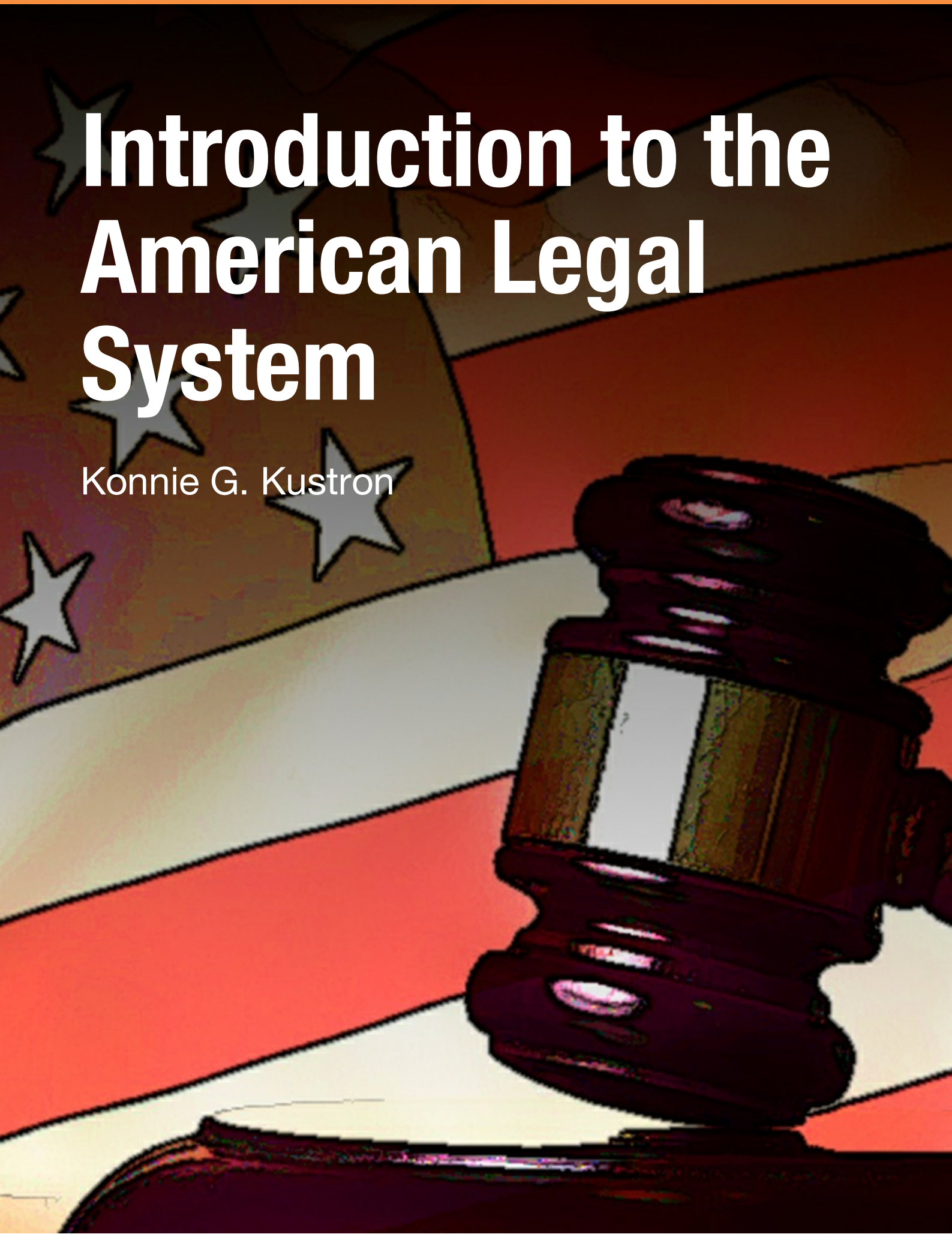
Introduction to the American Legal System

Konnie G. Kustron



bookboon
The eBook company

Konnie G. Kustron

Introduction to the American Legal System

Introduction to the American Legal System
1st edition

ISBN 978-87-403-0554-8

Contents

Note: Court cases, illustrations, and photographs used in this book have been taken primarily from United States federal government websites. They are public documents belonging to the United States government (17 U.S.C. § 105), and as such, are not subject to U.S. copyright protection. Included documents are available at various websites including https://public.resource.org. Other documents have been included for educational purposes and discussion.

Images designated as "used with permission" are owned by the author.

Any errors or omissions are the sole responsibility of the author.

About the Author

Konnie Kustron is an attorney-educator. She is currently a professor in Paralegal Studies Program at Eastern Michigan University in Ypsilanti, Michigan.

Professor Kustron received her B.S. with honors in pre-law from Michigan State University, and her J.D. from the Michigan State University, College of Law. She is a member of the Michigan Bar and approved as a Veteran's Affairs attorney with United States Department of Veteran's Affairs. Professor Kustron is the recipient of an Eastern Michigan University Alumni Teaching Award as well as the Dean's Outstanding Faculty Award. Recently, she has been a contributor to the *Encyclopedia of Mathematics and Society* (Salem Press, 2011), which was described as the "Best Reference 2011," by the *Library Journal* – a leading reviewer of library materials in the United States. Professor Kustron is also a chapter author in the *Internet Guide for Michigan Lawyers*, a winner of the "Award of Excellence in the Best Publication" category awarded by the Association for Continuing Legal Education.

About the Contributing Reviewer

Christopher Bezak is an attorney specializing in intellectual property law in Washington, D.C. Mr. Bezak received his B.S. with honors in Computer Engineering from the University of Michigan, Ann Arbor, and his J.D. with honors from the Michigan State University, College of Law.

1 Background of U.S. Law in the United States

Objectives

After completing this chapter, the student should be able to:

- Discuss and define the importance of studying the law;
- Identify the historical sources that support the foundations of U.S. law;
- Explain how the Declaration of Independence, the Constitution, and the Bill of Rights apply to modern U.S. law; and
- Identify the importance and significance of the Bill of Rights to those living in the United States.

1.1 Why Study the Law?

As you read this book, you might ask yourself, "Why should I study the law?" The answer is simple. The law is a part of everything you do from the day you are born. The law regulates what information goes on your birth certificate, when you are required to attend school, when you can drive a car, and when you can vote. On the other hand, it also gives you freedoms and rights that people in other countries may not have. Some of these include the right to criticize your government and the right to be presumed innocent if you are accused of a crime.

The law affects your life every day in many aspects. For example, the next time you are stopped at a traffic light, look at the area around you. There might be video cameras at that stop light. Is this an invasion of your privacy? It is the law that regulates those cameras. Perhaps you have a cell phone with you right now. Did you know your movements can be tracked using your cell phone? How and when your cell phone can track your movements is also regulated by the law. Or, maybe you purchased something today from a vendor with a debit or credit card? The law regulates the electronic transfer of your funds to the vendor. These types of activities were not envisioned by those who wrote the U.S. Constitution, but as you will learn, the law is a large part of your daily life and has deep roots in American history.

1.2 What is a Law? What is a Legal System?

As you begin your study of the law, you want to understand what a **law** is and its relationship to a **legal system**. A law is a set of rules that guides the behavior of a society. It is something that must be obeyed. When those rules are broken, rule breakers are punished with penalties. On the other hand, a legal system is an *organization* of social and government control that creates and regulates order in a society through laws. It is this organization that regulates the system of rules and regulations designed to encourage good behavior and to deter negative conduct.

A legal system also includes rule making bodies (such as legislatures) that make laws and tribunals (such as courts) that review and decide legal disputes. These rule making bodies are a part of a government, which is responsible for defining laws and regulating its legal system.

There are many types of legal systems. They differ from state to state, and from country to country. The legal system in the United States has deep roots in English law, as the United States was originally a British colony. As a colony, the United States was under the legal control of the British government and subject to the English legal system known as **common law.** Common law is a legal system based on fairness, custom, and common sense. Historically, judges appointed by the King of England would travel throughout the country and apply the concepts of common law to resolve disputes. Their decisions were the basis for a legal concept called **stare decisis**, which means that judges decided "similarly situated disputes based on previously settled disputes." A decision of a previously settled dispute is known as **precedent**, which forms the basis for resolving new, but similar disputes. As such, when the first settlers came to the United States from England, they brought their legal system with them.

Besides the United Kingdom (Great Britain, Northern Ireland, Scotland, and Wales), other countries that follow common law traditions include Canada, Australia, New Zealand, Hong Kong, Malaysia, and most parts of India, which were also former British colonies.

Another unique characteristic of common law is the concept of **equity**. Equity is used by judges whenever the law does not provide an adequate remedy for a dispute. In these situations, judges will use their equitable powers to make a decision to "do the right thing" in the eyes of the law. In early courts, there would be a separate court tribunal called a Court of Chancery to make decisions based on equity. In most states today, those distinctions no longer exist and courts of law have equitable powers also. In modern day courts, equitable remedies would include legal resolutions such as **injunctions** or **specific performance**. An injunction is a court order to prevent a party from performing an action that would cause "irreparable harm" to an aggrieved party if the party is not stopped from performing the action. Injunctions can also force a party to perform an act if the court feels forcing the party to perform the action is essential to justice. **Specific performance** is a court order that forces a party to complete a contract. It is a remedy often used in breach of contract disputes when a party refuses to follow the requirements of a contract, such as transferring real estate.

Many countries follow a different type of legal process called **civil law** or a civil code system. Legal disputes in civil law countries are resolved by applying a series of laws called statutes or codes that have been passed by a legislative body. Judges in civil law countries administer the laws rather than interpret the laws. This is a more rigid legal process than common law, which tries to be flexible based on the facts presented in a dispute, and that makes decisions on interpreting laws through court decisions and precedent.

There are also countries governed in whole or part by **religious law**, which applies to individuals in both their private and public lives. The majority of countries that follow this type of legal system obey Islamic law (Sharia). Other countries follow a process called **totalitarian law**, which rejects the rights of the individual in favor of an autocratic government, such as a dictatorship.

1.3 The Development of Legal Authority in the United States

From the time early explorers crossed the boundaries into what is now the United States, there have always been instances of people seeking justice for wrongs or resolution for accusations made against them. This was no different in early America, so in 1774 the colonists met in Philadelphia and created the First Continental Congress where justice started its formalization process.

This Congress was formed in response to a variety of laws imposed by the British, often called the "Intolerable Acts." These laws from the British government restricted many freedoms of the colonists. For example, the colonies were required to use special paper imported from England on all printed materials. These materials were also embossed with the British "stamp tax." The colonies were angry with this requirement and, with the exception of Georgia, responded by refusing to import British goods. The British, displeased with the American rebellion, subsequently invaded the American colonies.

Who Were the Original 13?

The original 13 colonies in the United States included Massachusetts, New Hampshire, Delaware, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

A Second Continental Congress was convened in 1775, as the British troops were invading the American colonies. This Congress approved the creation of a Continental Army to fight against the British. On July 4, 1776 the Second Continental Congress approved the Declaration of Independence, signaling America's break from British control. The final version of the Declaration was ultimately signed by 56 individuals on August 2, 1776.

1.4 The Declaration of Independence

Many of you know already know the signing of the **Declaration of Independence** was a pivotal event in the history of the United States. It was in this document that the colonies declared their independence from England. The well-known orator, Thomas Jefferson was the primary author of the Declaration of Independence. This document outlined the grievances the colonists had again the King of England, which justified the dissolution of the relationship between the U.S. colonies and the British Empire.

Figure 1.1 – Declaration of Independence.
Source: United States National Archives and Records Administration

1.5 The Constitution of the United States

Because of the Declaration of Independence and the colonies' break from British governmental control, the **Constitution** of the United States was created to replace the British legal system. Although the Constitution was created 11 years after the signing of the Declaration of Independence, the Constitution embodied a government with freedoms envisioned by the drafters. Their dreams included the creation of three separate branches of government: **legislative, executive, and judicial**. Each branch would possess the ability to moderate an aspect of the government, so one branch of the government would never possess complete control over the lives of American citizens.

The Constitution is now the basic building block of the United States legal system, and applies to all citizens of the United States. The Constitution is divided into 7 sections called **Articles**. Each Article is broken down into subsections called **Clauses**.

The Constitution begins with the familiar phrase (called the Preamble) that says:

> "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, 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."

Since its inception, 27 **Amendments** have been added to the Constitution. The first ten Amendments are known as the **Bill of Rights**. They were proposed by James Madison who eventually became the fourth President of the United States.

Amendments are changes or additions to the U.S. Constitution. These changes can occur in two different ways. First, an Amendment can be added if two-thirds of both the U.S. House of Representatives and Senate approve the change. Then, three-fourths of legislatures of the 50 states must vote to approve the Amendment. The second way to amend the Constitution is if two-thirds of the States petition Congress, which must then approve the petition by a two-thirds majority. One example of constitutional change was the ratification of 19th Amendment in 1919, which gave women the right to vote. The last major challenge to the Constitution was in 1972 with the proposed Equal Rights Amendment; however, it failed to receive the required number of votes from the states.

Option 1	2/3 U.S. House of Representatives approve	2/3 U.S. Senate approves	3/4 state legislatures approve (38 states)
Option 2 (this option has yet to be used)	2/3 of the states petition Congress and 3/4 eventually approve	2/3 U.S. House of Representative approve	2/3 U.S. Senate approves

Figure 1.2 – Process for Making Changes to the U.S. Constitution

1.5.1 Articles of the Constitution

The Constitution is the "law of the land." It describes the rights and liberties afforded to its citizens, and the laws its government must follow. There are seven articles.

Article 1 of the Constitution addresses the power given to the legislative branch or Congress, which comprises the House of Representatives and the Senate.

Article 2 details the powers of the executive branch, which includes the President. Article 2 also discusses certain requirements for the House of Representatives. For example, members of the House of Representatives must be over the age of 25, and must be a resident of the state they represent. This section also gives the House of Representatives the power of taxation, and says that the House of Representatives has the power to impeach the President of the United States.

Article 3 details the powers of the judicial branch, and establishes the United States Supreme Court and the jurisdiction of the federal courts. Under this Article, the Supreme Court has the responsibility to interpret any legal controversies involving the Bill of Rights. This Article also defines the law of treason.

Article 4 requires each state to recognize the laws of other states (also known as "full faith and credit"), and to treat citizens of other states as they would their own.

Article 5 describes the process by which the Constitution is amended. As previously noted, under Article 5 the Constitution may be amended by a two-thirds majority of Congress and a three-fourths majority of the legislatures of the 50 states.

Article 6 is often called the Supremacy Clause. It states that federal laws take precedence over state laws that conflict with the federal laws, and that state and federal officials must take an oath to uphold and defend the Constitution.

Article 7 provides that nine of the original 13 states were required to ratify the original Constitution.

As you see, the first three articles established the executive, legislative, and judicial branches of the federal government. The last four articles embrace the concept of **federalism**, which separates the powers of federal government from the states.

1.5.2 The Bill of Rights

The first ten Amendments to the Constitution are known as the **Bill of Rights**, which defines the rights of individuals living in the United States. Many of these early Amendments were designed to protect those suspected of committing a crime. This is because at the time of drafting of the Constitution, citizens in England accused of a crime were *presumed guilty.* Also, it was common for the English government to treat criminals harshly for committing even the smallest offense. Our Bill of Rights took the opposite approach, so in the United States individuals are *presumed innocent of a crime*. The Bill of Rights also requires the government to prove the guilt of an accused *beyond a reasonable doubt*. These legal rights were given to everyone in the United States regardless of their citizenship, except the right to vote in a federal election is limited to U.S. citizens, and non-immigrant aliens are generally also forbidden to possess any firearms or ammunition.

The Bill of Rights was proposed by Congress in 1789, and it was ratified by the states on December 15, 1791. The legal protections guaranteed by the Bill of Rights may be familiar to many. The first eight Amendments detail individual rights. The Ninth and Tenth Amendments interpret the relationship between individuals and states and the federal government.

Let us now look at a brief description of each of the ten Amendments of the Bill of Rights.

First Amendment

The **First Amendment** guarantees the right of people to practice their religion of choice. It also gives individuals the right to free speech. The personal right to free speech is not absolute. Not all words are deemed to be protected speech. For example, words that incite actions that would harm others (such as "shouting fire in a crowded theater"[1]) are not protected as speech. Nor is vulgar speech such as in a setting where students made an obscene speech at a school-sponsored event.[2]

The First Amendment also gives the press and news organizations free speech protection. This was an important element of the Bill of Rights because prior to the American Revolution, the British government often censored the press's criticism of the government. Through this Amendment, groups of individuals can peacefully gather in public. This is called the right of freedom of assembly.

However, through a process called **judicial review**, a federal court may examine the constitutionality of the language of laws under the U.S. Constitution or any of the Amendments. For example, the U.S. Supreme Court has held that laws establishing a reasonable time, place, and manner may be imposed on the right to assemble.[3] The *Tinker v. Des Moines School District* case below is an example of judicial review of free speech. In this case, three public school students were suspended from school for wearing black armbands to school to protest the United States' military involvement in Vietnam. The protest was quiet and undisruptive. The parents of the students, 15 year old John Tinker, his 13 year old sister, and 16 year old Christopher *Eckhardt,* subsequently sued their school district arguing that the wearing of the armbands in a public school was a form of protest, and the First Amendment freedom of speech protections should apply. A portion of the Court's opinion is included below.

The Court Speaks

Tinker v. Des Moines School District, 393 U.S. 503 (1969)[4]

Facts:

In December, 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group had strong objections to the war in Vietnam. They agreed to publicize this disapproval by wearing black armbands during the holiday season and by fasting on December 16th and New Year's Eve. As a part of the protest, the children would be wearing the armbands at school. The parents and their children had previously engaged in similar activities.

The principals of the Des Moines schools learned of the students' plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove the armband, and if the student refused, he or she would be suspended until they returned without the armband. The Tinker and *Eckhardt parents* knew of the regulation that the school authorities adopted, but on December 16th, Mary Beth Tinker and Christopher *Eckhardt* wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they agreed to return without their armbands. They did not return to school until after the planned period for wearing armbands had expired – that is, until after New Year's Day.

Discussion:

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance by petitioners. There is here no evidence of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. This case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

Questions:

1. Why did the Court determine that the wearing of armbands was free speech?
2. Why do you think the principal expected the armbands to disrupt school activities?
3. Would the Court decide this case differently if it was a private school suspending the students?

In contrast to the *Tinker* case, in 2007 the United States Supreme Court held in *Morse v. Frederick*[5] against a student's free speech rights. In that case, a high school principal observed some of her students unfurl a large banner conveying a message (BONG Hits 4 JESUS) she reasonably regarded as promoting illegal drug use at a school-sanctioned and supervised event. The principal directed the students to take down the banner, which was required by school policy. One student – among those who had brought the banner to the event – refused to do so. The principal confiscated the banner and later suspended the student for encouraging illegal drug use (p. 393). The Court held this type of speech was not protected in a public school.

Second Amendment

The **Second Amendment** gives people the right to own and carry firearms, subject to certain restrictions. For example, the use of a firearm to rob a bank would not be protected under this Amendment, but owning a gun for self-protection in your home is safeguarded under this Amendment. The Second Amendment also provides for a "well-regulated militia." The U.S. Supreme Court has defined this term as comprising "all able-bodied men".[6] Selective service laws requiring men to register for military service at the age of 18[7] are authorized under this Amendment.

Third Amendment

The **Third Amendment** has its roots in English law. It states that a homeowner cannot be required to house a soldier or the militia without the homeowner's permission. This was included as an Amendment because colonists had been forced to house and feed English troops in their homes during the Revolutionary War.

Fourth Amendment

The **Fourth Amendment** is well known to most individuals. Perhaps not by its name, but by the rights it promotes. It states that people cannot be subject to unreasonable search and seizure unless the government has probable cause.[8] One way law enforcement can demonstrate probable cause is by obtaining a search warrant from a court. However, this Amendment is key to the American criminal process as it limits personal and property searches by law enforcement. There have been several cases in recent years interpreting this Amendment. One key case is *United States v. Jones,*[9] where in 2012 the U.S. Supreme Court ruled that a local police department cannot place a global positioning system (GPS) unit on a suspect's car without a search warrant. As this case deals with the legal challenges to technology, many have stated this decision is one the most important search and seizure opinions in the 21st century. The Court's opinion follows.

The Court Speaks

United States v. Jones, 565 U.S. _____ (2012)

Facts:

This case involved Antoine Jones, who owned and operated a nightclub in the District of Columbia. He was being observed by state and federal law enforcement officers for possible trafficking in narcotics. To monitor Jones' whereabouts, the officers employed various investigative techniques, such as visual surveillance of the nightclub, the installation of a camera focused on the front door of the club, and a pen register and wiretap of Jones's cell phone.

Law enforcement officers also applied to the federal court for a warrant to place an electronic tracking device on Jones' Jeep Grand Cherokee. A warrant was issued with two restrictions: 1) installation of the device had to be completed while the vehicle was located in the District of Columbia, and 2) the GPS unit needed to be installed within 10 days from the date the warrant was issued.

On day 11, in Maryland (and not in the District of Columbia as required in the warrant), federal agents installed a GPS tracking device on the undercarriage of Jones' Jeep while it was parked in a public parking lot. Over the next 28 days, the Government used the device to track the car, and the GPS unit communicated the location of the car by cell phone to a law enforcement computer. It relayed over 2,000 pages of data over a 4-week period.

Discussion:

The Government conceded noncompliance with the warrant and argued a warrant was not required.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated". It is beyond dispute a vehicle is an "effect" as used in the Amendment. We hold that the Government's installation of a GPS device on a target's vehicle, and using that device to monitor the vehicle's movements, constitutes a "search."

It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures;" the phrase "in their persons, houses, papers, and effects" would have been superfluous.

Questions:

1. If the GPS unit had been installed on the car in the District of Columbia and within the 10-day period, would the Court have decided differently?
2. In the full text of the opinion, the Court often references how the 4th Amendment is "an 18th-century guarantee against unreasonable searches". What type of society would the United States be, if these rights were not included in our Constitution?

Similar to *Jones*, in 2013 the U.S. Supreme Court decided in *Florida v Jardines*[10] that the use of a drug-sniffing dog by the police, outside a person's home is a "search" that must be supported by probable cause or a warrant.

Fifth Amendment

The **Fifth Amendment** prohibits the federal government from depriving a person of their life, liberty or property, without **due process of law**. Due process of law means a person must be given notice and the opportunity to be heard by a tribunal before adverse action (such as imprisonment) may be taken by the government.

Most readers are familiar with a Miranda[11] warning, which is a Fifth Amendment arrest requirement set out by the U.S. Supreme Court. It protects an individual's right against self-incrimination in a criminal case. A typical **Miranda warning** includes the following language:

- You have the right to remain silent.
- Anything you say or do may be used against you in a court of law.
- You have the right to consult an attorney before speaking to the police and to have an attorney present during questioning now or in the future.
- If you cannot afford an attorney, one will be appointed for you before any questioning, if you wish.
- If you decide to answer any questions now, without an attorney present, you will still have the right to stop answering at any time until you talk to an attorney.
- Knowing and understanding your rights as I have explained them to you, are you willing to answer my questions without an attorney present?

It is important to note that Miranda rights do not go into effect until a person is in police custody, and an arrest has been made.

The U.S. Supreme Court has also determined that Miranda rights also apply to juveniles[12], as decided in *J.D.B. v North Carolina*, 564 U.S. ____ (2011). J.D.B. was a thirteen year old special education student who was questioned at his school in the presence of a police officer about the theft of a digital camera. He was later interrogated at his home by the police. On each occasion the police failed to give him his Miranda rights, and he was not told he could speak with his grandmother (who was his guardian), during this interrogation process. Because of the vulnerability due to his age, the U.S. Supreme Court held if J.D.B. was in "custodial interrogation" (meaning his movement was restricted by the police), then the Miranda warnings must be given.

The Fifth Amendment also states a person cannot be tried twice for the same crime (double jeopardy), and a person cannot be forced to testify against himself or herself (self-incrimination) in a court of law. In addition, the government cannot take private property (such as a home) for its use unless just compensation is paid to the owner. This taking of private property for public use is called **eminent domain.**

Sixth Amendment

The **Sixth Amendment** deals with the rights of the accused in a criminal prosecution. It requires an accused person to have a have a "speedy and public trial, by an impartial jury," and the right to have an attorney present at trial. The Sixth Amendment's guarantee of counsel has been upheld by the U.S. Supreme Court as a "fundamental right essential to a fair trial".[13] A person who cannot afford an attorney is entitled to representation at public expense. An accused also has the right to question witnesses at trial.

Seventh Amendment

This Amendment guarantees the right to a jury trial in a federal civil case where the dispute is greater than $20.00. The United States Supreme Court has also approved six person juries in a civil trial[14], rather than the 12-person jury required in a criminal trial.

Eighth Amendment

The **Eighth Amendment** protects a person accused of a crime from being required to post excessive bail prior to trial. The standard used by a court is the bail must be an amount necessary to ensure that the accused (also called a **defendant**) appears for trial.[15]

Ninth Amendment

Because the Bill of Rights does not identify all fundamental rights conferred on an individual, the **Ninth Amendment** states that individuals have rights and liberties beyond those specifically stated in the Constitution. For example, the U.S. Constitution contains no express right to privacy, yet the Supreme Court in *Griswold v. Connecticut* (1965)[16], acknowledged that right within a marriage.

Tenth Amendment

The **Tenth Amendment** recognizes the powers of the individual states to legislate and regulate laws in areas not delegated to the federal government.

It is important to remember that the Bill of Rights applies to all individuals, including aliens (also referred to as immigrants). This means that both legal and illegal immigrants have the right to due process in a criminal proceeding, including a speedy and public trial.

1.5.3 Other Amendments

The Constitution has been amended 26 times since its ratification in 1787. One of the most important amendments to the Constitution is the **14th Amendment**. This Amendment, ratified in 1868, prohibits *states* from depriving a person's life, liberty, or property without **due process of law**. Life, liberty and property are often referred to as *natural rights* owed to all persons. The 14th Amendment's main goal was to protect the civil rights and liberties of African Americans after the end of the Civil War.

Many other amendments have also been significant. For example the 13th Amendment in 1865 abolished slavery, the 15th Amendment held that former slaves were afforded the same rights as other Americans under the Constitution, the 16th Amendment in 1913 instituted the federal income tax, the 19th Amendment in 1920 gave women the right to vote, the 22nd Amendment limited the President to two, 4 year terms in office, and in 1971 the 26th Amendment changed the voting age to 18 in federal elections.

11th Amendment	Judicial limits	20th Amendment	Presidential and Congressional terms of office
12th Amendment	Presidential elections and the electoral college	21st Amendment	Prohibition repealed
13th Amendment	Abolition of slavery	22nd Amendment	Term limits for the presidency
14th Amendment	Citizenship rights	23rd Amendment	Presidential vote for the District of Columbia
15th Amendment	Race not a bar to voting	24th Amendment	Poll tax barred
16th Amendment	Income tax established	25th Amendment	Presidential disability and succession
17th Amendment	Senators elected by popular vote	26th Amendment	Voting age set at 18
18th Amendment	Prohibition established	27th Amendment	Limiting changes to congressional pay
19th Amendment	Women's suffrage		

Figure 1.3 – Amendments to the Constitution

Figure 1.4 – Paul Stahr, "1776 – Retouching an Old Masterpiece – 1915"
Cover illustration from *Life*, July 1915
Source: U.S. Library of Congress General Collections

The Bill of Rights

Amendment I

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

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

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

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

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

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

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 otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

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.

1.6 Summary

In this chapter you learned about the history of American law, and how life in the United States revolves around the law. You learned the importance of having laws and a legal system, and how rules create order in a society. You also read about the creation and importance of the Constitution and the Bill of Rights, and the other Amendments to the Constitution.

For supplemental historical information about these documents, you are encouraged to review the links in the "Additional Learning Opportunities" section (1.10).

1.7 Key Terms

Amendment	Equity	Precedent
Articles	Federalism	Religious law
Bill of rights	Fifth Amendment	Search and seizure
Civil law	First Amendment	Second Amendment
Clauses	Fourth Amendment	Seventh Amendment
Common law	Injunction	Sixth Amendment
Constitution	Judicial	Specific performance
Declaration of Independence	Judicial review	Stare decisis
Defendant	Law	Supremacy clause
Democracy	Legislative	Tenth Amendment
Due process of law	Legal system	Third Amendment
Eighth Amendment	Miranda warning	Totalitarian law
Executive Eminent domain	Ninth Amendment	

1.8 Chapter Discussion Questions

1. What is the difference between common law and civil law?
2. What is equity?
3. Define precedent. What is the relationship to stare decisis?
4. What would life in the United States be without the protections of the Bill of Rights?
5. Why do you think the Bill of Rights were not included in the language of the Constitution?
6. Which of the Amendments to the Constitution do you feel is the most important to the freedoms in the United States?
7. The *Tinker v Des Moines School District* case was decided in 1969. If *Tinker* was being decided before the U.S. Supreme Court today, would their ruling be the same or different? Why?
8. What is the most important Amendment to the U.S. Constitution? Why?

1.9 Additional Learning Opportunities

The United States Archives and Records Administration is the federal agency that maintains historical documents for the government. Not only are actual copies of the documents available for viewing, but background information on the records is available. For more information on these materials, use these links:

- Declaration of Independence (http://www.archives.gov/exhibits/charters/declaration.html)
- United States Constitution (http://www.archives.gov/exhibits/charters/constitution.html)
- Bill of Rights (http://www.archives.gov/exhibits/charters/bill_of_rights.html)

1.10 Test Your Learning

1. A police officer and a drug sniffing dog locate drugs in a student locker. Which constitutional Amendment applies to the search of the student's locker?
   A. Second
   B. Fourth
   C. Fifth
   D. Sixth
   E. Tenth

2. What is precedent?
   A. It is using statutes to make a ruling in a court proceeding.
   B. It is using administrative regulations to make a ruling in a court proceeding.
   C. It is using treaties to make a ruling in a court proceeding.
   D. It is using prior court decisions to make a ruling in a court proceeding.

3. A large group of protestors assemble at the U.S. Capitol in Washington, D.C. They are arrested for protesting a change to a right to work law. Their arrest appears to violate which First Amendment right?
   A. freedom of speech
   B. freedom of assembly
   C. freedom of the press
   D. freedom of religion
   E. freedom to strike

4. A Miranda warning is based on what Amendment?
   A. Second
   B. Fourth
   C. Fifth
   D. Sixth
   E. Tenth

5. A court uses equitable powers
   A. when the law is not adequate to provide the parties with a remedy
   B. when monetary damages cannot resolve a case
   C. where a judge feels other remedies are necessary
   D. where a judge wants to use discretion to be fair to the parties
   E. all of the above

6. Who was the primary author of the Declaration of Independence?
   A. Jefferson Davis
   B. John Hancock
   C. Thomas Jefferson
   D. James Madison
   E. George Washington

7. How many Amendments have been made to the Constitution?
   A. 10
   B. 19
   C. 27
   D. 36
   E. 54

8. What Article in the Constitution establishes the federal court system?
   A. 2
   B. 3
   C. 4
   D. 5
   E. 6

9. What is the Supremacy Clause?
   A. It is a constitutional provision.
   B. It is a constitutional provision that says federal law takes precedence over state law.
   C. It is a constitutional provision that says federal law takes precedence over state law, and that state officials must take an oath to uphold and defend the Constitution.
   D. It is a constitutional provision that says federal law takes precedence over state law and that state and federal officials must take an oath to uphold and defend the Constitution.

10. What is a legal system?
    A. It is a governmental organization that ensures justice and order in a society.
    B. It is a governmental organization that ensures justice and order in a society, and a set of rules that provides direction how to behave.
    C. It is a governmental organization that ensures justice and order in a society, and it is a system and set of rules that provides direction how to behave.
    D. It is a governmental organization that ensures justice and order in a society, and a system and set of rules that directs governments how to provide due process to its citizens.

Test Your Learning answers are located in Appendix A.

2 Federal and State Court Systems

Objectives

- After completing this chapter, the student should be able to:
- Discuss the four main categories of law;
- Explain the structure, jurisdiction, and functions of the federal courts;
- Explain the structure, jurisdiction, and functions of the state courts; and
- Describe the types of cases each court system handles.

A Learning Story

Sally has a Facebook® friend by the name of Chris. She met him one day while playing Mafia Wars® and they became good friends. One day Chris asked Sally to lend him $500 so he could purchase an airline ticket to visit her. Sally agreed and sent Chris the money, but he never bought the ticket. Instead, he ended their friendship. Sally wants to sue Chris. She lives in Florida and Chris lives in Alaska. What court has jurisdiction over the dispute? In other words, in which jurisdiction does Sally have to sue Chris to seek return of her $500?

2.1 Categories and Classifications of Law

To understand the American legal system, it is useful to first learn about the four main classifications of the law. These categories include constitutional law, statutory law, common law (or case law), and administrative law. These four areas are also classified as primary legal materials. **Primary law** (or primary authority) is the law used by an attorney to support a legal position. Primary law will be accepted as precedent by a court of law. **Secondary authority**, on the other hand is *non-law* that 1) explains primary authority, or 2) assists locating the appropriate law to support a legal argument. Many times people refer to secondary authority as **finding tools**. A legal dictionary or legal encyclopaedia would be an example of a finding tool. A party in a dispute would not present secondary authority to a judge as the basis to substantiate a legal position.

The first grouping, **constitutional law,** includes the U.S. Constitution and the state constitutions.[17] As you learned in Chapter One, the U.S. Constitution consists of a Preamble, the Articles, and the Amendments. Additionally, each state has its own constitution. The state constitutions often include similarities in language to the federal constitution. However, there is no requirement which provisions must be included in state constitutions.[18] The people of each individual state determine which provisions are included in their respective state constitutions.

The second main category of law involves statutes or codes called statutory law. **Statutory law** is legislated by lawmakers and then enacted into law by the executive officer of the government. On the federal level, statutes are passed by Congress and they are signed into law by the President.[19] Federal laws can be found in a set of books called the **U.S. Code** (also known as the U.S.C.). When you look at the U.S. Code, you will see laws are categorized and organized into groupings called **titles**. There are 51[20] titles in the federal code.[21] Each title represents a specific subject. For example, Title 6 deals with domestic security, and Title 20 discusses education. The laws are further broken down into groups called **sections**. Often you will see the section symbol § used to introduce the section of a federal law. For example, 15 U.S.C. § 201 means the law is located in Section 201 of Title 15 in the United States Code.

Each state legislature passes laws for their own state. A state law will be signed into law by its governor. Each state also has its own set of published codes.[22] Most are classified and numbered by subject, similar to the federal statutes.

The third category of law is **case law**. Case law is developed from court decisions, called **opinions**. Many courts publish their opinions in books called **legal reporters.** A legal reporter is a series of books containing printed legal opinions from a court.

Remember the United States is a common law country and follows a system of **precedent**. Precedent means a court will apply a decision of a higher court involving similar facts and legal issues as that of a pending case. **Stare decisis** is the term that describes a trial court's obligation to follow the precedent of higher courts. A legal system that uses precedent promotes stability and uniformity in its courts, which is one reason the American judicial system is typically respected. Note that not all court decisions are published, and generally, an opinion must be published in a reporter for a court to use the opinion as precedent.

The last category of law is **administrative law.** Administrative law includes the rules and regulations that govern administrative agencies.[23] An administrative agency is regulatory body in a governmental system that handles a specific area of the law. There are administrative agencies at the federal, state, county, and city level. Administrative agencies receive their power through their respective laws. Agencies may be independent, or may report to their executive branch. Often, parties in a dispute are required to "exhaust all administrative remedies" before instituting a lawsuit in court. The exhaustion of administrative remedies means that, prior to instituting an action in court, the matter must first be pursued before the appropriate administrative department. Examples of federal agencies include the Federal Bureau of Investigation (FBI), the National Security Agency (NSA), and the U.S. Department of Education. Areas regulated by administrative agencies on the state level include health, labor, education, and others.

2.2 Overview of the U.S. Court System

As mentioned in Chapter One, the United States is a common law country. One of the key elements of a common law jurisdiction is a court system that resolves disputes and controversies between parties in conflict.

The United States has two main court systems: a **federal court** system and a **state court** system. Each state court system has its own structure. When considering all states and territories, there are over 50 different judicial systems in the United States.

Courts in the United States are hierarchical. At the bottom of the hierarchy are the **trial courts**. Actions typically begin in a trial court, and it make a decisions based on the presented facts. Depending on the type of action and the parties involved, a judge or a jury may render a judgment to resolve the action.

The **appellate courts** are positioned at the next level of the hierarchy. These courts review the legal correctness of decisions made by the trial courts. To complete this review process, an appellate court will reexamine certain aspects of the proceedings of the lower court. This examination may include review of the transcripts of testimony given by witnesses, and the evaluation of other evidence and documents filed with the trial court.

The highest level of the hierarchy is a court system most often called a **supreme court**, which reviews the correctness of decisions of the appellate courts and has the final ruling in a dispute.

The federal and state courts have **jurisdiction** over different types of disputes. Jurisdiction is the authority of a court to render judgment over a certain type of disagreement. At times, a court will have **exclusive jurisdiction** over a matter, which means a particular court must hear a particular dispute. For example, divorce conflicts may only be instituted in state courts. This means a state court has "exclusive" jurisdiction over domestic relations matters. Similarly, only federal courts can render judgement over patent or federal tax disputes, giving federal courts exclusive jurisdiction over those matters. There may be times where courts have **concurrent jurisdiction**. Concurrent jurisdiction is a situation in which more than one court system may oversee a case. It would not be unusual for a dispute to be able to heard in either a federal or a state court. This would mean that a party would have a choice where to file their lawsuit. Lawsuits can involve either a civil or criminal matter. Both federal and state courts oversee **civil cases**, in which one party sues another for a private wrong, and **criminal cases** brought by the government against a person for committing a crime.

2.3 The Federal Court System

As you learned in Chapter One, the U.S. Supreme Court is the only federal court named in the U.S. Constitution. **Article III** of the U.S. Constitution authorizes that judicial power "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Constitution also bestows upon Congress the responsibility to define and establish the structure of other federal courts and to determine the number of judges placed on the bench.

Federal judges are not elected, but instead the President nominates individuals as potential judges to the federal courts. After nomination, the U.S. Senate holds confirmation hearings to approve the choice of the President and the selection of the judge. There are currently 875 federal judges nationwide.[24] Unlike most states, federal judges are appointed for life, conditioned on their "good behaviour".[25]

The Federal Court System[26]	**The State Court System**
Federal judges[27] (including U.S. Supreme Court Justices) are nominated by the President and confirmed by the Senate (Article III, Section 1 of the U.S. Constitution) • They hold office during good behavior, typically for life. • Through congressional impeachment proceedings, federal judges may be removed from office for misbehavior.	State court judges are selected in a variety of ways including • election, • appointment for a given number of years, • appointment for life, or • a combination of these methods, e.g., appointment followed by election.

Figure 2.1 – Comparing Selection of Judges and Justices

Courts authorized by Article III of the U.S. Constitution ("Article III courts") oversee the majority of federal cases. Article III courts include (1) the U.S. District Courts, (2) the U.S. Circuit Courts of Appeal, and (3) the U.S. Supreme Court, as well as two special courts: (a) the U.S. Court of Claims, and (b) the U.S. Court of International Trade.[28] The Court of Claims oversees disputes involving U.S. government contracts. The U.S. Court of International Trade oversees customs and international trade disputes involving the United States.

In addition to Article III courts, there is a second category of federal courts called **legislative courts**. These courts are created by federal statute to handle "specialized matters." The U.S. Supreme Court[29] has stated that the jurisdiction of these cases includes military cases, and challenges involving public rights (such as tax cases).

Current federal legislative courts include (1) magistrate courts, (2) bankruptcy courts, (3) the U.S. Court of Military Appeals, (4) the U.S. Tax Court, and (5) the U.S. Court of Appeals for Veterans Claims (formerly the U.S. Court of Veterans' Appeals). The judges in these courts are appointed for a set term of years. Magistrate courts try civilians for crimes committed on a military base. Bankruptcy courts allow people or entities having excessive debt to liquidate property to pay creditors. They also provide the option for some individuals to create a repayment plan to creditors. The Court of Military Appeals oversees appellate issues for certain types of military cases involving active members of the armed services and anyone[30] subject to the Uniform Code of Military Justice, such as prisoners of war in military custody. Unlike most appeals courts, there is no appeal from the Court of Military Appeals. The U.S. Tax Court oversees cases appealed from decisions of the Internal Revenue Service. The U.S. Court of Appeals for Veterans Claims reviews decisions of the Board of Veterans' Appeals.

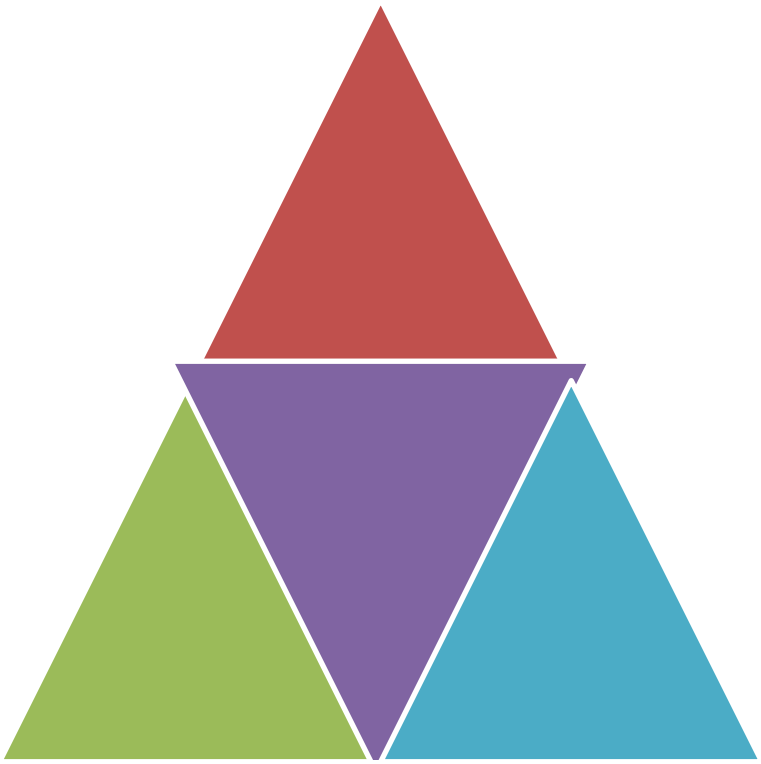


Figure 2.2 – U.S. Federal Court System

2.3.1 United States District Court

The **U.S. District Court** is the lowest level court in the federal system, and is where most federal cases start. Each state has at least one least one District Court. Larger states may have up to four Districts (such as New York).

There are 94[31] judicial districts spread throughout the United States and its territories. The previously mentioned Bankruptcy Court is a part of the U.S. District Court. Cases from the U.S. District Court may be appealed to the U.S. Court of Appeals.

The U.S. Court of Claims and U.S. Court of International Trade are examples of Article III specialized courts also located at the level of the federal judicial system.

2.3.2 United States Court of Appeals

The **U.S. Court of Appeals** is at the intermediate level of federal Court, and includes 12 regional geographic circuits, including a District of Columbia Circuit. The United States Court of Appeals is generally not a **court of original jurisdiction.** This means that actions are not first instituted in this Court. Instead, actions are filed in the District Court, and then once a judgement is reached, decisions are appealed to the Court of Appeals. The Court of Appeals also oversees appeals from decisions of federal administrative agencies located within its boundaries.

The circuits are illustrated and color coded in Figure 2.3. The First Circuit is the smallest of the group, and the Ninth Circuit (that includes California and other west coast states) is the largest.

As an example, a decision by a federal District Court in Michigan would be appealed to the 6th Circuit Court of Appeals in Cincinnati, where the Circuit Court of Appeals for the Sixth Circuit is located. Appeals are heard by a panel of three rotating judges; however, there are certain circumstances in which all the judges in a Circuit (called "en banc") will participate in rendering a decision, with the exception that an en banc hearing in the Ninth Circuit will consist of only 11 randomly selected judges because of the Ninth Circuit's large size.

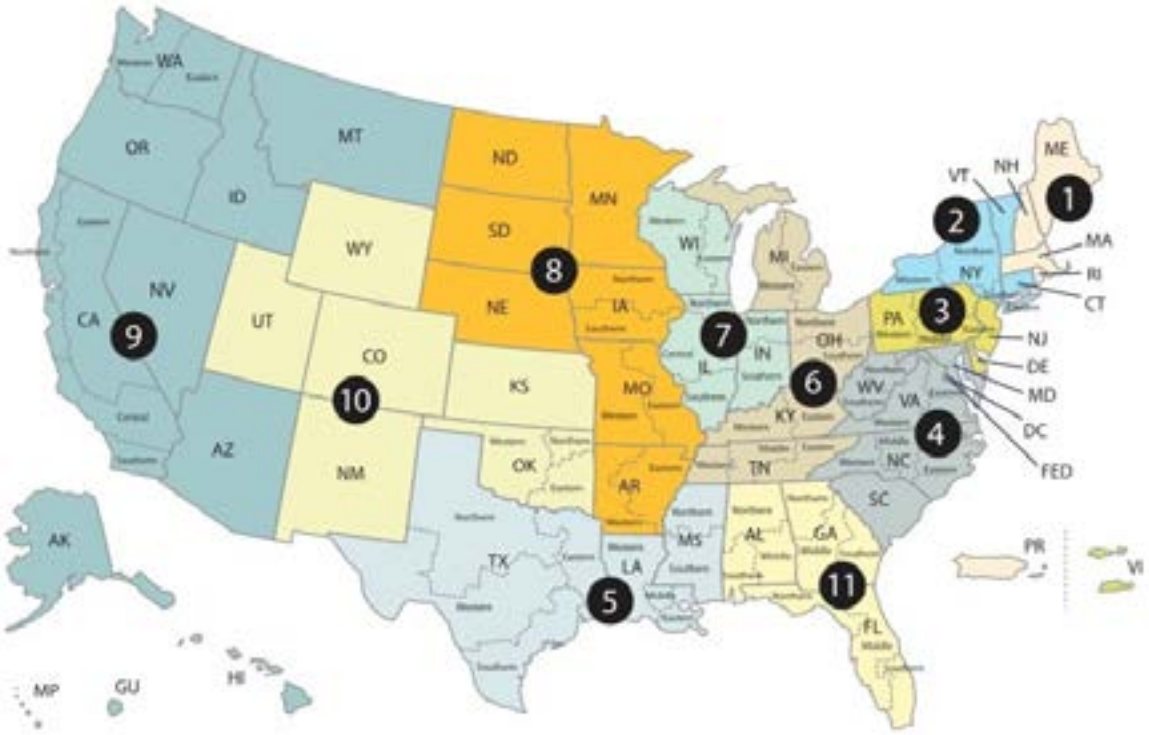


Figure 2.3 – Geographic Boundaries of the United States Court of Appeals and District Courts[32]

When a judgment is appealed to the federal Court of Appeals, the court has many choices how to handle review. The Court of Appeals may deny the appeal, in which case the lower court's decision will stand. Alternatively, the Court of Appeals may accept the appeal and then agree with (*i.e.*, affirm) the lower court's decision, or disagree with (*i.e.*, reverse) the lower court. If there are several issues on appeal, the Court of Appeals may render different decisions for each legal question reviewed. Cases from the Court of Appeals may be appealed to the United States Supreme Court, which is the highest court in the United States.

2.3.3 United States Supreme Court

The **U.S. Supreme Court** is at the top of the hierarchical court pyramid, and is known as a "court of last resort." The Supreme Court is the final venue in which a party may seek appeal of a judgment. The United States Supreme Court consists of nine Justices who, similar to other federal judges, are appointed by the President and require confirmation by the Senate. Supreme Court judges (on both the federal and state level) are always referred to as Justices, while judges at lower levels are referred to as judges.

The U.S. Supreme Court does not "automatically" review judgments, and has wide authority to accept or deny petitions for the review of judgments. Few actions originate in the Supreme Court; rather the Supreme Court is an appellate court. If a party wishes the Supreme Court to review a matter, they must petition the Court by filing a **writ of certiorari**, which is a formal request to the Court to review a matter. The Court is not required to accept every petition, and few cases are in fact accepted for review by the Court. At least four of the nine Justices must agree that there is a federal question of significance in order to accept the appeal. The Court is normally in session from October to June and, as such, there is typically a rush of written decisions announced from the Court each June, so the matters for the Court's review may be cleared as much as possible prior to the Court's next session.

The Supreme Court is an appellate court; however, 28 U.S.C. § 1251 states that when there is a dispute between the states, the Supreme Court has original and exclusive jurisdiction over the dispute.

State courts may also request the U.S. Supreme Court provide an interpretation of a U.S. treaty, statute, or a Constitutional provision.

2.4 Jurisdiction of the Federal Courts

How does a person know which court should settle a dispute? How does one choose a court? How does someone know whether to file an action in a federal or a state court? Well, the answers are not that complex.

There are established legal standards that govern whether a federal court or a state court should decide a matter. This is called **subject matter jurisdiction.** Subject matter jurisdiction depends on a variety of factors, such as the type of dispute, the amount of restitution sought by the action, and the physical location of the parties to the dispute.

First, whenever a lawsuit is based on the U.S. Constitution, a **treaty** (which is an agreement with another country or a Native American tribe), or on a federal law or constitutional challenge (also called a **federal question**), the lawsuit is filed in a federal court. This includes both civil and criminal cases, and speciality type cases, such as bankruptcy or copyright infringement.

Second, a case may be filed in federal court if there is **diversity of jurisdiction**. Diversity of jurisdiction means that the parties involved in the dispute (this includes the **plaintiff** who initiates the action and the **defendant** who is being sued) must reside in or be doing business in different states. Diversity of jurisdiction also exists when one of the parties is located outside the United States. A party may be an individual, company, or organization suing or being sued. Diversity cases only apply to civil lawsuits. A federal question is not required to file a diversity case, but "**complete diversity**" must exist between the plaintiff and defendant in a federal court case. Complete diversity means, for diversity jurisdiction purposes, individuals are citizens of the state in which they maintain a *principal residence*, and they may be a citizen of only one state at a time. A corporation, however, may be a citizen of two states. Those states would include the state where the company is incorporated and the state in which its principal place of business (assuming they are different) is located.

The Federal Court System	The State Court System
• Article III of the Constitution vests the judicial power of the United States in the federal court system. Article III, Section 1 specifically creates the U.S. Supreme Court and gives Congress the authority to create the lower federal courts.	• The Constitution and laws of each state establish the state courts. A court of last resort, often known as a Supreme Court, is usually the highest court. Some states also have an intermediate Court of Appeals. Below these appeals courts are the state trial courts. Some are referred to as Circuit or District Courts.
• Congress has used Article III to establish the 13 U.S. Courts of Appeals, the 94 U.S. District Courts, the U.S. Court of Claims, and the U.S Court of International Trade. U.S. Bankruptcy Courts handle bankruptcy cases. Magistrate Judges handle some District Court matters.	• States also usually employ courts reviewing specific legal matters, e.g. probate courts (wills and estates); juvenile court; family court, *etc*.
• Parties dissatisfied with a decision of a U.S. District Court, the U. S. Court of Claims, and/or the U.S. Court of International Trade may appeal to the U.S. Court of Appeals.	• Parties dissatisfied with the decision of the trial court may take their case to an intermediate court, usually known as a Court of Appeals.
• A party may petition the U.S. Supreme Court to review a decision of the U.S. Court of Appeals, but the Supreme Court is usually under no obligation to accept the petition. The U.S. Supreme Court is the final arbiter of federal constitutional questions.	• Parties have the option to petition the highest state court to review a matter.
	• Only certain matters are eligible for review.

Figure 2-4. Comparison of the U.S. Court System[33]

In a federal diversity case, a controversy over $75,000 in damages is also required.

For example, assume two drivers are involved in a car accident in Ohio. Party A is killed. Also suppose Party A was a Michigan resident and Party B was a Pennsylvania resident. Because the parties resided in two different states, and because a death case likely involves damages over $75,000, an action concerning the accident *could be filed* in a federal court.

Once a federal court is determined as the appropriate jurisdiction for this lawsuit, the appropriate **venue** must be determined. Venue means determining which district court in the federal court system is the correct location to file the lawsuit. In a federal court, venue is based on federal law.[34] The law provides the proper venue is the judicial district "where any defendant resides or where a substantial part of the claim that gave rise to a case occurred, or where the property subject to the action is located." This means the case could be filed in a federal district court in Michigan, Ohio, or Pennsylvania.

What if Party A lived in Canada? Again, this case could be still be filed in federal court, due to the diversity of jurisdiction rules and that the fact the damages exceeded $75,000.

2.5 The State Court System

Federal courts have authority across the United States, while a state court only has authority within its borders. Similar to the federal government, each state has its own constitution authorizing its courts. Each state also has an executive, legislative, and judicial branch. Each state controls its own government, and has the power to create its own laws.

The federal system is independent of the state courts, and each state court system in independent of each of the state courts. This means a decision from the New York Supreme Court is not binding on the North Dakota Supreme Court. However, there might be situations (such as those dealing with U.S. Constitutional issues) in which a state court must follow a decision from a *federal court*. This happens particularly in criminal cases, where federal constitutional issues are commonly litigated. Remember from Chapter One, in which you read that police officers must give people taken into custody their Miranda rights, prior to questioning them. Even though the *Miranda* case was a ruling from the United States Supreme Court, state courts must also follow the Miranda procedures because the right against self-incrimination under the Fifth Amendment is a constitutional matter.

Most state courts follow a model similar to the federal courts. A typical state system will begin at the lowest level with a trial court based in a city or county. Then, there may be one or two appellate courts. The names of the courts will also be unique to that state. For example, the lower level courts might be known as a common pleas court, a district court, or a municipal court.

California[35]	**Florida**[36]	**Michigan**[37]	**Virginia**[37]
Supreme Court	Supreme Court	Supreme Court	Supreme Court
Courts of Appeal	District Courts of Appeal	Court of Appeals	Court of Appeals
Superior Courts	Circuit Courts	Circuit Court	Circuit Court
	County Courts	District Court	General District Court

Figure 2.5 – A Comparison of the Structure of Selected State Trial Court Systems

State courts will oversee disputes brought under on state law. This will include civil actions (where two individuals sue each other), including landlord-tenant, traffic cases, will and probate disputes, family issues, such as divorce, adoption, delinquency, neglect, and crimes violating state law. Crimes are classified as misdemeanours and felonies. A **misdemeanor** is a crime for which punishment is less than one year in incarceration, while a **felony** is a crime for which a person is subject to over one year in incarceration. For example, a crime, such as shoplifting a candy bar, would be a misdemeanor, while the theft of a new car would be a felony.

The Federal Court System	**The State Court System**
• Cases that deal with the constitutionality of a law; • Cases involving the laws and treaties of the U.S.; • Ambassadors and public ministers; • Disputes between two or more states; • Admiralty law; and • Bankruptcy.	• Most criminal cases, probate (involving wills and estates); and • Most contract cases, tort cases (personal injuries), family law (marriages, divorces, and adoptions), etc. State courts are the final arbiters of state laws and constitutions. Their interpretation of federal law or the U.S. Constitution may be appealed to the U.S. Supreme Court. The Supreme Court may choose to accept or deny such appeals.

Figure 2.6 – Types of Cases Heard in the Federal and State Court Systems[39]

This is a good opportunity to revisit the "Learning Story" included at the beginning of the Chapter. Recall that Sally had an online relationship with Chris and she lent him $500 so he could purchase an airline ticket to visit her. Sally sent Chris the money and he cashed Sally's check in Alaska, but never visited, and instead ended the relationship. Sally lived in Florida and Chris resided in Alaska. What state court has jurisdiction over the dispute? Where does Sally sue Chris to seek redress?

Clearly, the facts do not support filing a lawsuit in a federal court, due to the amount in controversy, so this is a state court issue. The answer to which state court has jurisdiction depends on which court has **personal jurisdiction.** Personal jurisdiction determines which court has power over a party to require the party to appear. In general, a state court has personal jurisdiction over a defendant:

- if the defendant resides within the state;
- if the defendant does business within a state;
- if the defendant owns property within a state; or
- if there is some other significant connection within the state, such as the parties being involved in an automobile accident.

A court must have some special connection with a defendant for jurisdictional purposes. In the situation with Sally and Chris, Sally's best option is to sue Chris in Alaska, as Chris has limited connections with Florida. Chris does not live or work in Florida, he does not own property in Florida, and he did not cash Sally's check in Florida. This will be a problem for Sally, as she will need to hire an Alaska attorney to sue Chris in home state of Alaska.[40]

There is also a type of state law called a **long-arm statute**, which details the "minimum types of contact, a state must have with a person to exercise jurisdiction over a person" to effectively pull a person from one state to another state to answer a lawsuit. The laws in each state are different, and to sue in Florida, Sally would need to determine whether her situation comports with the Florida jurisdictional requirements.

Once a person determines the appropriate state court for a lawsuit, then the appropriate **venue** must be determined. As you may recall, venue is the determination of which court within a court system is the correct place to file an action. If it has been determined that a case should be filed against Chris in a county court in Alaska, the next question would be to decide which county court in Alaska would be the proper venue. The answer to that question will be based on state law. Usually venue is determined based on:

- where in the state the defendant resides;
- where in the state the defendant does business;
- where in the state a business a contract was signed or where the transaction took place; or
- where in the state any other significant transaction took place relating to the lawsuit.

State law determines the court of appropriate venue.

Jurisdiction of State Courts	Jurisdiction of Federal Courts	State or Federal Courts
• Crimes under state legislation. • State constitutional issues and cases involving state laws or regulations. • Family law issues. • Real property issues. • Most private contract disputes (except those resolved under bankruptcy law). • Most issues involving the regulation of trades and professions. • Most professional malpractice issues. • Most issues involving the internal governance of business associations such as partnerships and corporations. • Most personal injury lawsuits. • Most workers' injury claims. • Probate and inheritance matters. • Most traffic violations and regulation of motor vehicles.	• Crimes under statutes enacted by Congress. • Most cases involving federal laws or regulations (for example: tax, Social Security, broadcasting, civil rights). • Matters involving interstate and international commerce, including airline and railroad regulation. • Cases involved securities and commodities regulations, including takeover of publicly held corporations. • Admiralty cases. • International trade law matters. • Patent, copyright, and other intellectual property issues. • Cases involving rights under treaties, foreign states, and foreign nationals. • State law disputes when "diversity of citizenship" exists. • Bankruptcy matters. • Disputes between states. • Habeas corpus actions. • Traffic violations and other misdemeanors occurring on certain federal property.	• Crimes punishable under both federal and state law. • Federal constitutional issues. • Certain civil rights cases. • "Class action" cases. • Environmental regulations. • Certain disputes involving federal law.

Figure 2.7 – A Comparison of the Jurisdiction of the State and Federal Court Systems[41]

The Court Speaks

Dedvukaj v Maloney, 447 F. Supp. 2d 813 (E.D. Mich, 2006)[42]

Facts:

Plaintiff Dedvukaj was a resident of Michigan, and successfully bid on paintings in two auctions that Defendant and his company conducted through eBay. Based on the item description, Plaintiff believed he was bidding on original artwork.

During the bidding process, Plaintiff also spoke on the phone with Defendant Maloney to verify the authenticity of the artwork. Defendant Maloney was a resident of Syracuse, New York, and operated Mr. Markdown, L.L.C. ("Mr. Markdown"). Defendants sold items on the Internet through the website www.eBay.com (eBay). They used a Syracuse, N.Y. warehouse as part of their online business. They also operated a brick and mortar store at the Syracuse location.

Defendants never shipped the paintings, and offered Plaintiff a full refund. Plaintiff refused a refund and demanded the delivery of the paintings or their fair market value as original artwork.

Plaintiff sued Defendants in the Eastern District of Michigan. Defendants argued that the case should have been filed in the Northern District of New York and requested a change of venue to that court.

Discussion:

The Court held that the Plaintiff must establish the district court's jurisdiction. Under the due process requirements of the 14th Amendment, the Court also held the diversity of citizenship obligations were met. Since this was a contract case, Michigan law would apply in the dispute. Venue would be decided under Michigan law to determine if the case should have been filed in the Michigan federal court or the New York federal court. To determine venue, the court looked at the Michigan long arm statute.

Michigan's "long-arm" statute extends "limited" jurisdiction over individuals under M.C.L. § 600.705:

The existence of any of the following relationships between an individual or his agent and the state shall constitute a sufficient basis of jurisdiction to enable a court of record of this state to exercise limited personal jurisdiction over the individual and to enable the court to render personal judgments against the individual or his representative arising out of an act which creates any of the following relationships:

(1) The transaction of any business within the state.

(2) The doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort. […]

(5) Entering into a contract for services to be rendered or for materials to be furnished in the state by the defendant.

In the present case, Defendants transacted business in Michigan when Defendants communicated with Plaintiff Dedvukaj in Michigan through email messages and telephone calls, accepted Plaintiff's bids during the auctions, accepted Plaintiff's winning bids in two auctions, sent notice and confirmation to Plaintiff he had submitted the winning bids in two auctions, confirmed shipping charges for two items to Michigan, and accepted payment through the mail from Michigan. The "arising out of" requirement is satisfied because the alleged harm stems directly from the breach of the contracts that establish the transaction of business in Michigan. Defendants transacted business in Michigan, and Plaintiff's claims arise from those transactions.

Viewing the facts in the light most favorable to Plaintiff Dedvukaj, Plaintiff has presented a prima facie case that limited jurisdiction extends to Defendants under Michigan law. Personal jurisdiction attaches to Defendants.

Venue is proper in the Eastern District of Michigan because a substantial part of the events or omissions occurred here.

Questions:

1. What is the difference between jurisdiction and venue in this case?
2. As a practical matter, why would the Plaintiff, who is a Michigan resident, want to file his lawsuit in the Eastern District of Michigan instead of the Northern District of New York? Alternatively why would the Defendant want Plaintiff to file the case in the Northern District of New York?
3. Locate the full text of Michigan statute M.C.L. § 600.705 at michiganlegislature.org. What other types of minimum contacts does the state allow to establish jurisdiction over a party?

2.6 Reading and Understanding a Court Opinion

A court opinion is the court's decision in a dispute. The opinion will discuss the facts, identify the legal issue or problem in the dispute, include a discussion about the law used to render a decision, and present an analysis of precedent to support its decision. Court opinions have several common elements, including:

- The *case caption*, which lists the names of the parties involved in the dispute. If the parties are individuals, they are often listed by their last names.
- The *docket number* of the case, which is an identifier assigned to the case by the court. Many times the docket number will include the year the case was filed, a code that describes type of case being filed, and a chronological number assigned to the case.
- The *citation* or the location of the opinion in a hard copy reporter in which the opinion can be located.
- The *date* of the case, which is the date of the decision.
- The *name of the judge* who wrote the opinion.
- The *name of the judges* (if a panel) deciding the case.
- The *procedural posture* of the parties. In other words, in whose favor did the court rule?
- The *facts*.
- The *issues* presented or the problem that existed between the parties.
- The *holding* as to how the court applied the law to the facts.
- The *finding* of the case or the factual decision.

A Sample Case – State Court

Name of the Parties	BARBARA PETTERMAN, Plaintiff-Appellant, v. HAVERHILL FARMS, INC., ROGER TURNER, and YOUNG MEN'S CHRISTIAN ASSOCIATION, Farmington Branch, jointly and severally, Defendants-Appellees
Case Number	Docket No. 60710
Court Name	Court of Appeals of Michigan
Citation with Parallel Cites	*125 Mich. App. 30*; *335 N.W.2d 710*
Date	April 18, 1983, Decided
Procedural Posture and Disposition	Remanded for an evidentiary hearing and the award of a reasonable attorney fee.
Attorneys for the Parties	*Zeff & Zeff* (by *Thomas F. Campbell* and *Michael T. Materna)*, for plaintiff. *Jenkins, Nystrom, Hitchcock, Parfitt & Nystrom, P.C.* (by *Janis B. De Gennaro)*, for defendant.
Judges on the Appellate Panel	T. M. Burns, P.J., and R. M. Maher and H. Hood, JJ.
Writer of the Opinion	Per Curiam
Opinion Text	The trial court ordered plaintiff to pay defendants' attorney's fees pursuant to GCR 1963, 316.7. Plaintiff appeals as of right the amount of the fees assessed.
Facts	Plaintiff was injured in a horseback riding accident at defendant Haverhill Farms after defendant Roger Turner, the instructor of her class, told her to jump from a runaway horse. A mediation panel recommended that defendants pay plaintiff damages in the amount of $ 12,500, a figure all parties rejected. During trial, defendant YMCA settled with plaintiff and was dismissed from the case. The remaining defendants, however, continued to directed verdicts in their favor. Defendants requested $ 9,304 in attorney fees pursuant to GCR 1963, 316.7, which the trial court granted, finding defendants' attorney's itemized bill of costs to be "prima facie accurate".
Discussion and Legal Analysis of Current Law	While GCR 1963, 316.7 allows the payment of attorney fees where all parties reject the mediation panel's evaluation and the ultimate damages awarded are more than 10% below the panel's recommendation, the fees must be reasonable as determined by the trial judge. GCR 1963, 316.8. An award of attorney fees will be upheld by this Court absent an abuse of the trial court's discretion. *Superior Products v Merucci Bros, Inc, 107 Mich App 153; 309 NW2d 188 (1981)*; *Sturgis Savings & Loan Ass'n v Italian Village, Inc, 81 Mich App 577; 265 NW2d 755 (1978)*. The court must make findings of fact on the issue. *Sturgis, supra; Desender v DeMeulenaere, 12 Mich App 634; 163 NW2d 464 (1968)*.

Citation to Precedential Case	In *Crawley v Schick, 48 Mich App 728; 211 NW2d 217 (1973)*, this Court established several factors which should be considered by the trial court when considering the reasonableness of attorney fees: (1) the professional standing and experience of the attorney; (2) the skill, time, and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. These guidelines were adopted by the Supreme Court recently in *Wood v DAIIE, 413 Mich 573; 321 NW2d 653 (1982)*.
Analysis and Application of the Law to the Facts in the Case	In the present case, the trial court considered none of these factors on the record. It made no findings of fact. Instead, it found the bill of costs to be "prima facie accurate". But even a superficial application of the *Crawley* factors raises questions as to the reasonableness of the attorney fees award: the $ 9,304 fee was charged for a claim evaluated at $ 12,500; the questionable difficulty of the case; and the appropriateness of the time allocated to various tasks listed on the bill of costs.
Holding as to Issue on Attorney Fees	The itemized bill in itself was not sufficient to establish the reasonableness of the fee, nor was the trial judge required to accept it on its face. See *Sturgis, supra, p 584*. The burden of proving fees rests upon the claimant of those fees. See *In re Eddy Estate, 354 Mich 334, 348; 92 NW2d 458 (1958)*. When plaintiff challenged the reasonableness of the fee requested, the trial court should have inquired into the services actually rendered by the attorney before approving the bill of costs. Letters and interrogatories could have been examined, actual time of trial and motions determined, and the appropriateness of the assignment of the work load between attorneys and paralegals discussed. Since plaintiff claimed that defendants' attorney fees were excessive in general and the trial court failed to actually consider the issue of reasonableness but instead found the bill acceptable on its face, the trial court abused its discretion. This case is therefore remanded to the trial court for an evidentiary hearing on the reasonableness of the fee requested by defendants' attorney. In making a final award of attorney fees, the trial court should determine a reasonable fee based on the particular facts of the case and community legal practice.
Discussion and Holding on Issue on Due Process of Law	Plaintiff next contends that the application of GCR 1963, 316.7 deprived her of her constitutional rights to trial and to due process of law. Plaintiff, however, presented neither of these issues to the trial court. Constitutional challenges may not be raised for the first time on appeal. *Crawford v Consumers Power Co, 108 Mich App 232; 310 NW2d 343 (1981)*; *Drewes v Grand Valley State Colleges, 106 Mich App 776; 308 NW2d 642 (1981)*. This rule applies even if the constitutional claims may be of merit. *Penner v Seaway Hospital, 102 Mich App 697; 302 NW2d 285 (1981)*. Since plaintiff failed to preserve these issues for appeal, and since we require remand on other grounds, this Court does not consider the constitutional arguments raised by plaintiff.
Finding and Decision	Remanded for an evidentiary hearing and the award of a reasonable attorney's fees. Costs to plaintiff.

Figure 2.8

2.7 Types of Court Opinions

Courts speak through written orders and opinions. However, there are many types of court opinions. Most cases include a **majority opinion** that explains the court's decision. In a majority opinion, one judge writes the "opinion of the court," and the other judges may join in agreement. The writer also includes a legal analysis of the court's decision. This type of writing is the most important of all those issued, because it has the majority of the judges agreeing with the judgment of the judges on the panel and the legal reasoning behind the decision. A majority opinion carries the most weight of precedential authority.

Sometimes, other judges want to present alternate views. The legal process provides judges with an avenue to share their legal analysis. This is accomplished through concurring and dissenting opinions. In a **concurring opinion**, a judge agrees with the decision listed in the majority opinion, but the judge disagrees with the court's rationale and wants to present a different analysis or legal perspective. The precedential weight of these decisions is limited.

A **dissenting opinion** disagrees with all or part of the majority. The dissenting opinion is issued by one or more judges who do not agree with the majority opinion and have written their own opinion about what they believe the outcome and the legal reasoning should be in a case.

Some jurisdictions use **memorandum** decisions, which are short opinions that briefly state the facts, and include the court's decision without a legal analysis. Other courts issue **per curiam** opinions. Per curiam decisions are usually shorter than authored opinions, and have less discussion of the facts and law than a majority opinion. The words *per curiam* are indicated at the beginning of the opinion instead of the author of the opinion.

2.8 Summary

In this chapter, you learned about the U.S. Court system and the types of cases are decided by the federal courts and the state courts. The differences between Article III and legislative courts were reviewed and the jurisdictional rules for federal courts were discussed. At the state level, both the jurisdiction and venue requirements were discussed. Last, key types of court opinions were studied.

2.9 Key Terms

Administrative law	Felony	Reporter
Appellate courts	Finding tools	Secondary authority
Article III courts	Jurisdiction	Section
Case law	Legislative courts	Stare decisis
Civil case	Long arm statute	Statutory law
Complete diversity	Majority opinion	Subject matter jurisdiction
Concurrent jurisdiction	Memorandum decision (or opinion)	Title
Constitutional law	Misdemeanor	Trial courts
Criminal cases	Opinions	Treaty
Defendant	Original jurisdiction	U.S. Code
Dissenting opinion	Per curiam decision (or opinion)	U.S. Court of Appeals
Diversity of jurisdiction	Personal jurisdiction	U.S. District Court
Exclusive jurisdiction	Plaintiff	U.S. Supreme Court
Federal court	Precedent	Venue
Federal question	Primary law or primary authority	Writ of certiorari

2.10 Chapter Discussion Questions

1. What are the four main types of authority?
2. What authority created the federal courts?
3. What is the difference between exclusive jurisdiction and concurrent jurisdiction?
4. What is diversity of jurisdiction?
5. What is a federal question?
6. What types of cases are only heard in a state court?
7. What is the difference between venue and jurisdiction?
8. What are the key parts of a court opinion?

2.11 Additional Learning Opportunities

To learn more about the federal courts, visit the federal courts website at: (http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsInAmericanGovernment.aspx)

The Federal Judicial Center provides statistics and operational information on the federal courts at: (http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalJudicialCenter.aspx)

The National Center for State Courts provides information and links to all 50 state courts: (http://www.ncsc.org/information-and-resources/browse-by-state/state-court-websites.aspx)

2.12 Test Your Learning

1. Federal judges are:
   A. appointed by the President and approved by the Senate.
   B. appointed by the President and approved by the House of Representatives.
   C. appointed by the Senate and approved by the House of Representatives.
   D. appointed by the House of Representatives and approved by the President.
   E. elected.

2. The _____ is the only court specifically named in the U.S. Constitution.
   A. U.S. Supreme Court
   B. U.S. Court of Appeals
   C. U.S. District Court
   D. U.S. Court of Claims
   E. Court of Military Appeals

3. Cases in which court are typically heard by a panel of three judges?
   A. U.S. Supreme Court
   B. U.S. Court of Appeals
   C. U.S. District Court
   D. U.S. Court of Claims
   E. Court of International Trade

4. The _____ is the trial court in the federal system.
   A. U.S. Supreme Court
   B. U.S. Court of Appeals
   C. U.S. District Court
   D. U.S. Court of Claims
   E. Tax Court

5. Diversity of citizenship means:
   A. a dispute involves parties from different states
   B. a dispute involves parties from different court circuits
   C. a dispute involves parties from different court districts
   D. a dispute involves two parties outside the United States
   E. all of the above are examples

6. How many Justices comprise the U.S. Supreme Court?
   A. 6
   B. 7
   C. 8
   D. 9
   E. 11

7. Choose all that are an example of diversity of jurisdiction:
   A. The plaintiff and the defendant both live in New Jersey.
   B. The plaintiff does business in France and the defendant lives in England.
   C. The plaintiff lives in Texas and the defendant lives in Hawaii.
   D. The plaintiff lives in Wyoming and the defendant does business in Canada.
   E. The plaintiff lives in Germany and the defendant does business in Michigan.

8. What Article in the Constitution established the federal court system?
   A. 2
   B. 3
   C. 4
   D. 5
   E. 6

9. Which type of opinion disagrees with all or part of the majority?
   A. concurring
   B. dissenting
   C. majority
   D. memorandum
   E. per curiam

10. A state court has personal jurisdiction over a defendant:
    A. if the defendant resides within the state
    B. if the defendant does business within a state
    C. if the defendant owns property within a state
    D. if there is some other connection within the state such as the parties being involved in an automobile accident
    E. all of the above

Test Your Learning answers are located in Appendix A.

3 The Civil Litigation Process

Objectives

After completing this chapter, the student should be able to:

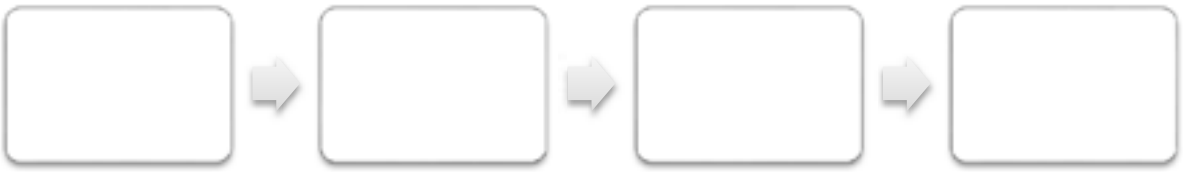
- Describe the steps to file a civil lawsuit;
- Explain the discovery process and the difference between interrogatories, depositions, production of documents, and requests for admission;
- Understand how evidence is used in the trial process, and the role that witness testimony plays in litigation; and
- Explain the importance of each step in a trial from the jury selection though appeal of a verdict.

3.1 Introduction to Civil Litigation

Disputes between people are common. They take place both in business and in personal relationships. Often times the disagreements cannot be resolved in an informal manner and the parties turn to the legal system to resolve their differences. A **civil case** is a legal dispute in which one party sues another. A civil case is very different from a **criminal case**, in which the government brings charges against a person or organization for the violation of crime.

Not all civil disputes belong in the legal system. The first step in determining whether to go to court is for a person to seek the assistance of an attorney. At the initial meeting with the lawyer, the attorney will interview the client to determine the nature of the dispute. The lawyer will also evaluate the facts in the case and research the law. If through investigation the client's facts support a violation of the law, the lawyer will advise the client of their legal options. Generally, the attorney will first seek resolution outside of court through negotiations. If negotiations with the other party are unsuccessful, then the attorney will determine if the dispute is so serious that a lawsuit would be an appropriate means to seek resolution. If the client agrees, the attorney will file a lawsuit. An attorney is not necessary to file an action; however, it is not normally recommended for a person to file a court action on their own due to the intricacies of the law and the unique nature of the American legal process.

Phase 1: Client Interview and Preliminary Investigation



One element that must also be evaluated is the cost-benefit analysis of going to trial. If the monetary costs exceed the potential economic reward, the attorney may not recommend litigation, or may suggest the litigant consider filing the case in **small claims**. In a small claims court, the litigants represent themselves without the benefit of an attorney, and the decision of the judge cannot be appealed. Most state courts have a small claims division for smaller legal disputes. For example, in Michigan[43] and Florida[44] the limit that can be recovered is $5,000, and in California[45] it is $10,000.

As you learned in Chapter Two, a determination must be made which court has subject matter jurisdiction and personal jurisdiction over the defendant. Once the proper court is determined, the attorney will draft the necessary paperwork and file it with the court.

The attorney must closely follow a court's procedures and rules when a case is filed. In particular, each court system has written **court rules** that detail the procedures litigants must follow. Federal courts, state courts and local courts each have their own specific process set forth in the court rules. Federal and state courts also have different laws and rules for civil and criminal cases. At the federal level, the civil litigation rules are set forth in the *Federal Rules of Civil Procedure,*[46] while the court rules in a criminal case are outlined in the *Federal Rules of Criminal Procedure.*[47] In addition, some jurisdictions have additional special court rules for evidentiary issues and appeals. In the federal courts, the *Federal Rules of Evidence*[48] detail the types of evidence may be presented in a case, as well as the process for submitting the evidence to the court.

3.2 Filing the Complaint

After an attorney completes his investigation and determines that the facts support the filing of an action and the proper court for the case, then the attorney must draft a **summons** and a **complaint**. In most courts, these are the initial documents required to commence the litigation process. A summons is a court order that directs the defendant to respond to plaintiff's complaint. The complaint is a legal document that sets out the plaintiff's legal claims against the defendant, and will include the jurisdictional basis for the legal action, as well as the type of legal relief the plaintiff is demanding. Some courts provide standard complaint forms for filing lawsuits involving common disputes, such as landlord-tenant and collection actions.[49] However, in cases involving complex legal issues, the attorney will draft a complaint specific to the plaintiff's case. The complaint is a type of legal **pleading**, which is a written document filed with a court for presenting **claims, defenses, and legal issues in a lawsuit.**

The federal courts have a **notice pleading**[50] requirement. Notice pleading means that a complaint must be written in a way to advise the party being sued of the general facts and issues in the dispute. This is in contrast to some state courts, which follow a **fact pleading** standard requiring each allegation in a complaint to include detailed facts supporting the claims against the defendant.

UNITED STATES DISTRICT COURT
IN THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

_____,

Plaintiff,

vs. No.

_____,

Defendant.

_____/

Name of Plaintiff's Attorney
Address of Plaintiff's Attorney
Telephone Number of Plaintiff's Attorney

_____/

COMPLAINT AND DEMAND FOR JURY TRIAL

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this Complaint pending in this Court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a Judge.

NOW COMES Plaintiff _____, by and through [his/her] attorney, _____ [attorney/firm name] and for [his/her] Complaint against [Defendant(s)] _____ hereby state as follows:

JURISDICTION AND VENUE

1. Plaintiff brings this action under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"), and the Michigan Regulation of Collection Practices Act, M.C.L. § 445.251, *et seq.* ("MRCPA").

2. This Court has jurisdiction pursuant to the following statutes:

   a) 28 U.S.C. § 1331, which gives federal district court original jurisdiction over civil actions arising under the Constitution, laws or treaties of the United States;
   b) 28 U.S.C. § 1367, which gives the district court supplemental jurisdiction over state law claims.

3. Venue is appropriate in this Judicial District under 28 U.S.C. § 1391(b) as the events that gave rise to this Complaint occurred in this District.

First Page of a Sample Federal Complaint

Many courts prefer documents be filed electronically. This is beneficial to the parties, as electronic filing is faster and more efficient than filing physical documents, and reduces travel time and expense.

The defendant must receive legal notice of the lawsuit. This is normally accomplished by physically serving the defendant with a copy of the summons and complaint. Sometimes it is difficult to locate the defendant. In those situations, the court rules provide a process for serving the defendant through alternate means, such as through certified mail or by posting the summons and complaint on the defendant's front door. This alternate process is referred to as **substituted service**.

After the defendant is served, the next requirement is for the defendant to respond to the plaintiff's allegations. This is completed by the defendant's filing of a legal document called an **answer**. In the answer, the party being sued must respond to each of plaintiff's allegations, generally by either admitting or denying each allegation. If the defendant does not know the answer to the claim, the response might also state that an allegation "it is neither admitted nor denied." It is possible, when an action is filed, that the defendant will also have their own legal action against the plaintiff. In this situation, the defendant will file their own legal action in a **counterclaim** against the plaintiff, along with the answer.

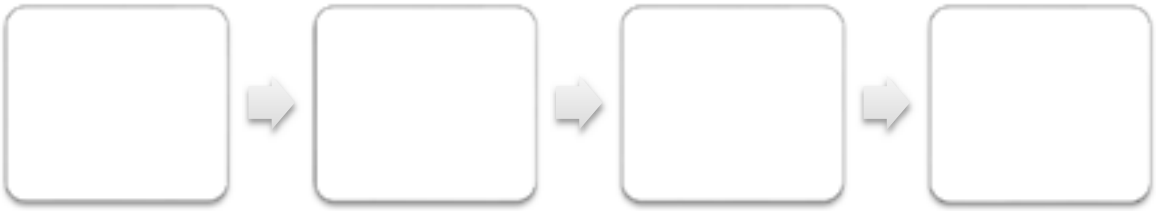
The defendant's answer may also request dismissal of the plaintiff's complaint. This is often accomplished through a **motion for summary disposition** (sometimes called a **motion for summary judgment**). A motion is a written request asking the court to perform an action for one of the parties in the case. A motion for summary disposition is a particular request petitioning the court to dismiss plaintiff's case because the plaintiff has failed to plead a case that meets legal requirements such that there is "no genuine issue as to a material fact."

If the defendant has been appropriately served and fails to answer the complaint, the plaintiff may request the court to order a **default judgment** against the defendant. A default judgment is a court order awarding the plaintiff the requested relief, eliminating the need for a trial.

Lawsuits must be filed on a timely basis. Typically, there is a time limit detailed by statute that dictates how quickly a party must institute an action once the party has been aggrieved. This time limit is called the **statute of limitations.** For example, in a contract dispute, the statute of limitations might require all lawsuits involving a breach of contract be filed within six years from the occurrence of the breach of contract.

Based on the defendant's answer to the plaintiff's complaint, plaintiff's attorney will create their strategy for proceeding with the next phase in the case, called discovery.

Phase 2: The Initial Court Filing



UNITED STATES DISTRICT COURT FOR THE DISTRICT OF STATE

If you were ever exposed to asbestos in ABC Corporation products, you could get a payment from a class action settlement.

A federal court authorized this notice. This is not a solicitation from a lawyer.

- The settlement will provide $270 million to pay claims from those who are currently suffering from an asbestos-related disease, as well as those exposed but not sick, who need medical monitoring.
- To qualify, you must have been exposed to asbestos in ABC Corporation products. Your exposure may have happened in different ways:
  - **Homeowners may have had ABC's Xinsulation in their attics or walls.**
  - **Workers may have installed ABC building products like Xbestos.**
- Your legal rights are affected whether you act or don't act. Read this notice carefully.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT:	
SUBMIT A CLAIM FORM	The only way to get a payment.
EXCLUDE YOURSELF	Get no payment. This is the only option that allows you to ever be part of any other lawsuit against ABC, about the legal claims in this case.
OBJECT	Write to the Court about why you don't like the settlement.
GO TO A HEARING	Ask to speak in Court about the fairness of the settlement.
DO NOTHING	Get no payment. Give up rights.

- These rights and options—**and the deadlines to exercise them**—are explained in this notice.
- The Court in charge of this case still has to decide whether to approve the settlement. Payments will be made if the Court approves the settlement and after appeals are resolved. Please be patient.

QUESTIONS? CALL 1-800-000-0000 TOLL FREE, OR VISIT ABCSETTLEMENT.COM
PARA UNA NOTIFICACIÓN EN ESPAÑOL, LLAMAR O VISITAR NUESTRO WEBSITE

Figure 3.1 – Sample Class Action Notice[51]

3.3 Class Actions

A class action is a lawsuit instituted by a group of plaintiffs who claim to have suffered a similar wrong.

The rationale behine a class action is that, by joining individuals with common claims, the number of lawsuits can be reduced. Court rules from each jursidiction control who may institute a class action. For example, in federal court Rule 23[52] of the *Federal Rules of Civil Procedure* details that process.

In addition, in a class action the parties must use their best efforts to notifiy the members of the class about the lawsuit. (See Figure 3-1 for a sample federal court class action notice.) These types of lawsuits often result in court approved financial settelments for members of the class. An example of a class action would include a group of patients alleging harm from taking a pharmaceutical drug, employees charging sex-discrimination by an employer, or a group of investors suing the board of directors of a company for mispresenting profits.

3.4 Discovery Process

Once the complaint has been served and answered, then **discovery** can take place. Discovery is a process that allows opposing parties in a lawsuit to gather information from one another in preparation for trial. It is referred to as a fact finding phase of the trial, and often encourages settlement. During this process, the court's rules for discovery must be followed very closely, to allow each party to obtain the evidence needed to support its legal position.

A party is not required to avail itself of all the discovery options; instead, the attorney representing a party will make a strategic determination as to the type of discovery that best serves the case. Parties who refuse to participate in the discovery process, and who do not timely object are subject to monetary and other court ordered sanctions. If the discovery process becomes too burdensome for a party or would involve the release of confidential information, such as trade secrets or patient files, a court may issue a protective order that limits the scope of discovery.

3.4.1 Types of Discovery

There are several types of discovery. Common types of discovery include:

a) interrogatories,
b) demand for the production of documents,
c) requests for admissions, and
d) depositions

Interrogatories are written questions presented by one party to another requiring a written response under oath. These questions are often the first type of discovery used by the parties. Court rules will detail how and when the questions are given to the opposition and the time frame permitted for a response. Parties are required to accurately, completely, and honestly respond to the interrogatories. The party answering the interrogatory questions may object to any of the questions included in the interrogatories. However, the objection must have a legal basis for the challenge, such as a question being irrelevant to the dispute.

For example, in an employment contract dispute sample interrogatories might include:

1. Please state the reasons that plaintiff was terminated.
2. If the plaintiff was replaced in her position, please state the age, sex, race and rate of pay of her replacement.
3. Please detail all policies and procedures you believe that plaintiff violated during her employment at your company.
4. Was any part of plaintiff's employment covered by the terms of a collective bargaining agreement? If so, please provide a copy of the agreement.
5. Was the plaintiff ever disciplined during her employment? If so, please detail the circumstances surrounding the discipline.

Document requests, also known as a **demand for the production of documents**, require the opposing party to produce physical or electronic copies of materials. For example, in a divorce case, one party might ask the opposition to produce copies of financial documents.

Requests for admissions are a process to compel a party to admit to certain evidence that cannot be controverted. This often helps with the settlement process, as it clarifies which facts are truly in dispute between the parties.

Depositions are probably the most well-known type of discovery. A deposition is an interview of an opposing witness (called a **deponent**) where the deponent is placed under oath and questioned by the opposing attorney. A court reporter is present during a deposition, as well as attorney for the opposition. Depositions usually takes place in an attorney's office, and the court reporter will subsequently prepare a transcript for all parties involved in the case. Any witness who has information relevant to the case may be deposed. Often times, an attorney uses the testimony given by another party's witness to discredit the party during a courtroom examination.

A **subpoena duces tecum** is used to require the deponent to bring certain documents to the deposition. Relevant documents might include contracts, phone records, receipts, *etc*. This allows the attorney to question the witness about their personal knowledge of the documents.

Phase 3: Discovery Process

3.4.2 Electronic Discovery

Electronic discovery (e-discovery) involves locating digital evidence for use at trial. To locate electronic information, attorneys use specialized computer programs to search for sought after information. In addition, these programs can sometimes recover deleted information that might be relevant to the case.

Electronic discovery presents some unique challenges because electronic files can be located in any type of digital media. For example, electronic information can be found in email, voice mail, instant messages, text messages, electronic documents, databases, file fragments, metadata, and digital images. Electronic information may be recovered from all types of electronic storage devices including hard drives, flash drives, handheld devices, and optical disks. Cloud computing, or the saving of electronic data at a remote location managed by a third party, presents unique challenges in discovery. As such, third parties holding data relevant to a dispute may be ordered by a court to provide relevant information to all litigants.

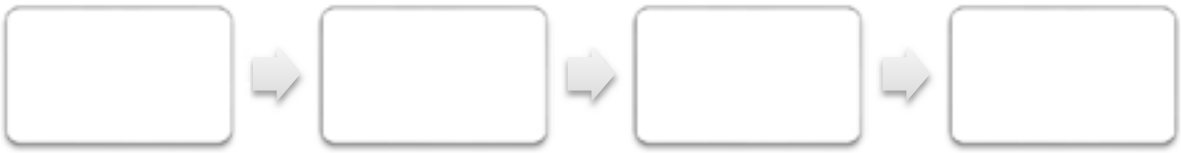
There is no single business standard for saving and storing electronic data, but the federal courts have established guidelines for the discovery of electronic information in civil actions in federal courts. The rules are designed to ensure standardization and to speed justice. But these guidelines do not apply to lawsuits in state courts.

Rule 26[53] of the *Federal Rules of Civil Procedure* outlines the process for the discovery electronic records. This rule is unique, as it requires the parties to share with the opposition "a copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses" prior to the electronic information being requested through formal discovery. This is done early in the litigation process at a "meet and confer" conference in which the attorneys discuss discoverable electronic evidence and the issues related to retrieving and sharing the electronic information with the opposing party. Parties must share their discovery plan so each party knows what **electronically stored information (ESI)** is needed by each litigant, how each party stores its ESI, the form of the electronic information, and any issues related to privileged information. Privileged information could be documents subject to the attorney-client privilege, which includes information provided by the client to the attorney in confidence.

3.5 The Pre-Trial Process

At some point in the trial process, the court clerk will schedule a meeting between the parties and the judge to review discovery, and assess the progress of the parties in the litigation process. Later, a pre-trial conference will be scheduled. The rationale requiring a pre-trial meeting is that the attorneys for both sides will come to the court prepared with settlement authority from their clients. It is common practice for the attorneys to attempt to negotiate a settlement prior to the actual trial date, as over 90% of cases[54] are settled prior to trial. At the pre-trial meeting, the parties will also obtain written stipulations as to any undisputed facts, and agree on witness lists and exhibits to present at trial.

Phase 4: Pre-Trial



3.6 Alternative Dispute Resolution

Mediation and **arbitration** are alternative avenues through which a lawsuit may be settled. These two processes are known as **alternative dispute resolution.**

If the parties are unable to settle the case, the court may require the parties to submit their dispute to a mediator. The mediator may consist of a single mediator or a panel of mediators, who may be attorneys with experience in the area of the legal dispute. The panel will review all the court documents in the case, listen to presentations by the attorneys, and issue an opinion detailing recommendation for settlement. Each side may have the option to accept or reject the recommendation for settlement. If the parties agree with the recommendation, they will enter into a formal contract called a **settlement agreement.**

Alternatively, some courts might appoint an arbitrator as a neutral party to adjudicate the case. Frequently, arbitrator awards are binding to the parties with a limited right to appeal.

3.7 The Trial

The court clerk is responsible for setting a trial date. Some courts immediately schedule the trial date when the complaint is filed, while others schedule the trial date at the pre-trial conference. In the event of a date conflict with one of the parties, the trial date can be rescheduled. The date change is not automatic, as rescheduling is done at the discretion of the judge. The parties must also have completed the discovery process prior to the trial date.

3.7.1 Judge or Jury?

One key decision to be made at the beginning of the trial process is for the plaintiff's attorney to determine whether the case should be decided by a judge or jury. Normally, jury trials must be requested at the time the complaint is filed.

A trial by jury is often a choice for cases involving emotional events, such as the death of a child. Judge trials are typically chosen for cases that have difficult facts or require detailed explanations. It would not be unusual for a complex contract case or a securities fraud dispute to be heard only before a judge.

If there is a jury trial, there is a possibility that the judge may not agree with the jury's decision. If the weight of the evidence does not support the jury's verdict, it is possible for the judge to overrule the jury's decision.

3.7.2 Jury Selection

If a party elects trial by jury, the court clerk or administrator's office will send a jury notice to potential jurors requiring them to appear in court. Eligible jurors are residents within the geographical boundaries of the court. Members of a jury pool are typically determined from voter registration records, drivers' license databases, or other government records. The goal is to obtain a jury pool representative of the community.

Jurors are required to complete a questionnaire[55] for the court clerk prior to appearing for jury duty. The form will ask the potential juror for basic personal information, such as their occupation, education, club membership, previous service as a juror, military experience, and prior contact with the legal system (such as being a witness or litigant). In addition, the potential juror will be asked about their ability to read and speak the English language. Jurors are paid a daily fee for their service. In the federal courts jurors are paid $40.00 per day of service for the first 10 days, and then $50.00 thereafter. In addition, jurors are reimbursed reasonable parking and travel expenses.[56]

To be legally qualified for jury service, an individual must:

- be a United States citizen;
- be at least 18 years of age;
- reside primarily in the judicial district for one year;
- be adequately proficient in English to satisfactorily complete the juror qualification form;
- have no disqualifying mental or physical condition;
- not currently be subject to felony charges punishable by imprisonment for more than one year; and
- never have been convicted of a felony (unless civil rights have been legally restored)

There are three groups that are exempt from federal jury service:

- members of the armed forces on active duty;
- members of professional fire and police departments; and
- "public officers" of federal, state or local governments, who are actively engaged full-time in the performance of public duties

Persons belonging to these groups may not serve on federal juries, even if they so desire.

Figure 3.2 – Juror Qualifications for Federal Court[57]

On the federal level, both the U.S. Supreme Court,[58] as well as the *Federal Rules of Civil Procedure*, allow civil juries to be a six member panel. However, at the state level, a civil trial may be as large as twelve individuals, in addition to two alternate jurors. An alternate juror attends the trial proceedings, along with the regular members of the jury; however, if a juror is unable to continue or is removed from the jury, for example by failing to follow the court guidelines, an alternate juror will replace the removed juror.

When a person arrives for jury duty, they are assigned a number. Numbers are randomly chosen for the next level of screening, called a **voir dire.** The voir dire is an interactive process during which a group of potential jurors (called a **jury panel**) is called into the courtroom for questioning to determine whether a person can impartially serve on a jury to render a fair verdict. During the voir dire, the judge, the attorneys or both, ask questions of the potential jurors. During this questioning, if the juror shows bias to one of the parties or appears to have a pre-disposition to the type of case presented, the potential juror can be **challenged for cause**. For example, a person who knows one of the parties involved in the case would be dismissed for cause, as would a person who appears to have a predetermined opinion of the verdict in the case. An attorney for a party can also make a **preemptory challenge** to remove an individual from the jury. The attorney is not required to have a valid reason to dismiss a juror with a preemptory challenge; in federal courts, the rules limit a party to three preemptory challenges. However, the United States Supreme Court in more recent years has also prohibited racially based peremptory challenges,[59] as well as gender based preemptory challenges,[60] as violations of the Equal Protection Clause of the Fourteenth Amendment.

If a juror is not stricken for cause or by a preemptory challenge, they are selected to serve on the jury. Once selected, they will be sworn in by the judge and take an oath to decide the case "upon the law and evidence."

In high profile cases, the attorney may choose to employ a jury consultant specialist. These may be individuals or companies that provide services for assisting with jury selection, such as making recommendations when an attorney should use a preemptory challenge. Consultants can also assist with witness preparation, and provide feedback regarding the jury's response to each party's arguments.

3.7.3 Opening Statement

A trial begins with the Plaintiff presenting an **opening statement.** The purpose of this statement is to present a brief overview of the case to the trier of fact. In other words, the Plaintiff's attorney is telling the court (or jury) what the case is all about, and the facts that will be proved during the trial.

The opening statement is more important in a jury trial, as it is an excellent opportunity for an attorney to capture the jury's attention, and it is one of two opportunities for the attorney to directly speak to a jury. First impressions are crucial when working with a jury, so the attorney needs to carefully plan how to present the lawsuit to the jury. However, only key facts in the Plaintiff's case should be discussed at this point, in order to help the jury focus on the most important elements of the case. After the Plaintiff's attorney finishes the opening statement, the Defendant's attorney will have a similar opportunity to present an opening statement to the jury.

3.7.4 Evidence

Having the proper evidence is critical to winning a civil case. As mentioned earlier, before a lawsuit is filed, the attorney will have done research to make certain that evidence exists to obtain an advantageous verdict. The pre-investigation phase involves locating and interviewing witnesses, as well as finding and inspecting documents, reviewing and photographing key evidence, and whatever else might be needed to prove a case. This is also an opportunity for an attorney to determine whether there is sufficient evidence to be successful in court.

Once the evidence is obtained, it must be preserved. Proper identification must accompany each piece of evidence, including its identification, how, where, and when it was obtained. This is necessary to authenticate the evidence before the judge.[61]

Federal Rules of Evidence (FRE)
Rule 401. Test for Relevant Evidence[61]

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.

Evidence offered through witness testimony is known as **testimonial evidence**. Other proofs, such as **real evidence** (also known as **physical evidence**), consist of tangible evidence, such as blood, DNA, fingerprints, photographs, email messages, and text messages. Real evidence may be further classified into **direct** and **indirect evidence**. Direct evidence proves or disproves a fact directly. For example, in a civil trial, a witness may confirm their signature on a document. The statement of the witness would be considered direct evidence providing authenticity of a signature. On the other hand, indirect evidence does not directly prove evidence, but will instead lead to facts and proofs that are often circumstantial. **Circumstantial evidence** is a type of indirect evidence, which through a series of proven facts, infers to a court that a certain action took place.

During the trial process, an attorney will often object to questions asked by the opposition. When a party objects, they "place on the court record" their concerns that the court rules have not been followed, or that the judge has not correctly interpreted the law. So, when an attorney "objects," they are responding to improper evidence offered by the opposing party, the wording of questions, or other legal errors.

If an attorney objects, they are doing so for a reason. Generally, that reason is to establish a record for appeal. If there is not an **objection** on the record, then an attorney cannot use that possible error as the basis for an appeal to a higher court.

Evidence must be **relevant** to be accepted. The standard used for relevance will depend on the court rules for the court hearing the case.

It is not unusual for an attorney to object to the evidence as being **hearsay.** Hearsay is a statement made by a person other than the person appearing in court. Other common objections might be brought in response to evidence that is irrelevant, immaterial, misleading, confusing, argumentative, or conclusory.

When an attorney objects to a question, the judge will make a ruling on the objection. If the judge agrees with the basis of the challenge, the objection will be **sustained**. If the judge disagrees with the objection, the judge will **overrule** the objection.

In a civil case, the plaintiff has the burden of proof to establish the elements of the case. The standard in a civil case is to prove the case by a **preponderance of the evidence**, which is a somewhat subjective standard. A preponderance of evidence means that, more likely than not, the Plaintiff has proved its case. This standard is in contrast to the criminal standard **beyond a reasonable doubt**, which is the highest legal standard found in a court of law.

3.7.5 Witness Examination

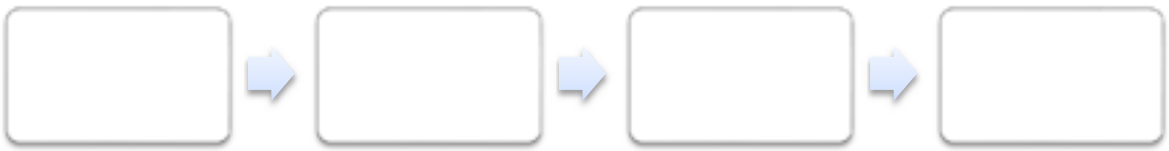
After the plaintiff and defendant have presented their opening statements, the parties take turns presenting their cases to the court. This consists of presenting all relevant evidence, as well as the testimony of witnesses.

Most witnesses are **lay witnesses.** This means that the witness does not have any special experience or expertise, but the witness will be testifying about facts of which they have firsthand knowledge. Witness testimony is the core of a legal case, so prior to appearing in a court, the attorney will work with a witness to prepare the person for questioning at trial. This preparation includes explaining the formality of the witness examination process. Actual trials are different from what people see on television or at the movies, so the witness needs to be prepared for the stress of the witness examination process.

During trial, the plaintiff will first present its case by offering and questioning witnesses. This is called a **direct examination**. The questions asked of the witness are designed to help the plaintiff prove its case. The opposition will also have an opportunity to question each witness. When the defendant questions the plaintiff's witness, it is called **cross examination**. The defendant's attorney will design the questions to try to discredit the plaintiff's witness. Then the plaintiff can again question its witness. This is called the **redirect**. **Recross** allows opposing counsel to again question the witness as to matters brought up in redirect. This process is repeated until the plaintiff offers all of its witnesses and "rests" its case. Once the plaintiff completes its case, it is common for the defendant's attorney to petition the judge for a **directed verdict** on its behalf. The request for directed verdict is accomplished through a motion, which is simply a formal request to a court. A motion for directed verdict (also known as a motion for involuntary dismissal in some jurisdictions) requests dismissal of the case on the basis that the evidence presented is factually insufficient to prove plaintiff's case.

After the plaintiff rests, the defendant will have the opportunity to present witnesses, and produce evidence to challenge plaintiff's case. The process continues until all the defendant's witnesses have been questioned. Remember that in a civil case, the plaintiff will prevail only if its case is proven by "the preponderance of evidence." Again, that simply means the evidence supports a determination that the facts alleged by the plaintiff, support a finding, that more likely than not, the plaintiff's allegations are true.

Phase 5: Questioning a Witness



Expert Witnesses

Often in a trial, there is a need for testimony of an **expert witness**. Expert witnesses are called to assist the trier of fact interpreting evidence that goes beyond the knowledge of the average person. They can also be called to assist in placing a value on the financial loss that a party has experienced.

Types of Cases Using Expert Witnesses
Automobile Accidents
Business Litigation
Construction Accidents
Insurance Litigation
Medical Malpractice
Other Professional Malpractice (e.g. attorney)
Patent Litigation
Product Liability

What is an expert witness? It is someone who has specialized knowledge, skills, experience, or training on the subject that is the basis of a lawsuit. When an expert witness is called to testify, the expert witness must first be qualified by the attorney. To establish the witness's knowledge, the expert witness will be asked about academic credentials, professional resume, and scholarly and academic publications. The court will also want to know how often an expert has testified in the past, as well as explore any bias toward the plaintiff or defendant.

Federal and state court rules provide guidelines on the use of expert witnesses at trial. In the federal courts this information is located in Federal Rule of Evidence 702.

Every party in a lawsuit can offer expert witness testimony to the court by an expert of their own choosing. The judge may also appoint an expert to testify. Lastly, expert witnesses are entitled to reasonable compensation. However, they are paid for their time and not their testimony.

Impeaching a Witness

The opposing side will always want to discredit witness testimony presented by the opposition. This is called **impeaching a witness**.[62]

Federal Rules of Evidence (FRE)

Rule 702. Testimony by Expert Witnesses[62]

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

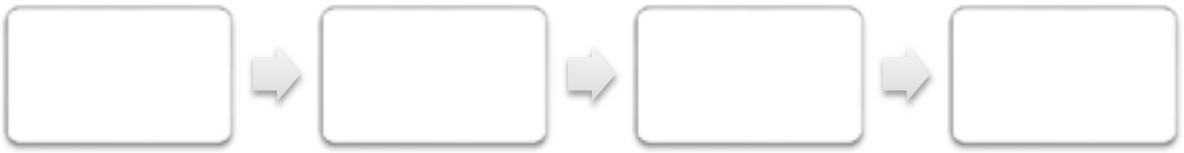
There are some special issues surrounding impeachment of an expert witness. The witness's credentials may be challenged, or the expert witness may be shown to be biased. During these challenges, the expert witness will defend their testimony, to prevent eroding of their credibility.

3.7.6 Closing Argument

The last part of the case involves the **closing argument**. During the closing argument, each party will reinforce the testimony of their witnesses and state how the case should be decided. Each party will also use the closing argument as an opportunity to highlight the weaknesses of the opposition's case, as well as attack the credibility of their witnesses. If appropriate, an attorney might also use this time to make an emotional appeal to the jury.

At any time during the case (including during the closing argument), either party may ask the court for a **mistrial.** A mistrial may occur when one of the attorneys has made a statement during trial that is against the weight of the evidence, improper, or prejudicial. In other words, if the judge feels that the comments have improperly prejudiced the jury, a mistrial will be ordered, resulting in a new trial and new jury.

Phase 6: Trial and Post Trial Process



3.8 Jury Instructions

Prior the jury's deliberation, the judge will instruct the jury how to interpret the evidence and what level of evidence is required to decide the case. Both the plaintiff and defendant's attorney will have input into the wording of the jury instructions. In addition, courts typically have standard language to use for certain types of lawsuit. Jury instructions will also include guidelines on awarding the amount and type of **damages**, if the case is decided in the plaintiff's favor. Damages typically involve an amount of money that is awarded to compensate the plaintiff for his injury. Jurors may also award additional punitive damages to punish the defendant for "wanton, reckless, malicious, or deceitful conduct." In addition, the defendant may be ordered to perform a specific action.

Occasionally, a jury will be **sequestered**. Sequestration generally occurs in high profile cases, and more often in a criminal than in civil cases. During sequestration, the jurors are isolated from the public without access to news media. As a group, the jurors meet during the day at court, and in the evenings the jurors live in housing (such as a hotel) paid by the government.

The jury's main goal is to make a decision on the facts and the law and come to a decision or **verdict**. A verdict is always read in open court. Many times, a jury will be polled after rendering their verdict. Polling involves asking each of the jurors if the verdict represents their decision in the case.

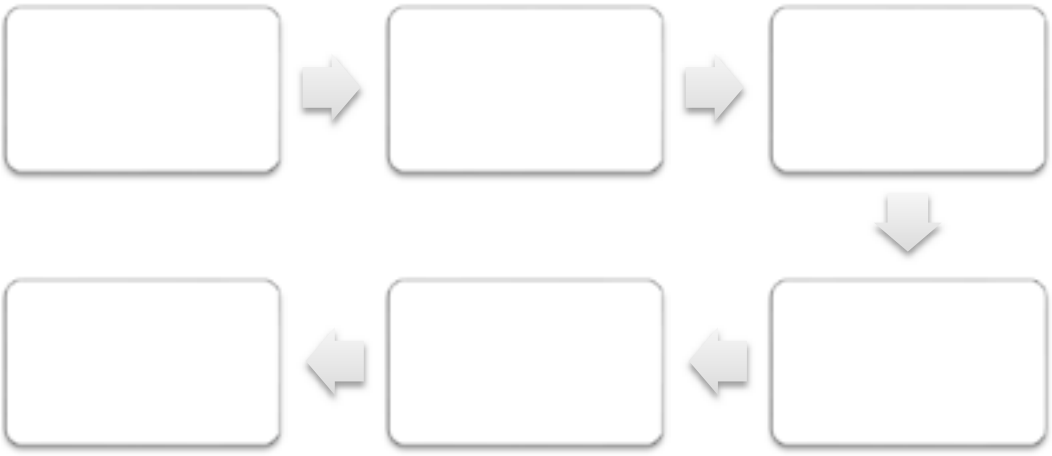
A **hung jury** means that the jury members cannot come to agreement. Hung juries typically result in a mistrial, which requires in a new trial. Hung juries often encourage settlements, as the parties do not want to expend the time and cost to try the case a second time.

In addition, the judge may determine that the jury's verdict cannot be substantiated by the evidence that was presented. In this case, the judge can "set aside" a verdict of the jury, and render a different determination on the case.

3.9 The Appellate Process

In a civil case, if a party disagrees with the decision of the judge or jury, the party may **appeal** the case to the next court level. Again, court rules will govern the process for the appeal.

Phase 7: Appellate Process



Typically, the party wanting to appeal must first request a motion for a new trial from the trial court. The motion must detail "grievous" errors that took place during the trial. If the trial judge denies the motion, the party may proceed to the next level to file the appeal. Typically, a **notice of appeal** must be filed with the court and with the opposing party within the timeframe detailed by court rules. At the federal level, this timeframe is 30 days[63] after the entry of the trial court's judgment. Next, the trial transcript must be ordered from the court reporter. This is a key element of the appeal because appeals are based on error taking place at the trial level. Note that the parties cannot present new evidence at the appellate level.

As a part of the appeal, the parties will also file **appellate briefs**. An appellate brief is a legal document that provides the argument of each party as to the error that took place during trial. The party filing the appeal is called the **appellant**. The appellant is responsible for filing the **initial brief**. The opposing party is the **appellee.** The appellee is required to respond to the initial brief with an **answer** to the brief. The appellant then has an option to respond to the appellee's answer with a **reply brief**.

The parties also have the option to argue their case before the court. An **oral argument** in an appellate court is very short; often only 15 to 30 minutes per party is allowed. It may take the appellate court several months to render its decision. Appellate decisions are documented in written opinions. Many times, an appellate decision is published in a court reporter, which makes the decision available for use as precedent. If the appellant does not agree with the appellate court's decision and feels the appellate court has erred in interpreting the law, they may submit a motion for rehearing. Similarly, either party has the option to request an appeal to a higher court, but these appeals are generally not automatic and require the higher court's approval to proceed further.

3.10 Summary

A civil case involves a legal dispute between individuals or entities. If the law supports the plaintiff's claim, an attorney will draft and file a legal document called a complaint. The defendant will then have a set period of time (often 21 days) to reply to the plaintiff's complaint. The filing of the defendant's answers starts the formal discovery process. At this time, both parties may interview each other's witnesses, as well as request documents from each other. Courts are always anxious to close cases, so the court might order mediation or arbitration to encourage settlement. If the case is not settled, the judge will order a pretrial hearing to set the boundaries for the trial. Once a trial is completed, it is possible one party may request an appeal. If no appeal is started, and if a monetary judgment was awarded at trial, the winning party can return to court to attempt collection of the judgment.

3.11 Key Terms

Alternative dispute resolution	*Federal Rules of Evidence* (FRE)	Opening statement
Answer to the brief	Indirect evidence	Oral argument
Appeal	Initial brief	Overrule
Appellant	Interrogatories	Physical evidence
Appellate brief	Deponent	Pleading
Appellee	Depositions	Polling
Arbitration	Direct examination	Preemptory challenge
Beyond a reasonable doubt	Direct evidence	Preponderance of evidence
Circumstantial evidence	Directed verdict	Protective order
Civil case	Discovery	Real evidence
Challenges for cause	Electronic discovery	Recross examination
Closing argument	Electronically stored information	Redirect examination
Complaint	(ESI)	Relevant evidence
Counterclaim	Hearsay	Reply brief
Court rules	Hung jury	Requests for admissions
Criminal case	Impeaching a witness	Sequestration
Cross examination	Initial brief	Settlement agreement
Damages	Jury panel	Small claims
Default judgment	Lay witness	Statute of limitations
Demand for the production of	Mediation	Subpoena duces tecum
documents	Mistrial	Substituted service
Expert witness	Motion for new trial	Sustained
Fact pleading	Motion for summary disposition	Summons
Federal Rules of Civil Procedure (FRCP)	Notice of appeal	Testimonial evidence
	Notice pleading	Verdict
	Objection	Voir dire

3.12 Chapter Discussion Questions

1. What is the difference between a civil and a criminal case?
2. Why is jurisdiction important with the filing of a civil case?
3. Why would a party prefer a jury trial over a judge trial?
4. What is the significance of the discovery process in a civil case?
5. Under what types of circumstances would a person be removed from a jury panel and excused from serving?
6. Explain in what types of situations an expert witness will be used at trial?
7. Assume Party A is suing Party B for failing to pay a loan. What type of evidence would be relevant in a case of this type?
8. What is the difference between direct examination, cross examination, redirect examination, and recross examination?
9. Describe the differences between an opening statement and a closing argument.

3.13 Additional Learning Opportunities

Civil case basics are reviewed through the Findlaw.com website at:

(http://litigation.findlaw.com/filing-a-lawsuit/civil-cases-the-basics.html)

The U.S. Federal Courts website provides an overview of civil cases in the federal court system at:

(http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/CivilCases.aspx)

For an example of a juror handbook see:

(http://www.nysd.uscourts.gov/jury_handbook.php?id=1) or
(http://14adistrictcourt.org/jury_duty/jurorsmanual.pdf)

3.14 Test Your Learning

1. The first step in the civil litigation process is:
   A. drafting the complaint
   B. drafting the settlement agreement
   C. the initial client interview
   D. preliminary investigation of the evidence
   E. preparing the interrogatories

2. Litigation is:
   A. a dispute that turns into a lawsuit
   B. a type of alternative dispute resolution
   C. a part of the discovery process
   D. a type of legal document
   E. an out of court settlement

3. An interrogatory is:
   A. an oral interrogation of one of the parties
   B. the oral questioning of an expert witness
   C. written questions submitted to one of the parties
   D. a written request to produce documents
   E. none of the above

4. The purpose of a legal complaint is to:
   A. choose a jury
   B. file an appeal
   C. initiate discovery
   D. initiate a lawsuit
   E. interview witnesses

5. Discovery is:
   A. a part of the lawsuit where the parties obtain information from each other
   B. a rule of evidence
   C. the time to present the closing argument
   D. when a plaintiff files a complaint with the court
   E. when the jury is chosen

6. Attorney Jordan is meeting with a potential client to learn about the client's legal problem and to determine whether to take the case. This describes a(n):
   A. informational interview
   B. initial client interview
   C. subsequent client interview
   D. witness interview

7. What type of witness offers special knowledge and expertise?
   A. a character witness
   B. an expert witness
   C. a friendly witness
   D. a hostile witness
   E. a lay witness

8. What type of document must be filed by a party to start an appeal?
   A. notice of appeal
   B. notice of complaint
   C. notice of disagreement
   D. notice of dispute
   E. notice of filing

9. After a defendant has been successfully served with a summons and complaint, what should be the defendant's next course of action?
   A. answer the complaint
   B. file a motion for a new trial
   C. file a motion for summary disposition
   D. file a request for motion for the production of documents

10. Chris is on a jury panel and knows one of the witnesses. Chris can be removed from the panel with a:
    A. challenge for bias
    B. challenge for cause
    C. challenge for knowledge
    D. preemptory challenge

Test Your Learning answers are located in Appendix A.

4 The Criminal Trial Process

Objectives

After completing this chapter, the student should be able to:

- Describe the difference between a crime and a tort;
- Explain the different classifications of a crime, and the elements of act and mens rea;
- Explain the constitutional safeguards in the prosecution of a criminal case;
- Explain the importance of each step in a trial process beginning with the selection of the jury though the appeal.

4.1 Introduction to Criminal Law

As mentioned in Chapter 3, **criminal law** and **civil law** are different areas of the law. Whereas civil law involves a dispute between two individuals or groups**,** criminal law concerns illegal conduct banned by society. That unlawful conduct is called a **crime**. When someone commits a crime, the government (rather than a private party) institutes charges against a person or organization for violating the law. If found guilty, the defendant is punished through **sentencing**. Crimes can be prosecuted at the federal, state, and local levels.

The definition and punishment of a crime is located in **substantive law**. How a defendant is prosecuted is referred to as **procedural law**.

> The standard of proof in a criminal trial is "beyond a reasonable doubt", which means that evidence must be so strong that there is no reasonable doubt that the defendant committed the crime.[64]

The Bill of Rights as interpreted by the United States Supreme Court forms the foundation of the criminal law process. Under the federal Constitution, there are certain due process protections that must be provided to all individuals. They begin with the principle that a person is presumed innocent by the government until proven guilty. Additionally there are specific procedural guarantees afforded under the Fourth, Fifth, Sixth, and Eighth Amendments of the Constitution. Through the Fourteenth Amendment, those legal protections must also be observed in the prosecution of crimes in state courts. Persons accused of crimes in the United States have the following rights:

- Under the Fourth Amendment, people have the right to be free from **unreasonable search and seizure.** In other words, **l**aw enforcement officers must have probable cause to search an individual or their property. "(A) search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed," and a seizure "occurs when there is some meaningful interference with an individual's possessory interests in that property."[65]
- The Fifth Amendment gives an accused the right to remain silent. This is also known as the **privilege against self-incrimination**. It means that a person cannot be forced to testify against oneself. This right places the burden of proof in a criminal case on the government.
- The Fifth Amendment also guarantees the right against **double jeopardy**. Double jeopardy means that a person cannot be prosecuted more than once for the same crime. In other words, if a judge or jury acquits a person of a crime, the government cannot prosecute that person a second time for the same offense.
- Under the Sixth Amendment, a person has the right to be represented by an attorney. The United States Supreme Court[66] guarantees the right to a lawyer at all key stages of the criminal process. This means that the government must appoint an attorney free of charge to any defendant who cannot afford a lawyer. The government can either pay for a private attorney or provide a public defender.
- The Sixth Amendment also gives a defendant the right to confront his witnesses. Someone accused of a crime has the right to question and cross-examine any witnesses and require them to be present at their trial.

- A criminal defendant is entitled to an impartial jury trial of his peers. This is a Sixth Amendment right. However, a prosecutor cannot exclude jurors solely on their race by using its preemptory challenges. If a Defendant's attorney feels race has been a factor in dismissing jurors, the pool may be disputed through a ***Batson* challenge.**[67]
- In addition to other Sixth Amendment rights, the U.S. Constitution guarantees a criminal defendant the right to a speedy trial. Speedy is normally defined by state statute.
- Under the Eighth Amendment, there is a right against **excessive bail**. A person cannot be required to post excessive bail when charged with a crime. Bail must be an amount that reasonably assures the defendant will appear in court for trial. However, unlike others, this Constitutional right *has not* been applied by the U.S. Supreme Court to the states under the Fourteenth Amendment.

As mentioned, these rights are guaranteed by the U.S. Constitution. State constitutions also contain legal rights, and those at the state level usually resemble those included in the U.S. constitution. However, many states have provisions that offer different or broader protections. For example, in the State of Michigan, less severe crimes (called misdemeanors) may consist of juries of fewer than 12 jurors.[68] In addition, Michigan's Constitution provides a defendant with a state paid attorney if the defendant appeals a conviction to a higher court.

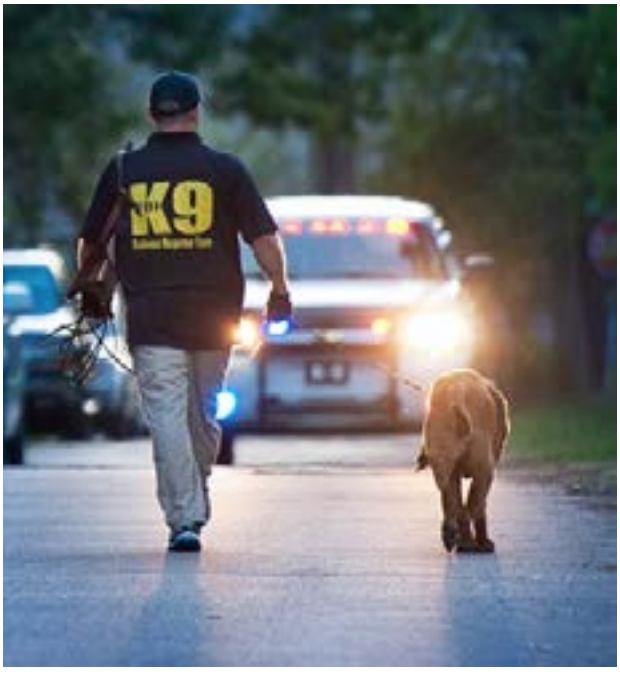


Figure 4.1 – Source: FBI.gov

4.2 Jurisdiction over Crimes

Both the federal and state governments have jurisdiction over crimes. If a federal law or agency defines a certain action as a crime, then federal jurisdiction exists and the U.S. Attorney's Office will prosecute the crime.

Generally, federal criminal jurisdiction exists over crimes involving interstate commerce or communications, crimes interfering with the operation of the federal government or its agents, and crimes directed at citizens or property located outside of the United States. All federal crimes are prosecuted in the federal district court where the crime occurred. At the state level, the seriousness of the crime will determine which court in the state system will hear the defendant's case.

State crimes are for wrongs against a person or property that take place within the boundaries of a state. State laws will define a state's jurisdiction for crimes. In these cases, the "People," the "City," or the "State" will be the party who prosecutes the defendant in a state criminal proceeding. State crimes are prosecuted by an attorney for the government, known as the county or state prosecutor, district attorney, prosecuting attorney, city attorney, or county attorney.

4.3 Classifications of Crime

Crimes are violations of laws. In an attempt to standardize and clarify state criminal laws, the American Law Institute (ALI),[69] a scholarly organization of attorneys, judges, and law professors has drafted a Model Penal Code (MPC)[70] for state legislators to consider when drafting legislation. Many states have incorporated some or all of the MPC language into their laws.

Figure 4.2 – Used with Permission

Under the MPC, crimes fall into the following three basic classifications:

1) **Felonies** or serious crimes that carry a penalty of imprisonment for more than one year or death.
2) **Misdemeanors** or less serious crimes for which the penalty includes imprisonment up to one year.
3) **Petty offenses** are the least serious kind of crime, such as traffic or building-code violations. They may also be called infractions.

Sometimes a crime is confused with a legal claim called a **tort**. A tort is a type of civil wrong where someone has been harmed. Common torts include negligence, product liability, and intentional infliction of emotional distress. A crime can be distinguished from a tort by these characteristics:

- A crime is an offense against society as a whole.
- Criminal defendants are prosecuted by the state, not by other private parties.
- The penalties for criminal violations include fines, imprisonment, and in some cases, death. Tort remedies are generally limited to monetary compensation.
- Criminal law is primarily statutory law, while tort law is primarily common law.

- There is a significant difference between the level of proof in criminal and civil law. Criminal cases must be proved **beyond a reasonable doubt**. Civil cases are decided by a preponderance of the evidence.
- A criminal act does not necessarily involve a victim, where an injury or harm must be suffered by a party for a tort to occur.

There are times when an act can be both a crime and a tort. For example, assault and battery may provide the basis for both a criminal prosecution and a civil lawsuit. Theft would be an example of an overt act. However, a person might be found not guilty of the crime of assualt and battery, but found liable in a civil proceeding. This is because the level of proof is lower in a civil case.

4.4 Elements of a Crime

The general elements of a crime include **act** and **mental state**.

Under the Model Penal Code, the act is the performance of criminal doing. This is also known as the **actus reus**. Most crimes require an overt action to have taken place. However, in some cases the failure to act can be a crime. If a person has a legal duty to act and fails to act, then a crime may have been committed. For example, a person has a legal obligation to stop and remain at the scene of an auto accident, if their vehicle was involved in the accident. Failure to do so would be a crime.

A wrongful mental state, called **mens rea,** is also required to establish criminal liability. Many crimes require the defendant to have **specific intent** to commit the act, which means the person intentionally committed the crime, and intended the consequences of the crime to occur. For example, if a person stabs another person with a knife intending to kill him, and the person dies, that would be a specific intent crime. Other crimes are referred to as **general intent** crimes. This happens when a person simply committed a crime without the specific intent to cause a particular result.

Mental state can also be an element of a crime. How a crime is defined and punished often depends on the degree of "wrongfulness" of the defendant's state of mind. As an example, consider the crime of homicide such as: **first-degree murder, voluntary manslaughter**, and **involuntary manslaughter**. Murder in the first degree involves premeditation or a killing that is "rationally planned in advance." On the other hand, voluntary manslaughter is committed in the "heat of passion," while involuntary manslaughter involves a criminally negligent commission of an act, such as reckless driving. Different crimes may result from the same act, depending on the mental state of the perpetrator.

Example 1:

A person puts on bulletproof vest and fills a backpack with two handguns, a semi-automatic rifle, several loaded magazines and 1000 rounds of ammunition. They go outside, walk over to their neighbor's home, and shoot their neighbor in the chest. The wearing of the bulletproof vest and the carrying of the multiple guns with such a large amount of ammunition suggest premeditation and a first-degree murder charge would be appropriate.

Example 2:

A crane operator in San Francisco tears down a building when a wall collapses on a drug store located next door. Evidence suggests he failed to follow appropriate protocol in the demolition of building, but he had also had high levels of marijuana in his system. Three people died and five were injured by the collapse of the wall. An involuntary manslaughter charge would be appropriate, as the operator's judgment was impaired due to drug use.

At one time, a business entity could not commit a crime, but it could only act through its agents. Under modern law, a corporation may be held responsible for its crimes, and crimes committed by its agents or employees acting within the scope of their employment. In addition, a business organization may be fined or denied legal privileges as a punishment. Additionally, corporate directors and officers are individually liable for crimes they commit at work, regardless of whether the crimes were for personal benefit or the company's benefit. Under the **responsible corporate officer doctrine**, officers and directors may also be liable for crimes committed by employees under their supervision. This is true even if the officer or director did not participate in, lead or direct, or have personal knowledge about the criminal violation.

4.5 Types of Crimes

Figure 4.3 – Used with Permission

Under the Model Penal Code, crimes are broken down into five specific categories[71]:

1. Crimes endangering a person;
2. Crimes against property;
3. Crimes against the family;
4. Crimes against public administration; and
5. Crimes against public order and decency.

Crimes endangering a person[72] are violent crimes. They include assaults (including assault and battery), homicide, sex crimes, false imprisonment and kidnapping, and abusive crimes (including domestic violence). These levels of crimes are the most serious, as they can cause physical harm or death to a person.

Sample Definition Under the Model Penal Code

§ 210.4. Negligent Homicide.

(1) Criminal homicide constitutes negligent homicide when it is committed negligently.
(2) Negligent homicide is a felony of the third degree.

Violent crimes are further classified into degrees depending on the circumstances surrounding the criminal act. This includes the criminal's intent, whether a weapon was used in the commission of the crime, and the type of injury the victim has suffered (except in a murder case).

Crimes against property[73] are those infringing on property rights. Property rights include personal property and real property (real estate), but also include economic rights.

Forms of stealing (theft, burglary, shoplifting, robbery, and forgery), arson, receiving stolen goods, and extortion are all examples of crimes involving property.

Crimes against the family[74] are those having a traditional basis protecting home and family. Examples include "immoral" sexual behavior, such as incest, bigamy (marriage to more than one person), and crimes endangering the welfare of children, such as non-support.

Crimes against public administration[75] are those committed by people who corrupt the governmental process. They include bribery and corruption, perjury, obstruction of justice, and abuse of office.

Crimes against public order[76] are contrary to public values and morals and deemed detrimental to society because they create an environment that gives rise to property and violent crimes. They consist of public drunkenness, prostitution, some gambling, and illegal drug use. Often these crimes are called **victimless crimes** because the person being hurt is the offending party. In many countries, these types of acts are often not crimes. An example of this would be the legalization of prostitution in limited areas of the United States, such as in some parts of Nevada, as well as the decriminalization of marijuana in many college towns, such as Ann Arbor, Michigan.

4.6 Defenses to Criminal Liability

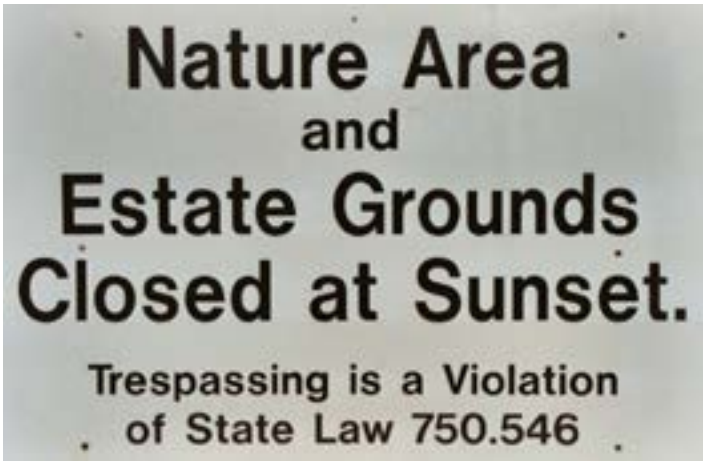


Figure 4.4 – Used with Permission

Defenses are arguments or justifications of an accused. The most common defense asserted by a defendant is denial. Often times, a denial is accompanied by an alibi, which is proof the defendant was physically somewhere else at the time of the crime. Truth is always a defense to a crime. In others, such as a rape case, consent can be a defense. Entrapment is another defense argued when undercover officers persuade a defendant to commit a crime, which would not have been otherwise committed. Other common defenses include:

- **Mental state deficiency**. Criminal liability may be avoided if the required state of mind was lacking due to a mental disease or defect.
- **Protection of persons or property**. Self-defense, defense of others, and defense of property may be alleged to diminish guilt and as a justification. However, the force used to protect oneself, as well as another person, is the force that is reasonable under the circumstances. Deadly force can only be used to repel a deadly attack. Deadly force is normally not allowed in the defense of one's property unless accompanied by a threat to human life.
- **Statute of limitations**. With some exceptions, such as for the crime of murder, a statute of limitations applies. This requires that crimes be prosecuted within a certain number of years from the date of the offense, or prosecution is waived.

Other defenses may include immunity, double jeopardy, mistaken identity, and procedural violations; however, ignorance of the law is never a valid defense to a crime.

4.7 Arrest and Interrogation

The criminal process includes the investigation, prosecution, and sentencing of a criminal act. It includes all steps from the arrest through a possible appeal. Arrests can be based on a warrant obtained by law enforcement; however, **warrantless arrests** are legal if police observe or have probable cause to believe a person committed a crime. In addition, law enforcement officers may stop and frisk an individual without a warrant for a "**Terry Stop.**"[77] This action is justified when the police have "reasonable suspicion" that someone may have been involved in a crime or they are carrying a weapon.

Arrest warrants can also be based investigation and indictment by a **grand jury**. A grand jury is a hearing in which a prosecutor presents evidence to a special jury to determine whether sufficient evidence exists to indict or charge a person with a crime. Grand juries hear evidence about criminal activity; they also have the power to subpoena evidence, and to compel witnesses to appear and to hold witnesses in contempt for the failure to appear. The proceedings of a grand jury are secret to protect witnesses who have testified. A grand jury also has the legal right to grant immunity to prosecution to those who testify. There are two types of immunity: **transactional immunity** and **use immunity**. Transactional immunity is an agreement with the state that the witness will not be prosecuted for possible crimes related to the witness's testimony. Use immunity is not as broad and only prevents the witness from being prosecuted based on his testimony, or any evidence derived from the testimony.

Figure 4.5 – Used with Permission

Grand jury decisions do not have to be unanimous, but they need a 2/3 to 3/4 majority vote of the panel to indict, with an arrest warrant to follow. Due to the secrecy of the proceedings, those under investigation generally are unaware of the grand jury investigation

As you learned in Chapter One, once a suspect is arrested, police must warn suspects who are in custody of their rights to remain silent and have an attorney present during questioning. This requirement is based on the ruling in *Miranda v Arizona*. Read more what the Court has said and the basis for its decision.

The Court Speaks

United States v. Miranda, 384 U.S. 436 (1966)[78]

Facts:

On March 3, 1963, an 18-year-old girl was kidnapped and forcibly raped near Phoenix, Arizona. Ten days later, on the morning of March 13, petitioner Miranda was arrested at his home and taken to a Phoenix police station. At this time, Miranda was 23 years old, indigent, and educated to the extent of completing half the ninth grade. He had "an emotional illness" of the schizophrenic type, according to the doctor who eventually examined him; the doctor's report also stated that Miranda was "alert and oriented as to time, place, and person", intelligent within normal limits, competent to stand trial, and sane within the legal definition. At the police station, the victim picked Miranda out of a lineup, and two officers then took him into a separate room to interrogate him, starting about 11:30 a.m. Though at first denying his guilt, within a short time, Miranda gave a detailed oral confession, and then wrote out in his own hand and signed a brief statement admitting and describing the crime. All this was accomplished in two hours or less, without any force, threats or promises. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me." Two hours later, the officers emerged from the interrogation room with a written confession signed by Miranda.

The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present. The written confession was admitted into evidence over the objection of defense counsel. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession, and affirmed the conviction. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically request counsel.

Discussion:

This case raises questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless the prosecution demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of their freedom of action in any significant way.

The privilege against self-incrimination, which has had a long and expansive historical development, is the essential mainstay of our adversary system, and guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will," during a period of custodial interrogation as well as in the courts or during the course of other official investigations.

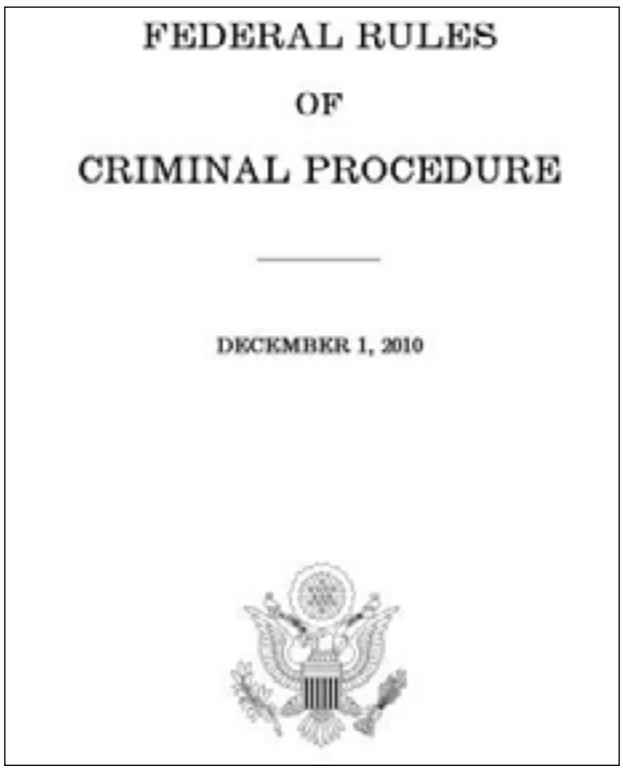
A person in custody must, prior to interrogation, be clearly informed that they have the right to remain silent, and that any statements may be used in court; they must be clearly informed of the right to consult with a lawyer and to have the lawyer present during interrogation, and that, if is indigent, a lawyer will be appointed.

If the individual indicates, prior to or during questioning, the desire to remain silent, the interrogation must cease; if the desire for an attorney is indicated, the questioning must cease until an attorney is present.

Where an interrogation is conducted without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived the right to counsel. This means, when an individual answers some questions during in-custody interrogation, they have not waived privilege, and may invoke the right to remain silent thereafter. Additionally, the warnings required and the waiver needed are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement, inculpatory or exculpatory, made by a defendant.

Questions:

1. How is the Fifth Amendment applied in this case?
2. At what point in the interrogation process, must a defendant be advised of Miranda rights?
3. Considering the time involved and inconvenience of giving Miranda rights to someone in custody, why did the Court rule the way that it did?


FEDERAL RULES

OF

CRIMINAL PROCEDURE

DECEMBER 1, 2010

Figure 4.6 – Source: UScourts.gov

The Miranda case mentioned that the defendant was not apprised of his right to have an attorney present. The right to counsel is a core legal protection. The Sixth Amendment provides "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense." The United States Supreme Court through the decision in *Gideon v Wainwright* (1963)[79] has held that the right to counsel applies to state cases through an application of the Due Process clause of the Fourteenth Amendment. In addition, indigent defendants are entitled to have an attorney paid for by the court if the defendant is unable to afford private counsel.

4.8 The Pre-Trial Process

After arrest, the defendant is required to make a court appearance to begin the formal charging process, called an **arraignment**. How and when that appearance takes place depends on the jurisdiction and the severity of the crime. At this hearing, the court will read charges against the defendant, inform the defendant of their constitutional rights, and make a determination whether the accused can be released prior to trial. If the defendant has been accused of a serious crime, they may be placed in jail pending trial. In less serious cases, a judge will allow the pretrial release of the defendant after setting a reasonable bail. At this hearing the defedant will be asked to enter a plea to the charges. The accused may enter a plea of not guilty or guilty. If the defendant pleads guilty, the plea will end the case at this point and sentencing will proceed. There is also available a no content plea. This is essentially a guilty plea, but not one of admission.

At the federal level, the pretrial process is governed by the *Federal Rules of Criminal Procedure*.[80] These rules, similar to federal rules in civil proceedings, govern the process that both the U.S. Attorney and defendant's attorney must follow at all stages of the criminal process.

As in civil cases, the parties will file pretrial motions in the proceedings. Criminal cases are often newsworthy, so a **motion to change venue** is often requested. A motion to change venue is a formal request to move the trial to a different court location within the court system. Defense attorneys often fear that their client cannot receive a fair trial and that the news media has tainted the jury pool. Additionally, a **motion for continuance** may be requested for a trial postponement or a **motion to dismiss** the case may be filed.

At some point in the pretrial process, the prosecution and defense may negotiate a plea. A **plea bargin** is a an agreement where the defendant agrees to plead guilty to a crime in exchange for a reduction in the charges and/or a reduction in the punishment.

In criminal proceedings, the prosecution has a duty to provide opposing counsel with any type of **exculpatory evidence**. Exculpatory evidence is information that supports the innocence of the defendant. As mentioned earlier, this requirement is based on the U.S. Supreme Court ruling in *Brady v. Maryland* (1963). Evidence can be suppressed based on prosecutorial misconduct for failure to share evidence with counsel of the defendant. Information on a case example follows.

The Court Speaks

Brady v. Maryland, 373 U.S. 83 (1963)[81]

Facts:

Brady and a companion, Boblit, were found guilty of first-degree murder and were sentenced to death. Upon appeal, their convictions were affirmed by the Court of Appeals of Maryland. Each defendant had a separate trial. Brady's trial was held first. At his trial, Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment."

Prior to the trial, Brady's attorney had requested the prosecution to allow him to examine Boblit's extrajudicial statements (those comments made outside of court). Several of those statements were shown to him, but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution, and did not come to Defendant's attention until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

Brady moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution.

Figure 4.7 – Used with Permission

The U.S. Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law, and remanded the case for a retrial at the trial court of the question of punishment, not the question of guilt.

Discussion:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Society wins not only when the guilty are convicted but also when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice.

We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Questions:

1. The U.S. Court of Appeals held that the defendant should receive a new trial and that it should include presenting the extrajudicial comments to the jury. The State's attorney did not agree with this ruling and appealed. What might be the government's argument that Brady's comments should not be included in a new trial?
2. How does the Brady court appear to define due process?

4.9 The Criminal Trial

Many of the procedures followed during a criminal trial are similar to the civil process, such as jury selection, the opening statement, the examination and cross examination of witnesses, the closing argument, and jury instructions and deliberations. However, since a person may be jailed and in the case of severe crimes be subject to death, the U.S. Constitution has many safeguards that must be followed during trial. First, the burden of proof is on the government to present evidence that proves the defendant's guilt beyond a reasonable doubt. Second, any evidence presented must be relevant, material, and competent. However, evidence may be challenged at trial with a **motion to suppress** or a **motion in limine**. A motion in limine is typically argued prior to the start of a trial. It is a formal request before a court to limit or exclude certain types of evidence. Evidentiary standards in federal criminal proceeedings are detailed in the *Federal Rules of Evidence (FRE).*[82]

Federal Rules of Evidence (FRE)

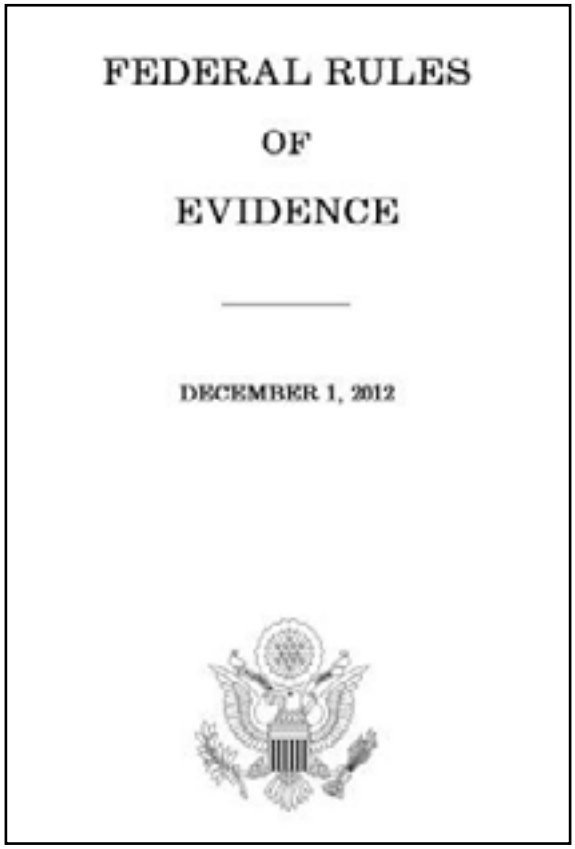
Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Common challenges to the admissibility of evidence have their basis in the Fourth Amendment. Remember that most evidence is based on a search warrant. A search warrant can only be issued based on **probable cause.** Probable cause is the legal standard requiring a reasonable basis to believe that a that crime has been committted and evidence of the crime in the place being searched. If it is found that probable cause did not exist or the search warrant was defective (such as being overbroad), evidence from that search may be suppressed. However, there is an **exigent circumstances exception**. This means that if "a reasonable officer could believe that to delay acting to obtain a warrant would, in all likelihood, permanently frustrate an important police objective,"[83] the police may act without a warrant. Additionally, a warrant is not needed if a person consents to a search and consent is "unequivocal, specific, and freely and intelligently given."[84] The prosecution may also argue that a search was legally performed through a "knock and talk" procedure. This is a method used by police where they go to the suspect's home, knock on the door and ask for permission to enter the suspect's home. Once the suspect has given permission to the officers to enter, any evidence they seize in plain view is normally admissible during a trial. The **plain view doctrine**[85] is a rule established by the U.S. Supreme Court. Under the plain view doctrine, if the police see incriminating evidence in plain view during a lawful search, the evidence may be used at trial. This means, if a search arrant does not describe the evidence in plain view, it may still be seized. Evidence obtained in violation of this rule may be suppressed under the **exclusionary rule**[86] as **"fruits of the poisionous tree."**[87] However, if evididence demonstrates that an officer acted in "good faith," and that the officer's conduct was reasonable, it is possible a court may admit the evidence.[88]



Figures 4.8 – Source: UScourts.gov

Witness testimony may also be challenged. For example, if an attorney objects stating that the answer calls for a conclusion, counsel is stating that it is the responsibility only of the judge and jury (and not the attorney) to make a legal conclusion in the case. Or, an attorney may object on the basis that the question contains information leads the witness to the answer. This means that the answer to the question is suggestive in the question itself.

Experts are frequently used in criminal trials. The standard for an expert witness is the same as in a civil trial. In a federal court, the requirements are detailed in FRE 702. If a party does not believe that that expert witness possesses "the requisite level of expertise or used questionable methods to obtain data," a *Daubert*[89] motion may be presented to the court to exclude the testimony of the witness.

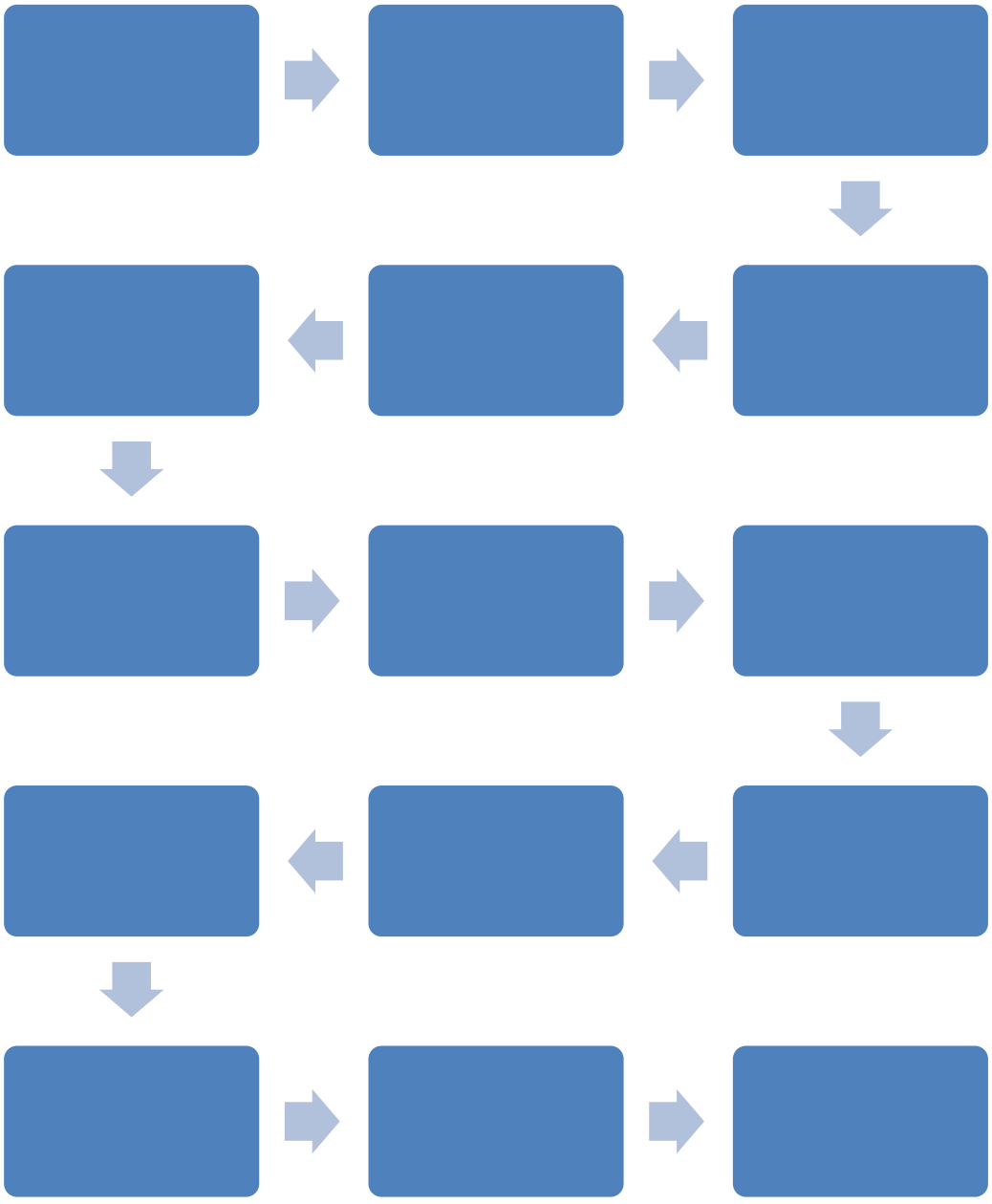
Under the Fifth Amendment, a defendant does not have to testify at trial. Whether a defendant testifies is a strategic decision of defense counsel. For example, if the defendant has a prior criminal history, illegal drug use, or a substance addiction, on cross examination the prosecution could challenge the client's character for untruthfulness based on such factors. Also, if an attorney knows a client is goint to lie on the stand, the attorney must disclose a client's perjury to the court. If an attorney fails to advise the court of the lie, it would be a violation of the attorney's professional code of conduct. It is also a requirement of the U.S. Supreme Court as decided in *Nix v Whiteside*, 475 U.S. 157 (1986).[90]

Federal Rules of Evidence (FRE)

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons[91]

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Federal Criminal Process



4.10 Sentencing

If a defendant is found not guilty, the proceedings are completed and the defendant is free to leave. If the defendant is found guilty, sentencing is usually performed at a later date. In the federal courts, sentencing is administered by guidelines issued by the United States Sentencing Commission[92].

The purpose of sentencing a criminal is to prevent the individual from committing additional crimes, but to also inflict punishment for criminal acts that have caused harm upon other individuals. Sentencing is similar to a trial. The judge is aided in his or her decision by the prosecutor, defense attorney, and occasionally a probation officer. In some states, a jury may be involved.

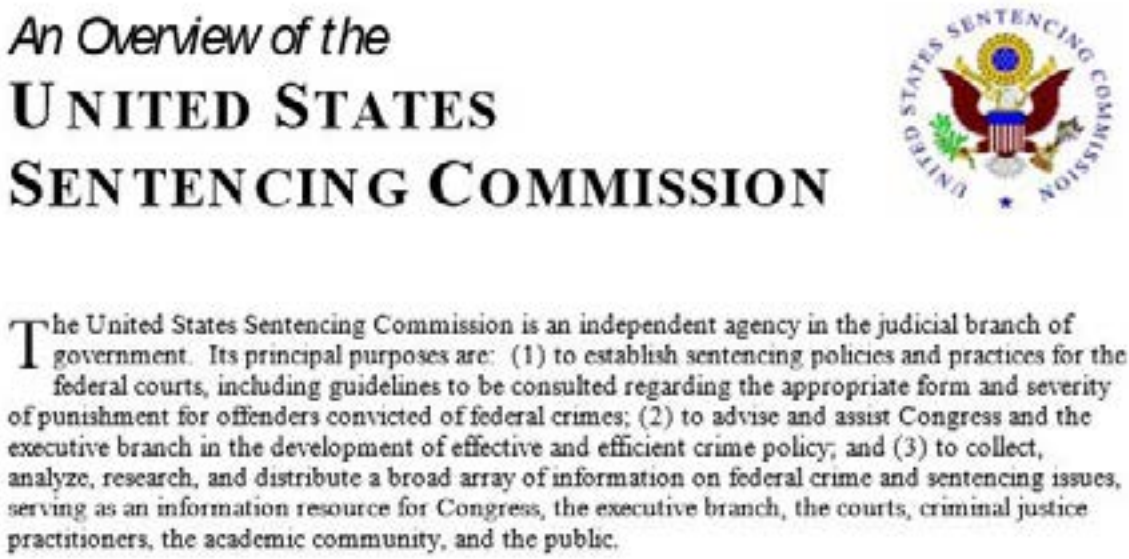


Figure 4.9 – Source: ussc.gov

There are four main goals of sentencing: retribution, deterrence, incapacitation, and rehabilitation. **Retribution** means that offenders who commit criminal acts should be punished based on the degree of the crime. **Deterrence** threatens punishment as a strategy to prevent offenders from committing crimes in the future. **Incapacitation** detains offenders in a prison to reduce criminal opportunity. Lastly, in **rehabilitation** defendants are provided resources needed to eliminate criminal behavior patterns in a monitored environment. Alternatives to incarceration include probation, boot camp, community service, restitution, and fines.

Due to their age, the sentencing of juvenile offenders is reviewed closely. In 2012, the U.S. Supreme court held in *Miller v Alabama*, 567 U.S.____, that the Eighth Amendment forbids a mandatory life sentence for a juvenile offender and that the court must review a juvenile's "youth and attendant characteristics" before ordering this type of sentence.[93]

Sample Jury Instruction in a Criminal Case[94]

Charge One: Introduction of the Final Charge – Province of the Court and the Jury

Now that you have heard all the evidence that is to be received in this trial and each of the arguments of counsel, it becomes my duty to give you the final instructions to the Court as to the law that is applicable to this case. You should use these instructions to guide your decisions.

It is your duty as jurors to follow the law as stated in all of the instructions of the Court and to apply these rules of law to the facts as you find them to be from the evidence received during the trial.

You are not to single out any one instruction alone as stating the law, but must consider the instructions as whole in reaching your decisions.

You were chosen as a juror for this trial in order to evaluate all the evidence received and to decide each of the factual questions presented by the allegations brought by the government in the indictment and the plea of not guilty by the defendant.

In resolving the issues presented to you for decision in this trial you must not be persuaded by bias, prejudice, or sympathy for or against any of the parties to this case or by any public opinion.

4.11 Summary

Crimes can be either state or federal based. Certain crimes are exclusive to the federal court system; federal statutes define those crimes. In all criminal cases, defendants must be given their constitutional rights such as the right to counsel, the right against self-incrimination, and the right to question witnesses.

Criminal trials follow a process similar to civil trials; however, the government must prove the defendant's guilt beyond a reasonable doubt. In addition, defense counsel may challenge the admissibility of evidence based on defects in the search warrant or an illegality in the search.

Due to the possibility of incarceration or possible death, criminal defendants must be afforded their constitutional rights at every step of the criminal process.

4.12 Key Terms

Act	Fruits of the poisonous tree	Plea bargain
American Law Institute	Grand jury	Probable cause
Arraignment	Incapacitation	Procedural law
Batson challenge	Involuntary manslaughter	Rehabilitation
Civil law	Mens rea	Responsible corporate officer doctrine
Crime	Mental state	Retribution
Criminal law	Misdemeanor	Search and seizure
Defenses	Motion to change venue	Sentencing
Deterrence	Motion for continuance	Substantive law
Double jeopardy	Motion to dismiss	Terry Stop
Exclusionary rule	Motion in limine	Tort
Excessive bail	Motion to suppress	Transactional immunity
Exigent circumstances exception	Plain view doctrine	Use immunity
Felony	Privilege against self- incrimination	Voluntary manslaughter
First degree murder		Warrantless arrest

4.13 Chapter Discussion Questions

1. What is the difference between a civil and a criminal case?
2. What constitutional safeguards are afforded a defendant under the Fourth Amendment?
3. What constitutional safeguards are afforded a defendant under the Fifth Amendment?
4. What constitutional safeguards are afforded a defendant under the Eighth Amendment?
5. Define probable cause.
6. What happened in the *Miranda* case? What was the Court's decision?
7. Under the Model Penal Code, what are the five categories or crime?
8. List three different crimes against public order.
9. Officer Green looks into the window of a house and sees what appears to be a dead body. Can Officer Green enter the home without a search warrant? Why or why not?
10. What are the four reasons for sentencing? What is the goal for each?

4.14 Ethical Considerations

Can a judge use sentencing guidelines in effect at the time of sentencing to impose a sentence harsher than called for under the sentencing guidelines in effect at the time of the crime?

See what the United States Supreme Court decides in *Peugh v United States*, 569 U.S. _____ (2013).[95] Does your answer agree with the Court's decision? Do you agree with the ruling of the Court?

4.15 Additional Learning Opportunities

Criminal case basics are reviewed through the Findlaw.com website at:

(http://criminal.findlaw.com/criminal-procedure/)

The U.S. Federal Courts website provides an overview of criminal cases in the federal court system at:

(http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/CriminalCases.aspx)

The U.S Attorney's Office in Minnesota provides an overview of the federal criminal court system:

(http://www.justice.gov/usao/mn/criminal_proc.html)

4.16 Test Your Learning

1. Under the _____ Amendment, a criminal defendant is entitled to a jury trial of his peers.
   A. Fourth
   B. Fifth
   C. Sixth
   D. Eighth
   E. Fourteenth

2. A Batson challenge is:
   A. used when race is a criteria in jury selection
   B. used to file a motion in limine to challenge illegally seized evidence
   C. used to define probable cause
   D. a standard used to request a search warrant
   E. a standard used to disqualify jurors

3. How is "speedy" defined under the Sixth Amendment as it refers to a speedy trial?
   A. It means as soon as possible.
   B. It means scheduling a trial date within three months of arraignment.
   C. It means scheduling a trial date within six months of arraignment.
   D. It means scheduling a trial date based on the availability of the judge.
   E. It means scheduling a trial date based on the statute.

4. What does self-incrimination means?
   A. It means you do not have to talk to the prosecutor.
   B. It means you can refuse to have your fingerprints taken.
   C. It means you can refuse to have an arrest photo taken.
   D. It means you do not have to testify at your trial.
   E. It means you can waive your right to an attorney.

5. Federal court sentencing is based on guidelines issued by the:
   A. United States Sentencing Commission
   B. United States U.S. Attorney's Office
   C. Judicial Conference of the United States
   D. Judicial Panel on Multidistrict Litigation
   E. Administrative Office of the U.S. Courts

6. Officer Jones stops Mary Gregory, as she believes Gregory is carrying an illegally concealed weapon. This type of stop and frisk is:
   A. Legal, as the officer had reasonable suspicion Gregory had an illegal weapon.
   B. Legal, as the officer was threatened.
   C. Illegal, as there were no exigent circumstances.
   D. Illegal, as the officer had no basis for the search.
   E. None of the above

7. What is the difference between act and mental state?
   A. An act is an overt action; the mental state is the intent to commit an act.
   B. An act is an overt action; the mental state is the mental stability of the criminal.
   C. An act is a hidden action; the mental state is the intent to commit an act.
   D. An act is a hidden action; the mental state is the mental stability of the criminal.
   E. An act and mental state have the same legal significance.

8. What type of a crime is a violent crime?
   A. A crime endangering a person
   B. A crime against property
   C. A crime against the family
   D. A crime against public administration
   E. A crime against public order and decency

9. What is the purpose of a defense?
   A. To raise doubt about the prosecutor's case
   B. To strengthen the defendant's case
   C. To provide an alibi for the defendant at the date and time of the crime
   D. To provide justification for the crime
   E. All of the above

10. Beth is a witness in a grand jury investigation and a possible defendant. She has asked the U.S. Attorney for immunity. What type of immunity should she request?
   A. defense immunity
   B. passive immunity
   C. transactional immunity
   D. use immunity
   E. vague immunity

Test Your Learning answers are located in Appendix A.

5 Ethics and the Legal Professional

Objectives

After completing this chapter, the student should be able to:

- Explain the differences between the job responsibilities of legal professionals;
- Understand the significance of the Model Rules of Professional Conduct established by the American Bar Association;
- Describe the key ethical obligations an attorney owes to a client; and
- Describe the discipline process for attorneys and possible sanctions.

5.1 The Legal Professional

The legal profession is not composed of just one person or one job. When it comes to providing legal services, several jobs are involved. According to the *U.S. Department of Labor Occupational Outlook Handbook,*[96] legal occupations include four distinct groups: **court reporters; lawyers; judges, mediators and hearing officers; and paralegals and legal assistants.** Each of these job groups represent distinct duties and obligations related to providing legal services to the public.

5.1.1 Court reporters (Stenographers)

Court reporters (or stenographers) are trained to synchronously capture statements made in a legal proceeding. These proceedings may include court hearings and depositions. Court reporters use "verbatim methods and equipment to capture, store, retrieve, and transcribe pretrial and trial proceedings or other information. This career also includes stenocaptioners who operate computerized stenographic captioning equipment to provide captions of live or prerecorded broadcasts for hearing-impaired viewers."[97] Stenographers also "attend legal proceedings and public speaking events to create word-for-word transcriptions. Some court reporters provide captioning for television and at public events."[98] The role of the court reporter is critical during the trial process. In the event of an appeal, a court reporter will be asked to transcribe the testimony from the court proceeding and provide a copy to the parties. This transcript is then provided to the appellate court for review. Since new evidence and testimony is not presented during an appeal, the transcript is used to establish whether an error was committed in the lower court proceeding, whether the error was prejudicial, and whether an appeal and review of the lower court decision is appropriate.

Training to be a court reporter involves attending a post-secondary program offered by a court reporting school, college, or university. Most states require that a court reporter be certified or licensed. For example, in the State of Michigan, a reporter must be certified to "record or prepare transcripts of proceedings held in Michigan courts or of depositions taken in Michigan".[99] California is another state with licensing standards.[100]

5.1.2 Attorneys (Lawyers)

Attorneys, also known lawyers, are licensed legal professionals. For an attorney to practice law within a state, they must meet its licensing requirements.[101] Licensing requirements are administered by the state bar and/or its state Supreme Court. To receive a license, an attorney must meet the character and fitness standards established by the state board of bar examiners, have a law degree (a handful of states allow applicants to take the exam prior to graduation), and pass the state's bar exam. A law degree is a graduate degree that typically involves three years of full time study. Most states require law degrees from an **American Bar Association (ABA)** approved law school.[102] Bar exams consist of written essay questions and a **multi-state bar examination (MBE)**. The written essay portion of the exam is state specific and tests knowledge of state law. The multi-state portion of the exam involves 200 multiple-choice questions. Topics tested in the MBE include "Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Real Property, and Torts."[103] The goal of the exam is to assess legal reasoning and an application of the law. The exam is administered by the **National Conference of Bar Examiners**. Both exams are typically scheduled for one day each.

Many states also require attorney applicants to successfully pass an ethics exam called the **Multi-State Professional Responsibility Examination (MRPE**). This is also a national exam similar to the MBE, but the focus of the exam is on professional responsibility and the application of the American Bar Association Model Rules of Professional Conduct (discussed later in this chapter).

Lawyers may be self-employed and operate a private practice, or they may be employed in a law firm. Others choose teaching law as a career, are employed by the state and federal governments, corporations, and non-profit organizations, such as a public defender's office.

Attorneys are required to take an oath upon receiving a law license[104] acknowledging their obligation as an officer of the court.

5.1.3 Judges and Hearing Officers

Most judges and hearing officers are first trained as attorneys, although it is not a requirement in all jurisdictions. "Judges, mediators, and hearing officers apply the law to court cases and oversee the legal process in courts. They also resolve administrative disputes and facilitate negotiations between opposing parties."[105]

5.1.4 Paralegals (Legal Assistants)

Paralegals (sometimes referred to as legal assistants), provide support to attorneys and clients by performing tasks that require an understanding of substantive and procedural law. They must work under the supervision of an attorney. Tasks include performing legal research, drafting documents, interviewing witnesses, and the preparation of trial notebooks. Paralegals are commonly used in law firms and corporate legal departments, which allows the attorney to delegate many tasks at a cost savings to the client. Additionally, these professionals have specialized training, generally through a college degree in paralegal studies. As with law schools, the American Bar Association also approves paralegal programs.[106] Approval means that the program follows a specialized curriculum and maintains high educational standards. Except for a few states such as Florida,[107] paralegals are not licensed.

5.2 Model Rules of Professional Conduct

The American Bar Association is a national professional association for attorneys. It is a voluntary organization that provides "leadership in developing and interpreting standards and scholarly resources in legal and judicial ethics, professional regulation, professionalism and client protection."[108] As mentioned earlier, the ABA sets standards for law schools and paralegal programs. Even though each state has its own requirements for practicing law, the American Bar Association is intimately involved in developing standards for lawyers, known as **Model Rules of Professional Conduct**. These model rules provide guidelines for language to be included in the local ethical rules, as the ethical dilemmas faced by lawyers are common throughout the United States. A state is not required to follow these rules, but most states use them as a close guide and then adjust them to local practice. Attorneys who fail to follow ethical guidelines are subject to discipline by their state bar.

5.3 Attorney-Client Relationship

One of the most important aspects of the attorney's responsibility is the relationship with a client. This relationship (called the **attorney-client relationship**) is known as a **fiduciary relationship**. This is a legal standard that means the client (called the **principal**) should expect the highest degree of trust and confidence in all transactions with the attorney (called the **fiduciary**). In other words, there is a legal duty that requires an attorney to act in the best interests of the client, and to act in an ethical and legal manner at all times while providing legal services.

For example, suppose the single father of a young child dies leaving a large estate. The court assigns an attorney to manage the funds for the young child, who is now his client. The attorney spends a portion of the estate funds for his personal use on hotels, restaurants, and travel. The attorney's action would be a violation of his fiduciary duty to the young boy.

An attorney may fire their client and a client may fire their attorney. An attorney may terminate the attorney client relationship based on a breakdown of the relationship, such as a personality conflict. Other reasons for a lawyer to cease representation include the failure of the client to pay the lawyer for services, if the client asks the attorney to engage in illegal or unethical conduct, or if the attorney becomes ill and is unable to provide appropriate legal services. In certain situations such as in the midst of a trial proceeding, the attorney may be required to seek approval from the court to withdraw. Clients on the other hand, do not need grounds to fire an attorney and can do so without cause.

5.3.1 Competence[109] and Diligence[110]

An attorney is required to knowledgeably and capably handle a legal matter. This means that an attorney should not undertake legal representation in an unfamiliar area of the law, unless he is willing to take the necessary steps to gain the knowledge and skill to gain competency in that field. In addition, an attorney must be diligent and timely in representing a client's best interests. That means that the attorney must closely follow legal deadlines and use their best efforts to complete work for a client on a timely basis.

5.3.2 Communication[111]

As a part of the attorney's diligence requirement, an attorney must keep a client informed about the status of their case. The most important part of this requirement is an attorney must communicate to the client all settlement offers with any other pertinent information that assists the client to make an educated decision about the offer. There is a similar requirement in criminal cases when a plea bargain has been presented to the client.

5.3.3 Fees[112]

Lawyers can charge a client a reasonable fee based on several factors. These include their expertise, the time involved in representing the client, the complexity of the matter, and the fee customarily charged in the area for similar services.

However, a client is responsible for the costs involved in a contingency fee case. Costs include out of pocket expenses, such as court fees, expert witness fees, and travel expenses.

The most common ways to bill clients is by hourly rate, flat fee, and contingency. An hourly fee is simply that: an hourly charge for services. A flat fee is a charge based on completing a task or a project. Divorces are normally charged on a flat fee basis. The last type of fee is a contingency fee based on the outcome of a case. In a contingency fee case, if the lawyer loses a case, there is no fee. However, if the attorney wins the case, they are awarded a percentage of the verdict. In some states a contingency fee may be as high at 50% of the value of a case, although in most states it is less. State ethical rules set the amounts. Personal injury and medical malpractice cases are typically charged on a contingency fee basis.

Attorney's fees can be paid by someone other than the client only with the knowledge and consent of the client.

The Bar Speaks

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 46[113, 114]

Issued on October 27, 2011.

BACKGROUND

The committee received a request from a legal document service that performs various task for Nevada attorneys, such as process serving, document filing and courier services for an opinion on whether an attorney failing to pay legal documents service providers for costs incurred on behalf of clients is a violation of the Nevada Rules of Professional Conduct.

QUESTION PRESENTED

Is failure to pay legal document service providers, or other third-party providers, for services incurred on behalf of clients a violation of the Nevada Rules of Professional Conduct?

ANSWER

If an attorney receives payment from a client for expense incurred and then fails to pay a third-party provider for those expenses, it may be considered dishonesty or misrepresentation which is professional misconduct under RPC 8.4(c). However, in the absence of circumstances that indicate dishonesty, fraud, deceit or misrepresentation, an attorney may be responsible for payment for services rendered by the responsibility is not the result of an ethical obligation.

AUTHORITIES

a) Nevada Rules of Professional Conduct 1.5, 4.1, 8.4 (2010)
b) ABA Model Rules and Accompanying Commentary

DISCUSSION

I. **A Failure to Pay One's Bills Is a Legal Issue More Appropriate for the Courts than the Ethics Committee.**

In the preamble of the Model Rules of Professional Conduct, the ABA notes that the Model Rules are "designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies."[1] They are "not designed to be a basis of civil liability."[2] When the issue an attorney's obligation to pay for services rendered has been reviewed, the American Bar Association and the Delaware Bar Association have both based opinions in contract law rather than ethical obligations.[3] In a situation where on lawyer sought assistance from another lawyer for his client, the second lawyer billed the first lawyer for his services.[4] When the first lawyer refused to pay for the services, the ABA concluded that it was not an ethical question that existed, but rather a matter of contact law to be determined by the Courts.[5]

The situations in which a party has a contractual dispute require an evaluation of contract construction and good faith defenses. For example, an attorney may fail to pay an invoice for services rendered because the services were inadequate or the invoice inaccurately reflected the work completed. These issues would be properly adjudicated in a court of law, and are not proper to be evaluated by the State Bar. Merely because an attorney is the one who fails to pay the bills, a creditor should not have more available avenues for recourse that what is available to the average creditor.

II. **An Attorney's Failure to Pay For Services Rendered May Become An Ethical Issue When It Involves Fraud of Deceit.**

The Nevada Rules of Professional Conduct ["NRPC"] prohibit an attorney from engaging in conduct that involves dishonesty, fraud, deceit or misrepresentation.[6] An attorney is also prohibited from collecting "an unreasonable amount for expenses."[7] When an attorney bills a client for services rendered, the charge must reasonably reflect the attorney's actual costs for the services rendered.[8] Any invoices for these services fairly reflect the basis on which the client's charges have been determined.[9] Thus, an attorney collect costs from a client and fail to forward that payment onto a third party who provided services, those costs would clearly be an unreasonable amount for expenses as the attorney has not suffered any out-of-pocket loss. In addition, this would clearly amount to the dishonesty and misrepresentation prohibited in NRPC 8.4 (c).

Not only do attorneys have a duty of candor to their clients, attorneys may not make a false statement of material fact or law to a third person. [10] If an attorney has in fact received funds from clients for services that have been performed and tells the party who performed the services that the client has not paid, this would be a false statement that would also rise to a violation of the NRPC. In these situations, it is proper to notify the State Bar as to a potential ethical evaluation.

CONCLUSION

In general, an attorney's failure to pay for services rendered is a matter of law to be determined by the courts and does not involve an ethical question. There is little precedent to indicate that this controversy would rise to the level of an ethical violation unless there is fraud, deceit, or misrepresentation alleged.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunals charged with regulatory responsibilities, or any member of the State Bar.

Notes:

1 Model Rules, Preamble and Scope, ¶ 20

2 *Id.*

3 See ABA Information Op. No. 664 (1963); see also ABA Informal Op. No. C-482 (1961); Del. State Bar Ass'n Professional Ethics Comm. Op. No. 1981–2.

4 ABA Formal Op. No. 63.

5 *Id.*

6 NRPC 8.4(c).

7 NRPC 1.5(a).

8 ABA Formal Op. No. 93–379 (1993)

9 *Id.*

10 NRPC 4.1(a).

Questions:

1. Did the Committee on Ethics and Professional Responsibility make the correct decision? Why or why not?
2. Why did the Committee determine that the failure to pay bills was a legal issue and not an ethical issue? In what type of action(s) would the attorney have to participate to make this situation subject to an ethical violation?

5.3.4 Confidentiality[115]

The law recognizes that communications between an attorney and a client are privileged. This means an attorney must keep the confidences of a client at all the times about any information relevant to the legal representation of the client. Exceptions to the privilege vary from state to state, but generally the privilege does not apply to a situation where the client intends to do harm to another. Admissions of a crime relevant to the representation would also be covered under the attorney-client privilege. In addition, an attorney cannot be a witness against a client in a proceeding related to the representation.

Similar type legal privileges exist between a doctor and patient, a cleric and a penitent, and a therapist and their patient. In addition, the law recognizes a spousal or marital privilege between a husband and wife. One cannot be compelled to testify the other regarding confidential conversations made during the marriage. This privilege applies in both civil and criminal cases.

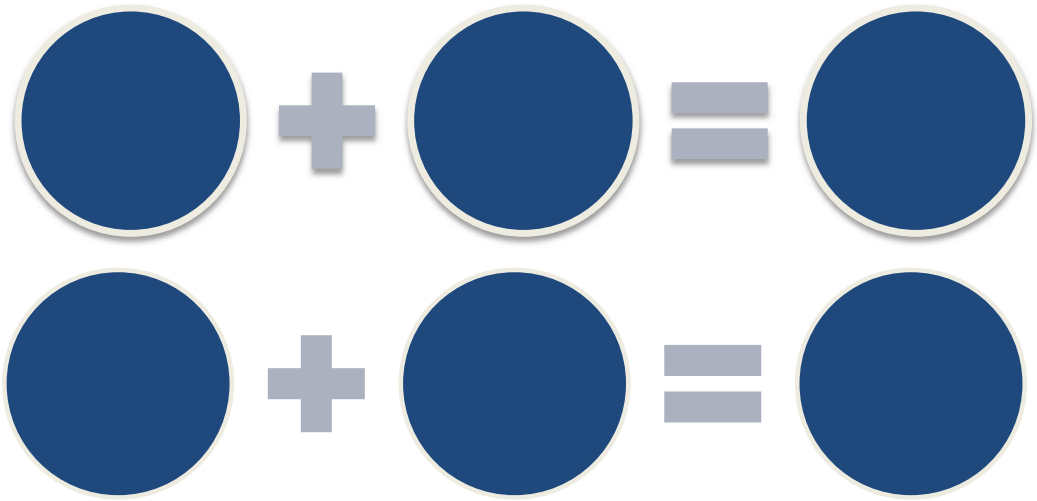
Only the client can waive the confidentiality privilege. Even in a police investigation, the attorney-client privilege must be maintained.

5.3.5 Conflict of Interest[116]

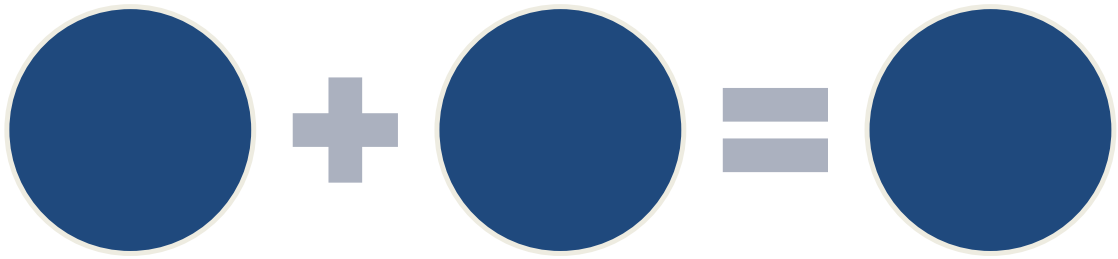
When a client asks an attorney to provide representation and the attorney agrees to represent a client, the client's interest must always be paramount. This means an attorney cannot have a previous legal relationship with a party that is "directly adverse" to the client's interests.

For example, an attorney cannot represent a client where the attorney had previously represented a witness in a case. Alternatively, an attorney cannot represent both parties in a case, such as the husband and wife in a divorce, or both the buyer and seller in a real estate dealing. In the case of lawyer spouses, it would be a problem for the husband to represent the plaintiff in a lawsuit and for the wife to represent the defendant in a case without the written agreement of all parties.

Conflicts apply to all members of a firm. Suppose that Attorney Greenbax of the firm of Onez, Fivez & Tenz, represented Orchard Lake Nursery (OLN) as the plaintiff in a contract dispute where they sued Sod, Seeds, and Trees (SST). Also assume that later that year Sod, Seeds and Trees asks Attorney Nickle N. Dyme, also of Onez, Fivez & Tenz to represent them in a negligence action against Orchard Lake Nursery. This would be a conflict of interest. No other lawyer in the law firm would be able to represent Sod, Seeds and Trees based on its previous representation of the Orchard Lake Nursery in the prior lawsuit.



Conflicts can also exist when an attorney changes employment. In some cases, a firm can control the conflict by creating a "**Chinese wall.**" This is a not an actual physical barrier, but an informational wall that limits an attorney's access or participation in a case that would create an ethical conflict. Suppose that Mr. Greenbax moves to a firm by the name of Bills & Sense. Upon his arrival Attorney Greenbax finds out that the firm represents Sods, Seeds, and Trees in a negligence lawsuit against Orchard Lake Nursery. To avoid any conflict of interest, the firm could build a Chinese wall in the case so that Mr. Greenbax has no involvement.



5.3.6 Trust Accounts[117]

Attorneys are required to maintain law firm funds separate from client funds. This means that office funds and client funds must be held in two different bank accounts. The office account is normally referred to the **general business account** and is used for law firm expenses. On the other hand, the client account is called a **trust, escrow, or special account**. Ethical rules require the client assets be separate from the lawyer's personal and other business accounts so client funds are safeguarded. State ethics rules will detail specific requirements for managing these accounts, and some states go so far as to limit the deposit of client funds to specific approved banks.[118] However, under no circumstances may an attorney use client funds for personal or for firm use. The trust account is used to hold unearned fees, called a **retainer**, that are paid in advance to the attorney for legal services. In addition, if an attorney settles a case for a client, those monies should first be deposited in the trust account. Then a distribution is made from the trust account to pay the attorney's fees as well as distribute the settlement amount to the client.

The Bar Speaks

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 11-56-GA

JOHN B. LYGIZOS, P 27934,

Respondent.
_____/

FILED
ATTORNEY DISCIPLINE BOARD
12 JUN 13 PM 3:38

ORDER AFFIRMING HEARING PANEL ORDER OF DISBARMENT

Issued by the Attorney Discipline Board
211 W. Fort St., Ste. 1410, Detroit, MI

The hearing panel found that respondent violated MRPC 8.4(b), MRPC 1.15(d), and MCR 9.104(A)(3), among other rules, and ordered disbarment of the respondent.[1] Respondent has filed a petition for review, arguing that the panel's ruling that "misappropriation is a per se offense" precluded him from introducing evidence of his intent in handling estate funds at issue in this matter, and that the discipline imposed was too severe. We find no basis for reversal.

At the hearing on misconduct, respondent testified at length, and in various ways, that he did not intend to convert the estate's funds. Early in the hearing on sanctions, the hearing panel announced that it agreed with the Administrator's position that misappropriation was a per se offense. It is clear from the record that this ruling simply mirrored the terms of MRPC 1.15(d).[2] In other words, this rule contains no element regarding state of mind. However, evidence regarding respondent's claimed inadvertence in violating this and the other rules set forth in the formal complaint was received during the misconduct phase. Respondent testified as to his purported innocent intent in moving the estate monies from a dedicated account to his IOLTA account and then spending it on his personal and business expenses.

There is no dispute that over a period of several years, respondent spent the estate funds by transferring them to his IOLTA account and then spending the funds in that account for personal and business expenses. Nor is it disputed that respondent filed, in 2008, false reports with the probate court indicating that the appropriate balances had been maintained on behalf of the estate from 2003-2008. Among the panel's findings is this statement regarding respondent's state of mind:

> In the instant matter, as in [*Grievance Administrator v Frederick A. Petz*, 99-102-GA (ADB 2000)] and [*Grievance Administrator v Terry A. Trott*, 10-43-GA (ADB 2011)], the respondent knew that he was

[1] The panel dismissed allegations that he violated MRPC 1.15(b)(3) and MCR 9.104(A)(5).

[2] MRPC 1.15(d) provides: "A lawyer shall hold property of clients or third parties in connection with a representation separate from the lawyer's own property. All client or third person funds shall be deposited in an IOLTA or non-IOLTA account. Other property shall be identified as such and appropriately safeguarded."

Figure 5.1 – Michigan Attorney Discipline Board

taking client funds and knew that he was spending funds held in trust for others. Respondent himself wrote the checks. There is no question that his misconduct exceeds any imaginable level of "sloppiness" or honest mistake, although there was evidence of that as well. [HP Report, p 3.]

These findings have proper evidentiary support in the record, and respondent has not established any error which prevented him from litigating issues essential to a determination that he committed dishonest conduct (MCR 9.104(A)(3); MRPC 8.4(b)) by converting estate proceeds and thereby failing to properly safeguard funds held for the estate (MRPC 1.15(d)). As the Administrator clarified in addressing the panel's ruling at the hearing, evidence of intent was relevant, admitted, and appropriately considered by the panel as to whether the conduct amounted to dishonesty, conversion, or criminal conduct.

Respondent has not demonstrated that the sanction imposed by the panel is inappropriate under the American Bar Association Standards for Imposing Lawyer Sanctions or precedent.

Accordingly, the hearing panel's order of disbarment is **AFFIRMED**.

IT IS FURTHER ORDERED that respondent shall, pay court reporting costs incurred by the Board for the review hearing conducted on May 9, 2012 in the amount of $137.69. This cost shall be added to the payment plan currently in effect. Respondent's final payment shall now be due on or before **July 20, 2013**, in the amount of **$137.69**. Costs may be paid by check or money order made payable to the State Bar of Michigan but submitted to the Attorney Discipline Board, 211 West Fort St., Ste. 1410, Detroit, MI 48226, for proper crediting.

ATTORNEY DISCIPLINE BOARD

By: Thomas G. Kienbaum, Chairperson

DATED: June 13, 2012

Board members Thomas G. Kienbaum, James M. Cameron, Jr., Rosalind E. Griffin, M.D., Andrea L. Solak, Carl E. Ver Beek, Craig H. Lubben, Sylvia P. Whitmer, Ph. D., Lawrence G. Campbell, and Dulce M. Fuller concur in this decision.

Figure 5.2 – Michigan Attorney Discipline Board

Questions:

1. The attorney accused of misconduct (also called the Respondent) stated that he "did not intend to convert the estate's funds." Should it matter if the attorney intended or didn't intend to commit the misconduct?
2. Are there any circumstances that could justify an attorney taking client funds for personal use? For instance, suppose an attorney is short on funds in the office account and needs to "temporarily" borrow funds from the trust account with the full intent to reimburse the monies? Would this be acceptable?

5.4 The Attorney Advocate[119]

An attorney is an officer of the court. With that responsibility, this means an attorney must make certain any claims filed in a court are meritorious. In other words, the attorney must both investigate the facts of the client's claim and make certain the law exists to support the claim. If the attorney files a case in a court that is not soundly based on the law, it would be an abuse of the legal process and unethical for the attorney to do so.

Attorneys must also be honest in all their interactions with the court or tribunal, and not use any delaying tactics in litigation. For example, an attorney cannot present falsified evidence at trial, cannot coach a witness to lie at trial, or seek to influence a judge or member of a jury.

5.5 Unauthorized Practice of Law (UPL)

Individuals are required to be licensed in each state (and in any country) where they practice law. Practicing law involves providing a client with legal advice or representing a party in court. Unlicensed individuals representing themselves as an attorney are subject to violating the law. State laws govern the unauthorized practice of law. The purpose of these laws is to protect the public from those practicing law who are not qualified.

Figure 5.3 – Used With Permission

For example, in Maine the law states that "No person may practice law or profess to practice law within the State or before its courts, or demand or receive any remuneration for those services rendered in this State, unless that person has been admitted to the bar of this State…"[120] Similarly in Utah, "persons who are active, licensed members of the Bar in good standing may engage in the practice of law in Utah."[121]

Interestingly, in some states, the unlicensed practice of law is not a crime[122] and the investigatory agency can only stop the illegal advocacy through court orders, such as an injunction. However, any crime committed as a part of the UPL, such as fraud or embezzlement, may be prosecuted.

In certain cases, UPL can turn into crimes that are far more serious for the offender. For example, where an unlicensed individual portrays himself as an experienced criminal appellate attorney, and takes hundreds of thousands of dollars from unsuspecting individuals perpetrating a fraud on the public, federal violations may take place and subject the perpetrator to criminal prosecution by the U.S. Attorney's Office.[123]

Is This the Unauthorized Practice of Law?

1. Lynn has a law degree, but no law license and drafts a Last Will and Testament for a neighbor who wants to disinherit a child.
2. Kimberly, a non-lawyer sells forms and provides typing services to people who represent themselves in child custody matters.
3. Kaseem, a non-lawyer, tells his aunt what to say in court in a collection case she is pursuing and tells her whether it is legal for her to present certain evidence to a court.
4. Ligia appears in court for her best friend who has to work on court day, and tells the court she is an attorney acting on her friend's behalf. She has no law license.
5. Dennis is a disbarred attorney and continues to practice law in his home state.
6. Cecylia is a non-lawyer who appears in a court, argues she has a constitutional right to practice law, and attempts to represent defendant Bennett in a felony case.
7. Hàn is a non-lawyer operating a business called the Legal Shoppe and drafts legal documents and provides legal and tax advice to individuals seeking to obtain a divorce.

All of these examples, except for (2), illustrate UPL activities. They require the person to correctly apply law to certain fact situation and necessitate the skill, knowledge, and judgment of a licensed attorney. The licensing of non-lawyers is an issue under constant review, and a few states such as Arizona[124] license document preparers. Notarizing a document, when someone witnesses the signature of a person, does not constitute the unauthorized practice of law. Notaries take an oath, are licensed, and receive their certifications through individual states.

5.6 Advertising and Solicitation of Clients

Figure 5.4 – Used With Permission

Until 1977, it was illegal for attorneys in the United States to advertise their services. This changed with the ruling in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)[125]. In *Bates*, the Arizona Bar sued attorneys John R. Bates and Van O'Steen for advertising their "legal clinic" in a newspaper, in violation of the Arizona ethical rules. In the advertisement, the lawyers also marketed their legal services indicating they charged "very reasonable fees". The advertisement also included a sample fee chart. The United States Supreme Court held 1) the advertising was entitled to First Amendment protections, 2) that the marketing was not misleading, and 3) the advertising was beneficial to the average consumer seeking an attorney. The result of *Bates* was that attorney advertising became legal across the United States and is now commonly seen on billboards, Internet ads, and television.

Solicitation is a different matter. Solicitation is defined under the Model Rules as contacting a person to perform legal services, when a prior professional or personal relationship does not exist. Solicitation is a violation of ethical rules.

Model ABA Rule 7.3 Solicitation of Clients[126]

(a) A lawyer shall not by inperson, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or
(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by inperson, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a) (1) or (a) (2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses inperson or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Figure 5.5 – Used With Permission

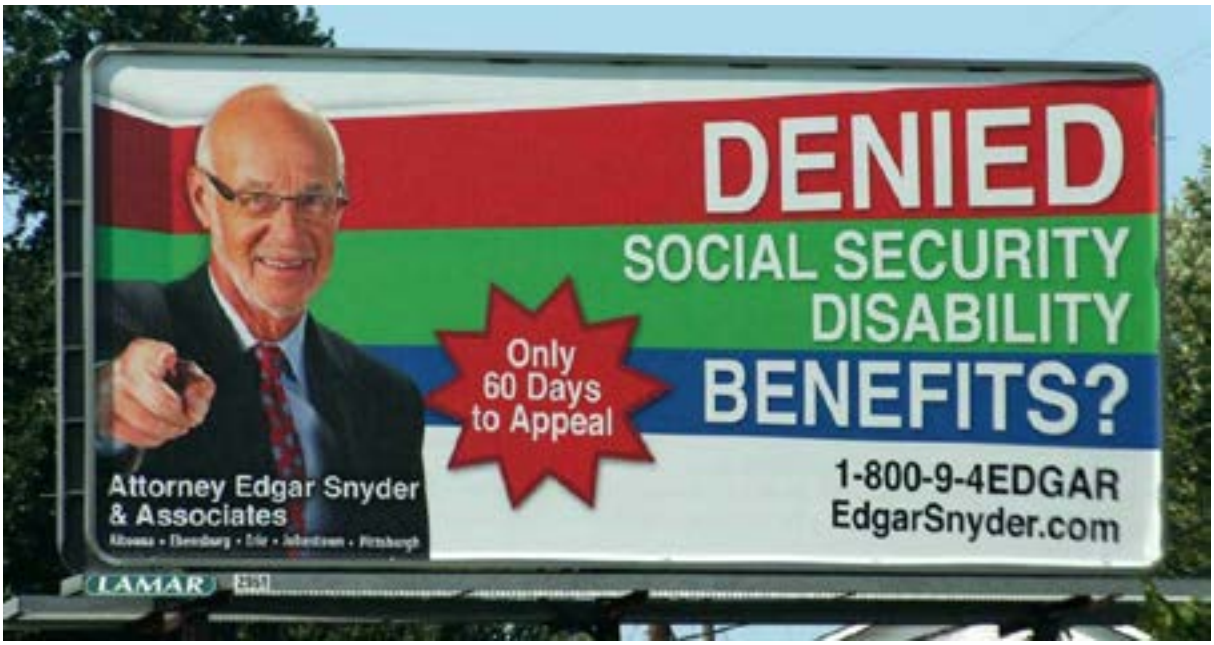


Figure 5.6 – Used With Permission

Figure 5.7 – Used With Permission

Figure 5.8 – Used With Permission

Figure 5.9 – Used With Permission

5.7 The Discipline Process

When an attorney receives a law license, they must take an oath to uphold the laws of the United States and to engage in ethical and honest conduct. Each state has its own code of professional conduct and, as you have learned, most are modeled after the American Bar Association's Model Rules of Professional Conduct. If an attorney has violated these rules, a client may take action against the attorney in form of a grievance.

A grievance involves a written allegation against a lawyer for failing to follow one of more of the state's ethical guidelines. Grievances are normally instituted through a specialized unit of the state bar by the filing of a written complaint that details the ethical violations alleged to have taken place. Once the bar association or state court receives the complaint, an investigation takes place to determine the merit of the charges. The attorney will be asked to respond to the allegations. If there appears to be enough evidence for the bar to pursue the complaint, there may be a formal hearing of the charges against the attorney. This hearing will follow the format of a trial. Allegations need to be established by a preponderance of the evidence for the attorney to be found responsible. Attorneys found to have violated the ethical guidelines are subject to discipline.

Figure 5.10 – Used With Permission

In establishing disciplinary procedures, the American Bar Association's "Standards for Imposing Lawyer Sanctions"[127] are followed by many states.

Common sanctions against attorneys include **admonition (also called a letter of caution)**, **reprimand**, **probation**, **suspension**, **and disbarment.** If the violation has also included the appropriation of client funds, the attorney may also be ordered to provide restitution to the client. There is normally an appeal process available to the attorney being investigated, often to the Supreme Court for that particular state.

An admonition is a "form of non-public discipline issued by the Committee, which declares the conduct of the lawyer improper, but does not limit the lawyer's ability to practice. Admonition is the least serious of the formal disciplinary sanctions, and is the only private sanction."[128] In some states, admonitions become a part of the public record during the penalty phase if an attorney is subject to additional discipline, as it demonstrates a record of continued violations.

A reprimand is a formal written public acknowledgment of the attorney's misconduct. It is used in less serious violations, such as missing a court deadline that did not prejudice a client's case. On the other hand, "(p)robation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be imposed alone or in conjunction with a reprimand, an admonition or immediately following a suspension. Probation can also be imposed as a condition of readmission or reinstatement."[129]

In the event of suspension, an attorney's license is temporarily inactivated. The attorney is unable to practice law and must advise all clients of the suspension. Disbarment is a permanent revocation of an attorney's license to practice law as punishment for the most severe ethical violations.

In assigning discipline, the review panel will consider such factors as:

(a) the duty violated;
(b) the lawyer's mental state;
(c) the potential or actual injury caused by the lawyer's misconduct; and
(d) the existence of aggravating or mitigating factors."[130]

Records (but not unfounded complaints or investigations) of **substantiated** attorney discipline are normally available through each state bar association.

There is typically a separate division in a state bar for complaints against judges. Judges have an additional code of ethics to follow, and complaints against judges for unethical or illegal actions performed during the course of their judicial position would be filed first in that division.

SAMPLE PROVISIONS

AMERICAN BAR ASSOCIATION
STANDARDS FOR IMPOSING LAWYER SANCTIONS[131]

AS APPROVED, FEBRUARY 1986
AND AS AMENDED, FEBRUARY 1992

A. PURPOSE AND NATURE OF SANCTIONS

1.1 Purpose of Lawyer Discipline Proceedings

The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to dis charge their professional duties to clients, the public, the legal system, and the legal profession.

1.2 Public Nature of Lawyer Discipline.

Upon the filing and service of formal charges, lawyer discipline should be public, and disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed.

1.3 Purpose of These Standards.

These standards are designed for use in imposing a sanction or sanctions following a determination by clear and convincing evidence that a member of the legal profession has violated a provision of the Model Rules of Professional Conduct (or applicable standard under the laws of the jurisdiction where the proceeding is brought). Descriptions in these standards of substantive disciplinary offenses are not intended to create grounds for determining culpability independent of the Model Rules…

5.8 Summary

A legal professional includes attorneys and judges, but also court reporters and paralegals who are all valuable members of the legal team.

Attorneys must have a license to practice law, and lawyers must follow the ethical rules of conduct for each state where they are licensed. Among other things, attorneys have several obligations they owe to clients such as being a fiduciary. They also must provide the client diligence and competency, and well as keeping client information privileged and confidential. Those without a license who provide legal advice or appear in a court or tribunal on behalf of a client are subject to the unauthorized of practice of law regulations for that particular state.

Attorneys who engage in unethical conduct are subject to discipline by their state bar association. Model standards are available through the American Bar Association. These standards have been adopted by most of the 50 states.

5.9. Key Terms

Admonition	Disbarment	National Conference of Bar Examiners
Attorney advertising	Discipline	Paralegal
Attorney-client relationship	Fees	Probation
American Bar Association	Fiduciary relationship	Reprimand
Chinese wall	Hearing officers	Retainer
Communication	Judges	Solicitation of clients
Competence	Lawyers	Suspension
Confidentiality	Legal assistant	Trust accounts
Conflict of interest	Mediators	Unauthorized practice of law
Court reporters	Multi-State Bar Examination	
Diligence	Multi-State Professional Responsibility Examination	

5.10 Chapter Discussion Questions

1. What are the names and responsibilities of the main types of legal occupations?
2. What are the educational requirements for these occupations?
3. Who is the American Bar Association?
4. What is the difference between the MBE and the MRPE?
5. What are the Model Rules of Professional Conduct?
6. What makes the attorney-client relationship so unique?
7. Why should communications between an attorney and client remain confidential?

8. What is a trust account? How is it used?
9. What is the difference between the different types of attorney discipline (admonition, reprimand, probation, suspension and disbarment)?
10. Should attorneys be allowed to advertise? Why or why not? For example, other professionals such as physicians do not regularly advertise. Is advertising a negative on the profession?

5.11 Additional Learning Opportunities

Each state has their own process for filing a grievance against an attorney. Do a quick Internet search and locate that organization in your state. Then review the procedures for filing a complaint against an attorney.

The American Bar Association Center for Professional Responsibility has FAQ's and additional information on attorney ethics that is provided for the general public.

(http://www.americanbar.org/groups/professional_responsibility/resources/resources_for_the_public.html)

5.12 Test Your Learning

1. Which legal occupation is responsible for capturing and documenting witness testimony?
   A. court reporter
   B. hearing officer
   C. judge
   D. mediator
   E. paralegal

2. To practice law, an attorney must:
   A. attend law school
   B. have a license to practice law
   C. have an active law practice
   D. A and B
   E. A and C
   F. A, B, and C

3. Law school involves how many years of full time study?
   A. 2
   B. 3
   C. 4
   D. 5
   E. 6

4. The Model Rules of Professional Conduct were drafted by:
   A. the American Bar Association
   B. the Multistate Professional Responsibility Examination Bar
   C. the National Conference of Bar Examiners
   D. the State Board of Law Examiners
   E. all are responsible

5. What is a fiduciary relationship?
   A. A legal standard where one party owes another the highest degree of trust and confidence.
   B. A legal standard of confidentiality between multiple parties.
   C. A person who acts on behalf of another.
   D. A person who acts as a partner on behalf of another.

6. An attorney _____ fire their client, and a client _____ fire their attorney.
   A. may, may
   B. may, may not
   C. may not, may
   D. may not, may not

7. Attorney Jones agrees to represent Mrs. Green in the probate of her husband's estate. Jones is a new attorney who has never practiced in the area probate law. By agreeing to handle this matter, Attorney Jones could potentially violating the obligation of:
   A. Competence
   B. Communication
   C. Conflict of Interest
   D. Diligence
   E. Reasonable Fees

8. This is a multiple answer questions. Which of the following is an example of a conflict of interest?
   A. The attorney represents the husband and wife in a divorce.
   B. The attorney will make a profit on a piece of property by undertaking representation of a client.
   C. The attorney represents the plaintiff in settlement negotiations, and her son, also an attorney represents the defendant. The relationship has not been disclosed.
   D. The attorney who drafts a will also is a beneficiary to receive 50% of the client's estate.

9. Client funds must be:
   A. Placed in the general office account.
   B. Placed in a client trust account.
   C. Placed in an investment account.
   D. It does not matter where the client funds are placed.

10. Attorney James is disciplined by her State Bar Association for the commingling and embezzlement of client funds. The Bar has determined that Ms. James must return the funds to the client and that she receive the strongest discipline possible. This means she will most likely receive:
   A. an admonishment
   B. disbarment
   C. probation
   D. suspension
   E. as long as the funds are returned, she will not be disciplined.

Test Your Learning answers are located in Appendix A.

6 Appendix A

6.1 Test Your Learning

Chapter 1: Background of US Law

1. B
2. D
3. B
4. C
5. E
6. C
7. C
8. B
9. D
10. C

Chapter 2: Identifying and Locating Sources of US Law

1. A
2. A
3. B
4. C
5. A
6. D
7. C, D and, E
8. B
9. B
10. E

Chapter 3: The State and Federal Court Systems

1. C
2. A
3. C
4. D
5. A
6. B
7. B
8. A
9. A
10. B

Chapter 4: Civil Law and the Civil Trial Process

1. C
2. A
3. E
4. D
5. A
6. A
7. A
8. A
9. E
10. C

Chapter 5: Criminal Law and Criminal Procedure

1. A
2. F
3. B
4. A
5. A
6. A
7. A
8. A, B, C, D, and E
9. B
10. B

7 Appendix B

7.1 The Constitution of the United States

THE U.S. NATIONAL ARCHIVES & RECORDS ADMINISTRATION

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 encreased 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 respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; – And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit 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 Controul 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.

The Word, "the," being interlined between the seventh and eighth Lines of the first Page, the Word "Thirty" being partly written on an Erazure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

Attest William Jackson Secretary

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 Independance of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names,

G°. Washington
Presidt and deputy from Virginia

Delaware
Geo: Read
Gunning Bedford jun
John Dickinson
Richard Bassett
Jaco: Broom

Maryland
James McHenry
Dan of St Thos. Jenifer
Danl. Carroll

Virginia
John Blair
James Madison Jr.

North Carolina
Wm. Blount
Richd. Dobbs Spaight
Hu Williamson

South Carolina
J. Rutledge
Charles Cotesworth Pinckney
Charles Pinckney
Pierce Butler

Georgia
William Few
Abr Baldwin

New Hampshire
John Langdon
Nicholas Gilman

Massachusetts
Nathaniel Gorham
Rufus King

Connecticut
Wm. Saml. Johnson
Roger Sherman

New York
Alexander Hamilton

New Jersey
Wil: Livingston
David Brearley
Wm. Paterson
Jona: Dayton

Pennsylvania
B Franklin
Thomas Mifflin
Robt. Morris
Geo. Clymer
Thos. FitzSimons
Jared Ingersoll
James Wilson
Gouv Morris

For biographies of the non-signing delegates to the Constitutional Convention, see the Founding Fathers page.

Page URL: http://www.archives.gov/exhibits/charters/constitution_transcript.html

---

U.S. National Archives & Records Administration
8601 Adelphi Road, College Park, MD, 20740-6001, • 1-86-NARA-NARA • 1-866-272-6272

8 Appendix C

8.1 The Constitution: Amendments 11–27

THE U.S. NATIONAL ARCHIVES & RECORDS ADMINISTRATION

www.archives.gov June 22, 2013

The Constitution: Amendments 11–27

Constitutional Amendments 1–10 make up what is known as The Bill of Rights. Amendments 11–27 are listed below.

AMENDMENT XI

Passed by Congress March 4, 1794. Ratified February 7, 1795.

Note: Article III, section 2, of the Constitution was modified by amendment 11.

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

Passed by Congress December 9, 1803. Ratified June 15, 1804.

Note: A portion of Article II, section 1 of the Constitution was superseded by the 12th amendment.

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 choose immediately, by ballot, the President. But in choosing 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 choose 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.

**Superseded by section 3 of the 20th amendment.*

AMENDMENT XIII

Passed by Congress January 31, 1865. Ratified December 6, 1865.

Note: A portion of Article IV, section 2, of the Constitution was superseded by the 13th amendment.

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

Passed by Congress June 13, 1866. Ratified July 9, 1868.

Note: Article I, section 2, of the Constitution was modified by section 2 of the 14th amendment.

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. **Changed by section 1 of the 26th amendment.*

AMENDMENT XV

Passed by Congress February 26, 1869. Ratified February 3, 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

Passed by Congress July 2, 1909. Ratified February 3, 1913.

Note: Article I, section 9, of the Constitution was modified by amendment 16.

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

Passed by Congress May 13, 1912. Ratified April 8, 1913.

Note: Article I, section 3, of the Constitution was modified by the 17th amendment.

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

Passed by Congress December 18, 1917. Ratified January 16, 1919. Repealed by amendment 21.

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

Passed by Congress June 4, 1919. Ratified August 18, 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

Passed by Congress March 2, 1932. Ratified January 23, 1933.

Note: Article I, section 4, of the Constitution was modified by section 2 of this amendment. In addition, a portion of the 12th amendment was superseded by section 3.

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 3rd 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 3rd 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 choose 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 choose 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

Passed by Congress February 20, 1933. Ratified December 5, 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

Passed by Congress March 21, 1947. Ratified February 27, 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

Passed by Congress June 16, 1960. Ratified March 29, 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

Passed by Congress August 27, 1962. Ratified January 23, 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

Passed by Congress July 6, 1965. Ratified February 10, 1967.

Note: Article II, section 1, of the Constitution was affected by the 25th amendment.

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

Passed by Congress March 23, 1971. Ratified July 1, 1971.

Note: Amendment 14, section 2, of the Constitution was modified by section 1 of the 26th amendment.

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

Originally proposed Sept. 25, 1789. Ratified May 7, 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.

Page URL: http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html

---

U.S. National Archives & Records Administration

8601 Adelphi Road, College Park, MD, 20740-6001, • 1-86-NARA-NARA • 1-866-272-6272

9 Endnotes

1. *Schenck v. United States,* 249 U.S. 47 (1919). The full text of the case is available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0249_0047_ZS.html.

2. *Bethel School District #43 v. Fraser,* 478 U.S. 675 (1986). The full text of the case is available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0478_0675_ZS.html.

3. *Hague v. CIO*, 307 U.S. 496 (1939). The full text of the case is available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0307_0496_ZS.html.

4. The full text of the case is available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0393_0503_ZS.html.

5. *Morse v. Frederick,* 551 U.S. 393 (2007). The full text of the case is available at http://www.law.cornell.edu/supct/html/06-278.ZO.html.

6. *District of Columbia v. Heller,* 554 U.S. 570 (2008). The full text of the case is available http://www.law.cornell.edu/supct/html/07-290.ZO.html.

7. Even though the draft was abolished in the United States in 1973, registration is still required under The Military Selective Service Act (50 U.S.C. App. § 451). Registration information is available at http://www.sss.gov/default.htm.

8. Probable cause exists where "the facts and circumstances within [the law enforcements officer's] knowledge" are of a "reasonably trustworthy" basis to "warrant a man of reasonable caution" to believe that an offense has been or is about to be committed, *Carroll v. United States,* 267 U.S. 132 (1925).

9. The full text of the case is available at http://www.law.cornell.edu/supremecourt/text/10-1259.

10. *Florida v. Jardines*, 569 U.S. ____ (2013). The full text of the case is located at http://www.oyez.org/cases/2010-2019/2011/2011_11_564. You can also listen to the oral arguments at this site.

11. *Miranda v. Arizona*, 384 U.S. 436 (1966). The full text of the case is available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0384_0436_ZS.html.

12. *J.D.B. v. North Carolina,* 564 U.S. ____ (2011). The full text of the case is available at http://www.oyez.org/cases/2010-2019/2010/2010_09_11121. You can also listen to oral arguments at this site.

13. *Gideon v. Wainwright,* 372 U.S. 335 (1963). The full text of the case is available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0372_0335_ZO.html.

14. *Williams v. Florida*, 399 U.S. 78 (1970). The full text of the case is located at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0399_0078_ZS.html.

15. *United States v. Salerno*, 481 U.S. 739 (1987). The full text of this case is available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0481_0739_ZS.html.

16. *Griswold v. Connecticut*, 381 U.S. 479 (1965). The full text of the case is available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0381_0479_ZS.html.

17. The Legal Information Institute at Cornell Law School (http://www.law.cornell.edu/states/listing) has a listing and links to state constitutions.

18. There is a comprehensive search site at the University of Maryland State Constitution Project, which allows searching of specific language of current and prior versions of the federal and state constitutions (http://www.stateconstitutions.umd.edu/index.aspx).

19. For more information on the federal legislative process, visit Thomas at http://thomas.loc.gov/home/lawsmade.toc.html.

20. The Legal Information Institute at Cornell Law School (http://www.law.cornell.edu/uscode/text) has a listing and links to all titles located in the U.S. Code.

21. There are several sites on the Internet where you can locate and search the U.S. Code. These include Findlaw.com (http://www.findlaw.com), the Legal Information Institute at Cornell Law School (http://www.law.cornell.edu/uscode/text), and the U.S. House of Representatives Office of Law Revision Counsel (http://uscode.house.gov).

22. The Legal Information Institute at Cornell Law School (http://www.law.cornell.edu/states/listing) has a listing and links to all state courts.

23. Federal agencies are required to follow the procedures detailed in the Administrative Procedure Act, 5 U.S.C. § 551 (http://www.law.cornell.edu/uscode/text/5/part-I/chapter-5/subchapter-II).

24. This number includes Article III courts such as the U.S. Supreme Court, the U.S. Courts of Appeals, U.S. District Courts, and the Court of International Trade. Statistics are from the United States Senate Committee on the Judiciary (http://www.judiciary.senate.gov/nominations/judicial.cfm)

25. See the U.S. Constitution, Article III, Section 1.

26. See http://www.uscourts.gov/uscourts/FederalCourts/Publications/English.pdf.

27. Source is http://www.uscourts.gov/Common/FAQS.aspx#FederalJudges.

28. Source is http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx.

29. See *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 516 (1828).

30. See 10 U.S.C. § 802 (http://www.law.cornell.edu/uscode/text/10/802).

31. This number was current as of 2013 (http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts.aspx).

32. Source is http://www.uscourts.gov/uscourts.

33. Source is http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure.

34. Venue is defined in 28 U.S.C. § 1391 (www.law.cornell.edu/uscode/text/28/1391).

35. Source is http://www.courts.ca.gov/courts.htm.

36. Source is http://www.flcourts.org/courts/bin/Jurisdiction_chart.pdf.

37. Source is http://www.flcourts.org/courts/bin/Jurisdiction_chart.pdf.

38. Source is http://www.courts.state.va.uscourts/.

39. Source is http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure.

40. See http://courts.alaska.gov/faq.htm for more information.

41. From http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/JurisdictionOfStateAndFederalCourts.aspx.

42. The full text of the court's Memorandum Opinion can be located through the PACER federal court database at https://ecf.mied.uscourts.gov/doc1/0971940805.

43. See http://courts.mi.gov/Administration/SCAO/Forms/courtforms/smallclaims/dc84.pdf.

44. See http://www.flcourts.org/gen_public/family/self_help/smallclaims.shtml.

45. See http://www.courts.ca.gov/selfhelp-smallclaims.htm.

46. See http://www.uscourts.gov/uscourts/rules/civil-procedure.pdf.

47. See http://www.uscourts.gov/uscourts/rules/criminal-procedure.pdf.

48. See http://www.uscourts.gov/uscourts/rules/rules-evidence.pdf.

49. Sample forms are available at Washburn University Law School (http://www.washlaw.edu), U.S. Legal Forms (http://www.uslegalforms.com), and the University of Memphis (http://www.lib.memphis.edu/gpo/forms.htm).

50. See *Federal Rules of Civil Procedure* 7–10 (http://www.law.cornell.edu/rules/frcp).

51. This is a sample products liability class action certification and settlement full notice from http://www.fjc.gov/.

52. See http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Civil%20Procedure.pdf.

53. See http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Civil%20Procedure.pdf.

54. See the Bureau of Justice trial statistics (http://www.bjs.gov/index.cfm?ty=tp&tid=451).

55. A sample juror questionnaire for the federal district court is located at http://www.fjc.gov/public/pdf.nsf/lookup/dpen0023.pdf/$file/dpen0023.pdf.

56. See http://www.uscourts.gov/FederalCourts/JuryService/JurorPay.aspx.

57. Source is http://www.uscourts.gov/FederalCourts/JuryService/JurorQualificaitons.aspx.

58. The case of *Colgrove v Battin*, 413 U.S. 149 (1973) established federal civil juries to be based on six individuals.

59. See *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991) (http://www.oyez.org/cases/1990-1999/1990/1990_89_7743).

60. See *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (http://www.oyez.org/cases/1990-1999/1993/1993_92_1239).

61. See http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2011%20Rules/Evidence%20Procedure.pdf.

62. See http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2011%20Rules/Evidence%20Procedure.pdf.

63. See 28 U.S.C. § 2107 (http://www.law.cornell.edu/uscode/text/28/2107).

64. See http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/CriminalCases.aspx.

65. See *United States v. Jacobsen*, 466 U.S. 109 (1984) at http://www.law.cornell.edu/supct/pdf/03-923P.ZO at p. 113.

66. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) at http://www.oyez.org/cases/1960-1969/1962/1962_155.

67. See *Batson v. Kentucky*, 476 U.S. 79 (1986) at http://www.oyez.org/cases/1980-1989/1985/1985_84_6263.

68. This provision is based on Section 20 of the Michigan Constitution which states: "In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal."

69. See http://www.ali.org/index.cfm?fuseaction=about.overview.

70. The MPC was originally proposed in 1962. There have been changes to certain areas of the law including capital punishment, sentencing and sexual assault and related offenses (http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=92).

71. See "Part II. Definition of Specific Crimes" in the MPC.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. This is based on the ruling in *Terry v. Ohio*, 392 U.S. 1 (1968) and available at http://www.oyez.org/cases/1960-1969/1967/1967_67.

78. The full text of the case is available at http://www.oyez.org/cases/1960-1969/1965/1965_759.

79. The case cite is 372 U.S. 335 (1963). The full text of the case is available at http://www.oyez.org/cases/1960-1969/1962/1962_155.

80. See http://www.law.cornell.edu/rules/frcrmp.

81. The full text of the case is available at http://www.oyez.org/cases/1960-1969/1962/1962_490.

82. See http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2011%20Rules/Evidence%20Procedure.pdf.

83. See *United States v. Rengif*, 858 F.2d 800, 805 (1st Cir. 1988) at https://bulk.resource.org/courts.gov/c/F2/858/858.F2d.800.87-2047.87-2043.html.

84. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) at http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=412&invol=218.

85. The "plain view" exception requires (1) that the initial intrusion by the police must be lawful and (2) that the incriminating nature of the evidence must be immediately apparent to the officer. See *United States v. Garcia*, 205 F.3d 1182 (9th Cir), cert denied, 531 U.S. 856 (2000).

86. See *Mapp v. Ohio*, 367 U.S. 643 (1961) at http://www.oyez.org/cases/1960-1969/1960/1960_236.

87. See *Wong Sun v. United States*, 371 U.S. 471 (1963) at http://supreme.justia.com/cases/federal/us/371/471/.

88. See *United States v. Leon*, 468 U.S. 897, 924-925 (1984) at http://www.oyez.org/cases/1980-1989/1983/1983_82_1771.

89. See *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) at http://www.oyez.org/cases/1990-1999/1992/1992_92_102.

90. See http://supreme.justia.com/cases/federal/us/475/157/.

91. See http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2011%20Rules/Evidence%20Procedure.pdf.

92. See http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/2012_Guidelines_Manual_Full.pdf.

93. The *Miller* case is available at http://www.oyez.org/cases/2010-2019/2011/2011_10_9646.

94. See http://www.uscourts.gov/educational-resources/get-informed/federal-court-resources/jury-instructions.aspx.

95. The full text of the opinion is located at http://www.oyez.org/cases/2010-2019/2012/2012_12_62.

96. See http://www.bls.gov/ooh/legal/home.htm.

97. See http://www.bls.gov/oes/current/oes232091.htm.

98. See http://www.bls.gov/ooh/legal/court-reporters.htm.

99. See http://courts.mi.gov/administration/scao/officesprograms/crr/pages/default.aspx.

100. See http://www.courtreportersboard.ca.gov/.

101. A comprehensive list of bar requirements is located at http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf.

102. As of 2013, 203 law schools are approved by the American Bar Association. See http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html.

103. See http://ncbex.org/multistate-tests/mbe/.

104. The Michigan State Bar Attorney's Oath is located at http://www.michbar.org/generalinfo/lawyersoath.cfm. It is nine sentences and much longer than the California Bar Oath that is one sentence in length and simply states: "I solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my knowledge and ability." It is located at https://www.calbarxap.com/applications/CalBar/PDFs/code_section_6068.pdf.

105. See http://www.bls.gov/ooh/legal/judges-mediators-and-hearing-officers.htm.

106. See http://apps.americanbar.org/legalservices/paralegals/directory/.

107. See http://www.floridabar.org/TFB/TFBLawReg.nsf/9DAD7BBDA218AFE885257002004833C5/BB20210B9C5186F385257187006468C7#Florida%20Registered%20Paralegal%20Appl.

108. See http://www.americanbar.org/groups/professional_responsibility.html.

109. ABA Model Rule of Professional Conduct 1.1.

110. ABA Model Rule of Professional Conduct 1.3.

111. ABA Model Rule of Professional Conduct 1.4.

112. ABA Model Rule of Professional Conduct 1.5.

113. The opinion is published at https://www.nvbar.org/sites/default/files/Ethics_Op_46_0.pdf.

114. Note the full text of the Nevada Rules of Professional Conduct is available at http://www.leg.state.nv.us/CourtRules/RPC.html.

115. ABA Model Rule of Professional Conduct 1.6.

116. ABA Model Rules of Professional Conduct 1.7–1.12.

117. ABA Model Rule of Professional Conduct 1.15. Trust accounts are often referred to as IOLTA accounts(i.e., Interest on Lawyer Trust Accounts). Ethical rules require attorneys to return an interest earned on client monies to the client.

118. For example, the State Bar of Michigan has placed this restriction on its members with active trust accounts. See http://www.michbar.org/opinions/TAON_lawyer_reference.pdf.

119. ABA Model Rules of Professional Conduct 3.1–3.4.

120. Maine Revised Statutes, Title 4, § 807. See http://www.mainelegislature.org/legis/statutes/4/title4sec807.html.

121. See Utah SCR 14-802, at http://www.utcourts.gov/resources/rules/ucja/ch14/08%20Special%20Practice/USB14-802.html.

122. See http://www.michbar.org/professional/pdfs/SBMReferralletter.pdf.

123. See *United States of America v John Wilson and Lari Zeka*, Case 2:10-cr-20581 (2013), United States District Court, Eastern District of Michigan, Southern Division.

124. Arizona is one of those states. Since "July 1, 2003, all individuals and businesses preparing legal documents without the supervision of an attorney in good standing with the State Bar of Arizona, must be certified pursuant to Rule 31, and Arizona Codes of Judicial Administration § 7-208 and § 7-201." See http://www.azcourts.gov/cld/LegalDocumentPreparers.aspx.

125. See the full text of *Bates v Arizona* at http://www.oyez.org/cases/1970-1979/1976/1976_76_316.

126. Source (http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_3_direct_contact_with_prospective_clients.html).

127. The Standards are located at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf.

128. This definition is from the New York State Courts, but it represents the standard understanding of admonitions. More details are available at http://www.nycourts.gov/courts/ad4/AG/AG-caution.pdf.

129. This definition is from the Michigan Attorney Grievance Commission, which has adopted standards from the American Bar Association. See http://www.adbmich.org/download/aba%20standards%20%281992%29.pdf.

130. See the Section C (3) (a)-(d) of the ABA STANDARDS FOR IMPOSING LAWYER SANCATIONS available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf.