify the appr opriate legal rules, apply the legal ru les to the facts, repor t the results, and tak e actions on behalf of the client. Although we ha v e pr ese nted each stage in a linear fashion, the reality is that these various stages ar e inter twined. Legal reasoning often r eveals

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the need to do more research. In the process of reporting your findings, you may discover flaws in your analysis. Thinking, researching, and writing are inseparable.

Do not be dismayed if you are sometimes overwhelmed by the complexity and sheer volume of legal concepts and materials. Learning law is a lot like learning a foreign language. Although many of these terms may be new to you now, they will become increasingly familiar to you as you progress through the text. In the end, you will be amazed at how these diverse pieces end up fitting into a logical and effective system.

REVIEW QUESTIONS

Pages 3 through 8

1. What is the definition of a paralegal?
2. What is a freelance paralegal?
3. Why are some states developing programs for nonlawyers to provide limited legal services directly to the public?

Pages 8 through 12

4. What are the requirements for becoming a lawyer?
5. What are the requirements for becoming a paralegal?
6. When did formal paralegal education begin?
7. What role does the ABA play in paralegal education?
8. What are the names of the two major paralegal associations?

Pages 13 through 15

9. What is involved in the process of registration?
10. What are the major differences between certification and licensure?
11. Who has the right to use the designation CRP; the designation CP?
12. What are the three ethical issues of which paralegals must be particularly aware?

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Pages 15 through 22

13. What are some of the basic tasks that most traditional paralegals perform?
14. What is a cause of action? What does it mean to say that a person does not have a valid cause of action? 15. What is legal reasoning?
16. What is the doctrine of *stare decisis*, and why is it important?
17. Why is it important to know whether your client's facts are analogous to or distinguishable from those in prior court decisions?
18. Why does law change? Should it?
19. Why is there no one "right" answer to a legal problem?
20. Should it be the lawyer or the paralegal who signs a client letter that analyzes the law? Why?
21. Why does the study of law involve more than simply memorizing rules?

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1 Adopted by the ABA House of Delegates, February 2020.

2 As we will discuss more fully later in this chapter, this is starting to change with some states developing programs that provide for limited licensure of nonlawyers. This change is in response to the growing recognition that many cannot afford the services of an attorney, especially in the areas of family and landlord-tenant disputes.

3 For example, it is estimated that of the more than 120,000 cases filed in New Hampshire's circuit court system every year, only 15% of the litigants are represented by an attorney. Advocates: Signing SB 361 Allows Paralegals to Represent Clients in Some Cases (June 17, 2024) at *indepthnh.org/2024/06/17/advocates-signing-sb-361-allows-paralegals-to-represent-clients-in-some-cases/*.

4 Daniel M. Taubman, Licensed Paralegals Changing the Face of the Legal Profession (2024) at *judicialwci.colorado.gov/licensed-paralegals-changing-the-face-of-the-legal-profession*.

5 A few non-ABA accredited law schools will accept students without a bachelor's degree who have a minimum number of undergraduate credits.

6 A few states have provisions that allow someone without a law school degree but with extensive law office experience to take that state's bar exam.

7 Missouri v. Jenkins, 491 U.S. 274, 288, n.10 (1989).

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Chapter 2

Functions and Sources of Law

We hold these truths to be self-evident . . .
Declaration of Independence

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Chapter Objectives

After reading this chapter, you should be able to:

- Define "law" and explain its role in our modern society.
- Describe the two main functions of the U.S. Constitution.
- Explain what federalism is and how it affects our legal system.
- Explain the rationale behind our system of checks and balances.
- Contrast statutory with administrative law and executive orders and memoranda.
- Compare enacted law to the common law.
- Describe the "hierarchy of the law."

INTRODUCTION

No modern society can exist without a strong legal system, and when a person has a problem or is trying to avoid a problem, that person frequently turns to lawyers and the legal system for help. While there may be a great deal of debate over the wisdom and appropriateness of a particular law (as there is, for example, over laws relating to the ownership and licensing of handguns or legalizing the recreational use of marijuana), there is general agreement that laws themselves are necessary. In this chapter, we examine who actually makes our **laws** and the format that these laws take.

Laws

Rules of conduct promulgated and enforced by a government.

Most people recall something from high school civics class about the three branches of government and that the legislature makes the law, the executive branch enforces the law, and the courts interpret the law. The truth is that the legislative, executive, and judicial

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branches are all involved in making the law. The legislature creates statutes, executive agencies promulgate regulations, and the judicial branch issues court decisions.

To help illustrate the application of constitutional, statutory, and administrative laws, we will be referring to the following case involving a pregnant waitress, Diane Jackson, who has brought a problem to lawyer Harper, a lawyer with the law firm of Darrow and Bryan. As you read the chapter, think about the nature of Diane's problem, and the extent to which the law may, or may not, provide a remedy for her.

Case 3: The Pregnant Waitress

Diane Jacksons had been employed by the Western Rib Eye Restaurant for the past three years. Throughout that time, her work record had been exemplary. Customers often spoke to the manager to tell him how Ms. Jackson's service and personality contributed to their especially enjoyable dining experience at the restaurant.

Six months ago, Ms. Jackson, who is not married, found out that she was pregnant. When she approached her manager, Ben Fischer, to discuss arrangements for a maternity leave, instead of the favorable reception she had expected, Fischer reached over, patted her stomach, and said, "Well, I guess we can't have you working for us any longer." Fischer then grabbed her by the arm and escorted her out of the restaurant. Ms. Jackson protested and asked to be allowed to collect her personal belongings from her locker, but the manager just laughed and said she was "history." When Ms. Jackson began to cry, he softened his demeanor a little and said, "Look, we simply can't have a pregnant lady working here. It just wouldn't be good for business."

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Although she has been actively looking, Ms. Jackson has not yet been able to find suitable employment.

When a client presents a problem to a lawyer, the lawyer will seek to identify which laws are relevant to solving the problem and what steps need to be taken to utilize those laws on the client's behalf. However, as we indicated in Chapter 1, not every problem can be resolved by the legal system. To better appreciate why this is so, we need to study the function of law, the history of the American legal system, and the sources of U.S. laws. You also need to understand the sources of law to do legal research and analysis.

As you read about the different sources of law, answer the following questions related to this case:

- Does Diane Jackson have a constitutional claim against her employer?
- Does she have a statutory claim against her employer?
- Does she have an administrative claim against her employer?
- Is there a provision in the common law that gives the waitress a claim against her employer?

A. FUNCTIONS OF LAW

It is our laws—rules of conduct promulgated and enforced by the government—that define the types of conduct that are either prohibited or required. For example, a criminal code usually prohibits the unauthorized taking of property that belongs to someone else. Tax laws require that certain types of individuals or corporations give part of their income to the government. The laws can apply to the behavior of individuals, businesses, and even governments themselves. Thus, municipalities may be prohibited from dumping raw sewage into lakes and rivers and the police prohibited from conducting unreasonable searches and seizures.

To be considered laws, these rules of conduct must be promulgated and enforced by the appropriate governmental bodies.

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For example, only the U.S. Congress can make federal statutory law, and only a state's highest court can authoritatively interpret the meaning of that state's laws.

These rules of conduct also carry with them certain sanctions that can be imposed on those who fail to follow them. When individuals violate a section of the criminal law, they may be fined, sent to prison, or in some cases even suffer loss of life. Persons who are found liable under the civil law may be forced to pay various penalties or damage awards or to perform some action, such as carrying out the terms of a contract. Police who conduct illegal searches and seizures may be denied the right to use in court any evidence they find and may even be forced to pay damages to the injured parties.

There may be a great deal of debate over the wisdom and appropriateness of a particular law (as there is, for example, over the ownership of handguns), but there is general agreement that laws themselves are necessary. Some of these laws, such as restrictions on abortion, gambling, and pornography, are heavily influenced by the religious and moral beliefs of various groups in our society, whereas others, such as traffic regulations, have no moral content at all. In either case, laws help to provide the type of order and predictability that are essential elements of our modern society.

DISCUSSION QUESTION

1. Do you agree with the statement "Laws are necessary"?

B. SOURCES OF LAW

We will begin our discussion of the sources of law with a look at **constitutional law**, our most fundamental source of law. Take a few minutes now to turn to Appendix A at the back of this book to see how the U.S. Constitution is organized.

Constitutional law

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A body of principles and rules that are either explicitly stated in, or inferred from, the constitutions of the United States and those of the individual states.

1. Constitutional Law

The term "constitutional law" refers to the principles and rules that are either explicitly stated in, or inferred from, government constitutions. At the federal level, it is the U.S. Constitution, and at the state level, it is the constitution of each of the 50 states.

Constitutions are usually written by specially selected delegates to a "constitutional convention." The text that is agreed upon by these delegates then has to be "ratified" (approved) by either a direct vote of the people or by some representative body.[1] A constitution also includes the steps required to amend it.[2]

a. U.S. Constitution

The United States was the first nation to adopt a written constitution. It provides the framework within which all our laws are made. The first major function of the U.S. Constitution is to establish the organizational structure of the government and the allocation of those governmental powers. Its second major function is to protect individual rights from governmental overreaching. These two functions are summarized in Figure 2-1.

1) Establish the Organization of Government
   a. Federal Government: Three Branches (Separation of Powers; Checks and Balances)
      i. Legislative (Article I)
      ii. Executive (Article II)
      iii. Judicial (Article III)
   b. Division of Power between the Federal and State Governments: Federalism (Tenth Amendment)
2) Protect Individual Rights from Governmental Overreaching (Bill of Rights)

Figure 2-1 Functions of the U.S. Constitution

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(1) Organization of Government

As to the first major function, establishing an organizational structure for the government on the national level, the Constitution divides governmental powers among the legislative (Article I), executive (Article II), and judicial branches (Article III). This is commonly referred to as the **separation of powers**, but it is more accurate to describe this as a system of shared powers exercised by separate branches of government. Because they share power, each branch of government has the ability to limit the actions of the other branches.

Separation of powers

The division of governmental power among the legislative, executive, and judicial branches.

In the Federalist Papers, James Madison explained that this system of **checks and balances** is designed to guard against "a gradual concentration of the several powers in the same department." For example, under the Constitution, Congress has the power to make laws, but the president has the power to veto them. The executive branch is responsible for administering the law, but it cannot spend money to do so unless Congress provides for the appropriate funding in the budget. And although the president appoints federal judges, those appointments do not become final unless the Senate votes to confirm.

Checks and balances

Division among the three branches of the federal government so that each one acts as a check on the power of the other two, thereby maintaining a balance of power among the branches.

The check and balance most relevant to the legal system is the **power of judicial review**. The U.S. Constitution and its amendments

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constitute the "supreme law of the land," and based on the concept of judicial review, it is left up to the courts to determine what the Constitution means and whether laws passed by the legislative branch are constitutional or whether the law is valid.

Power of judicial review

A court's power to review statutes to decide if they conform to the federal or a state constitution.

It could be argued that because the U.S. Constitution established three coequal branches, each branch should be free to interpret the Constitution as it sees fit. However, there are times in which there is disagreement among the three branches about the interpretation of the Constitution, and in those situations, someone has to have the final say.

In *Marbury v. Madison*,[3] the U.S. Supreme Court claimed this power for the courts. The Court held that it was inherent in the nature of a court's work to resolve conflicting interpretations of the law before it can carry out its assigned task of applying the law. If a court determines that a statute does not conform to the Constitution, then the statute is invalid and the court cannot enforce it. The Court stated:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.[4]

Over the years, the U.S. Supreme Court has used this power of judicial review to invalidate a number of federal and state laws that it found to be in conflict with the U.S. Constitution. Some of the most controversial applications of judicial review include decisions involving racial segregation, abortion, gun control, and same-sex marriage.

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Whenever the courts use their power of judicial review and find a governmental action unconstitutional, the legislative and executive branches are powerless to reverse that particular decision. Legislatures do have some other options, however. First, they can sometimes enact new laws to accomplish their intended goal if they can do so without violating the constitutional provisions in questions. Alternatively, they can start the difficult process of amending the Constitution to more explicitly allow them to do what they want to accomplish their goal with a differently worded statute or propose a constitutional amendment. And at the federal level, as vacancies occur, the president can appoint new justices who may interpret the constitution differently.

The U.S. Constitution also divides governmental power between the national government and the states. This division of power between the national government and the states is referred to as **federalism**. Certain powers are explicitly granted to the federal government. All others are reserved to the states and the people. We will discuss this federal-state division of power more fully in the next chapter.

Federalism
A system of government in which the authority to govern is split between a single, nationwide central government and several regional governments that control specific geographical areas.

(2) Protection of Individual Rights

The second major function of the Constitution is to protect individual rights from governmental overreaching. Because the first Congress perceived a lack of such protection in the Constitution, as soon as it was ratified, the members began work on the first ten amendments, commonly known as the **Bill of Rights**. These amendments include protections for freedom of speech and press, freedom of religion, a privilege against self-incrimination, the right to a lawyer and a trial by jury, and safeguards against unreasonable searches and seizures, among others.

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Bill of Rights

The first ten amendments to the U.S. Constitution.

At the time the Bill of Rights was written, the major concern of the drafters was overreaching by the federal government, not the state governments. Therefore, they wrote the amendments specifically to limit only the federal government's power. For example, the First Amendment states "Congress shall make no law . . . abridging the freedom of speech." During the Civil War, however, it became clear that the states could also be guilty of infringing on the rights of their citizens and the Thirteenth (banning slavery), Fourteenth (guaranteeing due process and equal protection), and Fifteenth Amendments (giving the right to vote to all males) were added with language that made it clear that they applied to the states.

Gradually, in a series of cases, the U.S. Supreme Court interpreted the Fourteenth Amendment's prohibition against states depriving any person of "life, liberty, or property, without due process of law" as meaning that many of the rights contained within the Bill of Rights also apply to the states. This is known as the **doctrine of incorporation**, and it means that the first ten amendments, along with the Fourteenth Amendment, serve to prevent state or federal government officials from interfering with civil rights and liberties.

Doctrine of incorporation

In constitutional law, the application of the Fourteenth Amendment's due process protections to incorporate the provisions of the Bill of Rights and make them applicable to the states.

Notice that the Constitution's Bill of Rights limits the actions of the federal and state governments, but not those of ordinary individuals. So while the First Amendment protects your freedom of religion from governmental interference and the Fourth Amendment protects against unreasonable searches by agents of the government, neither provides protection from the actions of a private employer or a nosy neighbor. This is known as the **state action requirement**.

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State action requirement

A requirement that a defendant cannot be charged with a violation of constitutional rights unless the defendant was acting as an agent of a governmental entity.

Therefore, in our opening scenario involving the pregnant waitress, as we will discuss in the next section, the restaurant manager may have violated a federal statute prohibiting sex discrimination. However, as a private citizen, the manager personally cannot be charged with violating any of Ms. Jackson's constitutional rights.

PRACTICE TIP

In areas having to do with individual rights, sometimes a state constitution will give more protection than the U.S. Constitution.

DISCUSSION QUESTIONS

2. Arguably, if Congress passes a statute, it means that the majority of both the House of Representatives and the Senate believed that it was not in conflict with the Constitution. Why should the decision of the people's elected representatives be overridden by unelected, appointed judges?

3. When public opinion is split on a controversial issue, what are the appropriate roles for the legislative, executive, and judicial branches?

b. State Constitutions

Each of the 50 states also has a written constitution that defines the organization and powers of its government. Most also include an

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equiv alent of the federal Bill of Rights. The supr eme cour t, or highest cour t, of a sta te is the fina l arbiter of what its state constitution means, so long as the state constitution does not confli ct with the federal constitution.

Sometimes state constitutions pr o vide mor e pr otection of individual rights than does the federal constitution. F or example, in the state of W ashingt on, par ents of student athletes sued their childr en's school district, which had adopted a policy of random and suspicionless drug testing of all student athletes. The par ents ar gued that this violated the students' rights under the W ashingt on Constitution. Thir teen years earlier , the U.S. Supr eme Cour t had ruled that a similar policy in Or egon violated neither the Or egon nor the U.S. Constitution. [5] In the W ash ingt on case, howe ver, the W ashingt on Supr eme Cour t held in 2008 that the policy violated the student athletes' rights under the W ashingt on Constitution. [6] Hence, student athletes in Or egon ar e subject to random drug tests because their priv acy rights ar e not pr otec ted by either their state or the federal constitution; but in the neighboring state of W ashingt on, student athletes *cannot* be for ced to under go simila r drug testing because their priv acy rights ar e pr otected under their state 's constitution.

NE TNO TE

You can read the full texts of the Declaration of Indepen dence, the Constitutio n, and the Bill of Rights at the National Ar chiv es website: *ar chiv es.go v /founding-docs.*

2. Statutor y Law

As explained abo ve, federal and state constitutions delineate the general frame work within which the go vernment must operate.

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Although these documents do list some major substantive and procedural rights, they were not designed to contain the types of detailed laws and regulations we need to operate in today's complex society. Rather, the federal and state constitutions specifically delegate the power to make these laws to the legislative branches of government. The laws that these legislative bodies make are usually referred to as **statutes** or codes.

Statute

A law enacted by a state legislature or by Congress.

At the federal level, the U.S. Congress is the source of statutory law. The process of creating a statute starts with the introduction of a bill in either the House of Representatives or the Senate.[7] Bills are assigned to an appropriate committee. The committee often conducts hearings on the bill's merit and then votes on whether it should be brought to the full House for consideration. For the bill to become law, the Constitution requires a majority vote of both the House and the Senate, and the language of the Senate and House bills must be identical. If it is not, then a conference committee made up of members of both houses is formed to try to work out language agreeable to a majority of both chambers. If the conference committee is able to find language that is agreeable to a majority of both the House and Senate, then the bill is sent to the president. If the president signs the bill, a new statute will have been created. If the president does not want to see the bill become law, the president can veto the proposed law. Congress can override a presidential veto with a vote of at least two-thirds of both chambers.

At the state level, legislatures also create statutory law. In addition, a variety of local bodies, such as city councils and village boards, enact **ordinances**, a subcategory of statutory law.

Ordinance

A law enacted by a local government; a subcategory of statutory law.

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These statutes and ordinances lay down general rules that govern future conduct. They are general in the sense that they apply to broad categories of people rather than to specific individuals. Furthermore, the requirements they impose generally cannot be applied to actions taken *before* the law went into effect. Because a law typically cannot be passed retroactively, it is often passed stating the date on which the law will be enforceable.

The formulation of such future-oriented rules is a difficult task because legislatures cannot foresee all the possible circumstances that might arise. Statutes therefore often contain general prohibitions that are somewhat ambiguous and open to differing interpretations. Ambiguity in statutes can also result from sloppy draftsmanship or be intentionally inserted to avoid creating conflicts among the legislation's supporters.

An example of the ambiguity contained in statutes can be found in the following excerpt from Title VII of the 1964 Civil Rights Act. It states:

> It shall be an unlawful employment practice for an employer (1) to . . . discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin. [8]

Recall the situation of Diane Jackson, mentioned at the beginning of the chapter. Was the restaurant manager discriminating against Ms. Jackson because of her sex when he fired her for being pregnant? The statute clearly states that employers cannot discriminate on the basis of sex, but it is not clear what types of actions should be considered sex discrimination. After the enactment of Title VII, some people argued that pregnancy discrimination should be considered a form of sex discrimination because only women can become pregnant. Others argued that it should not be considered sex discrimination because the differential treatment is based on the condition of being pregnant rather than on the employee's sex. Although only women can become pregnant, the employer was legitimately differentiating between two different types of women—

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those who were pregnant and those who were not—rather than discriminating between women and men.

As with ambiguities in constitutional provisions, when disagreements such as this arise over the meaning of a statute, a court must resolve the ambiguity. Thus, in *General Elec. Co. v. Gilbert*,[9] the U.S. Supreme Court was called upon to determine if discrimination based on pregnancy was a form of sex discrimination under Title VII. The Supreme Court ruled in *Gilbert* that Title VII allowed employers to discriminate based on pregnancy.

The Supreme Court's interpretation would have left Ms. Jackson without a remedy under the statute. However, luckily for her, if the legislative branch disagrees with the interpretation a court gives to one of its statutes, Congress can always introduce new legislation that amends the original statute to make clear that a different result or interpretation was intended. If this new legislation passes, the court's interpretation is superseded by the new statute. In this instance, Congress reacted by amending the statute to include pregnancy discrimination in the definition of sex discrimination.[10] Thus, under the amended statute, it was unlawful for Ms. Jackson's employer to fire her based on her pregnancy.

Note, however, the difference between interpreting a statute and determining that it is unconstitutional. Whereas the legislative branch can amend one of its statutes to override a judicial interpretation, the courts retain the final authority with respect to deciding whether it is constitutional.

3. Administrative Law

Administrative law can be found at both the state and federal levels. At the federal level, it is created most often by agencies, through rules and regulations. It can also be created through presidential executive orders or memoranda. A similar structure exists at the state level.

Administrative law
Rules and regulations created by administrative agencies.

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a. Administrative Agencies

Administrative agencies can be created by Congress or by state legislatures. On the federal level, Congress creates administrative agencies through an **enabling act**

Enabling act
A statute establishing and setting out the powers of an administrative agency.

that sets out the limits to the powers of the agency being created. Administrative law is similar to statutory law, in that it lays down rules designed to regulate future conduct. However, these rules are usually drawn more narrowly and directed to a more specialized group. Often the legislative branch intentionally leaves it to the executive branch and to independent regulatory agencies to "fill in the details" of a law within a general structure set down by the legislature. Through the process of filling in these details, the executive branch is actually making the law.

NETNOTE

You can find a listing of the U.S. departments and agencies at *usa.gov/federal-agencies.*

For example, assume that a taxpayer wins $50 in the lottery. Must she pay taxes on it? The Internal Revenue Code, a federal statute, provides that she must pay tax on income, but it only includes general categories of income. The Internal Revenue Service (IRS), a federal agency, has developed **regulations** that define in much more detail what the word "income" means. Without the IRS, Congress would be forced to make constant revisions in the federal tax laws and would

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be hard-pressed to see that they were enforced. Other examples of federal agencies include the Occupational Safety and Health Administration (OSHA), which oversees the federal statute requiring safe working conditions, and the Environmental Protection Agency (EPA), which oversees the federal statute governing the environment.

Regulation
A law promulgated by an administrative agency.

At both the federal and state levels, administrative agencies begin the process of creating or amending regulations through what is known as a "notice and comment" period. First, the administrative agency gives notice of its intent by publishing the proposed changes in the *Federal Register* (or its state equivalent). Second, interested parties have a set time in which to inform the agency of their support, opposition, or suggestions for change. At the close of this "comment" period, the agency formally promulgates the regulation through its publication in the *Federal Register* (or its state equivalent).

PRACTICE TIP

Your understanding of a statute may be incomplete without also checking for related regulations. For example, policies such as the right of the police to conduct breathalyzer tests may be set by state statutes. However, how those policies are to be implemented (e.g., how a breathalyzer test is to be conducted) may be set by administrative regulations.

Just as the courts are drawn into the lawmaking process when they must interpret constitutions and statutes, so, too, are they called on to be the final arbiters of the meaning of administrative regulations. If someone disagrees with the administrative

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interpr etation of a statute, the dissatisfied par ty can go to cour t to challenge the agency 's interpr etation. The cour t must suppor t the agency 's interpr etation unless the cour t determines that the regulation is outside the authorization Congr ess ga ve to the administrativ e agency or that the regulation is unconstitutional. To determine whe ther the agency has stepped out of the boun ds cr eated for it by Congr ess, the cour t will examine the enabling act for the agency . The cour t will als o seek to determine the underlying legislativ e inte nt of the statute that the agency is atte mpting to interpr et thr ough its r egulations.

Returning once again to the case of the pr egnant waitr ess, Harper ma y de cide to sue Ms. Jacks on 's emplo yer for sexual harassment. A sexual harassm ent case would be based on the same fede ral statute, Title VII, discussed abo ve. Th e statute mak es no specific refer ence to sexual harassment. The Equal Emplo yment Oppor tunity Commission (EEOC), howe ver, acting under authority giv en it in the statute, has declar ed that acts of sex ual harassment ar e a form of sex discrimination. One of its administrativ e r egulations states:

> Unwelcome sexual adv ances, requests for sexual fa vors, and other verbal or physical conduct of a sexual natur e const itute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual' s emplo yment, (2) submission to or rejection of such conduct by an individual is used as the basis for emplo ym ent decisions aff ec ting such individual, or (3) such conduct has the purpose or eff ect of unr easonably inter fering with an individual' s wo rk per forman ce or cr eating an intimidating, hostile, or off ensiv e working envir onment. [11]

Note how much mor e specific the wor ding of the regulation is compar ed t o the wor ding of the statute.

Recall that Ms. Jackson alleged that the manager patted her on the st omach as he was firin g her for being pr egnant. Do you think that is sufficie nt to suppor t a claim of sexual harassmen t? Is ther e any language in the r egulation that could suppor t such a claim?

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In addition to their power to promulgate regulations, and as part of their enforcement powers, most agencies have investigatory and adjudicative powers. For example, if Ms. Jackson wants to pursue her claim of sexual harassment, Title VII mandates that she first take her complaint to the EEOC or a comparable state agency. The agency will investigate her case and, if it deems it appropriate, will hold a hearing to determine the truth of her claims. If she or her employer is not satisfied with the results they obtain at the agency, they can then take the case to court. Ultimately, the court would be the final arbiter of whether Ms. Jackson's situation fits the agency definition of sexual harassment.

Because administrative agencies combine the legislative, executive, and judicial functions, they are sometimes referred to as the **fourth branch of government**. This combination of powers, not mentioned in the Constitution, has led some to argue that the very existence of administrative agencies endangers the traditional separation of powers. In a recent U.S. Supreme Court decision, the majority of the Court seemed to share that concern when it emphasized that if there is a dispute as to the meaning of a federal statute, it is ultimately up to the courts, and not an administrative agency, to determine that meaning. [12]

Fourth branch of government
Administrative agencies.

b. Executive Orders and Memoranda

Executive orders and **executive memoranda** are also forms of administrative law. They are policy directives issued by the president (or, at the state level, by governors) that direct government employees as to how they should implement either statutes passed by the legislature, rules and regulations enacted by administrative agencies, or executive powers listed in the federal or state constitution. [13]

Executive order

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An official policy directive issued by the president for the federal government, or by the governor of a state, which directs government employees as to how they should implement a law. At the federal level, executive orders are published in the *Federal Register*.

The terms "executive order" and "executive memorandum" are often used interchangeably, the primary difference being that executive orders are published in the *Federal Register* and executive memoranda are not. Perhaps the most famous example of such an executive action was President Abraham Lincoln's Emancipation Proclamation. Other notable historical examples include President Franklin Delano Roosevelt's detention of Japanese citizens in internment camps during World War II; President John Kennedy's prohibition of discrimination in federally funded housing; President Richard Nixon's freezing of all prices, rents, wages, and salaries to stop inflation; President George W. Bush's creation of the U.S. Department of Homeland Security after the September 11 terrorist attacks; President Barack Obama's deferral of deportation proceedings for a set number of years for illegal immigrants who met specified criteria; and President Donald Trump's phasing out of this deferral of deportation policy. In particular, in his second term, President Trump made more use of the power of executive orders and memoranda than any other modern-day president. One immediate response was the filing of a record number of lawsuits challenging many of those orders. As with the rules and regulations issued by administrative agencies, courts can find that executive orders or memoranda are unconstitutional or are outside the authorization given by Congress.

Executive memorandum

An official policy directive issued by the president for the federal government, or by the governor of a state, which directs government employees as to how they should implement a law.

DISCUSSION QUESTIONS

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4. Why do you think presidents create executive orders and memoranda? Should there be a limit to their number?

5. The first sentence of Article II of the U.S. Constitution states that the "executive Power shall be vested in a President of the United States of America." Do you think this gives the President the power to make significant policy changes without involving Congress? If not, then do you think the current mechanisms for challenging presidential orders and memoranda are sufficient to maintain our system of checks and balances?

4. Common Law

Constitutions, statutes, and administrative regulations are classified as enacted law because they are written documents that have been formally authorized by governmental entities. As we have noted above, courts play a vital role in interpreting constitutions and the laws created by legislatures and agencies. At times, however, no constitutional, statutory, or administrative regulations govern a situation. When that happens, courts must look to their own earlier opinions, known as the **common law**. Therefore, courts have three roles to play:

Common law

Law created by the courts. The body of law that has evolved from judicial decisions in cases that do not involve constitutional, statutory, or administrative regulation interpretation.

- to determine the constitutionality of a statute or executive action;
- to interpret ambiguous statutes and regulations; and
- when no written law exists, to create the common law.

The common law consists of legal principles that have evolved through the years from the analysis of prior court decisions. Ultimately, these principles can be traced to medieval England, although they have been modified through the years by various state

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courts up through modern times. When a legal dispute involves a subject that is not adequately covered by the other types of law, the judge applies the principles of the common law. In other words, in the absence of pronouncements from the Constitution or a legislative or administrative body, the judge looks to earlier decisions by other judges in similar circumstances.

When the United States was established, the English common law formed the foundation of our legal system. Unless there is a good reason for doing otherwise, judges are expected to follow the legal rules laid down in prior decisions. This was how the doctrine of ***stare decisis*** developed. Once courts had determined the law in an area, other courts followed that rule unless a court thought that there was a good reason to change it.

Stare decisis

The doctrine stating that normally once a court has decided one way on a particular issue, it and other courts in the same jurisdiction will decide the same way on that issue in future cases given similar facts unless they can be convinced of the need for change.

Today, there are areas of state law that are still totally governed by the common law, such as most matters dealing with torts. However, over the years, many areas of the common law have been enacted into statutes. This process of converting the common law into statutory form is known as the **codification of the common law**. Sometimes, however, instead of following the common law, a statute will differ from that approach. When the common law is changed through legislation, the statute is said to be in **derogation of the common law**.

Codification of the common law

The process of legislative enactment of areas of the law previously governed solely by the common law.

Derogation of the common law

A term referring to legislation that changes the common law.

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In addition to the common law created by law courts discussed above, another part of our common law heritage involves the use of **equity** courts. Law courts had the power to settle disputes by requiring one party to compensate the other with money damages. But there are times when money is not what the litigants want. Rather, they would like the court to order the other party to do something, such as living up to contractual obligations, or to cease doing something, such as having loud parties in the wee hours of the morning. In response to this need, the English created equity courts.

Equity
A principle that allows judges to take actions such as issuing injunctions and ordering specific performance when the law would otherwise limit their decisions to monetary awards.

Equity powers include a judge's ability to issue an **injunction** or to order **specific performance**. An injunction is a court order requiring someone to act or to refrain from acting. Specific performance requires that a party fulfill his or her contractual obligations. In the 1800s most states merged their law and equity courts. Therefore, today judges have the power to give either monetary awards or equitable relief or both, as they deem appropriate.

Injunction
A court order requiring a party to perform a specific act or to cease doing a specific act.

Specific performance
A requirement that a party fulfill his or her contractual obligations.

DISCUSSION QUESTION

6. For each of the following, which source of law—a constitution, a statute, an administrative regulation, or a court opinion—would be best able to handle the problem, and why? Before answering, keep in mind that constitutional provisions generally cover the most general,

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basic rights, such as freedom of speech. Statutes are more detailed and administrative regulations are even more specific, often going into great detail as to what is to be regulated. Statutes and regulations are forward looking; that is, legislatures enact statutes and administrative agencies issue regulations with an eye to what they expect to happen in the future. On the other hand, court decisions are designed to address something that has already happened; by their nature, they are very fact specific.

a. A requirement that all motorcycle riders wear helmets.
b. A rule making a bar owner liable for any injuries caused by a patron to whom the bar sold drinks.
c. A rule that all semi-trailers traveling on interstate highways use conca ve mud flaps.
d. A requirement that employers not discriminate on the basis of religion or sexual orientation.
e. A requirement that no more than a certain percentage of a known pollutant be released by factory smokestacks.
f. A question as to whether a person not wearing a seat belt should be able to recover for injuries that person sustained in an automobile accident that was not her or his fault.
g. A law prohibiting the government from interfering with an individual's right to own an assault weapon.

5. The Hierarchy of Laws

In this chapter, you have seen that our laws come in different formats: constitutions, statutes, administrative regulations, executive orders and memoranda, and court decisions. In analyzing Ms. Jackson's situation, we found that statutory and administrative laws, as well as court decisions, would affect her legal situation.

Constitutional law is at the top of the established "hierarchy of law." In fact, the U.S. Constitution provides that it and the laws made pursuant to it are the "Supreme Law of the Land." With their power of

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judicial review, the courts are the final arbiters of what the Constitution means.

Discussion Question

7. The U.S. Supreme Court is the final arbiter of what the Constitution means. But as the membership on the Supreme Court changes, its interpretation may also change. Consider two examples. First, in 1896 in *Plessy v. Ferguson*,[14] the Court ruled that segregation laws did not violate the U.S. Constitution as long as racially segregated facilities were equal in quality, giving rise to the doctrine of "separate but equal." Fifty-eight years later, in *Brown v. Board of Education,* [15] the Court overruled *Plessy* on the basis that racially segregated facilities can never be equal. Second, in relation to a woman's right to an abortion, in 1973, in *Roe v. Wade,* [16] the Court held that the Fourteenth Amendment of the U.S. Constitution granted women the absolute right to an abortion in the first trimester and a limited right thereafter. Fifty years later, in *Dobbs v. Jackson Women's Health Organization,* [17] the Court overruled *Roe*, finding that it had been wrongly decided because there was no universal right to an abortion in 1868 when the Fourteenth Amendment was ratified, thereby ending the protections given to pregnant women in *Roe*.

a. How does this ability of the Court to change its interpretation of the Constitution relate to the theory of *stare decisis* and the importance of precedent?

b. What does it mean for the doctrine of *stare decisis* and the stability of our legal system if courts can overrule precedent not because facts or values have changed but because the court views the prior decision as having been wrongly decided?

Most legal problems, however, do not involve constitutional issues unless an argument arises over the underlying constitutional validity of a statute or administrative regulation. Instead, most legal situations involve the application and interpretation of state and federal statutes, along with any relevant administrative regulations.

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If a statute contains any ambiguities, lawyers look to relevant court decisions for assistance in interpreting the statutory language. Therefore, the courts have a great deal of power in their role as interpreters of enacted law.

As noted earlier, always keep in mind the crucial difference between court decisions that interpret the meaning of statutory language and those that strike down a statute because it conflicts with provisions of the federal or state constitution. Whereas the legislative branch can amend one of its statutes to clarify its intent and thus override a judicial interpretation, the courts retain the final authority with respect to deciding whether a statute is constitutional. When the courts declare a statute unconstitutional, the legislature's only recourse is to seek to amend the constitution or to wait for a change in court membership. This important difference is outlined in Figure 2-2.

Judicial Statutory Interpretation	Versus	Judicial Constitutional Determination
Congress enacts a statute; the terms are unclear.		**Congress enacts a statute; the terms are clear, but its constitutionality is questionable.**
Example: Statute: It shall be an unlawful employment practice for an employer to discriminate because of such individual's sex. Court interpretation: Pregnancy discrimination is not a form of sex discrimination.		**Example:** Statute: It shall be a criminal offense to desecrate the U.S. flag. Court determination: The statute is not constitutional, as it violates the First Amendment's right to free speech.
If the legislature disagrees with the court's interpretation, it can amend the statute.		**Even if the legislature disagrees with the court's decision regarding the constitutionality of the statute, it is bound by that decision.**
Example: Congress amends the statute to add a definition of sex		**Example:** Congress can do nothing short of working toward a constitutional amendment.

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Judicial Statutory Interpretation	Versus	Judicial Constitutional Determination
discrimination that includes pregnancy discrimination.		

Figure 2-2 Judicial Statutory Interpretation versus Determination of Constitutionality

It is only when no applicable constitutional or statutory provision governs the situation that the courts will apply court-made common law. Today most areas of the law are governed by statutes, but the common law still has a role to play, most notably in the areas of property, tort, and contract law.

Legal Reasoning Exercises

1. Assume that Congress enacted a statute making it a federal crime for "anyone" to kidnap children and take them across state lines. Assume further that the U.S. Supreme Court decided that the word "anyone" did not include a parent. If it wanted to do so, could Congress amend the statute to say that the word "anyone" does include parents? Why?
2. Assume that Congress enacted a statute making rape a federal crime. Assume further that the U.S. Supreme Court declared the statute to be unconstitutional because it exceeded congressional power under the Commerce and Equal Protection clauses. If it wanted to do so, could the executive branch prosecute individuals for violating the statute? In other words, does Congress or the Supreme Court have the final word on what is constitutional? Why?

SUMMARY

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Although our laws come from different sources, they all establish rules of conduct that can be enforced by the governments that enacted them. They play an important role in managing conflict and insuring the rule of law in modern democratic societies. In this chapter, we have looked at four sources of law: constitutions, statutes, administrative regulations, and the common law.

Our country was the first to adopt a written constitution, and it is our federal constitution that provides the framework within which all our laws are made. Similarly, states' constitutions provide the legal basis for their governments to act.

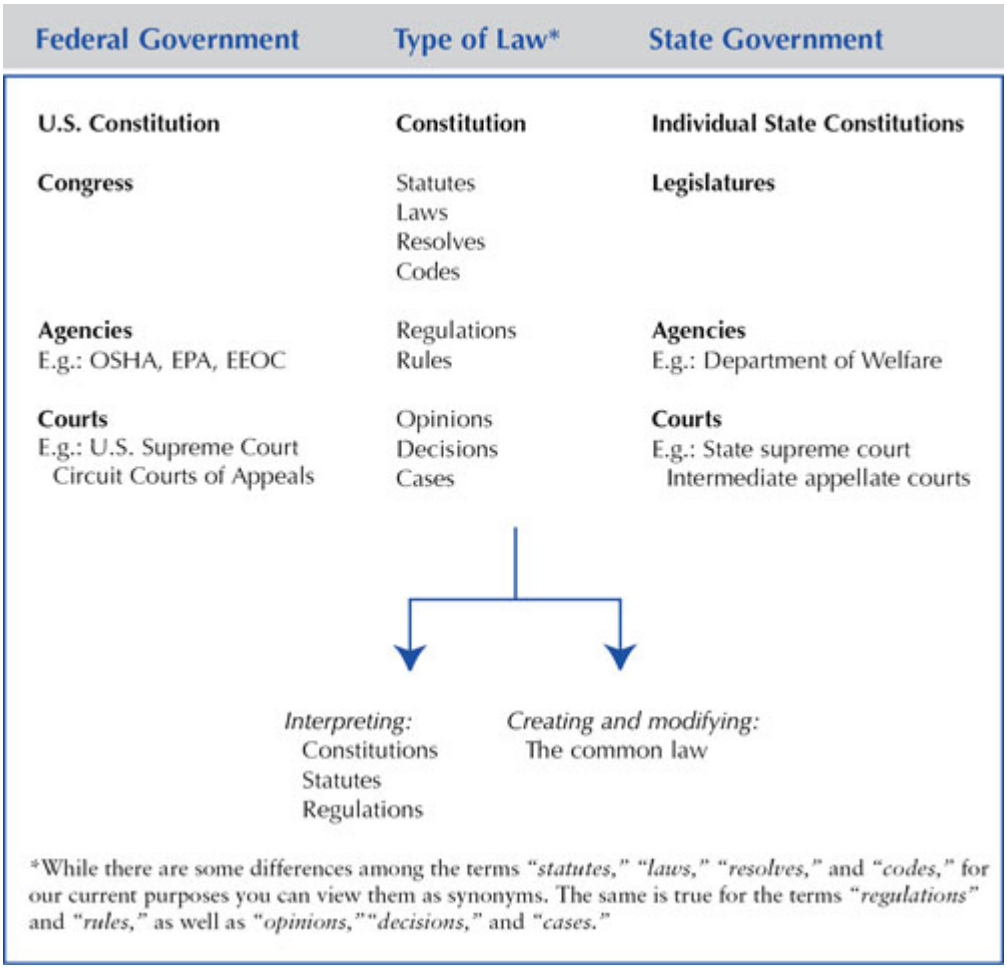

Figure 2-3 Sources of Law

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Even though traditionally we say that the legislature makes the law, the executive branch enforces the law, and the courts interpret the law, the truth is that the legislative, executive, and judicial branches, as well as administrative agencies, are all involved in making law. Legislatures create law by enacting statutes; agencies create law by promulgating regulations; the executive branch creates laws through executive orders and memoranda; and appellate courts create law through their written opinions, known as "court decisions."

The example with which we began this chapter provides a good illustration of how statutory, regulatory, and court-made law work together. Congress enacted a statute that prohibited "sex discrimination." Because this phrase is so broad, the EEOC, an administrative agency, has issued regulations that more clearly define some types of sex discrimination, such as sexual harassment. Even the most detailed regulation cannot cover every individual case, however. Therefore, the courts are constantly called on to interpret the meanings of both statutes and regulations. In the case of women such as Diane Jackson, the U.S. Supreme Court determined that the federal statute prohibiting sex discrimination did not cover pregnancy. Because the Court based its ruling on its interpretation of the statute, not on any constitutional authority, Congress was able to reverse this result by enacting a statute that more explicitly prohibits discrimination based on pregnancy.

Where no constitution, statute, or administrative regulation applies, the courts rely on the common law to resolve the problem. But it is in their role as interpreters of constitutional, statutory, and administrative provisions that courts have the greatest power: By interpreting the law, the courts end up creating the law. Figure 2-3 summarizes the major sources of law.

REVIEW QUESTIONS

Pages 25 through 31

1. What are the two primary functions of the U.S. Constitution?

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2. Read the excerpts from the U.S. Constitution and the Bill of Rights located in Appendix A. Then answer the following questions:
   a. Which article deals specifically with the legislature? With the executive? With the judiciary? (This may seem like trivia necessary only for *Jeopardy* contestants, but lawyers often refer to Article I, Article II, or Article III powers.)
   b. Which amendment states that the powers not specifically delegated to the federal government are reserved to the states?
   c. Make a list of the rights protected by the first ten amendments (Bill of Rights).
3. What is the doctrine of separation of powers, and how does it relate to our system of checks and balances?
4. What is the power of judicial review, and why is it so important to our legal system?
5. What is the doctrine of incorporation, and why is it important for understanding our rights under the U.S. Constitution?
6. John is upset with his neighbor because on weekends the neighbor plays loud music, disturbing John's sleep. John is so angry that he wants to sue his neighbor for violating his federal constitutional right to privacy. Why will John not be able to win his lawsuit?
7. Are the protections provided by state constitutions the same as those given by the U.S. Constitution? Why might that matter?

Pages 32 through 37

8. Why do constitutions and statutes frequently include ambiguous language?
9. How do courts become involved in the legislative process?
10. How are statutes and administrative regulations similar? How do they differ?
11. What is an enabling act?

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12. Why are administrative agencies referred to as the fourth branch of government?
13. How are administrative regulations and executive orders and executive memoranda similar? How do they differ?
14. Can executive orders and executive memoranda be reviewed by the courts?

Pages 37 through 38

15. What is the common law?
16. What is the doctrine of *stare decisis* and why is it important to our legal system?
17. What does it mean to say the common law has been codified? That a statute is in derogation of the common law?
18. Why were equity courts created, and what special powers were they given?

Pages 38 through 41

19. Who has the final say as to what a statute means: the legislature or the courts?
20. Who has the final say as to the constitutionality of a statute, the legislature or the courts?

---

[1] The U.S. Constitution had to be ratified by conventions of at least nine states. Most state constitutions require ratification by a majority vote of the general electorate.

[2] Article V of the U.S. Constitution requires that amendments be proposed by two-thirds of both houses (the House of Representatives and the Senate), or by a special convention called at the request of the legislatures of two-thirds of the states. Three-fourths of the state legislatures or conventions must then ratify the proposed amendment.

[3] 5 U.S. (1 Cranch) 137 (1803).

[4] Id. at 177-78.

[5] Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995).

[6] York v. Wahkiakum School District No. 200, 178 P.3d 995 (Wash. 2008).

[7] The exception to this is for bills raising revenues, which must originate in the House.

[8] 42 U.S.C. §2000e-2(a) (2025).

[9] 429 U.S. 125 (1976).

[10] Bennett Amendment, 42 U.S.C. §2000e(k) (2025).

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11 29 C.F.R. §1604.11 (2025).
12 Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).
13 The U.S. Constitution, Article II, Section 1, states, "The executive Power shall be vested in a President of the United States of America."
14 163 U.S. 537 (1896).
15 347 U.S. 483 (1954).
16 410 U.S. 113 (1973).
17 597 U.S. 215 (2022).

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Chapter 3

Classification of the Law

Logically , e v er ything ought to come first.
Jean-Jacques Rousseau

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Chapter Objectives

After reading this chapter, you should be able to:

- Explain what it means to say that Congress has limited powers.
- Identify areas of the law that could be federal only, state only, or both.
- Describe the basic differences between civil and criminal law.
- Distinguish substantive from procedural law.

INTRODUCTION

In this chapter, we will discuss the most common ways in which lawyers have traditionally categorized law: federal versus state, criminal versus civil, and substantive versus procedural. Keep in mind, however, that although it is necessary to categorize a client's legal problem to help the client, you should not fall into the trap of seeing a client as only a set of legal problems that can be neatly sorted into predefined categories. There is a person behind every legal problem.

In Chapter 2, we explained how law is made not only by legislatures, but also by administrative agencies, executive orders and memoranda, and the courts. Based on its source, we classified law in terms of constitutional, statutory, administrative, or common law, or law made by executive orders or memoranda. You can also classify law based on whether it involves:

1. state or federal law (every state, as well as the federal government, has its own laws);
2. civil or criminal law (**civil law** deals with harm against an individual—for example, a broken contract—whereas **criminal law** deals with harm against society as a whole—as when violence leads to someone's death); and

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3. substantive or procedural law (**substantive law** defines our legal rights and duties—for example, the duty to obey speed limits and the right of freedom of speech—whereas **procedural law** is comprised of the rules that govern how the legal system operates).

Civil law

Law that deals with harm to an individual.

Criminal law

Law that deals with harm to society as a whole.

These categories are not mutually exclusive. A client's situation may involve both federal and state laws, both civil and criminal issues, and procedural as well as substantive questions. For example, the victim of a battery could sue the attacker for civil damages at the same time the state is prosecuting the attacker on a criminal charge. Figure 3-1 illustrates how these categories relate to each other. At this point, do not be concerned about understanding all of the terms listed in the chart. As the chapter proceeds, we will discuss each term in more detail.

To illustrate key points in this chapter, we will be making frequent references to events surrounding the aftermath of the Boston Marathon bombing.

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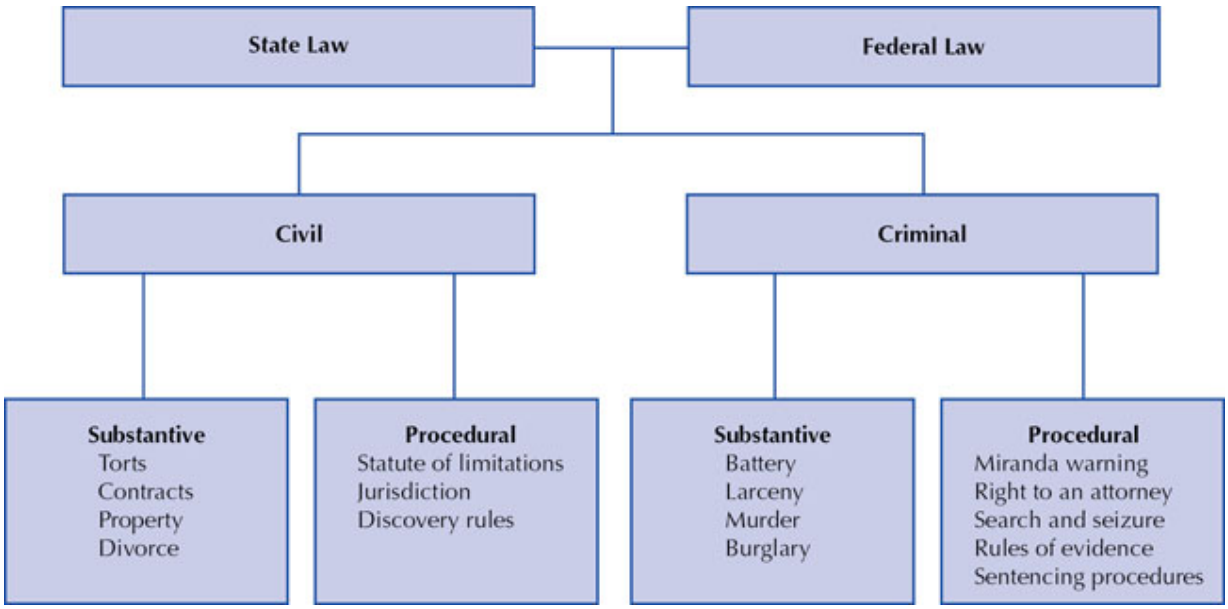

Figure 3-1 How Lawyers Classify the Law

Case 4: The Boston Marathon Bombings

On April 15, 2013, two bombs were detonated near the finish line of the annual Boston Marathon, killing three and injuring more than 200 runners and spectators. The government alleged that the attack was carried out by 26-year-old Tamerlan Tsarnaev and his 19-year-old brother, Dzhokhar Tsarnaev. In the ensuring manhunt, Tamerlan was killed, but Dzhokhar was captured and charged with committing a host of crimes.

As you read about the different ways that the law can be classified, think about how you might answer the following questions:

- Should Dzhokhar have been charged with state or federal crimes, or both? What are the implications of bringing federal versus state charges?
- How could the victims go about trying to receive compensation for the injuries they suffered?

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- What procedural issues might the Tarnaev case raise?

A. FEDERAL VERSUS STATE LAW

In the previous chapter, we noted how the U.S. Constitution created a system of government, known as **federalism**, in which the power to make various types of laws is divided between the federal government in Washington, D.C., and the 50 state governments. Each of the 50 states, along with the federal government, has its own legal system. Each determines how its court system will be organized and what laws it will enforce. Although the laws of one state are often similar to the laws of another, each state ultimately decides for itself what those laws will be. A client's problem may involve state law, federal law, or both state and federal law.

Federalism
A system of government in which the authority to govern is split between a single, nationwide central government and several regional governments that control specific geographical areas.

1. Federal Law

Federal law is involved if the situation concerns any of the following:

1. a U.S. Constitutional issue (such as whether a branch of the federal government has exceeded its delegated powers, or whether an individual's freedoms guaranteed by the Bill of Rights have been violated);
2. a federal statute (such as the Internal Revenue Code or the Civil Rights Act of 1964); or
3. a regulation of a federal agency (such as the Internal Revenue Service or the Environmental Protection Agency).

When a client's problem is covered by one of these three areas, you will hear lawyers referring to this as raising a federal issue or a

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federal question. As we will see later in Chapter 5, on civil litigation, the raising of a federal question is one basis for establishing jurisdiction in the federal courts.

Federal question

A legal question involving the application of federal law.

While states have "inherent power" to take actions designed to advance the health, welfare, safety, and morals of the people, the federal government is limited to those powers that are delegated to it in the U.S. Constitution. Therefore, for example, Congress has the power to enact legislation regarding taxation, but not a national divorce law.

However, even though the federal government is limited to the powers that are delegated to it in the Constitution, these powers are quite sweeping. Take a moment to look at Article I, Section 8 of the U.S. Constitution (in Appendix A). The government can lay and collect taxes, regulate currency, fix weights and measures, establish post offices, raise armies, and declare war, just to name a few. In addition, several constitutional amendments such as the Fourteenth Amendment have provisions enabling Congress to pass legislation necessary to enforce those specific amendments.

Congress also has the ability to enact laws that are "necessary and proper" to carry out its delegated powers. The last clause in Article I, Section 8, states: "[And] to make all Laws, which shall be necessary and proper for carrying into Execution the foregoing Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

This is commonly called the **doctrine of implied powers**. For example, even though the Constitution did not explicitly delegate to Congress the power to create a national bank, in the 1819 case of *McCulloch v. Maryland*,[1] the U.S. Supreme Court determined that its ability to do so was implied because the Constitution had expressly delegated to Congress the power to collect taxes and borrow money.

Doctrine of implied powers

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Powers not stated in the Constitution but that are necessary for Congress to carry out other, expressly granted powers.

One of the most expansive federal powers involves the application of the Commerce Clause. Article I, Section 8, provides that "Congress shall have power to regulate commerce . . . among the several states." On its face, this seems quite straightforward, that is, whenever something crosses state lines, the federal government, rather than the individual states, should be the appropriate source of authority so as to create a uniform system. For example, if a river flows through several states, the federal government should be able to impose uniform limits as to what can be dumped into the river, as what is dumped in one state will inevitably flow into and affect the next. However, it is not always clear when something will have an impact on interstate commerce, especially when an activity is carried out entirely within just one state.

In the landmark case of *Wickard v. Filburn*, the U.S. Supreme Court interpreted the Commerce Clause as giving the federal government the power to regulate not only the movement of things that cross state lines but also any activity that has an effect on interstate commerce.[2] In that case, a farmer had harvested more wheat than allowed under a federal statute. He argued that the wheat was to be used solely on his farm and so its production would have no impact on interstate commerce. The Court disagreed. "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[3] Since setting this standard, the Supreme Court has grappled many times with whether a particular action has a great enough effect upon interstate commerce to justify federal regulation.

For example, in the 1960s, Congress relied upon those powers when it enacted the 1964 Civil Rights Act, making it unlawful to discriminate on the basis of race, color, religion, sex, or national origin. As the provisions were challenged, the Supreme Court continued to uphold the right of Congress to legislate through a broad reading of the Commerce Clause. In *Heart of Atlanta Motel, Inc. v. United States,*

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a motel in Georgia refused to rent rooms to Black patrons, in direct violation of the Civil Rights of Act of 1964, which banned racial discrimination in public accommodations. The motel argued that by depriving places of public accommodation of the right to choose with whom they wished to do business, Congress had exceeded its Commerce Clause powers. The U.S. Supreme Court held that the statute was within the scope of the Commerce Clause because the existence of racially discriminatory practices made it more difficult for minorities to travel from one state to another, and this had a negative impact on the free flow of interstate commerce. [4]

Beginning in the 1990s, the Supreme Court began to interpret the Commerce Clause less expansively. In 1990 Congress enacted a statute making it a crime to possess or discharge a gun in a school zone. Five years later, in *United States v. Lopez*,[5] the U.S. Supreme Court ruled that the statute was unconstitutional because it "exceeded Congress' power to legislate under the Commerce Clause," as the presence or absence of guns in schools had no economic impact on interstate commerce. Therefore, the decision as to whether to create a gun-free school zone was the sort of intrastate activity that states, but not the federal government, could regulate.

In addition, any fundamental right given by the U.S. Constitution, and especially the first ten amendments along with the Fourteenth Amendment, provide a source of federal law. Many of these rights involve protections for those accused of a crime such as the right to remain silent and to have an attorney. One right not explicitly stated in the Constitution but recognized by the U.S. Supreme Court is the right to privacy. For example, in *Griswold v. Connecticut*,[6] the Court ruled that a Connecticut statute prohibiting contraception devices was unconstitutional when applied to married couples. Seven years later, the Court extended that right to unmarried people. [7] Prior to these decisions, many states had banned contraceptives, prohibiting physicians and other medical personnel from prescribing, or even discussing, contraceptive methods with their patients. Then in 1973, in the landmark decision of *Roe v. Wade*, the Court concluded that a Texas anti-abortion statute violated that same right of privacy.[8] This

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was followed by other cases in which the Court recognized a right to same-sex sexual intimacy in *Lawrence v. Texas*,[9] and the right to same-sex marriage in *Obergefell v. Hodges*.[10] This expansion of federal control over family planning decisions and interpersonal relationships ended in 2022, when the Supreme Court overturned *Roe v. Wade* and held that the Constitution does not confer a right to abortion, returning to the states the power to regulate abortions.[11] Therefore, abortion regulation is no longer a matter of federal law but rather of individual state laws.

Finally, in recent years, although the reach of general federal administrative law has decreased, the extent and impact of presidential executive orders has dramatically increased. The traditional role of executive orders has been fairly limited to giving directives to agencies. But in his second term, President Trump used executive orders to cover a wide range of topics including such diverse areas as renaming the Gulf of Mexico the Gulf of America, imposing tariffs on imported goods, deporting illegal immigrants, dismantling the Department of Education, and ordering the defunding of various charitable organizations as well as public broadcasting. Many of these orders were challenged in court as some saw them as exceeding the limits of legitimate constitutional executive powers.

DISCUSSION QUESTION

1. Do you think the decision to ban or allow abortion is something that is best decided by the U.S. Supreme Court, Congress, state supreme courts, state legislators, or voters? What are the benefits and drawbacks of each approach?

2. State Law

Whereas the federal government must trace all of its powers back to a specific constitutional authorization, the states are allowed to make any laws they deem appropriate for the health, welfare, safety, and morals of their citizens, so long as those laws are not prohibited by

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the U.S. Constitution. [12] Typical examples of areas covered by state law are criminal behavior (from murder and rape to burglary and fraud), contracts, torts, property, and family matters. Figure 3-2 compares federal and state legislation.

Although much of the law from one state to the next is quite similar, the states are free to create their own unique laws. Where one state may choose to create a state lottery, another may not; where one state may choose to allow no-fault divorces, another may not.

Some see this diversity as one of the great strengths of our political system. They argue that it encourages experimentation and innovation by allowing the residents of Georgia, for example, to establish rules of conduct that differ from those established by the residents of Nevada. Critics, on the other hand, point to the problems it creates for interstate business and travel—for example, forcing large corporations and other out-of-state parties to hire local lawyers and making it difficult for a lawyer to move a practice from one state to another. They also point out that states are sometimes reluctant to impose needed regulations (in areas such as environmental protection and worker safety) for fear that the affected businesses will move to another state with fewer restrictions.

As we become an ever more interdependent nation, however, state laws are tending to become more and more uniform, especially in the area of commercial law. Businesses with dealings in more than one state would rather not have to worry about adhering to a multiplicity of state laws. Therefore, most states have voluntarily moved to adopt uniform laws in areas such as commercial sales.

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	Federal	State
Who enacts	Congress	State legislature
Limitations on legislative powers	Must be found in the Constitution: Article I, Section 8 delegated power Implied power Effect on interstate commerce Amendment enabling provision	Essentially none, so long as not prohibited by the U.S. Constitution and related to the welfare of its citizens
Examples	Income taxes Creation of a national bank Regulation of interstate train travel The Americans with Disabilities Act	Divorce laws Laws governing gambling Landlord/tenant law

Figure 3-2 A Comparison of Federal and State Legislation

While state legislatures enact statutes that can affect everyone in the state, local governmental units can enact laws (usually referred to as "ordinances") that have a more localized effect. Local governments are considered to be part of the state government, and can only make laws when they have been specifically authorized to do so by the state legislature.

3. The Supremacy Clause and Preemption

The federal and state governments often pass laws that overlap. So long as state laws do not interfere with the enforcement of federal laws, states are usually free to pass additional regulations or protections for their citizens.

For example, the Civil Rights Act of 1964 is a federal statute prohibiting employers from discriminating on the basis of race, sex, color, religion, or national origin. State or local governments may pass

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laws prohibiting such discrimination as well. For example, a state could add to the list of prohibited types of discriminatio n, such as also prohibiting discrimination based on height or weight. This would be permitted because the state statute would not interfere with the enforcement of federal law. A state, however, could not pass a statute allowing discrimination based on religion because that would be in direct conflict with federal law.

There are a few areas where this type of overlapping of federal and state law is not allowed. This is because the U.S. Constitution includes a **Supremacy Clause** that gives the federal government the power to prohibit states from passing any law in certain areas. This is known as **preemption**. For example, it would make sense that only the federal government could pass laws regulating railroad safety, such as maximum train speed and train length, preempting any type of state or local government regulation of trains. In addition to federal statutes preempting state law, at times the U.S. Supreme Court has determined that there are areas that should be reserved for federal control. For example, in *Obergefell v. Hodges,* the U.S. Supreme Court determined that same-sex marriage is a fundamental right under the Fourteenth Amendment and the Equal Protection Clause.[13] Prior to *Obergefell*, some states passed laws allowing same-sex marriage and others passed laws prohibiting it. Once the U.S. Supreme Court determined that same-sex marriage is a fundamental right under the U.S. Constitution, the state laws prohibiting same-sex marriage became invalid because they conflicted with the U.S. Constitution. States may, however, still legislate regarding marriage where their laws do not conflict with federal law, such as the requirement to obtain a marriage license.

Supremacy Clause

A clause in the U.S. Constitution that dictates if there is a conflict between federal law and state law, federal law takes precedence.

Preemption

The power of the federal government to prevent the states from passing conflicting laws, and sometimes even to prohibit states from

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passing any laws on a par ticular subject.

4. Application of F ederal v ersus State Law

As mentioned abo ve, if ther e is no conflict, both federal and state go vernments can pass laws co vering the same general ar ea of the law . Th e Bost on bombing case described at the beginning of this chapter illustrates a situation in which an action can violate both federal and state laws. In thi nking about that case, criminal char ges for m ur der ar e the first thing that comes to most people 's minds, and mur der is traditionally an ar ea co ver ed by state criminal law . Indeed, Massachusetts authorities char ged Dzhokhar Tsarnae v with violating a number of Massachusetts state laws, including mur der . Howe ver, federal author ities also char ged him with a number of federal off enses, inclu ding the use of a weapon of mass destruc tion. [14] One consequence of Tsarnae v being char ged with federal crimes is that the federal char ges also carr ied the possibility of the dea th penalty , something not a vailable to Massachusetts state pr osecut ors, as Massachusetts does not ha ve the death penalty .

Note that being char ged with both state and federal crimes does not raise double jeopar dy concerns. **Double jeopardy** is a constitutional pr ohibition against being tried twice for the same crime. The cour ts ha ve interpr eted "same crime " to ref er to a violation of the same section of the same criminal code.

Double jeopardy
A constitutional pr ohibition against being tried twice for the same crime.

5. Recap

As we ha ve seen, a legal pr oblem could be go verned by federal law , state law , or both. K eep the following thr ee possibilities in mind:

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First, there are some areas in which only the states can legislate—areas reserved to the states—such as divorce.

Second, there are some areas in which both the states and Congress can legislate—such as criminal behavior that crosses state lines.

Third, there are a few areas in which only Congress can legislate—areas of total preemption—such as certain safety issues involving trains traveling across state lines.

DISCUSSION QUESTIONS

2. Can you think of any areas of the law that are not now regulated on a federal level but should be? Conversely, can you think of any areas of the law that should be left solely to state and local governments? If so, what are they, and why do you think the federal government should not be involved?

3. In 1970, the U.S. Congress passed the Controlled Substance Act (CSA), making it unlawful to manufacture, distribute, dispense, or possess any Schedule I substance. From then on, marijuana, or cannabis, has been a Schedule I substance, considered to have no acceptable medical use and a high potential for abuse. By 2024, a majority of states had legalized marijuana for medical use or for recreational purposes. How should our federal legal system resolve this conflict between federal and state laws?

Legal Reasoning Exercise

1. For each situation, determine whether you think the law involved is federal, state, or both.

   a. A person is liable for slander if that person intentionally says that someone is a thief when she knows it is not true.

   b. To be valid, a contract for the sale of real estate must be in writing.

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c. Trucks traveling on interstate highways must be equipped with conca ve mud flaps.

d. No employer with ten or more employees may discriminate on the basis of race, color, religion, sex, or national origin.

e. A manufacturer of inherently dangerous products will be liable for any defective product that causes injury.

B. CRIMINAL VERSUS CIVIL LAW

Another major classification within the law is the division between criminal law and civil law. Both provide mechanisms for addressing violations of the law, but they differ regarding the procedures you must use and the types of sanctions or remedies that are available. In this section, we will first compare criminal and civil law. Next, we will take a quick look at the major substantive areas of criminal and civil law. We cover substantive civil law in more depth in Chapters 6, 9, and 10 and criminal law in Chapter 7.

1. A Comparison of Criminal and Civil Law

Some of the major differences between criminal and civil law are listed in Figure 3-3, on page 55. When you are analyzing a fact pattern, it is important to be able to differentiate between criminal and civil law and to understand the different procedures entailed in each. Keep in mind, however, that a single event can become the basis for actions in both the criminal and the civil courts. For example, the victim of a battery could sue the attacker for civil damages at the same time the state is prosecuting the attacker on a criminal charge. The driver of an automobile involved in a traffic accident may receive a traffic ticket from the police and at the same time be sued by someone else involved in the accident.

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While the Boston bombing case that started this chapter dealt mostly with criminal activities, civil lawsuits by the victims and their families were also a possibility. However, very few civil lawsuits were actually filed, partly because there was no reasonable expectation that Tsarnaev had the funds to pay for the harm he caused, and also, there was no evidence to suggest that anyone else was to blame based on theories such as failure to maintain adequate security.

a. *Double Jeopardy and* Res Judicata

Just as being charged with a state and a federal crime does not constitute double jeopardy, charging a person with a criminal violation and suing that person civilly also does not constitute double jeopardy.

Civil law has a principle similar to double jeopardy, ***res judicata***, which precludes trying a civil case more than once.

Res judicata
Occurs when a civil case has a final judgment and is no longer subject to appeal; at that point, the case cannot be relitigated between the original parties.

b. Type of Harm

Civil law is invoked when one individual harms another. When an individual violates a part of the criminal law, society considers itself the offended party and takes an active role in the sanctioning process. Thus, if Peter Jones burglarizes Sam Smith's home, criminal law views that act as an offense against society itself, rather than simply as a matter between Smith and Jones.

But what determines when an act such as burglarizing someone's home is a wrong against society as a whole? It is up to the legislative branch of government to decide when the consequences of certain acts are viewed as grave enough to classify the act as a crime against the state. Thus, when the legislature perceives that a

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particular act, such as drunk driving, has that broader impact, it can criminalize such behavior.

c. Names of the Parties and the "Prosecutor" of the Claim

The person who brings a civil suit (also known as a "civil action" or a "civil lawsuit") is known as the **plaintiff**, and the person sued is called the **defendant**. For example, recall the situation involving the pregnant waitress presented at the beginning of Chapter 2. If Diane Jackson were to sue the restaurant, she would be the plaintiff. Both the corporation that owns the Western Rib Eye Restaurant and the restaurant manager would probably be named as defendants. Although civil suits are usually between individuals, a governmental unit (federal, state, or local) can become a plaintiff in a civil suit.

Plaintiff
A person who initiates a lawsuit.

Defendant
In a lawsuit, the person who is sued; in a criminal case, the person who is being charged with a crime.

In a criminal case, the governmental unit that brings the charge is the **prosecutor**, and the accused is the defendant. For example, in the Boston bombing case, the federal case would be cited as *United States v. Tsarnaev* and the Massachusetts state case as *Commonwealth v. Tsarnaev*. Governmental lawyers prosecute the accused party (the defendant), and the victim is a witness, not a party to the action.

Prosecutor
The attorney responsible for presenting the government's evidence against a criminal defendant.

d. Standard of Proof

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Because of the serious consequences of violating criminal laws, the stan dar d o f pr oof is diff er ent fr om that used in civil cases. On the criminal side, the pr osecution is requir ed to pr o v e its case **be y ond a reasonable doubt** . Judges usually explain the "be y ond a reasonable doubt" standar d t o jur ors as the degr ee

Be y ond a reasonable doubt

The standar d of pr oof used in criminal trials. The e vidence pr esented must be so conclusiv e and complete that no r easonable doubts regar ding the facts r emain.

of doubt that causes a reasonable person to refrain from acting. The pr oof must be so conclusiv e and complete that all reasonable doubts regar ding the facts ar e r emo v ed fr om the jur ors' minds.

	Civil	Criminal
Principle governing relitigation	*Res judicata*	Double jeopardy
Type of harm	Private injury	Harm to society
Names of the parties	Plaintiff/defendant	State*/defendant
"Prosecutor" of the claim	Usually an individual; sometimes the government	Government
Standard of proof	Preponderance of the evidence	Beyond a reasonable doubt
Judgment	Liable/not liable	Guilty/not guilty
Sanctions/remedies	Damages/injunction	Imprisonment/fines/death
Source of law	Common law/statutes	Statutes

*The state may also be referred to as "the Commonwealth" or "the People." Although the state is the named party, it is actually a government employee, the prosecutor (also known as the "district attorney," "state's attorney," or "attorney general"), who brings the lawsuit as the state's representative.

Figure 3-3 A Comparison of Civil and Criminal Law

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In most civil actions, the plaintiff need only meet the **preponderance of the evidence** standard. A preponderance of the evidence is usually understood to mean that the facts asserted are more likely to be true than not true. One study showed that judges equate "beyond a reasonable doubt" with a median probability of approximately 8.8 out of 10. Jurors averaged approximately 8.6 out of 10. The judges interpreted preponderance of the evidence as a median probability of 5.4 out of 10. For jurors, the median was 7.1 out of 10.[15] These results indicate that although judges and jurors may disagree as to the precise meaning of the standards, they agree that the criminal law requires a greater degree of proof before its sanctions can be applied.

Preponderance of the evidence

The standard of proof most commonly used in civil trials. The evidence presented must prove that it is more likely than not the defendant committed the wrong.

There are a few occasions in which a higher, **"clear and convincing** evidence" standard, is used in civil actions. Examples include situations in which someone is being denied an important government benefit or is facing involuntary commitment to a mental institution. This standard is also used when a court has to determine whether to terminate a parent's rights. Generally, the state must prove the parent is "unfit" by clear and convincing evidence.

Clear and convincing

The standard of proof used in some civil trials. The evidence presented must be greater than a preponderance of the evidence, but less than beyond a reasonable doubt.

DISCUSSION QUESTIONS

4. What do you think of the differences between judges' and jurors' definitions of "beyond a reasonable doubt" and a

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"preponderance of the evidence"? Do you think this causes any problems for our legal system?

5. Think about the different standards of proof: beyond a reasonable doubt, preponderance of the evidence, and clear and convincing evidence.

- **a.** What factors do you think should be considered in determining which standard should be applied?
- **b.** Specifically, do you think that preponderance of the evidence is the appropriate standard when determining whether to terminate the parental rights of an "unfit" parent? Why?

6. On June 12, 1994, Nicole Brown Simpson and Ron Goldman were murdered in Los Angeles. The State of California charged Nicole Brown Simpson's ex-husband, O. J. Simpson, with the murders. After a lengthy trial, the jury found him not guilty. After the trial, the families of Nicole Brown Simpson and Ron Goldman sued O. J. Simpson for damages in civil court. O. J. Simpson was found responsible. Why did the two cases, on the same facts, have different results? Does this undermine our justice system? Why or why not?

e. Judgment

The result of the court's actions in a civil suit is a finding of liability or no liability. Do not use the term *guilty* when referring to a civil defendant. Only in a criminal case do we say that the defendant was found guilty or not guilty.

f. Sanctions/Remedies

The typical remedy in a civil case is either **damages**, where the defendant pays the plaintiff for the harm that he or she has done, or an **injunction**, where the court orders the defendant to take some specific action or to cease acting in a specific way. For example, a restaurant libeled by a newspaper might ask for damages to pay for lost business and an injunction ordering the paper to print a retraction. In the case of the waitress, Diane Jackson, she might ask

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to be paid for the time she has been out of work (damages) and request a court order requiring the restaurant to rehire her (an injunction).

Damages

Monetary compensation, including compensatory, punitive, and nominal damages.

Injunction

A court order requiring a party to perform a specific act or to cease doing a specific act.

Whereas the focus of civil law is on redressing the losses of the plaintiff, in criminal law the sanctions are designed to punish the offender and deter not only the offender but future offenders as well. If a court of law determines that a provision of criminal law has been violated, it may impose two broad types of sanctions—loss of liberty and financial penalty. The loss of liberty can range from receiving unsupervised probation to spending a few days in the county jail to serving several years in a state penitentiary to receiving the death penalty. The fines assessed as part of the criminal process become the property of the state rather than the victim. Only occasionally will a negotiated settlement with a criminal defendant contain some provisions for restitution for the victim. Usually, if the victim wishes to receive money from the criminal defendant to compensate her for the harm done to her, she must hire a lawyer and initiate a civil suit.

g. Sources of Law

A final difference relates to the sources of criminal and civil law. Criminal law is almost entirely statutory, while civil law is rooted in the common law (court-made law). Gradually, however, this distinction is being eroded as more and more areas of the civil law are becoming controlled by statutory law.

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h. Recap

Common ways of differentiating criminal from civil law include the following: In a civil case, the harm is to an individual, while in a criminal case, the action is said to harm society itself; in a civil case, the parties are labeled the plaintiff and the defendant, whereas in a criminal case, they are the state and the defendant; the government prosecutes criminal cases, while individual plaintiffs initiate civil cases; in a criminal case, the government must prove its case beyond a reasonable doubt, whereas in a civil case, the plaintiff must prove his or her case by a preponderance of the evidence; a finding of guilt in a criminal case results in a fine or imprisonment, while a finding of liability in a civil case results in a monetary award or an injunction; and the source of law for civil cases is both court-made law and statutes, whereas almost all criminal law is based in statutes.

2. Criminal Law

Murder, robbery, and arson are examples of criminal behavior. However, it is much easier to list types of criminal behavior than it is to define the difference between criminal and civil law. As mentioned earlier, usually it is said that a criminal act harms not just the victim, but also society as a whole. That definition does not get us very far. What is a wrong against society as a whole? One way of viewing that is to say that the act hurts not only the individual victim, but also society as a whole because the act's consequences are so grave as to cause concern to the rest of the population. When the legislature perceives that a particular act such as arson has that broader impact, it enacts a statute outlining the elements of the crime and its punishment.

a. Types of Crimes

Serious crimes, such as murder, rape, armed robbery, and aggravated assault, are classified as felonies, and they generally

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involve a punishment that can include a year or more in a state prison. Misdemeanors include such lesser charges as disorderly conduct and criminal damage to property. When incarceration is called for in these cases, it usually is for less than one year and is served in a county jail. As mentioned above, in most jurisdictions criminal law is entirely statutory, and the legislature determines whether a given act is to be considered a felony or a misdemeanor.

b. Establishing a Prima Facie *Case*

For a person to be convicted in a criminal trial, the prosecution must establish that the defendant committed an act defined as being illegal in the criminal code. This involves proving that the accused both possessed the requisite bad intent (called ***mens rea***) and the requisite bad behavior (called ***actus reus***). Different acts—killing someone, burning down a building, robbing a store—can give rise to different crimes. It is also true that the same act accompanied by different types of intent can give rise to different crimes. For example, the act of killing could be categorized as murder or manslaughter, depending on the defendant's state of mind when he or she committed the act.

Mens rea
Bad intent.

Actus reus
Bad act.

At the trial, the prosecution must first present a ***prima facie* case**, one that establishes the elements of the crime, the requisite bad intent and bad behavior. A *prima facie* case contains enough evidence to support a finding of guilty if the defense presents no contrary evidence. If the prosecution fails to present a *prima facie* case, the judge must issue a not guilty verdict without the defense even presenting its case.

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Prima facie case

What the prosecutor or plaintiff must be able to prove for the case to go to the jury—that is, the elements of the prosecution's case or the plaintiff's cause of action.

Practice Tip

Even though we sometimes talk about civil versus criminal law, keep in mind that the same facts may give rise to both civil and criminal lawsuits. If a potential defendant in a civil case has been convicted at a criminal trial, it will be easier for the plaintiff to win a civil case. However, even if the defendant was acquitted at the criminal trial, because of the different standards of proof and evidentiary requirements the plaintiff may still win in a civil case.

Legal Reasoning Exercise

2. Take a moment to read the following Massachusetts statute regarding larceny.

> Whoever steals . . . and with intent to steal . . . the property of another . . . shall be guilty of larceny . . . .[16]

a. Assume that Alan got into a car, knowing that it was not his, "hot-wired" it, and then drove off in it. Is he guilty of violating the statute? Why?

b. Assume that Bill approached a car that he intended to steal but was scared away by a passerby. Is he guilty of violating the statute? Why?

c. Assume that Charles got into a car, thinking he was getting into his friend's car, and "hot-wired" it, but he only

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meant t o borr ow it. Is he guilty of violating the statute? Why?

c. Def enses

If th e pr osecution does pr es ent a *prima facie* cas e, the def e nse then has the oppor tunity to pr esent evidence that either contradicts that pr esented by the pr osecut or or establishes a legally recogniz ed justification. This evidence could inv olv e witnesses who contradict the testimony of pr osecution witnesses or evidence that establishes an alibi, self-def ense, or an insanity def ense.

Ther e ar e essentially two ty pes of criminal **defense s**. The first type jus tifies the act. The se cond type negates the requisite *mens rea.* An example of the first type of def ense, which justifies the act, is self-def ense. The def endant admits killing the victim but a rgues that he or she had no choice. Ex amples of the second type o f def ense, which negates the requisite intent, ar e insanity , infancy , and int oxication. Ea ch of these de fenses has as its pr emise th e fact that the def endant was incapable of forming the requisite intent to commit the crime.

Defense
In a criminal case, a fact or legal ar gument that would r elie v e the def endant of guilt.

After th e def ense has pr esented its evidence, the pr osecution has a chance to respond with rebuttal witnesses to attack these def enses and r eestablish the cr edibility of its own witnesses.

3. Civil Law

Civil law inv olv es priv ate actions br ought by individuals to addr ess per ceiv ed wr ongs. In this section, we will discuss what is necessar y to prove a civ il *prima facie* cas e, the def enses to a civ il suit, the damages that a plaintiff can r eco v er, and the main ar eas of civil law .

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a. Establishing a Prima F acie *Case*

Just as the pr osecution has the bur den of establishing a *prima facie* cas e in a criminal case, so too does the plaintiff shar e a similar bur den in a civil case. The plaintiff has the bur den of pr ovi ng that the various elemen ts listed in his or her complaint show the plaintiff has a valid **cause of action** . A cause of action is a claim that based on the law and the facts is sufficien t to demand judicial action. The plaintiff must pr ove these elements by a pr eponderance of the evidence, which means it is mor e lik ely than not that the def endant committed the wr ong.

Cause of action

A claim that based on the law and the facts is sufficient t o suppor t a lawsuit. If the plaintiff does not state a v alid cause of action in the complaint, the cour t will dismiss it.

For exa mple, assume that a car and a truck collide at an intersection. The driv er of th e car is injur ed and wants to sue the truck dr iv er, alleging that the truck driv er ran a red light. Th e car driv er will be the plaintiff, and his cause of action will be based on the law of negligence (acting unr easonably under the cir cumstances) and the facts of what happened at the intersection. To succeed in a lawsuit, the plai ntiff will ha ve to pr esent evidence that it is mor e lik ely than not that the truck driv er was negligent. If the plaintiff/driv er is able to do so, then he has satisfied his *prima facie* cas e. Ever y ar ea of civil law has its own requir ed elemen ts that constitute the plaintiff 's *prima facie* cas e. Later in this chapter , as you read about tor ts, con tracts, and pr oper ty law , note the requir ements of each for the plaintiff to pr ove a *prima facie* case.

b. Def enses

The def endant/truck driv er can respond first by tr ying to negate the plai ntiff 's case. P erhaps the def endant has a witness who will testify that the light was gr een for the truck driv er and red for the

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plaintiff. In addition to attempting to negate the plaintiff's case, the defendant can present evidence that would negate or reduce the defendant's liability, known as **affirmative defenses**. In effect, the defendant is saying this: Even if you are right and I did something wrong, I have a good excuse or a reason why my liability should be reduced.

Affirmative defense

A defense whereby the defendant offers new evidence to avoid judgment.

For example, in the accident mentioned above, the truck driver might ask the car driver's passenger to testify that the car driver was not being as attentive to his driving as he should have been. This behavior could have contributed to the accident, thereby decreasing the defendant's share of the liability.

It is very important to keep these two approaches separate: First, the defendant tries to negate the plaintiff's case. Second, the defendant raises defenses that could limit his liability even if the plaintiff's version of the law and facts is true.

Depending on the area of law, different defenses will be available. For example, it might be a valid defense to a contract claim that the defendant was only 15 years old when he signed the contract. However, being 15 years old may not be a defense to an intentional tort, such as battery.

In some cases, statutes or constitutions protect certain classes of people or institutions from being sued by granting them either full or partial immunity. One of the oldest and most important forms of immunity is **sovereign immunity**. Historically, the doctrine of sovereign immunity prohibited injured parties from suing the government unless the government gave its consent. This protection can be traced back to the concept of the divine right of kings and the idea that "the king can do no wrong." Later in this book, we also discuss the related concepts of spousal and parental immunity.

Sovereign immunity

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The pr ohibition against suing the go vernment without the go vernment' s consent.

c. Damages

If a cour t determines that the plaintiff should reco ver, the issue of damages (monetar y compensation) arises. Ther e ar e thr ee types of damages: compensat or y, punitiv e, and nominal. **Compensator y damages** ar e intended to compensate the plaintiff for the harm done to h er or him. In a tor t action inv olving harm to a person, that might mean the cost of medical bi lls, lost wages, and pain and suff ering. **Punitiv e dama ges** ar e des igned to punish the de fendant and typically ar e awar ded only for intention al tor ts when the cour t deem s that the **tor tfeasor** (the person who committed the tor t) deser ves additional punishment be yond just compensating the plaintiff for the harm done to h im or her . Finally , **nominal damages** ar e awar ded when the law has been violated, but the pla intiff cannot pr o ve any monetar y harm. As mentioned earlier , in addition to or instead of damages, the cour t might issue an injunction, an or der to the def endant telling the def endant t o do a specific act or t o cease doing a specific act.

Compensator y damages
Mone y awar ded t o a plaintiff in pa yment for his or her actual losses.

Punitiv e damages
Mone y awar ded t o a plaintiff in cases of intentional t or ts t o punish the def endant and ser ve as a warning t o others.

Tor tfeasor
A person who commits a t or t.

Nominal damages
A t ok en sum awar ded when liability has been found, but monetar y damages cannot be shown.

d. Ar eas of Civil Law

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Civil law covers a very broad range of subjects, including adoption, admiralty, bankruptcy, corporations, divorce, employment, environmental protections, intellectual property, personal injury, probate, and real estate law. It is helpful to think of civil law as falling into three main categories: making deals, owning property, and protecting people and property from harm. The most basic principles of each are covered in the standard law school courses of contracts, property, and torts, respectively. The various specialty fields listed above all involve applications of the principles taught in these three courses.

(1) Contract law

Contract law involves identifying the elements of a valid contract and the procedures used to enforce those agreements. A **contract** is a written or verbal agreement that is legally enforceable, supported by consideration. Therefore, contract law deals with two-sided agreements or bargains. I agree to sell you my diamond ring, and you agree to give me $500 in return. We have struck a bargain, entered into a contract. If something should go wrong—if I refuse to hand over the ring or you refuse to give me the money—we would find our actions governed by contract law.

Contract
A legally enforceable written or verbal agreement, supported by consideration.

For a contract to be valid, there must be an offer, an acceptance of the offer, and **consideration**; that is, something of value must be exchanged. It is the consideration that differentiates a contract from a gift. Common defenses to a contract action include breach by the other side and incapacity to contract, as when one party is underage. Questions raised in contract law include the following:

Consideration
Something of value exchanged to form the basis of a contract.

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- When does a contract become enforceable?
- What is the difference between an offer and an invitation to negotiate?
- Under what circumstances can a mistake justify ending a contract?

We cover the answers to these and other contract questions in Chapter 9 .

(2) Property law

Property law is an area of the law that deals with the ownership and use of property. It covers topics such as the difference between **real property**, land and objects permanently attached to land, and **personal property**, all other property; the acquisition and disposition of property; and the use of property. Questions raised in property law involve issues such as:

Property law
Law dealing with ownership of things, tangible and intangible, and land

Real property
Land and items growing on or permanently attached to that land.

Personal property
All property that is not real property.

- Should a room air conditioner be treated as real or personal property?
- What types of materials can be copyrighted and what types of inventions can be patented?
- Under what circumstances can the government take private property for government use?

We discuss these and additional property law topics in Chapter 10 .

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(3) Tort law

Issues of **tort law** arise when one person harms another person or that person's property. A tort is defined as a private wrong (other than a breach of contract) in which a person is harmed because of another's failure to carry out a legal duty. Through the common law the courts have defined legal duties as occasionally including the affirmative obligation to act to protect others. More commonly, courts require that everyone refrain from taking actions that inflict harm on others. Torts are traditionally categorized as intentional, negligent, or the result of strict liability. Questions raised in tort law include the following:

Tort law
Law that involves harm to a person or a person's property.

- How do negligence laws vary from state to state?
- What is the difference between intentional torts and negligence?
- What remedies are available?

As the name indicates, an **intentional tort** occurs when someone deliberately harms a person or that person's property. If one of your classmates deliberately hits you, your classmate has committed the intentional tort known as battery. Battery is the intentional, harmful, or offensive physical contact by one person with another person. Libel, slander, invasion of privacy, and false imprisonment are other examples of intentional torts.

Intentional tort
A tort committed by one who intends to do the act that creates the harm.

The most common category of tort law is that of **negligence**, the failure to act as a reasonably prudent and careful person is expected to act under the circumstances. This is known as the "reasonable person standard."

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Negligence

The failur e t o act r easonably under the cir cumstances.

E THICS ALER T

You ar e walking along the beach and see a young child dr owning. No one else is in sight. Should the law requir e you to try to sa ve the child? Should it matter if you ar e an off-duty lif eguar d?

Case 5: Mr . Whipple

Mr . Whi pple owns a gr ocer y stor e. A cust omer br eaks a bottle of apple juice and pr omptly repor ts it to Mr . Wh ipple. Nonetheless, M r. Whipple fails to ha ve the br ok en bottl e and spilled juice cleaned up. Another 20 minutes later , another cust omer slips on the wet floor , br eaking her leg.

Mr . Whi pple ma y be found lia ble for negligence. Clearly , he did not intend for the cust omer to slip and br eak her leg. Ther efor e, ther e was no in tentional tor t. But a jur y m ight find that a reasonable stor e owner would ha ve or der ed the spill cleaned up within the 20 minutes after learning of it.

F or a plaintiff t o pr o ve negligence, he or she must show that

1. the def endant owed the plaintiff a duty of car e;
2. the def endant br eached that duty; and
3. the br each caused
4. the plaintiff harm.

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These four basic prerequisites (elements) in a negligence case are known as duty, breach, causation, and harm. In the case just mentioned Mr. Whipple had a duty to act as a reasonable store owner would under the circumstances. The circumstances were a broken bottle of apple juice about which Mr. Whipple was informed and a 20-minute period in which he did nothing. If the jurors believe Mr. Whipple breached his duty to act as a reasonable store owner, then they will find liability if they also think that breach caused the customer harm.

As the store owner, Mr. Whipple would, of course, try to defend himself through rebutting the plaintiff's evidence. Perhaps it had been only 2 and not 20 minutes since he learned of the spill. In addition, he might try to raise an affirmative defense. As mentioned previously, an affirmative defense is a defense whereby the defendant offers new evidence to avoid or limit the judgment. The two main affirmative defenses to negligence are **contributory negligence** and **assumption of the risk**. Contributory negligence means that the plaintiff was also negligent, and through that negligence contributed to his or her own injury. In Mr. Whipple's case, perhaps the customer was in a hurry and was not looking where she was going. Assumption of the risk means that the plaintiff voluntarily and knowingly subjected himself or herself to a known danger. Perhaps the customer saw the spilled juice but chose to walk through it anyway. In many states, assumption of the risk is no longer a separate defense to negligence, as it has been subsumed under the more general category of contributory negligence.

Contributory negligence

Negligence by the plaintiff that contributed to his or her injury. Normally, any finding of contributory negligence acts as a complete bar to a plaintiff's recovery.

Assumption of the risk

Voluntarily and knowingly subjecting oneself to danger.

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Historically, any showing of contributory negligence or assumption of the risk meant that the plaintiff could recover nothing from the defendant even if the defendant's actions were much more culpable than those of the plaintiff. Only three states currently continue to allow this pure contributory negligence defense. Instead, most states use some variation of the **comparative negligence**

Comparative negligence
A method for measuring the relative negligence of the plaintiff and the defendant, with a commensurate decrease in the compensation for the injuries.

defense. Under comparative negligence, instead of the plaintiff's own negligence relieving the defendant of liability, the jury compares the negligence of the plaintiff to that of the defendant and apportions the responsibility. The plaintiff's recovery is reduced by his or her degree of negligence.

The third category of tort law is called **strict liability**. In some cases, persons or corporations can be held liable for injuries that resulted from their actions, even when their actions were reasonable under the circumstances and they did not intend to harm anyone. The doctrine of strict liability holds that persons who engage in activities that are inherently dangerous are responsible for any injury that results, even though they carried out the activities in the safest and most prudent way possible. For example, someone who uses explosives or who keeps wild animals is liable for all resulting injuries, even if that person used the utmost care. In recent years, many courts have held manufacturers and sellers to be strictly liable when a defective product the defendant manufactured or sold caused harm to the user or consumer, even when the user or consumer could not show that the manufacturer's negligence caused the defect.

Strict liability
Liability without a showing of fault.

We discuss tort law in greater detail in Chapter 6.

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3. For each question, decide whether the facts raise an issue of t or t, contract, or pr oper ty law , or mor e than one ar ea of law .

a. You buy a new car . Two da ys later , as you ar e driving, the brak es fail and you go off the road, hitting a telepho ne pole. L uckily y ou ar e unhur t, but the car is badly damaged.

b. You ren t an apar tment. One night, as you ar e lea ving the building thr ough the central stair wa y, the railing giv es wa y and y ou fall, br eaking y our leg.

c. You agr ee to pur chase a bicy cle fr om your neighbor for $50. Th e next da y, your neighbor decides not to sell you the bik e.

d. You put in an off er for a house. A week later , you ha ve a pest inspection and disco ver that the house is inf ested with activ e termites.

e. You ar e riding your bicy cle in the middle of the afternoon on a dedicated bik e path. While you ar e ridi ng, someone runs over to you and pushes you and your bik e, causing y ou t o crash.

4. For each of th e following situations, decide if you think liability should be found base d on an intentional tor t, neglig ence, or strict liability , or whether no liability should be found.

a. Sally was angr y with Mar tha. One night after lea ving class, she deliberately dr ove her car int o the side of Mar tha 's car .

b. One night after lea ving class, Sally was in a hurr y. When she arriv ed at the st op sign at the student parking lot entrance to Main Str eet, she did a "r olling st op." Mar tha was driving by on M ain Str eet. Sally 's car hit the side of Mar th a's car .

c. One night after lea ving class, Sally got int o her brand-new Do dge van. When she arriv ed at the st op sign at the student parking lot entrance to Main Str eet, she pr essed on

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the brakes, but nothing happened. Martha was driving by on Main Street. Sally's van hit the side of Martha's car.

d. One night after leaving class, Sally got into her car. When she arrived at the stop sign at the student parking entrance to Main Street, she suddenly got a tremendous cramp in her side and momentarily lost control of her car. Martha was driving by on Main Street. Sally's car hit the side of Martha's car.

C. SUBSTANTIVE VERSUS PROCEDURAL LAW

Finally, law can also be classified as either substantive or procedural. **Substantive law** refers to the laws that define our rights and duties. It defines what actions will violate criminal law and what our obligations are in civil law. For example, substantive law includes the statutes that govern the legal speed limits, the circumstances under which someone can be convicted of robbery, and when a contract is enforceable. **Procedural law**, on the other hand, deals with how the legal system operates. For example, it specifies such things as which types of cases have to be filed in which courts and what has to be included in those court documents. It defines the procedures the police must follow in conducting a search or interrogating a suspect. Further examples are included in Figure 3-4.

Substantive law
Law that creates rights and duties.

Procedural law
Law that regulates how the legal system operates.

Every case is founded in substantive law, and lawyers must determine what their client's obligations and liabilities are. However, they must be equally aware of the procedural aspects of the case. For example, even if the substantive law is on the client's side, the case

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may be lost if a claim is not filed within the time prescribed in the **statute of limitations**, a limitation imposed by the legal system on how much time a plaintiff has before he or she can no longer bring suit. Those limitations vary given the type of case involved. A plaintiff could also lose if the complaint, the initial document that starts a lawsuit, fails to include all the required information.

Statute of limitations

The law that sets the length of time from when something happens to when a lawsuit must be filed before the right to bring it is lost.

We have all heard of the criminal who was set free due to a "technicality." These rules of criminal procedure have their roots in the Constitution and are intended to protect the innocent from the overreaching of possibly overzealous law enforcement officials. These rules govern everything from the way in which the arresting police officer must inform a suspect of his or her rights to how evidence is introduced at trial. For example, in the Boston bombing case, one of the first procedural issues that arose was the question of whether it was proper for federal agents to question Dzhokhar Tsarnaev for 16 hours before reading him his Miranda rights. [17]

	Substantive	Procedural
Definition	Creates rights and duties	Regulates how the legal system operates
Civil Law Examples	*Requirements of an enforceable contract. *Negligence is acting unreasonably. *A gift requires offer, acceptance, and delivery.	*The statute of limitations for tort actions is usually two years. *A complaint must state the grounds for the lawsuit. *Only claims worth up to a certain dollar amount can be filed in small claims court.
Criminal Law Examples	*Murder is the unlawful killing of a human being. *Burglary is the breaking and entering of a dwelling at nighttime. *Self-defense is the justified use of force	*A person cannot be tried twice for the same crime. *The necessity for a search warrant.*Requirement to read a suspect Miranda rights.

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	Substantiv e	Procedural
	to pr otect oneself or others.	

Figure 3-4 A Comparison of Substantiv e and Pr ocedural Law

W e discuss civil pr ocedur e in mor e detail in Chapter 5, and criminal pr ocedur e in mor e depth in Chapter 8 .

Legal Reasoning Ex ercise

5. Re view the hypothetical cas e of the pr egnant waitr ess that began Chapter 2. H ow would you categoriz e Diane 's legal pr oblems?

SUMMAR Y

In this chapter , we ha ve seen how lawy ers categoriz e law as either state or federal, civil or crimi nal, and substantiv e or pr ocedural. The first categor y, state or federal, arises because the United States operates under a system of federalism. Under our federal system, go vernmental authority is split between the national go vernment and the 50 state go vernments. Some ar eas of the law , such as div or ce, ar e res er ved ex clusiv ely to the states; some ar e reser ved to the federal go vernment; and so me ar e shar ed by the states and the federal go vernm ent. If you ar e in doubt as to which law app lies, check state law first. F ederal law will be inv olv ed only if the U .S. Constitution, a federal statute, a federal regulation, or an ex ecutiv e or der is inv olv ed.

Civil law inv olv es harm to an individual, wher eas criminal law deals with harms to society as a whole. In both criminal and civil cases, the par ty with the bur den of pr oof must first establish a *prima*

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facie case. Once that is established, the other side is given the opportunity to negate the *prima facie* case or to raise affirmative defenses. Although the law has become increasingly specialized, the main areas of civil law are contracts, property, and torts. Tort law can be further subdivided into those involving intentional acts, those based on negligent behavior, and those that result from an imposition of strict liability.

Finally, substantive law defines our rights and duties. Procedural law deals with how the legal system operates.

REVIEW QUESTIONS

Pages 45 through 53

1. What are the three major ways in which lawyers categorize the law?
2. What is federalism?
3. True or false: Every state must have the same laws regarding divorce. Why?
4. What does it mean to say that the federal government is a government of limited powers?
5. Do you think Congress could (not should) enact a national divorce statute? Why?
6. Why are some areas of the law preempted by the federal government?

Pages 54 through 57

7. Name at least four ways in which civil law differs from criminal law.
8. When is the burden of proof "beyond a reasonable doubt" and when is it a "preponderance of the evidence"? What is the difference between them?
9. In a civil case, if a jury is evenly split, leaning equally toward the plaintiff's and the defendant's views of the facts, who will win, the plaintiff or the defendant? Why?

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Pages 57 through 61

10. What two basic elements must be established for the government to prove the *prima facie* case in a criminal case?
11. Why can the same act constitute several different crimes?
12. What are the two basic defenses to a criminal action?
13. In a criminal case, does the government or the defendant present its case first? Why?
14. What is the general definition of a civil cause of action?
15. In a civil case, does the plaintiff or the defendant present its case first? Why?
16. What are the three types of damages available in a civil case?
17. In addition to damages, what might a plaintiff seek in a civil case?

Pages 61 through 65

18. What must be present for a contract to be valid?
19. What is the basic difference between a contract and a gift?
20. What is the difference between real property and personal property?
21. What are the three main areas of tort law?
22. Give the general definition of negligence and list the elements necessary to prove a *prima facie* case.
23. What are the main defenses to negligence?

Pages 65 through 67

24. What is the difference between substantive and procedural law?
25. What is the function of a statute of limitations?

---

1 17 U.S. (4 Wheat.) 316 (1819).
2 317 U.S. 111 (1942).
3 Id. at 125.
4 Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964).
5 United States v. Lopez, 514 U.S. 549 (1995).
6 381 U.S. 479 (1965).
7 Eisenstadt v. Baird, 405 U.S. 438 (1972).

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8 410 U.S. 113 (1973).

9 539 U.S. 558 (2003).

10 576 U.S. 644 (2015).

11 Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

12 The Tenth Amendment to the U.S. Constitution declares that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

13 Obergefell v. Hodges, 576 U.S. 644 (2015).

14 18 USCA §2332a (West 2025). Under federal law, the type of bomb that Tsarnaev used would qualify as a "weapon of mass destruction," so long as its use also affected interstate commerce. This latter requirement was easily satisfied, as the annual Boston Marathon attracts runners and fans from all over the United States, and even the world. Their travel across state lines, as well as their spending millions of dollars at local hotels, restaurants, and stores, has a direct impact on interstate commerce.

15 Simon & Mahan, *Quantifying Burdens of Proofs*, 5 L. & Soc'y. Rev. 319 (1971).

16 Mass. Gen. Laws ch. 266, §30(1) (2025).

17 The government argued that it was appropriate and not a violation of Tsarnaev's rights under a "public safety" exception.

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Chapter 4

Cour ts

Trial cour ts search for truth and appellate cour ts search for error .

Unknown

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Chapter Objectiv es

After reading this chapter , y ou should be able to:

- Categoriz e cour ts as either trial or appellate.
- Distinguish between questions of law and questions of fact.
- List the major cour ts in the f ederal system.
- Describe a typical state cour t system.
- Explain the concept of jurisdiction.

INTRODUC TION

Now that we ha ve identified the functions, sour ces, and classifications of law , we turn our attention to the manne r in which the judi cial system enfor ces the law . Although the law pr o vides rules about how people should b eha ve in diff er ent types of situations, these ru les ar e not self-enfor cing. It is to the cour ts and the judicial system that we must turn fo r interpr etation and enfor cement of the law .

A **cour t** is a unit of the judicial branch of go vernment that has authority to decide legal disp utes. Howe ver, depending on the natur e of the dispute, only cer tain cour ts will ha ve jurisdiction to hear the case. **Jurisdiction** ref ers to the power of a cou rt to hear a par ticular type of case or t o hear cases within a specific geographic ar ea.

Cour t
A unit of the judicial branch of go vernment that has authority t o decide legal disputes.

Jurisdiction
The power of a cour t t o hear par ticular types of cases or t o hear cases within a specific geographic ar ea.

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We will begin by describing how courts are classified as either trial or appellate and either federal or state, but before we do so, please read over Case 6.

As you read this chapter, think about:

- the differing roles of the trial and appellate courts, and
- if you were Jones's lawyer, on what grounds do you think you would base an appeal of his conviction?

Case 6: Alibi to a Murder

Frederick Jones could not believe it when he was arrested for murder, because he thought he had an ironclad alibi.

At his trial, an elderly gentleman testified that he saw Jones near the scene of the murder shortly after it took place. At one point in the trial, over the objection of the defendant's lawyer, the prosecutor showed the jury bloody and gruesome pictures of the deceased victim.

Jones testified that not only did he *not* commit the murder, but that he was attending an out-of-town wedding at the time the murder was supposed to have taken place. Ten witnesses then took the stand in succession and testified that they had been at the wedding and seen the defendant there.

At the end of the trial, the jury convicted Jones. As he had so many witnesses testifying as to his whereabouts on the night of the murder, Jones could not understand how the jury could possibly have found him guilty, so he wants his lawyer to appeal his case.

A. TRIAL VERSUS APPELLATE COURTS

One major way of classifying courts is in terms of whether they are trial or appellate courts. Most court cases begin in a **trial court**.[1]

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Sometimes the losing party is able to appeal what it sees as an error of law (but not of fact) to the appropriate **appellate court**. In this section, we discuss the differences between trial and appellate courts and between questions of fact and questions of law.

Trial courts
Courts that determine the facts and apply the law to the facts.

Appellate courts
Courts that determine whether lower courts have made errors of law.

1. Trial Courts

Trial courts are said to be courts of **original jurisdiction** because trial courts are where actions are initiated and heard for the first time. In addition to conducting trials, much of a trial court's time is spent in far less dramatic proceedings, such as receiving plea agreements and ratifying out-of-court settlements. When a trial is held, the lawyers present witness testimony and other evidence. After considering the evidence and the lawyers' arguments, trial courts have two functions.

Original jurisdiction
The authority of a court to hear a case when it is initiated, as opposed to appellate jurisdiction.

First, they must determine whose version of the facts is most credible. Second, they must apply the law to those facts to reach a decision. Therefore, trial courts must determine both questions of fact and questions of law.

Questions of fact relate to the determination of what took place: who, what, when, where, and how. **Questions of law** relate to how the law is interpreted and applied and include such issues as how a statute is to be interpreted and whether a specific piece of evidence is admissible.

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Questions of fact

Questions relating to what happened: who, what, when, where, and how.

Questions of law

Questions relating to the interpretation or application of the law.

In most cases that go to trial, the meaning of the law is clear but the facts themselves are very much in dispute. For example, under the criminal codes of most states, it is a violation of the law for a person to forcibly take some one else's property without the owner's permission—a crime called robbery. When someone is tried for robbery, the trial usually focuses on such factual questions as the identification of the alleged robber and the ownership of the property taken.

Although the primary focus of most trials is on factual issues, legal issues are involved as well. In the example cited above, the judge may have to interpret what the word "forcibly" means. The judge will also have to decide if certain testimony or evidence is admissible. These are questions of law. If the judge decides that the testimony or evidence is not admissible, then the trial proceeds without it. Also, if the judge rules that a search was illegal or that disputed pictures are too prejudicial, then the objects discovered in that search or the pictures are not admitted as evidence. Based on the evidence that has been allowed, the jury then resolves the questions of fact.

Consider the following example. In most states, it is a crime for someone other than a physician, pharmacist, or other authorized medical person to sell or distribute narcotic drugs. When someone is on trial for selling narcotics, the prosecution must present evidence that shows the accused did in fact sell a substance that fits the legal definition of a prohibited narcotic drug. These are issues of fact. The evidence often consists of an undercover police agent testifying that the accused sold the agent a substance that laboratory reports identify as a narcotic.

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It is possible, however, that the defendant might admit to selling the drug, but then claim **entrapment**. The entrapment doctrine prohibits law enforcement officers from instigating criminal acts to lure an otherwise innocent person into committing a crime. One question of fact relating to the entrapment defense is whether the defendant ever committed such a criminal act or thought of committing such an act before. However, in addition to the factual questions, and depending on the circumstances of a given case, a legal issue of what constitutes entrapment could arise. For example, assume that government agents supplied the defendant with a drug and then later arrested him for selling the very same drug to another government agent. Here, no one would be disputing what happened (the facts). But an appellate court could be asked to decide whether such actions legally qualify as entrapment. In *Hampton v. United States*,[2] the U.S. Supreme Court held that so long as the defendant is predisposed to commit the crime, it is not entrapment when government agents supply the defendant with a drug and then later arrest him for selling the very same drug to another government agent.

Entrapment
A defense requiring proof that the defendant would not have committed the crime but for police trickery.

It is not always easy to determine if something is a question of fact or a question of law. Because appellate courts will rule only on issues involving questions of law, appellate judges determine what they will treat as a question of law. To illustrate the nature of the problem, let us consider the situation presented in Case 6, set out at the beginning of the chapter. Do you think there is any basis for launching an appeal in Jones's case? Remember that a losing party can only appeal questions of law.

It is a question of fact whether on the night of the murder, Jones was present at the scene of the murder (as testified to by one elderly witness) or out of town attending a wedding (as testified to by ten

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other witnesses). Therefore, his whereabouts on the night of the murder cannot form the basis for an appeal.

On the other hand, it is a question of law as to whether the judge should have allowed the jury to see pictures of the victim's bloody corpse. It can be argued that viewing those pictures was so inflammatory as to prejudice the jury. Therefore, showing the pictures could form the basis of an appeal. Keep in mind that this does not mean that Jones would win at the appellate level. It simply means that he will be given the opportunity to argue his case to the appellate court.

Legal Reasoning Exercises

1. Because it is not always easy to know whether something is a question of fact or a question of law, there have been cases when the issue on appeal was whether something was a question of fact or a question of law. That question is itself a question of law. To see how that can happen, assume that there was a negligence trial in which a grocer was sued when a customer slipped and fell. The customer testified that she slipped on a banana peel in the produce section. The grocery store owner testified that when he came to the assistance of the customer, there was no peel on the floor. One of the store employees also testified that he had mopped the floor in that area just five minutes before the accident, and that there were no banana peels on the floor. Nonetheless, the jury found the store liable. Can the store appeal on the grounds that it was telling the truth and the customer was lying? No. Why? Because that is a question of fact, and factual determinations generally cannot be appealed. But can the store appeal on the grounds that the jury should not have found that it acted negligently because even if there were a banana peel, such hazards are to be expected in the produce section, and the store had done all it could to make the

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area safe? Is that issue—that is, whether the store acted as a reasonable store should—a question of fact or a question of law?

In the following cases, do you think the losing party has a valid basis for appeal? Why?

a. A prosecutor commented on a defendant's failure to take the stand in his own defense. His lawyer argued that this violated his client's constitutional right to remain silent. The defendant was convicted.

b. The prosecutor introduced evidence showing that the defendant purposely set fire to his neighbor's garage. This included testimony by the fire chief and a forensic scientist who examined the remains of the burned building. The defendant took the stand and claimed that the fire was an accident. The jury convicted the defendant of intentionally starting the fire.

c. John signed a will in front of two witnesses. The will made no provision for his son, Jimmy. When John died, Jimmy contested the will, arguing that his father was not of sound mind. At the trial, the two witnesses present at the signing testified that John had been legally competent when he signed the will. The court found that the will was valid.

d. June was walking her miniature poodle, Suzy, in her front yard. Suddenly a German Shepherd leaped over the fence and bit Suzy several times, killing her. June was distraught and sued the owner of the German Shepherd for $30,000 for her pain and suffering. The trial judge dismissed the case, stating that as Suzy was property, the most June could recover was the cost of a new dog.

In a **jury trial,** questions of fact are determined by the jury, while questions of law are determined by the judge. If it is a **bench trial** rather than a jury trial, the judge will decide the factual questions as well as the legal ones.

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Bench trial
A trial conducted without a jur y.

2. Appellate Cour ts

Appellate cour ts, usually working in a panel of thr ee or mor e judges, review alleged trial cour t err ors (and, in some cases, the actions of administrativ e agencies) to determine whether the law was corr ectly interpr eted and applied. When the person who loses in a trial cour t is able to appeal the decision to an appellate cour t, that par ty (the one filing the appeal) is called the **appellant or the petitioner** . The par ty who wo n in the trial cour t is called the **appellee or the respondent** . It is impo rtant to note that m ost states and the federal g overnment pr o vide for only one appeal as a matter of right. Addition al appeals ar e usually at the discr etion of the higher cour t.

Appellant or petitioner
The par ty in a case who has initiated an appeal.

Appellee or respondent
The par ty in a case against whom an appeal has been filed.

a. Questions of Law

Unlik e trial cou rts, appellate cour ts do not hear testimony . The y rely on the written recor d of what occurr ed in the trial to determine whether the trial cour t made an err or regar ding the law . The y do so because when conducting a r eview , appellate cour ts limit themselv es to "l egal" as opposed to "factu al" issues that ar e specifically raised by the par ty who is bringing the appeal. Ther efor e, you can appeal a lower cour t decision only when you raise a valid legal issue. Appellate cour ts will not reconsider the facts; the y will consider only whether the trial cour t made an err or of law . Legal issues can arise in thr ee wa ys:

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- The y can inv olv e interpr etation of the meaning of the laws that underlie the cause of action (e.g., whether entrapment had occurr ed).
- The y can inv olv e the manner in which the trial was conducted. Examples include whether a par ticular piece of e vidence should be ex cluded because it is the pr oduct of an illegal sear ch and seizur e, whether the plaintiff 's lawy er should be allowed to pursue a cer tain line of ques tioning, whether the judge should pr esent a par ticular set of in structions to the jur y, or wh ether pr ejudicial publicity has tainted the def endant' s trial.
- The y ca n inv olv e challenges to the constitutionality of the law that is being applied. F or example, homeless persons could ar gue that a law banning sleeping in public places is itself unconstitutional. [3]

D ISCUSSION Q UESTION

1. Situ Wil kinson fled to the United States in 2003 after police in his hom e countr y beat, robbed, and thr eated to kill him. Ten years later he had a son, who suff ers fr om a serious medical condition and relies on Situ for emotional and financial suppor t. When Situ was detained for a traffic violatio n, it was disco ver ed that he was in the countr y illegally and was scheduled for remo val. His att orne y ar gued that Sit u's remo val would cause his son "ex ceptional and extr emely unusual har dsh ip." The immigration judge denied his request and the Thir d Cir cuit dismissed his appeal, stating that it had no power to review the case as the determination of whether his situation pr esented an "ex ceptional and extr emely unusual har dship " was a question of fact, not of law .

a. Do you think the determination that Situ' s situation did not cr eate an "ex ceptional and extr emely unusual har dship " was a question of law , a question of fact, or a mix ed question of law and fact?

b. Why should it matter? [4]

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b. Reversible Errors

There is one limited exception to the rule that appellate courts review only questions of law. Occasionally, the courts will review a case when it is alleged that no "reasonable" jury could have reached the verdict they did. This is extremely rare, however, as normally appellate courts will accept a jury's determination as to which witnesses and evidence were most credible.

In Case 6 at the beginning of the chapter, Jones' s lawyer may try to appeal on the facts of the case rather than the law. Jones had ten witnesses testify that Jones was at a wedding and the prosecutor had only one witness testify that Jones was at the scene of the crime. In this instance, the appeals court is likely to find that because the prosecutor had a witness testify as to Jones' s whereabouts, that the jury was within its purview to find that the prosecutor's one witness was simply more credible than the defendant' s ten witnesses.

If the appellate court determines that no legal error occurred, the court will **affirm** the lower court's decision. In addition, if a legal error occurred but the court determines that it was minor and did not affect the result, the court labels it a **harmless error** and allows the decision to stand. However, if the court finds that a significant legal error was made in the way that the trial was conducted, it will usually cancel the original outcome by **reversing** the trial court's decision. It may also **remand** the case, returning it to the trial court for further consideration.

Affirm
When the higher court agrees with what the lower court has done.

Harmless error
A trial court error that is not sufficient to warrant reversing the decision.

Reverse

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A decision is reversed when the litigants appeal the lower court decision and the higher court disagrees with the decision of a lower court.

Remand
When an appellate court sends a case back to the trial court for a new trial or another action.

In criminal cases, when a court reverses a conviction and remands the case, it does not necessarily mean that the defendant will go free, as the government then has the option of retrying the case. However, if the basis for the reversal was the appellate court ruling that a key piece of evidence was inadmissible, the government may choose not to retry the defendant because it may feel that its case is too weak without the excluded evidence.

If the government chooses to proceed with a new trial, this does not violate the constitutional provision regarding **double jeopardy**. Double jeopardy occurs when a person is tried more than once for the same criminal offense. The Fifth and Fourteenth Amendments to the U.S. Constitution prohibit various forms of double jeopardy. However, when a defendant voluntarily appeals a conviction, he or she waives the right not to be retried for the same crime.

c. The Structure of Appellate Decisions

Appellate court judges reach their decisions by majority vote. Someone from the majority writes the **majority opinion** explaining the court's decision and how that decision was reached. In cases where the decision is not unanimous, judges may also write concurring or dissenting opinions to explain the nature of their disagreements. In a **concurring opinion**, the judge agrees with the result reached by the majority, but not with its reasoning. In a **dissenting opinion**, the judge disagrees with the result and with the reasoning.

Majority opinion
An opinion in which a majority of the court joins.

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Concurring opinion
An opinion that agr ees with the majority 's r esult but disagr ees with its reasoning.

Dissenting opinion
An opinion that disagr ees with the majority 's decision and its reasoning.

3. Recap

In summar y, ther e ar e se ver al major diff er ences betwee n trial and appellate cour ts. As we noted in Chapter 3, at the trial-cour t le vel, the par ties ar e called the plaintiff and the def endant in a civil ca se and the state and the def endant in a criminal case. At the appe llate-cour t le vel, the par ty who lost in the trial cour t is called either the appellant or the petitioner and the par ty who won is called either the appellee or the respondent. In the trial cour t, the jur y decides the facts and the judge determines the law . In a bench trial, the judge ser ves as both the finder of fa ct and determiner of the law . In the appellate cour t, a panel of thr ee or mor e judges decides questions of law based on the lawy ers' briefs (written ar guments) and oral ar guments. No witnesses giv e testimony in appellate cour t, and ther e ar e no juries. The judges mer ely review the trial transcript and the written briefs fr om the lawy ers. Sometimes oral ar guments fr om the opposing lawy ers ar e hear d, during which the judges ha ve an oppor tunity to pose questions. Low er-le vel appe llate judges usually work in rotating panels of thr ee, wher eas in the upper-le vel appellate cour ts, all the judges jointly decide each case.

Most of thes e diff er ences ar e dir ectly related to the most impor tant distinction between trial and appellate cour ts: Trial cour ts determine the facts and apply the law to those facts; appellate cour ts deal on ly with questions of law . Thr ee basic types of legal questions can arise at the appellate le vel. First ar e those that relate to the meaning of the underlying le gal cause of action or def ense, such as what qualifies as entrapmen t. Second, legal issues can arise that

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ha ve nothing to do with the underlying legal claim, but rather relate to how the trial was conducted. Finally , one of the par ties can ar gue that the law being applied is unconstitutional, as when a doct or challenges an abor tion law . Figur e 4-1 summariz es the diff er ences between trial and appellate cour ts.

	Trial Court	Appellate Court
Parties' names	Plaintiff/defendant State/defendant	Appellant/appellee or petitioner/respondent
Decision maker	Judge and sometimes a jury	Majority vote of three or more judges
Attorney arguments	Yes	Yes
Witness testimony	Yes	No
Evidence introduced	Yes	No
Questions of fact decided	Yes	No
Questions of law decided	Yes	Yes

Figure 4-1 A Comparison of T rial and Appellate Cour ts

D ISCUSSION Q UESTIONS

2. Do you think it is a good or a bad idea that only questions of law can be appealed?

3. Can you think of a situation when an appellate judge m ight reverse and remand a case? How about when a judge might reverse but not r emand a case?

B. FEDERAL AND ST ATE COUR T SY STEMS

Trial and appellate cour ts exist in both the federal and the state cour t systems. At first glance, the federal and state judicial systems of this countr y pr esen t a confusing mixtur e of titles and functions. In lar ge

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part, this is because there are actually 51 different court systems (the federal system, plus one for each state). To complicate matters, the same types of courts often have different names. For example, the basic trial court is called the court of common pleas in Pennsylvania, the district court in Minnesota, the circuit court in Illinois, the superior court in California, and the supreme court in New York. Although New York uses the "supreme court" designation for its trial courts, most states reserve that title for their highest appellate court.

It is in the state courts where most legal business is conducted. However, we begin our discussion with an examination of the federal court system because it is uniform throughout the country. Although the diversity among state court systems prevents us from covering them in any detail, we will point out some of the common patterns. For example, most state courts follow the federal pattern of being organized on three levels: the trial courts, the intermediate appellate courts, and one appellate court of last resort.

1. The Federal System

The structure for the federal court system is set forth in the U.S. Constitution. Article III, Section 1, provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Those **inferior courts** are the district courts and courts of appeals. Congress established the first inferior courts through the Judiciary Act of 1789. That act provided for 13 districts and three circuits. Over the years, Congress has increased the number of both district and federal circuits. Figure 4-2 shows how cases flow through these three types of federal **constitutional courts:**

Inferior courts
In the federal system, all courts other than the U.S. Supreme Court.

Constitutional courts
A court established by Article III of the U.S. Constitution.

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- **U.S. District Courts:** These trial courts are organized into 94 different districts located throughout the 50 states, the District of Columbia, and U.S. territories. (See Figure 4-3, which shows district court boundaries.)

U.S. district courts
The general jurisdiction trial courts in the federal system.

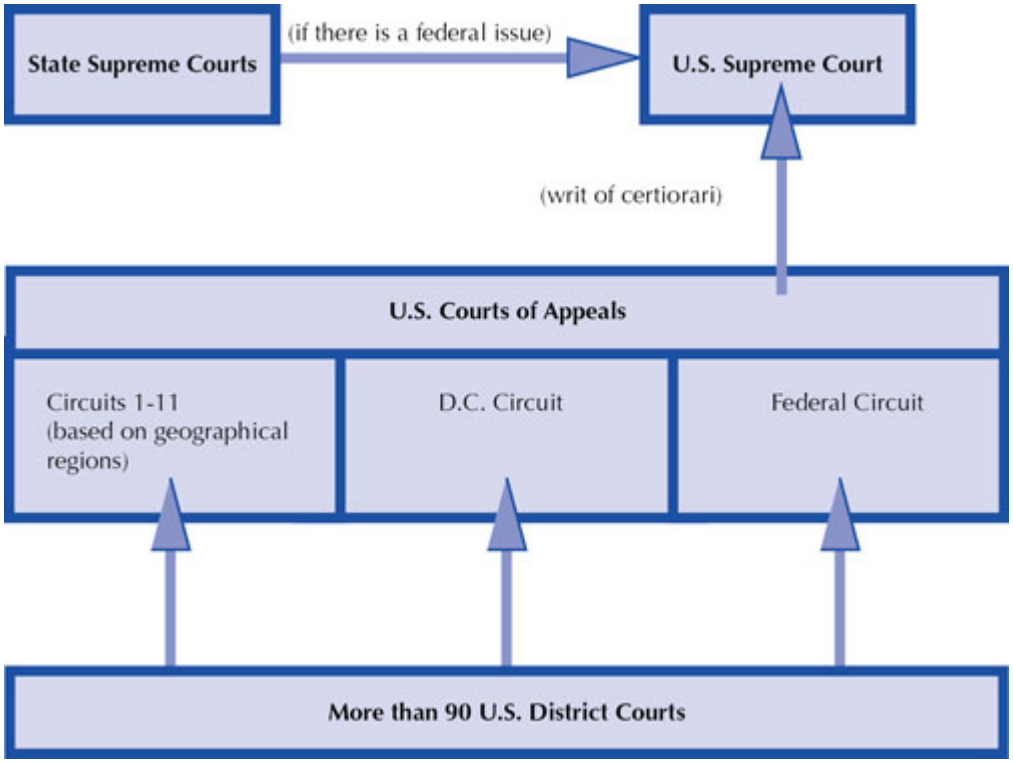

Figure 4-2 The Federal Court System

- **U.S. courts of appeals:** These first-level appellate courts are organized into 12 regional circuits and hear appeals from the district courts located within the circuit. They also hear appeals from decisions of federal administrative agencies. (Figure 4-3 also shows circuit court boundaries.)

U.S. Courts of Appeals
The intermediate appellate courts in the federal system.

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- **U.S. Supreme Court:** This is the highest court in the federal system. At its discretion, and within certain guidelines established by Congress, it hears a limited number of the cases involving the most important constitutional issues and conflicts among the circuits. In addition to reviewing decisions of the U.S. courts of appeals, it can review decisions of state courts if they involve important questions about the Constitution or federal law.

U.S. Supreme Court

The highest federal appellate court, consisting of nine appointed members.

Article II of the Constitution gives the president the power to appoint the judges who serve on these federal courts. But before an appointment can become final, the Senate must confirm it. Article III, Section 1, provides that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." This means that "constitutional" judges are guaranteed lifetime tenure unless they resign or are impeached and convicted. It also means they are protected from any salary reductions.

a. U.S. District Courts

The U.S. district courts are the trial courts in the federal system. Within limits set by Congress and the Constitution, the district courts have jurisdiction to hear nearly all categories of federal cases, including both civil and criminal matters. There are 94 federal district courts, with at least one for each state.

The number of judges assigned to each district varies from two to 28 depending on the caseload of the district. Usually, cases are heard by a single judge or a judge and a jury. In criminal cases, the default is a jury trial unless the defendant requests a bench trial. In civil cases, a

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bench trial is the default. One of the parties must request a jury in the pleadings or else the right to a jury is waived.

The district court judges are assisted by **magistrate judges**. The magistrate judges supervise court calendars, hear procedural motions, issue **subpoenas**, hear minor criminal offense matters, and conduct civil pretrial hearings. In some district courts, the magistrate judges, with the consent of the parties involved, conduct trials and enter judgments in civil cases. They are selected by a majority of the active judges in each district for full-time terms of eight years or part-time terms of four years. They can be removed for cause.

Magistrate judge
A court official who exercises limited judicial powers such as issuing subpoenas, conducting preliminary hearings, and ruling on procedural motions.

Subpoena
A court order requiring a person to appear to testify at a trial or deposition.

b. U.S. Courts of Appeals (Circuit Courts)

If a litigant wants to appeal a district court decision, the appeal must be filed with the U.S. court of appeals for the circuit within which the district court operates. For example, cases from California district courts are appealed to the Court of Appeals for the Ninth Circuit.

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Note: The large numerals indicate the Courts of Appeals, and the broken lines represent jurisdiction boundaries of district courts.
Source: Administrative Office of the U.S. Courts.

Figure 4-3 District and Circuit Court Boundaries

Each of the 12 regular circuits has from 6 to 29 judges. In the federal courts of appeals, cases are usually heard by a panel of three judges randomly selected from that circuit's active members. Decisions are based on a majority vote of the judges on the panel. Occasionally, all the judges sit together and decide a case **en banc**. This happens most frequently when the losing party in a case already decided by a panel of the court requests a rehearing before the full membership of the court.

En banc
When an appellate court that normally sits in panels sits as a whole.

c. U.S. Supreme Court

Sitting at the top of the federal judicial system is the U.S. Supreme Court. The Court is composed of nine justices, who hear all appeals

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as a group. It is interesting to note that the Judiciary Act of 1789, mentioned above, provided for a Supreme Court with one chief justice and five associate justices. As with the number of courts, the number of Supreme Court justices has also changed over the years as the volume of the Court's work has increased.

A case seldom goes any further than a circuit court of appeals or state supreme court, as the U.S. Supreme Court has the power to choose which cases it wants to hear from among the thousands of cases brought to it every year. Most of the cases come to the Court as a petition for a **writ of *certiorari***.[5] In this petition, the losing party does not argue the merits of the case but rather asks the Supreme Court to review the case. At least four of the nine justices must agree to grant *cert* before the case will be placed on the Court's docket. If there are not at least four votes to review, it is simply announced that *cert* was denied, without any further explanation. The denial of *cert* does not mean that the Court agrees with the lower court's decision. It simply means that the Court does not want to hear that case. The Supreme Court usually hears no more than 80 of the approximately 7,000 to 8,000 case requests that it receives each year.

Writ of *certiorari*
A means of gaining appellate review; in the U.S. Supreme Court, the writ is discretionary and will be issued to another court to review a federal question if four of the nine justices vote to hear the case.

While still pending in the appellate courts, each year the Supreme Court rules on an additional 100 or more emergency applications from the trial courts. The Court decides these cases without oral argument and the decisions are typically unsigned and unexplained, thereby setting precedent without explanation. This is often referred to as the **shadow docket**. Historically the shadow docket had been used most often in death penalty cases. In the past ten years, the pace and breadth of the cases decided has greatly accelerated. The attorneys can file briefs containing their arguments, but unlike regular court opinions, the Court's order does not contain the reasoning normally found in their opinions.

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Shadow dock et

Emer gency applications fr om trial cour ts t o the U.S. Supr eme Cour t that ar e decided without oral ar gument and ar e unsigned and unexplained.

Unlik e the U.S. cour ts of appe als, wher e cases ar e typically hear d by a panel of thr ee judges, the U.S. Supr eme Cour t alwa ys considers cases en banc. Unless ther e is a vacancy on the Cour t or a justice has chosen not to par ticipate in the decision in a case, [6] all nine justices vote on every case the Cour t hears. With the ex ception of th e decision to review or not review a case, the outcome is decided by a majority of th e ju stices par ticipating. In situations wher e ther e is a tie vote, the lower cour t's decision is left unchanged.

NE TNO TE

The official website of the federal judiciar y is *uscour ts.go v.* It contains links to the U.S. Supr eme Cour t, the U.S. cour ts of appeals, the U.S. district cour ts, and the U.S. bankruptcy cour ts. The U.S. Supr eme Cour t's site, at *supr eme cour t.go v* contains helpful information on the Cour t's pr ocedur es, and biogr aphies and pictur es of the curr ent Justices.

D ISCUSSION Q UESTIONS

4. One cri ticism of the incr eased use of the shadow dock et is that it is being used in contr oversial cases wher e the ju stices ar e making decisions without oral ar guments, written opinions, or even pr olonged discussions among themselv es. In addition, without a written opinion, lower cour ts ma y be left without an understanding of the hold ing of the case and w hat pr ecedent is being established. Both

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Democrats and Republicans have expressed concern on the expanded use of the shadow docket. What are some of the benefits of a shadow docket? What are some of the concerns about the shadow docket? Should there be limits on the types of cases heard on the shadow docket? Why or why not?

5. Revelations that both Justice Clarence Thomas and Justice Samuel Alito had received free luxury trips and other "gifts" from billionaire conservative donors led to the Supreme Court adopting for the first time a formal code of ethics. The Code states that justices "should refrain from financial dealings that exploit the judicial position or involve the Justice in frequent transactions [with] persons likely to come before the Court." The Code also states that a "Justice should disqualify himself or herself in a proceeding in which the Justice's impartiality might reasonably be questioned."[7]

- **a.** The Code does not contain any enforcement mechanism. Should federal judges be allowed to determine for themselves whether or not they have a conflict of interest?
- **b.** What are the pros and cons of allowing the judiciary to continue its own oversight of ethical issues involving federal judges versus having an outside body, such as a Congressional committee or administrative agency, oversee the Court's code of ethics?

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Figure 4-4 The U.S. Supreme Court. Seated from left are Justices Sonia Sotomayor (2009), Clarence Thomas (1991), Chief Justice John G. Roberts, Jr. (2005), Justices Samuel A. Alito (2006), and Elena Kagan (2010). Standing from left are Justices Amy Coney Barrett (2019), Neil M. Gorsuch (2017), Brett M. Kavanaugh (2018), and Ketanji Brown Jackson (2022).

d. Other Federal Courts

In addition to the Article III constitutional courts, there are also several highly specialized **legislative courts** that Congress has created using its Article I powers. These legislative courts include, among others, the bankruptcy courts, U.S. Court of Military Appeals, the U.S. Tax Court, and the U.S. Court of Federal Claims.

Legislative courts
Courts created under Congress' Article I powers.

For example, Congress was able to establish the bankruptcy courts because Article I, Section 8 grants Congress the power to "establish ... uniform Laws on the subject of Bankruptcies throughout

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the United States," and to do what is "necessary and proper" to accomplish that goal. Because the bankruptcy court is an Article I and not an Article III court, its judges do not enjoy lifetime tenure and instead are appointed for 14-year terms. Also, Article I court jurisdiction is more limited than that of Article III courts. In the case of the bankruptcy court, that limitation is to hearing all "core" proceedings arising under the federal Bankruptcy Code. However, what is "core" is not always clear. For example, if litigants in a bankruptcy case raise related state law claims, such as fraud, questions as to the scope of the court's jurisdiction occur. The U.S. Supreme Court has determined that with regard to state law claims, such as common law fraud, a bankruptcy court can make recommendations but not enter a final judgment.[8]

One federal court that until recently was fairly unknown is the Court of International Trade. Established by Congress in 1980, the court came into the limelight in 2024 when it ruled that President Trump's worldwide tariffs, imposed through executive order, were unconstitutional. The court stated that setting tariffs exceeded the president's authority, as only Congress has the power to enact tariffs.

2. State Court Systems

Many important cases and significant constitutional issues are decided in the federal courts, but it is in state courts where over 90% of all legal business occurs. While paralegals may have some opportunities to work with federal courts, most will spend their time operating within state court systems.

PRACTICE TIP

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Find the time to take a walking tour of your local courts. Note the location of the clerk's offices, the courtrooms, and the nearest law library.

Rather than attempting to describe each of these 51 court systems, we will review some general patterns and leave it to you to search out the details for your specific state. Organizational charts of state court systems can generally be found on each state's official government website.

Most states have court systems that are very similar to the federal system, with three basic types of courts: trial, first-level appellate, and one appellate court of last resort. Figure 4-5 shows the organization of a typical state court system. Note how closely it parallels Figure 4-2, showing the core of the federal court system. The path for appeals in most state court systems is from the trial court to an intermediate appellate court (if one exists), and then, usually only at the court's discretion, to the state's highest appellate court (usually called the supreme court).

Starting at the bottom of Figure 4-5, you can see that states can have either **general jurisdiction** or **limited jurisdiction** trial courts.[9] The former can hear any type of case, not specifically reserved for the federal courts. General jurisdiction courts typically carry a name such as circuit court, district court, county court, or superior court. Many states also have a confusing variety of specialized courts with limited jurisdiction. These courts hear a narrow range of cases on a specific subject (such as probate, domestic relations, or traffic) and sometimes even overlap regarding the types of cases they can hear. For example, in Massachusetts, both the probate court and the superior court can hear divorce cases.

General jurisdiction

A court's power to hear any type of case arising within its geographical area.

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Limited jurisdiction
A court's power to hear only specialized cases.

States maintain either one or two levels of appellate courts. The larger states have generally gone to a two-tiered system like that in operation at the federal level. The intermediate-level appellate courts usually sit in panels, while the court of last resort sits en banc. On some matters appeals to the highest court are discretionary, whereas on others they are a matter of right. A few states have established separate courts to handle criminal versus civil appeals at the intermediate or highest level. Finally, as noted earlier in this chapter, even the name of the highest-level appellate court varies from state to state. While most states identify their highest court as the state supreme court, in New York and Maryland it is called the court of appeals.

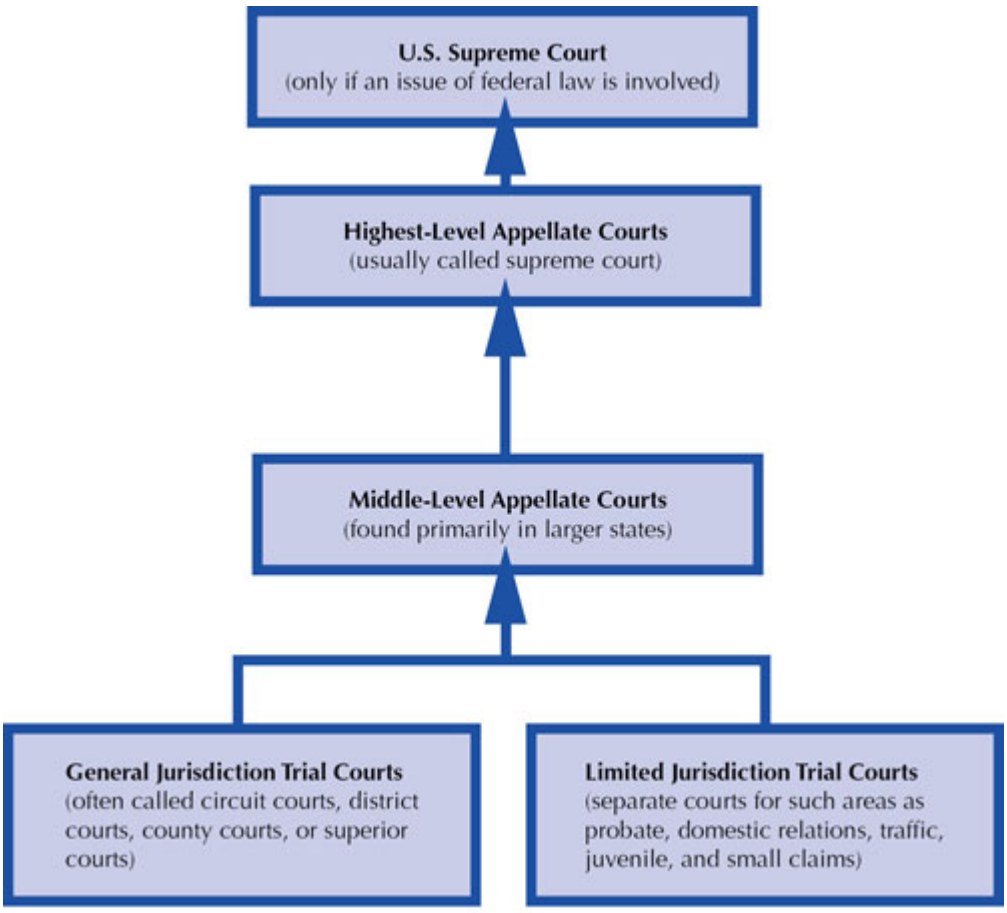

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Figure 4-5 Organization of a Typical State Court System

In most cases, a state's top appellate court issues the final judgment because cases can be appealed to the U.S. Supreme Court only if they raise a federal issue. For example, in criminal cases, state courts must accord the due process rights guaranteed by the U.S. Constitution. This can involve resolving issues regarding the right to counsel, the admissibility of evidence resulting from an allegedly illegal search, jury selection procedures, and so on. If the defendant thinks these constitutional rights have been violated, she or he may be able to appeal the case to the federal courts on the basis that a federal issue is involved. Whenever a federal law or a provision of the U.S. Constitution is involved, the federal courts have the right to make the final determination as to what that law or constitutional provision means. But remember that a criminal defendant has no right to appeal his or her conviction in a state court to a federal court unless such federal issues are raised. Under the principles of federalism, the state courts are the final arbiters as to the meaning of state statutes and state constitutional provisions.

Unlike federal judges, state court judges are selected in a variety of ways. They are appointed by the state's chief executive or the state legislature in only a few states. In others, they are selected in either partisan or nonpartisan elections. While some see the appointment of judges as undermining the democratic process, others fear that elected judges may be influenced by those who make large contributions to their election campaigns.

Partially in response to this disagreement about whether it is best to appoint or elect judges, some states have developed a modified system that has become known as merit selection, or the Missouri plan. Under that type of plan, a special panel of lawyers and lay persons is convened, and they nominate a few candidates for a vacancy. The governor then appoints from among this select group. A year or two later, the person who was appointed goes before the general electorate in a special retention election. In such an election,

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the candidate runs unopposed and the voters are asked simply whether that judge should be retained.

Some states also use justices of the peace, court commissioners, or magistrates in their court systems. Although they are not judges, state laws authorize these individuals to exercise limited judicial powers in specified types of cases. For example, they may handle criminal arraignments or hear small claims or probate cases. In a few states, they do not need to be licensed lawyers. They may be either elected or appointed.

DISCUSSION QUESTIONS

6. Why do you think the Framers of the Constitution chose to give federal judges lifetime tenure and protect them from salary reductions?

- **a.** Explain whether you think that was a wise decision.
- **b.** Do you think term limits should be established for all federal judges or for the nine U.S. Supreme Court justices? If so, what do you think those limits should be?

7. Do you think judges should be elected or appointed? Why or why not? If appointed, what do you think the criteria should be?

8. How are state and local judges selected where you live? In what way do you think the selection process is better or worse than the federal system of judicial selection?

3. Choice of State or Federal Court

As you have seen, there are 50 state court systems in operation in the United States, in addition to the federal court system. Choosing the right court requires knowing which court has jurisdiction over the case. That is, a lawyer must select a court that has the power to hear the case. The first decision is whether to select a state or federal court.

State courts generally have the power to hear any type of case, state or federal. The only time state courts are prohibited from

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hearing cases involving federal law is when Congress has expressly included that limitation in a federal statute.

As to whether the federal courts have jurisdiction, you will recall from Chapter 3 that the federal government is a government of limited powers. Just as Congress can legislate only if the Constitution has given it the power to do so, federal courts can hear cases only if the Constitution has given them the power to do so. Article III, Section 2 of the Constitution describes the jurisdiction of the federal courts in terms of (1) the nature of the subject matter of the case, and (2) the parties involved. Figure 4-6 lists the requirements for federal court jurisdiction.

Two of the grounds for federal court jurisdiction require particular emphasis, as they account for the bulk of federal cases. The federal courts have jurisdiction when the case involves

- a federal question, or
- diversity of citizenship.

Based on the subject matter (federal question):

Any case involving the interpretation or application of

1. the U.S. Constitution,
2. a federal law or regulation,
3. a treaty, or
4. admiralty and maritime laws.

Based on the parties involved:

Any case or controversy in law and equity in which

1. the case affects ambassadors or other public ministers and counsels,
2. the United States is a party to the suit,
3. the controversy is between two or more states,
4. the controversy is between a state and citizens of another state,*

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5. the parties are citizens of different states (known as diversity jurisdiction),
6. the controversy is between citizens of the same state claiming lands under grants of different states, or
7. the controversy is between (a) a state or the citizens thereof and (b) foreign states, citizens, or subjects.*

Based on the amount of money involved:

In addition to the constitutional requirements stated above, Congress has the power to add a minimum dollar value to suits between citizens of different states. The current federal statute states that the amount in controversy in diversity actions must exceed $75,000 to qualify for original federal jurisdiction.

*The Eleventh Amendment modified this to exclude situations where the suit was commenced or prosecuted against a state by an individual.

Figure 4-6 Jurisdiction of Federal Courts

A federal question is involved when there is an issue dealing with a federal statute, a federal regulation, or the U.S. Constitution. **Diversity of citizenship** occurs when the plaintiff and the defendant are residents of different states. Congress has limited jurisdiction in diversity cases to those where the amount of money involved in the case exceeds $75,000.

Federal question
A legal issue involving the application of a federal law.

Diversity of citizenship
A situation where the opposing parties are from different states and the amount in controversy exceeds $75,000.

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That federal courts have jurisdiction over cases involving federal law seems obvious. But why should federal courts have jurisdiction over matters relating to state law simply because the litigants are from differing states and the amount in controversy exceeds $75,000? Traditionally, it has been argued that diversity jurisdiction is necessary to protect out-of-state litigants from the biases they would suffer in state court. Today, however, many disagree as to whether there is a continuing need for diversity jurisdiction.

While it might seem as though it should be relatively easy to decide whether there are valid grounds for finding federal jurisdiction based on the case involving either a federal question or citizens of differing states, this is not always so. In fact, before the parties can resolve the underlying legal issues, they often have to litigate whether a state or federal court is the proper forum.

Questions of diversity jurisdiction can be particularly troubling. For the litigants to be able to proceed in federal court, there must be complete diversity of citizenship. This means that no plaintiff can be from the same state as any of the defendants. If they are, then they must proceed in state court.

For example, in a widely publicized breach of contract dispute involving Facebook, the plaintiffs, New York residents, filed suit against Mark Zuckerberg, the founder of Facebook, in New York state court. New York was Zuckerberg's legal residence while in college. However, since then he had moved to California where he owned property, registered his automobile, and paid taxes. Zuckerberg was able to remove the case to federal court on the grounds of diversity by showing he was no longer a New York resident. [10]

Sometimes only one court is authorized to hear the type of case in question. That is known as **exclusive jurisdiction**. When more than one court is authorized to hear the same type of case, they each have **concurrent jurisdiction**. For example, if a case involves state law and is between citizens of different states, then the state and federal courts would have concurrent jurisdiction. In those situations where both the state and the federal courts have jurisdiction, the plaintiff makes the initial decision as to which court to use. However, as

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illustrated by the Zuckerberg case, when the plaintiff selects a state court and the federal courts also have jurisdiction, the defendant may be able to **remove** the case to federal court.

Exclusive jurisdiction

When only one court has the power to hear a case.

Concurrent jurisdiction

When more than one court has jurisdiction to hear a case.

Removal

The transfer of a case from one state court to another, or from a state court to a federal court.

It is very important to understand that deciding whether to go to state or federal court is not the same as deciding whether the court will apply state or federal law to the case. See Figure 4-7. For example, in a negligence case, a federal court might have jurisdiction based on the diversity of citizenship of the parties. However, the federal court must follow state negligence law in deciding the case. If the case involves an area of unsettled state law, the federal court must base its decision on its best guess as to what the state's highest court would do if faced with the same situation. Because the federal court is only guessing at what the state court would do, the federal court's decision is binding on the current litigants but is not binding on the state courts. Therefore, no matter how the federal court decides the case, it will still be open to the state courts to change the law in that area the next time a litigant brings a case on the same issue to the state courts. Likewise, when a state court hears a case involving a federal matter, it must follow the guidance of the federal courts.

Does a State or Federal **Court** Have **Jurisdiction**?	Does State or Federal **Law Apply**?
Federal court—federal question jurisdiction **Federal court**—diversity jurisdiction	**Federal law**—(1) issues arising from the U.S. Constitution, (2) federal

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	statutes, or (3) federal agency regulations. **State law**
State courts—generally have jurisdiction over **any type of case** unless Congress has provided for exclusive federal jurisdiction.	**State law or federal law**

Figure 4-7 Two Separate Questions: State or Federal Court *and* State or Federal Law?

PRACTICE TIP

When dealing with court personnel, remember that sometimes a few kind words and a professional attitude will get you the assistance you need.

DISCUSSION QUESTION

9. As the federal courts face an increasingly heavy workload, many have argued that it is time to either raise the required amount in controversy or eliminate diversity jurisdiction entirely. The requirement that the amount in controversy exceed $75,000 is to help ensure that federal courts are not inundated with cases of minimal importance. In 1789, Congress set the amount at $500, but over the years, it has increased it to the present-day $75,000. Would you be in favor of such changes?

Legal Reasoning Exercise

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3. For each of these situations determine whether you think the matter should be heard in state or federal *court*. Also decide whether you think a court would apply state or federal *law*.

a. A wife wants to divorce her husband.

b. Martha, a Massachusetts resident, wants to sue Susan, a Massachusetts resident, for $80,000 based on breach of contract.

c. Sam, a Massachusetts resident, wants to sue Jill, a Vermont resident, for $80,000 based on breach of contract.

d. A teacher in a public school wants to challenge a state law requiring all teachers to start each day of class with a minute of silent prayer.

C. COURT PERSONNEL

It takes many different participants to make the judicial system work effectively. Court personnel include not only the judges who preside over the court proceedings and lawyers appearing before them, but also court clerks, court reporters, and bailiffs.

The trial court judge is, of course, one of the most powerful members of the judicial system. Within the limits of the law, the judge decides whether to dismiss a case before it reaches trial, the extent of pretrial discovery, and the amount of time the lawyers will have to prepare their cases. Once the trial is under way, the judge acts as the presiding officer, rules on objections, and determines when recesses will occur. If a jury is involved, the judge supervises its selection, removes jury members from the courtroom at key times to protect them from improper influences, and instructs them on the meaning of the law they are to apply. When a jury is not involved, the judge also acts as the fact-finder and decides whether the defendant is guilty (in criminal cases) or liable (in civil cases). In criminal cases the judge is also responsible for sentencing the convicted defendant. If the

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litigants want to contest a trial judge 's findings, the y must pr esent their ar guments t o appellate judges.

Lawy ers pla y the most visible role in cour t pr oceedings. In addition to being adv ocates for their clients, lawy ers ar e officers of the cou rt. As such, the y ar e responsible for maintaining pr oper decorum in the cour troom and acting within the ethical restraints imposed on them b y the cour ts and their pr of ession.

Cour t clerks ar e responsib le for keeping the cour t files in pr oper condition and ensuring that the various motions filed by lawy ers and the acti ons tak en by judges ar e pr operly recor ded. A head clerk of the cour ts is usually responsible for running the central recor ds section of the cour thouse; his or her assistants ar e assigned to sit in on the actual cour troom pr oceedings.

The **cour t repor ter** prepar es verbatim transcripts of cour troom pr oceedings. Most repor ters use a stenotype machine rather than shor thand. Because it is expensiv e, the y pr epar e a written transcript only if the case is being appealed.

Bailiffs ar e responsible for maintaining or der in the cour trooms. The y ar e also responsible for watching over the juries whe n the y ar e in recess or w hen the y ha ve been sequester ed. When a jur y is sequester ed, the members sle ep at a hotel and ar e kept iso lated fr om the public and their families to pr event them fr om being exposed to pr ejudicial publicity , thr eats, bribes, or any other impr oper influences.

Finally , sheriffs and marshals also ser ve as officers of the cour t. The y ser ve summonses and other cour t documents, collect mone y as requir ed by cour t judgme nts, and other wise help in carr ying out the cour t's or ders.

D. THE ROLE OF THE COUR TS IN INTERPRE TING AND APPL YING THE L AW

As par t of their judicial duties, both trial and appellate cour t judges apply the lawt o the facts in the cases befor e them. Howe ver, befor e the y can apply the law , judges must determ ine the law' s scope and

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meaning. When the law contains ambiguous language, judges must choose between competing interpr etations.

Because the y ha ve this power to interpr et and apply the law , thr oughout our hist or y judges , especially those on the U.S. Supr eme Cour t, ha ve pla yed a major ro le in determining what the g overnment can and cannot do. Often this has inv olv ed contr oversial issues of public policy . For example , in 1896 the Cour t interpr eted the Four teenth Amendment as allowing "separate but equal" tr eatment to justify racial segr egation. It was not until 1954 that the Supr eme Cour t reinterpr eted the Four teenth Amendment and in *Br own v. Boar d of Education* rejected the doctrine of "separate but equal, " thus star ting a national civil rights r evolution.

Those unhapp y with a par ticular decision often criticiz e the judges for "making law" rather than applying it. Howe ver, the truth is that whene ver a judge chooses a par ticular interpr etation of a law , that judge is, in fact, " making the law ."

SUMMAR Y

In this chapter , we ha ve seen that although the U.S. legal system ma y seem to inv olv e a confusing mix of names and functions, all cour ts can be classified in two wa ys:

1. The y ar e either trial or appellate cour ts. Some trial cou rts ha ve only limited jurisdiction; for example, the y only hear cases in which less than a cer tain amount of mone y is in dispute.
2. The y ar e par t of either the f ederal or a state system.

The federal cour t system and most state cour t systems ar e based on a thr ee-tier model. At the bott om ar e the trial cour ts, wh ich decide both factual and legal issues. Abo ve the trial cour ts, you will generally find an intermediate appellate cour t. At the top of ever y system is the highest appellate cour t. Appellate cour ts decide questions of law only . In the federal system, the trial cour ts ar e called district cour ts,

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the inte rmediate appellate co ur ts ar e called cour ts of ap peals, and the highest cour t is the U.S. Supr eme Cour t.

The pow er of a par ticular cour t to hear cer tain types of c ases is known as its jurisdiction. The U.S. Constitution limits all federal cour ts' jurisdic tion by allowing them to hear only the type s of cases listed under Ar ticle III, Section 2. The two most common gr ounds for federal cour t jurisdiction ar e federal question and div ersity of citiz enship.

The judges who sit on these various cour ts ar e selected th rough a variety of diff er ent methods. While federal constitutional judges ar e appointed by the pr esident wi th the advice and consent of the Senate, some state cour t judges ar e appointed, some ar e chosen by the elect orate in elections, and others ar e chosen thr ough a modified appointment pr ocess followed b y an election.

Lawy ers ar e consider ed to be "officers of the cour t" and ar e critical to the eff ectiv e operation of the adv ersar y system of justice. Other key cour t personnel include cour t clerks, cour t repor ters, bailiffs, sheriffs, and marshals.

Due to the degr ee of ambiguity contained in constitutions, statutes, admi nistrativ e regu lations, and the common law , judges ha ve a gr eat deal of discr etion when it comes to interpr eting and applying the law in the cases that come befor e them. In ex er cising this discr etion, it can be fairly said that the y ar e " making law ."

REVIEW QUESTIONS

P ages 69 through 76

1. What ar e the two basic functions of trial cour ts?
2. What is the diff er ence between questions of law and questions of fact? Why is it impor tant t o know the diff er ence?
3. Giv e an example of a questio n of fact that might arise during a m ur der trial. Giv e an exam ple of a question of law that might arise in that same trial.
4. What is the diff er ence between a bench trial and a jur y trial?

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5. What will an appellate court usually do if it finds that the trial court made a harmless error?
6. What is the difference between reversing and remanding a case?
7. How do majority, dissenting, and concurring opinions differ from each other?
8. List the major differences between trial and appellate courts.

Pages 76 through 83

9. In the federal court system what are the names given to
   a. the highest appellate court,
   b. the intermediate appellate courts, and
   c. the trial courts?
10. Look at the map in Figure 4-3. How many district courts are there in your state? In which circuit is your state located? Which other states are in your circuit?
11. If you hear that *cert* has been denied in a case, what does that mean?
12. In the federal system, what are the "inferior courts"?

Pages 83 through 90

13. Describe a typical state court system. How is your state court system similar to or different from the "typical" state system?
14. True or false: In every state, the highest appellate court is called the supreme court.
15. How are state judges selected? How does that differ from how federal judges are selected?
16. Jurisdiction refers to the power a court has to hear a case. Define each of the following types of jurisdiction:
   a. general jurisdiction
   b. limited jurisdiction
   c. original jurisdiction
   d. appellate jurisdiction
   e. exclusive jurisdiction
   f. concurrent jurisdiction

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17. What are the two major grounds for gaining federal court jurisdiction?
18. Other than judges and lawyers, what other court personnel are you likely to encounter in a courtroom? What are their functions?
19. What does it mean to say that judges sometimes "make the law"?

---

[1]The primary exception to this pattern occurs when a dispute is adjudicated in an administrative agency and then appealed to the courts. In very rare circumstances, a case can be filed directly with the U.S. Supreme Court under its original jurisdiction.

[2]425 U.S. 484 (1976).

[3]Grants Pass v. Johnson, 144 S. Ct. 2202 (2024), the U.S. Supreme Court found that the law was constitutional as homelessness is not a status protected by the Eighth Amendment's prohibition on cruel and unusual punishment.

[4]This Discussion Question is based on Wilkinson v. Garland, 601 U.S. 209 (2024).

[5]In this process, the party seeking review of a lower court decision petitions (asks) the court to issue a writ of *certiorari*. This writ is an order to the lower court to send a certified record of the case to the Supreme Court so that the Court can be "be informed about" the previous proceedings.

[6]Justices might recuse themselves because of a potential conflict of interest or for medical or personal reasons.

[7]Code of Conduct for Justices of the Supreme Court of the United States (adopted Nov. 13, 2023), *supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf* (last visited Aug. 7, 2024).

[8]See Stern v. Marshall, 564 U.S. 462 (2011).

[9]In some states, below the trial courts shown in Figure 4-5 is a system of inferior courts with names such as justice of the peace, city, and magistrate courts. Those courts are not courts of record. This means that no permanent record is kept of the testimony, lawyers' remarks, or judges' rulings. The absence of a record eliminates the possibility of an appeal and requires the losing party to initiate a completely new trial in a higher-level trial court if that party wishes to have the matter reconsidered.

[10]Ceglia v. Zuckerberg, 772 F. Supp. 2d 453 (W.D. N.Y. 2011).

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Chapter 5

Civil Litigation and Its Alternativ es

Discourage litigation. P ersuade y our neighbors to compromise whene v er y ou can. As a peacemak er the lawy er has superior oppor tunity of being a good man. There will still be business enough.

Abraham Lincoln

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Chapter Objectives

After reading this chapter, you should be able to:

- Explain the advantages and disadvantages of litigation, mediation, and arbitration.
- Describe the three basic stages of litigation.
- Explain the importance of subject matter and personal jurisdiction.
- Discuss the functions of the complaint, answer, and summons.
- Compare and contrast a motion to dismiss with a summary judgment motion.
- List the main methods used in discovery, including electronic discovery.
- List the steps in a typical trial.

INTRODUCTION

Litigation is the process of using the courts to settle disputes. In this chapter, we provide an overview of the litigation process, including the procedural steps involved in initiating, trying, and appealing civil cases. Litigation can be a very expensive, stressful, and lengthy process. The party that loses a lawsuit rarely pays the legal fees of the prevailing party. Because of this, most civil litigation cases settle.[1] **Settlement** can occur prior to the filing of the lawsuit, any time prior to trial, during trial, or even after trial. Because of the time, expense, and uncertainty of the litigation process, various alternatives to litigation, such as arbitration and mediation, are commonly used. The alternative approaches are known collectively as **alternative dispute resolution (ADR)**.

Settlement

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The resolution of a dispute between parties independent of the rendering of a final decision by a trial or appellate court.

Alternative dispute resolution (ADR)
Techniques for resolving conflicts that are alternatives to full-scale litigation. The two most common of these are arbitration and mediation.

To help illustrate the procedures used in litigation and its alternatives to settle civil disputes, we will again refer to the hypothetical situations involving Donald Drake (first discussed in Chapter 1) and Diane Jackson (introduced in Chapter 2). You will recall that Mr. Drake witnessed the death of his grandson, Philip, when he was struck by the car driven by Wilma Small. Ms. Diane Jackson was the waitress who was fired when she announced to her boss that she was pregnant.

Case 1: The Distressed Grandfather (Continued)

After researching the law and gathering additional facts, attorney Harper met with Mr. Drake a second time to discuss their various options, including proceeding with a lawsuit or first trying an alternative method for resolving his case.

Case 3: The Pregnant Waitress (Continued)

In a second meeting with Ms. Jackson, attorney Harper asked her whether she had belonged to a union and, if so, the terms of any collective agreement with her employer. Ms. Jackson recalled that some money had been taken out of her paycheck every pay period, but did not know if it was just for

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taxes or also covered union dues. She said she would find out and report back to attorney Harper.

A. ALTERNATIVE DISPUTE RESOLUTION

We begin with a discussion of ADR techniques because they are designed to be used either prior to or instead of litigation. You should keep in mind, however, that in real life, actions may not proceed in such a straightforward manner. Although informal negotiations may begin the moment a dispute arises, there is no set order in which the parties are required to proceed. They may decide to file a complaint immediately, initiating the litigation process, but then suspend their litigation efforts while trying to resolve the dispute through arbitration or mediation. Should those efforts fail, the parties may then pick up where they left off in the litigation process. A variation of ADR may be required prior to trial in some jurisdictions. At other times, however, the parties may turn first to an ADR process and then proceed with initiating a lawsuit only if that process fails. Finally, parties may have signed a contract agreeing to the sole remedy of arbitration long before a dispute arises. Therefore, as you read this chapter, keep in mind that the various forms of ADR, including informal negotiations, mediation, and arbitration, can occur at any time, from before formal litigation has begun to well after a lawsuit has been filed and the litigation process is underway.

In comparison to litigation, ADR is designed to resolve conflicts more rapidly and at a lower cost. It can take many forms, ranging from very informal negotiations, which usually begin as soon as a dispute arises and may not end until the final appeal has been filed, to the more formal approaches of mediation and arbitration, which require the involvement of a neutral third party as either a mediator or arbiter.

The main difference between mediation and arbitration is that in mediation, the third party acts as a facilitator who tries to help the

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par ties reach their own resol ution. In arbitration, the thir d par ty is a decision mak er who acts much as a judge would at a bench trial.

NE TNO TE

If you ar e inte rested in learning mor e about various forms of ADR, ther e ar e se veral web sites you can visit, including the American Arbit ration Associa tion , the Me diation Information an d Resour ce Center , the ABA Sectio n on Dispute Resolution, and the College of Commer cial Arbitrat ors . The ABA Journal online has a list of ADR blogs .

1. Mediation

In **mediation** , a neut ral thir d par ty attempts to guide the disputants towar d a compr omise that is voluntarily accepted by both sides. Mediation is based on the pr emise that the best solution is one that the par ties themselv es de vise, rather

Mediation
An ADR mechanism wher eb y a neutral thir d par ty assists the par ties in r eaching a mutually agr eeable, v oluntar y compr omise.

than ha ving one imposed on them. The mediation pr ocess is designed to help the opposing par ties view themselv es as collaborat ors working towar d a compr omised solution rather than as combatants out t o " win " at any cost.

The mediat or helps the dispu tants identify the issues that divide them and explor e potential solutions that would be acceptable to both par ties. If the mediation is successful, the mediat or will draft a written agr eement for the par ties to sign. Once signed, this

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agr eement becomes a cour t-enfor ceable contract. If the y do not reach an agr eement, the par ties can simply walk awa y fr om the mediation and seek other appr oaches t o r esolving their diff er ences.

While m ediation is normally seen as a pr ocess inv olving v oluntar y cooperation between the par ties, many states ar e now imposing "mandat or y me diation " in selected types of disputes, such as those inv olving issues of child cust ody . It is mandat or y in the sense that both par ties ar e requir ed to engage in a formal mediation pr ocess befor e a cour t will hear the case. If the mediation pr oces s fails, the par ties can continue with the cour t pr oceedings.

Generally , som e types of cases ar e better suited for mediation than ot hers. M ediation is par ticularly useful in situations wher e the par ties will ha v e to deal with each other in the futur e, such as child visitation issues after a div or ce or a dispute between neighbors. In these situations, it is hoped that the mediation pr ocess w ill not only resolv e the curr ent situation, but also impr o v e the par ticipants' interpersonal and conflict management skills as the y continue to deal with each other in the futur e.

Some situation s do not lend themselv es to mediation, such as those in v olving domestic violence. Not only ma y the contact during mediation bet ween the abuser and the victim result in fur ther violence following the mediat ion session, but the victim ma y per ceiv e the mediation session itself as another form of abuse. F ur ther , as mediation works best when the par ties ar e of fairly equal bar gaining power , it is not as eff ectiv e in situations of abuse, wher e the victims often per ceiv e themselv es as powerless against the abuser .

D ISCUSSION Q UESTION

1. Mediation is often used in child cust ody cases. What ar e fact ors that would mak e a child cust ody mediation mor e s uccessful? Less successful?

2. Arbitration

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Unlik e mediation, in **arbitration** , th e neutral thir d par ty ha s the authority to render binding de cisions e ven if the par ties do not agr ee with that result. Wher eas a m ediat or is a facilitat or, an arbit rat or pla ys a ro le mor e similar to that of a judge. Arbitrat ors follow a much simpler set of pr ocedur es than do judges, howe ver, and arbitration usually does not requir e as much time or expense as litigation. Generally spea king, both par ties must agr ee in adv ance to accept the arbitrat or's dec ision, and a dissatisfied par ty ma y not challenge it in cour t ex cept on ver y limited g rounds, such as ar guing that the awar d was obtained b y fraud.

Arbitration

An ADR mechanism wher eb y the par ties submit their disagr eement to a thir d par ty, whose decision is binding.

The business community str ongly suppor ts arbitration because it is viewe d as a faster and less expensiv e means of settling disputes that arise in the course of doing business. It is a common practice for businesses to include arbitration clauses in their contracts. Under these clauses, the par ties ar e legally bound to ref er disputes o ver the interpr etation of a contract to arbitration rather than tak e them to cour t. In addition to sa ving time and mone y, arbitration ofte n allows a company to settle a dispute without attracting the public attention that ma y accompany a lawsuit because arbitration decisions often include a confidentiality clause.

Arbitration doe s ha ve its critics. Many complain that arbitration is acquiring too many of the dis adv antages of litigation regar ding cost and time spent, without retaining the benefits of litigation (i.e., the ability to use disco ver y to unco ver facts known only to the other par ty and the possibility of appealing an unfa vorable decision).

In the field of labor law , arb itration is often used as a wa y of avoiding strik es . Spor ts fans ar e familiar with the role that arbitration has pla yed in determining the salaries of baseball pla yers. Public emplo yees ar e often requir ed to use arbitration when state law pr ohibits them fr om striking.

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As mentioned above, arbitrators are not required to apply the same procedures and rules of evidence that judges must use, something that professional football player Adrian Peterson learned when he attempted to challenge an arbitration ruling that upheld the decision by the National Football League (NFL) to suspend and fine him. The NFL had acted after Peterson was charged with "reckless or negligent injury to a child" in connection with his allegedly having beaten his four-year-old son with a switch. After the arbitrator upheld the league's decision, Peterson sued in federal court, alleging that the charge against him and the arbitrator's ruling violated the Due Process Clause of the U.S. Constitution. He based his argument on the fact that the NFL had applied a new disciplinary rule to him that had not been in effect at the time of the incident with his son. In rejecting these claims, the Court of Appeals emphasized that the NFL Players' Association had agreed to the arbitration procedures, and that the statute governing labor arbitration did not allow rulings to be vacated on grounds of lack of "fundamental fairness."[2]

As it turns out, the pregnant waitress, Ms. Jackson, was not a member of a union. If she had been, then there would have been a collective bargaining agreement with her employer, and it is likely that she could have filed a formal grievance. The union representative would then have attempted to negotiate a resolution of her dispute with management. If those negotiations were not successful, most likely the collective bargaining agreement would have included a mandatory arbitration clause that would require Ms. Jackson to submit her grievance to arbitration.

Some employers require that their employees sign an agreement that provides that all employment disputes will be resolved through arbitration. Although Ms. Jackson did not sign such an agreement, in *Epic Systems Corp. v. Lewis*,[3] the U.S. Supreme Court upheld the validity of such compulsory arbitration clauses.

DISCUSSION QUESTION

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2. In some jurisdictions, court-ordered mediation involves a three-person panel that renders a decision at the end of the mediation. The parties to the litigation can either agree to the decision or proceed to trial. If the party that did not agree to the mediation ends up with a verdict 20% or more in the opposing party's favor, they are required to pay the other party's lawyer fees. What are the advantages to this system? The disadvantages? Why do you think arbitration does not use this method?

3. Role of Paralegals in ADR

Because arbitrators and mediators do not have to be lawyers, experienced paralegals may be able to qualify for such positions if they have the right mix of formal training and experience in the substantive field in which they wish to work. Some states, such as Texas, have extensive programs to train mediators in many areas in which disputes can arise between individuals. In Texas, nonlawyer mediators are frequently used, but in some states, it is much less common for nonlawyers to be used as mediators.

Even if paralegals are not working as mediators, their assistance in mediations is often critical. Their involvement in ADR closely parallels the functions that paralegals serve in traditional litigation. They assist in gathering and preparing information that will be presented to the mediator or arbitrator. They help make administrative arrangements for the ADR proceedings and schedule expert and lay witnesses. They also prepare clients and other witnesses for what to expect in the ADR process. Following a decision, they will often prepare documents required as part of the settlement.

Case 1: The Distressed Grandfather (Continued)

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Generally, attorney Harper prefers to use a form of ADR whenever possible, as it may save her clients time, stress, and expense. Also, if there is a chance for an ongoing relationship between the parties, mediation, because it is less adversarial than litigation or arbitration, may help to preserve that relationship.

However, Ms. Small's lawyer has indicated that his client is not interested in using ADR. It is his position that because Mr. Drake was not Philip's parent, there is no legal basis for making Ms. Small responsible for his injuries. [4] Attorney Harper informed Mr. Drake that they have no choice, if they want to proceed, except to turn to the court system and litigation.

DISCUSSION QUESTIONS

3. If you were involved in a dispute, which ADR method would you prefer, and why?

4. Do you think either mediation or arbitration would be appropriate to resolve Mr. Drake's case? Why or why not?

When ADR methods fail, the parties may decide to proceed to litigation. The process of litigation is the subject of the next section.

B. LITIGATION

Specific rules govern the litigation process. Both the federal and state courts have published their particular rules under names such as the Federal Rules of Civil Procedure, the Federal Rules of Evidence, Massachusetts Rules of Civil Procedure, and Illinois Criminal Law and Criminal Procedure. Most state rules are quite similar to those used in the federal courts.

PRACTICE TIP

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Keep a copy of your state's rules of civil procedure and rules of evidence, along with the federal rules. Add to this set any local trial court rules. These can all be found at *uscourts.gov/rules-policies/current-rules-practice-procedure*.

In both federal and state courts, litigation has three basic stages: pretrial, trial, and appeal. Take a few moments to study Figure 5-1, which provides an overview of the litigation process. Refer to it as you proceed with the remainder of this chapter to help you keep track of the various stages.

1. The Pretrial Stage

Before litigation can begin, the lawyer must handle some preliminary matters:

- whether a legal basis for the suit exists,
- who should be sued,
- in which court the case should be brought,
- whether the statute of limitations has expired, and
- whether any administrative agency must be consulted before filing suit.

Once those issues have been resolved and a determination to sue has been made, the lawsuit enters the pleadings stage. The **pleadings** are the documents that each side files with the court and serves on the other side to commence the lawsuit. To narrow the issues, either party may file **pretrial motions**. Finally, the parties will engage in **discovery**, an attempt by both sides to gather as much information as possible. The end result of this process may be a negotiated settlement, a court determination to dismiss the suit, or a decision to proceed to the trial stage.

Pleadings

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The documents that begin a lawsuit—generally , the complaint and the answer .

Pretrial motion

A motion br ought befor e the beginning of a trial, either t o eliminate the necessity for a trial or t o limit the information that can be pr esented at the trial.

Disco ver y

The modern pr etrial pr ocedur e b y which one par ty gains information fr om the adv erse par ty.

a. Pr eliminar y Matters

The dec isions as to these pr eliminar y matters ar e not alwa ys easy to mak e and ma y inv olv e extensiv e factual and legal resear ch to determine the best course of action. P aralegals ar e often assigned the task of locating and analyzing statutes, cour t rules, and cases that ar e rele vant to these decisions. In addition, the y ma y be called upon to engage in factual in vestigation, such as tracing corporate ownership or locating par ties and witnesses t o the suit.

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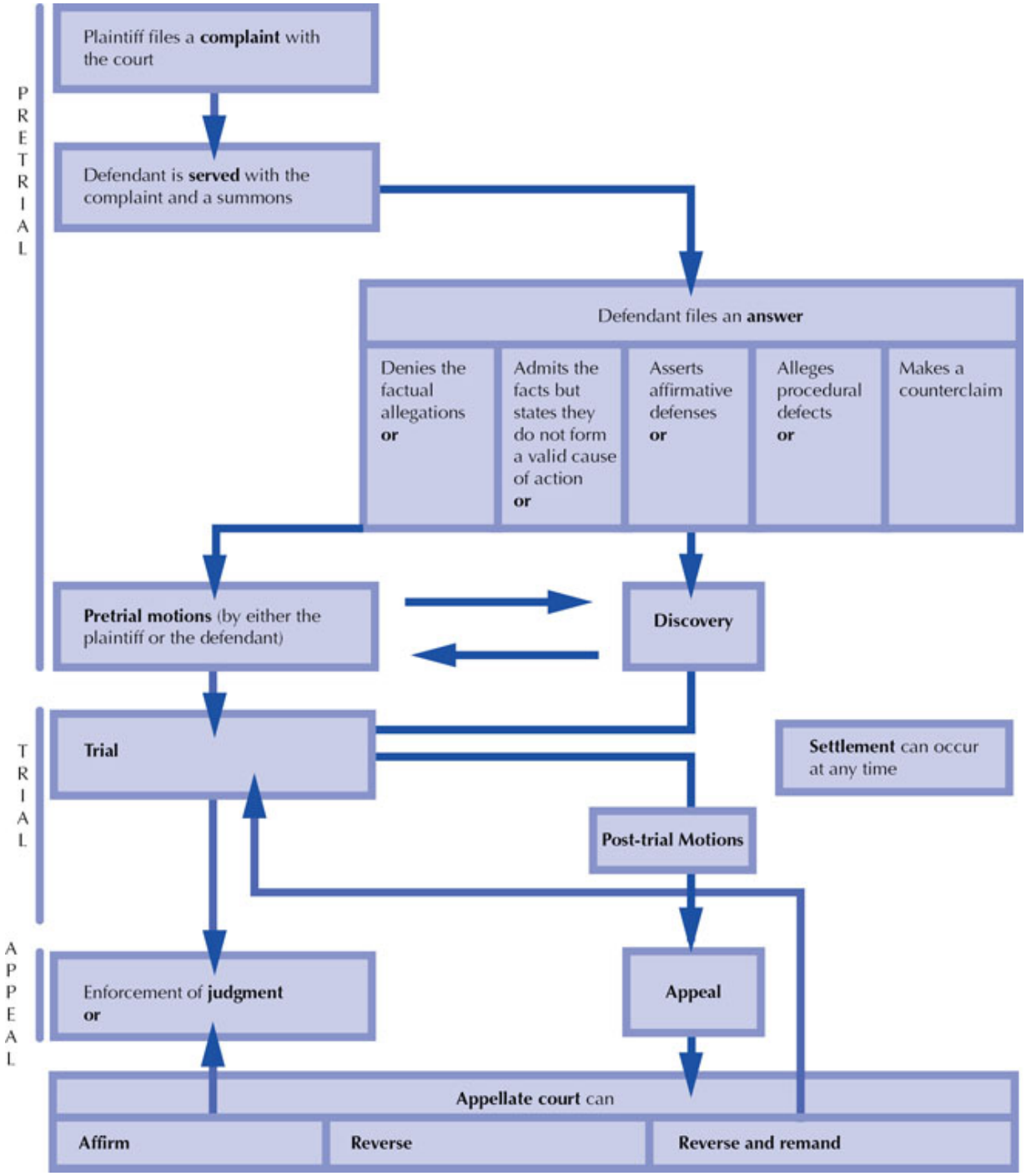

Figure 5-1 Civil Procedure

PRACTICE TIP

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A paralegal generally performs several tasks at the beginning of any lawsuit, including the following:

- Collecting contact information for the client and all potential litigants so that a conflict of interest check can be performed to ensure that no one at the law firm has represented or spoken to any of the other litigants;
- Sending a fee agreement that delineates the scope of engagement and the agreed-upon fee; [5]
- Setting up a **tickler system** to list and monitor all of the deadlines in the case, including statutes of limitations;
- Creating a file to collect all recording/tickler deadlines, evidence, records, pleadings, correspondence, pleadings, and discovery;
- Creating a trial notebook; and
- Creating a settlement brochure (as an option). Prior to the filling of any complaint, the lawyer may request a settlement brochure evaluating the case and delineating the liability and damages of the opposing party. Presented as a story, it explains why the plaintiff is likely to win the lawsuit. Settlement brochures can be written; however, they can also be provided in video form, sometimes referred to as a "legal settlement documentary."

Tickler system
A calendaring system that records key dates and important deadlines.

(1) Legal grounds for the suit

As you will recall from Chapter 1, not every problem is a legal problem for which the courts can provide a remedy. Therefore, before a lawyer can initiate a lawsuit, the lawyer must be convinced that the client has a valid cause of action—that is, based on the law and the facts, the client's claim is sufficient to support a lawsuit. This

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determination involves answering two questions affirmatively. First, does the lawyer believe that there are sufficient credible facts to support the plaintiff's position? Second, does the lawyer believe that there is a valid legal theory to support the claim?

In determining whether a client's position is supported by credible facts, lawyers must review relevant documents and interview witnesses. In some practice areas, including workers' compensation and family law, lawyers will ask for access to the client's social media accounts. They may assign a paralegal to do much of the background research needed to determine whether there are credible facts and a valid legal theory to support the claim.

ETHICS ALERT

If lawyers file lawsuits without first conducting a reasonable investigation regarding the facts of the case, they may be subject to court-imposed sanctions. For example, under Rule 11 of the Federal Rules of Civil Procedure, if a judge determines that a lawyer has not conducted a reasonable inquiry into the facts and law or has filed suit for an improper purpose, then the judge may impose monetary sanctions on the lawyer and on the parties that lawyer represents. If a party is represented by a lawyer, Rule 11 also requires that the lawyer sign the pleadings, written motions, and other papers. Paralegals are never authorized to sign these documents.

DISCUSSION QUESTION

5. In Mr. Drake's case, assume that Massachusetts courts have allowed mothers and fathers to recover in situations similar to that experienced by Mr. Drake but have never spoken about whether they would extend the rule to allow recovery by grandparents. Several

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other states, however, that have directly confronted this issue have ruled against grandparents. The most common reason for not allowing recovery is the fear that to do so would encourage people to bring too many potentially frivolous lawsuits. With that as the legal precedent, do you think Mr. Drake's attorney should feel any concern in signing her name to the complaint? Why or why not?

Even if there are legal grounds for proceeding with a lawsuit, not all legal solutions are worth the cost. For example, no matter which side wins, both parties usually remain responsible for paying their own lawyer's fees. Therefore, lawyers should speak to their clients about the amount that they can expect to recover if they win the lawsuit, minus any expenses and lawyer fees. Clients should also be told that there is never a guarantee that they will win their claim, no matter how strong their case appears to be. Even when clients pay their lawyers on a contingency fee basis so that the lawyers recover a percentage of the award plus costs, plaintiffs may end up losing money if the costs outweigh their portion of the award.

PRACTICE TIP

Recommendation 1: Once the lawyer has identified the cause of action, looking at your state's Pattern Jury Instructions can help you understand what your supervising lawyer will need to prove to win the lawsuit. Then it is helpful to create a list of those elements and what evidence is needed to prove them.

Recommendation 2: Whenever you interview a potential witness, type up the witness' statement and ask the witness to sign it, thereby increasing the likelihood that the witness' testimony at trial will be consistent with that in the initial interview. If a witness is not willing to sign, then it may be necessary to do additional research to support the client's claim.

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Recommendation 3: Facts can change as a case develops. A story usually has two sides, and when clients first meet with a lawyer, they usually only present one—theirs. If at some point it becomes clear that the facts do not support the client's claim, the lawyer may direct that the client be sent a disengagement letter.

(2) Parties to the suit

Lawsuits can involve just one plaintiff and one defendant or multiple plaintiffs and defendants. Determining the appropriate parties is one of the first issues that must be resolved before the lawsuit can proceed. The client should provide the lawyer with the names of all of the other potential litigants. Paralegals are often tasked with confirming the legal names of the defendants. If the defendant is a corporation, it is critical to look up the legal corporate name. The secretary of state of each state maintains a website that allows you to search the legal names of a business incorporated or doing business in that state.

(a) Standing You cannot sue someone simply because you do not like something they did or said. To sue, you must be able to establish you were personally affected by something the defendant did. This requirement is referred to as **standing**. It is designed to keep courts from deciding abstract issues or rendering advisory opinions.[6] By requiring the parties to have a vested interest in the outcome, courts benefit from hearing litigants who will vigorously argue their positions.

Standing
The principle that courts cannot decide abstract issues or render advisory opinions; rather, they are limited to deciding cases that involve litigants who are personally affected by the court's decision.

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Why limit lawsuits to people who have been hurt? One reason is that they're likely to marshal the strongest arguments. It brings to mind the old line about the role of the chicken and the pig in furnishing your breakfast: The chicken is involved, but the pig is *committed.* Let chickens file lawsuits against bacon-and-egg combos, and they may lack the motivation to do a good job. [7]

Because of this requirement of standing, persons and organizations cannot file lawsuits simply because they do not approve of a certain governmental policy or some corporation's building project. For example, only persons who have been sentenced to death can challenge the death penalty. If the court determines that the parties do not have standing, it simply dismisses the case without making a determination on the merits.

A classic example of how the requirement of standing affects who can sue occurred in conjunction with the litigation that led up to the famous case of *Brown v. Board of Education.* [8] Although the National Association for the Advancement of Colored People (NAACP) was opposed to the Kansas policy of segregating its public school system, it had no standing on its own to challenge the constitutionality of that policy. Before it could proceed, the organization had to recruit an African American child who was actually turned away when she attempted to enter an all-White school located in her neighborhood. [9] Eventually, the NAACP was able to find 13 parents and their children who were willing to serve as plaintiffs in the case.

(b) Legal competence The lawyer must also be certain that the parties to a lawsuit are legally capable of suing and being sued. For example, in many states a minor must sue or be sued through a named guardian or "next friend." A **guardian** is someone who has the legal right and duty to take care of another person's property when that person is a child or is otherwise incompetent. A **next friend** is not the legal guardian but is a responsible party that the court recognizes as a legitimate representative. Allowing suit by such representatives is an exception to the requirement of standing mentioned above. The guardian or next friend is not suing in his or her own right, but rather as a representative for the child or incompetent person.

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Guardian

A person appointed by the court to manage the affairs or property of a person who is incompetent due to age or some other reason.

Next friend

A person who represents the interests of someone in court without being that person's legal guardian.

(c) Class action lawsuits **Class action lawsuits** allow multiple individuals to come together in a single lawsuit to sue the same defendant for the same type of injury. Class actions promote efficiency by allowing testimony to be heard and issues to be resolved in one large trial rather than repeatedly in a series of individual trials. Also, the use of class actions may allow plaintiffs with individually small claims a chance to recover. Usually, it is not economically feasible for a single plaintiff to pay the legal fees necessary to recover a small amount of damages, but it becomes worthwhile for a lawyer to take the case on a contingency basis when the damages of hundreds or even thousands of plaintiffs are consolidated.

Class action lawsuit

A lawsuit brought by a person as a representative for a group of people who have been similarly injured.

Before a class action can proceed, the court must certify that it meets two basic requirements:

1. there must be questions of law or fact common to the class, and
2. the claims of the named class members must be typical of the claims of the class as a whole.

Defendants can object to the validity of proceeding with a class action lawsuit by arguing that either or both of those two requirements are missing. For example, Wal-Mart challenged the validity of a class action brought on behalf of 1.5 million of its

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employees and former employees. The U.S. Supreme Court agreed with Wal-Mart that the class was too diverse to qualify for class action status.[10] Although they all claimed Wal-Mart had discriminated against them on the basis of their sex, the Court noted that the class members "held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed."[11]

Five years later a group of 3,000 Tyson Foods Inc. employees sued, seeking overtime wages for time they had to spend donning and doffing protective gear, required as part of their job. The Court allowed them to proceed with their class action suit. The Court distinguished *Wal-Mart* on the basis that in *Wal-Mart* the employees were not similarly situated whereas the employees at Tyson Foods were—they worked in the same facility, did similar work, and were paid under the same policy.[12]

DISCUSSION QUESTION

6. Do you agree with the Supreme Court's decision in *Wal-Mart*? Is it fair that Wal-Mart will not have to answer to the thousands of women whose individual claims are too small to justify the costs of litigation? If the individual women had been able to proceed with a lawsuit, would it have promoted the best use of judicial resources for Wal-Mart to have to defend 1.5 million lawsuits instead of just one large class action suit?

(d) Selecting the appropriate defendants After having determined who are the appropriate plaintiff or plaintiffs, the lawyer must decide who should be named as defendants. Naturally, the lawyer will choose to sue the person who caused his or her client harm. However, the most logical person to sue may not be worth suing because he or she may not have money to pay the damages that a court might award. This is referred to as being **judgment proof**. If there is more than one possible defendant, the plaintiff will want to

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make sure to include the one with the deepest pockets, that is, the most assets.

Judgment proof
When a defendant does not have sufficient money or other assets to pay a judgment.

For example, under a theory known as ***respondeat superior***, an employer can sometimes be held responsible for the acts of its employees. Because employers usually have more money than employees, persons injured by an employee will frequently also sue the employer. Similarly, in an automobile accident case,

Respondeat superior
The tort theory that an employer can be sued for the negligent acts of its employees.

the plaintiff may sue the manufacturer of the auto or the governmental unit responsible for maintaining the roadway.

There are times when a plaintiff cannot sue one potential defendant without including the others as well. This is known as **compulsory joinder**. For example, in a dispute involving a piece of property with three owners, all three would have to be made part of the lawsuit. Where such rules do not apply, the plaintiff may be selective in deciding who should be included in the suit. The defendant, however, may later file a motion to add a defendant that the plaintiff left out.

Compulsory joinder
When a person must be brought into a lawsuit as either a plaintiff or a defendant.

(3) Selection of the court

Unless the parties signed a contract that predetermined jurisdiction, the last preliminary issue requires the plaintiff's lawyer to

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decide in which court to file the lawsuit. From your readings in Chapter 4, you know that lawsuits begin in a trial court and not an appellate court, but which trial court? That will depend on which trial courts have jurisdiction over the type of case that the lawyer will be filing. Recall that **jurisdiction** relates to the power of a particular court to hear a case brought before it. In some cases, the lawyer may have the option of selecting among several different courts and must evaluate the advantages and disadvantages of using one versus the other.

Jurisdiction

The power of a court to hear a case.

Once it is determined which court has jurisdiction to hear the case, a related issue is the question of **venue**, which determines the specific geographical location of the court that will hear the case. Jurisdiction and venue are related, in that they both deal with which court will hear the case, but they are very different. Once jurisdiction is determined, venue simply relates to which of several courts that have jurisdiction geographically is the most appropriate one. For example, assume that two people signed a contract in Ann Arbor, Michigan. Jurisdiction would be determined by the type of case, the law underpinning the case, and the parties to the contract. Once jurisdiction was established (in this case the state court), then the appropriate geographical area would be selected. In this example, that would likely be the county in which the contract was signed.

Venue

When the court with the power to hear the case has multiple locations, the proper location for the case to be filed and heard.

In determining whether jurisdiction exists, you must consider both **subject matter jurisdiction** and personal jurisdiction. If a court does not have both subject matter jurisdiction and personal jurisdiction, it cannot hear the case.

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Subject matter jurisdiction

The power of a court to hear a particular type of case.

(a) Subject matter jurisdiction As the term implies, **subject matter jurisdiction** is determined by the subject matter of the case—that is, by the type of law that is involved. Generally, federal courts can hear only cases relating to federal law (such as federal constitutional or statutory issues) or cases in which the plaintiff and defendant are from different states and the amount in dispute exceeds $75,000. Rule 8 of the Federal Rules of Civil Procedure requires that the lawyer filing a complaint include "a statement indicating why the federal court has jurisdiction to hear the case."

Unless barred by a specific federal statute, generally state courts can hear any type of case. Therefore, cases involving diversity of citizenship and more than $75,000 can usually be started in either federal or state court. In deciding which court to choose, a lawyer will consider matters such as filing requirements, deadline dates, the current backlog of cases, discovery procedures, the rules of evidence, and the personalities of the judges. The convenience of the physical location of the court may also be a factor.

Case 1: The Distressed Grandfather (Continued)

Mr. Drake's case involves negligence, a matter of state law. Therefore, as the accident happened in Massachusetts, attorney Harper could bring her lawsuit in a Massachusetts state trial court. However, even though Mr. Drake's case does not involve federal law, if the amount in dispute exceeds $75,000, she would also have the option of bringing it in federal court. She could do this under diversity jurisdiction, based on Mr. Drake being a resident of Massachusetts and Ms. Small, the defendant, being a resident of New Hampshire. Therefore, in Mr. Drake's case, the federal and state courts have concurrent jurisdiction. Attorney

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Harper is free to choose the forum that is most advantageous to her case.

If she elects to sue using a Massachusetts state court, naturally the court will apply Massachusetts law. However, even if she brings the case in federal court, because jurisdiction is based on diversity of citizenship and the accident happened in Massachusetts, the federal court will also apply Massachusetts state law, not federal law.

(b) Personal jurisdiction **Personal jurisdiction** relates to the court's power to force a person to appear before it—hence the name personal jurisdiction. Generally, for a state court to have personal jurisdiction over a defendant, the defendant must be a resident of that state, be served with process within the state, consent to the lawsuit, or have some **minimum contacts** with it. For example, a state court would have jurisdiction over a nonresident defendant who caused an automobile accident within that state's borders.

Personal jurisdiction
The power of a court to force a person to appear before it.

Minimum contacts
A constitutional fairness requirement that a defendant have at least a certain minimum level of contact with a state before the state courts can have jurisdiction over the defendant.

States exercise this jurisdiction over nonresidents through **long-arm statutes**. Typically, such statutes allow the states to exercise jurisdiction if the subject matter of the lawsuit is a tort the defendant committed within the state, a contract the defendant entered into within the state, or a harm the defendant caused as a result of business conducted within the state. Each of these activities would satisfy the minimum contacts requirement, so long as exercising jurisdiction does not offend "traditional notions of fair play and substantial justice."

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Long-arm statute

A statute that gives state courts jurisdiction over nonresidents who have a sufficient connection with the state.

Because Mr. Drake's accident happened in Massachusetts, the accident supplies the minimum contacts that Massachusetts courts need to hear the lawsuit. Mr. Drake may sue Ms. Small in Massachusetts.

To better understand this concept of personal jurisdiction, just for a moment assume that the situation had been different, as illustrated in Figure 5-2. Assume that Mr. Drake, a Massachusetts resident, had been vacationing in Maine when the accident happened, and assume that Ms. Small, a New Hampshire resident, was also vacationing in Maine. Then the issue of personal jurisdiction would be much more complicated. As he lives in Massachusetts, Mr. Drake would like to commence his lawsuit there. Under these revised facts, however, Ms. Small has had no contact with Massachusetts, and as at least minimum contacts are required, Mr. Drake would not be allowed to sue her in Massachusetts. He could sue her in New Hampshire because, as a resident of that state, the New Hampshire courts would have jurisdiction over Ms. Small. He could also sue her in Maine, as the accident in that state provides the minimum contacts necessary to satisfy personal jurisdiction.

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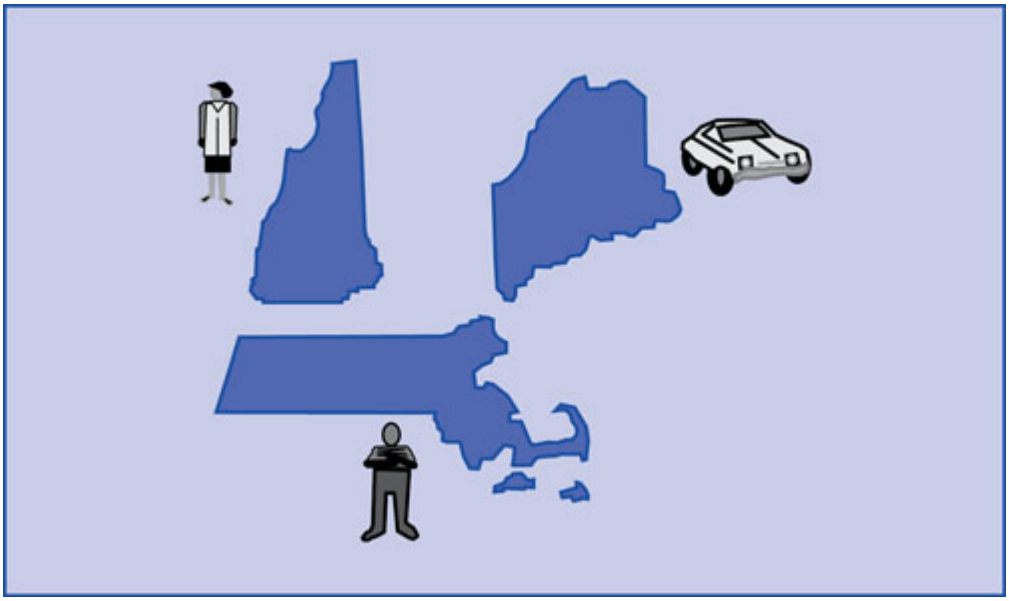

Figure 5-2 Personal Jurisdiction

NETNOTE

On the Internet, you can find all sorts of useful information about the courts—everything from their fax numbers to the location of a specific courthouse. To find the address of any state court, a good place to start is at the home page for the National Center for State Courts, *ncsc.org*. The center maintains a complete listing for all 50 states. For information on federal courts, you can visit either the federal judiciary home page or the Federal Judicial Center home page. Finally, the U.S. Supreme Court has its own website, *Supremecourt.gov*.

Legal Reasoning Exercises

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1. Assume that Mary was injured in an automobile accident while vacationing in California. Joe was driving the car that hit her. Mary is a resident of Michigan. Joe is a resident of Florida. In which state(s) may Mary bring suit? Why?

2. Four Seasons Campground rents campground spaces in New Jersey, the state in which it is also incorporated. John Haas, a resident of Pennsylvania, learned about the campsite on its website and decided that he wanted to lease campground space for the next summer. Because the website did not allow for such seasonal purchases to be made online, Haas drove to New Jersey, where he signed a contract. Later that year, while he was at his leased campsite, a branch fell from a tree, striking Haas on his head and causing him to fall into a brick fireplace, and then to the ground. When he sued the campground in Pennsylvania for the injuries he suffered, the campground filed a motion to have the case dismissed for lack of personal jurisdiction. How do you think the court ruled, and why?

(4) Statutes of limitations

A **statute of limitations** sets a time limit within which a person can sue. Once that specified time has passed, the person is forever barred from suing. Such statutes vary depending on the type of situation involved. Some statutes of limitations set very short deadlines. For example, a person complaining of discrimination at work has only 180 days to bring a complaint. Other statutes of limitations, such as that for murder, are essentially without limit. Typically, persons have two years from the date of a negligent act to file a lawsuit. Mr. Drake is fortunate in that he sought legal advice well within the time frame allowed by the statute of limitations.

Statute of limitations

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The law that sets the length of time fr om when something happens to when a lawsuit must be filed befor e the right t o bring it is lost.

P RAC TICE T IP

Accepting a case a f ew da ys befor e the statute of limitations runs out can be risky . Many lawy ers will write a non-engagement letter t o such a potential client, letting them know that the y ar e *not* taking the case, that the potential client might ha ve a legal remedy , and that the potential client will need t o act quickly t o secur e another lawy er on their behalf.

NE TNO TE

The common statutes of limitations in your state can be found at *statelaws.findlaw .com* . C lick on your state and then click on the link for "Statutes of Limitations. "

(5) Exhaustion of administrativ e remedies

If a person 's cl aim inv olv es matters coming under the juris diction of an administ rativ e agency , the plaintiff might ha ve to consult that agency befor e being allowed to sue in a cour t of la w. Such a requir ement is known as the **exhaustion of administrativ e remedies** . The purpose behind this rule is to giv e the administrativ e agency a chance t o r esolv e the pr oblem befor e the par ties r esor t t o a lawsuit.

Exhaustion of administrativ e remedies

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The requirement that relief be sought from an administrative agency before proceeding to court.

Once a person has filed a complaint with an administrative agency, that agency usually tries to resolve the issue by getting the parties to reach a mutually agreeable resolution. If those efforts are not successful, the process may proceed to a formal hearing. Such a hearing is similar to a trial, but the rules are relaxed. Instead of a trial court judge, an administrative law judge oversees the proceeding. Usually there is no requirement that the rules of evidence be strictly followed. Some administrative agencies also allow for paralegals and others who are not licensed lawyers to represent people in these administrative hearings. Often, the hearing officer's decision resolves the dispute. However, if one of the parties is dissatisfied with the decision, depending on the agency, that party may have the option either to appeal the decision to a higher body within the agency itself, to appeal the decision to a court, or to start the whole process anew with a lawsuit.

PRACTICE TIP

Especially in employment cases, even before seeking an administrative remedy, there may be a contractual or union procedure that must be followed, or else your client may be precluded from pursuing a remedy in court.

Case 3: The Pregnant Waitress (Continued)

In employment discrimination cases, there is a requirement that an employee who has experienced discrimination at work

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first com plain to the state or federal agency that handles such claims befor e being allowed to pr oceed with a lawsuit. Ther efor e, Ms. Jac kson 's att orne y instru cted her to file a complaint with the local agency handling emplo yment discrimination claims.

After Ms. Jackson filed her complaint, the state agency conducted an inv estigation that led it to conclude that ther e was pr obable cause to belie ve she had been fir ed because of unlawful sex discrimination. After an unsuccessful attem pt to resolv e the dispute thr ough informal negotiations wit h the restaurant owner , the agency issued a right-t o-sue letter that authoriz ed Ms. Jackson t o pr oceed with a lawsuit.

Case 1: The Distr essed Grandfather (Continued)

Mr . Drak e's case against M s. Small does not raise any administrativ e law issues. Ther efor e, Mr . Drak e's lawy er did not need to inv olv e an administra tiv e agency prior to pr oceeding to litigation. Howe ver, separate fr om Mr . Drak e's claims against her , Ms. Small ma y find herself be for e an administrativ e agency if the police d etermine the acciden t was her fault. F or exampl e, she might ha ve to ar gue befor e a state licensing agency that her driv er 's license should not be r evok ed.

b. Pleadings

The ple adings ar e the documents that each side files with the cour t and ser ves on the othe r side to commence the law suit. Their purpose is to narr ow and focus the issues inv olv ed. Pleadings begin with a **caption** . The caption must include the names of the par ties, the name of th e cour t, the title of the action, the dock et or file number , and the name of the pleading.

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Caption

The heading section of a pleading that contains the names of the parties, the name of the court, the title of the action, the docket or file number, and the name of the pleading.

Exhibit 5-1 shows what the caption would look like in Mr. Drake's case. First, the caption would identify Donald Mr. Drake as the plaintiff and Wilma Ms. Small as the defendant. It would also indicate that the case is being filed in the U.S. District Court for the District of Massachusetts and would leave space for the eventual docket number to be entered by the court clerk. The court assigns the number at the time the lawyer files the complaint.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action, File Number _____

Donald Drake, Plaintiff }
v. } COMPLAINT
Wilma Small, Defendant }

Exhibit 5-1 Caption

Case 1: The Distressed Grandfather (Continued)

After reviewing the facts and the jurisdictional questions involved, attorney Harper has determined that the best court in which to proceed with Mr. Drake's case is federal district court.

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She directs paralegal Kendall to assist with initiating the lawsuit by drafting a complaint.

(1) The complaint

The initial document the plaintiff files is logically called a **complaint** because the plaintiff is the person starting the lawsuit, and hence complaining of some behavior. A complaint states the allegations that form the basis of the plaintiff's case.

Complaint
The pleading that begins a lawsuit.

PRACTICE TIP

Find the specific caption that is required for each of the courts with which you frequently file pleadings. Then use your word processor to create some standard captions.

Note that the complaint contains all of the following:

- a caption listing the names of the parties, the name of the court, the title of the action, and space for the docket file number to be provided by the court;
- all claims and defenses in numbered paragraphs that can be admitted or denied by the defendant(s);
- the basis for jurisdiction;
- the legal grounds for the case;
- the type of relief sought; and
- a request for a jury trial unless the plaintiff wants to waive the right to a jury trial.

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The requirements for the format and the contents of a federal complaint are spelled out in the Federal Rules of Civil Procedure. A complaint must contain allegations as to why the case falls within the court's jurisdiction, the grounds that form the basis of the plaintiff's case, and the relief desired. If the complaint is to be filed with a state court, the requirements are in the Rules of Civil Procedure for that state.

The body of the complaint consists of the allegations of facts that constitute the cause of action. The federal rules allow for **notice pleading**; that is, the complaint must identify the transaction from which the plaintiff's claim arises. In many states, however, the facts being pleaded must be "ultimate" facts, as opposed to conclusions of law.

Notice pleading
A method adopted by the federal rules in which the plaintiff simply informs the defendant of the claim and the general basis for it.

Case 1: The Distressed Grandfather (Continued)

In Mr. Drake's case, at a minimum, the complaint must include a statement indicating why he believes the federal district court has jurisdiction, a statement showing why he has a valid claim against Ms. Small, and finally what relief he would like the court to grant him. After considering all of these issues, Kendall drafted the complaint that appears in Exhibit 5-2. Locate each of these items in the complaint.

This sample complaint has only one **count**, or basis for the lawsuit: the negligence of Ms. Small. If the facts were different, however, the plaintiff could have alleged more than one basis for his lawsuit. For example, in Mr. Drake's case, if he did not know whether Ms. Small was simply being careless or had actually intended to hit

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Philip expressly to cause Mr. Drake's suffering, the complaint could include a count for the intentional infliction of emotional distress, as well as one for negligence. This is known as **pleading in the alternative**.

Count
In a complaint, one cause of action.

Pleading in the alternative
Including more than one count in a complaint; the counts do not need to be consistent.

DISCUSSION QUESTION

7. Does it seem fair to you that plaintiffs should be allowed to plead in the alternative? Why or why not?

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action, File Number _____

Donald Drake, Plaintiff	}	
	}	
v.	}	COMPLAINT
	}	
Wilma Small, Defendant	}	

1. The plaintiff, Donald Drake, is a natural person residing at 56 Bancroft Way, Springfield, Massachusetts.

2. The defendant, Wilma Small, is a natural person residing at 106 Hemingway Lane, Keene, New Hampshire.

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3. Jurisdiction of this court is founded on diversity of citizenship. Plaintiff is a citizen of Massachusetts, and defendant is a citizen of New Hampshire. The matter in controversy exceeds, exclusive of interest and costs, the sum of seventy-five thousand dollars.

4. On September 1, 2025, while the plaintiff was walking on the sidewalk along a public way called Bishop Street in Springfield, Massachusetts, the defendant negligently drove a motor vehicle onto the sidewalk where the plaintiff's grandson, Philip Drake, was walking approximately thirty feet ahead of the plaintiff.

5. As a result of the defendant's negligence, the plaintiff's grandson was struck by the defendant's motor vehicle and instantly killed. The plaintiff viewed the entire accident.

6. As a direct result of viewing the death of his grandson, the plaintiff suffered a heart attack, great physical pain, mental suffering, and expenses for medical attention and hospitalization in the sum of one million dollars.

WHEREFORE the plaintiff demands judgment against the defendant in the sum of one million dollars, interest, and costs.

Plaintiff demands trial by jury.

Dated: _____ _____

Pat Harper BBO#098467
333 Main St. Springfield, MA
01009413-787-9999

Exhibit 5-2 Complaint

If a paralegal has drafted the complaint, the supervising lawyer must carefully review and sign it. In some states, there is a final requirement that the client verify the complaint. A **verification**

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consists of an affidavit signed by the client indicating that he or she has read the complaint and that its contents are correct.

Verification

An affidavit signed by the client indicating that he or she has read the complaint and that its contents are correct.

Finally, the lawyer or paralegal will file the complaint with the court, which officially begins the lawsuit. Traditionally, filing pleadings and other legal documents involved delivering a hard copy to the court clerk's office during regular business hours. However, through **electronic filing, or e-filing,** the federal courts and many state courts now allow, or even require, pleadings and other documents to be submitted electronically.

Electronic filing (e-filing)

The filing of court documents over the Internet as electronic files.

In the federal courts, it is the **Case Management/Electronic Case Files (CM/ECF)** system that allows for the filing of electronic documents and the maintenance of the case docket. The CM/ECF system uses standard computer hardware, an Internet connection, and a browser, and requires that documents be submitted in **Portable Document Format (PDF)**. In addition to allowing lawyers to file their documents over the Internet 24 hours a day, seven days a week, additional benefits include the reduction of paper, photocopy, postage, and courier costs, and the ability to receive e-mail notices in CM/ECF cases.

Case Management/Electronic Case Files (CM/ECF)

A comprehensive case management system developed for the federal courts, allowing them to receive electronic filings and to maintain case files accessible via the Internet.

Portable Document Format (PDF)

A format that allows a document to be captured and electronic versions to be sent, viewed, and printed consistently across multiple

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de vices and platforms. F ederal cour ts r equir e all documents t o be filed in PDF format.

(2) The summons

Befor e a cour t will hear a lawsuit, def endants must receiv e a **notice** that a suit has been filed against them. Cour ts requir e such **ser vice** for reasons of basic fairne ss. Befor e a cour t will hea r a lawsuit, it must be convinced that the def endant has receiv ed pr oper notice that the suit has been filed against him or her . A **summons** is a formal notice to def endants named in a lawsuit informing them that a suit has been filed against them and specifying what the y must do to respond to the allegations contained in the complaint. A separate summons is made for each def endant, and each summons must ha ve a cop y of the complaint attached.

Notice
Being informed of some act done or about t o be done.

Ser vice
The deliv er y of a pleading, subpoena, or other paper in a lawsuit t o another par ty .

Summons
A notice informing the def endant of the lawsuit and r equiring the def endant t o r espond or risk losing the suit.

> ***ETHICS ALER T***
>
> Although paralegals ma y draft pleadings, the y ma y *not* sign them. To do so would constitute the unauthoriz ed practice of law (ULP).

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Case 1: The Distr essed Grandfather (Continued)

In addition to the complaint, paralegal Kendall pr epar ed the summons shown in Exhibit 5-3. This would be ser ved along with a cop y of the complaint to notify the def endant, Ms. Small, of the natur e of the claim.

UNI TED ST ATES DISTRIC T COUR T FOR THE DISTRIC T OF M ASSA CHUSE TTS

Civil Action, File Number _____

Donald Drak e, Plaintiff	}	
	}	
v .	}	SUMMONS
	}	
Wilma Small, Def endant	}	

To the abo ve-named Def endant:

You ar e her eb y summoned and requir ed to ser ve upon Pat Harper plaintiff 's att orne y, whose addr ess is 333 Main St., Springfield, M A 01009 an answer to the complai nt which is her ewith ser ved upon you, within 20 da ys after ser vice of this summons upo n you, ex clusiv e of the da y of ser vice. If you fail to do so, ju dgment by default will be tak en against you for the relief demanded in this complaint.

Witness _____ Esq,
at _____ the _____ da y of
_____ 20 _____.

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_____
Clerk of Court

(Seal of Court)

This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Exhibit 5-3 Summons

Traditionally, the plaintiff's lawyer arranges to have a copy of the complaint and the summons hand-delivered to a defendant via a **process server**. On some occasions, proper notice could be satisfied by mailing the summons to the defendant's last known address, publishing copies of it in newspapers of general circulation, or delivering it to a corporation's authorized agent. Registered agents can be found in the corporation's articles of incorporation on the secretary of state's website and should be noted and retained in the file when searching for the legal name of the corporation. Some jurisdictions also allow for electronic service in limited circumstances.

Process server
A person authorized by law to serve legal papers on defendants.

(3) The answer

Upon receiving the summons, the defendant has a designated time within which to file a formal answer to the complaint. This document is called an **answer** because it contains the defendant's answers to the charges laid out in the complaint. In addition, if the plaintiff had not asked for a jury trial and the defendant wanted one, the defendant would have to ask for a jury trial in the answer. Otherwise, the right to a jury trial would be considered waived.

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Answer

Def endant' s r eply t o the complaint. It ma y contain statements of denial, admission, or lack of knowledge and affirmativ e def enses.

P RAC TICE T IP

You can sear ch online t o find sheriffs and others who can per form ser vice of pr ocess, but it is much mor e efficient t o k eep a curr ent list in y our addr ess book or computer database.

When reviewing the complaint, notice that each paragraph is number ed, and each alleges only one per tinent fact or con cept. In the answer , the def endant will respond to each of the number ed paragraphs and can choose a combination of responses fr om among the following alternativ es:

- deny the facts that the plaintiff sa ys t ook place,
- admit the facts but asser t that those facts do not pr o vide the plaintiff with a legal r emedy ,
- claim that additional facts giv e rise t o an **affirmativ e defense** ,

  Affirmativ e defense

  A def en se wher eb y the def endant off ers new evidence to a void judgment.

- asser t that the complaint contains pr ocedural def ects,
- bring a claim o f one 's own against either the plaintiff or an other def endant, and
- tak e no action.

These options ar e not mutually ex clusiv e.

(a) D eny the fa cts that the pl aintiff sa ys took place Ms . Sm all will naturally deny as many of the complaint' s allegations as sh e can. She

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must be careful, however, to deny only those allegations that she truly intends to dispute. As to the other matters, she must either admit their validity or state that she is without the knowledge to form a belief as to the truth or falsity of these statements.

(b) Admit the facts but assert that those facts do not provide the plaintiff with a legal remedy As suggested earlier, under Massachusetts law it is unclear whether grandfathers can sue for the emotional distress they experience when seeing a grandchild harmed. Therefore, Ms. Small may want to take advantage of the second option, arguing that even if the facts as alleged are true, they do not form a basis for a lawsuit.

(c) Claim that additional facts give rise to an affirmative defense In her answer Ms. Small will also include any affirmative defense that she thinks may reduce or even eliminate her liability. In this case there does not appear to be any such defense, but let us assume the facts were different. Assume that instead of walking down the sidewalk Mr. Drake was driving his car. Assume further that just as he was approaching an intersection, the light turned from green to yellow. He might have had time to stop, but he chose to proceed through the intersection. Ms. Small, speeding toward him from his right, ran her red light and struck his car, killing Philip in the passenger seat. Clearly, Ms. Small was negligent, and Mr. Drake would want to sue her. However, Ms. Small might feel that Mr. Drake was also negligent given these changed facts. Therefore, in her answer Ms. Small would allege the affirmative defense of contributory negligence.

(d) Assert that there are procedural defects in the complaint This option is usually raised through a separate motion. A motion is simply a request made to the court asking for a court ruling on a particular matter. The assertion that the complaint is defective will be discussed later with regard to pretrial motions.

(e) Bring a claim of one's own against either the plaintiff or another defendant The two basic and most common pleadings are

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the complaint and answer, but there are other options as well, including a **counterclaim** (a countersuit by the defendant against the plaintiff), a **cross-claim** (a suit by one defendant against another defendant), and a **third-party claim** (a suit by a defendant against someone not originally part of the lawsuit).

Counterclaim

A claim by the defendant against the plaintiff.

Cross-claim

A claim by one defendant against another defendant or by one plaintiff against another plaintiff.

Third-party claim

A claim by a defendant against someone in addition to the persons the plaintiff has already sued.

Figure 5-3 diagrams one example of how these various pleadings might be used in litigation. Here plaintiff Smith sued two defendants, Jones and Brown, by filing a complaint against them. Defendant Jones responded with an answer to the complaint and an additional counterclaim against the plaintiff. Defendant Brown filed an answer to the complaint, a cross-claim against defendant Jones, and a third-party claim against Jim Jackson, someone whom the plaintiff had not named as a defendant in the original complaint.

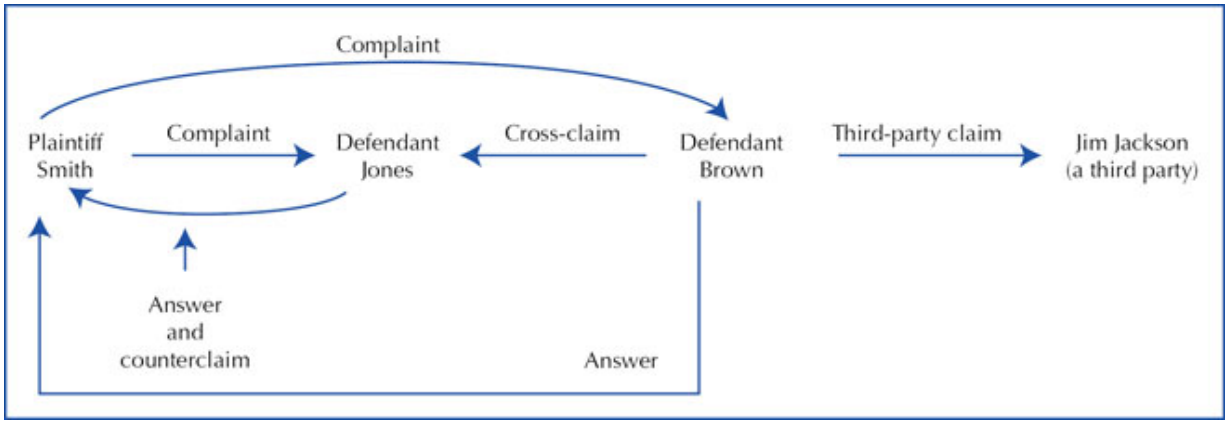

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Figure 5-3 Pleadings

In Mr. Drake's case, it does not appear that Ms. Small has any basis for a counter claim. Let us suppose, however, the same altered facts laid out above, in which both Mr. Drake and Ms. Small were driving their own vehicles. If Ms. Small had been injured, in addition to alleging that she does not owe Mr. Drake any money because of his contributory negligence, she might countersue Mr. Drake to try to recover some money from him to compensate her for her own injuries.

(f) Take no action A sixth alternative is simply not to respond at all—that is, not to file any documents with the court. The failure to take any action is viewed as an admission of the allegations contained in the complaint, however, and creates a situation in which the plaintiff can seek a **default judgment**. In a default judgment, the judge awards the judgment against the party who fails to appear in court to contest the matter. While the plaintiff must still convince the judge that the claim is legitimate, the defendant has no right to challenge the evidence presented or to present contrary evidence. Although it is possible to have a default judgment set aside, it is a very difficult task.

Default judgment
A judgment entered against a party who fails to complete a required step, such as answering the complaint.

Ms. Small's answer might look like Exhibit 5-4.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 25-483

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Donald Drak e, Plaintiff	}	
	}	
v.	}	ANSWER
	}	
Wilma Small, Def endant	}	

First Def ense

The complaint fails to state a claim against the def endant upon which relief can be granted, as ther e is no right to reco ver for the injuries suff er ed by a grandpar ent upon seeing the negligently caused death of a grandchild.

Second Def ense

1. The def end ant has no kn owledge as to the allegations in paragraph 1.

2. The def end ant has no kn owledge as to the allegations in paragraph 2.

3. The def endant admits the allegation in paragraph 3.

4. The def endant admits that the plaintiff was walking on a sidewalk along a public wa y called Bishop Str eet in Springfield, Massachusetts, on September 1, 2025. The def endant denies the allegation of negligence contained in paragraph 4. The def endant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 4.

5. The def endant denies the allegation of negligence contained in paragraph 5. The def endant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 5.

6. The def endant is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in

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paragraph 6.

Dated: _____ _____

William Smith
886 State St.
Keene, NH 03431
603-787-1111

Exhibit 5-4 Answer

c. Pretrial Motions to End Part or All of the Litigation

Sometimes the parties feel they have grounds for having the lawsuit dismissed without a trial. Therefore, in addition to or instead of filing an answer, the defendant may file a motion asking that the court immediately dismiss the case. A **motion** is a written request directed to the court. Under the federal rules, there are two basic motions that can end part or all of a lawsuit: Rule 12 motions, known as motions to dismiss, and Rule 56 motions, known as motions for summary judgment.

Motion
A request made to the court.

PRACTICE TIP

When going to court, bring clean printouts of all cases that the judge may want to see.

(1) Rule 12 motions to dismiss

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Rule 12 outlines the basic types of pretrial motions, as well as how they are presented to the court. This rule offers seven options, such as arguing that the court lacks jurisdiction over the subject matter or over the defendant. But probably the most important of the Rule 12 motions is the sixth, commonly referred to as a **12(b)(6) motion**. This motion states that the plaintiff has failed "to state a claim upon which relief can be granted." If the defendant can convince the court that she has a solid foundation for such a motion, then the court will dismiss the complaint. This means that there will be no trial.

Rule 12(b)(6) motion

A request that the court find the plaintiff has failed to state a valid claim and dismiss the complaint.

In Mr. Drake's case, that would mean that no judge or jury will ever hear about the accident or about Mr. Drake's injuries. Ms. Small's lawyer might very well file such a motion, arguing that, in Massachusetts, trial courts have no right to grant relief to a grandfather who suffers injury upon seeing a grandchild negligently killed.

(2) Rule 56 motions for summary judgment

Another method that lawyers may use to try to end a case before trial is through filing a **Rule 56 motion**, better known generally as a **summary judgment motion.** A lawyer's objective in filing a summary judgment motion is generally the same as that in filing a 12(b)(6) motion—to resolve the case without the need for a trial.

Rule 56 motion (summary judgment motion)

A request that the court grant judgment in favor of the moving party because there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. It is similar to a 12(b)(6) motion except that the court also considers matters outside the pleadings.

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One major difference between the two motions is that when faced with a 12(b)(6) motion, the court must make a determination based only on the facts as alleged in the complaint, and it must assume that those facts are true for purposes of deciding the motion. (If the court denies the motion, all parties treat the facts as once again being in dispute.)

In a summary judgment motion, however, the court will consider additional evidence as presented in documents other than the pleadings, such as depositions, answers to interrogatories, admissions on file, and affidavits. Rule 56 provides that if those documents show that

- there is no genuine issue as to any material fact and
- the moving party is entitled to a judgment as a matter of law,
- then the court will grant the motion and enter judgment for the moving party.

Plaintiffs as well as defendants can bring summary judgment motions. The purpose of a trial is to determine the facts. If the facts are already known, there is no need for a trial, and either side can ask the court to determine that there is no need for a trial and to declare it the winner.

Summary judgment motions can also relate to just part of the case. If a judge grants a partial summary judgment, a trial will be held, but only on the issues still in dispute. For example, assume that during her deposition, Ms. Small broke down and admitted that her speeding caused the accident. The court might grant a partial summary judgment in favor of Mr. Drake on the issue of liability but still hold a trial on the issue of what caused his heart attack: a combination of old age and poor eating habits or seeing his grandson die in the accident.

To summarize, the most fundamental difference between Rule 12(b)(6) motions and summary judgment motions is that Rule 12(b)(6) motions are based on just the complaint and the law. Summary judgment motions are based on the complaint, the law, and something else. To illustrate, assume in Mr. Drake's case that case law held that grandparents cannot sue in a situation such as his. If

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his com plaint stated that he was Philip 's grandfather , Ms. Small' s lawy er could bring a 12(b)(6) motion ar guing that the case should be dismissed. If, howe ver, the complaint had not included his relationship to Philip, Ms. Sm all' s lawy er could send him a request for admissions. If Mr. Drak e adm itted that he was Philip 's grandfather , Ms. Small' s lawy er could file a summar y judgment motion based on the com plaint, the law , and a cop y of his response in the request for admissions.

(3) Appealing a summar y judgment or motion to dismiss

A cour t's decision to grant a motion to dismiss or a su mmar y judgment is consider ed a fina l decision, and as such is appealable. If the losing par ty convinces the appellate cour t to reverse the trial cour t's decisio n, the case wi ll then be returned to the trial cour t so that the par ties can pr oceed with the litigation. Ha ving an appellate cour t reverse the decision to grant a motion to dismiss or a summar y judgment motion does not mean that the pr evailing par ty will ha ve won on the me rits. All the pr evailing par ty will ha ve won is the right to pr oceed with the litigation.

Case 1: The Distr essed Grandfather (Continued)

Ms. Small' s lawy er filed a sum mar y judgment motion on the gr ounds that Ms. Small owed Mr. Drak e, a grandfather , no duty of car e. The trial cour t granted this motion. Attorne y Harper appealed this decision and convinced the appellate cour t to reverse the trial cour t's decision.

By getting the appellate cour t to reverse the summar y judgment moti on, Mr. Drak e has not yet won his case. He has

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won the right to continue with the lawsuit from the point at which the motion for summary judgment was granted.

Legal Reasoning Exercise

3. You are a trial court judge. In each case, would you allow a motion to dismiss, grant summary judgment, or order the case to proceed to trial?

a. The law in your state is that a pet owner cannot recover for the emotional distress she suffers from seeing her pet injured or killed. Sam, a German Shepherd, bit Suzy, a toy poodle, killing her. Suzy's owner, Sarah, sued Sam's owner for the emotional distress she suffered in seeing her dog killed. In the complaint, it stated that Suzy was a dog.

b. Assume the same facts as in a., but also assume that in the complaint, Sarah's lawyer did not indicate that Suzy was a dog, merely stating that Sarah suffered emotional distress when she saw Suzy killed. In an answer to a request for admissions, however, Sarah admitted that Suzy was a dog.

c. The law in your state is that landowners owe a duty of reasonable care to those invited onto their land, but no duty toward trespassers. Tom went onto John's land. Tom tripped over some garden tools that John had left lying outside on his lawn. Tom sued John for the injuries he suffered. In the complaint, Tom admitted that when he was injured, he was trespassing on John's land.

d. Assume the same facts as in c., but also assume that in Tom's complaint, there was no mention of his being a trespasser. When deposed, Tom admitted that he was injured while trespassing on John's land.

e. Assume the same facts as in c., but also assume that in Tom's complaint, there was no mention of his being a

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trespasser. When deposed, Tom denied that he was trespassing, and in fact, claimed that he had been invited to John's house to enjoy an evening of playing cards. At his deposition, John denied that he had invited Tom to his house.

f. The law in your state is that an owner of a wild animal is strictly liable for any injuries caused by that animal. Sam kept a pet monkey. One day when his best friend, Jim, came over to his house for lunch, the pet monkey unexpectedly and suddenly attacked Jim, severely injuring him. Everyone agrees to the facts. The only issue is the appropriate amount of money to award Jim to compensate him for his injuries.

d. Discovery

Once the defendant files an answer, each side frequently begins using various **discovery** devices to find out more about the strengths and weaknesses of the other side's case. The purpose of discovery is to help each side find out as much information as possible so that each can fairly evaluate the case and prepare for trial or settlement. The parties seek to discover information about the identification of witnesses, the nature of the testimony that such witnesses can be expected to provide, and the contents of relevant contracts, medical reports, and so forth. Such information is acquired through various discovery tools, including interrogatories, depositions, requests for admissions, motions to produce documents, and motions for physical and mental exams. In addition to making trials run more efficiently, discovery often makes it more likely that the parties can reach an out-of-court settlement.

(1) Interrogatories

Interrogatories are written questions sent by one party in a lawsuit to another party to obtain written answers in return. **Interrogatories** are used to help locate potential witnesses, establish dates,

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determine a person 's medical or financial condition, and inquir e about the existence of documentar y evidence. Lawy ers fr equently ask their paralegals to draft interr ogat ories. A sample of the types of questions that par alegal K endall might draft in Mr . Drak e's case can be found in Exhibit 5-5.

Interrogatories
W ritten questions sent b y one side t o the opposing side, answer ed under oath.

Note that interr ogat ories ar e only sent to par ties and ma y not be ser ved on nonpar ties. Also, cour ts usually limit the number of interr ogat ories that can be sent.

When a law office receiv es int err ogat ories dir ected to its client, the client usually is instructed to write out the answers as fully as possible. A lawy er ma y then edit these answers and pr epar e the formal responses, which will be returned to the other par ty 's lawy er. When answers to a firm 's interr ogat ories ar e receiv ed fr om the other par ty, a paralegal ma y help in analyzing and or ganizing them.

A m ajor adv antage of interr ogat ories is that the y ar e relativ ely inexpensiv e to pr epar e. A major disadv antage is that the answers can be c losely re viewed by that person 's lawy er or paralegal befor e the y ar e returned to the par ty submitting the questions. Other disadv antages include restrictions on the number of inte rr ogat ories allowed and on not being able t o ask timely follow-up questions.

D ISCUSSION Q UESTION

8. In addition to the questions ra ised in the sample interr ogat or y shown in Exhibit 5-5, what o ther types of information do you think K endall attempted t o gather thr ough the interr ogat ories?

(2) Depositions

If a law yer would lik e to ask questions of a nonpar ty, such as the doct or w ho tr eated Mr . Drak e, or would lik e to ask questions of either

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a par ty or a nonpar ty in person, that lawy er will consider taking a deposition. A **deposition** is sworn testim ony that is ta ken outside the cour troom without a judge being pr esent. Although a judge is not pr esent, ther e is a cour t repor ter who administers the oath and recor ds the testimony . The fo rmat of a deposition is simila r to that of a tr ial, in that one lawy er questions the witness and the opposing lawy er h as an oppor tunity to mak e objections and cr oss-examine the witness.

Deposition

The pr etrial oral questioning of a witness under oath.

UNI TED ST ATES DISTRIC T COUR T FOR THE DISTRIC T OF M ASSA CHUSE TTS

Civil Action No. 25-483

Donald Drak e, Plaintiff }

v. } PL AIN TIFF'S IN TERROGA TORIES

Wilma Small, Def endant } TO WILM A SM ALL

[The in terr ogat ories star t with fairly standar d boile rplate language. Lawy ers use the wor d "boilerplate " to ref er to standar d language foun d in a par ticular type of legal document. In the case of interr ogat ories, the boilerplate language at the beginning sets out basic information such as to whom the interr ogat or y answers ar e to be returned, the deadline for their return, and instructions for answering the interr ogat ories. This language is then followed b y the specific questions.]

1. State y our full name, age, full addr ess, and telephone number .

2. At the time of the events ref err ed to in paragraphs 4 and 5 of the complaint, did y ou ha ve a v alid driv er 's license?

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3. Has your driver's license ever been suspended or revoked, and if so, state

a. When and where it was suspended or revoked;
b. The grounds upon which the license was suspended or revoked.

. . . .

15. During the 24 hours preceding the events referred to in paragraphs 4 and 5 of the complaint, had you consumed any medicines, drugs, or alcoholic beverages of any type, and if so, state

a. The type and amount consumed;
b. The length of time over which the substance was consumed;
c. The names, addresses, and telephone numbers of every person who has knowledge as to your consumption of the substance.

. . . .

Dated: _____

_____

Pat Harper
333 Main St.
Springfield, MA 01009
413-787-9999

Exhibit 5-5 Interrogatories

Depositions can be used to preserve the testimony of a witness when that witness may not be available for the trial (as in the case of a physician), or when the lawyer wants to ensure that the story of the individual being deposed can not be changed. Because a person can be subpoenaed to be deposed, a statement may be obtained from a witness otherwise unwilling to talk to the lawyer or to an investigator. A lawyer is responsible for asking the questions during a deposition.

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PRACTICE TIP

Psychological games can often be played regarding the scheduling and holding of depositions. These tactics can involve everything from where the deposition is held to how the room is arranged. If you notice this happening, help your lawyer and client take control. For example, if the chair your client is to sit in has no arms or is otherwise uncomfortable, suggest that the seating arrangement be changed.

NETNOTE

You can find a variety of videos of depositions online from "famous" to "crazy." There are a number of sites that provide information about common basic deposition questions, how to answer tricky questions, and primers. The short YouTube video "2pac interview by judge" is actually a series of clips of Tupac Shakur answering questions in a 1995 deposition and it provides an excellent example of maintaining composure during a deposition and a few examples of the lawyer providing instructions to assist his client.

The advantages of a deposition over interrogatories are that the deposing lawyer is not limited in the number of questions he or she can ask, the **deponent's** answers are usually more spontaneous, the deposing lawyer can view the demeanor of the person answering the questions, and under certain circumstances, the answers may be used later in a court trial. Because the answers can be used to contradict the deponent's testimony at trial or to show

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inconsistencies, lawy ers often advise their clients to giv e honest but not lengthy answers and to tr eat the deposition questio ns as the y would if the y wer e being ques tioned while in fr ont of a jur y. The major disadv antages ar e the time and cost inv olv ed.

Deponent
The person who is being ask ed questions at a deposition.

At a minimum, a deposition requir es the time and pr esen ce of both lawy ers, a cour t repor ter, and the deponent. Without a special cour t or der , f ederal rules limit the number of depositions t o ten.

Case 1: The Distr essed Grandfather (Continued)

The lawy er repr esenting Ms. Smith arranged for a deposition of Dr. G ar y Boo th, one of the doct ors who tr eated Mr. Drak e after his hear t attack.

(3) Requests for admissions

A **request for admissions** is a written document that lists statements regar ding specific facts for the other par ty to admit or deny . Once admitted, a matter cannot be contested. The purpose of the req uest fo r admissions is to clarify what is not in di spute, and ther efor e what will not need to be resolv ed thr ough a trial. P aralegals fr equently draft r equests for admissions.

Request for admissions
A document that lists statements r egar ding specific items for the other par ty t o admit or deny .

(4) Requests for documents and physical examinations

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The motion to produce documents is used to obtain documents in the possession of one of the parties. Documents in the possession of third parties can be obtained through a ***subpoena duces tecum***. The motion for a physical examination is usually used in personal injury cases or other situations where the health of one of the parties is at issue.

Subpoena duces tecum
A court order that a person who is not a party to litigation appear at a trial or deposition and bring requested documents.

(5) Electronic discovery

Electronic discovery (or e-discovery) consists of any information stored in electronic form, such as e-mails, voicemails, texts, spreadsheets, documents, social media postings, video, photographs, or location data. E-discovery is no different than for any other discoverable information, but often the sheer amount of it means that producing it can be more challenging.

Electronic discovery (e-discovery)
Information found in electronic form, such as e-mails, voicemails, text messages, photographs, spreadsheets, documents, social media postings, and location data.

Failing to request electronic discovery may be grounds for a malpractice lawsuit or an ethics violation. Consider the relatively routine automobile accident case. Liability seems clear—the defendant ran a red light. However, at issue is the amount of damages that the plaintiff suffered. She claims to have ongoing pain and an inability to return to work. But what if, in an e-mail to a friend, she describes spending last weekend water skiing, or better yet, posts a picture of herself doing so on her Facebook page? Finding that e-mail or Facebook post could make the difference between winning and losing the case.

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PRACTICE TIP

E-Discovery: The Paralegal Perspective
by Suzanne A. Wells, Paralegal
Morrison Mahoney LLP
Springfield, Massachusetts

1. **Meet and Confer Conference:** Do not underestimate the importance of the initial meet and confer conference, which is designed to save time, money, and effort. To prepare an attorney for the conference, review the complaint and any information the parties have shared regarding the people involved and the types of documents available. Create a memorandum listing search terms, the format in which documents will be produced, names of people involved, and time frames. Also confer with the client (get permission first) and list the storage devices available to be searched. Using the memorandum you have prepared, the attorney will only need to circle what is agreed upon in order for the e-discovery process to move to the next step: searching the storage devices.
2. **Document Everything:** This is a good practice for a paralegal no matter what the task, but especially in e-discovery. Paralegals should not perform the actual searches, as the individuals who execute the searches may be required to testify. Instead, paralegals should document the searches done by the user of the storage device or the network administrator. To document the searches, create a table identifying the date, the time, the storage device, the search terms, the number of results, and the number of results that were relevant. Update the table as the searches are performed so the information is accurate. Months later, if opposing counsel contends that documents are missing or a search was not

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performed on a particular storage device; the table will help to determine if a second search needs to be conducted. The table will also assist the paralegal in writing an affidavit to the court to show that a good-faith effort was made to search and produce relevant information.

3. **Relevance Review:** Usually, the attorney will review the documents to determine what is relevant. However, if there are a substantial number of files, the attorney may ask the paralegal to narrow it down by categorizing the documents:
   a. definitely relevant: communications between the plaintiff and defendant,
   b. not relevant: for example, spam e-mail, such as advertisements that contain the plaintiff's first name, and
   c. possibly relevant: for example, reports to the company president about a similar situation to the one at issue in the lawsuit.

4. **Bates Stamping:** Bates stamp numbering is a useful tool when organizassigns a unique, individual number to each page so that out of the thousands of document pages, no two pages have the same number. This makes it easier to locate documents during depositions, hearings, and trials.

5. **E-discovery Companies:** For really complicated systems involving a variety of storage devices (networks, laptop, desktops, mobile phones, archived information, the cloud), the parties should consider hiring an e-discovery company. E-discovery companies have the technology to perform thorough searches quickly and efficiently, as well as special software to assist the attorneys and paralegals in reviewing each file for relevancy.

6. **Good-Faith Effort:** It is not possible to collect every electronically stored document. Opposing counsel will

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> say they want everything, but judges, experts, network administrators, and attorneys, including opposing counsel, know it is not possible to produce everything. The key is to make a good-faith effort to obtain as much of the relevant electronically stored information as possible.

The greatest challenge facing those engaged in e-discovery is presented by the sheer volume of the electronically stored data, which can be overwhelming. Think about how a single e-mail can be duplicated many times when the receiver sends a reply to the sender or forwards the e-mail to others. Hence, a single e-mail can turn into hundreds of "documents."

DISCUSSION QUESTION

9. What key words and search parameters do you think would be important when creating an algorithm to find e-discoverable material in the litigation against opioid manufacturers and the Sackler family, the owners of Purdue Pharma, a pharmaceutical company whose main drug is Oxycontin, an opioid on which the Sacklers built their $13 billion fortune?

(6) Preservation of potential evidence

In addition to the very time-consuming process of reviewing and recording useful information found either in hard copy or electronic format, there is the problem of simply getting the documents before they have been either shredded or deleted. Federal and state statutes sometimes require businesses to keep certain types of documents for a set period of time, but absent such a restriction, the documents being sought may be lost due to routine, good-faith operations of a document management system. Sanctions may apply for willful alteration or destruction of **electronically stored information (ESI)**

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once there is a reasonable belief that litigation may arise. It is therefore incumbent upon lawyers to inform their clients that as soon as there is a reasonable belief that litigation may be involved, they must preserve all documents, even those they would otherwise

Electronically stored information (ESI)

Information created, disbursed, or stored in an electronic format.

routinely delete. This is known as a **litigation hold**. If this is not done, and documents are altered or destroyed, such actions can be seen as **spoliation**, the willful destruction or alteration of relevant documents. Sanctions for spoliation can range from the court ordering additional discovery to setting monetary fines to, in extreme cases, instructing the jury that it can infer that the documents would have been harmful to the party that destroyed them or to dismissing the case altogether.

Litigation hold

A requirement that routine alteration or destruction of ESI must stop whenever there is a reasonable belief that litigation may arise.

Spoliation

The destruction or alteration of documents relevant to a case.

Once litigation commences, the lawyers must hold a **meet and confer conference**, at which they develop a proposed discovery plan. The plan may include a **claw-back provision**. Assuming that reasonable methods are used to protect confidential material, a claw-back provision gives the parties a way to retrieve confidential information that they may inadvertently give to the other side.

Meet and confer conference

In federal court, a mandated conference at which the parties must develop a discovery plan.

Claw-back provision

An agreement whereby privileged documents inadvertently produced can be retrieved.

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After the parties and the court agree to a plan, the party required to produce ESI must review the thousands (or even millions!) of documents for relevancy and privilege. Sometimes these records are reviewed manually. Other times, because of the sheer volume of material, computer programs can be written to assist with the process. The relevant documents are then given to the requesting party.

(7) Enforcing discovery rights

The parties to a lawsuit are legally obligated to respond to discovery requests. If a party refuses to respond, the opposing lawyer can file a motion seeking a court order requiring the other side to comply with a valid discovery request. A plaintiff's failure to follow such a court order can result in one of the following sanctions: a prohibition against using certain evidence, a dismissal of some counts, and, on rare occasions, a **dismissal with prejudice** of the entire case. A dismissal with prejudice means that the case cannot be refiled.

Dismissal with prejudice
A court order that ends a lawsuit; the suit cannot be refiled by the same parties.

On the other hand, there are limits to the materials that each side must supply. If the judge is convinced that discovery attempts have gone beyond the bounds of reasonableness and amount to an undue burden or harassment, the judge can issue a protective order to allow the party to refuse to comply with certain types of discovery requests.

DISCUSSION QUESTION

10. If you were doing the discovery plan for Mr. Drake, what methods of discovery would you prefer? Why? Would your answer change if you were representing Ms. Small? Why or why not?

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e. Settlement or Pr etrial Conf er ence

Due in par t to the information gained thr ough disco ver y, most cases settle ra ther than go to trial. Settlement is a possib ility at any time, even befor e the commencement of a lawsuit, but human natur e being w hat it is, it often seems to happen on the ver y eve of trial. One method for tr ying t o encourage settlement is the pr etrial conf er ence.

Pretrial conference s ar e informal sessions in which the opposing lawy ers meet (usually in the pr esence of the judge) to discuss the case befor e it goes to trial. Such conf er ences focus on the issues to be pr esented at the trial an d encourage the par ties to agr ee to matters that the y ar e not con testing. The y also mak e the trial mor e efficient and encourage out-of-cour t settlements. The hope is that as both sides learn mor e about the str engths and weaknesses of the case, the y will be mor e lik ely to agr ee on the pr obable outcome of a trial, and ther efor e reach a mutually agr eeable accommodation. Such accommodations ar e encouraged because the y ser ve the public inter est b y easing the pr essur e on an o verbur dened cour t system.

Pretrial conference
A meeting of the lawy ers and the judge t o discuss a case prior t o the beginning of the trial.

If the effor ts to settle fail, a trial date is set, and various matters related to how the trial will be conducted ma y be discussed. F or example, in a case inv olving sensitiv e material a lawy er m ay mak e a **motion *in limine***. A mot ion *in lim ine* is mad e to pr event ref er ence to specific information in the pr esence of the jur y. A lawy er might also file a motion requesting that the judge allow inquir y int o ce rtain ar eas during ***voir dir e***, the por tion of the trial durin g which potential jur ors ar e questioned t o determine whether the y ar e fit t o ser ve on a jur y.

Motion *in limine*
A r equest that the cour t or der that cer tain information not be mentioned in the pr esence of the jur y.

Voir dire

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An examination of a prospective juror to see if he or she is fit to serve as a juror on a specific case.

2. The Trial

If the case is not settled, then it proceeds to trial. Even if you have never seen a trial in person, no doubt you have watched enough movies and television shows to have a general feeling for how a trial is conducted. You know that there are opening statements by lawyers, testimony by witnesses, closing statements, and verdicts.

While judges, and sometimes juries, play an indispensable role, lawyers play the most visible (and, many would argue, the most important) role during a trial. Under our **adversarial system**, the lawyers are responsible for presenting all of the relevant facts and arguments needed for a neutral judge or jury to reach a proper decision. It is the lawyer's responsibility to serve the client's interests, and the judge's role is limited to that of a neutral arbitrator of the rules. Within certain limits, it is the lawyer who determines what witnesses to call and what questions to ask.

Adversarial system
A system characterized by competing, opposing parties overseen by a neutral decision maker.

Although the majority of lawsuits filed never reach the trial stage, the results of those that are tried influence the results of future settlements. For example, some companies compile and publish reports of recently decided personal injury cases in different areas of the country. When parties learn of the amount of damages being awarded in similar cases, they may see the wisdom of settling their case out of court.

PRACTICE TIP

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Trial-related paralegal tasks during the trial stage generally include the following:

- delivering all necessary documents, trial notebooks, and exhibits to the courtroom;
- making travel arrangements;
- arranging any special equipment needs;
- serving subpoenas on all necessary parties;
- assisting with *voir dire*;
- coordinating the attendance of clients and witnesses for testifying;
- handling all documents and exhibits;
- taking notes and observing;
- maintaining contact with the office, court personnel, and witnesses; and
- reviewing the case and presentations for opening and closing statements.

a. The Right to a Jury Trial

Under the Seventh Amendment to the U.S. Constitution, the right to a jury trial extends to most types of federal civil cases. In contrast, each state has defined for itself the extent to which juries are to be available in state courts. Generally, you will find juries provided for, either by statute or by constitution, in criminal cases and in contractual and tort matters exceeding a specific dollar limit. In all of these cases, the right to a jury trial is an affirmative right. It must be requested in the pleadings or it will be considered waived. In most states, you will not find juries in divorce and probate cases.

The basic function of the jury is to resolve the factual, as opposed to the legal, questions raised in the case. Generally, this comes down to deciding how much credibility to give to the often conflicting testimony of various witnesses. When damage awards are called for, the jury must decide how to measure pain and suffering in terms of

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dollars and cents. In cases of a bench trial, where a jury is not used, the judge takes over the jury's function in addition to the normal duties of presiding over the trial and resolving the legal questions raised.

Under the common law, a jury consisted of 12 people. However, there is nothing that is constitutionally significant about that number, and 6-person juries have been used in civil cases at both the federal and the state levels. Furthermore, it is not unusual to select 1 or 2 extra jurors as alternates, especially where the trial is expected to last for more than a few days. These alternates sit in the jury box with their fellow jurors throughout the trial and are used as substitutes if regular jurors are unable to continue. An alternate does not participate in the deliberations, however, unless he or she has replaced one of the original jurors.

b. Jury Selection

The first formal step in a jury trial is the selection of individual jurors from a pool. The modern trend is to require almost everyone to serve as a juror. In the *voir dire* process of selecting individual jurors, potential jurors are questioned to determine whether they are fit to serve on the jury for that specific case. For example, a potential juror would be disqualified for having a personal relationship with a party in the case or with one of the lawyers involved. Potential jurors may also be disqualified if they have been exposed to high levels of prejudicial pretrial publicity or if they have been involved in similar lawsuits themselves.

Lawyers use two types of challenges when seeking to prevent specific individuals from serving as jurors. The first is a **challenge for cause**, used when a lawyer wants to convince the judge that something about the person's background or answers demonstrates some type of bias. If the judge agrees, the person will not be seated. The number of such challenges, whether raised or granted, is unlimited. In some well-publicized and highly controversial cases, lawyers have gone through hundreds of potential jurors before arriving at the final 12.

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Challenge for cause
A method for excusing a prospective juror based on the juror's inability to serve in an unbiased manner.

The second type of challenge is a **peremptory challenge** that allows a lawyer to have a potential juror removed without giving a reason. Peremptory challenges are limited in number. In deciding whether to use one, lawyers must weigh the risk of having to accept a worse juror later if they have exhausted their limited supply of peremptory challenges.

Peremptory challenge
A method for excusing a prospective juror in which no reason need be given.

Although lawyers need not give a reason for why they used a peremptory challenge, they cannot dismiss jurors based on race. In *Batson v. Kentucky*, the U.S. Supreme Court held that to purposefully exclude members of the defendant's race is to deny defendants their equal protection rights.[13] Most recently, in *Flowers v. Mississippi*, the Supreme Court applied this principle to a case involving a Black defendant who had been criminally prosecuted for murder in six separate trials. At his sixth trial, he was found guilty and sentenced to death. He appealed, arguing that the state had engaged in racial discrimination when using its peremptory challenges. The Supreme Court set out what it viewed as the four critical facts that required reversal.

> First, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court. Second, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. Third, at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in

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dramatically disparate questioning of black and white prospective jurors.[14] Fourth, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State. We need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not "motivated in substantial part by discriminatory intent." In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.[15]

PRACTICE TIP

Today, some professionals specialize in jury selection analysis. However, if your firm cannot afford such a professional, you can perform many of the same functions by sitting at the counsel table with your supervising lawyer and helping spot potential problems. Make sure to keep track of the peremptory challenges. There are apps that can assist with *voir dire*, or you can use a paper system. Write a table to add each juror as they are seated, and two numbered lists where you can record the peremptory challenges of each side.

DISCUSSION QUESTIONS

11. Many people argue that lawsuits have become too complex for the average juror. Do you think there are certain types of lawsuits

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wher e the jur y should be co mposed only of exper ts in that field? Should jur y trials be eliminated entir ely in some ar eas of the law?

12. Jur y exper ts work under th e theor y that cer tain types of people will be lik ely to fa vor one side over the other . F or ex ample, in a medical malpr actice case, one person ma y lean towar d the doct or, wher eas other s will fa vor the patient. Can you think of any gr oups that you could characteriz e in this wa y? Do you think this is a valid appr oach t o choosing a jur y? E ven if v alid, should it be used?

13. In the Johnny Depp-Amber Hear d trial, the jur y was not sequester ed and walk ed past vocal Johnny Depp suppor ters as the y enter ed the cour thouse ever y da y. The judge ask ed them not to read or speak to their families abo ut the case. Do you belie ve that none of the jur ors read about the case, watched any social media, or spok e to any one about the case? In public cases lik e this, do you think that jur ors ar e able to come to a ver dict without thinking abou t how their ver dict will appear on social media?

14. In the United K ingdom, jur or s ar e not allowed to talk about the ver dict after a trial. In the United States the y ar e not allowed to talk abo ut the pr oceedings du ring the trial, but after the trial the y can speak about it or even write a book. How might the diff er ent appr oaches influence how jur ors act during a trial?

c. Opening Statements

Once the jur y is selected, the lawy ers mak e opening statements, in which the y outline the evidence the y hope to pr esent. The plaintiff 's and def endant' s lawy ers state their theories of the case an d describe, fr om th eir respectiv e points of view , what allegedly took pl ace and to what the y expect the witness es to testify . The jur y is thus pr esented with a framework for viewing the upcoming testimony .

Because the plaintiff has the bur den of pr oving his or her case, the plaintiff 's lawy er pr esents the first opening ar gument. In most cases, the def endant' s lawy er mak es an opening statement im mediately following that of the plaintif f's lawy er. At other times, th e def ense waits until the plaintiff 's lawy er has finished pr esenting the plaintiff 's witnesses and exhibits and the def ense is about t o pr esent its case.

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PRACTICE TIP

When accompanying your supervising lawyer to court, you need to bring three essential items with you: (1) a list of the witnesses, along with their phone numbers (if a witness unexpectedly fails to appear, you can call and try to solve the problem); (2) a pin of the courthouse that you can send as a message to someone's phone or written directions to the courthouse and parking instructions that you can read over the phone to any missing witness; and (3) a cell phone.

d. Presentation of Evidence

After the opening statements, the plaintiff's lawyer presents evidence in the form of witness testimony and exhibits. The exhibits consist of such things as medical records, accident reports, videos, and photographs. Exhibits can only be introduced through witnesses. For example, accident reports are generally admitted through the officer who wrote the report. Specific rules of evidence dictate what types of evidence can be admitted and the manner in which witnesses can be questioned.

In considering evidence, it is essential to be aware of the difference between facts and opinions. When a witness testifies that he saw the defendant's automobile strike the plaintiff's car broadside, he is testifying about a fact he observed. But when that same witness says the defendant was driving too fast for the icy condition of the road, he is stating an opinion. Generally, only expert witnesses, such as doctors and police officers, can testify as to their opinions, which they have formed based on their expert knowledge.

In conducting the **direct examination** of a witness, a lawyer usually cannot ask leading questions. A **leading question** is one that suggests the answer. For example, "Wouldn't you say the defendant appeared to be very angry at that point in time?" is a leading question.

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Direct examination
The questioning of your own witness.

Leading question
A question that suggests the answer; generally, leading questions may not be asked during direct examination of a witness.

Once the plaintiff's lawyer has completed questioning a witness, the defendant's lawyer may cross-examine that same witness. The **cross-examination** clarifies any potentially misleading statements or half-truths and sometimes attacks the credibility of the witness. For example, the defense lawyer may attempt to bring out possible biases or the inability of witnesses to have seen clearly what they claim to have seen. On cross-examination, a lawyer may ask leading questions; however, the lawyer may not ask questions on a new topic.

Cross-examination
The questioning of an opposing witness.

The defendant's cross-examination is then followed by redirect examination, where the plaintiff's lawyer has the opportunity to ask additional questions of the witness to rehabilitate the witness after the defense's attack on the witness's credibility. These questions cannot be used to raise new subjects or to explore topics that were not covered as part of the cross-examination. The redirect is then followed by an opportunity for recross-examination by the defendant's lawyer, but that must, in turn, be limited to topics raised during the redirect. At that point, the witness is finally excused, and the plaintiff's lawyer then proceeds to call the next witness.

Throughout the process of questioning witnesses and presenting evidence, the lawyers must keep in mind that appellate courts usually require them to raise appropriate objections at the proper times during the trial. Practically, a lawyer will often simply state, "Objection," at the point at which the opposing lawyer or a witness makes a remark, without stating the basis for the objection. If it is a common objection and the basis for it is obvious, the judge will rule

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immediately . If the natur e of the objection is not immediately clear , the judge will ask the lawy er to explain the reasons for the objection befor e either sustaining or overruling it. In some situations, the judge ma y ha ve the jur y remo ved fr om the cour troom while the lawy ers mak e th eir ar guments about the objection. After the judge has made a ruling on the objection, the jur y will be returned to the cour troom, and the examination of the witness will continue. A lawy er cannot complain later to an appe llate co ur t about something that he or she did not complain about at the pr oper time t o the trial judge.

This requir ement places additional pr essur es on the trial lawy er. A car eless or incompetent lawy er can simultaneously destr oy the client' s chances to win at the trial le vel and to successfully appeal an adv erse decision. Lawy ers w ill mak e objections for the recor d, even when the y do not expect the trial judge to accept them. This is sometimes ca lled "pr otecting the recor d" or "making a recor d for appeal. "

After the plaintiff 's lawy er has finished calling witnesses and pr esenting evidence, the def ense has its oppor tunity . Befor e this occurs, it is not unusual for the def ense lawy er to mo ve for a **directed v erdict** . This motion requests that the judge end the trial at that point and find in fa vor of the def end ant on the basis that the plaintiff 's side failed to meet its obligation of pr esenting a *prima facie* case suppor ting its position. The judge will enter a dir ected v erdict if the judge conclude s that the plaintiff 's evidence is so weak that even consider ed in its most fa vorable light (without considering any rebuttal eviden ce fr om the def endant), it is not sufficient as a matter of law t o merit a v er dict in the plaintiff 's fa vor.

Directed v erdict

A v er dict or der ed b y a trial judge if the plaintiff fails t o pr esent a *prima facie* case or if the def endant fails t o pr esent a necessar y def ense.

Case 1: The Distr essed Grandfather (Continued)

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Mr. Drake's lawyer made sure that she presented evidence on each element of negligence. Those four elements are duty, breach, cause, and harm.

It is the plaintiff's responsibility to present a *prima facie* case. If attorney Harper had inadvertently omitted one of the necessary elements, the court could not find a basis for the negligence claim, and a directed verdict in the defendant's favor would be appropriate.

If the court grants the motion for a directed verdict, the trial is over. However, it is very unusual for a judge to accept a motion for a directed verdict at this point in the trial.

Typically, the judge denies the motion, and the defense lawyer goes on to present his or her witnesses. The same process of direct, cross, redirect, and recross is used. The defense strategy involves presenting evidence that contradicts evidence presented by the plaintiff and possibly attempting to raise a legally accepted defense for that particular type of case.

Once the defendant's case is complete, the plaintiff can ask for a directed verdict on the basis that even if the defendant's evidence is taken in its most favorable light, it would be insufficient to rebut the plaintiff's case. If the judge denies this motion, as is usually the case, the plaintiff can present witnesses who will attempt to rebut the testimony and evidence presented by the defense. After that, either side can again renew its motion for a directed verdict. If these motions are again denied, both sides then give their closing arguments.

DISCUSSION QUESTIONS

15. Do you agree with the rule that only experts should be allowed to state their opinions? Why should it matter if a witness who saw Ms. Small stumble just before she entered her car testifies that "Ms. Small was drunker than a skunk"?

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16. One of the all-time famous leading questions is "So, when did you stop beating your wife?" What is the problem with asking a witness this type of question during direct examination?

17. Do you think that the party that goes first has an advantage or disadvantage at trial? Why?

e. Closing Arguments

Perhaps the most dramatic part of any trial is the closing arguments. Here, the lawyers review and interpret the evidence in its most favorable light and develop emotional appeals. Closing arguments are their final chance to persuade the jury. Although both the plaintiff and the defendant receive equal time, in some states the plaintiff has the advantage of splitting the time and speaking both first and last. The plaintiff is given this advantage because the plaintiff also has the burden of proving their case.

f. Jury Instructions

Before sending the jury members out to deliberate, it is the judge's responsibility to properly instruct them about the nature of their duties and the requirements of the law. The jury's duty is to determine the facts and then apply the requirements of the law to those facts. However, the jury is composed of a group of lay persons who do not know what the law requires. Therefore, it is the duty of the judge to explain the law in terms the jury can understand.

Rather than starting from scratch and risking reversal for failing to include some key element or for explaining some concept in a misleading way, judges frequently rely on **pattern jury instructions**. These are collections of instructions that have already been tested on appeal in other cases. The lawyers in the case also have the opportunity to submit instructions that they would like to see included. The judge then reviews their submissions and often discusses the issues with the lawyers in chambers before deciding which instructions to give.

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Pattern jury instructions
A set of standardized jury instructions.

DISCUSSION QUESTION

18. In a seven-month trial on a complex corporate issue, the judge did not instruct the jury before or during the testimony. After the lawyers' presentations concluded, and before asking the jury to reach a verdict, he read to the jury the 81-page jury instructions, a process that took several hours. He refused to provide the jury a written copy of the jury instructions. This is an example of the language used in the jury instructions: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of supply and demand between the product itself and the substitutes for it." The defendant appealed, arguing that the jury instructions could not be understood by a reasonable jury.[16] Do you think that the appeal was successful? Why?

g. Jury Deliberations, Verdict, and Judgment

Once they have been properly instructed, the jurors retire to a special room where they deliberate in private until they reach their **verdict**, or they report they cannot reach a consensus and the judge declares a **mistrial**. In most cases, the jurors must come to a unanimous agreement regarding the verdict, although some states have provisions for less-than-unanimous verdicts in certain types of cases.

Verdict
The opinion of a jury on a question of fact.

Mistrial
A trial ended by the judge because of a major problem, such as a prejudicial statement by one of the lawyers.

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Usually , evidence is presented at the trial regarding the question of liability and the amount of damages. If the jurors find that the defendant is liable, they next consider the amount of damages. In some cases, however, a bifurcated trial is held. During the first phase of such a trial, the jury hears testimony regarding liability and then deliberates on that issue alone. If the jury finds the defendant liable, the trial enters a second stage, in which the jury hears evidence about the nature of the damages. The jury then deliberates regarding the amount of damages to award.

Once a verdict is reached, the court enters its official **judgment** regarding the rights and obligations of the parties involved in the case, and the clerk enters it into the record. Usually , if the losing party does not appeal within a specified time period, the judgment automatically becomes effective. If the losing party does appeal, the court stays the judgment until the appellate court reaches its decision.

Judgment
The decision of the court regarding the claims of each side. It may be based on a jury's verdict.

h. Posttrial Motions

After the verdict has been announced, the losing party has a certain time period within which to file posttrial motions. The most common motions are a motion for judgment notwithstanding the verdict and a motion for a new trial.

The motion for a **judgment notwithstanding the verdict,** also known as a **judgment N.O.V.** (judgment *non obstante veredicto*), is a request to the judge to reverse the jury's decision on the basis that the evidence was legally insufficient to support its verdict. If the judge grants the motion, the case is over and the moving party has won.

Judgment notwithstanding the verdict (judgment N.O.V.)
A judgment that reverses the verdict of the jury when the verdict had no reasonable factual support or was contrary to law .

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A lawyer usually bases the **motion for a new trial** on the assertion that some procedural error has tainted the outcome. The losing party might argue, for example, that some piece of evidence was admitted that should not have been admitted, or that someone made improper contact with a juror on the case. If the court grants the motion, the case has to be retried.

Motion for a new trial
A request that the court or der a r ehearing of a lawsuit because irregularities, such as errors of the court or jury misconduct, make it probable that an impartial trial did not occur.

Both motions are frequently made but seldom granted. Nevertheless, they are important because they may be necessary to preserve the client's right to appeal to a higher court. The trial court must be given every possible opportunity to correct its own errors before the appellate courts intervene, a principle known as **exhaustion**.

Exhaustion
The requirement that appellate courts intervene only after the trial court has had an opportunity to correct its own errors.

3. The Appeal

"I'll take my case all the way to the Supreme Court" is a battle cry that has been echoed by many concerned litigants. No one likes to lose, and there are few lawyers who have not dreamed of arguing a case before the U.S. Supreme Court.

On the other hand, appeals consume time and money. The client's initial desire for appeal often pales because of the costs involved. Cases often settle after the verdict. In fact, they may settle for far less than the verdict because of the time and cost of the appellate process. In addition, the option to appeal may be very limited, or even nonexistent. If the lawyer did not make the correct objections during

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the trial, or if the client's case did not involve any questions of law, there will be no basis for an appeal.

a. The Timing and Filing of the Appeal

A case cannot be appealed until a final judgment has been entered. A court can grant a final judgment after a jury verdict, but also after a motion to dismiss, a summary judgment motion, a motion for a directed verdict, or one of the posttrial motions. The party wishing to appeal must file a notice of appeal within a specified time period after the final judgment is entered.

The side bringing the appeal, the appellant, files an **appellate brief**, which explains the facts of the case, lists the relevant statutes and court cases, and then presents legal arguments for overturning the lower court's decision. Then the other side, the appellee, files its brief. Finally, the appellant has the opportunity to file a reply brief in response to the appellee's argument and to any new authorities cited in the appellee's brief.

Appellate brief
A formal written argument to an appellate court, in which a lawyer argues why that court should affirm or reverse a lower court's decision.

b. The Scope of the Review

When an appellate court considers a case, it does not conduct a new trial. It simply reviews the official record of the proceedings at the trial court. Moreover, it limits its review to specific appealable issues, for which the party appealing the case must have laid a proper foundation at the trial level.

As you know, appellate courts typically only consider legal issues. Recall that legal issues involve the interpretation and application of the law; factual issues involve the determination of whether a given event took place as alleged.

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Sometimes, howe ver, appellate cour ts ar e ask ed to re view a trial cour t's findings of fact. When the y do so, it is on a ver y limited basis. Generally , appellate cour ts will resolv e conflicts in the testimony and questions of the cr edibility of the witnesses in fa vor of the trial judge 's position. The y cannot disr ega rd a trial cour t's findings of fact unless the y determine that the findings wer e **clearly erroneous** . Th is means not simply that the appellate cour t would ha ve found other wise, but that the appellate cour t is convinced that the trial cour t made a mistak e, as, for example, whe n the trial cour t did not base its findings on sufficient e vidence.

Clearly erroneous

The standar d used b y appellate cour ts when r eviewing a trial cour t's findings of fact.

Howe ver, when an appellate cour t re views legal issues, it giv es no def er ence to the trial cour t's findings but rather mak es its own independent re view . A legal issue might inv olv e review ing a trial judge 's interpr etation of a sta tute or legal document, such as a will or a lease. Similarly , questions about the natur e of the jur y ins tructions and the trial cour t's decision on the admissibility of evidence pr esent legal issues.

If th e appellate cour t decide s that the trial judge made a legal err or, it must d etermine whet her that err or was pr ejudicial or mer ely harmless. Err ors ar e defined as pr ejudicial when the y pr obably aff ected the results. **Harmless error s** ar e err ors so minor and peripheral that the y had no significant eff ect on the outcome. Only pr ejudicial err ors ar e consider ed t o be **re versible error s** .

Harmless error

A trial cour t err or that is not sufficient t o warrant r eversing the decision.

Re versible error

An err or made b y the trial judge that is sufficiently serious t o warrant re versing the trial cour t's decision.

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Examples of harmless errors include (1) a mistake in the pleadings if the facts can be determined at trial; (2) errors in jury instructions, unless there is reason to believe that they actually misled the jury; and (3) the failure to strictly follow the rules of evidence in a bench trial, as it is assumed a judge is unlikely to be affected by incompetent evidence.

Finally, sometimes an appeal is based on a challenge to a trial judge's decision as to court procedure or how the case should be managed. Examples include permission to amend a complaint, denial of a request for a continuance, imposition of sanctions for filing an improper pleading, and the awarding of prejudgment interest. Because these types of decisions are generally left to the discretion of the trial judge, appellate courts review them using an abuse of discretion standard. They will reverse a trial court only if the appellant can prove the judge committed a clear error of judgment, lacked the authority to act, or acted with prejudice or malice.

c. Oral Arguments

Depending on the rules of the particular appellate court, the court may hear oral arguments on appeal. During oral arguments, the lawyers present their clients' positions. The court gives the lawyers a limited time to speak, often no more than 20 minutes, and the judges frequently interrupt the lawyers with questions. The purpose of the questioning is to probe weak points in the argument and to explore the implications of the lawyer's line of reasoning.

NETNOTE

The U.S. Supreme Court website makes available all oral arguments made before the Court in audio and transcript form at *supremecourt.gov/oral_arguments/oral_arguments.aspx.*

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d. The Decision and Its Publication

With or without the benefit of oral argument, the judges study the matter until they reach a decision by majority vote. Usually, the case is assigned to one of the judges in the majority to prepare the official opinion of the court. The other judges on the court have the right to prepare either concurring or dissenting opinions. You will recall that in a concurring opinion, the judge agrees with the outcome but disagrees with the reasoning in the official opinion. In a dissenting opinion, the writer disagrees with both the outcome and the reasoning. The court's decision is then published in the appropriate **reporters**, law books that contain all of an appellate court's opinions.

Usually, the appellate decision is either to **affirm** the lower court's action or to **reverse** and **remand** (return) the case to the lower court for reconsideration. Sometimes, based on the nature of the case, a new trial is not needed to supplement the factual record. Then the judges may simply enter a final judgment based on the existing record.

Affirm
When a higher court agrees with what a lower court has done.

Reverse
When the litigants appeal a lower court decision and the higher court disagrees with the decision of the lower court.

Remand
When an appellate court sends a case back to the trial court for a new trial or other action.

e. Further Appeals

Depending on the court structure and the nature of the case, the party that loses at the appellate level may have the option of appealing to yet a higher-level appellate court. The general rule, however, is that there is only one right of appeal. A second appeal to a

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higher court is usually discretionary rather than a matter of right. The judges on the higher appellate court choose to hear only the cases that they believe have the greatest judicial significance. For example, to have a case heard by the U.S. Supreme Court, the losing party must first petition the Court and request that it grant a writ of *certiorari*. In support of this request, the applicant will file a written brief. The purpose of the brief is not to argue the merits of the case, but rather to convince the Court to agree to hear the case. Common reasons are the importance of the case for others beyond the immediate litigants and the need to resolve conflicts among the circuits.

For example, for many years, the federal courts of appeals were reaching different results in sexual harassment cases. Some courts of appeals thought such situations were covered by Title VII but others disagreed. In a federal system, leaving such a conflict unresolved is obviously undesirable, as the outcome of a case would vary based on where it was brought. Eventually, the Supreme Court agreed to hear a case involving sexual harassment, and it resolved the issue by deciding that such situations are covered by Title VII. [17]

If the Court grants the petition for a writ of *certiorari*, the litigants will then file briefs arguing the merits of the case. However, the Court denies most petitions for *certiorari*.

Most state courts follow a similar procedure. If the higher appellate court accepts the appeal, the parties file new briefs and the process described above begins all over again.

PARALEGAL PROFILE

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Carolyn Pitts

I work for the lead partner in a 13-attorney law firm in Central Illinois. While the attorneys in our firm practice in a wide range of legal matters, I work exclusively in litigation, which I really enjoy. I have a great deal of variety in my day-to-day activities. For instance, on any particular day, I might be researching and writing a memorandum, finding and speaking to an expert for a case, drafting an appellate court brief, or speaking with witnesses or potential clients. Under my supervising attorney's review, I write proposed opinion letters, correspondence to clients, and settlement demand letters. I draft complaints, read and summarize the medical records for a personal injury client, answer discovery requests, and write interrogatories and requests to produce to be sent to the opposing party. I help prepare for depositions by collating the appropriate documents and listing potential questions for the attorney to ask.

After my supervising attorney reviews my work, it sure feels good if he reads something I have written and offers no corrections or changes. I have even had the privilege of being the "second chair" with my attorney in several medical malpractice trials.

Litigation remains my favorite area of the law because I like the problem-solving aspects of it. There have been times when we have had to develop a new legal theory or adapt an existing concept to fit the particular factual circumstances of a case, and my attorney has enough confidence in my critical thinking skills to bring me in to brainstorm the theories with him, and then to find case law to support the theory. I find tremendous satisfaction in doing my part to "right the wrongs" of the world, even if it is for only one person at a time.

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While computer skills are paramount, my view is that one of the often-overlooked attributes of a valued paralegal is curiosity. Asking "why" or "what if" at every stage of the case can have tremendous payback, both in keeping your skills relevant, as well as in assisting the attorney to achieve the best outcome for the client. It also pays to become involved in your local and national paralegal associations. I have learned so much from other paralegals and have made not only lasting connections but also friendships.

SUMMARY

When people have a dispute they cannot settle themselves, they typically turn to the courts to have a judge or jury settle it for them. This process of using the courts is referred to as litigation. Because it is such a complex, time-consuming, and expensive way of settling disputes, people are increasingly turning to various forms of ADR.

The most common types of ADR are arbitration and mediation. Increasing numbers of courts are requiring litigants to try different types of mediation before they allow a case to come to trial. Many business contracts include provisions for mandatory arbitration.

In some circumstances, it may be necessary to exhaust administrative remedies prior to filing a lawsuit. Adjudicatory hearings in administrative agencies follow the general outline of a civil trial, but they are less formal and do not involve as many due process protections. A hearing officer presides over the hearing, acting much as a judge would. Although it is relatively easy to get evidence admitted into the record, the hearing officer has a great deal of discretion over the weight given to that evidence. Once all avenues of appeal within an agency have been exhausted, a party can often seek review within the judicial system.

The three main stages of litigation are pretrial, trial, and posttrial. In the pretrial stage, the parties use pleadings, discovery, and pretrial conferences to identify the facts and the legal issues involved in the

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dispute. The majority of cases are settled out of court during this stage.

At the trial stage, the parties present their evidence to either a judge or a jury. The rules of evidence dictate the form in which the evidence must be presented and what types of questions witnesses can be required to answer. Following the trial verdict, the losing party may challenge the trial court's decision in an appellate court.

REVIEW QUESTIONS

Pages 93 through 110

1. What are the most common forms of ADR, and how do they differ from each other?
2. What types of disputes are best suited to resolution through ADR? Which are least appropriate?
3. What do the proponents of ADR see as the advantages of ADR over traditional litigation?
4. What are the three basic stages of civil litigation?
5. What are five common tasks for a paralegal during the pretrial period?
6. What issues have to be considered in deciding who should be sued?
7. How does a class action lawsuit differ from one brought by and on behalf of one individual?
8. If someone says that a particular court does not have jurisdiction over a lawsuit, what is meant by that?
9. What is the difference between jurisdiction and venue?
10. What is the difference between subject matter jurisdiction and personal jurisdiction?
11. What is the purpose of requiring litigants to first exhaust their administrative remedies?
12. How does an administrative hearing differ from a civil trial?

Pages 110 through 118

13. What is the purpose of each of the following pleadings:

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a. the complaint
b. the answer
c. a counter claim
d. a cr oss-claim
e. a thir d-par ty claim

14. Under the federal rules, what thr ee items must be include d in a complaint?
15. What is a caption?
16. Who must sign all pleadings? Why?
17. What is the purpose of a summons?
18. What ar e the adv antages t o e-filing?
19. What is the da nger to the def endant in failing to answe r a complaint?

P ages 119 through 121

20. What ar e the gr ounds for a 12(b)(6) motion, and what is its purpose?
21. What is the diff er ence between a 12(b)(6) motion and a summar y judgment motion?

P ages 121 through 129

22. What is the main goal of disco ver y?
23. What ar e interr ogat ories and depositions, and how do the y diff er?
24. Besides interr o gat ories and depositions, what ar e the m ain disco ver y t ools a vailable t o the par ties?
25. What is e-disco ver y, and wh at basic steps ar e followed in cases inv olving it?
26. What special challenges does e-disco ver y pr esent?
27. What is the purpose of a pr etrial conf er ence?

P ages 129 through 136

28. What is the function of the jur y?
29. What is a *voir dir e*, and what is its purpose?
30. What ar e the diff er ences between a challenge for cause and a per empt or y challenge, and what is the function of each?

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31. What are the limitations to a lawyer's right to use peremptory challenges?
32. What are five common tasks for paralegals during trial?
33. What do lawyers hope to accomplish in their opening statements?
34. Who presents evidence first, the plaintiff or the defendant? Why?
35. When can either side move for a directed verdict? What is the purpose of that motion?
36. What is the difference between a verdict and a judgment?
37. What is the difference between the motion for a judgment notwithstanding the verdict (judgment N.O.V.) and a motion for a new trial? Give an example of when each could be used.

Pages 137 through 141

38. Describe the limitations on a litigant's right to appeal.
39. What is the difference between a harmless error and a reversible error?

---

1 For a nuanced article on civil settlement rates, the American Judges Association has published a study, "A Profile of a Settlement" by John Barkai, Elizabeth Kent, and Pamela Martin, found at *http://aja.ncsc.dni.us/htdocs/publications.htm*.

2 NFLPA v. NFL, N. 15-1438 (August 4, 2016).

3 584 U.S. 497 (2018).

4 See the discussion of standing later this chapter on page 103.

5 Of course, if the firm chooses not to proceed, then the appropriate document to prepare would be a non-engagement letter. A non-engagement letter should include a sentence informing the client that to be able to continue pursuing the claim with another lawyer, the client should act immediately so as not to lose the right to sue.

6 The one exception occurs in some states where courts are authorized to respond to requests for advice from other governmental bodies.

7 Steve Chapman, No Decision Sometimes Best Decision, The Republican, June 22, 2004, at A9.

8 347 U.S. 483 (1954).

9 Paul E. Wilson, A Retrospective of *Brown v. Board of Education:* The Genesis of *Brown v. Board of Education*, 6. Kan. J.L. & Pub. Pol'y 7 (1996).

10 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

11 Id. at 359-60.

12 Tyson Foods v. Bouaphakeo, 577 U.S. 442 (2016).

13 Batson v. Kentucky, 476 U.S. 79 (1986).

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14One hundred forty-five questions were asked of the five Black prospective jurors and 12 questions were asked of the 11 White seated jurors.
15Flowers, 588 U.S. 284 (2019).
16Brooke Group, Ltd., v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
17Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

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2

PAR T
Substance of the Law

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Chapter 6

Torts

The risk reasonably to be perceived defines the duty to be obeyed.
Justice Benjamin Cardozo

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Chapter 18

Computers and Case Management

A man ma y as well open an o yster without a knife as a lawy er's mouth without a fee.
Bar ten Holy da y

Chapter Objectives

After reading this chapter, you should be able to:

- Explain why it is important for a law firm to run a conflict check before accepting a new client.
- Identify the types of specific information that law offices collect in a case file.
- Discuss how law offices handle calendaring, timekeeping, billing, and case management.
- Describe the advantages of using an integrated case management program.
- Contrast a structured with a full-text database.

INTRODUCTION

In the past, legal documents, lawyers' letters and notes, billing and payment records, and other documents were all kept in paper files. Today, while many firms still maintain backup hard copies of important documents, they generally rely on computers to store their case information in a digital format. This has made it cheaper to copy, store, search, analyze, and share the information that lawyers need to serve their clients more efficiently and effectively.

Large firms often maintain their own information technology (IT) department to select, set up, and maintain their computers, computer software, and computer networks. Sole practitioners and small firms may subscribe to software packages that include 24/7 tech support from the company selling each specific product. Others rely on the knowledge of an in-house "techie" lawyer or paralegal.

Because of wireless networks and the ability to store information in the cloud, a law firm's software programs or data can be accessed by users over the Internet through a desktop, laptop, tablet, or smartphone. This means that lawyers and paralegals have 24/7

access to their programs and data, no matter where they are. Lawyers and paralegals can work on a case from the beach as easily as from the office. Some law offices have become entirely virtual, having no physical presence, only renting a conference room when it is necessary to meet with a client in person.

> ***ETHICS ALERT***
>
> A law firm must consider security and confidentiality issues when storing client data in the cloud.

In this chapter, we will provide an overview of how advances in law office computer technology have affected how paralegals perform their case management functions. **Case management** is about handling the information involved in a case within the law office. All documents and case materials must be organized to allow for the easy, fast, and accurate retrieval of information. Computers make the whole process quite manageable, and advances in technology now include generative artificial intelligence (AI) tools to increase efficiency in drafting documents as well.

Case management
Handling the flow of information involved in client cases.

Case management functions include:

- running conflict checks;
- setting up and maintaining the client file, containing background information on the client and the case, and a record of actions taken;
- entering key dates, such as filing deadlines and court dates, into a calendar or "tickler system;"
- preparing correspondence, pleadings, and other documents; and

- recor ding time char ges and sending out bills, and in some cases, managing litigation documents.

To help explain how this pr ocess works, we will follow K endall, the paralegal, as he manages the case file for Donald Drak e.

Case 1: The Distr essed Grandfather (Continued)

At the end of their inter view , paralegal K endall escor ted Mr . Drak e to the door and then sat at his computer to enter key information fr om the inter view . Although K endall had pr eviously receiv ed basic information fr om Mr . Drak e thr ough an electr onic intak e form, he learned many additional facts and details during the inte rview . Next, K endall used his computer to do a conflict check to ensur e that the firm had ne ver repr esented Wilma Small or any one r elated t o her .

A. PERFORMING A CONFLIC T CHECK

Befor e a law firm can accept someone as a new client, it must per form a **conflict check** . To maintain client confiden tiality and to avoid any br each of the fid uciar y duty of client trust and lo yalty , lawy ers cannot accept any case that would inv olv e either a personal conflict or a conflict with a prior client. In an incr easing ly litigious society , conflic t checks ar e becoming mor e complex. Thus, when a new file is opened, not only th e names of the adv erse par ties, but also any other entities connected with the case, must be cr oss-r ef er enced with other law firm r ecor ds.

Conflict check

The pr ocess of ensuring that ther e is no conflict of inter est between the firm 's curr ent or past clients and a potential new client.

Especially in small firms, it may be tempting to assume that it is possible to do a mental conflict check. But the best approach is to realize that memories are fallible and all conflict checking should be done through a computerized system that faithfully records all client names and related parties. Also, once the conflict program has been run, firms frequently double-check for conflicts by circulating memos within the firm to inform all lawyers and paralegals of the firm's new clients.

B. SETTING UP A CLIENT CASE FILE

Once a person is formally accepted as a client, a paralegal or a member of the clerical staff will set up a **client file**. The first step in this process is usually that of assigning the file a coded number rather than the client's name. This client number is used to help preserve client confidentiality. A numbering system can include such information as the date when the file was opened and a code for the matter type. An indication of the specific matter is included as a law firm can represent a client in more than one matter, such as in both a divorce and a personal injury.

Most client files contain:

1. background information on the client (including addresses, phone numbers, and billing arrangements);
2. correspondence between the firm and either the client or other outside parties connected to the case;
3. internal office memoranda (including research memos prepared in connection with the case);
4. copies of all pleadings related to the case;
5. copies of relevant documents, such as contracts, leases, medical reports, and laboratory reports; and
6. notes by lawyers and paralegals working on the case.

Usually, hard copies of correspondence, contracts, leases, and other documents are scanned into PDF files or imported as word

processing documents. Depending on office practices, a backup set of the hard copies may also be kept.

Practice Tip

If you are the person responsible for maintaining the case file, as the case progresses, always get the full name of any insurance or opposition representative who contacts you, and always take notes recording the substance of the conversation and place them in the file. You should also have an organized way of keeping an ongoing narrative of all the phone calls you have made and received in which you record the substance of all conversations. If you are not around to provide an update, your supervising lawyer can still locate the needed information.

Many law firms use integrated practice or case management platforms. With this technology, it is possible to store all of a case's basic information, correspondence, legal documents, and pleadings in one linked platform. The **law office platform** also provides a way to perform many case and practice management tasks such as maintaining a conflicts check and a tickler system, managing documents and client information, and automating billing.

Law office platform
A platform that provides for information sharing among various interconnected applications, such as case management software, generative AI tools, and office productivity programs (e.g., Microsoft Office).

Case 1: The Distressed Grandfather (Continued)

Paralegal Kendall really appreciates that he never has to search for anything related to Mr. Drake's case, because it is all stored in one location and all the relevant items are linked to each other.

While the case is still open or shortly before it is closed, many law firms evaluate the various work products, such as complaints, motions, and memoranda of law as to their future usefulness. Legal research can be time-consuming, and there is nothing to be gained from duplicating work that already has been done. Rather than beginning from scratch, it would be more efficient if a lawyer or a paralegal could review work that someone else had done on a similar topic or problem. Therefore, if a document might serve as a valuable starting point for future work, the document may be uploaded as a template in the firm's management platform. Now that generative AI has entered the field of legal technology, if lawyers or paralegals have access to an AI assistant through a commercial database, such as Westlaw, Lexis, or vLex, they can use generative AI to utilize those templates, perform additional legal analysis, build arguments for their new case, compare documents, prepare questions for depositions, and more.

After the firm's involvement in a matter is completed, a file clerk or secretary officially closes the file. Some materials in the file are returned to the client, some are discarded, and some remain as part of a permanent file.

C. CALENDARING AND DOCKET CONTROL

The failure to meet deadlines is a leading cause of malpractice claims. Therefore, every law office needs a reliable way to keep track of and give advance warnings of important dates.

Probably the most important date is the statute of limitations. If a lawsuit is not filed within the time limits established by the statute of limitations, clients may be barred from going to court. Other

impor tant dates include deadlines for filing responses to complaints and motions. Ever y time a motion is filed or an answer is receiv ed, another time period begins, and another deadline appr oaches. To monit or these impor tant dates, lawy ers de velop dock et contr ol systems, commonly r ef err ed t o as **tickler system s**.

Tickler system
A calendaring system that r ecor ds k ey dates and impor tant deadlines.

Most law firms use some electr onic form of tracking their impor tant even ts. Some rely on generic pr ograms, such as Micr osoft Outlook or Google Calendar , but law office–specific softwar e pr ograms, such as Clio 's CalendarRules or W estlaw' s Deadline Assistant, can be much mor e power ful. F or example, the y can aut omate a whole series of events, based on a set of rules that the user se ts up, so that any sp ecific steps requir ed prior to a cer tain event can be a ut omatically enter ed. Thus, a computer ca n generate dates for all steps that must be completed prior to a real estate closing or in litigation for each stage of a cour t-imposed tracking system.

These pr ograms will also aut omatically calculate dates that occur a cer tain number of da ys befo re or after any giv en date. The y can add reminders at any inter val you lik e prior to the deadline itself. If you should ha ve to change a deadline, the reminders connected to that deadline will aut omatically change as well. Then, if you fail to complete a task, most pr ograms will k eep reminding you of the missed deadline until you mark the task as completed. The y also allow th e entering of such rec urring events as weekly staff meetings or the boss' s bir thda y.

Case 1: The Distr essed Grandfather (Continued)

In addition to doing a conflict check and setting up a case file, paralegal Kendall entered the date of Mr. Drake's next appointment and a list of tasks, such as obtaining the medical records with reminder dates; and most important, the relevant statute of limitations, into the calendaring function in his case management system.

The key to the success of any tickler system is making someone responsible for routinely checking on what needs to be done and circulating that information with sufficient advance notice to the relevant lawyer or paralegal. Some paralegals also keep a paper calendar of important dates to make sure that there is a redundant system and that all deadlines are met.

D. DOCUMENT AUTOMATION

Lawyers and paralegals create a lot of documents—letters, contracts, settlement agreements, pleadings, and research memos—to name only a portion of the volume of written work produced in the average law firm. Much of this can be based on work already created for another client through the assistance of case management software, and, if the paralegal has access to an AI assistant like vLex's Vincent AI, Lexis's Protege, or Westlaw's CoCounsel, new arguments and counterarguments can be drafted in minutes through generative AI technology.

When drafting a complaint, lawyers and paralegals often first look for a similar complaint that the firm has filed in the past and then adapt it to the new case. Using document automation, a new client's information can be efficiently inserted into a document, whether the paralegal uses a template created from a previously drafted complaint or official court forms in libraries included within the firm's management platform. Additionally, a hybrid or cloud-based case management program, such as those provided by Clio, vLex, or CARET Legal, can collect clients' information on intake e-form

templates, create workflow checklists, transform Microsoft Word documents into templates, and create document sets for similar cases.

One can easily imagine that an ethical issue could arise if an attorney or paralegal misses one of the references to the prior case, so that in a complaint involving Donald Drake, a reference to Sam Jones, a prior client, appears. Case management programs prevent this type of error from occurring, customizing documents by automatically inserting the client's name into multiple locations, such as correspondence, court pleadings, and other documents related to the client's case.

Case 1: The Distressed Grandfather (Continued)

Attorney Harper asked paralegal Kendall to draft a complaint in Mr. Drake's case. Kendall has already created a caption template by using his firm's document automation software. Using this template will allow him to instruct the program as to where the appropriate data should be entered, such as the names of the plaintiff and defendant.

To create the template, he first created fields to hold the information that will vary with each client, along with appropriate questions to remind the user of what information is needed. It takes time to set up a caption template and the relevant questions to ask, but once the template is created, it makes creating captions much easier and less time-consuming. For each new client, Kendall simply answers the series of questions that he has already created. The form will look something like this:

Label	Question	Answer
Plaintiff	Who is the plaintiff?	
Defendant	Who is the defendant?	
Title	What is the title for this pleading?	
Case number	What is the civil action number?	

The document automation software will then insert those answers into the form. Most document assembly programs are quite smart and can be programmed to enter data using correct capitalization, such as all caps for the pleading title, and will insert the correct/preferred pronouns for people. Kendall fills in the information for Mr. Drake's case without answering the question regarding the civil action number, as he does not yet have it, creating the following caption. The placeholders have been replaced by the unique information in Mr. Drake's case. (When printed, the shading will not appear.)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUETTS

Civil Action No. _____

Donald Drake, Plaintiff	}	
v.	}	COMPLAINT
Wilma Small, Defendant	}	

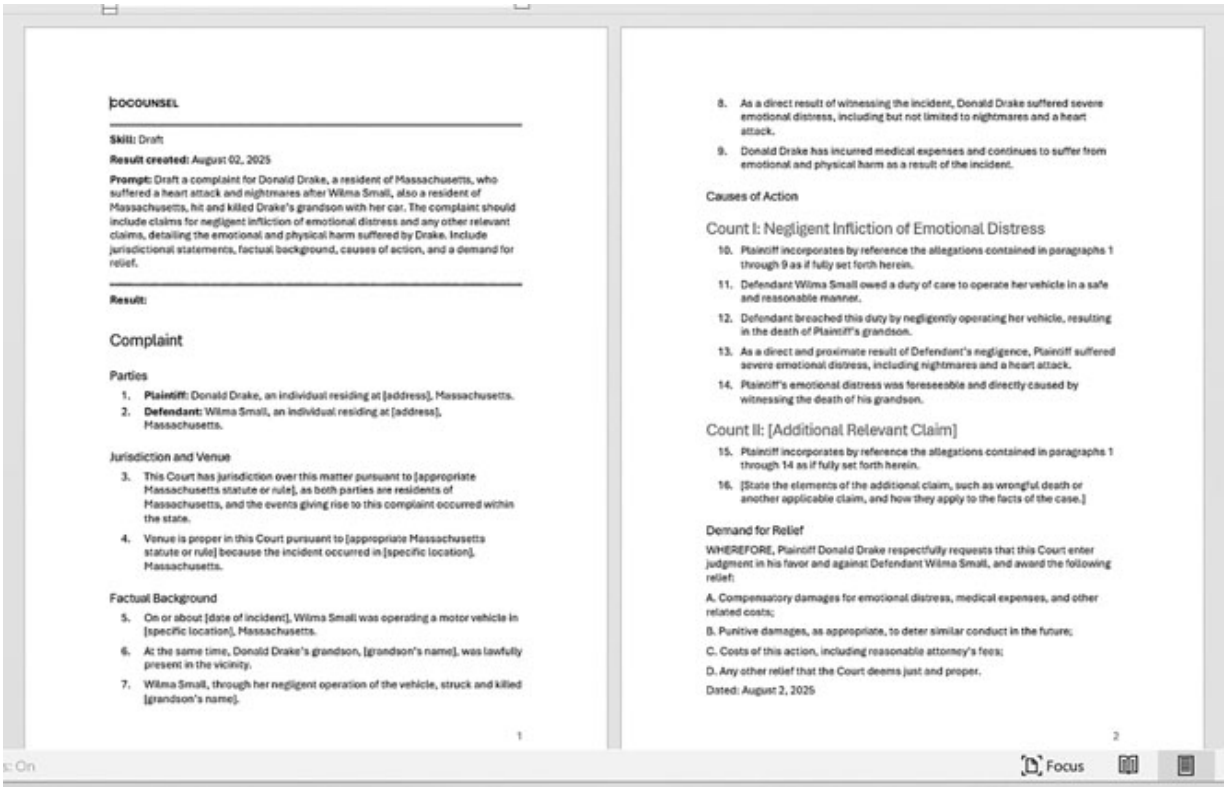
The creation of a caption is a very simple demonstration of what document automation programs can accomplish. Think about how much time would be saved by only having to type a client's name once in documents such as contracts or wills, where the name might appear many times.

NETNOTE

Some case management programs, like Clio, offer specific packages that include the option of having one of their personal representatives draft documents for you.

E. DOCUMENT DRAFTING WITH GENERATIVE AI

Advances in technology are ever changing, and commercial legal AI assistants, such as Westlaw's CoCounsel, have the revolutionary capability of not only making legal research more efficient, as discussed in Chapter 13, but also assisting lawyers and paralegals in drafting documents by providing templates and clauses from trusted legal sources. Or you may upload one of your firm's templates or existing documents for the AI assistant to incorporate in its creation of documents for a new case. Thus, legal professionals are no longer required to manually draft documents. Instead, they can use generative AI to quickly write first drafts of contracts, deposition questions, complaints, and other commonly used legal documents. For example, integrating with other applications, such as Microsoft Word, CoCounsel can draft clauses in a civil complaint based on other documents and information the paralegal has already uploaded into the case file. CoCounsel will reference facts from the client's intake form and the paralegal's electronic notes to form allegations and legal arguments in the complaint. In our hypothetical Donald Drake case, we do not have much background or evidentiary information, but in a real-world case the paralegal would have quite a bit of information for their AI assistant to use. Figure 18-1 shows a portion of Westlaw CoCounsel's initial draft of Mr. Drake's complaint, provided with the facts currently known to us.



CoCounsel

Skill: Draft

Result created: August 02, 2025

Prompt: Draft a complaint for Donald Drake, a resident of Massachusetts, who suffered a heart attack and nightmares after Wilma Small, also a resident of Massachusetts, hit and killed Drake's grandson with her car. The complaint should include claims for negligent infliction of emotional distress and any other relevant claims, detailing the emotional and physical harm suffered by Drake. Include jurisdictional statements, factual background, causes of action, and a demand for relief.

Result:

Complaint

Parties

1. **Plaintiff:** Donald Drake, an individual residing at [address], Massachusetts.
2. **Defendant:** Wilma Small, an individual residing at [address], Massachusetts.

Jurisdiction and Venue

3. This Court has jurisdiction over this matter pursuant to [appropriate Massachusetts statute or rule], as both parties are residents of Massachusetts, and the events giving rise to this complaint occurred within the state.
4. Venue is proper in this Court pursuant to [appropriate Massachusetts statute or rule] because the incident occurred in [specific location], Massachusetts.

Factual Background

5. On or about [date of incident], Wilma Small was operating a motor vehicle in [specific location], Massachusetts.
6. At the same time, Donald Drake's grandson, [grandson's name], was lawfully present in the vicinity.
7. Wilma Small, through her negligent operation of the vehicle, struck and killed [grandson's name].

1

8. As a direct result of witnessing the incident, Donald Drake suffered severe emotional distress, including but not limited to nightmares and a heart attack.
9. Donald Drake has incurred medical expenses and continues to suffer from emotional and physical harm as a result of the incident.

Causes of Action

Count I: Negligent Infliction of Emotional Distress

10. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 9 as if fully set forth herein.
11. Defendant Wilma Small owed a duty of care to operate her vehicle in a safe and reasonable manner.
12. Defendant breached this duty by negligently operating her vehicle, resulting in the death of Plaintiff's grandson.
13. As a direct and proximate result of Defendant's negligence, Plaintiff suffered severe emotional distress, including nightmares and a heart attack.
14. Plaintiff's emotional distress was foreseeable and directly caused by witnessing the death of his grandson.

Count II: [Additional Relevant Claim]

15. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 14 as if fully set forth herein.
16. [State the elements of the additional claim, such as wrongful death or another applicable claim, and how they apply to the facts of the case.]

Demand for Relief

WHEREFORE, Plaintiff Donald Drake respectfully requests that this Court enter judgment in his favor and against Defendant Wilma Small, and award the following relief:

A. Compensatory damages for emotional distress, medical expenses, and other related costs;

B. Punitive damages, as appropriate, to deter similar conduct in the future;

C. Costs of this action, including reasonable attorney's fees;

D. Any other relief that the Court deems just and proper.

Dated: August 2, 2025

2

Focus

Figure 18-1 Westlaw's CoCounsel, First-Draft Complaint

In its draft of Donald Drake's complaint in Figure 18-1, CoCounsel identified the necessary components of the complaint, including the identification of the parties, the jurisdiction and venue, the factual background, the causes of action appropriate for the case, and the demand for relief. One can see that this document provides the paralegal a solid start in preparing a pleading. Missing information can be added to this template or additional documents relevant to the case can be uploaded so that CoCounsel can revise the draft.

Further, AI assistants like CoCounsel can easily draft other documents, such as letters and reports. To do so, CoCounsel must be provided with a clear description of the contents and details that should be included in the draft, such as background information, the purpose of the document, key points to include, and even the preferred tone and style. In addition, previously saved documents, containing relevant information, can be uploaded to assist the AI assistant's creation of the draft.

This is just the tip of the iceber g when it comes to the potential use of generativ e AI in drafting documents in the law office. It is conceiv able that ever y law office will subscribe to the use of AI assistants in the near futu re. Yet even with these ad vances in technology , it is imperativ e that lawy ers and paralegals remember that the y must alwa ys comp lete an independent analysis of any AI-generated work pr oduct.

F. TIMEKEEPING AND BILLING

As the quotati on at the beg inning of this chapter somewhat dr olly suggests, to lawy ers and para legals, time is mone y. For a law firm to pr osper , not only must it pr o vide quality legal ser vices to a sufficient number of clients, but it must also bill and receiv e pa yment for those ser vices. To accomplish this, lawy ers and paralegals must keep track of the time that the y spend on a case. This must be foll owed by a timely and detailed bill to th e client. Studies ha ve shown that the longer the time lapse betwee n the time the legal ser vice is render ed and the time th e bill is receiv ed, the less lik ely it is that the client will pa y. Using a computeriz ed timek eeping and billing pr og ram is the best method to ensur e that ther e is an efficient method for recor ding time spent and generating bills in a timely fashion.

1. Alternativ e F ee Structures

In any law firm , the discussion of fees is an essential element of the initial c lient inter view . Depen ding on the natur e of the case and whether the repr esentation is for a plaintiff or a def endant, lawy ers use v arious methods t o bill for their own and their paralegals' time.

Befor e star ting work on a case, the law firm will draft a written agr eement between the law firm and the client regar ding the client' s obligations as to the pa yment of fees and expenses. This is known as a **retainer agree ment** . Th e firm ma y also ask the client to pa y an amount of mone y, a **retainer** , as a kind of down pa yment against futur e fees and expenses. The firm must deposit such adv ances in a

special client's trust fund and cannot withdraw any of the funds until they have been earned as fees or spent on expenses. All unused funds must be returned to the client at the conclusion of the case.

Retainer agreement

A contract that outlines the attorney's duties and the client's obligations regarding payment, on either an hourly or contingency fee basis, as well as the client's responsibilities regarding costs and expenses.

Retainer

An advance or down payment that is given to engage the services of a lawyer.

The most common billing methods include the following:

- fixed fee,
- contingency fee, and
- hourly fee.

a. Fixed Fees

Consumers generally pay a set fee for a particular product or service. For example, a physician typically charges a set amount for a routine office call or a specific surgical procedure. Lawyers also price some of their services in this manner, charging a fixed fee. This is especially true for routine tasks, such as drawing up a simple will, incorporating a small business, or handling an uncontested divorce. In many areas, real estate closing fees are also billed in this manner.

When **fixed fees** are used, it is to the firm's advantage to delegate as much work as possible to paralegals because they typically cost the firm less than lawyers. The decreased overhead that results from such delegation to paralegals should result in higher profits, a reduction in the established fee, or both. A fee reduction not only benefits consumers of legal services but also improves the firm's competitive position in the marketplace.

Fix ed fee

A set char ge for a specific ser vice, such as drafting a simple will.

b. Contingency F ees

Under a **contingency fee** a rrange ment, the client does not pa y the lawy er anything by wa y of fees unless the plaintiff collects some sor t of awar d or settlement. Howe ver, in most states, the client is still responsible for all expenses. If the plaintiff does collect so me sor t of awar d or settlement, then the lawy er's fee will be calculated as a per centage of the damage a war d and paid fr om those fu nds when the plai ntiff rec eiv es them. It is common for the law firm to receiv e 33% if a case is settled befor e it goes to trial, 40% if it goes to trial, and 50% if the case is appealed.

Contingency fee

A f ee calculated as a per centage of the settlement or awar d in the case.

The pla intiff 's lawy er in a pe rsonal injur y suit and lawy ers doing collections work ar e usually hir ed on a contingency fee ba sis. On the other h and, this type of fee structur e is usually pr ohibited in div or ce and criminal actions. Althoug h per centage fees used to be common in re al e state and pr obate work, the tr end in those ar eas h as been to use fix ed f ees and time char ges, r espectiv ely .

The use of a contingency fee raises a number of significant issues. Pr oponents ar gue th at contingency fee agr eem ents allow some c lients to bring cases w ho could not other wise affor d to do so. Howe ver, a contingency fee a lso reduces the amount of the client' s awar d. If the awar d repr esents the amount the jur y or judge thought adequate to compensate the client for pain and suff ering, medical expenses, los t earning capacity , and disfigur ement, then any reduction in that awar d lea ves the client without adequate compensation. Also, as the siz e of the reco ver y (and hence the siz e of the fee) incr eases, the gap widens between what the lawy er would

have recovered if charging on an hourly basis and what the lawyer actually recovers based on a contingency fee basis.

In some states, these concerns have been addressed by placing a cap on the amount of contingent fee awards in certain types of cases, such as medical malpractice, so that as the award increases, the lawyer's percentage decreases. For example, a lawyer might recover 40 per cent of any award under $150,000, but only 25% of any amount of an award that exceeds $500,000.

As with fixed fees, it is economically advantageous for a law firm to delegate as much work as possible to paralegals. Such delegation reduces costs without affecting the fees received from the case.

c. Hourly Basis

Many legal fees are based on **hourly rates** rather than on percentages or fixed charges. This is particularly true for litigation defense and corporate work. Hourly charges vary depending on whether the work is done by a paralegal, an associate, or a senior partner. The hourly fee may also vary based on the type of activity. For example, court appearances usually command a higher rate than out-of-court work. The client's best interests are served by having less complex matters delegated to paralegals and paying top dollar only for the matters that require the expertise and experience of a senior partner.

Hourly rate
A fee based on how many hours lawyers or paralegals spend on the case. Different hourly rates are often charged for different lawyers and paralegals within the firm, based on their seniority and experience.

The hourly fees established by the firm reflect its overhead costs, the income expectations of its partners, and the fees charged by competing law firms. Part of the amount collected for an hour of paralegal time pays the paralegal's salary, part pays for office space and secretarial services, and part is the firm's profit.

Both lawyers and clients have attacked the acceptability of billing by the hour. When firms bill by the hour, there is tremendous pressure on lawyers and paralegals to increase their **billable hours**. A number of reports by the American Bar Association have documented a slow shift away from hourly billing, driven by both client demand and lawyer preference. The use of generative AI tools may accelerate this shift.

Billable hours
The number of hours, or parts of an hour, that can be charged to a specific client.

The ABA has recognized that using AI tools can raise concerns about ethical billing. If a firm uses generative AI, the firm should consider its increased efficiency when establishing any fee. The ABA has opined that a lawyer should bill the client only for the actual time spent entering information into the AI tool as well as the time spent reviewing the accuracy and completeness of the generated document. [1]

DISCUSSION QUESTIONS

1. From the perspective of the client, what are the advantages and disadvantages of using a contingency fee structure?
2. In what ways do you think the various methods of billing affect how willing lawyers are to delegate significant legal work to paralegals?
3. How do you think the use of generative AI tools to assist with legal research and document drafting will affect billing practices in the near future?

2. Time and Expense Records

No matter which fee system is used, a law office must maintain adequate time and expense records. If the firm charges an hourly rate

for its services, it must document those charges. In cases where a court may order the payment of lawyers' fees, a specific accounting must be made of the time actually spent on the case by different legal personnel. Even when there is a flat fee, the firm needs to have a record of the time spent on the case so that it can determine whether or not it has set its rates at levels that will produce a reasonable profit. In addition to recording the time spent, the firm must keep track of and bill the client for the firm's expenses, such as photocopying, computerized legal research, and postage.

Several systems are used for recording how the time is spent. Many lawyers and paralegals use specialized computer software, some use simple software apps, and others may simply write down their time on a ledger or on notecards. No matter which system is used, throughout the day, the timekeeper (whether lawyer or paralegal) must record everything done on a client's case, typically in six-minute intervals. Although that may seem like an awkward number, it represents one-tenth of an hour and thus simplifies calculation of bills.

Each time record must indicate the date, the name of the client, a description of the nature of the work performed, the initials of the timekeeper, and the time spent on the project. To speed data entry, codes are frequently used for recording services performed. For example, TF stands for *t*elephone call *f*rom; LR, *l*egal *r*esearch; FR, *f*actual *r*esearch; P, *p*reparation of, and so on.

PRACTICE TIP

Record your time as close to when you do the work as possible. If you wait until later, you may find that it is impossible to make an accurate record. This could result in overbilling the client (an obvious ethical problem) or underbilling (a disservice to your

firm). Profitable law firms cannot afford to make a regular practice of billing for less time than is actually spent on a case.

As in other areas of law office administration, specialized computer software has been developed to automate the reporting and integration of this data into the firm's billing and cost accounting systems. Typically, these systems allow the timekeeper (the lawyer or paralegal) to directly enter time into the computer, so that the information is automatically linked to a specific case. The computer can also automatically take the time spent and multiply it by the user's hourly rate to arrive at the amount to bill the client.

At whatever intervals the firm and client have agreed upon, the computer software then totals the entire amount owed and prepares an itemized bill. Some systems can also prepare payroll and calculate various partners' contributions to the income of the firm.

Case 1: The Distressed Grandfather (Continued)

Each time paralegal Kendall sat down at his computer to work on Mr. Drake's case, he first started AbacusLaw and turned on its automatic timer so that it would accurately record how much time he was spending. Whenever his work was interrupted, he would turn off the timer and then start it again when he resumed his work.

By now, you will have noticed that integrated programs like AbacusLaw can perform many case management functions: conflict checks, client contact information, docket control, and timekeeping. This integrated approach is one of the strengths of law office management platforms.

PARALEGAL PROFILE

Angela Ellis Wilde

Paralegal Legal Forms Manager on the Content Specialist Team Smokeball

I work for Smokeball, a case management software company for lawyers and their staff. Our clients range from sole practitioners to 15-user firms. Smokeball assists attorneys by organizing all relevant contact information, case information, documents, and e-mails into one digital file. Our content team is made up of paralegals and attorneys using our knowledge and experience of the law to build and maintain the software.

In addition to case management software, Smokeball has established an extensive forms library where we compile and create legal forms from across the United States. I am responsible for building, compiling, and maintaining Smokeball's Forms Library. Our software integrates with Microsoft Office, specifically Outlook and Microsoft Word. The integration with Word allows me to automate forms with the data already stored in the software. Our clientele spans across the United States, making it imperative to have an understanding of the rules for each jurisdiction. Doing so ensures the forms are properly automated and are legally compliant.

Your knowledge and skills as a paralegal are transferable across many career paths. Becoming a paralegal doesn't mean your only

option is to work for a law firm. I took my experience and was hired by a technology company .

G. COMPUTERIZED LITIGATION SUPPORT PROGRAMS

Case 1: The Distressed Grandfather (Continued)

During the course of his investigation, paralegal Kendall collected numerous documents. As he collected each document, he entered a summary of it into his computer program. This enabled him to sort and search through the information contained in those documents. For example, he could easily sort all of Mr. Drake's medical records by date to create a chronology of his medical treatment.

Cases that involve litigation provide their own special challenges. As such a case progresses through formal discovery activities, such as interrogatories and depositions, as well as more informal investigation undertakings, a great deal of documentary and witness testimony is generated. To organize such a large volume of information so that any item can be retrieved easily, firms often use computerized litigation support systems. These can be based on a structured database, a full-text database, or a combination of the two.

A **structured database** consists of fields into which the paralegal can enter specific information, such as a client's contact information or a summary of a key document, along with its date, author, and other relevant information. Many law firms use a Microsoft Excel spreadsheet for this purpose. This works well for the entry of objective data, such as the dates a client visited a doctor, but not as well for subjective data, such as a summary of a doctor's report. To

be able to see the entire original document, such as the doctor's report, it would be best to use a full-text database.

Structured database

A computerized database that contains key information about the content of documents, such as medical records.

In a **full-text database**, the entire document, such as a medical record or deposition transcript, is entered into the computer. This allows for searching for any word or phrase contained in the document. Some law firms use the best of both worlds with programs that allow for a structured database that then can be linked to the full text.

Full-text database

A computerized database that contains the full text of documents, such as court opinions or depositions.

The primary advantages of creating a database are as follows:

- The speed and ease with which information can be retrieved. You can find and easily view the document on your computer.
- The number of people who can view the same document at the same time from different locations. Network users can have either read-only access, which allows them to view but not alter the document, or read/write access, which allows the user not only to read, but also to make changes in the document.
- The ease with which you can add or modify information in the file. In a structured database, you enter summary information such as the date of a document, its author, and a brief description of its contents. If you discover that any of the information you entered is not correct, it is a simple matter to edit your entry.
- The decreased amount of physical space required for records storage.
- Finally, the search capabilities of database programs allow you to locate that proverbial needle in the haystack. For example,

assume that you remember that a deponent mentioned that your client had seen a psychiatrist or psychologist. That information had not seemed important at the time, but now your supervising lawyer wants to know who said it and in what context. Unfortunately, you do not remember which deponent made that statement, and there were eight deponents who collectively created over a thousand pages of deposition testimony. Using a full-text system, you can type in a search such as "psych*." The * is known as a "wildcard," and it tells the program to search for all words that begin with the letters "psych." Within seconds, the program would search through those hundreds of deposition pages and produce a list of all the question-answer pairs that contain any variation of a word beginning with "psych," such as "psychiatrist" or "psychologist." You could then print out those question-answer pairs so that your supervising lawyer could see the context in which the word "psychiatrist" or "psychologist" was used.

SUMMARY

Case management involves the handling of the information involved in cases within the law office. All documents and case materials must be organized to allow for easy, fast, and accurate retrieval. While there are variations among offices, the same basic types of files will be kept in most law offices. These include electronic client files, work product files, tickler systems, and timekeeping and billing records.

Sophisticated software programs and law office management systems have greatly increased office automation. This has reduced the number of clerical personnel needed to operate a law office and has opened new opportunities for paralegals to increase their effectiveness. Integrated programs that combine the ability to manage conflict checks, client information, timekeeping, and docket control are particularly useful. AI assistants provided by commercial legal research providers increase efficiency by helping paralegals to quickly generate letters, reports, deposition questions, complaints,

contracts, and other commonly used documents in law offices. Litigat ors dealing with massiv e amounts of information can also benefit fr om litigation suppor t pr ograms.

REVIEW QUESTIONS

P ages 507 through 511

1. What is case management ? How ha v e AI tools made a diff er ence in the ar ea of case management?
2. What is the pu rpose of per forming a conflict check? Why is a computeriz ed conflict check mor e reliable than man ual methods?

P ages 511 through 515

3. Why should client files not be labeled with the client name?
4. What might a typical client file contain?
5. What is a tickler system, and why is it impor tant?
6. How can old documents be used to electr onically cr eate documents for a diff er ent client' s case?
7. What ar e the adv antages of using a document assembly pr ogram?
8. What ar e the benefits of u sing an AI assistant to d raft documents in the law office? What types of documents could be generated?
9. Ar e the re any ethical concerns with using an AI assistant to draft documents?

P ages 515 through 519

10. Why is it imp or tant for paralegals to recor d the time the y spend?
11. Why is it imp or tant to bill a client pr omptly once work is completed?
12. Describe the thr ee traditional billing methods. Giv e an example of when each type of billing method is m ost commonly used.

13. What are the problems with hourly billing?
14. How do you think the use of AI assistants in the law office will affect billing practices?
15. What are the problems with contingency fee billing?

Pages 519 through 521

16. What are the advantages of computerized litigation support programs?
17. Describe the differences between a structured and a full-text database.

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[1] ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).

Appendix es

Appendix A

The Constitution of the United States

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all

other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it,

unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; To borrow Money on the credit of the United States; To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures; To provide for the Punishment of counterfeiting the Securities and current Coin of the United States; To establish Post Offices and post Roads; To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; To constitute Tribunals inferior to the supreme Court; To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the

States respecti vely, the Appointment of the Officers, and the Authority of train ing the Militia accor ding to the discipline pr escribed by Congr ess; To ex er cise ex clusiv e Legislation in all Cases whatsoe ver, over such District (not ex ceeding ten Miles squar e) as ma y, by Cession of par ticular States, and the Acceptance of Congr ess, become the Seat of the Go vernment of the United States, and to ex er cise lik e Authority over all Places pur chased by the Consent of the Legislatur e of the State in which the Same shall be, for the Er ection of For ts, Magazines, Arsenals, dock-Y ar ds, and other needful Buildings;—And To mak e all Laws which shall be necessar y and pr oper for carr ying int o Ex ecu tion the for egoing Powers, and all other Powers vested by this Constitution in the Go vernment of the United States, or in any Depar tment or Officer ther eof.

Section 9. The Migration or Im por tation of such Persons as any of the Sta tes now existing shall think pr oper to admit, shall not be pr ohibited by the Congr ess prior to the Year one thousand eight hundr ed and eight, but a Tax or duty ma y be imposed on such Impor tation, not ex ceeding ten dollars for each P erson.

The Privilege of the Writ of Habeas Corpus shall not be suspended, un less when in Cases of R ebellion or Inv asion the p ublic Saf ety ma y r equir e it.

No Bill of A ttainder or ex post fact o Law shall be passed.

No Capitation, or other dir ect, Tax shall be laid, unless in Pr opor tion to the Census or enumeration her ein befor e dir ected to be tak en.

No T ax or Duty shall be laid on Ar ticles expor ted fr om any State.

No Pr ef er ence shall be giv en by any Regulation of Commer ce or Re venue to the Por ts of one State over those of another; nor shall Vessels bound to, or fr om, one State, be obliged to enter , clear , or pa y Duties in another .

No Mone y shall be drawn from the Treasur y, but in Consequence of Appr opriatio ns made by Law; and a regular Statement an d Account of the Receip ts and Expenditur es of all public Mone y shall be published fr om time t o time.

No Title of Nob ility shall be granted by the United States: And no Person holding any Office of Pr ofit or Trust under them, shall, without

the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death,

Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III

Section 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and

that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same. Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.

ARTICLES IN ADDITION TO, AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

Amendment I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II [1791]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III [1791]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII [1791]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be other wise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X [1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI [1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII [1804]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall chuse immediately, by ballot, the President. But in chusing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from

two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not chuse a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII [1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV [1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

Amendment XVI [1913]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII [1913]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII [1919]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United

States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX [1920]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX [1933]

Section 1. The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor

a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may chuse a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may chuse a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI [1933]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII [1951]

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which

some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII [1961]

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV [1964]

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV [1967]

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue,

assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI [1971]

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII [1992]

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of representatives shall have intervened.

Appendix B

Fundamentals of Good Writing

I have made this letter longer than usual, only because
I have not had the time to make it shorter.
Blaise Pascal

INTRODUCTION

How you say something is often as important as what you say. No matter how insightful and intelligent your thoughts are, if your writing is filled with misspellings and grammar errors, the reader will very likely discount the value of what you are saying. In legal writing, good writing is especially important because people's fortunes often rest on what a lawyer or a paralegal has written. In legal writing, therefore, it is simply too costly to write in any style other than one that is clear, concise, and grammatically correct.

To be an effective writer, follow these simple rules:

Rule 1 Develop a clear, readable writing style that is appropriate for the audience to whom it is directed. This partly depends on an awareness of the ways in which legal writing differs from more informal writing and speech.

Rule 2 Always use good grammar and proper punctuation. The law is a profession of words. Precision is necessary in order to make certain that the meaning of each sentence you write is clear and unambiguous. If you do not follow the basic conventions of correct

spelling and grammar, the meaning of your writing may not be clear and that could have profound legal consequences.

Rule 3 Carefully proofread what you have written. Take advantage of any spell-checking or grammar programs associated with the word-processing software you use, but do not rely on these programs alone. A spell checker will not find correctly spelled but misused words. For example, a spell checker would find nothing wrong with this sentence: "The witness recounted the hole story."

Rule 4 Write and rewrite and then rewrite again. There is no such thing as good writing, only good rewriting. For those of you who suffer from writer's block, this is actually good news. Sometimes people are afraid to start writing because they assume what they initially write will be the final product. It is not.

This appendix is designed to help you improve the style and technical quality of your writing so that your work will be as professional looking as possible.

PAR T I: GRAMMAR

Good legal writing star ts by being good writing, period. Ther efor e, to rate as good legal writing, the document must follow the no rmal rules of grammar and punctuation. The following suggestions should help you corr ect the most common grammar err ors.

A. USE PROPER SENTENCE STRUC TURE

Using proper sentence structur e will mak e your writing easier to compr ehend. Pr oper sentence structur e means using simple sentence cons truction, avoid ing sentence fragments an d run-ons, and using parallel constructions.

1. Use Simple Sentence Construction

Whene ver possible, stick to simple sentences. Legal writing is har d enough to read without complicating it fur ther thr ough long, conv oluted sentences. F ollow these guidelines:

a. Use normal sentence or der

Unless ther e is a good reas on to do other wise, follow normal sentence or der: noun, v erb, object.

b. One thought per sentence

Ha ve one main thought in a sentence.

c. Limit sentences t o 25 wor ds

Var y the sentence length but the average sentence should be no longer than 25 wor ds.

d. Use tabulations

Divide long sentences using **tabulations** . If the items are complete sentences, use the following format:

1. Begin each item with an upper case letter .
2. End each item with a period.

If the items are not complete sentences, use the following format:

1. a lower case letter at the beginning of each item,
2. a semicolon or comma after each item, and
3. an " or " or " and" before the last item.

e. Avoid intrusive phrases

Do not let phrases or clauses intrude between the subject and verb. These **intrusive phrases** disrupt the sentence 's logical flow and make it difficult for the reader to follow what is being said.

Example: The interrogatories sent to our client and received by him at his home three days ago force us to reformulate our defense strategy .

Fourteen words separate the subject, *interrogatories* , from the verb, *force*. This writing style creates several problems. First, until the reader reaches the verb, he or she must wait in suspense as to what is going on with the subject, the interrogatories. Second, the reader must process the new information contained in the intrusive clause while remembering that the main point of the sentence relates to the interrogatories.

If you find yourself writing particularly long sentences, check to see whether your reader may get lost between the beginning and the end. If so, you may have inserted intrusive phrases between your

subject and verb. There are two solutions. First, you can simply divide the sentence and create two sentences.

Revised: Three days ago our client received interrogatories. The interrogatories force us to reformulate our defense strategy.

The other solution is to take the intrusive phrase out of the middle and put it at the beginning or the end.

Revised: Sent to our client and received by him at his home three days ago, the interrogatories force us to reformulate our defense strategy.

2. Avoid Sentence Fragments

An obvious corollary to the rule that you should use simple sentence construction is the requirement that you write in sentences. A sentence contains a subject and a verb and can stand alone as a complete thought. A sentence can be a single independent clause, two independent clauses joined with a coordinating conjunction, or an independent and a dependent clause.

Example: The many yelled for help. (independent clause)

The man yelled for help, and the police came running. (two independent clauses)

Even though the man yelled for help, no one came to his assistance. (dependent clause followed by independent clause)

Sentence fragments are incomplete sentences and cannot stand alone. One type of sentence fragment is the phrase with no verb.

Sentence fragment

An incomplete sentence.

Example: The doctor in white. (Did what?)

Another type of sentence fragment is the prepositional phrase standing alone.

Example: By six o'clock. (What will happen?)

To correct the first type of fragment, insert a verb.

Revised: The doctor in white *said* that I could go home.

To correct the second type of fragment, attach the prepositional phrase to the rest of the sentence.

Revised: By six o'clock *we should have heard from the*

doct or.

NE TNO TE

For mor e examples of grammar err ors and an explanation of how t o fix them,, go t o Grammar Bytes! .

The mo st common type of sentence fragment is the **dependent clause** standing alone. The writer thinks she has written a complete sentence when she has not. The dependent clause does contain a subject and verb, but it cannot stand alone and mak e sense, as it does no t contain a complete thought. When you read a dependent clause that is standing alone , it is as though you ar e waiting for the other shoe t o dr op.

Dependent clause

A clause that contains a subject and a v erb but that cannot stand alone, as it does not contain a complete thought. A dependent clause alwa ys begins with a subor dinating conjunction.

Example: Although the def ense att orne y ask ed for a finding of not guilty . (What happened?)

Dependent cla uses alwa ys begin with what is known as a **subordinating conjunction** : *after , although , as, because, befor e, even th ough, if, since, unless, when, wher e, wher eas,* and *while* . To corr ect a sentence fragment cr eated by a dependent clause standing

alone, drop the subordinating conjunction and turn the dependent clause into an independent clause, or add an independent clause.

Subordinating conjunction

Dependent clauses always begin with subordinating conjunctions: *after, although, as, because, before, even though, if, since, unless, when, where, whereas,* and *while*.

Revised:	The defense attorney asked for a finding of not guilty. (subordinating conjunction dropped) Although the defense attorney asked for a finding of not guilty, the jury brought in a guilty verdict. (independent clause added)

3. Avoid Run-On Sentences (Fused Sentences and Comma Splices)

The **run-on sentence** is the opposite of the sentence fragment. Instead of being half a sentence, it is actually two sentences. It can occur either as a comma splice (two independent clauses joined by a comma) or as a fused sentence (two independent clauses with no separating punctuation).

Run-on sentence

Two sentences written as one. It can occur either as a comma splice (two independent clauses joined by a comma) or as a fused sentence (two independent clauses with no separating punctuation).

Example:	The man yelled for help, the police came running. (comma splice)

	The man yelled for help the police came running. (fused sentence)

Run-on sentences can be corrected in any of the following ways:

Revised:	The man yelled for help. The police came running. (divided into two sentences) The man yelled for help, and the police came running. (two independent clauses joined by a comma and a coordinating conjunction)

As seen above, a comma and a coordinating conjunction can join two independent clauses. **Coordinating conjunctions** include *and, but, for, nor, or,* and *yet*.

Coordinating conjunction

A coordinating conjunction can join two independent clauses; examples include *and, but, for, nor, or,* and *yet*.

However, you cannot use conjunctive adverbs to join two independent clauses. Examples of **conjunctive adverbs** are *also, consequently, furthermore, however, moreover, nevertheless, then,* and *therefore*.

Conjunctive adverbs

Examples include *also, consequently, furthermore, however, moreover, nevertheless, then,* and *therefore*. These should not be used to join two independent clauses.

A very common error is to try to use *however* or *therefore* to join two independent clauses. Do not do it.

Incorrect: The holding in the *Lane* decision would appear to be against our client, however, we do have one counterargument.

Revised: The holding in the *Lane* decision would appear to be against our client. We do, however, have one counterargument.

4. Use Parallel Construction

Clauses or phrases that bear the same relationship to some major idea should have parallel grammatical structure. When writing lists, be particularly careful about not drifting into variations that lack **parallel construction**.

Parallel construction
Using the same grammatical structure for clauses or phrases that bear the same relationship to some major idea.

Incorrect: The boy ate, he went horseback riding, and he was swimming.

Revised: The boy ate, went horseback riding, and swam.

Incorrect: My objections are that the complaint was filed late, no valid cause of action, and the wrong defendant.

Revised: My objections are that the complaint was filed late, that it does not contain a valid cause of action, and that the plaintiff has sued the wrong defendant.

B. USE THE PROPER VERB TENSE

In legal writing there are two common problems with verb tense: making inappropriate shifts between verb tenses and using present tense for events that happened in the past. The first problem, inappropriate shifts, occurs when a writer begins describing an event in one tense but then, perhaps realizing the wrong tense is being used, switches to another tense. When proofreading, be sure to check for this potential problem.

To correct the second problem, inappropriately using present tense, remember that past tense should always be used for actions that happened in the past. In legal writing these include

1. the facts that make up your client's story,
2. the events that occurred in the cases you read, and
3. what the court said in those cases.

Incorrect:

1. In *Bennett,* Mrs. Brown runs home . . .;
2. In *Bennett,* a woman sues . . .; and
3. In *Bennett,* the court holds that. . . .

Revised:

1. In *Bennett,* Mrs. Brown ran home . . .;
2. In *Bennett,* a woman sued . . .; and
3. In *Bennett,* the court held that. . . .

But use present tense when describing a rule of law.

Incorrect: In *Bennett,* the court held that minors *were* allowed to void contracts that they have signed.

Revised: In *Bennett,* the court held that minors *are* allowed to void contracts that they have signed.

C. MAKE SURE PRONOUNS AND ANTECEDENT S AGREE

When you do not want to use a noun, you use a **pronoun** as a substitute. In the following sentence *Mary* is the noun and *her* is the pronoun.

Example: Mary reviewed her testimony with her attorney.

Because a pronoun (*hers, her, his, him, it, its, them, their, theirs*) substitutes for a noun that has preceded it, the noun is known as an **antecedent**. While there has been some movement away from this rule, generally the pronoun and its antecedent should match as to gender and number. When you are writing about people in general, there are several ways to write a sentence without using gendered language.

Incorrect: The new computer user may find, after many attempts at installing the software by themselves, that they need help.

This is incorrect because "user" is singular while "themselves" and "they" are plural. You could correct this by making the noun plural.

Revised: New computer users may find, after many attempts at installing the software by themselves, that they need help.

Another possibility would be t o dr op the pr onoun.

Re vised: The new computer user ma y find, after many attempts at installing the softwar e, that help is needed.

Finally , you might need to res or t to a "he or she," "his or hers," "her or him," or "the y or them " combination.

Re vised: The new computer user ma y find after many attempts at installing the softwar e that he or she needs help.

D. PUT MODIFYING WORDS CL OSE T O WHAT THEY MODIFY

Misplaced modifiers ar e a ver y common pr oblem. Sometimes the result is mer ely humor ous, as in the following example:

Example: The co llege h as all the mone y fr om students deposited in the bank.

Ob viously , the college has dep osited the mone y and not th e students. Other times, howe ver, a misplaced modifier could cause serious interpr etation pr oblems, and e ven litigation. Consider the following example, tak en fr om a lease pr ovision:

Example: If through no fault of Tenant, the apartment becomes uninhabitable, Landlord shall be notified immediately to provide alternative dwelling.

Does this mean that the landlord must be notified immediately or that the landlord must provide an alternative dwelling immediately? In this last example, the word *immediately* is referred to as a squinting modifier because you cannot tell if the writer means for it to modify the word that precedes it or the word that follows it. Frequently, this happens with the placement of the word *only*.

Example: You may talk with the witness only today.

Does this mean that you can talk with the witness but not with anyone else, such as the defendant, or does this mean that you can talk to the witness today only? Depending on what you mean, you could rewrite the sentence as follows:

Example: You may talk with only the witness today.

You may talk with the witness today only.

E. AVOID PUNCTUATION PROBLEMS

One area of grammar that may seem the most boring and useless is the area of punctuation. Nothing could be further from the truth. There are too many cases where a comma, or the lack of one, has been the focus of litigation. One example should suffice to emphasize

the importance of being careful with punctuation. A will contained the following provision:

> I bequeath and devise my entire estate, both personal and real, . . . in equal shares, absolutely and in fee to my cousin, the said Walter Cassidy; Robert Jamison and William Stivers, tenants on my farm; George E. Smith, who rents my property on Bland Avenue, Shelbyville, Kentucky; and the Kentucky Society for Crippled Children. [1]

Jamison and Stivers argued that they should each receive one-fifth of the bequest. The other three beneficiaries argued that the two men should share one-fourth. Semicolons separated each of the other beneficiaries, whereas Jamison and Stivers were not separated. How would you decide this case? The court awarded the two men one-fifth each. Was the court correct? Only the dead testator knows for sure.

1. Use the Serial Comma

As suggested above, the punctuation problem that gets more attorneys and paralegals into trouble than any other is the **serial comma**. In a series of three or more items, use a comma after each item until your each the final conjunction.

Serial comma

In a series of three or more items, use a comma after each item until your each the final conjunction.

Incorrect:	The boy swam, ran and played.
Revised:	The boy swam, ran, and played.

By always including that final comma, you will never have to face the following interpretation problem:

> Sally went to the bookstore to buy book covers in green, red, blue and yellow.

Does this mean she bought three covers: one green, one red, and one blue and yellow? Or did she buy four book covers: one green, one red, one blue, and one yellow?

2. Do Not Use a Comma with Compound Verbs or Between a Subject and Its Verb

Do not use a comma with compound subjects, verbs, or objects. Also do not let a comma separate your subject and its verb. Legal writers most often mispunctuate compound verbs.

Incorrect: The boy ran, and fell down.

Revised: The boy ran and fell down.

3. Use Commas to Set Off Phrases Containing Nonessential Information

Grammarians say that we must set off **nonrestrictive phrases** with commas. What that means is that if the sentence would make sense without the phrase, the phrase is nonrestrictive (i.e., nonessential) and should be set off with commas.

Nonrestrictive phrase
A phrase that is not essential to the sense of a sentence; it should be set off with commas.

Incorrect:	In the leading case *Dillon v. Legg* the court held that a mother can recover for emotional distress.
Revised:	In the leading case, *Dillon v. Legg*, the court held that a mother can recover for emotional distress.

The sentence would retain its meaning and still make sense without the phrase *Dillon v. Legg*.

A **restrictive phrase** contains essential information.

Restrictive phrase
A phrase that contains essential information; it should not be set off with commas.

Incorrect:	All students, who do not register on time, must pay a $20 late fee.
Revised:	All students who do not register on time must pay a $20 late fee.

Without the phrase "who do not register on time," the sentence reads: "All students must pay a $20 late fee." The phrase contains essential information, the absence of which alters the sentence's meaning. Therefore, it should not be set off with commas.

Example of restrictive:	Courts that recognize spousal immunity usually base their decision on a desire to promote family harmony. (Only some courts recognize spousal immunity.)

Example of nonrestrictiv e:	Cour ts, which ar e forums for justice, decide cases based on the facts pr esented to them. (All cour ts ar e forums for justice.)

As a general rule of thumb, use *that* wit h restrictiv e phrases and *which* with nonr estrictiv e phrases.

4. Forming the P ossessiv e

To form the possessiv e for singular nouns, use *'s* unless the no un ends in an **s** and it would mak e the possessiv e har d t o pr onounce.

Example:	child' s, Bob 's, James' s, witness' s

Traditionally , howe ver, you should dr op the *s* aft er the apostr ophe with some pr oper names that both end in **s** and ha ve an internal *s* sound.

Example:	Jesus' lif e

To form the possessiv e for pl ural nouns, use *'s* for nouns that do not end in **s** but only an apostr ophe for those that end in *s*.

Examples:	childr en 's, witnesses'

5. Combining Quotation Marks with Other Punctuation

Periods and commas always belong inside the closing quotation mark.

Examples: The court stated that "the case should be remanded for a new trial."

The court stated that "the case should be remanded for a new trial," and then it reprimanded the prosecuting attorney for his delay tactics.

Semicolons and colons always belong outside the closing quotation mark.

Example: The court stated that "the case should be remanded for a new trial"; the court also reprimanded the prosecuting attorney for his delay tactics.

When they are part of the quotation, place dashes, question marks, and exclamation points inside the closing quotation mark.

Example: The attorney asked his client, "Should we proceed?" before entering the courtroom.

Otherwise, place those marks outside the closing quotation mark.

Example: Did the court state that “the case should be remanded for a new trial”?

PAR T II: ST YLE

Accident Repor t

The par ty of th e first par t her einafter known as Jack . . . and . . . Th e par ty of the second par t her einafter known as Jill . . . Ascended or caused to be ascended an ele vation of undetermined height and degr ee of slope, her einafter ref err ed to as "hill. " Whose purpose it wa s to obtain, attain, pr ocur e, secur e, or other wise gain acquisitio n to, by any and/or all means a vailable to them a receptacle or container , her einafter known as "pail, " suitable for the transpor t of a liquid whose chemical pr oper ties shall be limited to hy dr ogen and oxy gen, the pr opor tions of which shall no t be less than or ex ceed two par ts for the first me ntioned element and one par t for the latter . Such combination will her einafter be called "water ." On the occasion stated abo ve, it has been established be yond reasonable doubt that Ja ck did plunge, tumble, topple, or other wise be caused to lose his footin g in a manner that caused his body to be thrust int o a downwar d dir ection. As a dir ect result of these combined cir cumstances, Jack suff er ed fractur es and contusions of his cranial regions . Jill, whether due to Jack' s misfor tune or no t, was known to also tumble in simi lar fashion after Jack. (Whether the term, "a fter ," shall be interpr eted in a spatial or time pa ssage sense, has not been determined.) [2]

Lik e the author of *The Legal Guide to Mother Goose* , ma ny view legal wr iting as ponder ous and laden with unnecessar y verbiage and redundancies. Howe ver, that does not ha ve to be true of what you write. Besides following the bas ic rules of grammar , th er e ar e various

techniques you can use to increase the clarity and effectiveness of your writing. These techniques include avoiding long paragraphs, using transitions, being concise by eliminating unnecessary words and introductory phrases and by saying it only once, and avoiding the passive voice. This section concludes with some special techniques peculiar to legal writing.

A. AVOID LONG PARAGRAPHS

Of course, there is no mechanical rule as to paragraph length. Nonetheless, if you find you have written a paragraph that is over half a page in length, consider whether it is too long. Check to be sure that you have only one major idea in the paragraph.

Trying to develop more than one theme in each paragraph can confuse the reader and require her or him to reread the paragraph. A good check is to go back over your document and see whether you can find a topic sentence in each paragraph that states the theme for that paragraph. Then, reading just those sentences from each paragraph, you should be able to follow your argument as it develops throughout your document.

NETNOTE

At the site *guidetogrammar.org,* you can find help organized by level: word and sentence, paragraph, and paper.

B. DON'T BURY YOUR POINTS

A common error is to start a paragraph with "In the case of. . . ." This is a poor writing style for two reasons. First, a reader pays the most attention to the first and last sentences of a paragraph. Therefore,

you should place your most important points there rather than burying them in the middle of the paragraph. Second, if you simply start your paragraph with a case description, you have failed to tell the reader why the case is relevant. No one (or at least no one we know) enjoys reading about case law in the abstract. To be interested in what you have to say about a given case, the reader must first understand why it is relevant. Lead off with a sentence or clause that will help the reader understand why you will be discussing the next case. At a minimum let the reader know that it is the leading case, the only case, the most recent case, or the like, and place the case citation at the end of the sentence.

Incorrect:	In *Bennett v. Bennett*, 186 N.E.2d 85 (Mass. 1988), the plaintiff sued to have a contract set aside, arguing that she was only 16 years old when she signed it. All students who do not register on time must pay a $20 late fee.
Revised:	Several cases have dealt with the issue of whether a contract can be set aside if one of the parties was a minor when the contract was signed. For example, in one recent case the plaintiff sued to have the contract set aside, arguing that she was only 16 years old when she signed it. *Bennett v. Bennett*, 186 N.E.2d 85 (Mass. 1988).

C. USE TRANSITIONS

The type of case introduction in the prior example is one form of **transition**. Transitions help your reader follow the flow of your argument. They provide the link from where you have been to where you are going. On the simplest level, transitions can indicate a sequence: "The first point to be made is. . . . The second point to be

made is. . . ." On a more sophisticated level, transitions artfully tie together the preceding thought and the one that follows. Assume a writer has written a paragraph analyzing *Bennett v. Bennett* and the paragraph concludes with the following sentence:

Transition
In writing, a technique used to help your reader move from one thought to the next and to see the connections between them.

> The court therefore held that as the plaintiff was only 16 at the time she signed the contract, the contract should be set aside as void.

The next paragraph could pick up on the theme presented in the first paragraph by beginning with the following sentence:

> Because Margaret was only 15 at the time of the contract's formation, her position that her contract should be set aside is consistent with that of the court in *Bennett*.

D. BE CONCISE

A taxpayer testified, "As God is my judge, I do not owe this tax." The judge answered, "He's not, I am; and you do."[3] This may be an extreme example of brevity, but it is always a good idea to write concisely so as not to bore your reader. It is particularly important for lawyers to do so.

One major reason for being as concise as possible is that every unnecessary word serves as a source of potential ambiguity. If you write "null and void" instead of simply "void," you raise the issue of

whether there is a difference between something that is only "void" and something that is both "null and void."

Second, those who read an attorney's or paralegal's writing are usually very busy people. Judges, other lawyers, and clients have little time to waste. They want to hear what you have to say and be done with it.

You should remember three guidelines when reviewing something you have written: Eliminate unnecessary words, remove unnecessary introductory phrases, and say it once. By following these guidelines you can condense your writing without sacrificing any of the content.

1. Eliminate Unnecessary Words

There are many compound word combinations that you can replace with a single word. Here are some examples:

At this point in time	Now
At that point in time	Then
Notwithstanding the fact that	Although
There is no doubt but that	Doubtless
The reason why is that	Because
The fact that	(Usually no replacement necessary)

Incorrect: Because of the fact that John shot the victim, he will be found guilty.

Revised: Because John shot the victim, he will be found guilty.

Finally , ther e is the att orne y's fa vorite wor d: "clearly "—as in "Clearly the def endant was negligent ." Either the def endant was or was not negligent. Sa yi ng the issue is clear will not mak e it so. In fact, this wor d often acts as a red flag, raising the reader 's suspicions. After all, if you ha ve to bootstrap your ar gument with wor ds such as "clearly ," perhaps y our ar gument is not that clear .

2. Remo ve Unnecessar y Introductor y Phrases

Phrases such as "It is inter esting to note that . . ." and "It should be noted in this connection that . . ." ar e unnecessar y filler . When writing a first draft, these phrases ar e often just what the writer needs to mak e th e pen star t mo ving ac ross the page (or to cause the wor ds to star t ap pearing on the computer monit or). Use these phrases for that purpose, but then go back and strik e them out. A good test is this: If the sentence mak es sense without the intr oduction, cr oss it out.

3. Sa y It Once

If you find phra ses such as "in other wor ds" sprinkled thr ou ghout your writing, check to mak e sur e that you ar e not engaging in some unnecessar y d uplication. Oft en a writer will finish a sentence and then think of a better wa y to sa y the same thing. W e all ha ve doubts now an d then about just how clear our points ar e. Ther efor e, when this better appr oach occurs to us, instead of recognizin g it as the better a lternativ e we lea ve in both sentences. Instead tr y to combine the two appr oaches, or simply pick the better one and dr op the other .

E. AV OID THE P ASSIVE V OICE

Use act ive voice whene ver possible. The **passiv e voice** is a weak er form of writing. In the passiv e voice the subject is acted on, but it is often unclear who is doing the acting.

Passive voice

A form of writing where the subject of the sentence is being acted on; opposite of active voice.

Examples:

The ball was thrown by Mary. (*passive voice*)

The ball was thrown. (*passive voice with actor missing so that it is unclear who threw the ball*)

The ruling was made by the trial judge that the defendant was guilty. (*passive voice*)

The ruling was made that the defendant was guilty. (*passive voice with actor missing so that it is unclear who made the ruling*)

Such ambiguity has its place in legal writing but only if you plan it.

The best clues that you are using the passive voice are the "by" construction, as in the first and third examples ("by Mary," "by the trial judge") and the absence of the actor entirely, as in the second and fourth examples.

Active voice is just that—active. In the active voice the subject of the sentence acts.

Active voice

A form of writing where the subject of the sentence does the acting; opposite of passive voice.

Examples:

Mary threw the ball.

The trial judge ruled that the defendant was guilty.

Avoid the passive voice whenever possible. Usually, because of the "by" construction, it adds needless weight to your writing through the addition of useless words. When, to solve that problem, the writer omits the "by" construction, ambiguity often results. Consider the following lease provision, and try to determine who must report what to whom:

> When conditions affecting the habitability of the rental property are discovered, they must be promptly reported and failure to do so shall constitute a material br each of this lease.

Does the landlord have to report defects to the tenant, or does the tenant have to disclose conditions that affect the habitability to the landlord? Perhaps each party must disclose such conditions to the other party. Ambiguity such as this is an open invitation t o a lawsuit.

The third reason for avoiding the passive voice is that it is a less powerful form. This becomes particularly important to the legal writer in advocacy writing, but it is something to keep in mind for any form of writing.

There are times when the passive voice is appropriate. But you must know when those times are and then use the passive voice by design and not by inadvertence. Specifically, there are four occasions when you may wish to use the passive voice:

1. When the writer wants to highlight the action instead of the actor.

> **Example:** The man had been murdered.

2. When the actor is unknown.

Example: The dead body had been left in the woods.

3. When the writer wants to state a general principle.

Example: All people are created equal.

4. When the writer wants to disassociate the actor from the statement.

Example: The victim was robbed.

Not: Our client robbed the victim.

F. SPECIAL RULES FOR LEGAL WRITING

As we mentioned at the beginning of this appendix, good legal writing is simply good writing. If you possess a clear, understandable style, you are well on your way to being a good legal writer. However, because you will be writing about the law and the legal system, you need to know a few special rules.

1. Avoid Legalese

Avoid the temptation to use "legalese," archaic legal terminology, to impress your reader. Several states have passed legislation requiring that all legal documents be written in plain English. Although many attorneys are still resisting the plain English movement, you should avoid legalese whenever possible.

Whene ver you find yourself tempted to use legal-sounding wor ds, such as *wher efor e*, *afor esaid* , and especially *said* , ask yourself if ther e is a less stilted English wor d that can ser ve your purpose better . Consider the following example, and ask yourself whether the wor d *said* adds anything or actually cr eates ambiguity:

Example: The def endant was seated in side a station wagon. P ark ed next to him was a C or vette. Said car was gr een.

Usually , wor ds such as *said* onl y giv e the illusion of pr ecision and bog down the writing with hea vy-sounding legal wor ds.

2. Mak e the Cour t and Not the Cour t Opinion the Actor

You can a void another comm on writing err or if you reme mber that inanimate objects cannot ac t. Alwa ys mak e the cour t and not the cour t opinion do the holding.

Incorrect: *Lewis* held that. . . .

Re vised: The cour t in *Lewis* held that. . . .

3. Av oid Unnecessar y V ariation

If you ha ve written "the car " four times in a paragraph, you ma y be tempted to switch to "the mot or vehicle. " A void the temptation. You ma y lea ve you r reader wondering if you ar e talking about both a car and a mot or vehicle. As this example illustrates, variation can cause

serious interpr etation pr oblems if your reader thinks you mean to ref er t o two separate objects when y ou mean t o r ef er t o only one.

4. Do Not Use the First P erson

The generally accepted rule in legal writing is to avoid using the first person. You want the emphas is to be on what you ar e sa yi ng and not on the fact that it is you who is sa ying it. Whene ver you find yourself star ting a sentence with a phrase such as "I think the cour t will hold that . . . ," go ba ck and delete the first two wor ds. Because you ar e the author , the reader alr eady kno ws that these ar e your thoug hts and no one else 's. The reader also knows that ther e is no wa y that you can be 100% cer tain of what you write. Ther efor e, ther e is no need to soften the cer titude with which y ou write b y inser ting "I think. "

The one time when you can use the first person is when you ar e ref erring to one of your firm 's clients, as in "Our client wishes to settle. " Howe ver, even in that case some purists would pr ef er to use the client' s name, as in "Ms. Br own wishes t o settle. "

5. Do Not Use Contractions

Legal writing is formal writing, and in formal writing ther e is no place for contractions. Contractions ar e acceptable only when you ar e writing an informal note for so meone within the firm or , depending on the policy of y our firm, occasionally a letter t o a client.

6. Do Not Ask Y our Reader Questions

It is your job to pr ovide answers, not to ask your reader questions. Ther e is nothing mor e anno ying than to be reading someone 's legal analysis only t o be st opped b y a series of questions.

Example: The court in *Lewis* held that liability is limited to automobile accidents. Will that court extend its holding to our client's facts? Will the court limit its holding to exclude our client's facts?

The reader will probably be thinking, "I don't know. That's what I'm paying you to tell me." When you find yourself posing questions, simply rephrase them as issues.

Revised: The court in *Lewis* held that liability is limited to automobile accidents. That raises the issue of whether the court will extend that holding to our client's facts or limit it to the facts of Lewis.

7. That Case/This Case

The convention is to refer to a cited case as **that case** and to your client's case as **this case**.

This case

Your client's case.

That case

A case that you are citing.

Example: The court in *Lewis* held that liability is limited to automobile accidents. In that case the husband

had been driving and the wife was a passenger when the accident occurred.

8. Written Numbers versus Numerals

There are times when you should write out numbers as opposed to using numerals. Many attorneys prefer the older, more formal approach of writing out all numbers from zero to ninety-nine, but a more modern approach is to use numerals for all numbers higher than ten. In addition, you should write out:

- any round number, such as one hundred; and
- any number that begins a sentence.

In footnotes you follow the same rules except you write out only the numbers zero through nine. When you have a series of numbers in a sentence, some of which you should write out and some of which you should give as numerals, use all numerals.

Example: There were 2 attorneys, 40 witnesses, and 105 documents.

9. Do Not Eliminate the Articles *A*, *An*, and *The*

Leaving out articles makes your writing choppy and hard to follow. This style probably comes from students mistakenly thinking that their writing will appear more "lawyerly" if they adopt a headnote style of writing.

Incorrect: A person injured in fall from automobile parking floor to ground below while seeking shelter from

	rain was at most gratuit ous or bar e licensee.
Re vised:	A person injur ed in *a* fall fr om *an* aut omobile parking floor to *the* gr ound below while seeking shelter fr om *the* rain was at most *a* gratuit ous or bar e licensee.

PART III: CORRECT WORD USAGE

Correct word usage simply means choosing the correct word to say exactly what you mean. At times this may require you to consult a dictionary or thesaurus. The following is a list of the most commonly misused words.

And/Or	There is much debate as to whether the *and/or* combination is acceptable. Many writers believe it is cumbersome and requires the reader to do too much work to understand its meaning. For example, in the phrase "the husband and/or the wife," the reader must translate that to mean the husband, the wife, or both. Therefore, many writers prefer it to be written just that way.
Because/Since	*Because* denotes a causal relationship. *Since* refers to time. Using *since* to also denote a causal relationship can cause ambiguity.

Examples:

Because he admitted his guilt, he has been held without bail. (The reason he is being held without bail is that he admitted his guilt.)Since he admitted his guilt, he has been held without bail. (Since the time he admitted his guilt, he has been held without bail.)

Court/court	Unless it starts a sentence, the word *Court* stands for the U.S. Supreme Court. Use *court* when referring to other courts.
Have/Of	In speech it often sounds as though someone is saying "of" when it really is "have." In writing, always use *would have, could have, should have*, not *would of, could of, should of*.

Its/It's	*Its* is a pronoun. *It's* is a contraction for *it is*.

Examples: The car wobbled on its loose axle. It's a beautiful day.

That/Which — *That* is used for restrictive or essential phrases.

Example: He went to the store that was around the corner to buy some bread.

The phrase "that was around the corner" describes which store and is essential for identifying the store.

Example: He went to George's Grocery, which was around the corner, to buy some bread.

The phrase "which was around the corner" simply further describes the store that was already clearly identified as George's Grocery. Therefore, it provides nonessential information.

Their/There/They're — *Their* is a possessive pronoun. *There* represents a place. *They're* is a contraction for *they are*.

Example: They're going to their house. Once they are there, they will have supper.

Which/Who	Use *which* for things and *who* for people.
Who 's/Whose	*Who 's* is a contraction for *who is. Whose* is a possessive pronoun.

Examples: Who 's going to the store?

Whose jacket is this?

Your/You're	*Your* is a possessive pronoun. *You're* is a contraction for *you are*.

Example: You're going to have to finish your report.

SUMMARY

Good legal writing starts with good writing. Follow the basic rules of grammar by using proper sentence structure, avoiding sentence fragments and run-on sentences, and using parallel construction. Also use the proper verb tense. Make sure your pronouns agree with your antecedents. Put modifying words close to what they modify, and be aware of common punctuation problems.

While you are encouraged to develop your own style, you should follow certain style guidelines. Avoid long paragraphs, and be careful that you do not bury your points in the middle of your paragraphs. Use transitions between paragraphs. Be concise by eliminating unnecessary words and phrases. Because the active voice is stronger, use it whenever possible. And when engaged in legal writing, do not fall into the trap of using legalese. Keep the court and not the court opinion the subject of your sentences. Avoid unnecessary variation and the use of the first person. In formal writing do not use

contractions, and do not ask your reader questions. Be aware of the differences between "that case" and "this case." Know when to use numerals and when to write numbers out. Finally, do not write like a headnote editor. Include the articles—*a*, *an*, and *the*.

REVIEW QUESTIONS

Pages 537 through 544

Correct the following sentences.

1. On any given day a paralegal can be asked to perform any of the following tasks, to interview clients, research in the library, drafting of documents, filed pleadings, or writing client letters.
2. The complaint, which contains theories based on both tort and contract law, alleging that the product was defective, was filed with the wrong court.
3. Even though the attorney made a long-winded and impassioned plea to the jury at the end of the trial.
4. The attorney made a long-winded and impassioned plea to the jury at the end of the trial the jury found the defendant guilty.
5. In *Jones*, a child is injured by his father's negligence. The court decides that children were able to sue for parental negligence.
6. Even though a criminal defendant may engage in plea bargaining, they still may receive a different sentence from the judge.
7. The judge, denied the plaintiff's request, ordered a new trial and set the new trial date.
8. All paralegals, who are members of the local paralegal association, have access to the job bank information.
9. He went over to Bob Browns house where he saw the Browns collection of stamps.
10. The witness stated that "I ran away from the accident", and he testified that he was "scared".

Pages 544 through 557

Correct the following sentences.

11. In *Black* the court held that only involuntary intoxication could be a defense to the formation of a contract. (first sentence in a paragraph)
12. It is interesting to note that notwithstanding the fact that the defendant was found guilty, at that point in time clearly the defendant still felt his attorney had done a good job of defending him.
13. The decision by the jury to convict the defendant surprised no one.
14. In *Jones v. Warner* the court felt that only those who were involuntarily intoxicated could be excused from their contractual obligations.
15. Said court also stated that two beers wouldn't be sufficient to prove intoxication.
16. Will the court in our case say that four beers are sufficient to prove intoxication? Would six be enough? What of two whiskeys?
17. There are five cases that deal with intoxication.
18. Defendant driving car after drinking five beers was found to be intoxicated.
19. The plaintiff can bring suit for negligence against the city for injuries he sustained in the accident. Even though his contributory negligence may bar him from recovery.
20. The woman was frightened by a man she described as seedy, it was only after she struck him with a rock that she discovered he was an undercover police officer.
21. During an autopsy, looking for the cause of death, the deceased is examined by the pathologist.
22. The new computer system offers four advantages for our firm:
    1. it includes 15 software packages
    2. the warranty extends to 160 days
    3. provides a full-scale training program

4. state-of-the-ar t f eatur es ar e included.

23. The enclosed forms should be completed by you no later than A ugust 15.
24. The depositions pr o ved to be ver y revealing, howe ver, our client has decided t o settle.
25. *Dillon* holds that under cer tain cir cumstances a bystander ma y r eco ver for emotional distr ess.

[1] Cassidy v . V anattas, 242 S.W .2d 619, 620 (K y. App. 1951).

[2] The Legal Guide t o Mother Goose 7-11 (Don Sandbur g trans., 1978).

[3] Judge J. E dgar M ur dock of the U nited States Tax Cour t, quoted in Brison v. Commissioner of Internal Re venue, T .C. Memo 1983-01, 11.

Glossary

Abstract A condensed history of the title to real property, which includes the chain of ownership and a record of all liens, taxes, or other encumbrances that may impair the title.

Abuse of process Misusing the criminal or civil court process.

Acceptance In contract law, an act by the offeree indicating agreement to be bound to the contract.

Accessory A person who assists the principal in the preparation of the crime; also known as an **accomplice.**

Accessory after the fact A person who aids the principal after the commission of the crime.

Accessory before the fact A person who assisted in the preparation of the crime, but was not present during the crime.

Accomplice A person who assists the principal with the crime or with the preparation of the crime; also known as an **accessory**.

Accord and satisfaction An accord is an agreement to do something different from that which was originally promised. The satisfaction is the performance of the accord.

Acknowledgment A formal declaration of a signature before a public official.

Acquit To determine that a criminal defendant is not guilty of the crime with which he or she is charged.

Active listening The process of signaling that you are really listening, accomplished by using verbal and nonverbal clues, paraphrasing, and reflecting the client's feelings.

Active voice A form of writing in which the subject of the sentence does the acting; the opposite of **passive voice**.

Actual cause This is measured by the "but for" standard: But for the defendant's actions, the plaintiff would not have been injured; also known as **cause in fact**.

Actual damages *See* **Compensatory damages**.

Actus reus A wrongful act; along with ***mens rea*** (bad intent), a required element of any crime.

Adhesion contract A contract formed where the weaker party has no realistic bargaining power. Typically, this form of contract is offered on a "take it or leave it" basis.

Adjudicatory hearing A mechanism through which parties to a dispute can present arguments and evidence about their case to an administrative law judge.

Administrative law Rules and regulations created by administrative agencies.

Administrative law judge *See* **Hearing officer**.

Administrative regulations Rules, regulations, orders, and decisions created by administrative agencies under their authority to interpret specific statutes.

Administrator/Administratrix A person appointed by the court to carry out the directions and requests of someone's will.

ADR *See* **Alternative dispute resolution (ADR).**

Advance sheets The first printing of a court decision before it appears in a hardbound reporter.

Adversarial system A system characterized by competing, opposing parties overseen by a neutral decision maker.

Adverse possession A transfer of real property rights that occurs after someone other than the owner has had actual, open, adverse, and exclusive use of the property for a statutorily determined number of years.

Adverse witness *See* **Hostile witness.**

Affinity Persons related to the decedent by marriage.

Affirm A decision is affirmed when the litigants appeal a lower court decision and the higher court agrees with what the lower court has done.

Affirmative action plan A temporary plan designed to remedy past discrimination by using race or sex as a "plus factor" in employment settings or admission to educational programs.

Affirmative defense A defense whereby the defendant offers new evidence to avoid judgment.

Agency adoption An adoption in which a licensed agency assumes responsibility for screening adoptive parents and matching them with available children.

Agent Someone who has the power to act in the place of another.

AI *See* **Artificial intelligence (AI).**

Alibi defense A defense requiring proof that the defendant could not have been at the scene of the crime.

Alien corporation A corporation formed in another country.

Alimony Financial support and other forms of assistance required to supply the "necessities" of life; also known as **maintenance** or **support**.

Alternative dispute resolution (ADR) Techniques for resolving conflicts that are alternatives to full-scale litigation. The two most common of these are **arbitration** and **mediation**.

American Association for Paralegal Education (AAfPE) A national organization of paralegal programs that promotes high standards for paralegal education.

American Bar Association (ABA) A national voluntary organization of lawyers.

American Bar Association approval A voluntary process; approval by the American Bar Association (ABA) indicates that a paralegal program meets its standards.

American Jurisprudence Second (Am. Jur. 2d) A general legal encyclopedia that summarizes the entire body of American law.

American Law Reports (A.L.R.) A source that contains the full text of leading court opinions, followed by a discussion of the issue with references to cases from around the country. Only selected topics are covered, but they are covered in more depth than you will find in an encyclopedia.

Amicus curiae Someone who, with the court's permission, intervenes in litigation, usually on appeal, to influence the decision;

also known as a **friend of the court**.

Analogize To find similarities between two situations.

Analogous cases Cases that involve similar facts and rules of law.

Annotated code A privately published statutory code that includes statutes arranged by subject matter as well as editorial material, such as legislative history and summaries of court decisions interpreting the statutes.

Annotated statutes *See* **Annotated code**.

Annotations Editorial features, such as court decision summaries and references to other sources of information, added by the editor to assist the research.

Annulment A legal (or religious) judgment that a valid marriage never existed.

Answer The defendant's reply to the complaint. It may contain statements of denial, admission, or lack of knowledge and affirmative defenses.

Antecedent When a pronoun (*hers, her, his, him, it, its, them, their, theirs*) substitutes for a noun that has preceded it, the noun is known as an antecedent.

Antenuptial agreement *See* **Prenuptial agreement.**

Anti-heartbalm statute A law that prohibits lawsuits for such things as breach of a promise of marriage, alienation of affection, and seduction of a person over the legal age of consent.

Appeal To ask a higher court to review the actions of a lower court.

Appealable issues Questions that can form the basis for an appeal.

Appellant or **petitioner** The party in a lawsuit who has initiated an appeal.

Appellate brief A formal written argument to an appellate court, in which a lawyer argues why that court should affirm or reverse a lower court's decision.

Appellate courts Courts that determine whether lower courts have made errors of law.

Appellate jurisdiction The power of a higher court to review and modify the decision of a lower court.

Appellee or **respondent** The party in a lawsuit against whom an appeal has been filed.

Appropriation An intentional unauthorized exploitive use of another person's personality, name, or picture for the defendant's benefit.

Arbitration An ADR mechanism whereby the parties submit their disagreement to a third party whose decision is binding.

Arraignment A criminal proceeding at which the court informs the defendant of the charges being brought against him or her and the defendant enters a plea.

Arrest Occurs when the police restrain a person's freedom and charge the person with a crime.

Arrest warrant A court order directing the arrest of a person.

Arson The malicious burning of the house or property of another.

Articles of incorporation The primary document needed to form a corporation.

Artificial intelligence (AI) Technology that enables computers to simulate human learning, providing a way to quickly access, analyze, and interpret vast quantities of data.

Artisan's lien The right to retain an interest in property until a worker has been paid for his or her labor.

Assault An intentional act that creates a reasonable apprehension of an immediate harmful or offensive physical contact.

Assigned counsel A private lawyer paid by the state on a contractual basis to represent an indigent client.

Assignee A person to whom contract rights are assigned.

Assignment The transfer by one of the original parties to the contract of part or all of his or her interest to a third party.

Assignor A person who assigns contract rights.

Assumption In logic, a belief that justifies one in arguing a conclusion.

Assumption of the risk Voluntarily and knowingly subjecting oneself to danger.

Attachment In secured transactions, a process that gives the creditor rights against the debtor when the creditor either possesses collateral from the debtor or has a signed **security agreement.**

Attorney A lawyer; a person licensed by a court to practice law. This term is often used to refer to a job title.

Attorney-client privilege A rule of evidence that prevents a lawyer or a paralegal from being compelled to testify about confidential client information.

Attorney general The chief legal officer of the federal or a state government.

Attorney work product Materials prepared by an attorney or paralegal in anticipation of litigation.

At-will employment When an employee has not signed a formal contract with the employer governing the employment relationship.

Authenticate To establish that the document being presented is what it is claimed to be.

Authentication Proof that the evidence is what it is said to be.

Bail Money or something else of value that is held by the government to ensure the defendant's appearance in court.

Bailee The party taking temporary control of personal property during a bailment.

Bailiff An officer of the court who is responsible for maintaining order in the courtroom.

Bailment A temporary transfer of personal property to someone other than the owner for a specified purpose.

Bailor The owner of the personal property that is being temporarily transferred as part of a bailment.

Bankruptcy judges Appointed for set terms, judges who handle bankruptcy matters.

Bankruptcy proceeding A process governed by federal law whereby a debtor unable to pay its debts seeks protection.

Bates stamping Assigns a unique, individual number to each page so that out of the thousands of document pages, no two pages have the same number.

Battered spouse syndrome A form of defense that is sometimes allowed when someone has been the victim of repeated attacks, even when that victim is not in immediate danger.

Battery An intentional act that creates a harmful or offensive physical contact. Can form the basis for either a tort or a criminal action.

Bearer paper A document that has written on its front a statement that it is payable to cash or payable to the bearer, or has a signature on the back, causing it to be indorsed in blank.

Bench trial A trial conducted without a jury.

Beneficiary The person named in a will, insurance policy, or trust who receives a benefit.

Bequest Also known as a **legacy**; a gift of personal property in a will.

Best evidence rule The rule requiring that the original document be produced at trial.

Beyond a reasonable doubt The standard of proof used in criminal trials. The evidence presented must be so conclusive and complete that all reasonable doubts regarding the facts are removed from the jurors' minds.

Bilateral contract A contract where a promise is exchanged for a promise.

Bill A proposed law as presented to a legislature.

Billable hours The number of hours, or parts of an hour, that can be charged to a specific client.

Bill of Rights The first ten amendments to the U.S. Constitution.

Black letter law Generally accepted legal principles.

Bluebook A book originally written by a group of law students to provide a uniform method for citations in law reviews; contains detailed rules for all forms of citation.

Board of directors The group responsible for the management of a corporation.

Boilerplate Standard language found in a particular type of legal document.

Bona fide occupational qualification (BFOQ) A defense to an overt discrimination claim, alleging that the qualification is necessary to the essence of the business operation.

Booking The process after arrest that includes taking the defendant's personal information, giving the defendant an opportunity to read and sign a *Miranda* card, and allowing the defendant the opportunity to use a telephone.

Boolean connectors Logical connectors, such as "or" and "and," that make keyword searches more precise.

Bribery Offering something of value to a public official with the purpose of influencing that official's actions.

Brief Either a short written summary of a court opinion or a written argument presented to a court. *See* **Appellate brief**.

Brief answer In a law office memorandum, the brief answer gives the reader a short, specific answer to the question presented.

Broad holding A statement of the court's decision in which the facts are either omitted or given in very general terms so that it will apply to a wider range of cases.

Burden of production The necessity to produce some evidence, but it need not be so strong as to convince the trier of fact of its truth.

Burden of proof The necessity of proving the truth of the matter asserted.

Bureau of National Affairs (BNA) A private publishing company that publishes legal materials, including United States Law Week.

Burglary Breaking into and entering a building with the intent of committing a felony.

"But for" standard *See* **Actual cause**.

Buyer in the ordinary course of business Someone who buys a product in good faith and without knowledge that someone else has a security interest in the goods.

Canons of construction General principles that guide the courts in their interpretation of statutes.

Capital crime A crime for which the death sentence can be imposed.

Caption The heading section of a pleading that contains the names of the parties, the name of the court, the title of the action, the docket or file number, and the name of the pleading.

Case briefing A stylized method for summarizing court opinions.

Case citation Information that tells the reader the name of the case, where it can be located, the court that decided it, and the year it was decided.

Case history Either prior or subsequent procedural history of the case cited.

Case management Handling the flow of paper work involved in client cases.

Case Management/Electronic Case Files (CM/ECF) A comprehensive case management system developed for the federal courts allowing them to receive electronic filings and to maintain case files accessible via the Internet.

Case of first impression A type of case that the court has never faced before.

Case reporters Books that contain appellate court decisions. There are official reporters and unofficial reporters.

Castle doctrine The defense that one can use deadly force if necessary to protect one's home and its inhabitants.

Cause of action A claim that based on the law and the facts is sufficient to support a lawsuit. If the plaintiff does not state a valid cause of action in the complaint, the court will dismiss it.

Cause in fact *See* **Actual cause**.

Caveat emptor Let the buyer beware.

Censure or reprimand A public or private statement that a lawyer's conduct violated the code of ethics.

Certificated The status of having received a certificate documenting that the person has successfully completed an educational paralegal program.

Certification A method of recognizing accomplishment administered by nongovernmental bodies.

Certified The status of being formally recognized by a governmental or nongovernmental organization for having met special criteria, such as fulfilling educational requirements and passing an exam, established by that organization.

Certified Legal Assistant A registered trademark of the National Association of Legal Assistants.

Certiorari *See* **Writ of *certiorari***.

Chain of custody A record identifying who had control and access to evidentiary materials from the time they were obtained until the time they are introduced into evidence.

Challenge for cause A method for excusing a prospective juror based on the juror's inability to serve in an unbiased manner.

Charging the jury After both sides have presented their final arguments, the judge's instructions to the jury on the meaning of

the law to be applied to the facts of the case.

Charitable immunity The prohibition against suing charitable institutions.

Chattel Personal property.

Check A specialized form of a draft in which a bank depositor names a specific payee to whom funds are to be paid from the drawer's account.

Checks and balances Division among the three branches of the federal government so that each one acts as a check on the power of the other two, thereby maintaining a balance of power among the branches.

Child abuse Intentional harm to a child's physical or mental well-being.

Child neglect The negligent failure to provide a child with the necessaries of life.

Child support Money that the noncustodial parent contributes to assist the custodial parent in paying for a child's food, shelter, clothing, medical care, and education.

Circumstantial evidence Indirect evidence, used to prove facts by implication.

Citation A stylized form for giving the reader information about a legal authority, generally including the name of the authority, its date, and specifics such as volume and page numbers to help the reader locate it. For court opinions, a citation includes the name of the case, where it can be located, the name of the court that decided it, and the year it was decided. A statutory citation is a formalized method for referring to a statute's chapter (or title) and section numbers. The Bluebook gives precise rules as to how citations are to be written. *See also* **Bluebook**.

Citator A resource to help ensure the validity of a law.

Cited case The case you are Shepardizing.

Citing case A case listed in Shepard's that cites your case.

Civil action A lawsuit brought to enforce an individual right or gain payment for an individual wrong.

Civil law Law that deals with harm to an individual.

Class action lawsuit A lawsuit brought by a person as a representative for a group of people who have been similarly injured.

Claw-back provision An agreement whereby privileged documents inadvertently produced can be retrieved.

Clear and convincing The standard of proof used in some civil trials. The evidence presented must be greater than a preponderance of the evidence, but less than beyond a reasonable doubt.

Clear title An ownership right that is free from encumbrances or other defects; also known as **marketable title**.

Clearly erroneous The standard used by appellate courts when reviewing a trial court's findings of fact.

Client confidentiality An ethical rule requiring that lawyers and paralegals maintain their clients' secrets.

Client file All of the relevant documents related to a client.

Client trust account A bank account used to hold money belonging to a client or to a third party.

Closed questions Specific questions that usually demand very short or yes/no answers.

Closely held corporation A relatively small business operation in which one person or the members of a family own all the stock.

Closing statement An itemized allocation of all the costs and moneys exchanged among the various parties, including financial institutions and real estate brokers, when a property is sold.

Closing table A table located in digest volumes and pocket parts indicating the last volume and page numbers for the reporters included in that digest.

Code A compilation of federal or state statutes in which the statutes are organized by subject matter rather than by year of enactment.

Code of Federal Regulations (C.F.R.) A compilation of federal administrative regulations arranged by agency.

Codicil A supplement or addition to a will that modifies, explains, or adds to its provisions.

Codification The process of organizing statutes by subject matter.

Codification of the common law The process of legislative enactment of areas of the law previously governed solely by the

common law .

Collaborativ e div orce A nona dv ersarial pr ocess wher eb y the div or cing couple hir es a team of pr of essionals to help them r each a mutually satisfact or y agr eement.

Collateral heir One who has the same ancest ors, but does not descend fr om the decedent.

Comma splice A ty pe of run-on sentence; tw o independent clauses joined b y a comma.

Commercial impracticability An ar gument that a contract has become t oo costly for one of the par ties.

Commercial paper A w ritten pr omise or or der to pa y a cer tain sum of mone y.

Committee hearing Legislativ e committees often hold public hearings wher e inter ested par ties can testify about a pr oposed law . The transcript of the hearing becomes a par t of the s tatute 's legislativ e hist or y.

Committee repor t When a legislativ e commit tee holds public hearings on pr oposed legislation, the r esult of those hearings is sometimes published in a committee repor t, which becomes par t of the statute 's legislativ e hist or y.

Common law The body of law that has e volv ed fr om judicial decisions in cases that do no t inv olv e constitutional, statut or y, or administrativ e regulation interpr etation. Law cr eated b y the cour ts.

Common-law marriage A marriage that has not been solemniz ed but in which the par ties ha v e mutually agr eed to enter int o a relationship in which the y accept all the duties and r esponsibilities that corr espond t o those of marriage.

Community proper ty state A state that classifies all pr oper ty acquir ed b y either the husband or the wif e during the marriage, with the ex ception of gifts or inheritance, as marital pr oper ty to be equally distrib uted between the spouses at the time of the div or ce.

Commutation An ex ecutiv e action that les sens the penalty for a crime without changing the fact of conviction.

Comparative negligence A method for measuring the relative negligence of the plaintiff and the defendant, with a commensurate sharing of the compensation for the injuries.

Compensatory damages Money awarded to a plaintiff in payment for his or her actual losses. *Compare* **punitive damages**.

Competency Relates to the fitness of a person to perform certain legal actions, such as meeting the minimum requirements to give testimony in court (must be able to explain to the jury what was seen or heard) or the requirements to serve on a jury (must be able to hear and follow testimony and arguments); the defendant's mental state at the time of the trial (must be able to understand the proceedings and communicate with his or her lawyer), a person's mental state at the time a will is signed (must be of "sound mind," know what property he or she possesses and to whom it should go); or a person's ability to make a binding contract (must be an adult without severe mental impairments).

Complaint The pleading that begins a lawsuit.

Complete defense A defense that, if proven, relieves the defendant of all criminal responsibility.

Compulsory joinder When a person must be brought into a lawsuit as either a plaintiff or a defendant.

Concluding paragraph The final paragraph in a written legal analysis that summarizes the writer's conclusions.

Concurrent conflict of interest Simultaneously representing adverse clients.

Concurrent jurisdiction When more than one court has jurisdiction to hear a case.

Concurring opinion An opinion that agrees with the majority's result, but disagrees with its reasoning.

Conditional fee estate The current owner of the land retains ownership only as long as certain conditions are met.

Cone of silence See **ethical screen**.

Confidentiality The ethical rule prohibiting lawyers and paralegals from disclosing information regarding a client or a client's case.

Conflict check The process of ensuring that there is no conflict of interest between the firm's current or past clients and a potential

new client.

Conflict of interest The ethical rule prohibiting lawyers and paralegals from working for opposing sides in a case.

Conjunctive adverb An adverb that joins two clauses. Examples include *also, consequently, furthermore, however, moreover, nevertheless, then*, and *therefore*. These should not be used to join two independent clauses.

Consanguinity *See* **Kindred**.

Consent to search When someone who has the authority to do so voluntarily agrees to allow law enforcement to search a dwelling, car, or business.

Consequential damages Indirect damages that must be foreseeable to be recovered. Also called **special damages**.

Consideration Anything of value; it must be present for a valid contract to exist, and each side must give consideration.

Consortium *See* **Loss of consortium**.

Conspiracy An agreement to commit an unlawful act.

Constitutional court A court established by Article III of the U.S. Constitution.

Constitutional law The study of the U.S. Constitution, the legal framework it established, and the rights it protects; a body of principles and rules that are either explicitly stated in, or inferred from, the constitutions of the United States and those of the individual states.

Constructive Not factually true, but accepted by the courts as being legally true.

Constructive delivery When actual delivery is impossible but the court decides that enough was done to prove intent to relinquish title and control.

Constructive eviction An act by a landlord that makes the premises unfit or unsuitable for occupancy.

Constructive knowledge Not actual knowledge but the knowledge that the person should have if reasonable care is taken to be informed.

Content neutrality The principle that laws may not limit free expression on the basis of whether the speech's content supports

or opposes any par ticular position.

Contextual ana lysis A fo rm of statu tor y analysis in which meaning is in ferr ed fr om the stateme nt of legislativ e purpose and other sections of the statute.

Contingency fee Lawy er compensation that is calculated as a per centage of the settlement or awar d in the case rather than a flat or an hourly f ee.

Contract A legally enfor ceable agr eement suppor ted by consideration.

Contract reformation An equi table remedy that allows the cour ts to "r ewrite " contract pr ovisions.

Contributor y n egligence Negligence by the plaintiff tha t contributed to his or her injur y. Normally , it is a complete bar to the plaintiff 's reco ver y. *See* **Comparativ e negligence** .

Conv ersion The taking of someone else 's pr oper ty with the intent of permanently depriving the owner; the civil side of theft.

Coordinating conjunction A coor dinating conjunction can join two independent cl auses; examples include *and, but, for , n or, or* , a nd *yet* .

Cop yright An a uthor or ar tist' s right to contr ol the use of his or her works.

Corporation A business entity formed by an association of shar eholders.

***Corpus Juris Secundum* (C.J.S.)** W est' s law ency clopedia; contains cr oss-r ef er ences t o W est digest t opics and k ey numbers.

Correctional system *See* **P enal system** .

Corroborativ e evidence E vidence that suppor ts pr evious testimony but that comes in a diff er ent form.

Count In a complaint, one cause of action.

Counterclaim A claim by the def endant against the plaintiff. A compulsor y counter claim relates to the facts alleged in the complaint. A permissiv e counter claim can relate to an entir ely diff er ent factual setting.

Counteroffer A return off er rejecting an off er fr om the other par ty in the negotiations and r eplacing it with a new off er.

Court A unit of the judicial branch of government that has the authority to decide legal disputes.

Court clerk A court official responsible for keeping the court files in proper condition and ensuring that the various motions filed by lawyers and the actions taken by judges are properly recorded.

Court commissioner A title given in some states to a public official with limited judicial powers.

Court of record A court where a permanent record is kept of the testimony, lawyers' remarks, and judges' rulings.

Court reporter A person trained to take a verbatim transcript of a courtroom proceeding or deposition.

Covenant not to compete A promise not to compete within a given geographical area for a specific time period; also known as a **noncompete agreement**.

Cover Finding substitute goods.

Crime An activity that has been prohibited by the legislature as violating a duty owed to society; it is prosecutable by the government, with the possibility of punishment of a fine, imprisonment, or even death.

Criminal complaint A document charging a person with a crime.

Criminal defenses In a criminal case, a fact or legal argument that would relieve the defendant of guilt.

Criminal justice system Used to refer to a combination of legislative, administrative, and judicial agencies that are involved in the development and enforcement of criminal law in the United States.

Criminal law Law that deals with harm to society as a whole.

Criminal procedure The way in which criminal prosecutions are handled; governed by the federal or state rules of criminal procedure.

Cross-claim A claim by one defendant against another defendant or by one plaintiff against another plaintiff.

Cross-examination The questioning of an opposing witness.

Cumulative evidence Evidence that does not add any new information but that confirms facts that already have been established.

Custodial interrogation Occurs when law enforcement authorities question a person who has been deprived of his or her freedom in a significant way.

Custody In criminal law, occurs when the defendant has been deprived of freedom in a significant way. In family law, when couples divorce, the court determines with whom the children will live and how legal decisions, regarding such things as the children's health care and education, will be made.

Damages Monetary compensation, including compensatory, punitive, and nominal damages.

Deadly force A force that would cause serious bodily injury or death.

Decedent A person who died.

Declarant The person who made a statement.

Deductive reasoning A form of logical reasoning based on a major premise, a minor premise, and a conclusion.

Deed A legal document that formally conveys title to property to the new owner. In most sales, a warranty deed is used.

Deepfake An audio visual file that has been altered, usually using off-the-shelf artificial intelligence tools, so that the file appears to be unaltered.

Defamation The publication of false statements that harm a person's reputation.

Defamation *per se* Remarks considered to be so harmful that they are automatically viewed as defamatory.

Default judgment A judgment entered against a party who fails to complete a required step, such as answering the complaint.

Defendant In a lawsuit, the person who is sued; in a criminal case, the person who is charged with a crime.

Defense A fact or legal argument that would relieve the defendant of liability in a civil case or guilt in a criminal case.

Delegatee A person who owes an obligation to the obligee in a contractual situation.

Delegation The transfer by one of the original parties to the contract of his or her obligations to a third party.

Delegator A person who delegates duties under a contract.

Demand letter A letter from a lawyer demanding that some action be taken, with either an implicit or an explicit threat to take the matter to court if the requested action is not forthcoming.

Dependent clause A clause that contains a subject and a verb but that cannot stand alone, as it does not contain a complete thought. A dependent clause always begins with a subordinating conjunction (e.g., *that, before, after, because*).

Deponent The person who is being asked questions at a deposition.

Deposition The pretrial oral questioning of a witness under oath.

Derogation of the common law A term referring to legislation that changes the common law.

Descendants Lineal heirs who descend from, or issue from, the decedent, such as children and grandchildren; also known as **issue**.

Detrimental reliance *See* **Promissory estoppel**.

Devise A gift of real estate that is given to someone through a will.

Dictum A statement in a judicial opinion that is not necessary for the decision of the case. Plural is *dicta*.

Digest A book that contains court opinion headnotes arranged by subject matter.

Direct appellate review Occurs when the courts think a case is so significant that the middle step of going through an intermediate appellate court should be skipped; the case proceeds directly from a trial court to the highest appellate court.

Direct evidence Establishes a direct link to the event that must be proved.

Direct examination The questioning of your own witness.

Directed verdict A verdict ordered by a trial judge if the plaintiff fails to present a *prima facie* case or if the defendant fails to present a necessary defense.

Disability Under the Americans with Disabilities Act (ADA), a physical or mental impairment that substantially limits a major life activity. An individual with a disability is one who has such an impairment, has a record of such an impairment, or is regarded as having such an impairment.

Disaffirm The ability to take back one's contractual obligations.

Disbarment The revocation of a lawyer's license.

Disclosure The intentional publication of embarrassing private affairs.

Discovery The modern pretrial procedure by which one party gains information from the adverse party.

Disillusionment *See* **Divorce**.

Dismissal with prejudice A court order that ends a lawsuit; the suit cannot be refiled by the same parties.

Dismissal without prejudice A court order that ends a lawsuit; the suit can be refiled by the same parties.

Disparate impact The legal theory applied when the use of a neutral standard has a disproportionate impact on one protected group.

Disparate treatment The legal theory applied when a rejected applicant claims the reason for rejection was based on a discriminatory intent but the employer alleges a nondiscriminatory reason.

Disposition The result reached in a particular case.

Dissenting opinion An opinion that disagrees with the majority's decision and reasoning.

Distinguish To find differences (distinctions) between two situations.

Distinguishable cases Cases that involve dissimilar facts or rules of law.

District attorney A lawyer elected or appointed to prosecute crimes in a particular jurisdiction.

Diversity jurisdiction The power of the federal courts to hear matters of state law if the opposing parties are from different states and the amount in controversy exceeds $75,000.

Diversity of citizenship A situation where the opposing parties are from different states and the amount in controversy exceeds $75,000.

Divided custody A situation in which the court separates the children so that each parent is awarded custody of one or more of the children.

Dividend A distribution of the corporate profit as ordered by the board of directors.

Div orce Also called **disillusionment** ; a legal judgment that dissolv es a marriage.

Doctrine of equitable distribution A system for distributing pr oper ty acquir ed during a marriage on the basis of such fact ors as the contributions of the spouses, the length of the marriage, the age and health of the spouses, and their ability t o mak e a living.

Doctrine of implied powers P owers not stated in the Constitution, but that ar e necessar y for Congr ess to carr y out other , expr essly granted powers.

Doctrine of incorporation In co nstitutiona l law , the appli cation of the F our teenth Am endment' s due pr ocess pr otections to incorporate the pr o visions of the Bill of Rights and mak e them applic able to the states.

Document har v esting The sear ching of electr onic files for rele v ant information.

Document preparer An individual who pr epar es legal documents for people who ar e attempting to handle their own legal matt ers *pr o se* .

Documentar y e vidence Consists of recor ds, contract s, leases, wills, and other written instruments, sa v ed as har d cop y print outs, computer files on a har d driv e or in the cloud, or as a posti ng on a social network site.

Documents clerk Someone who or ganiz es and files legal documents.

Domestic corporation A corporation doing business in its own state.

Donor A perso n who cr eates a trust; also known as a **grantor** or **settlor** .

Double jeopardy A cons titutional pr otection against being tried twice for the same crime.

Draft A thr ee-par ty instrument in which the drawer or ders the drawee, usually a bank, t o pa y mone y t o the pa yee.

Dramshop law s Statutes mak ing bar owners responsible if int o xicated patr ons negligently injur e thir d par ties.

Drawee On the face of a check or draft, the par ty that is or derin g pa yment t o be made.

Drawer On the face of a check or draft, the party that is ordered to pay.

Due process The principle, guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, that notice and a hearing must be provided before depriving someone of property or liberty.

Durable health care power of attorney A document that gives someone the power to make health care decisions for you if you become incapacitated and cannot make those decisions yourself. Also known as a **health care proxy**.

Durable power of attorney A document that gives someone else power to act for you if you become incapacitated and unable to handle your financial matters on your own. *See* **Health care proxy**.

Duress In criminal law, a defense requiring proof that force or a threat of force was used to cause a person to commit a criminal act. In contract law, pressure that is so great as to overwhelm the contracting party's ability to make a free choice.

Earnest money The money the buyer turns over to the real estate agent to be applied to the purchase price of property.

Easement A right to use property owned by another for a limited purpose.

Ejusdem generis A canon of construction meaning "of the same class."

Electronic discovery (e-discovery) The process of gaining information from the adverse party when that information is in electronic form, such as e-mails, voicemails, text messages, photographs, spreadsheets, and documents.

Electronic filing (e-filing) The filing of court documents over the Internet as electronic files.

Electronic signature A means of establishing that a document being sent electronically was properly authorized.

Electronically stored information (ESI) Information created, disbursed, or stored in an electronic format.

Element A separable part of a statute that must be satisfied for the statute to apply.

Emancipated minor Someone who is still under the legal age of adulthood but who has nevertheless been released from parental

authority and giv en the legal rights of an adult.

Eminent domain The pow er of go vernment to tak e priv ate pr oper ty for public purposes.

Emplo yee A person working for another . *Compar e* **Independent contractor** .

En banc When an appellate cour t that normally sits in panels sits as a whole.

Enabling act A statut e establishing and setting out the powers of an administrativ e agency .

Enacted law Constitutions, statutes, or dinances, and administrativ e regulations.

Encumbrance A lien or other type of securi ty inter est that signifies that some other par ty has a legitimate claim t o the pr oper ty.

Entrapment A de fense requiring pr oof that the def endant would not ha ve committe d the crime but for trick er y or inducement by law enfor cement officers.

Equity A princi ple that allows judges to tak e action, such as issuing injunctions and or dering specific per formance, when other wise the law would limit their decisions t o monetar y awar ds.

Escheat A r eversion of pr oper ty t o the state when ther e ar e no heirs.

Escrow account A bank accoun t used to hold mone y belonging to a client or a thir d par ty.

Estate In proper ty law , an inter est in or title to real pr oper ty. In pr obate law , the total pr oper ty of whate ver kind, both real and personal, that a person owns at the time of his or her death.

Ethical screen A sy stem de veloped to shield a lawy er or a paralegal fr om a case that other wise would cr eate a conflict of inter est. Also known as an **ethical wall** or **cone of silence** .

Ethical wall A syste m de veloped to shield a lawy er or a paralegal fr om a case that other wise would cr eate a conflict of inter est. Also known as an **ethical screen** or **cone of silence** .

Evict To r emo ve a tenant fr om possession of r ental pr oper ty.

Evidence Information that can be pr esented in a cour t of law as pr oof of some fact. Evidence can consist of witness testimony or documents and exhibits. It is the pr oof pr esented at a trial.

Evolutionary approach An approach to constitutional interpretation in which judges seek to determine the underlying purpose that the drafters had in mind at the time they wrote the law and the modern-day option that best advances that purpose.

Exception A lawyer's objection to a trial court's ruling to preserve it as grounds for an appeal.

Exclusionary rule A rule that states that evidence obtained in violation of an individual's constitutional rights cannot be used against that individual in a criminal trial.

Exclusive jurisdiction When only one court has the power to hear a case.

Exculpatory clause A provision that purports to waive liability.

Exculpatory evidence Evidence that suggests the defendant's innocence; the opposite of **inculpatory evidence**.

Execute To perform or to sign; in contract law, an executed contract is one that has been completely performed.

Execute a warrant To carry out the provisions of a warrant.

Executive clemency The power of the president or a governor to pardon someone or reduce someone's sentence.

Executive memorandum An official policy directive issued by the president for the federal government, or by the governor of a state, which directs government employees as to how they should implement a law.

Executive order An official policy directive issued by the president for the federal government, or by the governor of a state, which directs government employees as to how they should implement a law. At the federal level, executive orders are published in the *Federal Register*.

Executor/executrix A person appointed by the testator to carry out the directions and requests in his or her will.

Executory contract A contract that has not been fully performed.

Exemplary damages See **Punitive damages**.

Exhaustion The requirement that appellate courts intervene only after the trial court has had an opportunity to correct its own errors.

Exhaustion of administrative remedies The requirement that relief be sought from an administrative agency before proceeding to court.

Exigent circumstances Generally, an emergency situation that allows a search to proceed without a warrant.

Expert witness A witness who possesses skill and knowledge beyond that of the average person and is allowed to speculate about what caused something or how it happened.

Explanatory parenthetical A parenthetical located at the end of a case citation containing information about the case.

Express contracts Contracts that are formed through words, either oral or written.

Express warranty An express warranty or promise created by an affirmation of fact or a promise made by the seller, a description of the goods sold, or a sample or model provided that forms the basis of the bargain.

Extractive AI The original AI approach of identifying and extracting information from a database.

Extradition The transportation of an individual from one state to another so that person can be tried on criminal charges.

Fact An actual incident or condition; not a legal consequence.

Fact bound The principle that even a minor change in facts can change the outcome of a case.

False arrest Occurs when a person is arrested (by either a law officer or a citizen) without probable cause and the arrest is not covered by special privilege.

False imprisonment Occurs whenever one person, through force or the threat of force, unlawfully detains another person against his or her will.

False light The intentional false portrayal of someone in a way that would be offensive to a reasonable person.

Family law The area of the law that covers marriage, divorce, and parent-child relationships.

Federal question A legal issue involving the application of a federal law.

Federal question jurisdiction The power of the federal courts to hear matters of federal law.

Federal Register A daily newspaper in which proposed federal regulations are first printed.

Federal Reporter The West reporter that contains decisions from the U.S. courts of appeals.

Federal Rules of Civil Procedure The rules governing the stages of civil litigation in federal courts.

Federal Sentencing Guidelines Government guidelines that specify an appropriate range of sentences for each class of convicted persons based on factors related to the offense and the offender.

Federal Supplement The West reporter that contains decisions from the U.S. district courts.

Federalism A system of government in which the authority to govern is split between a single, nationwide central government and several regional governments that control specific geographical areas.

Fee simple absolute estate An ownership of land that is free from any conditions or restrictions.

Felony A serious crime, usually carrying a prison sentence of one or more years.

Fiduciary A person who has a legally imposed obligation to act in the best interests of another party.

Fiduciary duty A legally imposed obligation to act in the best interests of the party to whom the duty is owed.

Financing statement A public record of a security interest.

Fine A penalty requiring the payment of money.

Fixed fee A set charge for a specific service, such as drafting a simple will.

Floating lien A security interest in proceeds or after acquired property.

Floor debate Debate that takes place in the legislature before a vote is taken on a proposed statute. It becomes part of the statute's legislative history.

Follow precedent When a court bases its decision on prior similar cases.

Forcible entry and detainer In some states, a summary civil action by a landlord to regain possession of the premises from a tenant who disputes the landlord's right to possession. Also, an action by any one with the right to possession who has been unlawfully evicted.

Foreclosure The process by which a creditor who holds a mortgage or some other form of a lien on real property can force the sale of that property in order to satisfy the debt to the mortgagee or lien holder.

Foreign corporation A corporation incorporated in one state doing business in another state.

Forensic search In e-discovery, a search that is performed to recover deleted files or older versions of current files to look for any changes.

Forfeiture The loss of money or property as a result of committing a criminal act.

Forgery The alteration or falsification of documents with the intent to defraud.

Formal contract A contract requiring certain formalities, such as a seal, to be valid.

Formal will A will that has been prepared on a word processor or typewriter and that has been properly signed by the testator and the required witnesses.

Fourth branch of government Administrative agencies.

Fraud A false representation of facts or intentional perversion of the truth to induce someone to take some action or give up something of value.

Freehold estate A right of title or ownership to real property that extends for life or some other indeterminate period of time.

Freelance paralegal A paralegal who works as an independent contractor rather than as an employee of a law firm or corporation.

Friend of the court *See* ***Amicus curiae*** .

Fruit of the poisonous tree doctrine Evidence that is derived from an illegal search or interrogation is inadmissible.

Full-text database A computerized database that contains the full text of documents, such as court opinions or depositions.

Full-text search A computer search that identifies every place in which the search term appears in the actual text of the document being searched.

Fused sentence A type of run-on sentence; two independent clauses with no separating punctuation.

Garnishment A process through which a court can require an employer to withhold money from an employee's wages and turn this money over to the party to whom a debt is owed.

General damages Damages that you would naturally expect to occur given the type of harm suffered.

General intent An intention to act without regard to the results of the act.

General jurisdiction A court's power to hear any type of case arising within its geographical area.

General partnership A type of partnership in which all partners have the right to manage the business.

Generative AI Newer AI that can synthesize information and create new content. AI can provide an answer to a research question by summarizing and analyzing results rather than simply giving a list of documents.

Grand jury A group of people, usually 23, whose function is to determine if probable cause exists to believe that a crime has been committed and that the defendant committed it.

Grantor The prior owner.

Guardian A person appointed by the court to manage the affairs or property of a person who is incompetent due to age or some other reason.

Guardian *ad litem* Someone appointed by the court to speak for the interests of a child.

Guilty Convicted of a crime.

Habitual offender statute A statute that mandates required prison sentences for third-time offenders

Hallucinations AI-generated incorrect, misleading, or completely false results; a major ethical concern for legal professionals.

Harmless error A trial court error that is not sufficient to warrant reversing the decision.

Hate crime A crime in which the selection of the victim is based on that person's membership in a protected category, such as race, sex, or sexual orientation.

Hate speech Speech directed at a particular group or classification of people that involves expressions of hate or intimidation.

Headnote A summary of one legal point in a court opinion on some databases; written by the editors of the database in question.

Health care proxy A document in which an individual delegates legal authority to make medical or financial decisions for that person if he or she is too incapacitated to make such decisions; also known as a **durable power of attorney**.

Hearing officer Holds administrative hearings, administers oaths, issues subpoenas, oversees depositions, and holds settlement conferences; also known as an **administrative law judge.**

Hearsay Testimony or evidence introduced in court regarding what someone said out of court for the purpose of establishing the truth of what was said.

Heir Someone entitled to inherit property left by the decedent.

History The prior or subsequent history of the case you are Shepardizing; it is always preceded by a one-letter abbreviation.

Holder Someone who receives negotiable paper through proper delivery.

Holder in due course Someone who gives value in good faith (a subjective standard) and without notice that the instrument is overdue or has been dishonored or has any claims against it or defenses to it (an objective standard).

Holding The new legal principle established by a court opinion. In a case brief, the court's answer to the issue presented to it.

Holographic will A will that was handwritten by the testator, without the witness signatures necessary for a formal will; an informal will.

Home page The first page of a website that has multiple links to other places on the website and to other websites.

Homestead exemption A provision in state or local law that provides homeowners with specified types of protection from creditors or special tax deductions.

Homicide The killing of one human being by another.

Hostile witness A witness who shows bias or hostility toward the party that asked him or her to testify; also known as an **adverse witness**.

Hostile work environment Occurs when unwelcome sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Hourly rate A fee based on how many hours lawyers or paralegals spend on the case. Different hourly rates are often charged for different lawyers and paralegals within the firm, based on their seniority and experience.

Id. A short citation form indicating reference is to the immediately preceding authority.

Immunity For policy reasons, protection from being sued for negligent acts.

Implied warranty of fitness An implied promise that the goods being sold will satisfy a special purpose.

Implied warranty of habitability A requirement that property be fit for the purpose for which it is being rented. Owners are required to repair and maintain the premises at certain minimum levels.

Implied warranty of merchantability An implied promise that the goods being sold will be usable for the purpose for which they were sold.

Implied-in-fact contract A contract formed through conduct.

Inchoate crime An attempted crime.

Incidental beneficiary Someone who the original contracting parties did not explicitly intend to benefit from the contract.

Inculpatory evidence Evidence that suggests the defendant's guilt; the opposite of **exculpatory evidence**.

Independent adoption An adoption that involves a private agreement between the birth parents and the adoptive parents.

Independent clause A clause that contains a subject and a verb and that can stand alone as a sentence.

Independent contractor A person who works for another, but who retains the right to control the manner of producing the end result; not an employee.

Independent paralegal A paralegal working under the supervision of a lawyer in a contractual relationship. Sometimes used to refer to a paralegal providing legal services directly to the public without being under the supervision of a lawyer.

Indictment A grand jury's written accusation that a given individual has committed a crime. *Compare* **Presentment**.

Indorsement in blank When an indorser simply signs his or her name and does not specify to whom the instrument is payable.

Infant In the law, a name sometimes used to mean any minor child.

Inference A conclusion reached based on the facts given.

Inferior courts In the federal system, all courts other than the U.S. Supreme Court.

Informal contract A contract not requiring any particular formalities to be valid.

Information A prosecutor's written accusation that a person has committed a crime.

Infra Below; used to refer to authority cited later in a document. May not be used with citations to cases, statutes, or constitutions.

Initial appearance The first court hearing for a person charged with committing a crime.

Injunction A court order requiring a party to perform a specific act or to cease doing a specific act.

Insanity defense A defense requiring proof that the defendant was not mentally responsible.

Intangible property Personal property that cannot be touched, such as a stock certificate or a patent.

Intellectual property Intangible assets that are created by someone's intellectual activity, such as trade secrets, copyrights, patents, and trade or service marks.

Intended beneficiary A person whom the contractual parties intend to benefit.

Intentional infliction of emotional distress An intentional tort that occurs through an extreme and outrageous act that causes severe emotional distress.

Intentional tort A tort committed by one who intends to do the act that creates the harm.

***Inter vivos* trust** A trust that is created before a person's death.

Interference with a contractual relationship An intentional tort that occurs if someone induces a party to breach a contract or interferes with the performance of a contract.

International Paralegal Management Association (IPMA) A national association of paralegal managers.

Internet A worldwide network of computer networks.

Interrogatories Written questions sent by one side to the opposing side, answered under oath.

Intestate The status of a person's estate when that person died without leaving a valid will.

Intimidation Putting someone in fear, usually of physical harm to themselves or another person they know, to force them to do something or refrain from doing something.

Intoxication defense A defense requiring proof that the defendant was not able to form the requisite *mens rea* to commit a crime due to intoxication.

Intrusion The intentional unjustified encroachment into another person's private activities.

Intrusive phrase A phrase placed between a sentence's subject and verb.

Invasion of privacy An intentional tort that covers a variety of situations, including disclosure, intrusion, appropriation, and false light.

Involuntary manslaughter The unlawful killing of another human being through criminal negligence or recklessness.

IRAC A method for organizing legal writing; stands for "issue, rule, analysis, and conclusion."

Irresistible impulse test A test that provides that the defendant is not guilty due to insanity if, at the time of the crime, the defendant could not control his or her actions.

Irrevocable trust A form of *inter vivos* trust that the grantor cannot alter.

Issue A circumstance when the law is applied to specific facts and the result is not obvious. In a case brief, the rule of law applied to the case's specific facts. In an IRAC analysis, the statement of the client's problem. In probate law, a lineal heir; *see* **Descendants**.

Issue of first impression An issue that the court has never faced before.

Jail A place of confinement in a city or county.

Joint and several liability Liability shared collectively and individually.

Joint legal custody Both parents have an equal say in making major decisions, such as those regarding the education of the child.

Joint liability Shared liability, so that if one party is sued, others must be sued also.

Joint tenancy Ownership by two or more persons who have equal rights in the use of that property. When a joint tenant dies, that person's share passes to the other joint tenant(s).

Joint tenancy with right of survivorship Another term for **joint tenancy**.

Judge A court official who presides over courtroom proceedings and decides all legal questions. In a bench trial the judge also decides the facts.

Judgment The decision of the court regarding the claims of each side. It may be based on a jury's verdict.

Judgment notwithstanding the verdict (J.N.O.V.) A judgment that reverses the verdict of the jury when the verdict had no reasonable factual support or was contrary to law.

Judgment proof When a defendant does not have sufficient money or other assets to pay the judgment.

Judicial activism A judicial philosophy that supports an active role for the judiciary in changing the law.

Judicial history *See* **Procedural facts**.

Judicial notice When a judge formally recognizes something as being a fact without requiring the lawyers to prove it through the introduction of other evidence.

Judicial restraint A judicial philosophy that supports a limited role for the judiciary in changing the law, including deference to the legislative branch.

Judicial review The court's power to review statutes to decide if they conform to the U.S. Constitution.

Jurat A document with content that is sworn to or affirmed to be true by the signer, verbally, before a public official.

Jurisdiction The power of a court to hear particular types of cases or to hear cases within a specific geographic area.

Jurisprudence The study of law and legal philosophy.

Jury trial When a jury decides the facts and determines liability or guilt.

Just compensation The amount of money the government must pay the owner of property it seizes through eminent domain.

Justice of the peace A local public officer with the authority to try minor civil and criminal cases, usually with other limited powers such as to perform marriages.

Juvenile courts Special courts established to deal with juveniles who commit crimes or status offenses, or who are adjudged to be abused or neglected.

Juvenile delinquent A minor, usually under the age of 18, who commits acts that would be considered crimes if committed by adults or who commits status offenses, such as underage drinking or truancy.

Kidnapping An unlawful movement and confinement of the victim.

Kindred Persons related to the decedent by blood; also known as **consanguinity**.

Knowingly Not intending to cause a specific harm, but being aware that such harm would be caused.

Land contract An installment contract for the sale of land.

Landmark decision A court opinion that establishes new law in an important area.

Larceny Another term for **theft**.

Last clear chance The doctrine that states that despite the plaintiff's contributory negligence, the defendant should still be liable if the defendant was the last one in a position to avoid the accident.

Law clerk A law student or a recent law school graduate whose duties usually focus on legal research.

Law office memorandum An unbiased analysis of the client's situation.

Law office platform A platform that provides for information sharing among various interconnected applications, such as case management software, generative AI tools, and office productivity programs (e.g., Microsoft Office).

Law review A journal generally published by a law school editorial board or by a bar association. The articles usually contain in-depth analyses of current legal topics.

Laws Rules of conduct promulgated and enforced by a government, based on policy decisions that determine legal rights and duties between people or between people and the government.

Lawyer A person who has been officially licensed to practice law in a state or federal jurisdiction. Also referred to as an **attorney**.

Lay a foundation The process of providing the qualifications of a witness or properly identifying and authenticating evidence so that it can be introduced.

Lay witness A witness who has not been shown to have any special expertise and is limited to testifying about what was personally observed.

Leading question A question that suggests the answer; generally, leading questions may not be asked during direct examination of a witness.

Lease An agreement in which the property owner gives someone else the right to use that property for a designated period of time.

Leasehold A parcel of real estate held under a lease.

Leasehold estate A right to use real property for a limited period of time.

Legacy *See* **Bequest**.

Legal aid lawyer A lawyer who works for a nonprofit or government-funded program to provide free or low-cost legal services.

Legal aid services *See* **Legal Services Corporation**.

Legal analysis The process of applying the law to a client's facts; also known as **legal reasoning**.

Legal assistant Synonym for **paralegal**; may also refer to other nonlawyers who assist lawyers.

Legal clinic Usually organized as either a partnership or a professional corporation, law clinics provide low-cost legal services on routine matters by stressing low overhead and high volume.

Legal custody In family law, the designated parent or guardian who has authority to make legal decisions for the child relating to such matters as health care and education.

Legal fiction An assumption that something that is not real is real—for example, assuming that a corporation is a person for purposes of its being able to sue and be sued.

Legal formalism A legal theory that views the law as a complete and autonomous system of logically consistent principles within which judges find the correct result by simply making logical deductions.

Legal malpractice The failure of a lawyer to act reasonably.

Legal positivism A legal theory whose proponents believe that the validity of a law is determined by the process through which it was made rather than by the degree to which it reflects natural law principles.

Legal realism A legal philosophy whose proponents think that judges decide cases based on factors other than logic and preexisting rules, such as economic and sociological factors.

Legal reasoning The application of legal rules to a client's specific factual situation; also known as **legal analysis**.

Legal research The process of finding relevant legislation, administrative regulations, court opinions, and constitutional provisions.

Legal scrivener The provider of a typing service.

Legal Services Corporation A federally funded program to deliver legal assistance to the indigent.

Legal Services offices Affiliated with the federal government's Legal Services Corporation, these offices serve those who would otherwise be unable to afford legal assistance. *See also* **Legal aid services.**

Legal technician A nonlawyer who provides legal services directly to the public without being under the supervision of a lawyer; also known as a lay advocate. Absent a statute allowing this activity, it constitutes the unauthorized practice of law.

Legal writing Examples of legal writing include case briefs, law office memoranda, and documents filed with the court.

Legislative courts Courts created under Congress' Article I powers.

Legislative history The background documents created during the process of a bill becoming a statute. These documents can include alternative versions of the legislation, proceedings of committee hearings, committee reports, and transcripts of floor debates.

Legislative history approach A method for interpreting statutes, regulations, and constitutional provisions in which judges attempt to determine what the drafters intended to accomplish by passing the law.

Legislative intent The purpose of the legislature at the time it enacted a statute. In interpreting statutes, the role of the court is to try to discover the intent of the legislature at the time it enacted the statute.

Lessee or tenant The person with right of possession during the term of the lease.

Lesser included offense A crime whose elements are contained within a more serious crime. For instance, theft is a lesser included offense of robbery.

Lessor or landlord The owner of the property being leased.

Lexis An online legal database containing court decisions and statutes from the entire country, as well as secondary authority; such as Am. Jur. 2d and A.L.R.; Lexis +AI, a premium package, includes ProtégéTM, an AI assistant.

Liable A finding in a civil suit that a defendant is responsible.

Libel Written defamation.

Liberal construction An approach whereby the courts give a statute a broad interpretation.

Licensed Paralegal Practitioner (LPP) A paralegal in Utah meeting certain educational requirements, who is permitted to advise and

assist clients in appr oved practice ar eas.

Licensing Go vernmental permission t o engage in a pr of ession.

Life est ate An ownership right to real pr oper ty that lasts only as long as that person, or some other named individual, liv es.

Life tenant A person who has ownership under a lif e estate.

Limited jurisdiction A cour t's power t o hear only specializ ed cases.

Limited liabilit y company (LL C) A fo rm of busi ness ownershi p that giv es s mall businesses the adv antage of liability limited to the amount of the owner 's inv estment along with single taxation.

Limited liability par tnership (LLP) A form of business ownership similar to a general par tnership ex cept the par tners do not ha ve unlimited personal liability for the wr ongful acts of other p ar tners. Unlik e a limited liability company , howe ver, the par tners remain personally liable for other business debts, such as rent and utilities.

Limited par tnership A p ar tnership of at least on e general par tner and one or mor e limited par t ners. The limited par tners' liability is limited to their inv estments so long as the y do not par ticipate in management decisions.

Lineal h eir Someone who is a grandpar ent, par ent, child, grandchild, or gr eat-grandchild of the decedent.

Liquidated damages The result of a pr o vision in a contract that specifies what will happen in case of br each.

Listing agreement A document that spells out the natur e of the ser vices a real estate agent will per form with respect to selling real pr o per ty and how the ag ent will be compensated for those ser vices.

Litigation A lawsuit; a contr oversy t o be settled in a cour t.

Litigation hold A requir ement that routine alteration or destruction of ESI must stop whene ver ther e is a reasonable belief that litigation ma y arise.

Living constitution A ju dicial philosophy that seeks to interpr et the Constitution in light of existing societal values; also called "e v olutionar y" or "living law ."

Living trust A form of *inter viv os* tr ust that allows a person, w hile still living, t o benefit another .

Living will A document expressing a person's end-of-life health care wishes; also known as a **medical directive**.

Long-arm statute A statute that gives state courts jurisdiction over nonresidents who have a sufficient connection with the state.

Loss of consortium The loss by one spouse of the other spouse's companionship, services, or affection.

Magistrate A title sometimes given to a public official exercising limited judicial power.

Magistrate judge A court official who exercises limited judicial powers such as issuing subpoenas, conducting preliminary hearings, and ruling on procedural motions.

Maintenance *See* **Alimony**.

Major premise In deductive reasoning, the statement of a broad proposition that forms the starting point; in law, the statement of a legal rule that you can find in a statute or court opinion.

Majority opinion An opinion in which a majority of the court joins.

Maker On the face of a note, the person who signs, promising to pay.

Malice Making a defamatory remark either knowing the material was false or acting with a "reckless disregard" for whether or not it was true.

Malicious prosecution A lawsuit that can be brought against someone who unsuccessfully and maliciously brought an action without probable cause.

Mandatory authority or decisions Court decisions from a higher court in the same jurisdiction involving similar facts and law.

Marital property Property that is subject to court distribution upon termination of the marriage.

Market share theory A legal theory that allows plaintiffs to recover proportionately from a group of manufacturers when the identity of the specific manufacturer responsible for the harm is unknown.

Marketable title *See* **Clear title**.

Massachusetts Decisions The unofficial reporter published by West covering court decisions from Massachusetts also found in the North Eastern Reporter. The pages containing the court decisions from the other four states reported in the North Eastern Reporter are removed.

Massachusetts Digest A West publication; the digest is a collection of Massachusetts court decision summaries arranged by subject matter.

Massachusetts Digest table of cases An alphabetical listing of court decisions arranged by the plaintiff's last name, giving the citation and relevant topics and key numbers. There is also a defendant-plaintiff table, an alphabetical listing by the defendant's last name.

Massachusetts Practice Series (M.P.S.) A West publication; the Massachusetts equivalent of a legal encyclopedia. Contains cross-references to C.J.S. and Massachusetts Digest topics and key numbers.

Massachusetts Reports The official reporter published by the state of Massachusetts covering Massachusetts Supreme Judicial Court decisions.

Master In law, the name that is sometimes given to an employer.

Material breach A circumstance where there is such a grave failure to fulfill the contractual terms that the other party is relieved of all contractual obligations.

Material fact A fact on which the outcome of the case depends.

Mechanic's lien A claim filed by a contractor or repair person who had done work on a building for which he or she has not been fully paid.

Mediation An ADR mechanism whereby a neutral third party assists the parties in reaching a mutually agreeable, voluntary compromise.

Medical directive *See* **Living will**.

Meet and confer conference In federal court, a mandated conference at which the parties must develop a discovery plan.

Mens rea Criminal intent.

Merchant's firm offer An offer made by a merchant in a signed writing that assures the buyer that the offer will remain open for a specific period of time. It does not require consideration to be binding.

Metadata Information contained in a document that may include the author of the document, the date it was created, and other data

about the document.

Mini-digest A digest located in an adv ance sheet pamphlet or har dbound volume of cour t decisions published by W est. It contains the headnotes for the cases in that single publication.

Minimum contacts A constitutional fairness requir ement that a def endant ha ve at least a cer tain minimum contact with a state befor e the state cour ts can ha ve jurisdiction o ver the def endant.

Minor A child who is under the age of legal competence.

Minor premise In dedu ctiv e reasoning, the second pr oposition, which along with the major pr emise leads to the conclusion; in law , the minor pr emise consists of the client' s facts.

***Miranda* warnings** The requir ement that def endants be notified of their rights to remain silent and to ha ve a lawy er pr esent prior to being questioned b y the police.

Mirror image rule The requir ement that the acceptance exactly mirr or the off er or the acceptance becomes a counter off er.

Misdemeanor A mino r crime not amounting to a felony , usually punishable b y a fine or a jail sentence of less than a y ear .

Misfeasance Acting in an impr oper or a wr ongful wa y.

Mistrial A trial ended by the judge because of a major pr oblem, such as a pr ejudicial statement b y one of the lawy ers.

Mitigation of damages The requir ement that the nonbr eaching par ty tak e r easonable steps t o limit his or her damages.

M'Naghten test A test that pr o vides that the def endant is not guilty due to insanity if, at the time of the crime the def endant suff er ed fr om a def ect or disease of the mind and could not und erstand whether the act was right or wr ong.

Model Code of Professional Responsibility An older set of standar ds go verning lawy er ethics de veloped by the American Bar Association (ABA).

Model P enal Code The Am erican Law Institute 's pr oposal for a uniform set of criminal laws; it is not the law unless adopted by a state 's legislatur e.

Model Rules of Profession al Conduct A set of ethical rules de veloped by the American Bar Association (ABA). The Model

Rules have been adopted in whole or in part by every state and the District of Columbia.

Motion A request made to the court.

Motion for acquittal A request that the court end the trial by finding for the defendant.

Motion for a continuance A request that the court postpone the proceeding to a later time.

Motion for a directed verdict A request that the court find for the moving party because either the plaintiff failed to present a *prima facie* case or the defendant failed to present a necessary defense.

Motion for judgment notwithstanding the verdict A request that the court reverse the jury's verdict when the verdict had no reasonable factual support or was contrary to law.

Motion for a new trial A request that the court order a rehearing of a lawsuit because irregularities, such as errors of the court or jury misconduct, make it probable that an impartial trial did not occur.

Motion *in limine* A request that the court order that certain information not be mentioned in the presence of the jury.

Motion to dismiss In civil litigation, a request that the court dismiss the case based on one of several grounds, including the failure of the plaintiff to state a claim upon which relief can be granted; also known as a **Rule 12(b)(6) motion.**

Motion to require a finding of not guilty A defense request that the court find the prosecution failed to meet its burden and that it remove the case from the jury by finding the defendant not guilty.

Motion to suppress A request that the court prohibit the use of certain evidence at the trial.

NALA: The Paralegal Association A national association of paralegals advancing paralegals through certification and professional development.

Narrow holding A statement of the court's decision that contains many of the case's specific facts, thereby limiting its future applicability to a narrow range of cases.

National Federation of Paralegal Associations (NFPA) A national association of paralegal associations advancing the paralegal profession.

National Reporter System West's system for reporting court decisions from every state and the federal courts.

Native format The format used by the program that created the file, such as Microsoft Word or Microsoft Excel.

Natural law A legal philosophy whose proponents think there are ideal laws that can be discovered through careful thought and humanity's innate sense of right and wrong.

Necessaries Normally food, clothing, shelter, and medical treatment.

Necessity A defense requiring proof that the defendant was forced to take an action to avoid a greater harm.

Negligence The failure to act reasonably under the circumstances.

Negligence *per se* Violation of a statute as proof of negligence.

Negotiable instrument Commercial paper that can be transferred by indorsement or delivery. It must meet the requirements of UCC §3-104 to be negotiable. If it does not, a transferee cannot become a holder, but only gets the rights along with the liabilities of a contract assignee.

New trial A rehearing of a lawsuit granted when irregularities such as errors of the court or jury misconduct make it probable that an impartial trial did not occur.

Next friend A person who represents the interests of someone in court without being that person's legal guardian.

No-fault divorce A form of divorce that allows a couple to end their marital relationship without having to assess blame for the breakup.

No-knock warrant A warrant that allows the police to enter without announcing their presence in advance.

Nolo contendere A defendant's plea meaning that the defendant neither admits nor denies the charges.

Nominal damages A token sum awarded when liability has been found but monetary damages cannot be shown.

Noncompete agreement *See* **Covenant not to compete**.

Nonfeasance Failing to act.

Nonrestrictive phrase A phrase that is not essential to the sense of a sentence; it should be set off with commas.

North Eastern Reporter An unofficial regional reporter published by West covering court decisions from Massachusetts and four other states.

Note A promise to pay money; a two-part instrument in which the maker promises to pay the payee.

Notice Being informed of some act done or about to be done.

Notice pleading A method adopted by the federal rules in which the plaintiff simply informs the defendant of the claim and the general basis for it.

Novation In a contract, when a third party is substituted for one of the original parties.

Nuncupative will An oral will.

Obligee A person owed a contractual benefit.

Obligor A person under a contractual obligation.

Obscenity Sexually explicit material without redeeming artistic, scientific, or political worth.

Offer In contract law, an indication of a firm desire to enter into an agreement that is sufficiently definite that once accepted, a contract is formed.

Official report Governmental publication of court opinions.

On all fours A term used to describe two cases that are almost identical, with similar facts and legal issues.

On point A term used to describe a case that is similar to another case.

Open questions Broad questions that put few limits on the freedom of the respondent.

Option contract A contract in which the buyer gives the seller consideration to keep the offer open for a stated period of time.

Order paper An instrument that is payable to the order of a specific party.

Ordinance A law enacted by a local government; a subcategory of statutory law.

Original jurisdiction The authority of a court to hear a case when it is initiated, as opposed to appellate jurisdiction.

Originalism An approach to constitutional interpretation that narrowly interprets the text of the Constitution in a manner that

attempts to be consistent with what most people understood those words to mean at the time that they were written.

Output contract A contract in which one party agrees to deliver its entire output of a particular product to the other party.

Overbreadth A reason for invalidating a statute where it covers both protected and criminal activity.

Overrule A decision is overruled when a court in a later case changes the law so that its prior decision is no longer good law. *Compare* **Reverse**.

Overt discrimination When an employer openly refuses to treat all applicants or employees equally.

Paralegal A person who assists a lawyer and, working under the lawyer's supervision, does tasks that, absent the paralegal, the lawyer would do. Paralegals cannot give legal advice or appear in court, nor can they set legal fees.

Parallel citation When reference to two or more reporters is required, each citation is known as a parallel citation. For example, 333 Mass. 99 is the parallel citation for 89 N.E.2d 488; the reverse is also true.

Parallel construction Using the same grammatical structure for clauses or phrases that bear the same relationship to some major idea.

Pardon An executive action that cancels a conviction for a crime and the penalty associated with it.

Parental immunity The prohibition against allowing children to sue their parents.

Parenthetical The parenthetical that occurs at the end of a court citation always contains the year of decision and also the name of the court if that information is not obvious from the name of the reporter.

Parol evidence rule An evidentiary rule that a written contract cannot be modified or changed by prior verbal agreements.

Parole Conditional early release from custody.

Partial defense A defense that reduces a crime to a lesser included offense.

Partnership A business run by two or more persons as co-owners.

Partnership by estoppel A partnership created by the words or actions of persons acting as though they were a partnership.

Passive voice A form of writing where the subject of the sentence is being acted on; opposite of **active voice**.

Patent A right to exclude others from making, using, or selling one's invention.

Pattern jury instructions A set of standardized jury instructions.

Penal system The system of jails, prisons, and other places of confinement, as well as the pardon and parole system. Also known as the **correctional system**.

Peremptory challenge A method for excusing a prospective juror in which no reason need be given.

Perfect tender rule The requirement that the goods delivered exactly meet the contractual specifications.

Perfected security interest A creditor's interest in security is perfected if the creditor possesses the security, files a financing statement, or gives money to purchase consumer goods.

Perfection In secured transactions, a process by which the secured party gives notice of an attached security interest, usually by filing a financing statement, thereby giving the secured party priority to the collateral over the claims of other creditors.

Periodic tenancy A tenancy established at a set interval, such as week to week, month to month, or year to year. At the end of each rental period the lease can be terminated with proper notice.

Perjury Knowingly making a false statement while under oath.

Perpetrator A person who commits a crime.

Personal defense In negotiable instrument law, a defense that is good against everyone except a holder in due course. *Compare* **Real defense**.

Personal jurisdiction The power of a court to force a person to appear before it.

Personal property All property that is not **real property**; also referred to as **chattel.**

Personal recognizance bond A defendant's personal promise to appear in court.

Per stirpes A method of dividing an intestate estate whereby a person takes the place of the dead ancestor; also known as the **right of representation**.

Persuasive authority or decisions Court decisions from an equal or a lower court from the same jurisdiction or from a court in a different jurisdiction; also includes secondary authority.

Petitioner or appellant A person who initiates an appeal.

Physical custody The child lives with and has day-to-day activities supervised by the designated parent or guardian.

Physical evidence *See* **Real evidence.**

Piercing the corporate veil When a court sets aside the unlimited liability protection normally given to corporate shareholders.

Pinpoint cite The reference to a particular page within an opinion.

Plain meaning A method for interpreting enacted law in which the key terms are interpreted in light of their dictionary definitions and use in ordinary conversations.

Plain view doctrine A policy that allows police to seize contraband or evidence that is openly visible in an area where they are authorized to be.

Plaintiff A person who initiates a lawsuit.

Plea bargaining A process whereby the prosecutor and the defendant's lawyer agree for the defendant to plead guilty in exchange for the prosecutor's promise to charge him or her with a lesser offense, drop some additional charges, or request a lesser sentence.

Pleading in the alternative Including more than one count in a complaint; the counts do not need to be consistent.

Pleadings The documents that begin a lawsuit;generally, the complaint and the answer.

Pocket part A pamphlet inserted into the back of a book containing information new since the volume was published.

Popular name table Located in most codified statutes, this table lists statutes by their popular names along with their citations.

Portable Document Format (PDF) A format that allows a document to be captured and electronic versions to be sent, viewed, and

printed consis tently acr oss multiple de vices and platforms. F ederal cour ts r equir e all documents t o be filed in PDF format.

P ostconviction relief A statut or y collateral challenge to a judgment of conviction.

P otential conflict A situa tion in which a confl ict of inter est ma y arise in the futur e—for example, r epr esenting business par tners.

P ower of judicial re view A co ur t's power to re view stat utes to decide if the y conform t o the f ederal or state constitution.

P ower o f sale clause A claus e authorizing a priv ate for eclosur e sale that does not r equir e cour t action.

Practice of law An activ ity tha t requir es pr of essional judgment, or the educated ability t o r elate law t o a specific legal pr oblem.

Practitioners' Notes A sectio n of the Bluebook de voted to citation information for the practicing lawy er.

Precedent One or mor e prior cour t decisions.

Preemption The power of the federal go vernment to pr event the states fr om passing conflicting laws, and sometimes even to pr ohibit states fr om passing any laws on a par ticular subject.

Prejudicial erro r A trial cour t err or so serious as to requir e reversal of the trial cour t's decision.

Preliminar y hearing A he aring in which the pr osec ut or must pr esent sufficient evide nce to convince the judge that ther e is pr obable cause to belie ve the named individual committed the crimes for which the def endant is being char ged.

Prenuptial agr eement A document that pr ospectiv e spouses sign prior to marriage regar ding financial and other arrang ements should the marriage end; also known as an **antenuptial agreement**.

Preponderance of the evidence The standar d of pr oof most commonly use d in civil trials. The evidence pr esented must pr o ve that it is mor e lik ely than not that the def endant commit ted the wr ong.

Presentment Acting on its own initiativ e, a grand jur y's char ging a person with a crime. *Compar e* **Indictment**.

Pretrial conference A meeting of the lawy ers and the judge to discuss a case prior t o the beginning of the trial.

Pretrial motion A motion brought before the beginning of a trial either to eliminate the necessity for a trial or to limit the information that can be presented at the trial.

***Prima facie* case** What the prosecutor or the plaintiff must be able to prove in order for the case to go to the jury—that is, the elements of the prosecution's case or the plaintiff's cause of action.

Primary authority The law itself, such as statutes and court opinions.

Principal In criminal law, the person who actually commits a criminal act. In agency law, a person who permits or directs another person to act on the principal's behalf.

Prior case history Information about what happened procedurally to the cited case before it was heard by the cited court. Do not include this information in a citation.

Prisons Places of confinement for those convicted of the more serious crimes.

Privilege log A list of factors relevant to determining if evidence in documents and other materials is covered by attorney-client privilege.

Privity of contract The relationship that exists between the contracting parties.

Probable cause Not susceptible to a precise definition; a belief based on specific facts that a crime has been or is about to be committed; more than a reasonable suspicion.

Probate The legal process settling an estate after a person has died.

Probation An alternative sentence to incarceration that releases the defendant upon agreeing to certain conditions.

Probation officer A government employee who administers the probation system.

***Pro bono* legal services** Free legal services provided to those who cannot pay.

***Pro bono* work** Legal representation done without charge.

Procedural facts In a case brief, the facts that relate to what happened procedurally in the lower courts or administrative agencies before the case reached the court issuing the opinion,

and how the appellate court disposed of the case. Examples include reversed (*rev'd*) and affirmed (*aff'd*).

Procedural law Law that regulates how the legal system operates.

Process server A person authorized by law to serve legal papers on defendants.

Product misuse When the product was not being used for its intended purpose or was being used in a dangerous manner; it is a defense to a products liability claim, so long as the misuse was not foreseeable.

Products liability The theory holding manufacturers and sellers liable for defective products when the defects make the products unreasonably dangerous.

Professional corporation A professional entity in which the stockholders share in the organization's profits but have their liability limited to the amount of their investment.

Professional judgment The educated ability to apply law to specific facts.

Promissory estoppel Occurs when the courts allow detrimental reliance to substitute for consideration.

Pronoun A word that substitutes for a noun: examples include *hers*, *her*, *his*, *him*, *its*, *them*, *their*, and *theirs*.

Property A tangible object or a right or ownership interest.

Property law Law dealing with ownership and use of property, both real and personal.

Pro se Representing oneself in a legal matter.

Prosecuting attorney The lawyer responsible for presenting the state's evidence against the defendant; called "U.S. attorneys" on the federal level and **district attorneys** or **state's attorneys** on the state level.

Prosecutor A person representing the government who brings criminal charges and presents cases for criminal trial.

Prostitution Participating in sexual activity for a fee.

Protected categories Under Title VII, race, color, religion, sex, and national origin.

Protection order A court order issued in domestic violence and abuse cases to keep one spouse away from the other, the

childr en, or the home.

Pro ving a case within a case The requir ement in a legal malpractice case th at the plaintiff-clien t pr o v e that but for the lawy er's negligence, the client would ha v e won.

Pro ximate cau se Once ac tual ca use is found, a s a policy matter , the cour t m ust als o find that the act and the resulting harm wer e so for eseeably r elated as t o justify a finding of liability .

Public defender A la wy er emplo yed b y the state to repr esent indigent def endants.

Punitiv e damages Mone y awar ded to a plaintiff in cases of intentional tor ts to punish the def endant and ser v e as a warning to others.

Purchase mon ey security interest Arises when a seller giv es cr edit to a debt or so that the debt or can pur chase an item.

Purposeful Intending t o cause a specific harm.

Qualified individual Under the Americans with Disabilities Act (AD A), someone who can per form the essential job functions.

Quasi-contract A sc enario in w hich ther e is no agr eement, but both par ties tr eat it as though one existed. Although no actual contract was for med, the cour ts will fashion an equitable remedy to a v oid unjust enrichment.

Question of fact A quest ion relating to what h appened: who, what, when, wher e, and how . Dispu ted factual issues ar e normally for the jur y or trial cour t t o decide and cannot be appealed.

Question of law A ques tion relating to the application or interpr etation of the law . Disputed legal issues ar e initially for the trial cour t t o decide but can be appealed.

Question presented In a law office memorandum, the question pr esented state s the legal issue raised b y the facts of the pr oblem in as concr ete a fashion as possible.

Quid pro quo s exual harassment A situation inv olving an ex change of sexual fa v ors for emplo yment benefits.

Quiet e njo yment The ten ant' s right to be fr ee fr om inter fer ence fr om the landlor d with r espect t o how the pr oper ty is used.

Quitclaim deed A deed in which the grant or giv es up any claims to the pr oper ty without making any asser tions about ther e being a

clear title.

Ratio decidendi The court's reasoning for its decision.

Real defense In negotiable instrument law, a defense inherent in the instrument itself, such as forgery. *Compare* **Personal defense**.

Real estate *See* **Real property.**

Real estate closing A meeting at which the buyer and the seller and/or their representatives sign and deliver a variety of legal documents to finalize the sale and transfer of property.

Real evidence Any tangible object, like a bloody glove or a shell casing; also referred to as **physical evidence**.

Real property Land and items growing on or permanently attached to that land; also known as **real estate**.

Reasonable accommodation Under the Americans with Disabilities Act, an accommodation that would not create an undue hardship for the employer.

Reasonable suspicion A suspicion based on specific facts; less than probable cause.

Receiving stolen property Knowingly possessing stolen property.

Recidivist A repeat offender; one who continues to commit more crimes.

Recklessness Disregarding a substantial and unjustifiable risk that harm will result.

Reformation An equitable remedy whereby the court rewrites a contract.

Registered agent The person designated to receive service of legal documents.

Registration The process by which individuals or organizations have their names placed on an official list kept by some private organization or governmental agency.

Regulation A law promulgated by an administrative agency.

Relevancy Determined by whether the evidence leads one to logically conclude that an asserted fact is either more or less probable.

Remand When an appellate court sends a case back to the trial court for a new trial or other action.

Remedial statute A statute enacted to correct a defect in prior law or to provide a remedy where none existed.

Removal The transfer of a case from one state court to another, or from state court to federal court.

Reporters Books that contain court decisions. There are both official and unofficial reporters.

Reprieve An executive action that temporarily postpones the punishment until some future time when another authority can review the sentence.

Reprimand or censure A public or private statement that a lawyer's conduct violated the code of ethics.

Request for admissions A document that lists statements regarding specific items for the other party to admit or deny.

Request for documents A discovery tool whereby one party asks for documents in the other party's possession or control.

Requirements contract A contract in which one party agrees to buy all its requirements for a particular product from the other party.

Res ipsa loquitur "The thing speaks for itself"; the doctrine that suggests negligence can be presumed if an event happens that would not ordinarily happen unless someone was negligent.

Res judicata Occurs when a civil case has a final judgment and is no longer subject to appeal; at that point, the case cannot be relitigated between the original parties.

Rescission The act of canceling the contract and returning the parties to the positions they were in prior to the contract having been formed.

Respondeat superior The tort theory that an employer can be sued for the negligent acts of its employees.

Respondent or appellee The party in a lawsuit against whom an appeal has been filed.

Restatement of the Law of Torts, Second An authoritative secondary source, written by a group of legal scholars, summarizing the existing common law, as well as suggesting what the law should be.

Restatements A series of books—the Restatements of the Law—summarizing the basic principles of the common law, written by

the American Law Institute (ALI).

Restitution Repaying the victim for harm caused.

Restrictive covenant A provision in a deed that prohibits specified uses of the property.

Restrictive phrase A phrase that contains essential information; it should not be set off with commas.

Retainer An advance or down payment that is given to engage the services of a lawyer.

Retainer agreement A contract that outlines the lawyer's duties and the client's obligations regarding payment, on either an hourly or a contingency fee basis, as well as the client's responsibility regarding costs and expenses.

Retreat exception The rule that to claim self-defense, there must have been no possibility of retreat.

Reversal When an appellate court reverses a lower court decision.

Reverse A decision is reversed when the litigants appeal a lower court decision and the higher court disagrees with the decision of the lower court. *Compare* **Overrule**.

Reversible error An error made by the trial judge that is sufficiently serious to warrant reversing the trial court's decision.

Revocable trust A form of *inter vivos* trust that the grantor can alter.

RICO The federal Racketeer Influenced and Corrupt Organizations Act.

Right of representation *See* ***Per stirpes***.

Road map paragraph An introductory paragraph listing issues to be discussed in the order in which they are to be discussed.

Robbery Theft through the use of force.

Rule In a case brief, the general legal principle in existence before the case began.

Rule 8 The rule of civil procedure that sets forth the general pleading requirements.

Rule 11 A requirement that lawyers sign a pleading only after conducting a reasonable inquiry into the circumstances supporting it.

Rule 12(b)(6) motion A request that the court find the plaintiff has failed to state a valid claim and dismiss the complaint; also known

as a **motion to dismiss** .

Rule 56 motion (summary judgment motion) A request that the court grant judgment in favor of the moving party because there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. It is similar to a **Rule 12(b)(6) motion** except that the court also considers matters outside the pleadings.

Rulemaking hearing An administrative agency hearing that resembles a legislative hearing in which interested parties present evidence and arguments to an administrative agency about what the general law should be.

Rules of criminal procedure Federal and state rules that regulate how criminal proceedings are conducted.

Rules of evidence Federal and state rules that govern the admissibility of evidence in court.

Run-on sentence Two sentences written as one. It can occur either as a comma splice (two independent clauses joined by a comma) or as a fused sentence (two independent clauses with no separating punctuation).

Screen *See* **Ethical wall** .

Search engine A computer program that allows the user to retrieve web documents that match the keywords entered by the searcher.

Search warrant A court's prior permission for the police to search for and seize property.

Secondary authority Information about the law, such as that contained in encyclopedias and law review articles.

Secured transaction An arrangement whereby a creditor asks for and receives a guarantee of repayment from the debtor in the form of collateral.

Security agreement An agreement granting a creditor a security interest in specific property.

Security deposit An amount of money, usually equal to one month's rent, that is collected at the time the lease is signed and then a portion or all of it may be held by the landlord to cover the cost of repairs that may be needed when the tenant moves out.

Security interest A security interest is created when a debt or agrees to put up something as collateral that the creditor can then claim if the debtor fails to pay the debt.

Self-defense The justified use of force to protect oneself or others.

Self-proving clause A notarized affidavit, signed by the attesting witnesses, that may eliminate the need to call witnesses during the probate process to attest to the validity of the will.

Sentence fragment An incomplete sentence.

Sentencing hearing A hearing held after a finding of guilt to determine the appropriate sentence.

Separation of powers The division of governmental power among the legislative, executive, and judicial branches.

Serial comma In a series of three or more items, use a comma after each item until your each the final conjunction.

Servant In law, an archaic term sometimes used to mean employee.

Service The delivery of a **pleading**, **subpoena**, or other paper in a lawsuit to another party.

Service mark A mark used to identify a service-oriented business.

Service of process *See* **Service**.

Session law A statute that is enacted and published for a particular session of the legislature.

Settlement The resolution of a dispute between parties independent of the rendering of a final decision by a trial or appellate court.

Settlement agreement A document that contains the arrangements agreed on by the parties to a dispute.

Settlor *See* **Donor**.

Shadow docket Emergency applications from trial courts to the U.S. Supreme Court that are decided without oral argument, are unsigned, and are unexplained.

Shareholders The owners of a corporation.

Shepardize Using Shepard's Citations to check a court citation to see whether there has been any subsequent history or treatment by other court decisions.

Shepard's Citations A book that contains nothing but citations. It serves three purposes: (1) as a source for parallel citations; (2) as a source for subsequent history for a case or statute; and (3) as a

sour ce for tr eatment by later cour ts of the case or statute you ar e Shepar dizing.

Shor t citation form A par tial citation that ma y be used after you ha ve giv en a complete citation.

Signal A wor d or a ph rase that pr ecedes a citation to indicate the purpose for which the citation is being giv en.

Simultaneous death clause A clause that states that if a person named as a b eneficiar y in the will dies within a shor t pe riod of time after the decedent dies , it will be assumed for purposes of the will that the person in question failed t o sur viv e the decedent.

Slander Spok en defamation.

Slip laws A form in which statutes ar e published; the y ar e printed individually at the time the y ar e first enacted.

Softbound supplement A book containing new information since the original volume was publi shed, usually shelv ed along with the main v olume.

Sole custody An individual has both physic al and legal cust ody of the child.

Sole proprietorship A business owned b y a single owner .

Solemniz ed m arriage A m arriage in w hich the couple has obtained the pr oper marriage license fr om a local go vernment official and has then tak en marriage vows befor e either a recogniz ed member of the cler gy or a judge and a designated number of witnesses.

Solicitation In criminal law , encouraging someone to commit a crime. In a law office settin g, initiating communication with a potential client in or der to off er the legal ser vices of a la wy er or law firm.

So vereign imm unity The pr ohibition against suing the go vernment without the go vernment' s consent.

Special damages Indir ect damages that must be for eseeable to be reco ver ed. Also called **consequential damages.**

Specific intent An intention t o act and t o cause a specific r esult.

Specific per fo rmance When mone y damages ar e inadequate, a cour t ma y use this equitable remedy and or der the br eaching par ty t o per form his or her contractual obligations.

Split custody One parent has both physical and legal custody during one part of the year, and the other parent gets both physical and legal custody during the rest of the year.

Spoliation The destruction or alteration of documents relevant to a case.

Spousal immunity The prohibition against one spouse suing the other.

Stalking An intentional or knowing course of conduct that places a person in fear of imminent physical injury or death to that person or that person's family.

Standing The principle that courts cannot decide abstract issues or render advisory opinions; rather, they are limited to deciding cases that involve litigants who are personally affected by the court's decision.

Stand-your-ground laws Statutes that allow citizens to use deadly force without attempting to retreat, even when they are threatened outside their homes.

Stare decisis The doctrine stating that normally once a court has decided one way on a particular issue, it and other courts in the same jurisdiction will decide the same way on that issue in future cases given a similar set of facts unless they can be convinced of the need for change.

State action requirement A requirement that a defendant cannot be charged with a violation of constitutional rights unless the defendant was acting as an agent of a governmental entity

State's attorney A law officer who represents the state in criminal cases. Also known as a **district attorney**.

Statute A law enacted by a state legislature or by Congress.

Statute in derogation of the common law A statute that changes the common law.

Statute of frauds A statutory requirement that to be enforceable, certain contracts must be in writing.

Statute of limitations The law that sets the length of time from when something happens to when a lawsuit must be filed before the right to bring it is lost.

Statutes at large or session laws The chronological publication of statutes at the end of a legislative session.

Statutory element A separable part of a statute that must be satisfied for the statute to apply.

Stay the judgment A suspension of the judgment. It is often requested when the trial court judgment is being appealed.

Stipulate To agree.

Stop and frisk The right of the police to detain an individual for a brief period of time and to search the outside of the person's clothing if the police have a reasonable suspicion that the individual has committed or is about to commit a crime.

Strict construction An approach whereby the courts give a statute a narrow interpretation.

Strict liability Liability without having to prove fault.

Strict scrutiny The standard the courts use in equal protection claims involving race-based decisions or "fundamental rights." The government must prove that the challenged action is designed to achieve a compelling government interest and that there is no reasonable alternative method for achieving it.

String citation A series of citations in a row.

Structured database A computerized database that contains key information about the content of documents, such as medical records.

Subject matter jurisdiction The power of a court to hear a particular type of case.

Subordinating conjunction Dependent clauses always begin with subordinating conjunctions; examples include *after*, *although*, *as*, *because*, *before*, *even though*, *if*, *since*, *unless*, *when*, *where*, *whereas*, and *while*.

Subpoena A court order requiring a person to appear to testify at a trial or deposition. (Administrative agencies also usually have subpoena powers.)

Subpoena *duces tecum* A court order that a person who is not a party to litigation appear at a trial or deposition and bring requested documents.

Subsequent case history Information about what happened procedurally to the litigation after the case cited. Include this information in a citation.

Substantial capacity test Part of the Model Penal Code; a test that provides that the defendant is not guilty due to insanity if, at the time of the crime, the defendant lacked either the ability to understand that the act was wrong or the ability to control the behavior.

Substantial performance Although a breach of contract, performance of all the essential terms of the contract will entitle the breaching party to the contractual price minus any damages caused by the breach.

Substantive facts In a case brief, facts that deal with what happened to the parties before the litigation began.

Substantive law Law that creates rights and duties.

Successive conflict of interest Representing someone who is in a position adverse to a prior client.

Suicide The deliberate termination of one's own life.

Summary judgment A judgment based on a finding that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment motion A request that the court grant judgment in favor of the moving party because there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. It is similar to a **Rule 12(b)(6) motion** except that the court also considers matters outside the pleadings. Also called a **Rule 56 motion.**

Summary jury trial A nonbinding process in which lawyers for both sides present synopses of their cases to a jury, which renders an advisory opinion on the basis of these presentations.

Summons A notice informing the defendant of the lawsuit and requiring the defendant to respond or risk losing the suit.

Superseding cause In negligence, an intervening cause that relieves the defendant of liability.

Support *See* **Alimony**.

Supra Above; used to refer to authority already cited in the document. May not be used with citations to cases, statutes, or constitutions.

Supremacy Clause A clause in the U.S. Constitution that dictates if there is a conflict between federal law and state law, federal law takes precedence.

Supreme Court Reporter A West publication containing U.S. Supreme Court decisions.

Surrogacy contract A document in which a woman agrees to conceive and give birth to a child, deliver the child to its natural father, and terminate her parental rights so the father's wife can become its adoptive mother.

Suspension A determination that a lawyer may not practice law for a set period of time.

Syllabus A summary of a court opinion that appears at the beginning of the case.

Synthesis The process of integrating a series of cases in such a way that their interrelationship is explained to the reader.

Tabulation A method for writing lists.

Tangible personal property Also known as **chattel**; personal property that can be touched and moved.

Temporary restraining order (TRO) A court order of limited duration designed to maintain the status quo pending further court action at a later date.

Tenancy at sufferance A situation in which the person in possession of the land has no legal right to be there.

Tenancy at will An arrangement in which no time period is specified and the lessee can leave or the lessor can reclaim the land at any time.

Tenancy by the entirety A special type of joint tenancy applicable only to married couples.

Tenancy for a term or estate for years A right to control real property for a set period of time.

Tenancy in common Ownership by two or more people. Ownership shares do not have to be equal, but each has an undivided interest

in the property. When a tenant in common dies, that person's share passes either by will or by intestate statute.

Testamentary capacity The mental capacity, also known as sound mind, whereby the testator understands the nature of his or her property and the identity of those most closely related to him or her.

Testamentary trust A trust that is created by a will and does not become effective until after the testator's death.

Testator/testatrix The person making a will to direct how his or her assets will be distributed at death.

Testimonial evidence Consists of the description of events that a witness testifies to under oath in a legal proceeding.

That case A case that you are citing.

Theft Also known as **larceny**; the taking of another's property with the intent to permanently deprive the owner.

Third party Someone who is not a party to the agreement or transaction.

Third-party beneficiary Although not a party to the contract, someone the contracting parties intended to benefit.

Third-party claim A claim by a defendant against someone in addition to the persons the plaintiff has already sued.

This case Your client's case.

Tickler system A calendaring system that records key dates and important deadlines.

Title insurance Insurance against any loss due to a defective title.

Title search An examination of documents recording title to a property to ensure that the owner has clear title to the property.

Tort Harm to a person or a person's property.

Tort law Law that deals with harm to a person or a person's property.

Tortfeasor A person who commits a tort.

Trademark A name, combination of letters or numbers, or logo that identifies a particular product.

Trade secret A formula or process that has not been patented and is known by a limited number of individuals working for the company that uses it.

Transferred intent A legal fiction that if a person directs a tortious action toward A but instead harms B, the intent to act against A is transferred to B.

Transition In writing, a technique used to help your reader move from one thought to the next and to see the connections between them.

Treason Attempting to overthrow the government or betraying the government to an enemy of the United States, traditionally defined as a country or organization with which the United States is at war.

Treatise A book that summarizes, interprets, and evaluates the law.

Treatment How subsequent cases have affected the case you are Shepardizing. It is sometimes indicated by a one-letter abbreviation before the Shepard's citation.

Trespass The unauthorized intrusion onto the land of another. Also known as trespass to land.

Trespass to personal property Occurs when someone harms or interferes with the owner's exclusive possession of the property but has no intention of keeping the property.

Trial The process of deciding a dispute by presenting evidence and witness testimony either to a jury or to a judge.

Trial courts Courts that determine the facts and apply the law to the facts.

Trust A legal relationship in which one party holds property for the benefit of another.

Trustee The person appointed to administer a trust.

Ultrahazardous activities Those activities that have an inherent risk of injury and therefore may result in strict liability.

Unauthorized practice of law (UPL) When nonlawyers do things that only lawyers are allowed to do. In most states, this is a crime.

Unconscionable contract A contract formed between parties of very unequal bargaining power where the terms are so unfair as to "shock the conscience."

Undue influence When one party is in a position of trust and misuses that trust to influence the actions of another.

Unenforceable contract A valid contract that cannot be enforced, for example, because the statute of limitations has passed.

Uniform Commercial Code (UCC) Originally drafted by the National Conference of Commissioners on Uniform State Law, it governs commercial transactions and has been adopted by all states entirely or in part.

Uniform Partnership Act (UPA) Known as a gap filler, the UPA comes into play only if terms are left out of a partnership agreement.

Unilateral contract A contract where a promise is exchanged for an act.

United States Code (U.S.C.) Federal statutes arranged by subject matter.

United States Code Annotated (U.S.C.A.) Federal statutes arranged by subject matter, published by West.

United States Code Service (U.S.C.S.) Federal statutes arranged by subject matter, published by Lexis Law Publishing.

United States Law Week A publication of U.S. Supreme Court decisions by the Bureau of National Affairs (BNA).

United States Reports The official federal government publication of U.S. Supreme Court decisions.

United States Sentencing Guidelines Government guidelines that specify an appropriate range of sentences for each class of convicted persons based on factors related to the offense and the offender.

United States Supreme Court Reports, Lawyers' Edition A listing of U.S. Supreme Court decisions published by Lexis Law Publishing.

Unlawful detainer A civil action brought to recover use of property.

Unofficial reporter A private publication of court opinions; examples include the regional reporters, such as N.E.2d, published by West.

U.S. Constitution Drafted in 1787, it established the structure of the federal government and the relationship between the federal and state governments.

U.S. courts of appeals The intermediate appellate courts in the federal system.

U.S. district courts The general jurisdiction trial courts in the federal system.

U.S. Supreme Court The highest appellate court in the federal system; consists of nine appointed members; established by Article III of the U.S. Constitution.

Valid In logic, an argument is considered to be valid or sound if the assumptions underlying the argument are true.

Valid contract A contract having all the essential elements needed for a binding agreement.

Venue When the court with the power to hear the case has multiple locations, the proper location for the case to be filed and heard.

Verdict The opinion of a jury on a question of fact.

Verification An affidavit signed by the client indicating that he or she has read the complaint and that its contents are correct.

Vicarious representation The rule whereby all members of a law firm are treated as though they had represented the former client, even if only one lawyer did.

Victim impact statement A written or oral statement made by the victim of the crime (or the family members of a deceased victim) that is presented at the sentencing hearing.

vLex An online legal database (branded as vLex Fastcase to bar associations) containing court decisions and statutes from the entire country, as well as secondary authority; the premium package includes Vincent AI, an AI research assistant, to analyze data or documents.

Void A contract that is invalid even if it is not repudiated by either party. In law, if an action is void, it has no legal effect.

Void for vagueness A reason for invalidating a statute when a reasonable person could not determine a statute's meaning.

Void marriage A marriage that is invalid from its inception and that does not require court action for the parties to be free of any marital obligations.

Voidable A valid contract that can be set aside at the option of one of the parties. In law, if an action is voidable, it can be disaffirmed by one of the parties.

Voidable marriage A marriage that was valid when it was entered into and that remains valid until either party obtains a court order dissolving it.

Voir dire An examination of a prospective juror to see if he or she is fit to serve as a juror.

Voluntary manslaughter The unlawful killing of another human being with malice.

Warrant A court's prior permission for the police to search and seize.

Warranty A guarantee, made by the seller or implied by law, regarding the character, quality, or title of the goods being sold.

Warranty deed A deed in which the seller promises clear title to the property.

Web browser A computer program that allows users to access and search the web with a few clicks of a mouse.

West Group A major private publisher of legal materials; its logo is the key symbol.

Westlaw An online legal database containing court decisions and statutes from the entire country, as well as secondary authority; and KeyCite, similar in function to LexisNexis Shepard's online; Westlaw Precision with CoCounsel, a premium package, is also available and includes AI assistance.

Will The document used to express a person's wishes as to how his or her property should be distributed upon death.

Writ A judge's order requiring that something be done.

Writ of *certiorari* A means of gaining appellate review; in the U.S. Supreme Court the writ is discretionary and will be issued to another court to review a federal question if four of the nine justices vote to hear the case.

Writ of execution A court order authorizing a sheriff to take property to enforce a judgment.

Writ of *habeas corpus* A court order to produce the person detained; designed to give a neutral judge an opportunity to review the charges, to ensure there is a lawful basis for the incarceration.

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