Introduction to Law & Paralegal Studies

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Introduction to Law & Paralegal Studies

Connie Farrell Scuderi

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Dedication

With gratitude for teaching me to
keep my eye on the ball
and
to always strive for personal excellence,
I dedicate this effort to
Thomas J. Farrell
my father and mentor and paradigm of
everything a life should be.
I thank him for teaching me to always keep my sense of humor,
to see that,
no matter what,
I never had a bad day!!!!!
Thanks for everything, Tommy.
And
I also dedicate this effort to
AJ and ***Alexis,*** my son and daughter,
who have made every day I live worth living
and
I thank them for every moment of joy they have given me.

About the Author

Connie Farrell Scuderi

Connie Farrell Scuderi formerly practiced law, and she is currently a professional educator and educational administrator in higher education. She has experience teaching paralegal course material, critical thinking, and psychology. She also has designed paralegal courses and academic programs for paralegal studies as well as business-related disciplines. Ms. Scuderi had a career in business and real estate prior to practicing law, which is helpful in both teaching and designing coursework because she has an understanding of the theory, application, and interaction between the real world of business and law as well as other aspects of professional and daily life. Ms. Scuderi received a B.A. in Professional Studies from Barry University in Florida and a J.D. from The University of Miami School of Law in Coral Gables, Florida. She also has an M.S. in Psychology and Counseling from Chestnut Hill College in Philadelphia and has completed her studies for an E.D.D. in Educational Leadership from the University of Phoenix.

Preface

It is not unusual for a paralegal program to begin with an overview of law, the profession, and the role of the paralegal. Many introductory courses either present an overwhelming amount of information, more suitable for a law school course, or, at the other end of the spectrum, provide minimal course material, thus leaving a distorted view of the profession and the valuable contributions of the paralegal within the office practice and legal system. The student today is more knowledgeable about law and the diversity of positions within the system as well as the types of law. Regardless of how the student developed the interest in law, there are countless details and types of information needed to function effectively in the role of the professional paralegal. While the student today has more experience and awareness of the legal system, whether through personal experience, observing family situations in which the courts intervened, reading the newspaper, or watching high-profile trials on television, a great deal more is needed to function effectively as a paralegal. This textbook fills that gap and provides much of the necessary information.

Regardless of the level of heightened awareness of law, what actually happens when the lawyers return to their offices and the judges leave the bench remains a mystery for many, and how the system actually operates is equally mysterious. The information the beginning paralegal student may have about law lacks detailed background and context. Likewise, the student must gain understanding of how to read the law in the books and apply it to real-life experiences. The author fills the role of curious citizen, paralegal, and attorney, as well as instructor and teacher, to provide an approach that differs from many texts in a number of ways.

The first significant difference is that the history of each aspect of law is briefly covered. This lends context to the topic and helps illustrate how the various sources of law interact both with each other on a theoretical basis as well as with the procedure. The Constitution, the source of all law, whether state or federal, including procedure as well as theory, is presented and explored. The student builds from that foundation as the various areas of law are presented. The language of law is included to ensure the student called upon to explain the concepts has the proper vocabulary. Using appropriate terms communicates understanding of the theory and ability to apply the concepts whether for the supervising attorney or the client. Research is included to ensure the paralegal not only gains the skills to find the law but also how to evaluate what is read and apply the theory to the facts of the legal question or issue.

Another significant feature of this text is the variety of means to learn and apply the law, including research, writing, and critical analysis in both individual and collaborative projects. The skills helpful in developing competence in each of these functions also are presented and the student is then given opportunities to apply and interrelate the skills and theories. The paralegal student learns through collaboration with peers, instructor facilitation and guidance, personal effort, and continuing personal evaluation of successful understanding and professional growth. While the student is encouraged to use a wide variety of resources, including electronic research tools, the traditional methods of research and skill building also are presented.

The text helps the student learn about research by using both traditional and electronic research assignments. Doing traditional research is the optimal way to gain appreciation of the depth, scope, and volume of materials and interpretations available throughout the developmental periods of our legal system before electronic means were available. Electronic research means are extremely useful after developing a fundamental understanding of the basics. It is particularly useful to conduct the traditional research to gain appreciation of the tools and resources used when the law was in its infancy in this country as well as today.

The paralegal is often asked to complete projects involving legal analysis and critical-thinking skills. The assignments in the textbook focus on developing those skills and challenging the

student to look at analysis of case opinions, formulate legal positions, and frame issues. The student needs practical guidance and practice in the fundamentals of each of these skills. The collaboration and debates on issues throughout the text provide an opportunity to think like a legal scholar and apply the law creatively to facts to arrive at a legal position. The cases the student reads, researches, and analyzes involve all of the substantive legal issues as well as the spectrum of time. This allows the student to develop appreciation for the various interpretations and applications of legal principles over time.

Lastly, the student has an opportunity to review and evaluate his or her development through the portfolio assignments suggested throughout the course. The assignments help the student in skill building, analysis, and critical thinking, and, at the same time, the student builds a customized reference source to take into active practice. This practical application provides a custom-made tool for the paralegal entering practice. The style reflects the individual student and the most useful format for retaining and organizing materials in both the educational and professional setting. This is another example of the benefit of collaborative learning in the course work. As the student is exposed to the approach of others, aspects of the law will become illuminated and open for discussion and learning that might otherwise not come to the fore in a more traditional read, think, memorize, and repeat back environment. The vibrancy of law is part of the pleasure and challenge that you have chosen. The tools gained, pedagogy applied, and analysis developed will all be invaluable as you enter the world of the legal system. You should enter more as a veteran thinker than a raw recruit, regardless of your learning and working style.

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This project could not have been finished without the dedication, vision, and assistance of the tremendously capable professionals who contributed their professional expertise and valuable time to reading, commenting on, and guiding the information presentation. Each person added something of value, including his or her support throughout the work in progress. Each contributed unique insight into his or her area of expertise and gave much toward enhancing my vision.

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Connie Farrell Scuderi

A Guided Tour

Scuderi's ***Introduction to Law & Paralegal Studies*** teaches the basic skills paralegals will need when working in the field using a practical, uncomplicated approach. The material is directly applicable, providing an accurate sense of what paralegals do. The text provides basic coverage of the topics most important for a beginning paralegal student.

The pedagogy of the book applies three goals:

Learning outcomes.

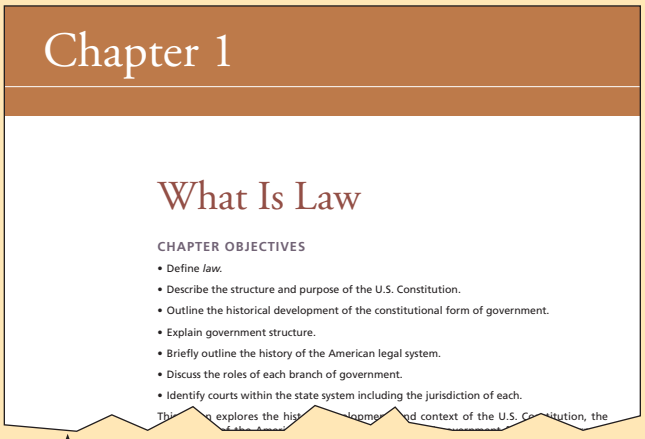
- Critical thinking
- Vocabulary builders
- Skill development
- Issues analysis
- Writing practices

Relevance of topics without sacrificing theory.

- Ethical challenges
- Current law practices
- Technology application

Practical application.

- Real-world exercises
- Portfolio creation
- Team exercises



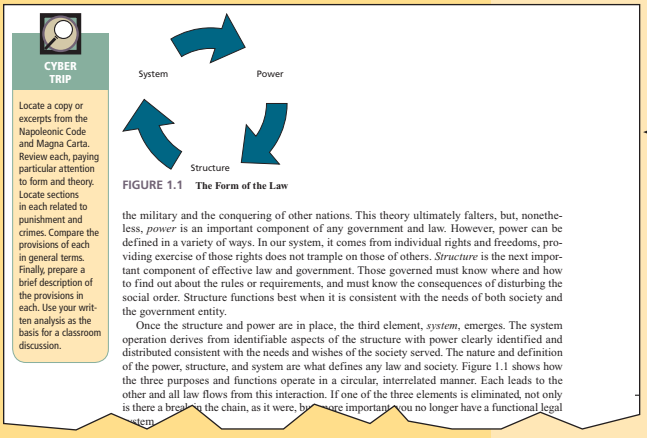
Chapter 1

What Is Law

CHAPTER OBJECTIVES

- Define *law.*
- Describe the structure and purpose of the U.S. Constitution.
- Outline the historical development of the constitutional form of government.
- Explain government structure.
- Briefly outline the history of the American legal system.
- Discuss the roles of each branch of government.
- Identify courts within the state system including the jurisdiction of each.

Chapter Objectives introduce the concepts students should understand after reading each chapter as well as provide brief summaries describing the material to be covered.



CYBER TRIP

Locate a copy or excerpts from the Napoleonic Code and Magna Carta. Review each, paying particular attention to form and theory. Locate sections in each related to punishment and crimes. Compare the provisions of each in general terms. Finally, prepare a brief description of the provisions in each. Use your written analysis as the basis for a classroom discussion.

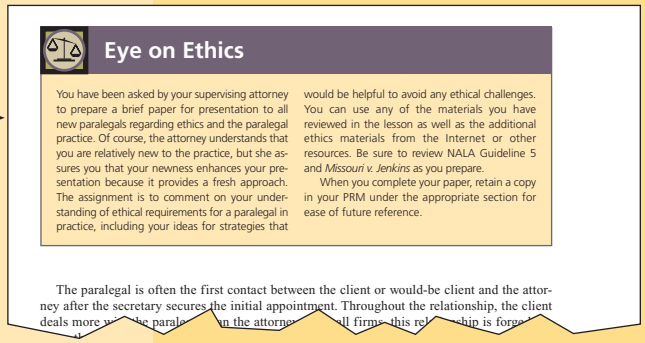
FIGURE 1.1 The Form of the Law

the military and the conquering of other nations. This theory ultimately falters, but, nonetheless, *power* is an important component of any government and law. However, power can be defined in a variety of ways. In our system, it comes from individual rights and freedoms, providing exercise of those rights does not trample on those of others. *Structure* is the next important component of effective law and government. Those governed must know where and how to find out about the rules or requirements, and must know the consequences of disturbing the social order. Structure functions best when it is consistent with the needs of both society and the government entity.

Once the structure and power are in place, the third element, *system*, emerges. The system operation derives from identifiable aspects of the structure with power clearly identified and distributed consistent with the needs and wishes of the society served. The nature and definition of the power, structure, and system are what defines any law and society. Figure 1.1 shows how the three purposes and functions operate in a circular, interrelated manner. Each leads to the other and all law flows from this interaction. If one of the three elements is eliminated, not only is there a break in the chain, as it were, but more importantly you no longer have a functional legal system.

Cyber Trip offers students a research exercise on using the Internet to study important law-related documents and resources.

Eye on Ethics raises legitimate ethical questions and situations attorneys and paralegals often face. Students are asked to reference rules governing these issues and make a decision.



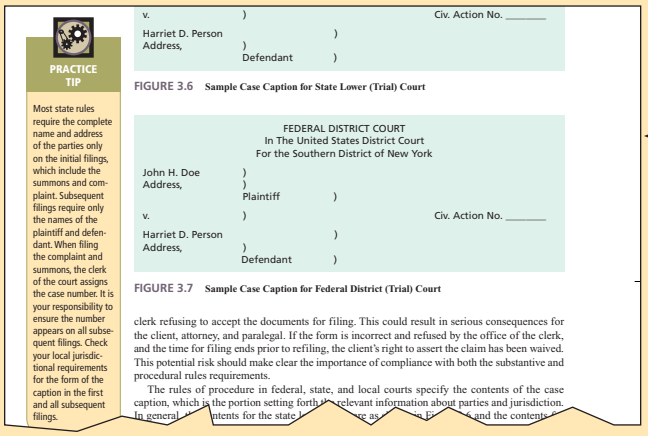
Eye on Ethics

You have been asked by your supervising attorney to prepare a brief paper for presentation to all new paralegals regarding ethics and the paralegal practice. Of course, the attorney understands that you are relatively new to the practice, but she assures you that your newness enhances your presentation because it provides a fresh approach. The assignment is to comment on your understanding of ethical requirements for a paralegal in practice, including your ideas for strategies that would be helpful to avoid any ethical challenges. You can use any of the materials you have reviewed in the lesson as well as the additional ethics materials from the Internet or other resources. Be sure to review NALA Guideline 5 and *Missouri v. Jenkins* as you prepare.

When you complete your paper, retain a copy in your PRM under the appropriate section for ease of future reference.

The paralegal is often the first contact between the client or would-be client and the attorney after the secretary secures the initial appointment. Throughout the relationship, the client deals more w[illegible] the paral[illegible]n the attorne[illegible]ll firm; this rel[illegible]ship is forge[illegible]

Practice Tips are designed to give students hands-on experience with different activities required for a paralegal, including research, filing, and note-taking.



PRACTICE TIP

Most state rules require the complete name and address of the parties only on the initial filings, which include the summons and complaint. Subsequent filings require only the names of the plaintiff and defendant. When filing the complaint and summons, the clerk of the court assigns the case number. It is your responsibility to ensure the number appears on all subsequent filings. Check your local jurisdictional requirements for the form of the caption in the first and all subsequent filings.

v.) Civ. Action No. _____
Harriet D. Person)
Address,)
Defendant)

FIGURE 3.6 Sample Case Caption for State Lower (Trial) Court

FEDERAL DISTRICT COURT
In The United States District Court
For the Southern District of New York

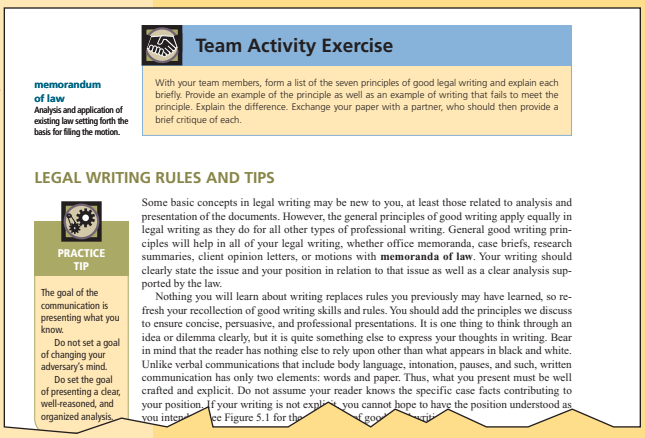
John H. Doe)
Address,)
Plaintiff)
v.) Civ. Action No. _____
Harriet D. Person)
Address,)
Defendant)

FIGURE 3.7 Sample Case Caption for Federal District (Trial) Court

clerk refusing to accept the documents for filing. This could result in serious consequences for the client, attorney, and paralegal. If the form is incorrect and refused by the office of the clerk, and the time for filing ends prior to refiling, the client's right to assert the claim has been waived. This potential risk should make clear the importance of compliance with both the substantive and procedural rules requirements.

The rules of procedure in federal, state, and local courts specify the contents of the case caption, which is the portion setting forth the relevant information about parties and jurisdiction. In general, the contents for the state [illegible] are as [illegible] and the contents [illegible]

Team Activity Exercises allow students to interact together to solve a hypothetical situation or work together to deliver an assignment.



Team Activity Exercise

With your team members, form a list of the seven principles of good legal writing and explain each briefly. Provide an example of the principle as well as an example of writing that fails to meet the principle. Explain the difference. Exchange your paper with a partner, who should then provide a brief critique of each.

memorandum of law
Analysis and application of existing law setting forth the basis for filing the motion.

LEGAL WRITING RULES AND TIPS

PRACTICE TIP

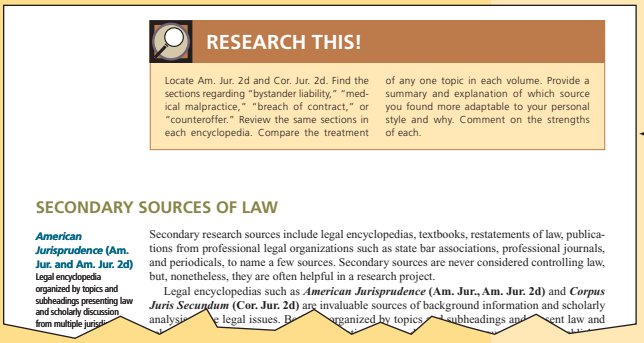
The goal of the communication is presenting what you know.

Do not set a goal of changing your adversary's mind.

Do set the goal of presenting a clear, well-reasoned, and organized analysis.

Some basic concepts in legal writing may be new to you, at least those related to analysis and presentation of the documents. However, the general principles of good writing apply equally in legal writing as they do for all other types of professional writing. General good writing principles will help in all of your legal writing, whether office memoranda, case briefs, research summaries, client opinion letters, or motions with **memoranda of law**. Your writing should clearly state the issue and your position in relation to that issue as well as a clear analysis supported by the law.

Nothing you will learn about writing replaces rules you previously may have learned, so refresh your recollection of good writing skills and rules. You should add the principles we discuss to ensure concise, persuasive, and professional presentations. It is one thing to think through an idea or dilemma clearly, but it is quite something else to express your thoughts in writing. Bear in mind that the reader has nothing else to rely upon other than what appears in black and white. Unlike verbal communications that include body language, intonation, pauses, and such, written communication has only two elements: words and paper. Thus, what you present must be well crafted and explicit. Do not assume your reader knows the specific case facts contributing to your position. If your writing is not expl[illegible], you cannot hope to have the position understood as you inten[illegible]ee Figure 5.1 for the [illegible] of goo[illegible]ri[illegible]



RESEARCH THIS!

Locate Am. Jur. 2d and Cor. Jur. 2d. Find the sections regarding "bystander liability," "medical malpractice," "breach of contract," or "counteroffer." Review the same sections in each encyclopedia. Compare the treatment of any one topic in each volume. Provide a summary and explanation of which source you found more adaptable to your personal style and why. Comment on the strengths of each.

SECONDARY SOURCES OF LAW

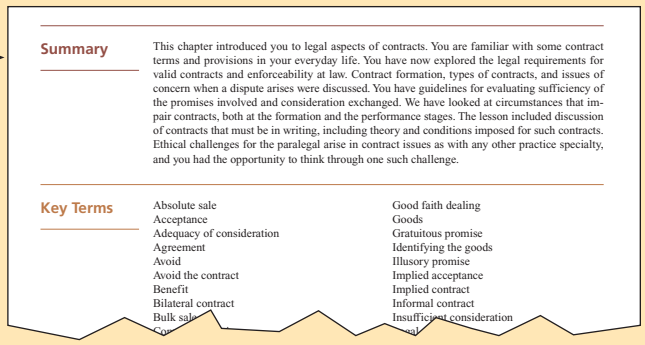
***American Jurisprudence* (Am. Jur. and Am. Jur. 2d)**
Legal encyclopedia organized by topics and subheadings presenting law and scholarly discussion from multiple jurisd

Secondary research sources include legal encyclopedias, textbooks, restatements of law, publications from professional legal organizations such as state bar associations, professional journals, and periodicals, to name a few sources. Secondary sources are never considered controlling law, but, nonetheless, they are often helpful in a research project.

Legal encyclopedias such as ***American Jurisprudence* (Am. Jur., Am. Jur. 2d)** and ***Corpus Juris Secundum* (Cor. Jur. 2d)** are invaluable sources of background information and scholarly analysis[illegible] legal issues. B[illegible] organized by topics [illegible] subheadings and [illegible]ent law and

Research This! engages students to research cases in their jurisdiction that answer a hypothetical scenario, reinforcing the critical skills of independent research.

Chapter Summary provides a quick review of the key concepts presented in the chapter.

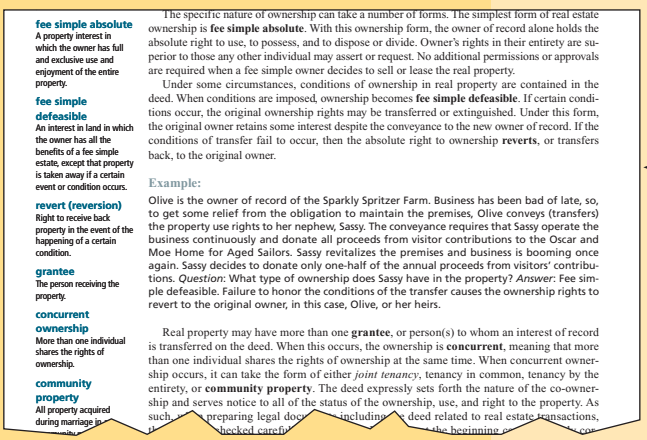


Summary

This chapter introduced you to legal aspects of contracts. You are familiar with some contract terms and provisions in your everyday life. You have now explored the legal requirements for valid contracts and enforceability at law. Contract formation, types of contracts, and issues of concern when a dispute arises were discussed. You have guidelines for evaluating sufficiency of the promises involved and consideration exchanged. We have looked at circumstances that impair contracts, both at the formation and the performance stages. The lesson included discussion of contracts that must be in writing, including theory and conditions imposed for such contracts. Ethical challenges for the paralegal arise in contract issues as with any other practice specialty, and you had the opportunity to think through one such challenge.

Key Terms

Absolute sale
Acceptance
Adequacy of consideration
Agreement
Avoid
Avoid the contract
Benefit
Bilateral contract
Bulk sale[illegible]
[illegible]
Good faith dealing
Goods
Gratuitous promise
Identifying the goods
Illusory promise
Implied acceptance
Implied contract
Informal contract
Insufficient consideration
[illegible]



fee simple absolute
A property interest in which the owner has full and exclusive use and enjoyment of the entire property.

fee simple defeasible
An interest in land in which the owner has all the benefits of a fee simple estate, except that property is taken away if a certain event or condition occurs.

revert (reversion)
Right to receive back property in the event of the happening of a certain condition.

grantee
The person receiving the property.

concurrent ownership
More than one individual shares the rights of ownership.

community property
All property acquired during marriage in

The specific nature of ownership can take a number of forms. The simplest form of real estate ownership is **fee simple absolute**. With this ownership form, the owner of record alone holds the absolute right to use, to possess, and to dispose or divide. Owner's rights in their entirety are superior to those any other individual may assert or request. No additional permissions or approvals are required when a fee simple owner decides to sell or lease the real property.

Under some circumstances, conditions of ownership in real property are contained in the deed. When conditions are imposed, ownership becomes **fee simple defeasible**. If certain conditions occur, the original ownership rights may be transferred or extinguished. Under this form, the original owner retains some interest despite the conveyance to the new owner of record. If the conditions of transfer fail to occur, then the absolute right to ownership **reverts**, or transfers back, to the original owner.

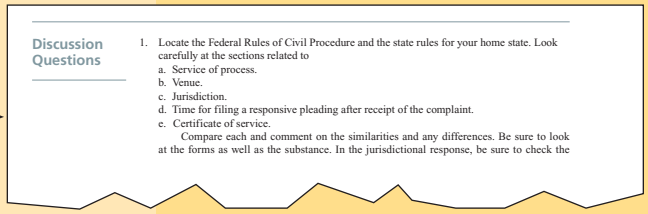
Example:

Olive is the owner of record of the Sparkly Spritzer Farm. Business has been bad of late, so, to get some relief from the obligation to maintain the premises, Olive conveys (transfers) the property use rights to her nephew, Sassy. The conveyance requires that Sassy operate the business continuously and donate all proceeds from visitor contributions to the Oscar and Moe Home for Aged Sailors. Sassy revitalizes the premises and business is booming once again. Sassy decides to donate only one-half of the annual proceeds from visitors' contributions. *Question:* What type of ownership does Sassy have in the property? *Answer:* Fee simple defeasible. Failure to honor the conditions of the transfer causes the ownership rights to revert to the original owner, in this case, Olive, or her heirs.

Real property may have more than one **grantee**, or person(s) to whom an interest of record is transferred on the deed. When this occurs, the ownership is **concurrent**, meaning that more than one individual shares the rights of ownership at the same time. When concurrent ownership occurs, it can take the form of either *joint tenancy*, tenancy in common, tenancy by the entirety, or **community property**. The deed expressly sets forth the nature of the co-ownership and serves notice to all of the status of the ownership, use, and right to the property. As such, [illegible] preparing legal doc[illegible] including [illegible] deed related to real estate transactions, [illegible] checked careful[illegible] [illegible] the beginning [illegible]

Key Terms used throughout the chapters are defined in the margin and provided as a list at the end of each chapter. A common set of definitions is used consistently across the McGraw-Hill paralegal titles.

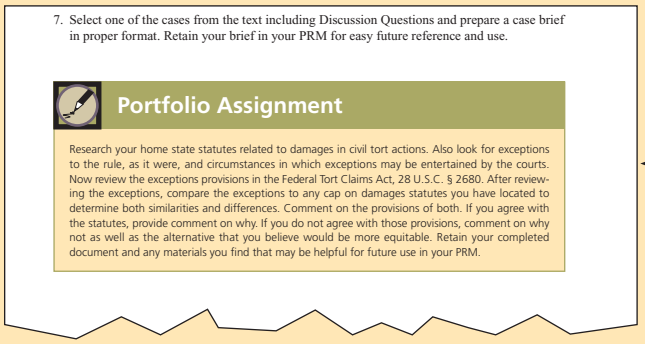
Discussion Questions ask students to apply critical thinking skills to the concepts learned in each chapter, focusing on more specific legal topics and promoting dialogue among students.



Discussion Questions

1. Locate the Federal Rules of Civil Procedure and the state rules for your home state. Look carefully at the sections related to
   a. Service of process.
   b. Venue.
   c. Jurisdiction.
   d. Time for filing a responsive pleading after receipt of the complaint.
   e. Certificate of service.

   Compare each and comment on the similarities and any differences. Be sure to look at the forms as well as the substance. In the jurisdictional response, be sure to check the



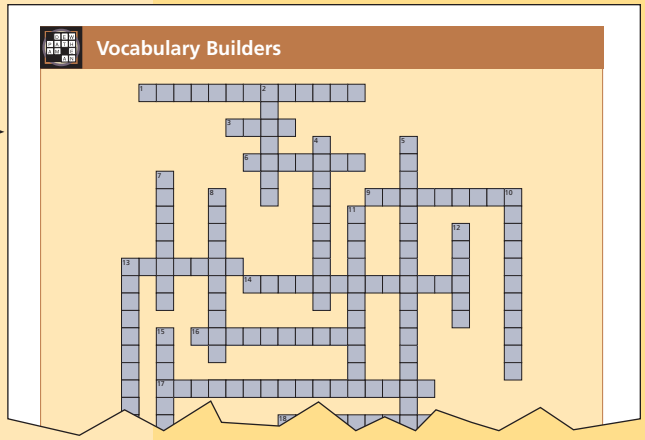
7. Select one of the cases from the text including Discussion Questions and prepare a case brief in proper format. Retain your brief in your PRM for easy future reference and use.

Portfolio Assignment

Research your home state statutes related to damages in civil tort actions. Also look for exceptions to the rule, as it were, and circumstances in which exceptions may be entertained by the courts. Now review the exceptions provisions in the Federal Tort Claims Act, 28 U.S.C. § 2680. After reviewing the exceptions, compare the exceptions to any cap on damages statutes you have located to determine both similarities and differences. Comment on the provisions of both. If you agree with the statutes, provide comment on why. If you do not agree with those provisions, comment on why not as well as the alternative that you believe would be more equitable. Retain your completed document and any materials you find that may be helpful for future use in your PRM.

Portfolio Assignments are designed to use the skills mastered in the chapter and convert them into a practical legal document that can be used as samples of work during interviews.

Crossword puzzles at the end of each chapter utilize the key terms and definitions to help students become more familiar using their legal vocabulary.



Vocabulary Builders

Supplements

Instructor's Resource CD-ROM An **Instructor's Resource CD-ROM (IRCD)** will be available for instructors. This CD provides a number of instructional tools, including PowerPoint presentations for each chapter in the text, an instructor's manual, and an electronic test bank. The instructor's manual assists with the creation and implementation of the course by supplying lecture notes, answers to all exercises, page references, additional discussion questions and class activities, a key to using the PowerPoint presentations, detailed lesson plans, instructor support features, and grading rubrics for assignments. A unique feature, an instructor matrix, also is included that links learning objectives with activities, grading rubrics, and classroom equipment needs. The activities consist of individual and group exercises, research projects, and scenarios with forms to fill out. The electronic test bank will offer a variety of multiple choice, fill-in-the-blank, true/false, and essay questions, with varying levels of difficulty and page references.

Online Learning Center The **Online Learning Center (OLC)** is a Web site that follows the text chapter-by-chapter. OLC content is ancillary and supplementary and is germane to the textbook—as students read the book, they can go online to review material or link to relevant Web sites. Students and instructors can access the Web sites for each of the McGraw-Hill paralegal texts from the main page of the Paralegal Super Site. Each OLC has a similar organization. An Information Center features an overview of the text, background on the author, and the Preface and Table of Contents from the book. Instructors can access the instructor's manual and PowerPoint presentations from the IRCD. Students see the Key Terms list from the text as flashcards, as well as additional quizzes and exercises.

The OLC can be delivered multiple ways—professors and students can access the site directly through the textbook Web site, through PageOut, or within a course management system (i.e., WebCT, Blackboard, TopClass, or eCollege).

PageOut: McGraw-Hill's Course Management System
PageOut is McGraw-Hill's unique point-and-click course Web site tool, enabling you to create a full-featured, professional-quality course Web site without knowing HTML coding. With PageOut, you can post your syllabus online, assign McGraw-Hill Online Learning Center or eBook content, add links to important offsite resources, and maintain student results in the online grade book. You can send class announcements, copy your course site to share with colleagues, and upload original files. PageOut is free for every McGraw-Hill/Irwin user and, if you're short on time, we even have a team ready to help you create your site! To learn more, please visit http://www.pageout.net.

Brief Contents

Table of Contents

Chapter 1

What Is Law

CHAPTER OBJECTIVES

- Define *law.*
- Describe the structure and purpose of the U.S. Constitution.
- Outline the historical development of the constitutional form of government.
- Explain government structure.
- Briefly outline the history of the American legal system.
- Discuss the roles of each branch of government.
- Identify courts within the state system including the jurisdiction of each.

This lesson explores the history, development, and context of the U.S. Constitution, the centerpiece of the American legal system. All law and government flow in one form or another from the Constitution. Understanding the role of the paralegal within law and society is easier with an understanding of the formation, rationale, and structure of the Constitution. Our system of law and government protects rights of the individual both substantively and procedurally, which differs from all other government forms throughout history. After looking at the historical evolution and design of the system resulting from the Constitution, the paralegal should develop a better understanding of the procedures incorporated in the system and competing interests of various parties in any legal matter. You will learn the foundations for dispute resolution that honors the individual rights of the parties and resolves disputes in the context of these rights rather than the rules that must be observed regardless of any individual rights or needs.

WHAT IS LAW?

law
Identifiable governance form characterized by structure, power, and systemic operation.

There are almost as many definitions of **law** as there are attempts to define it. In general, there are many who define law in criminal terms, which includes systemic punishment for wrongful conduct against society. Then there are those who define law in terms of a moral authority. Likewise, there are those who think law is the way society controls the acts of citizens. Each person would claim emphatically that his or her definition is the only correct one, and each would be entirely correct in this assertion. The law is personal to each person. The definition any individual provides results from the social, moral, and philosophical environment of the person asked. In any definition, there is an element of order, power, theory, rules, and procedure. Despite the variety of approaches, there are certain consistent elements in every definition: structure, power, and systemic operation. There is also evidence that society wants the structure; thus, law is a voluntarily chosen design for community conduct. In any case, the existence of something called *law* unifies and stabilizes the society.

The commonalities in the definition and operation of law include that law involves action and concept or theory. Any dictionary definition includes a noun and verb form. Law is intangible. Law is elusive. Law is wonderful. Law is exciting. Law is stoic. Law is impersonal while at the same time incredibly personal and situation specific. If you gain nothing else through your journey and study, you will learn to love and respect whatever it may be that is called the law, regardless of which definition you give when asked: What is law?

> *Black's Law Dictionary defines law as the regime that orders human activities and relations through systematic application of the force of politically organized society or through social pressure, backed by force, in such society; . . . The aggregate legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action [the law of the land].**

> *Law—a binding custom or practice of a community: a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority.*†

The definitions are similar, but there are subtle differences. Each definition embraces both a procedural and conceptual element. This consistent pattern reinforces that the operation of law is as important as the theory. You will see that the definitional relationship parallels perfectly the procedural and substantive law relationship that characterizes our legal system. While there are differences between substantive and procedural aspects of law, at the same time, they are inextricably interwoven in our system. A procedural error is as unacceptable as an obviously substantive one. Stated another way, the **substantive law** defines and establishes parameters for the rights, while the **procedural** establishes the way in which those rights are upheld.

substantive law
Legal rules that are the content or substance of the law, defining rights and duties of citizens.

procedural law
The set of rules that are used to enforce the substantive law.

Examples:

Procedural law error. The law requires that the defendant live within the county or district in which the issue arose, but the defendant really lives elsewhere. If this is the case, and the defendant nonetheless was found liable by what is essentially the wrong court, the judgment of the court would be invalid. To prevent this kind of violation of procedure, the law maintains that the judgment is unenforceable because the court had no power or authority to enter judgment against an individual who does not live within the district.

Substantive law error. Assume that the court is hearing a case involving breach of a contract to decorate a residence. The homeowner claims the decorator failed to complete the contract because one of the rooms was left unfinished after all existing furnishings were removed. After hearing the evidence, the jury finds the defendant liable, and the judge enters an order for repayment of the money paid for the one room, and also orders the decorator to go to a mental health professional for attitude adjustment and organizational skills training. This is a substantive error of law because the court has no authority and the law makes no provisions whatever for a judgment ordering mental health counseling and organizational skills training for a breach of contract. There is no legal basis for the court to enter such an order, thus it is unenforceable and violates substantive law principles.

The law in all cases essentially is that if you say what you say or do what you do improperly, it is no less wrong and contrary to law than saying or doing the wrong thing properly.

HISTORICAL PERSPECTIVE ON LAW

Since the beginning of man, and recorded time, something called *law* has been a part of each society. It may have been as relatively simple as the process through which the stronger animals survived and the weaker perished or it may have taken a less prominent role in society.

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* Reprinted from Garner, B. A. (1999). *Black's Law Dictionary*, 7th ed. St. Paul, MN: West Group. © 1999. Used with permission of Thomson/West.

† By permission. From the Merriam-Webster Online Dictionary © 2006 by Merriam-Webster, Incorporated (www.Merriam-Webster.com).

It may have been the more formal social structure designed in the time of Socrates and Aristotle. Regardless of the culture served, it is never static in design, nor is it only a tightly engineered to-do list. To serve the society and endure, law cannot be rigid. Law designed around the concept of regulation through restriction does not endure in the long run. History contains a long list of failed societies supporting that fact. As society and law evolve, and different facts are presented, the existing law may be modified or changed to accommodate new needs and legal realities.

The original legal systems as we know them evolved from social pressures exerted by the population involved. This pressure developed from the strong survival instinct inherent in animals and man. Another strong contributor to the formulation of law was the evolution from the less to the increasingly more sophisticated social and technological society.

structure
Fundamental principle of law and social order in any government system.

Structure is a fundamental principle of law and drives the formulation and application of some system in every culture and society regardless of how primitive. The details of the structure may differ. Even the earliest version of law, commonly called the law of the jungle, demonstrates that a design for conduct or living is intrinsic to both animals and man. It may be a more simplistic legal structure than our present system, but nonetheless it served the society.

Code of Hammurabi
First formalized legal system (1792–1750 B.C.).

The first formalized legal system, the **Code of Hammurabi** (1792–1750 B.C.), established a way of life that maintained social order through punishment commensurate with the nature and extent of the violation of the social order. The system relied on the fundamental principle of an eye for an eye. This means, quite simply, that the punishment used any method to guarantee the crime would not be repeated. Thus, the system was based on regulation, punishment, and deterrence. The Code was designed not only to punish the wrongdoer but also to remind society of the perils of activity opposed to the social order and of the unacceptability of such behavior.

An example of the operation of the code would be if a pickpocket ran throughout the marketplace picking pockets along the way but finally got caught in the act. The offender would have been taken to the city or village square and, in plain view of all interested citizens, the index finger of the right hand was chopped off. The theory was simple but effective. Without the right index finger, picking a pocket was nearly impossible; thus, the criminal behavior effectively was ended. Additionally, however, the absence of the finger made it clear to all citizens that the individual lived a criminal lifestyle and thus was unworthy of trust. In the case of a thief who stole large amounts of food or wares from the marketplace, however, not only was the index finger cut off, but several other fingers as well. The fingers were the tools of the crime; thus, if they were severed, the criminal activity ended. Without every finger, the offender could no longer steal, but also was prevented from finding alternative employment because of the missing digit(s). There were, therefore, myriad consequences suffered by the criminal, the most evident of which was the offender became a social pariah or outcast.

Socratic method
Analysis and teaching tool based on questioning and discussion.

The **Socratic method** of discourse was the foundational tool in learning and social evolution that ultimately formed the legal and social structure in ancient Greece. Socrates (c. 425–399 B.C.) developed his method to provoke thought and analysis of acceptable rules and conduct, all of which translated into a harmonious, ordered, and respectable social form. The Socratic method in part resulted from the conviction that understanding and critical thinking were inherent to social success and efficient operation. Thus, citizens who thought critically were better citizens and participants in the social order. That method of teaching and learning instilled in the student a sense of individual moral responsibility. Socrates believed this sense of personal responsibility was the *sine qua non* of a well-ordered society. He believed the knowledgeable citizen was the effective citizen. The method also was based on the premise that for the mind to reach optimal effectiveness, the body too must be maintained in optimal condition. Thus, the Greek scholars were also superior athletes. They spent half the day in physical training and the remainder in mental training and learning. The original Olympians were the brightest as well as the strongest in the country.

Plato, one of Socrates' most renowned students, further refined the Socratic method into a moral imperative for all members of society that held that ethics were the base of a well-ordered and universally applicable system of law and social order. Aristotle, another Greek thinker, contributed structure to the formulation, expanding on the ethical reasoning of his predecessors Socrates and Plato.

The next noteworthy legal and government system was the Roman Empire. You have probably heard stories of the Roman games and the system of justice that allowed feeding Christians to the lions! No question this is a controversial practice by standards then as well as now. However, the nature of society and the legal system at that time permitted such punishment. Note also that even though society was more sophisticated at that time, the legal system still was based on the theory of rigid rules of regulation, punishment, and deterrence much as at the time of the Code of Hammurabi.

Christianity was not the recognized state religion; thus, demonstrating Christian practice or belief was forbidden and punishable by death at the whim of the Caesars together with the ruling Senate. The body of law at the time of the Roman emperors prohibited behavior, rather than preserving and protecting individual citizen rights. Law was built on the principle of prohibition. There were two social classes: the wealthy, or patrician, and the commoners, or plebeians. There was no middle class. The plebeians, or common people, were expected to observe the law without question or punishment would be meted out. National superiority was defined in terms of territory conquered. Thus, war and violence were inherent parts of the cultural fabric. Each conquered area was required to comply with the law of the caesars, thus spreading the legal system and beliefs throughout the civilized world.

The Crusades were the next great pervasive social effort to implement a legal system. The Crusades differed from the Roman conquests in that battles and human sacrifice were undertaken in the name of preserving and spreading Christianity. The Crusades targeted Islamic nations during the 12th and 13th centuries A.D. to eradicate Muslim nonbelievers and absorb the conquered peoples into one culture worshipping the same god following the same code of behavior and principles. Muslim strongholds were targeted throughout that time span.

Magna Carta
British document (originally issued in 1215) describing the system and form of government and law upon which the U.S. Constitution was modeled.

Although Islam and Muslim beliefs differed from Christianity, they too had a well-defined legal and moral system. The religious differences created the conflict and led to the acrimony between the two cultures. As the Muslim territories were conquered, the Crusaders imposed a Christianity-based legal system that denied the legitimacy of all but the Christian religion, morality, and ethics. The government form supposedly reflected these same values.

By 1500, Great Britain was the most dominant legal and governmental power in the world. The **Magna Carta** was the document of governance embraced by the British and similarly the model for the governance in each country ruled by the British monarchy. The British colonized and ruled effectively through a powerful navy and strong regional governor system. All citizens of the conquered territories were British subjects, and governance in each was consistent with the British model. The drafters of the Constitution found certain parts of the Magna Carta consistent with the government form they sought to establish. They recognized that the Magna Carta in many respects was effective, moral, ethical, and equitable. This is an amazing commentary on both the founding fathers' insight and the incredible power of the British monarchy system.

Napoleonic Code
French code of law and government influencing certain aspects of our system. It serves as the model for the government and law in the state of Louisiana.

The French government wielded enormous power and rivaled Great Britain, but it was in decline when the colonists arrived in America. The French Revolution of 1789 signified the end of French rule as it had been and introduced a new government form built on the motto of "Freedom, Equality, Brotherhood," which is remarkably similar to the concepts of society and law in our constitutional form of government.

federalism
Balanced system of national and state government in the U.S. Constitution.

state rights
Constitutionally defined rights of individual state governments to preserve and protect individual rights of citizens of the state, providing there is no conflict with the federal Constitution.

The **Napoleonic Code**, enacted in 1804 during the reign of Napoleon Bonaparte in France, codified French government form and rule of law. The Code has been enormously influential on both world and U.S. government theory and policy and a significant influence in the formation of legal systems in Europe and Latin America. The state of Louisiana embraces Napoleonic Code principles in the state constitution, government, and legal system. Under our system of **federalism** and **state rights**, this is permissible providing there is no conflict between the federal and state provisions. (We will examine these concepts in much more detail in the next chapter.) The doctrine of **state supremacy** allows states to make decisions impacting only the citizens of the particular state without conflict or negative impact on the federal law and citizenry.

state supremacy
Constitutional principle that the individual states have sole governmental authority over matters related to only state citizens without influencing or negatively impacting federal rights and privileges.

While some of the legal theories prominent throughout history continue to operate in some form today, the most enduring form is the democracy embraced in our Constitution. The foundation of democratic law is that government functions to protect and preserve individual rights rather than define and restrict behavior. In many other civilizations, power comes from

CYBER TRIP

Locate a copy or excerpts from the Napoleonic Code and Magna Carta. Review each, paying particular attention to form and theory. Locate sections in each related to punishment and crimes. Compare the provisions of each in general terms. Finally, prepare a brief description of the provisions in each. Use your written analysis as the basis for a classroom discussion.

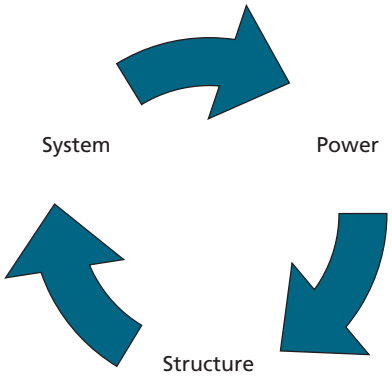


FIGURE 1.1 The Form of the Law

the military and the conquering of other nations. This theory ultimately falters, but, nonetheless, *power* is an important component of any government and law. However, power can be defined in a variety of ways. In our system, it comes from individual rights and freedoms, providing exercise of those rights does not trample on those of others. *Structure* is the next important component of effective law and government. Those governed must know where and how to find out about the rules or requirements, and must know the consequences of disturbing the social order. Structure functions best when it is consistent with the needs of both society and the government entity.

Once the structure and power are in place, the third element, *system*, emerges. The system operation derives from identifiable aspects of the structure with power clearly identified and distributed consistent with the needs and wishes of the society served. The nature and definition of the power, structure, and system are what defines any law and society. Figure 1.1 shows how the three purposes and functions operate in a circular, interrelated manner. Each leads to the other and all law flows from this interaction. If one of the three elements is eliminated, not only is there a break in the chain, as it were, but, more important, you no longer have a functional legal system.

U.S. CONSTITUTION

In some form or another, every American has at least a basic awareness of the Constitution and law. Understanding the historical setting at the time of formulation and the evolution of the government and law since that time is essential for anyone working in the field of law.

Our founding fathers came from England to avoid government intervention in private matters, including free exercise of religion. They believed that government intervention in certain uniquely personal issues was overreaching and an impermissible exercise of government power when the behavior targeted had no direct impact on society. They were unwilling to accept the state mandate that only the Church of England was the permitted religion. They were committed to the concept that establishing the new democracy required new applications of existing tools, theories, and procedures that served their goals and contained basic elements consistent with the concept of government they called **democracy**. The founding fathers defined *democracy* as the rule of, by, and for the people or, if more practical, by elected representatives of the people. They believed that government could only be effective if those governed participated in deciding how that government should operate to serve their needs.

democracy
Government form characterized by rule of and by the people or, if more practical, by elected representatives of the people.

The founding fathers understood not only the Magna Carta, but also the Napoleonic Code as well as other forms of government and society from as far back as ancient Greece. They assessed both strengths and weaknesses of each and used aspects borrowed from all of them to structure their form of democracy.

The British legal system embraced a series of rigid rules describing forbidden behavior as well as permissible social interaction or behavior. The monarchs believed their authority was limitless, their right to rule unrestricted, and the power of taxation to support the monarchy first unlimited. There was a two-class system: the wealthy gentility and the poor, or peons. This social structure endured from ancient Greece and Rome essentially unchanged. World expansion and

colonization of new territories in far-flung places contributed to the emergence of a British middle class comprised largely of merchants, shippers, and bankers. The founding fathers and many of the original colonists who came with them to the new country were part of this emerging middle class. Thus, the system built on a two-class model created the de facto middle class of articulate, educated thinkers representing the needs and wants of the general populace.

This middle class rejected the prevailing principle that preserving the monarchy at all costs was the purpose of law and government. The concept of monarchy ordering the conduct of the subjects and forcing unquestioned allegiance and homage to the crown was eroding. The founding fathers were the catalysts for large-scale emigration from the British monarchy system to the alternative democratic form of government emerging in the colonies.

The founding fathers realized that some form of structured guidance and governance was essential. However, unlike the British government approach, they were unwilling to embrace government through edicts of restriction and prescription. As so eloquently stated in the predecessor to the Constitution, the **Declaration of Independence**:

Declaration of Independence
Statement, preceding the U.S. Constitution, giving the intention to form a new government in the colonies and including general principles guiding the form of that new government.

> *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, . . .*

This statement from the preamble of the Declaration of Independence embraces the fundamental principle of our law, government, and social form. It embraces the concept of individual rights rather than monarchy alone having rights. The preamble also opens with a statement reiterating that all men are created equal. This means that the power of government comes from the people governed and is not the imposed will of a select few individuals. It is important to note that individual life, liberty, and pursuit of happiness are given equal weight and importance in both shape and operation of our democratic government form.

Unlike monarchies that derive power from one person or source, the government contemplated by the signers of the Declaration of Independence was "of men, for men and by men." In this form, those governed give consent and participate in government by casting individual votes. There is no distinction drawn in terms of value or weight of one vote as against another. From time to time, a law is enacted that an individual or even many individuals do not agree with and in fact may vigorously oppose. In those instances, the will of the majority prevails and the minority must conform to the voice of the majority. This concept is apparent in both the Declaration of Independence and the U.S. Constitution.

The Declaration of Independence, signed on July 4, 1776, was written primarily by Thomas Jefferson. The Declaration stated the intention of the framers of the Constitution to form a new government as well as general principles that would be the basis for the new government. The Declaration guided the design of the Constitution of the United States of America, after it was signed and ratified in May 1787. The **U.S. Constitution** is the primary source of law in the American system. In addition to establishing the operational schema and theoretical approach to law, the document establishes three separate but equal segments of government: the legislative, judicial, and executive branches.

U.S. Constitution
The fundamental law of the United States of America, which became the law of the land in March of 1789.

CYBER TRIP

Go to the following site and read the Declaration of Independence as well as any other material you find about the document, its historical context, and facts related to the formation and operation of the Declaration: www.archives.gov/national_archives_experience/charters/declaration_transcript.html. While reading, consider what parts are surprising and also what you find that raises questions and perhaps even disagreement. Lastly, while reading, try to put yourself in the place of any of the signers and imagine what it was like at that time to conceptualize such shocking concepts of government, law, and social order.

Take notes on your comments and retain them for use later in the lesson. You may want to retain them in your PRM as well for future reference.

The framers of the Constitution looked to the Magna Carta, confirmed by Edward I in 1297 (originally drafted in 1215), for guidance in forming their government. There they found some sound and useful concepts, including

> *No freeman shall be taken, imprisoned, . . . or in any other way destroyed . . . except by the lawful judgment of his peers, or by the law of the land. To no one will we sell, to non will we deny or delay, right or justice.*[‡]

In the discussions preceding the drafting and ratification of the Constitution, the framers agreed that they were particularly interested in some way to "spell out the immunities of individual citizens." Prior to the ratification of the Constitution, no other government in history had a written constitution. Unlike all other legal systems, the American system approaches law from the perspective of rights preservation rather than deprivation or prohibition. This not only sets our system apart from others, but it also necessitates a different analytical framework. If the U.S. Constitution assumes individual rights as the underpinning, then the resulting social structure must be consistent.

CYBER TRIP

Visit the U.S. government official Web site. Click on each branch and explore the materials regarding the function, structure, and operation in each:

www.archives.gov/national_archives_experience/charters/bill_of_rights.html.
www.cec.org/pubs_info_resources/law_treat_agree/summary_enviro_law/publication/us01.cfm?varlan=English.
www.findlaw.com/casecode/constitution/.

Articles of the Constitution
Establish government form and function.

Bill of Rights
Set forth the fundamental individual rights government and law function to preserve and protect.

fundamental individual rights
Contained in the first Ten Amendments to the Constitution, which spell out the individual rights the government functions to preserve and protect.

When beginning your analysis of the constitutional provisions, pay particular attention to the **Articles**, which precede the **Bill of Rights** and set forth the principles of government, structure, and distribution of power between the various branches as well as the state and federal governments. The Articles establish three separate but equal divisions, or branches, of government: the executive, judicial, and legislative. This concept represented an enormous departure from the British monarchy, which vested all power in the monarch. The Bill of Rights established the **fundamental individual rights** that the government form will preserve and protect. The Articles and Bill of Rights taken as a whole describe the form and rationale behind our governmental form and legal system.

CYBER TRIP

Either in a library using traditional books or electronically, locate the U.S. Constitution and read the Articles section. Explore the U.S. Constitution site on the Internet and read additional explanatory materials related to the articles: www.nara.gov/exhall/charters/constitution/constitution.html.

BILL OF RIGHTS

The Bill of Rights appears in the first 10 amendments. This particular section was ratified and adopted two years after the Constitution itself. Within the Bill of Rights are the fundamental individual rights recognized as the foundation of the legal and government system. The ratification process showed that negotiation and compromise are critical to our form of government and law, even at this early stage. The endurance of the constitutional form of government from that period until the present demonstrates how diligently and brilliantly the founding fathers' debate worked.

[‡] www.archives.gov/exhibit_hall/featured_documents/magna_carta/index.html.

FIGURE 1.2
Bill of Rights

Bill of Rights Rights and Privileges	
First Amendment:	Freedom of religion, the press, speech as well as peaceable assembly and, finally, the right to petition the government in those instances where a right is breached, or in the event of other disagreement.
Second Amendment:	Right both to bear and to keep arms.
Third Amendment:	Prohibits the government from requiring a citizen to lodge soldiers or other military in peacetime.
Fourth Amendment:	Individual right to be free from unreasonable search and seizure, either personally or of property owned by the individual
Fifth Amendment:	The right to indictment by grand jury, due process of law, and just repayment for seized property that will be used for public rather than private purposes. Further, the Fifth Amendment ensures the individual will not be required to testify against him- or herself or be subject to double jeopardy.
Sixth Amendment:	Speedy and public trial in a criminal matter. Additionally, the trial is by jury with right to counsel assured. Implicit in this is the right to confront and cross-examine both accusers and witnesses.
Seventh Amendment:	In civil matters with the amount in controversy greater than $20.00, the individuals likewise have a right to trial by jury. (The amount in controversy has been increased over time.)
Eighth Amendment:	Prohibits both cruel and unusual punishment as well as excessive bail.
Ninth Amendment:	Preserves the individual unnamed rights beyond those enumerated in the Constitution.
Tenth Amendment:	Powers not specifically conferred on the national or federal government are within the sole province of the state governments.

While the Declaration of Independence referred to citizen "immunities," the Bill of Rights changed the term to *individual citizen rights*. Each right relates to other provisions, guarantees, and laws in both the document itself as well as any subsequent enactments. When reading the Bill of Rights, note that the language speaks to individual rights and extends guarantees, rather than forbidding or prohibiting behavior. The Amendments and rights addressed therein are summarized in Figure 1.2. You can use this chart as a reference source throughout your course work.

Fundamental individual rights are those rights essential to ensuring liberty and justice. They are, more particularly, rights such as freedom of religion, right to bear arms, and right to a speedy and public trial in criminal matters, to cite a few. Under our legal system and democratic form of government, if these rights are violated, the court applies a **strict scrutiny standard**. This fact and law analysis is the most exacting and precise because at issue are our fundamental constitutional rights, which indeed may have been unconstitutionally restricted or revoked. The

strict scrutiny standard
Most exacting and precise legal analysis because fundamental constitutional rights may have been unconstitutionally restricted or revoked.

CYBER TRIP

Visit one of the following Web sites and read the entire Bill of Rights: www.archives.gov/national_archives_experience/charters/bill_of_rights_transcript.html.

Read about the history of the Constitution and framers when you visit www.archives.gov/national_archives_experience/charters/constitution.html.

The Bill of Rights, in the first 10 amendments, can be viewed at www.archives.gov/national_archives_experience/charters/bill_of_rights_transcript.html.

CYBER TRIP

This would be an excellent time to read the Bill of Rights and formulate a list of the rights specified therein, and thus considered fundamental rights. The Bill of Rights can be located in your appendix or on the Internet at www.archives.gov/national_archives_experience/charters/bill_of_rights_transcript.html.

courts require proof of compelling government interest to restrict these fundamental rights. The 20th century was the period in which personal individual rights overtook economic rights as the major focus of court challenge in this area. This focus resulted from emerging emphasis on how individual citizens can and do express themselves and behave within society. More recently, privacy and discrimination in all their forms are considered in a general sense as fundamental rights even though they are not enumerated or discussed in the Bill of Rights. As such, these are not constitutionally defined fundamental rights. Nonetheless, when infringements occur, a possible legal cause of action arises.

due process
Ensures the appropriateness and adequacy of government action in circumstances infringing on fundamental individual rights.

procedural due process
These requirements mandate scrupulous adherence to the method or mechanism applied. Notice and fair hearing are the cornerstones of due process, though certainly not the only consideration.

substantive due process
Requires that legislation be reasonable in scope and limitations, and further that the statute serve a legitimate purpose, including equal impact on all citizens.

The Fifth Amendment of the Bill of Rights introduces the concept of **due process**. Over time, there has been a tremendous amount of litigation challenging the scope and adequacy of process. Due process as stated and interpreted implies both procedural and substantive process and the adequacy of the challenged process under the facts and law. The concept is one borrowed from the Magna Carta. The goal of due process as interpreted in our government and legal form is to ensure the appropriateness and adequacy of government action in circumstances infringing on any fundamental and individual rights. **Procedural due process** requirements mandate scrupulous adherence to the method or mechanism applied. Notice and fair hearing are the cornerstones of due process, though certainly not the only consideration. **Substantive due process**, on the other hand, requires that legislation be reasonable in scope and limitations, and further that the statute serve a legitimate purpose.

Example:

Substantive due process. A statute requiring every citizen driving along the interstate highway system to turn off their car air conditioners, drive with the windows opened, and further sing to pass the time would not pass a substantive due process challenge. There is no reasonable purpose for such a law. While one could argue turning off an auto air conditioner might save gasoline consumption, it is not at all certain that the government is reasonable to demand citizens take this action in furtherance of that goal. The individual has the right to consume gas as he or she sees fit. It is also unfair to impose such a limitation on automobiles when there are other vehicle types—trucks, busses, and recreational vehicles—not subject to the law.

CYBER TRIP

To get a better sense of what kind of unreasonable law has been passed from time to time, visit the following Web site: http://www.washingtonpost.com/wp-dyn/content/article/2005/05/22/AR2005052200963_pf.html. Upon completing the article, list the laws mentioned and decide whether they are substantive or procedural. If you believe there may be a due process violation with some or any, note which, and then briefly comment on why.

FEDERALISM

The form of government established in the Constitution includes both state and federal systems. The Constitution confers on the federal government responsibility to guarantee those rights and governmental functions that transcend state lines and equally protect citizens of all states. Our system is designed to limit federal power. The limitations are set forth in the various sections of

the Constitution describing the powers of the federal government. Any power not specifically designated to the federal government by operation becomes the right and purview of the individual states. The Tenth Amendment reiterates specifically this concept, which ensures its continued viability. The statement removes both conjecture and interpretation of whether the constitution applies to the states. Allocation of power is based on assessment of the needs of the whole and the impact overall if the individual states enacted different laws concerning something affecting all citizens.

The relationship and distribution of power between the state and federal government is called *federalism*. The seminal court decision regarding federalism is found in *Marbury v. Madison*, 5 U.S. 137 (1890), which remains good law even today. Under the *Marbury* decision, the court reinforced the right of the judiciary to review an act of another branch of government. Further, *Marbury* held that if the reviewing court interpreted an act as beyond the governmental branch's scope of authority, the court need not approve acts extending beyond that scope of authority. Thus, *Marbury* stands for the proposition that a strict construction of the constitutional provisions and language is appropriate. In its findings, the *Marbury* Court made clear that judicial review is limited to interpretation of existing law and cannot create new law.

federal question
The jurisdiction given to federal courts in cases involving the interpretation and application of the U.S. Constitution or acts of Congress.

preemption
Right of the federal government to exclusive governance in matters concerning all citizens equally.

Federal law takes precedence over the state in what are called **federal question** matters. Otherwise, the state has sole responsibility for ensuring the rights of the citizens therein for all matters arising within that state. **Preemption** is the right of the federal government to exclusive governance and control over certain areas of law. The doctrine sets our government apart from others. The federal Constitution preceded any state constitution. When the various states were formulating their own documents of governance, many chose to mirror the provisions of the federal Constitution. There is no requirement that states apply and embrace the federal form, Constitution, and codes, but the document and scope of government work equally well on the state level; thus, adopting it creates a particularly cohesive system. You may recall reading about the Napoleonic Code. The doctrine of state rights allows the state of Louisiana to model its state government on the Napoleonic Code rather than the federal Constitution. As you know, the state is free to design the state governance and legal system in those matters related to the state, but as to federal issues, federal law prevails. The federal government may not interfere in state issues under any circumstances absent clear evidence of the state impingement on constitutionally identified individual rights.

FEDERAL SUPREMACY

Supremacy Clause
Sets forth the principle and unambiguously reinforces that the Constitution is the supreme law of the land.

We have gained some insight into the structure of the Government, but how can we be certain the Constitution is indeed the ultimate statement of law and theory of government? The **Supremacy Clause** found in Article VI of the U.S. Constitution and shown in Figure 1.3 sets forth clearly the principle and unambiguously reinforces that the Constitution is the supreme law of the land.

The Supremacy Clause says that a state court may not interpret the Bill of Rights or any other Constitutional provision differently than the federal statement and interpretation. However, the state may interpret its own constitution more liberally than the federal Constitution and, in fact, may extend a broader scope of rights, providing the liberal interpretation does not conflict with the federal Constitution.

The Court held in *Edgar v. Mite Corp.*, 457 U.S. 624, 631 (1982), that "a state statute is void to the extent that it actually conflicts with a valid federal statute." In practical terms, this means that if there is a direct conflict, or if there are both federal and state statutes on point, if compliance with the state statute creates conflict or failure to comply with the federal statute, then the federal statute prevails.

FIGURE 1.3
Supremacy Clause

> 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.
>
> —U.S. Const. art. VI, para. 2

FIGURE 1.4
Commerce Clause

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

—Art. I, § 8, cl. 3

COMMERCE CLAUSE

Commerce Clause
Statement in the Constitution that the federal government has absolute authority in matters affecting citizens of all states.

The federal government has limited powers but absolute authority in matters affecting citizens of all states. The specific operation of this federal versus state interaction is evident in the laws related to interstate commerce. Figure 1.4 contains the language from the Constitution known as the **Commerce Clause**.

Vehicles from various states use the interstate highway system. The federal government has legislative power in matters related to interstate highways, including funding, repairing, speed limits, truck weight limitations, and the like.

Example:

One state decided that no one could travel faster than 25 miles per hour within the road system of the state because the natural beauty is so spectacular that the state governor and legislature want to ensure that all who travel through enjoy it as much as the state residents do and/or should. While sharing the beauty of the state is the purpose of the law, in so doing, the law would create an extreme imposition on the truckers responsible for transporting goods across the country for consumers throughout the country. Schedules would suffer, consumers would be unable to get goods on a timely basis, and even serious emergency situations could arise from this restriction. While the law appears reasonable to the state citizens, it is unreasonable in the context of the federal interests and burdens that would accrue from such a law. Thus, federal law would govern and the state law would be constitutionally impermissible.

The court held in *Gibbons v. Ogden*, 22 U.S. 1, that the state of New York could regulate commerce on waterways within the state. At issue in *Ogden* was a dispute related to legislation by the federal government attempting to impose restrictions on New York state users of New York state waterways for business impacting only the citizens of that state. The opinion reaffirmed the scope of federal authority to regulate interstate commerce and distinguished inter- and intrastate commerce for purposes of enforcement and legislation.

comity
Federal government respect for state government power and authority results in federal refusal to intervene in matters clearly within the sole jurisdiction of the state government.

Due to concerns of **comity** and federalism, the scope of federal injunctive relief against an agency of state government must be narrowly tailored to enforce federal constitutional and statutory law only. *Toussaint v. McCarthy*, 801 F.2d 1080, 1089 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). This is critical because "a federal district court's exercise of discretion to enjoin state political bodies raises serious questions regarding the legitimacy of its authority." The doctrine of comity mandates that state and federal governments recognize the scope and limitations of the power of each. Thus, an act or omission by the federal government that goes beyond the scope of authority would not be imposed because, in so doing, the federal government would take power away from the state and would unconstitutionally expand federal authority.

STRUCTURE OF GOVERNMENT

separation of powers
A form of checks and balances to ensure that one branch does not become dominant.

checks and balances
Mechanism designed into the Constitution that prevents one branch from overreaching and abusing its power.

The Constitution established the *legislative*, *judicial*, and *executive* branches of government. Each serves a specific role, but one is no more important than the others. The doctrine of **separation of powers** establishes the scope of authority for each branch of government, and further precludes intervention by other branches into that authority. The doctrine functions as a form of checks and balances to ensure that one branch does not become dominant. The framers recognized the possibility that an unmonitored branch could abuse its power base; thus, they put preventive monitoring mechanisms in place to prevent such abuse of power. (See Figure 1.5 for the structure of the U.S. government.)

The governmental system of **checks and balances** enables each government branch to exercise checks on others and, in so doing, maintain an appropriate balance of power and avoid exceeding the scope of authority vested in the branch under the constitutional design and intent.

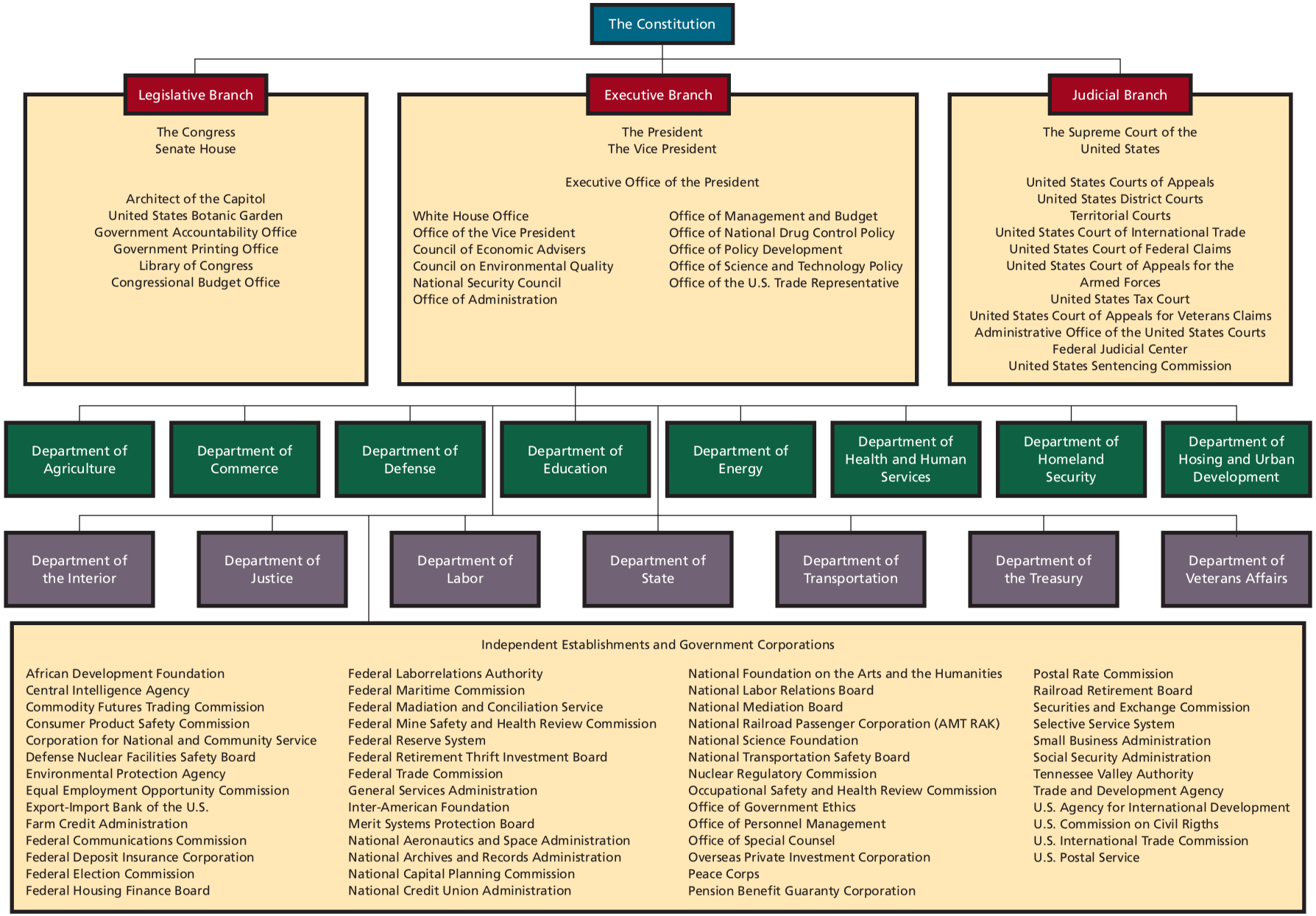


FIGURE 1.5 **Structure of the U.S. Government**

RESEARCH THIS!

Research the congressional Web site to locate examples of bills passed over presidential veto. Investigate what occurred after the veto and determine what changes were made when the president accepted the bill.

enumerated powers
Powers listed in the Constitution or the jobs of the particular office, for example, the president, or the branch, for example, the judicial.

Understanding the checks and balances requires first understanding what powers rest with which branch or office. Article III, as an example, contains the **enumerated**, or listed, **powers** held specifically by the judiciary and Article I, the enumerated or specific powers of the president. An example of checks and balances in operation follows.

Example:

Checks and balances. Congress circulates a *bill*, which is a recommendation for enactment into law. The president has the power to ratify enactment. In some cases, the president may veto the bill, which is one of the enumerated powers of the president. This sends the message that the chief executive, for whatever reason, does not agree with the proposal. The Congress can enact a bill over a presidential veto. However, the collegiality of the system would reasonably dictate some negotiated resolution when the presidential intent to veto becomes known as a reasonable next step. Thus, when the president exercises his right to veto, under the system of checks and balances, the Congress reviews the bill and attempts to reformulate it such that the president can accept and ratify it. On the other hand, the Congress can pass a bill over a presidential veto if and only if the appropriate process has been scrupulously observed.

The inherent control mechanism embraced by the checks-and-balances system creates an environment of openness and fairness, since the work of one is related to that done by other branches. The extent of independent and interactive work must conform to the constitutional requirements in all cases.

Another example of the operation of the system of checks and balances occurs when the president nominates a Supreme Court justice, which is another enumerated power of the president. By constitutional provision, one of the presidential powers is nominating Supreme Court justices. The system also allows for congressional approval. Recently, when vacancies have occurred, we have had publicly televised hearings of the questioning of the nominee. In the past, the nominee was

PRACTICE TIP

Make note of the process and Web sites used to locate this information. This is the type of research a paralegal in practice may be asked to conduct for the supervising attorney. You also will have similar research assignments as you go through your course, so the research process features are important to understand along with those resources that were particularly helpful.

CYBER TRIP

Explore various Web sites that discuss and spotlight the confirmation hearings for the most recent Supreme Court appointees: Chief Justice John Roberts and Associate Justice Samuel Alito. Research which justices they replaced and, after reviewing material about the confirmation hearings and process, prepare a brief comment in writing in which you discuss your views on the pros and cons of the process. Include comment on the specific justices and their qualifications for the position.

RESEARCH THIS!

Research to locate examples of checks and balances written into the U.S. Constitution. Briefly comment on the value of such a process. Then, present an argument in favor of eliminating the system of checks and balances.

Present your comments to your instructor and retain a copy in your PRM for easy future reference use.

FIGURE 1.6
U.S. Constitution, Article 1

U.S. Constitution Article I, § 8
Powers of U.S. Congress

The following powers, given to the federal government, are referred to as *delegated* or *enumerated* powers.

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 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 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.

investigated and limited, relatively informal questioning occurred. The more probing questioning evolved as the demands on the Court expanded and emphasis on government in the public increased dramatically. While the public cannot vote on the nominee, nonetheless, understanding the process and qualifications of the nominee has taken on greater importance to the public at large.

Legislative Branch

The primary duty of the *legislative branch*, empowered under Article I of the Constitution, is to enact law. Figure 1.6 outlines the powers conferred on the Congress by the U.S. Constitution.

The Constitution provides additional guidance as to the scope and content of the laws that might be passed in the enumeration of powers of Congress contained in Article I, § 8. The list provides guidance as to the general type of law and authority resting with the federal government. Both the House of Representatives and the Senate are guided by the section 8 list, but additional specific roles have developed for each by custom, practice, and necessity.

The legislative branch, or Congress, is designed as a bicameral or two-part system consisting of the House of Representatives and the Senate. The Senate has two members per state. Membership of the House of Representatives is created by formula based on the population of the respective states. Senators serve a six-year term and representatives, two. Each member may be reelected for an unlimited number of terms. Individual states generally structure their legislative branch in the same way as the federal system. Likewise, the state house and legislative functions operate in similar fashion in terms of power, scope of authority, and relationship with other branches of state government.

The process of legislating commences with introduction of a *bill*, which is a recommendation for a law. When every step of the process is completed, the bill becomes law. Unless a special provision is incorporated into the legislation, the newly enacted law takes effect on the first of January of the year following passage. Figure 1.7 contains an outline of the process of enacting a statute.

FIGURE 1.7
How a Bill Becomes a Law

How a Bill Becomes Law

A. Legislation Is Introduced

Any member can introduce a piece of legislation.

House: Legislation is handed to the clerk of the House or placed in the *hopper*.

Senate: Members must gain recognition of the presiding officer to announce the introduction of a bill during the morning hour. If any senator objects, the introduction of the bill is postponed until the next day.

- The bill is assigned a number (e.g., H.R. 1 or S. 1).
- The bill is labeled with the sponsor's name.
- The bill is sent to the Government Printing Office (GPO) and copies are made.
- Senate bills can be jointly sponsored.
- Members can cosponsor the piece of legislation.

B. Committee Action

The bill is referred to the appropriate committee by the Speaker of the House or the presiding officer in the Senate. Most often, the actual referral decision is made by the House or Senate parliamentarian. Bills may be referred to more than one committee and it may be split so that parts are sent to different committees. The Speaker of the House may set time limits on committees. Bills are placed on the calendar of the committee to which they have been assigned. Failure to act on a bill is equivalent to killing it. Bills in the House can only be released from committee *without* a proper committee vote by a discharge petition signed by a majority of the House membership (218 members).

Committee steps:

1. Comments about the bill's merit are requested by government agencies.
2. Bill can be assigned to a subcommittee by the chairman.
3. Hearings may be held.
4. Subcommittees report their findings to the full committee.
5. Finally, there is a vote by the full committee—the bill is "ordered to be reported."
6. A committee will hold a "mark-up" session during which it will make revisions and additions. If substantial amendments are made, the committee can order the introduction of a "clean bill" that will include the proposed amendments. This new bill will have a new number and will be sent to the floor while the old bill is discarded. The chamber must approve, change, or reject all committee amendments before conducting a final passage vote.
7. After the bill is reported, the committee staff prepare a written report explaining why they favor the bill and why they wish to see their amendments, if any, adopted. Committee members who oppose a bill sometimes write a dissenting opinion in the report. The report is sent back to the whole chamber and is placed on the calendar.
8. In the House, most bills go to the rules committee before reaching the floor. The committee adopts rules that will govern the procedures under which the bill will be considered by the House. A "closed rule" sets strict time limits on debate and forbids the introduction of amendments. These rules can have a major impact on whether the bill passes. The rules committee can be bypassed in three ways: (*a*) members can move rules to be suspended (requires two-thirds vote), (*b*) a discharge petition can be filed, or (*c*) the House can use a Calendar Wednesday procedure.

C. Floor Action

1. Legislation is placed on the calendar.

   House: Bills are placed on one of four House calendars. The Speaker of the House and the Majority Leader decide what will reach the floor and when. (Legislation also can be brought to the floor by a discharge petition.)

   Senate: Legislation is placed on the Legislative calendar. There is also an Executive calendar to deal with treaties and nominations. Scheduling of legislation is the job of the Majority Leader. Bills can be brought to the floor whenever a majority of the Senate chooses.

(Continued)

FIGURE 1.7 (Concluded)

2. Debate.
   - **House:** Debate is limited by the rules formulated in the rules committee. The Committee of the Whole debates and amends the bill but cannot technically pass it. Debate is guided by the sponsoring committee and time is divided equally between proponents and opponents. The committee decides how much time to allot to each person. Amendments must be germane to the subject of a bill—no riders are allowed. The bill is reported back to the House (to itself) and is voted on. A quorum call is a vote to make sure that there are enough members present (218) to have a final vote. If there is not a quorum, the House will adjourn or will send the Sergeant at Arms out to round up missing members.
   - **Senate:** Debate is unlimited unless cloture is invoked. Members can speak as long as they want and amendments need not be germane—riders are often offered. Entire bills therefore can be offered as amendments to other bills. Unless cloture is invoked, Senators can use a filibuster to defeat a measure by "talking it to death."
3. Vote. The bill is voted on. If passed, it is then sent to the other chamber unless that chamber already has a similar measure under consideration. If either chamber does not pass the bill, then it dies. If the House and Senate pass the same bill, then it is sent to the president. If the House and Senate pass different bills, they are sent to a conference committee. Most major legislation goes to a conference committee.

D. Conference Committee

1. Members from each house form a conference committee and meet to work out the differences. The committee is usually made up of senior members who are appointed by the presiding officers of the committee that originally dealt with the bill. The representatives from each house work to maintain their version of the bill.
2 If the conference committee reaches a compromise, it prepares a written conference report, which is submitted to each chamber.
3. The conference report must be approved by both the House and the Senate.

E. The President

The bill is sent to the president for review.

1. A bill becomes law if signed by the president or if not signed within 10 days and Congress is in session.
2. If Congress adjourns before the 10 days and the president has not signed the bill then it does not become law ("pocket veto").
3. If the president vetoes the bill, it is sent back to Congress with a note listing his/her reasons. The chamber that originated the legislation can attempt to override the veto by a vote of two-thirds of those present. If the veto of the bill is overridden in both chambers, then it becomes law.

F. The Bill Becomes a Law

Once a bill is signed by the president or his veto is overridden by both houses, it becomes a law and is assigned an official number.

CYBER TRIP

Locate the War Powers Act of 1973 on the Internet or manually in the law library. Read the act and compare its provisions with the war powers contained in the Constitution. What are the major changes or modifications of the power contained in the act of 1973? See http://usinfo.state.gov/usa/infousa/laws/majorlaw/warpower.htm.

Executive Branch

The *executive branch* was established under Article II, with the president at the head of this branch. The executive is responsible for the enforcement and administration of law and government. The powers of the office and the role the president plays within the branch and the federal power structure are contained in the Constitution, Article II, §§ 2–3. The powers are outlined in Figure 1.8 for easy reference.

The president has broad management power over national affairs and the operation of the federal government. On his or her own power, the president cannot legislate, but the Constitution conferred the authority to pass executive orders under certain specifically defined circumstances. These orders have the force of law. The House of Representatives does not need

FIGURE 1.8
Presidential Powers

Article II, Sections 2 and 3
Presidential Powers

Section 2

1. 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 Offenses against the United States, except in Cases of Impeachment.
2. 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.
3. 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.

to approve executive orders. The president has a number of roles including commander in chief of the military and National Guard. The war power is a broad one that operates in connection with the power of Congress to declare war pursuant to Article I, § 8. This is yet another example of the operation of checks and balances. The framers recognized the gravity of deciding about war with other nations; thus, exercise of the power requires two branches of the government working together.

The president nominates and the Senate confirms the heads of all executive departments and agencies, together with hundreds of other high-ranking federal officials. The scope of presidential power has been challenged in court from time to time. *Kendall v. United States*, 37 U.S. 524 (1837), heard by the Court in the 1800s, is still considered good law. The Court held, after review of the facts and law, "that Congress could impose upon an executive officer duties Congress thought proper which were not repugnant to any right secured and protected by the Constitution—especially where the duty enjoined was of a mere ministerial character." This opinion reinforces that any branch acting within its authority cannot be restricted or overridden when the exercise of authority is consistent with the provisions of the Constitution.

trier of law
Judge.

CYBER TRIP

To get insight into the number of agencies within the federal government and the function of each, visit the site www.lib.lsu.edu/gov/fedgov.html.

Judicial Branch

The third of the three co-equal branches of government is the *judicial branch*, established in Article III, which includes all federal courts. The judicial branch is responsible for interpreting the law. In a trial setting, the judge therefore fills the role of **trier of law**. The highest court is the U.S. Supreme Court. There are nine justices appointed for life by the president at the time of a vacancy, one of whom fills the role of Chief Justice. While the president nominates appointees to the panel, the Congress must ratify the choice.

In any decision, the courts must ensure that individual fundamental rights are preserved and protected in the opinions rendered. The judicial branch includes criminal, civil, administrative, and specialty divisions. As trier of law, the judge functions to apply and interpret both procedural

FIGURE 1.9
Branches of Government, Their Function in Law, and the Documents They Produce

Branches of Government			
Federal	**State**	**Function in Law**	**Documents Produced**
Legislative: Congress	Legislative: Congress	Enacts	Statutes
Judicial: courts	Judicial: courts	Interprets	Case opinions
Executive: president, agencies	Executives: governor, agencies	Enforces law	Regulations, rules, executive orders

and substantive law. Not all legal problems result in a trial proceeding. The system encourages amicable resolution through a variety of alternative means; thus, settlement prior to trial is a common outcome. Each specific court within the system has power, or *jurisdiction*, over those cases the relevant state or federal Constitution has authorized the court to hear and adjudicate, whether the matter resolves before or after a trial-by-jury verdict.

justiciable content
Genuine issue of law and fact within the power of the court to decide.

A **justiciable content** is a genuine issue of law and fact within the power of the court to decide. The court cannot intervene or suggest a resolution unless there is a justiciable controversy raised in a complaint, filed along with a summons in a court of **competent jurisdiction**, or the power to determine the outcome of the dispute. The body of law resulting from judicial decisions is called **common law**; thus, it is law created through interpretation by the court of law applied to the case facts.

competent jurisdiction
The power of a court to determine the outcome of the dispute presented.

common law
Judge-made law, the ruling in a judicial opinion.

While the legislative branch is responsible for enacting, the judicial for interpreting, and the executive for enforcing the law, the system could not operate as well as it does without each part, and all activity guided by the umbrella of checks and balances. The Constitution itself represents the supreme law of the land, so it is the penultimate source of law. States have an analogous process to the federal judiciary. The law passed by state legislature must apply to the individual citizens within that state and cannot be in direct conflict with federal law, nor can state laws take away any of the rights and privileges guaranteed by the federal Constitution.

administrative law
The body of law governing administrative agencies, that is, those agencies created by Congress or state legislatures, such as the Social Security Administration.

The **administrative law** system results from rules and regulations enacted and enforced by various agencies within the government structure. These agency law sources include the Occupational Safety and Health Administration (OSHA), the Internal Revenue Service (IRS), and the Environmental Protection Agency (EPA). The executive branch enforces the law, so it is reasonable to have the Department of Justice in the executive branch. The EPA monitors and controls observance and enforcement of penalties levied for violation of its rules and regulations.

The chart in Figure 1.9 provides a snapshot of the functions of each branch of government as well as the documents of primary law produced by the branches.

THE PARALEGAL WORKING WITH THE CONSTITUTION AND THE LEGAL SYSTEM

Now that we have looked briefly at the historical backdrop of the U.S. Constitution and the provisions of the document, you may be wondering why this information is relevant or important to your paralegal studies program. There are many reasons to be familiar with the background of the Constitution itself as the first step beginning your paralegal course of study. The first and

Team Activity

Divide the class members into groups with each representing one of the three branches of government. The teams should review the individual reports on checks and balances and then collectively formulate a list of appropriate checks and balances to apply to the branch. Be sure to include discussion of the potential overreaching of power your recommendations prevent.

perhaps most important is to develop an understanding of what led the framers to their formulation of a democratic form of government as set forth in the Constitution.

jurisdiction
The power or authority of the court to hear a particular classification of case.

In a more procedural vein, it is critical to understand the scope of state rights, but equally important to understand the limitations on both federal and state rights. **Jurisdiction** is the power of the court to hear the issues and impose a decision on the parties before the tribunal. If the matter is not properly within the jurisdiction of the court, any decision is nonbinding and unenforceable against the parties. In practical terms, this means that the whole process has been in vain, because the decision is meaningless.

Understanding that individual rights preservation and protection are the fundamental basis of the legal system helps in understanding how legal analysis is approached and decisions rendered. It also should remind you that each individual in any controversy has individual rights, regardless of the nature of the controversy. As you progress in your analysis of law, you may realistically ask which rights are first and whether there is actually a need to set priorities. You will answer as your analysis, knowledge, and understanding guide your thinking. The judge is responsible for ensuring that the legal interpretation of any concept is applied to the issue and parties to the dispute justly and equitably.

Many issues such as workplace discrimination or harassment are extremely challenging for any judge. A fundamental understanding of the theory and structure of government, agencies, and other legal entities within those agencies along with the law is particularly helpful to effective paralegal practice. You can get to the basic issues much more quickly when you have a good idea of the system, and law, and how to work within them both.

The court is clearly important to a paralegal in practice. Of course, you have an idea of the authority of the judge.

In real life, you undoubtedly will have more interaction with the clerk of the court, whose responsibility is to keep all records of any proceedings within the court. In some jurisdictions, the sheer volume has forced the office of the clerk to be divided according to type of cases, for example, family court, tax office, real property, and probate, which administers estates of the deceased, along with civil and criminal divisions. In smaller jurisdictions, there is no need for separate offices. The clerk's office is a great resource when you need to locate someone or something. The public has access to the records and case files. While the clerk cannot give legal advice, the office can and is willing to assist citizens and paralegals to ensure the procedural matters such as format, filing fee payment, court cover sheets, and the like are in order. Some judges have specific preferences such as receiving extra copies in the files, and the clerk of the court is your source for learning about those nuances. Many clerks' offices have become electronically accessible, so be certain you get the local rules regarding electronic filings, and do not forget that the rules in terms of format and timing apply equally for electronic and paper, or traditional, filings.

Eye on Ethics

Paralegals and attorneys are not the only professions with professional codes of ethics and guidelines. Many federal employees and private corporations have adopted similar codes for their employees. Likewise, the judiciary and attorneys are bound by codes. It is always valuable to see the scope and limitations or implied conditions in such codes.

Research to locate and review the federal employee code of ethics sites and state codes as well. After reviewing the materials, briefly summarize the similarities between them as well as any notable differences. Finally, if you have questions or suggestions that might improve the operation of the code in real life, briefly discuss what those might be and what would be gained by adding the recommendations. On the other hand, if you find the codes adequate, then briefly discuss why there are breaches of those codes and strategies to minimize breach. Samples of available ethics code sites:

- http://www.nara.gov/fedreg/eo.html
- http://www.faso-afrs.ca/docs/ethics-e.html
- http://www.chra.eur.army.mil/staffing/inprocessing/ipguide/empl_guide/SecA-llEmpl/ethics.htm
- http://www.ethics.state.fl.us/publications/Guide_2004.pdf

Summary

We began with an overview of the historical events leading up to the drafting and ratification of the Constitution. We continued with an overview of law and the structure of the government that evolved from the Constitution. An overview was then presented of the three branches of government. The executive, legislative, and judicial branches each performs separate yet interdependent functions under the system of checks and balances. The concept of state rights and federalism was presented and illustrated. Finally, you have read both the Declaration of Independence and the U.S. Constitution, two of the most extraordinary examples of documents of governance ever created. You are well on your way to building your love of law and understanding of the government system in this country that is the lynchpin of our legal system and your career choice.

Key Terms

Administrative law
Articles of the Constitution
Bill of Rights
Checks and balances
Code of Hammurabi
Comity
Commerce Clause
Common law
Competent jurisdiction
Declaration of Independence
Democracy
Due process
Enumerated powers
Federal question
Federalism
Fundamental individual rights
Jurisdiction
Justiciable content
Law
Magna Carta
Napoleonic Code
Preemption
Procedural due process
Procedural law
Separation of powers
Socratic method
State supremacy
State rights
Strict scrutiny standard
Structure
Substantive due process
Substantive law
Supremacy Clause
Trier of law
U.S. Constitution

Review Questions

TRUE AND FALSE

In each of the following, indicate whether the statement is true or false. For each false answer, rewrite the sentence to a true statement.

1. Professional paralegal organizations are state controlled and guided.
2. Paralegal practice does not require special training or knowledge.
3. Primary sources of law include statutes, constitutions, and agency regulations.
4. Paralegals can perform some legal tasks without a supervising attorney.
5. If the client understands he or she is speaking to a paralegal, then nothing the paralegal says can be construed as legal advice.
6. Separation of powers does not permit checks and balances.
7. As long as the paralegal does not intend to violate any ethical guidelines, there cannot be an ethical problem.
8. When the judicial branch is unable to complete the caseload for any given year, the president can appoint judges from the executive branch employees to help complete the task.
9. A paralegal historically was also called a legal assistant.
10. If the paralegal understands the codes of ethics related to paralegal practice, there is no need to be familiar with the attorney code of ethics and professional responsibility.

Discussion Questions

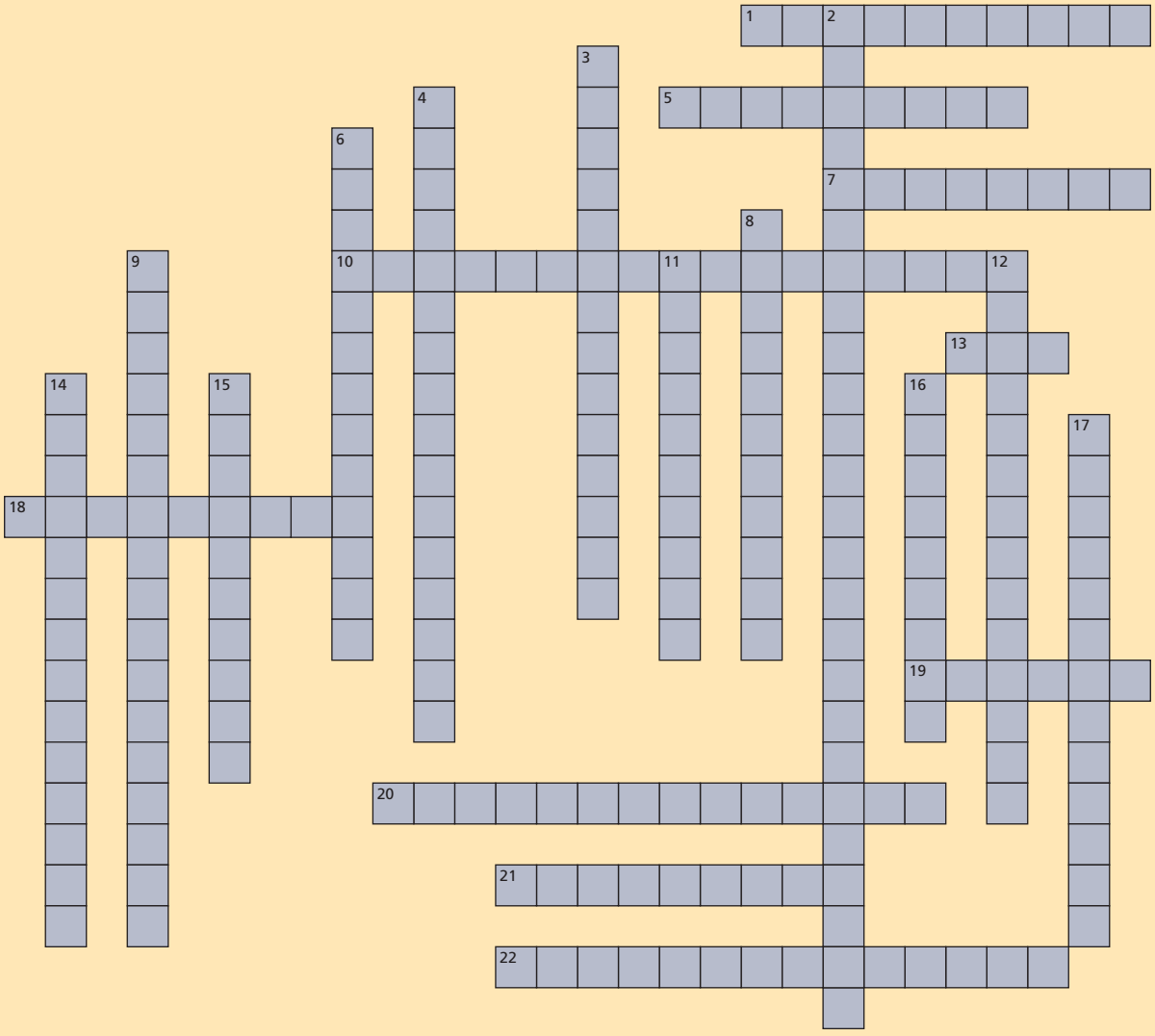
1. Louisiana uses the Napoleonic Code as the model for its constitution and government form. Discuss briefly your understanding of the constitutional provisions permitting states to do so. Include in your discussion any limitations on this state right. Finally, present your position on this constitutional provision and problems you foresee that may arise.
2. Test your understanding of the U.S. Constitution by visiting the Web site www.constitution-facts.com/. Once you have completed the test, reread those sections that may have posed a particular challenge. Describe in a brief essay what the test entailed, which parts you were particularly knowledgeable about, and which you decided to study more about to refresh your understanding.
3. Present a brief oral and written description of your understanding of the place of the U.S. Constitution in the American legal system. Include a description of the branches of government, the role of each in the legal system, the powers of each, and limitations if any.
4. Select a partner with whom you will prepare a chart or PowerPoint presentation outlining the primary provisions of the Articles of the U.S. Constitution as well as the Bill of Rights. This presentation should encompass the scope of the various sections in sufficient detail to ensure the reader will understand each discrete part as well as the entire document parts presented.
5. Prepare a brief essay on the judicial branch of the federal government. Present an overview of the legal system theory and structure as well as responses to the following questions: In a suit raising a federal and state issue, can the plaintiff decide which court has the best law for the desired outcome? Are there any rules regarding in which court to file a case and which court cannot hear certain cases? Does the system define the jurisdictional power of the courts? Based on your understanding, what suggestions would you make to ensure continued effective operation.
6. Prepare a PowerPoint or chart presentation of the court system in your home state. Include in your presentation the specific names of the various levels of the system, including all specialized courts and appellate courts in the system. Also, include the name and address of the clerk of courts office in your local U.S. district courthouse as well as for the state court. For all specialized courts in your state, briefly describe the scope and limitations of authority.
7. Prepare an outline of the judicial branch of your home state government. Present an overview of the structure as well as responses to the following questions: In a suit raising a state issue, can the plaintiff decide to go to a court other than the one for the district in which he or she resides to get a more liberal jury pool in terms of jury awards? Based on your understanding, what suggestions would you make to ensure continued effective operation? If your home state has municipal or other specialized courts, be sure to include them in your diagram, including clear indication of their rank or place in the general hierarchy of courts.

Portfolio Assignment

This chapter contains a great deal of information about law and our constitutional form of government. All of the information will be used continually in your education and career. Prepare a chart that shows the branches of government, the function of each, and the law each produces. Include in your chart the powers authorized to each branch. It is not necessary to include every power, but the major areas that were discussed in this chapter are the most important to include in your reference resource. Use any style that works well with your learning and working style. Identify the state government branch and specific changes in officers and/or law source, for example, the governor is the chief executive office in the state while the president is the chief executive office in the nation. The document from which federal law is derived is the U.S. Constitution, and, in the state, the document is the [Your home state] Constitution.

Retain both your written paper and a directory, if one is available from the court, or, in the alternative, that you prepare in your PRM for easy future reference.

Vocabulary Builders



Across

1. U.S. government form with authority and power balanced between individual states and federal government.
5. Fundamental principles and social order in government.
7. Sections of the Constitution establishing the form and function of government.
10. Mechanism in place preventing abuse of power by any branch of government.
13. Identifiable form of governance including structure, governance, and system.
18. Two-section structure of the legislative branch of government.
19. Doctrine of federal respect for state rights to govern in matters affecting only citizens of a particular state.
20. Part of government responsible for interpreting law.
21. Branch of government responsible for enforcing law.
22. Describes federal government right and authority regarding matters involving commerce and business flowing between and among several states.

Down

2. Came before the Constitution, stating a clear intention to form a government.
3. Defines rights.
4. Constitutional lists of powers of each governmental branch.
6. Defines how to preserve and protect rights.
8. British document describing form of government used as a model for the U.S. government form.
9. Part of government responsible for enacting laws.
11. Adequate, complete, and constitutionally acceptable procedure.
12. Allows states exclusive authority over matters affecting only citizens of the state.
14. Standard for assessing and interpreting legal issue based on a claim of constitutional violation.
15. Exclusive right of federal government in matters affecting all citizens in every state.
16. Government of, by, and for the people.
17. Sources of all law in the United States.

Chapter 2

What Is a Paralegal?

CHAPTER OBJECTIVES

Upon completion of this lesson, the student will be able to:

- Outline the history of the paralegal profession.
- Describe the roles of a paralegal.
- Explain the tools and skills of a paralegal.
- Outline reference sources for legal research.
- List national paralegal associations.
- Define *unauthorized practice of law* (UPL).
- Discuss the role of ethics in paralegal practice.

This chapter begins with a brief presentation of the historical evolution of paralegals within the legal system and continues with a discussion of various roles of the paralegal. Some career options other than practicing in a law firm environment are discussed as well as some general tips on conducting a job search. Along with career options and roles, we will begin to explore the variety of resources available to the paralegal for professional development when in the field as well as for researching, writing, organizing, and performing other tasks expected of the professional paralegal. This chapter introduces the role of ethics for the practicing paralegal. Discussions about the important role of ethics will continue throughout the course, including ethical challenge exercises that present opportunities to analyze strategies to minimize ethical compromise.

HISTORICAL PERSPECTIVE ON PARALEGAL PRACTICE

Now that we have looked at an overview of the history of the American legal system, we turn to the development of paralegals in the legal system. We will explore not only the development of the role of the paralegal but the diversity of tasks involved and career options for a paralegal. Understanding the roles of the paralegal helps in determining which career option is both most appealing and best suited to your work style and interests. Understanding the role of the paralegal in the various settings also enhances respect for the importance of the contributions of the paralegal to law and the legal system. We will look at the roles of the paralegal along with other key participants, including attorneys, judges, and clients. The development of a more sophisticated and complex society contributed substantially to the evolution of the paralegal in the legal system. As the volume of clients and demands on attorneys have increased, so too have the role and reliance on paralegals within the legal system.

Prior to formulation and adoption of the U.S. Constitution in the late 1700s, every society embraced some system for dispute resolution. In the less-complex societies, the parties were primarily responsible for dispute resolution among themselves without formal court intervention except in the most serious and complex matters. Society looked somewhat unfavorably on a system of legal representatives intervening in disputes. A mutually chosen third party may have been engaged to facilitate reaching an acceptable resolution that was binding and voluntarily entered by the parties. There was little demand for attorneys in a civil context because citizen disputes were resolved informally within the community. Similar to the **alternative dispute resolution** (ADR) mechanisms of today, if the parties could not agree with the informally mediated resolution, the dispute would proceed to a more formal setting.

alternative dispute resolution (ADR)
Method of settling a dispute before trial in order to conserve the court's time.

Despite the inclination to resolve disputes among citizens informally, as early as the 1680s, the legal system recognized the need, albeit limited, to engage lawyers who were paid for the services rendered. Even at that early date, anyone practicing law and receiving payment for legal services was required to have a license. Lawyers primarily handled criminal issues and matters related to disputes impacting society as a whole rather than individual, civil issues. There were no formal law schools per se, so those wishing to practice law learned through apprenticeships. Throughout colonial times, licensure remained a prerequisite to practicing as an attorney. Society recognized that standards by which to measure attorney performance were essential and mandatory licensing answered that need. Today, attorneys are licensed according to the requirements of the state in which they practice. The trend is moving toward a universal certification system for paralegals. Some states are considering a system requiring both certification and professional licensure of paralegals. As the role of the paralegal expands, the public and legal system itself has an increased need for identifiable standards of acceptable practice and consistent means to measure quality performance. A certification system provides the paralegal and society as a whole a means of measuring minimal competence and performance standards.

The focus on informal dispute resolution continued throughout the 1800s. The practice of formally engaging an attorney for a fee to assist in dispute resolution was not only viewed as distasteful but many believed that doing so actually violated the fundamental rights of an individual citizen to speak for him- or herself. Notwithstanding the constitutional guarantee of the right to trial by jury, the social tone and structure at that time dictated active citizen involvement and community intervention in resolving matters involving citizens in the same community.

By the mid 19th century, several great lawyers and judges had emerged in the American legal system, and the tradition has endured since then. However, those great lawyers, including Abraham Lincoln, were self-taught with no formal legal education other than that gained in apprenticeship and practice. The great influx of non-English-speaking citizens into this country was an important factor in the growth of the legal system and the development of paralegal practice. The newly arrived immigrants were chronically dissatisfied with their treatment in court. The dissatisfaction arose from concerns that language and cultural differences created bias, but lack of familiarity with the system disadvantaged the immigrants in securing justice as they saw it. This lack of citizen confidence in the system and poor outcomes when disputes were taken to the courts paved the way for development of higher standards for lawyers, including more education and training requirements.

As with so many other aspects of the American culture throughout the 20th century, industrialization and strong labor movements also engendered demands for better-trained, more-knowledgeable professional legal practitioners. By the 1960s, it was clear that the relationship between the legal community and the common people was not good. Many people continued to believe that, despite constitutional guarantees to the contrary, they were consistently underserved by the legal system, both civil and criminal. Lawyers had become more organized as a profession and they recognized a real place in the system for a paraprofessional trained to do more legal work than a traditional secretary could or would do. The paralegal movement therefore gained a real foothold and a position of value in the mid 1970s. It is from this background that the highly respected profession you have selected to pursue and practice developed.

WHAT IS A PARALEGAL?

National Association of Legal Assistants (NALA)
A legal professional group that lends support and continuing education for legal assistants.

paralegal
A person qualified to assist an attorney, under direct supervision, in all substantive legal matters with the exception of appearing in court and rendering legal advice.

American Bar Association (ABA)
A national organization of lawyers, providing support and continuing legal education to the profession.

Answering the question "what is a paralegal?" is much easier than answering "what is law?" that was posed in the first chapter. One of the most frequently referenced but by no means the only definition is that of the **National Association of Legal Assistants (NALA)**, one of the largest and most respected professional organizations for paralegals, which states as follows:

> *A legal assistant or **paralegal** is a person qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity who performs specifically delegated substantive legal work for which a lawyer is responsible. (Adopted by the ABA in 1997.)*

The NALA definition is the one we will use to begin our exploration of the profession you have chosen.

The **American Bar Association (ABA)** has not always recognized the contribution and value of the paralegal in the profession. However, the ABA now recognizes this paraprofessional as an important component of effective legal service and efficient operation of the legal system. ABA recognition formalizes the importance and professional contribution of the paralegal. The ABA policy-making body, the House of Delegates, at the August 1997 Annual Meeting, adopted the current definition of "legal assistant/paralegal," as recommended by the Standing Committee on Paralegals:

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

Figure 2.1, prepared by NALA, illustrates the breakdown by state related to sources of ethics guidelines for the paralegal. The figure also gives a quick reference point to check whether your state has legislation related to use of the terms legal assistant or paralegal.

FIGURE 2.1
Sources of Ethics Guidelines for Paralegals, by State

Source: Reprinted with permission of the National Association of Legal Assistants, www.nala.org, 1516 S. Boston, #200, Tulsa, OK 74119.

Legislation:

California
Florida
Illinois
Indiana
Maine
Pennsylvania

Supreme Court Cases or Rules:

Kentucky
New Hampshire
New Mexico
North Dakota
Rhode Island
South Dakota
Virginia

Cases:

Arizona
New Jersey
Oklahoma
South Carolina
Washington

Guidelines:

Colorado
Connecticut
Georgia
Idaho
New York
Oregon
Utah
Wisconsin

Bar Association Activity:

Alaska
Arizona
Colorado
Connecticut
Florida
Illinois
Iowa
Kansas
Kentucky
Massachusetts
Michigan
Minnesota
Missouri
Nevada

Bar Association Activity (*concl.*):

New Mexico
New Hampshire
North Carolina
North Dakota
Ohio
Oregon
Rhode Island
South Carolina
South Dakota
Tennessee
Texas
Virginia
Wisconsin

PRACTICE TIP

Research your home state requirements regarding certification and licensure for paralegals. Note the requirements presently in place. Next, contact your state bar association and local offices of NALA or other paralegal associations to get information on the trends in the practice in your home state. Discuss with the organizational representative criteria for student membership and the application process. Be sure to add the contact information to your directory of important practice resources for easy future reference.

RESEARCH THIS!

Your home state may have legislation related to both terms to describe and proper utilization of people in paralegal type roles within the state legal system. Figure 2.1 shows that the term selected could result from legislation, court case opinions, or other sources, such as Bar Association designation. Check your home state to ensure you have an up-to-date and accurate understanding of the proper term to use in your career and the scope of the definition.

RESEARCH THIS!

You can find out about the National Federation of Paralegal Associations (NFPA) by visiting the Web site located at www.paralegals.org/Choice/whatis.html.

The NFPA has the most inclusive definition and the organization emphasizes education or other special training as essential for continued quality assurance. This inclusion makes clear that education in programs such as the one you are completing and professional development through continuing training are essential.

The **National Federation of Paralegal Associations (NFPA)** has adopted the following definition:

> *A paralegal/legal assistant is a person qualified through education, training or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily but not exclusively, performed by a lawyer. This person may be retained or employed by a lawyer, law office, governmental agency or other entity or may be authorized by administrative, statutory or court authority to perform this work.*

Each paralegal professional organization has a unique definition. Nonetheless, certain characteristics recur regardless of the organization. The most significant element is that the paralegal performs tasks that would otherwise be the responsibility of or performed by the attorney. The functions illustrate the importance of the profession you have chosen as well as the significance of your contributions to the client, the attorney, and, in many respects, the law itself.

The first paralegals were legal secretaries, which should alert you to the importance of organizational skills, professional communication style, and interactive competence with both the supervising attorney and clients. As the practice of law expanded, and the sheer volume of work increased, the trend toward separating the secretarial and legal assisting functions began.

Attorneys frequently refer to their secretaries as **legal assistants**, thus drawing a distinction with the paralegal. Such a distinction makes clear the importance of both jobs and responsibilities designated to each. The different job titles and descriptions emerged as attorneys began using their secretaries to perform law-based tasks, including preliminary research, client interaction, and complicated calendar responsibilities. As the workload increased for the secretary, it became

National Federation of Paralegal Associations (NFPA)
National paralegal professional association providing professional career information, support, and information on unauthorized practice of law.

legal assistant
Individual qualified to assist an attorney in the delivery of legal services.

Team Activity Exercise

Your text material provides definitions of a paralegal and legal assistant from the ABA, NALA, and NFPA. Research other professional organization Web sites or printed materials from the organization for the definitions from each. Discuss the similarities and differences with your classmates. Next, collaborate with your team members to identify the strengths and weaknesses of each definition. Research your home state statutes or bar association sources to get the relevant definition including scope and limitations of paralegals. Discuss and compare the definitions among the other teams.

CYBER TRIP

Visit the ABA Web site for links to material related to paralegals. Next, visit professional organizations and review their materials on freelance paralegals. Finally, visit your state law resources to find legislation related to freelance paralegal practice in both a law firm and a freelance setting, including licensure, certification, and limitations.

Team Activity Exercise

Work in small groups to review and discuss the findings from your individual research on paralegals working in firms and freelancing. Formulate a list of the scope and limitations of paralegal practice, including recommendations for state legislation that clearly defines the scope and limitations whether there is existing legislation or not in your home state. Include with your statement the group rationale for your recommended statute scope and limitations.

clear that an attorney had need for assistants who could meet legal and nonlegal functions. One person simply could not be expected to do both equally well, but, nonetheless, both functions are critical to the efficient operation of the law practice. Choosing between the roles is a question of personal style, strengths, and job market demands. In many smaller firms, both functions continue to be filled by one person.

Many paralegals begin their career working in a law firm. This is certainly advisable for any number of reasons, not the least of which is that your supervising attorney will be immediately available to you on a daily basis. This is invaluable when developing your skills and minimizes the potential for errors and problems. The paralegal works under the direct supervision of an attorney even in settings with other paralegals available to give guidance and assistance. This is true whether the paralegal works in a firm or for a solo practitioner, or is in business for him- or herself. A paralegal working alone who contracts with an attorney to perform a task(s) is called a **freelancer**. Some of you may ultimately decide that *freelancing* is the path you wish to follow. You should check your home state law regarding such relationships. Even in a freelance setting, the paralegal works under the direct supervision of the attorney contracting for the services.

freelancer
Paralegal in business for him- or herself who contracts with an attorney or law firm to perform specific tasks for a designated fee.

Understanding the scope and limitations on freelance paralegals is essential. You can facilitate your search for information about your state guidelines regarding scope and limitations for paralegals by contacting your local bar associations, as well as the professional organizations listed in local legal publications, telephone directories, or public library.

WHAT DOES THE PARALEGAL DO?

The specific tasks of a paralegal in each office may differ somewhat based upon the work style of the attorney and paralegal, the nature of the practice, and whether the setting is a government office, private industry, or law firm. Generally, the paralegal performs a widely diverse number and type of tasks routinely regardless of the setting. You may recall from the history of the profession that the paralegal is expected to perform tasks directly related to law, client representation, research, and organizational aspects of the relationship. A sampling of the tasks that could be performed during a paralegal's day is provided in Figure 2.2.

FIGURE 2.2
Sample List of Typical Paralegal Tasks

- Conducting client interviews and general contacts
- Communicating both in writing and orally to clients, other attorneys, and the courts
- Performing case investigations
- Conducting witness interview
- Calendaring case progress and attorney schedules
- Maintaining client files
- Performing legal research
- Drafting and researching legal documents
- Summarizing testimony and depositions
- Attending and assisting at legal proceedings
- Handling routine client correspondence
- Timekeeping for attorney and self

Socratic method
Analysis and teaching tool based on questioning and discussion.

The sample list is not definitive, but it does provide an overview of the daily work life for a professional paralegal. Note the number of typical tasks requiring analysis as well as organizational skills. In Chapter 1, we briefly discussed the **Socratic method** of analysis, which, you may recall, is based on questioning, analysis of responses, and more questions as a means of learning. Many tasks routinely performed by the paralegal—such as client interviews, case investigation, or legal research—require analytical skills. Regardless of which skill-building and development tools you use, good analytical skills and questioning technique are particularly useful in your career. As an example, when you begin to research legal issues for a client, the more completely you questioned the client about the details, the more information you have as you begin your research, and the greater insight you will develop into the relevant and less important results of the research process. Your analysis will be much sharper when you have relevant details and can decide which are needed or missing to support the legal position. As you prepare your **legal memorandum** summarizing not only the case facts and questions asked but also the research results for your supervising attorney, you will have more focused results. If you question the client only generally, you can only gain general information and insight throughout the process.

legal memorandum
Summary of the case facts, the legal question asked, the research findings, the analysis, and the legal conclusion drawn from the law applied to the case facts.

The list of tasks for a paralegal in Figure 2.2 has been embraced in the NALA *Guidelines* for utilization of paralegal services. The *Guidelines* are used by many firms and bar associations when developing job descriptions as well as measuring paralegal performance on the job. In relevant part, NALA Guideline 5 is provided in Figure 2.3.

The opinion rendered in *Missouri v. Jenkins*, 491 U.S. 274 (1989), delivered a clear statement recognizing paralegals as professional members of the legal system. The *Missouri* opinion also provides an excellent example of the judiciary performing the job envisioned by the founding fathers, which is interpreting the law without restricting, voiding, or expanding beyond the intent and statement. The opinion also provides an example of checks and balances operating within the three branches of our government: judicial, executive, and legislative.

FIGURE 2.3
NALA Guideline 5: Paralegal Functions and Use

Source: Copyright 1984; adopted 1984; revised 1991, 1997, 2005. Reprinted with permission of the National Association of Legal Assistants, www.nala.org, 1516 S. Boston, #200, Tulsa, OK 74119.

Guideline 5

Except as otherwise provided by statute, court rule or decision, administrative rule or regulation, or the attorney's rules of professional responsibility, and within the preceding parameters and proscriptions, a legal assistant may perform any function delegated by an attorney, including, but not limited to the following:

1. Conduct client interviews and maintain general contact with the client after the establishment of the attorney-client relationship, so long as the client is aware of the status and function of the legal assistant, and the client contact is under the supervision of the attorney.
2. Locate and interview witnesses, so long as the witnesses are aware of the status and function of the legal assistant.
3. Conduct investigations and statistical and documentary research for review by the attorney.
4. Conduct legal research for review by the attorney.
5. Draft legal documents for review by the attorney.
6. Draft correspondence and pleadings for review by and signature of the attorney.
7. Summarize depositions, interrogatories, and testimony for review by the attorney.
8. Attend executions of wills, real estate closings, depositions, court or administrative hearings and trials with the attorney.
9. Author and sign letters providing the legal assistant's status is clearly indicated and the correspondence does not contain independent legal opinions or legal advice.

Comment:

The United States Supreme Court has recognized the variety of tasks being performed by legal assistants and has noted that use of legal assistants encourages cost-effective delivery of legal services, *Missouri v. Jenkins*, 491 U.S. 274, 109 S. Ct. 2463, 2471, n.10 (1989). In *Jenkins*, the court further held that legal assistant time should be included in compensation for attorney fee awards at the market rate of the relevant community to bill legal assistant time.

Among other issues, *Missouri* raised the question of scope of legal representation and paralegal participation in the representation. Specifically, the case involved billing practices in which time spent by a paralegal on tasks specifically related to the client representation, and deemed legal rather than secretarial or administrative in nature, were billed albeit at a lesser rate than services rendered by the attorney. The court enunciated the right to bill the client for time spent by a paralegal on a case file and the supervising attorney on a client file. Authority to bill for paralegal services performed requires a showing that the time billed was spent on substantive legal work. Tasks such as document copying or processing mail do not meet the standard and thus cannot be billed to the client if performed by the paralegal. The *Missouri* decision reiterated that many paralegal tasks such as interviews, investigation, calendaring, and research are permissible paralegal functions.

billing
Record keeping of time and tasks performed by a paralegal for each client and the legal task performed on behalf of the client.

The *Missouri* decision also discussed the concept of **billing** and recording time spent by the paralegal on client-related matters. At this point in your education and career development, it is important to recognize that both the paralegal and attorney must keep meticulous records not only of the time spent on various tasks throughout the day but the specific client for whom the work was performed. Without accurate record keeping, the paralegal cannot bill the client appropriately, nor can the paralegal account for the work completed daily, weekly, or monthly. After the fact, it is virtually impossible to accurately reconstruct an entire day, much less a week or month, so consistent record keeping as the work is performed is absolutely essential. As you progress through your course of study, you will learn more about billing and systems available to organize and maintain billing records.

Two particularly important paralegal tasks regardless of the practice setting are *calendaring* and *case management*. These two skills form the basis for efficient and effective client representation and billing. Law works on deadlines and certainty in terms of when events take place. Mastering legal timing and understanding the importance of the timelines are essential to becoming an effective professional. The larger and more diverse the caseload, the more demanding both tasks become. If you nurture these skills from this point in your professional development, you will master the most essential tasks needed for success in your career.

calendaring
System of tracking dates, appointments, filing deadlines for documents, and events throughout the case file for both the attorney and the paralegal.

Calendaring involves tracking dates, appointments, and events related to each client for both the attorney and the paralegal. Of course, with multiple clients, the task becomes more complex, as it does when several individuals are involved in the representation. Without well-developed organizational skills, efficient case management is virtually impossible. Failure to accurately calendar and track case dates, events, and legal document requirements including content and order of filing can result in serious problems for the client, paralegal, and supervising attorney. There are a variety of manual and technology-based tools available to assist in efficient case management maintenance. However, the more sophisticated programs are effective only when the user has a basic understanding of how the system flows and what the important benchmarks are.

case management
Keeping track of the progress or status of the file and proactively organizing the work of both the attorney and the paralegal.

In general, **case management** entails keeping track of the progress or status of the file throughout the client relationship and proactively organizing the work. This is an important skill to develop. While the supervising attorney has ultimate responsibility, the paralegal ensures timely completion of details required to ensure the cases are handled in an orderly fashion without waiting for instructions. Fortunately, there are a great many tools to assist in case management of single or multiple cases. As with calendaring, without a fundamental idea of how the process flows, the technology is of limited utility.

TOOLS OF THE TRADE

state, local, or federal rules of the court
Contain rules related to the conduct of proceedings before the respective court and judicial system at all levels, including agency proceedings.

Success as a paralegal depends on mastering skills of calendaring and case management, but there are additional tools and skills to master. Of course, the **state, local, or federal rules of the court**, the *rules of civil procedure*, the law, and an understanding of the court system structure are paramount. You also need to develop your research and organizational ability. Writing effectively, whether in a client letter or an internal memo to your supervising attorney, is not only helpful, but also essential in any work environment. A good understanding of your personal learning and working style is a tremendous asset. If you understand how you are most comfortable approaching a project or assignment, you are well along the road to successfully completing the task. The tools we will discuss are valuable whether working in a small, medium, or large firm, the public sector or freelancing.

Organizational Tools

A paralegal must be organized to operate most efficiently. Fortunately, in this advanced technology era, there are many tools available to help in the organizational aspects of the practice. We have already discussed two of the most important functions of a paralegal: calendaring and case management. Even in large law firms with people responsible just for keeping calendars, the paralegal still should maintain his or her own system to ensure that nothing is overlooked. The details of the system can be customized to match the working style of the individual paralegal, and there are a great many tools to choose from when selecting a format. The tools are aides and, as such, effectiveness of the tools depends on the individual and how he or she integrates the tools into the basic understanding of law and the role the paralegal fills within the legal system.

state or federal rules of civil procedure
Rules related to all aspects of the legal process, from the proper court for a particular dispute through each aspect, including appeals.

Despite the variety of tools available, if the paralegal does not understand the time parameters and nature of deadlines inherent in the legal system as contained in the **state or federal rules of civil procedure**, then calendar programs have only limited utility. The attorney depends on the paralegal to understand the details of timing, planning, and practicing within the guidelines of the applicable rules of procedure. With electronic calendar programs, the paralegal must provide the basic information and constantly review and update the data to maintain an organized workflow.

timekeeping
Records of the time spent and the nature of the work done for each client; a legal task for both paralegals and attorneys.

Time sensitivity and accountability are essential when preparing client billing and maintaining the proper timekeeping records is essential as well to adequately meet document preparation and filing requirements. Both the attorney and the paralegal must keep meticulous records of the time spent on each client case and related work. The records report specifically what was done and the amount of time spent doing it, which provides the basis for client billing. As with calendaring, there are a variety of programs and **timekeeping** systems available. The firm may have a system in place or you may be asked to select one that best suits the needs of the attorney, paralegal, and nature of the practice. Whether using a manual or automated system, consistency and accuracy simply must be maintained.

Personal Reference Manual (PRM)

The Personal Reference Manual (PRM) you develop and personalize throughout your coursework can be a customized reference source file when you go into practice. Many student paralegals continue using and expanding their manuals when working. You design the manual including the organization and inclusions based on what best fits your personal work style. Throughout your coursework, suggestions for retaining certain assignments in your PRM will be made. These suggestions are made to help you identify the types of information that should be of particular usefulness in practice. If you maximize your use of the PRM while in school, you will have a great many invaluable tools, including a variety of writing samples to present a perspective employer and the start of a basic forms file. You may develop a personalized list of Web sites relating to your area of specialty interest or general practice use. Your style may be such that retaining copies of rules, laws, or statutes is a great learning tool. You may merely keep records of how to access the information. The PRM provides a record of your progress in both legal analysis and writing style as well as a custom-made reference file to take with you to your first position. Having this kind of resource can be a great help in getting productive quickly and comfortably in a new situation.

Many employers request a writing sample as part of the hiring process. If you retain copies of some or your entire work product while in school, you will have a wealth of selections to present.

CYBER TRIP

Locate the December 2005 issue of *Legal Assistant Today* magazine. Explore the entire issue, with specific focus on the value of a professional portfolio for a paralegal. Focus on the items mentioned that are particularly valuable. You may want to use the recommendations as your organizational design for your own PRM. The recommendations in the article are not mandatory, but they are helpful in getting the manual started.

RESEARCH THIS!

Research various professional publications from organizations such as NALA, the ABA, or NFPA for the names of calendar, case management, billing, and timekeeping systems, both manual and electronic. Prepare a list of the alternatives along with a brief description of each. If you obtain additional information from the vendors, retain that information along with the list in your PRM for easy future reference.

You will have memoranda, case briefs, and critical essays; thus, you can show the potential employer samples of your critical analysis and research abilities. You should not feel that only recommended assignments should be retained. The PRM is *your* tool. You create, maintain, and expand it as you see fit.

Analysis and Critical Thinking

Throughout this and other courses in your paralegal program, you will be called upon to analyze and critically think about material. As a paralegal, you will need to continually employ and refine these skills. Every aspect of the paralegal function requires critical thinking and analysis. Whether interpreting the facts of the client case, and the application of law to those facts, or probing to get additional information or case law when researching, the paralegal is expected to perform many tasks otherwise performed by the attorney. This responsibility should reinforce in your mind the necessity for careful assessment and probing analysis in the various tasks performed. The law has developed and expanded because practitioners remember to ask the questions.

Just as good questioning technique is important, critically thinking about the response is equally important. Do not merely hear it and write it down. Consider what is said in relation to other data you have. Learn to challenge and think through the opposing position or result that could be equally argued based on the same information. Ours is an adversarial judicial system. For every well-framed and critically analyzed position, there is an alternative. You build strong arguments and solid positions when you consider the opposing position and use it to bolster any weaknesses or holes in your own position. Acknowledge the opposing position and prepare an argument countering the adverse position or interpretation. Mastering the art and skill of analyzing both sides of any questions will substantially improve the quality and effectiveness of both your research and your writing.

Language of Law and the Constitution

litigation process
Adversarial process in which parties use the courts for formal dispute resolution.

Black's Law Dictionary
Dictionary of legal terminology and word usage.

Prosser on Torts
Legal treatise or discussion on the law of torts.

***Corpus Juris Secundum* (Cor. Jur. 2d)**
Legal encyclopedia organized by topics and subheadings presenting law and scholarly discussion from multiple jurisdictions.

***American Jurisprudence* (Am. Jur. and Am. Jur. 2d)**
Legal encyclopedia organized by topics and subheadings presenting law and scholarly discussion from multiple jurisdictions.

As with most other professions, law has a unique language. Applying the language correctly is the sign of the effective competent paralegal. Learning the key terms and the appropriate application of legal concepts and language is mandatory. You will learn the language of law, as well as how to properly apply that language in your everyday work.

The language the Constitution contains is an important source of the language as well as the structure and theoretical underpinning of the American legal system. The **litigation process**, or trial work, is a comparatively small part of any legal practice. The trial is the culmination of a much broader set of principles, processes, theories, rules, and law. In fact, the vast majority of legal disputes are resolved in some manner long before the trial. All of the components, both individually and collectively, are important. The order of materials and topics presented in this course is not an indication of the level of importance or degree of difficulty. Each section of the Constitution, every rule of procedure, each discussion about law, and various sectors of the government system are of equal importance when developing a comprehensive understanding of law and its unique language.

Learning legal language can be facilitated with tools such as ***Black's Law Dictionary***, treatises on and about law such as ***Prosser on Torts***, legal opinions, legal encyclopedia such as ***Corpus Juris Secundum*** or ***American Jurisprudence***, to name but a few of the more readily available and particularly informative resources.

Ethics

NALA's Code of Ethics and Professional Responsibility states: "A legal assistant's conduct is guided by bar associations' codes of professional responsibility and rules of professional conduct."

Attorneys are bound by their code of ethics and, in some states, additional rules of professional conduct they are required to know, understand, and apply in their practice and personal dealings. Paralegals also have a variety of ethical codes and guidelines that are essential for the conscientious paralegal in practice. The most reliable sources for guidance regarding ethics codes and conduct would be your local professional organizations and the codes and guidelines from organizations such as the ABA along with any statutory provisions related to ethics in paralegal practice. While primarily responsible for attorneys, the ABA has developed rules and guidelines for using paralegals. The relevant guidelines from the ABA can be

accessed in the appendix or at the ABA Web site for more complete information. Similarly, professional organizations, including NALA and NFPA, not only have developed codes and guidelines, but they also have developed professional training series and sections of their publications are consistently dedicated to discussing ethics questions and strategies for minimizing the potential for violations of ethical guidelines. When challenges or concerns arise related to a particular issue, do not hesitate to ask questions. Direct the questions to someone you believe is in a position to give a good professional and realistic response. When confronted with a challenge that presents the potential for ethical or professional compromise, a casual chat with friends for some guidance would not be recommended. Develop the skill of asking the right question of the right person to ensure the response is useful and appropriate to the facts at issue. This is yet another example of the utility of critical thinking and analysis in your professional practice.

Unauthorized Practice of Law (UPL)

unauthorized practice of law (UPL)
Practicing law without proper authorization to do so.

Another important tool to become familiar with is an understanding of what constitutes **unauthorized practice of law (UPL)** and strategies for avoiding this problem. You may wonder why this subject is introduced so early in your program. Simply put, if you begin at this early stage in your development, you will understand the scope as well as the limitations and you also will formulate a comprehensive list of resources to use as a guide and reference in the event you are confronted with a challenge along these lines

Accurately determining whether certain actions or omissions constitute UPL is substantially enhanced by developing a clear understanding of what paralegals in practice are authorized to do. Based on analysis of an objective professional, if a paralegal gives the impression through his or her action or words of engaging in the practice of law without proper legal authorization, that is UPL. Both actions that are clear violations as well as actions that give the appearance of impermissible behavior are potential problems. The vastly expanded role of the paralegal has created more situations with potential compromise. Several guidelines help your professional manner and approach. Referring to the guidelines routinely minimizes the possibility of UPL violations. In daily practice, some tasks present particular difficulties; for example,

1. In dissolution of marriage actions, the client often seeks advice from the paralegal about child visitation. Be particularly vigilant about advising the client that legal advice must be given by the attorney. As a paralegal, you are unable to do so. You can give information, but not legal advice.
2. The client in an estate matter may seek direction or counsel regarding reasonable, equitable, and fair disposition of assets that satisfies several competing interests. Sometimes a client who is already distraught over the loss of a loved one may misinterpret comments as agreeing that a particular person is not entitled, even if that is not the intention of the comment.

The paralegal is expected to interact professionally, compassionately, and effectively with the clients. The paralegal also should have a clear grasp of the difference between properly communicating to the client and giving legal counsel. Both office protocol and ethical codes are useful tools for defining paralegal and client relationship scope and the extent to which such interaction is acceptable as well as the point at which the paralegal crosses the line of acceptable practice. When the paralegal goes into the territory of giving legal advice, he or she potentially becomes liable for violating UPL boundaries.

CYBER TRIP

Locate your state legal system UPL statute and related cases. Read the materials and retain them in your PRM for ease of reference and use throughout the coursework and your practice. Read the tips for avoiding UPL recommended on the Web site located at www.paralegals.org/Development/upl.html.

RESEARCH THIS!

Explore the publications of the professional organizations such as *Legal Assistant Today* magazine, or search online sources such as www.legalassistanttoday.com/issue_archive/03index.htm to locate a sampling of articles on ethics and UPL. Retain copies of the more informative articles or direct links to the Web sites in your PRM for easy future reference and use.

Under the NALA model standards and guidelines, a paralegal should not establish an attorney-client relationship by setting legal fees or establishing a fee arrangement with the client. The paralegal should not give legal advice or counsel. These are examples of the specificity of available guidelines. The burden rests with the paralegal to understand the difference between discussing issues with the client and giving legal advice. Finally, without express authorization to do so, a paralegal may not represent a client before a court. Naturally, in those circumstances where the tribunal specifically authorizes paralegal assistance, then so doing does not violate any UPL restrictions.

Of all of the guidelines, the most difficult one to balance is working with the client effectively and productively without giving legal advice. Bear in mind that when a paralegal tells a client during a discussion, "In my opinion. . . " or "I believe the best course of action for you is. . ." or similar statements, the client can easily interpret such statements as legal advice. Remember that the client sees you as a professional. The more involved the paralegal is with the case and client interaction, the more reliant the client reasonably may become on the paralegal. As such, it is important to understand that the client may construe things said as advising a legal strategy or course of action. Vigilance in choice of language and content are cautioned in all client interactions. It is your responsibility to ensure that the client talks with the supervising attorney about legal strategies, decisions, and options.

Awareness of what it is a paralegal can and should do as well as what, if any, limitations are imposed on the paralegal's authority and responsibility in a particular communication or situation helps avoid using language that implies authority beyond what is appropriate or other actions that communicate inferentially authority beyond the appropriate scope.

computer-assisted legal research (CALR)
Research method using electronically retrieved source materials.

primary sources of law
State the law in the state or federal system and can be found in statutes, constitutions, rules of procedure, codes, and case law.

secondary sources of law (secondary authority)
Authority that analyzes the law such as a treatise, encyclopedia, or law review article.

case reporters
Publish opinions of the appellate courts that serve to interpret the law. They contain opinions from every case heard and published within the relevant jurisdiction.

case (common) law
Published court opinions of federal and state appellate courts; judge-created law in deciding cases, set forth in court opinions.

case opinions
Explanations of how and why the court interpreted the law as it did under the specific facts and applicable law of the individual case.

Research

As we go through this course, we will be looking carefully at various aspects of the law you need to know. Knowing where and how to look is every bit as important as knowing what to look for and what to do with it when you find it. Legal research looks somewhat different today than in the days of our founding fathers with the expansion of **computer-assisted legal research** (CALR). The main contribution of CALR is faster access to volumes of information. However, as with many other paralegal tools, if you do not first understand the process from a traditional or manual perspective, the high-tech tools have limited utility and could actually become a liability rather than an asset.

The research process is relatively simple; the number of cases, statutes, and other documents forming the law have changed the level of difficulty. Fortunately, basic research processes still apply. Once understood, they are relatively simple to follow. To begin, remember there are two essential categories into which legal documents and research sources fall: *primary* and *secondary* sources. All materials located in a research plan fall into either of the two fundamental types. **Primary sources of law** state what the law is in the relevant state or federal system. Examples include statutes, constitutions, rules of procedure, codes, and case law.

Secondary sources of law interpret and report the application of the law. These include the reporters, journal articles, legal dictionaries, treatises, and encyclopedias. **Case reporters** publish opinions of appellate courts that interpret the law. There are a wide variety of reporters for specialized and general areas of law such as tax, bankruptcy, social security, and court rules, to name but a few. You will quickly become comfortable using each of them as you perform research assignments. You will undoubtedly develop certain favorites based on your learning style, work environment, and scope of understanding of the law. However, under all circumstances, when primary law sources are required, you must use them regardless of your personal impression of the value of certain other sources.

Case (common) law is sometimes called judge-made law. This source will be used quite often in your research. It is law derived from judicial **case opinions**, which are the explanations of how and why the court interpreted the law as it did. Common law provides a wonderful overview of the evolution not only of the legal system in this country but the changes in social viewpoint. It is important to understand that the common law interprets law, so it can change or be modified. When researching the law, the most important aspect of the research is to ensure the law being cited is the current state of the law. With case law research, a simple but invaluable rule of thumb is to locate the most recent case and then move backwards. Failing to do so puts your research at serious risk of misstating the current state of law. You may recall that such an error is considered an ethical violation.

There are a number of places to look for the law, including law libraries, courthouses, public libraries, and online. It is worth the time to go to the local library, at either a major university, law school, local bar association, or courthouse, to get an idea of the organization of the library, quantity of materials, and research methods. While, in your career, you will undoubtedly use online research, at this stage of your education, it is well worth going to the library and learning firsthand how to perform research in the traditional manner before going to the online sources. When you see the materials and go through some of the volumes, you begin to see the context more than with online research that presents specific information in response to specific input. This is obviously invaluable, particularly at the fast pace and workload of most law offices. However, when still in the learning situation, you should make the time to get a broader overview and understanding. It is important to understand the actual arrangement and relationship in a real brick-and-mortar setting to understand more completely the way to best navigate electronic databases currently available as a tool for research but not intended as a replacement.

You now have a brief overview into the resources available for effective legal research. In a later chapter, we will explore each of the sources and types of resources in detail and work on exercises to develop your skills along those lines.

PRACTICE TIP

Think about what it is you want to express before beginning.

Write some notes, or an outline, to keep your focus.

Review your notes before beginning and throughout the process.

Communication

Once you are comfortable in your ability to find the law, another important tool is skillful communication of what you found. Regardless of the setting in which you work, there are certain skills that you must have under all circumstances. Effective oral communication, professional writing, and well-developed analytical skills are all essential attributes of the great paralegal. For many, the mere thought of speaking in front of strangers or writing an essay or formal communication is frightening. However, these skills are essential and not as difficult to develop as you may think. A number of resources are available to help develop the skill. Throughout the coursework, you will have many opportunities to work on these skills and develop your communication skills.

PRACTICE TIP

As you go through your program, retain projects and assignments that represent the development of your research, writing, and communication skills in the various courses. Maintain a section of your PRM for these assignments. At the end of your program, you will have a comprehensive portfolio of writing samples to present to perspective employers.

Whether in a written or oral communication mode, careful consideration of precisely what it is you are trying to communicate is the first step. If you are unclear in your own mind, you cannot possibly convey concise meaning to your audience.

When a new client is about to hire the firm, the paralegal is often asked to sit in or individually conduct a detailed client interview. This is an awesome responsibility requiring excellent communication, critical-thinking, and listening skills. This function requires a comprehensive understanding of the law in order to get the facts and sufficient information to identify all potential causes of action, remedies, and possible counterclaims or defenses the defendant will raise. Communicating to the client effectively is essential to make the interview productive. In this setting as with others involving oral communications, listening is an essential element of an effective communication formula. Plan in advance what you need to cover; thus, when the client is speaking, you can listen attentively.

We will have a great many opportunities to work on both oral and written communication skills throughout the coursework. Before you begin, remember to avoid getting discouraged. If you organize properly, and think through what you want to say or write, much of the hard work is already completed. Often, when someone fails to make the point with the reader or listener, the real problem is that the speaker or writer did not have a clear idea of what he or she really wanted to say. If you are unclear, it is simply impossible to communicate coherent meaning to someone else.

Writing is a large part of the communication skill building in which you will engage throughout your coursework. Regardless of how scholarly and legally appropriate the position you take may be, if you are unable to communicate it clearly, the opinion is valueless. Critical-thinking skills are an asset for enhancing oral and written communications.

It is one thing to analyze your position and present it reasonably with persuasive supporting arguments. If challenged, however, you need to defend your position. Understanding the basis in law and fact the opposition will use is an invaluable asset. Understanding what the opposing position might be does not imply agreement with that position. It merely means that, if you know what the opponent will say about the issue, your position should be enhanced because you will build in points that directly address the opposing position. As such, you should conduct your research with an eye toward the opposition to ensure the strongest possible position on behalf of your client.

Saying what you know, rather than what you think the listener or reader wants to hear or see, is a very important tool for effective communication. Likewise, if you approach communication from the perspective of trying to change the other person's mind, you will rarely succeed. You do not actually know what is in the other person's mind. On the other hand, if your goal is to present your positions persuasively, then you will always succeed.

PARALEGAL EDUCATION

Before 1970, there was no formalized education available for the professional choosing to work in the legal field but not as an attorney. Tasks customarily performed by paralegals today were self-taught by legal secretaries who wanted to get more involved in the legal side of the work they typically did. The first formal paralegal programs developed in the late 1960s and early 1970s at community colleges and specialized schools. More recently, as a result of the demand for paralegals, as well as the increasingly complex nature of legal practice, four-year programs at many colleges and universities have flourished. Increasingly, attorneys are looking for paralegals with a good educational background and, thus, a greater appreciation and understanding of the law. The attorney often has no time to train the paralegal, nor do other paralegals in the firm.

The American Association for Paralegal Education (AAfPE) has taken an extremely proactive position in support of expanding the educational opportunities for access to paralegal educational opportunities. The organization has actively engaged in educating the professional community to the value of hiring professionally educated paralegals and supports demands for continuing certifications for paralegals currently active in practice. The most obvious result of this effort is the increased demand for paralegals with good skills and educational background.

Certification

Canon 1 of the National Association of Legal Secretaries (NALS) states as follows:

> ***Canon 1.*** *Members of this association shall maintain a high degree of competency and integrity through continuing education to better assist the legal profession in fulfilling its duty to provide quality legal services to the public.**

Certification is developing as the next important step for paralegal professionals. Unlike licensing, which is state controlled, certification is a requirement established and designed within a profession. The purpose is to define a mechanism for verifying that the professional has achieved and maintains a minimal competence level, as defined, administered, and monitored by professional peers. The certification programs are typically nationwide in scope and use written testing examinations to assess the competence of the applicant.

Certified Legal Assistant (CLA)
Standardized test based primarily on general concepts and federal law administered in connection with paralegal certification.

PACE
Two-tiered paralegal certification program requiring a bachelor's degree, completion of a paralegal program, and practical experience to qualify for the proficiency examination leading to certification.

As of this writing, the two most notable efforts at certification are the **Certified Legal Assistant (CLA)**, a standardized test based primarily on general concepts and federal law, and **PACE**, a two-tiered program to certify paralegals. The PACE program requires a bachelor's degree, completion of a paralegal program, and at least two years' practical experience. If the criteria are met, the paralegal may take the PACE proficiency examination. Qualifying for the second-tier certification requires that the candidate have at least four years' work experience in addition to all of the first-tier criteria. Both PACE and CLA examinations test general understanding of law. Because they are nationally administered, they do not test specific state material. The trend is toward state-specific addenda or separate examinations to ensure competence to practice within the home state.

Continuing Legal Education (CLE)

continuing legal education (CLE)
Continued legal competence and skills training required of practicing professionals.

Not only is formal education a prerequisite with many more firms, but continued legal competence training and paralegal certification above the academic setting are likewise becoming the *sine qua non* of paralegal job employment placement. Typically, the coursework for the **continuing legal education (CLE)** credits and credentials is offered by state bar associations and professional paralegal organizations. In some states, particular industries, such as title companies or medical

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RESEARCH THIS!

Research your home state position on paralegal certification. If your state requires certification, determine the specific process requirements. If not, determine your state status on the certification issue and the potential for such requirements in the near future.

risk management associations, offer programs for the paralegal looking to attain a greater level of professional competence in the particular aspect of the paraprofessional legal practice. Typically, certificates are issued with attendance and number of course completion credits indicated. In states endorsing paralegal certification, there may be a centralized databank maintaining CLE credit information. The database enables easy access to the information for both the public and interested professionals.

Just as certification and licensure are gaining momentum and supporters, paralegal education is accepted more and more as the credential that the professional must have. Therefore, you have made a good career choice, and have further elected a career pursuit that will continually offer programs to ensure your cutting-edge competence and knowledge.

ADDITIONAL TOOLS AND RESOURCES OF THE TRADE

You have selected a profession known for the variety of excellent professional, support organizations. These organizations are actively involved in the practice and sponsor many professional enrichment and skill-building activities, conferences, and seminars. You should become familiar with your local organizations as a student and continue your association when in practice. Through independent research with your state bar association, other practicing paralegals, and law firms, you should get some direction in locating local organizations.

PROFESSIONAL ORGANIZATIONS

Two of the largest professional organizations, NALA and NFPA, were mentioned earlier in the chapter in relation to the definition of a paralegal and functions within the law firm. These and other professional organizations, however, serve a great many purposes other than defining legal assistants and paralegals. The organizations are invaluable resources for the practicing paralegal and a respected professional source of job referrals, professional development, and reference resource within the legal system.

NALA publications describe the organization as follows:

> *The National Association of Legal Assistants is the leading professional association for legal assistants and paralegals, providing continuing education and professional development programs. Incorporated in 1975, NALA is an integral part of the legal community, working to improve the quality and effectiveness of the delivery of legal services. The National Association of Legal Assistants is composed of over 18,000 paralegals, through individual members and through its 90 state and local affiliated associations.*

The primary focus of the organization is education and continuing professional development. NALA recognizes the inherent change in the nature of law and has committed to serving the practitioner with a program of coursework, seminars, and publications designed to ensure access to information resources.

NFPA is another highly respected professional organization that defines its core value and goals as follows:

> ***Core values (not in any particular order):***
>
> - *Responsive to member needs.*
> - *Committed to honesty and integrity.*
> - *Supports unity within the profession.*
> - *Provides visionary leadership.*

CYBER TRIP

Partial listing of additional professional organizations:

www.aallnet.org American Association of Law Libraries (AALL)
www.abanet.org American Bar Association (ABA)
www.alanet.org Association of Legal Administrators (ALA)
www.aafpe.org American Association for Paralegal Education (AAFPE)
www.nala.org Association for Legal Professionals (NALA)
www.nals.org National Association of Legal Secretaries (NALS)
www.paralegals.org National Federation of Paralegal Associations (NFPA)

(Note: this list is representative, but not intended to be exclusive or completely comprehensive.)

- *Open to the exchange of ideas.*
- *Embraces diversity.*
- *Committed to the profession's Code of Ethics.*

Goals:

- *To achieve financial security.*
- *To achieve a more inclusive membership.*
- *Regulation and educational standards for the paralegal profession [are] achieved through the advocacy efforts of NFPA.*
- *To advance the paralegal profession through strategic alliances.*

Notwithstanding differences in specific purpose and goals for each organization, note the focus on education and continuing development with both NALA and NFPA. Likewise, ethics is included in both statements. Nothing is more important in the life of the paralegal than a clear understanding of the critical role ethics plays in the practice. Challenges arise daily. Networking and brainstorming with fellow professionals are excellent ways to develop strategies to minimize the potential for ethical compromise. The access to professionals who understand the practice and challenges reinforces the value of involvement in your professional organizations.

Collectively, the organizations offer a variety of specialty sections, publications, resources, and professional information. Typically, there is a subspecialty section or committee devoted to ethics for the paralegal in each organization. These sections are particularly good resources that should be used regularly either to answer specific questions or to review current issues that arise and recommended solutions to the challenges presented.

Each organization has a unique identity and approach, and all are invaluable resources both for the student as well as the practicing paralegal. With the growing emphasis on professional high-quality paralegal practice, you will find these and other state and local organizations invaluable sources of information, professional advice, and learning opportunities regardless of your particular practice setting.

EMPLOYMENT OPPORTUNITIES FOR THE PARALEGAL

Whether in private firms, the public service sector, corporations, or health care, paralegal employment is anticipated to continue growing much faster than the average career option. Industry and the public sector as well as legal practices, both large and small, recognize the value of a professional paralegal properly trained in the law. The complexity of the legal system has opened new areas and specialty practice niches that were previously filled only by an attorney.

The U.S. Bureau of Labor statistics anticipates paralegal career growth is projected to continue at 33.2 percent each year through 2010. In addition to expansion of the career, there is also an increasing demand for paralegals with a college degree. In the last 10 years, demand for paralegals with associate and four-year college degrees has risen so much that paralegals consistently

are within the top 10 employment fields seeking qualified entry-level candidates from the ranks of graduates.

Our increasingly complex society has created an enormous number of nontraditional settings in which the paralegal can work. Government and other public agencies have increased the variety of opportunities. Some of these government agencies function as government law firms, such as

- U.S. Department of Justice.
- State attorneys general offices.
- Federal and state public defenders.
- City attorneys.

Many government agencies have legal departments while not primarily being authorized for the practice of law. Social security and workers' compensation are good examples. Many states are actively looking for paralegals in the role of arbitrators and mediators. As you may know, a great many legal disputes are now resolved through mediation and arbitration and thus the need for mediators and arbitrators is growing rapidly.

In addition to paralegals being employed directly in law-related settings, the demand for paralegals has expanded into other settings. Among the non–law firm employment opportunities looking for trained paralegals are the following:

- Title insurance companies.
- Corporate law departments.
- Legal nurse practitioners.
- Legislative staff assistants.
- Lobbyists.
- Law specialist in corporate. human resources departments.
- Mediators
- Arbitrators.
- Insurance claims departments.
- Risk managers.

risk management
Prospectively evaluating potential problems or legal challenges in a particular situation and implementing avoidance strategies in advance to limit potential liability.

This list is just a sampling. With the increased threat of litigation, many corporations have placed new emphasis on **risk management**, which is prospectively evaluating potential problems and implementing avoidance strategies in advance, to minimize the opportunities of unsafe or potentially hazardous situations within the workplace as well as in customer relations. New employee training often includes awareness of potential liabilities and implementing strategies to eliminate those risks. This emphasis creates great opportunities for a paralegal to assist in designing effective training and professional development programs.

The writing and research skills you develop throughout your course of study are invaluable in a nontraditional environment as well as in a firm. Many positions require analytical skills and written communication on diverse topics as well as in more formal types of written and oral presentations. Understanding legal principles and effective use of research skills will be enormously attractive assets to corporate employers as well as law firms.

RESEARCH THIS!

Contact the human resource office or personnel managers in a local large law firm, Legal Aid or other not-for-profit legal, community service organizations such as the Red Cross, Habitat for Humanity, and the like to explore the opportunities for a paralegal within these nontraditional settings. Discuss the qualifications each organization has when hiring a paralegal. Prepare a brief outline of the various positions discussed and the job qualifications for each.

Eye on Ethics

You have been asked by your supervising attorney to prepare a brief paper for presentation to all new paralegals regarding ethics and the paralegal practice. Of course, the attorney understands that you are relatively new to the practice, but she assures you that your newness enhances your presentation because it provides a fresh approach. The assignment is to comment on your understanding of ethical requirements for a paralegal in practice, including your ideas for strategies that would be helpful to avoid any ethical challenges. You can use any of the materials you have reviewed in the lesson as well as the additional ethics materials from the Internet or other resources. Be sure to review NALA Guideline 5 and *Missouri v. Jenkins* as you prepare.

When you complete your paper, retain a copy in your PRM under the appropriate section for ease of future reference.

The paralegal is often the first contact between the client or would-be client and the attorney after the secretary secures the initial appointment. Throughout the relationship, the client deals more with the paralegal than the attorney. In small firms, this relationship is forged because the attorney is out of the office so often that the paralegal must interact with clients. In larger firms, important aspects of client representation such as deposition preparation, drafting of complaints, and locating and interviewing of potential witnesses often are delegated to the paralegal.

The public service sector offers a variety of positions for the professional paralegal, among which are included community legal service offices, agencies for the aged, and other service offices available to the public. In these positions, the paralegal performs tasks similar to those of the paralegal in private practice, including preparing legal documents, filing forms, conducting legal research, and representing individuals at certain administrative hearings and proceedings in those states that have expanded the scope of paralegal practice. Additionally, the paralegal often has substantial client contact, including intake interviews, preparation for hearings and other proceedings, and follow up after such proceedings.

Summary

This chapter began with a review of the historical development of paralegals as well as the scope of the valuable work performed by the paralegal for the law office, client, and legal system in the legal environment today. You were introduced to tools you will find most helpful and necessary in practice such as research, analysis, timekeeping, and calendaring. You had an opportunity to learn about the professional organizations both nationally and statewide that are invaluable resources for professional development, practice tips, job opportunities, and networking with other professionals.

Key Terms

Alternative dispute resolution
American Bar Association (ABA)
American Jurisprudence
Billing
Black's Law Dictionary
Calendaring
Case (common) law
Case management
Case opinions
Case reporters
Certified Legal Assistant (CLA)
Computer-assisted legal research (CALR)
Continuing legal education (CLE)
Corpus Juris Secundum
Freelancer
Legal assistant
Legal memorandum
Litigation process
National Association of Legal Assistants (NALA)
National Federation of Paralegal Associations (NFPA)
PACE
Paralegal

Primary sources of law
Prosser on Torts
Risk management
Secondary sources of law
Socratic method
State or federal rules of civil procedure
State, local, or federal rules of the court
Timekeeping
Unauthorized practice of law (UPL)

Review Questions

TRUE AND FALSE:

In each of the following, indicate whether the statement is true or false. For each false answer, rewrite forming a true statement.

1. Professional paralegal organizations are state controlled and guided.
2. Paralegal practice does not require special training or knowledge.
3. Primary sources of law include statutes, constitutions, and agency regulations.
4. Paralegals can perform some legal tasks without a supervising attorney.
5. If the client understands he or she is speaking to a paralegal, then whatever the paralegal says cannot be construed as legal advice.
6. CALR is an accepted legal research tool.
7. As long as the paralegal does not intend to violate any ethical guidelines, there cannot be an ethical problem.
8. If your supervising attorney is too busy, it is not an ethical violation for the paralegal to discuss and negotiate fees for the representation.
9. A paralegal historically was known as a legal assistant.
10. If the paralegal understands the codes of ethics related to paralegal practice, there is no need to be familiar with the attorney code of ethics and professional responsibility.

Discussion Questions

1. a. Write a brief introduction of yourself for your classmates and instructor. The standpoint you want to take is that you want them to know enough about you to understand why you have chosen this career, and what background information you wish to share including prior education, size and type of community, and prior career or work experience that contributed to your decision. Any additional information you believe will be helpful in getting acquainted with your colleagues in the course is also recommended.
   b. Each student will then take approximately 10 minutes to orally introduce him- or herself to the class and instructor. Take notes on the presentations of each and be prepared to ask questions or to comment.
2. Throughout the lesson readings, a number of Web sites have been identified related to paralegal practice and procedure, organizations for support and professional networking, and practice resources. Select one of these sites and provide a brief, but inclusive, summary of the Web site contents broken down by sections. Include in your description comments on the particular strengths of the site as well as comments on any part(s) that you believe might be better if modified or changed. Include discussion of why you make the recommended modifications.
3. Compose a list of the general and specific goals you have set for this course and career program. What do you hope to accomplish and, also, what one thing do you want to take away from the course? Be as specific as possible. When listing your goals, include your ultimate career goal as well as your goal for this course. This does not have to be presented for

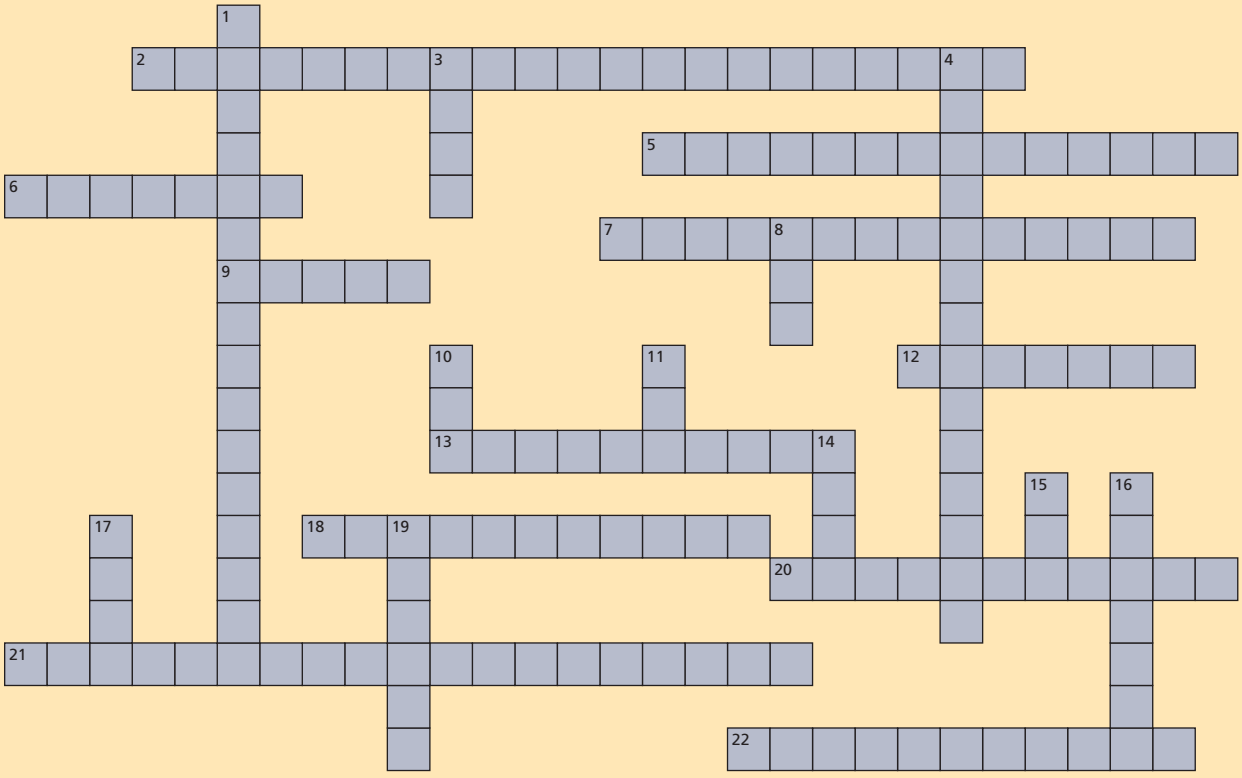
grading, but it should be clear enough for your reference throughout the course; it should be in written form and retained in your PRM under the Personal Data section. Reviewing and revising upon completion of each course and prior to commencement of the next would provide a good source of motivation throughout your coursework.

4. Compose a list of those personal strengths you believe make you particularly well suited for the paralegal profession. Also, include those areas you believe will require strengthening or refining. This is an opportunity for you to honestly "discuss" with yourself those aspects of your work habits, learning approach, and personality that make you well suited for the profession, as well as those posing some challenges. Retain this exercise in your PRM under the Personal Data section. There is no requirement that you share this information with anyone, but feel free to discuss with anyone you choose.
5. Spend some time looking through the newspaper or watching television news to identify one or two current lawsuits or other legal matters of particular interest to you. Briefly, summarize the details as you understand them, including your understanding of what the issue or controversy between the parties may be. Save your essay and the article(s) in your PRM under the Current Legal Issues section. As you work through the course, pay attention to any details or information about the case issue and note these developments. This assignment should be reviewed and updated as you see or hear new information about the issue at various parts of the coursework.
6. Contact a local law firm, and ask to speak to one of the paralegals in the firm. Ask if you can take a few minutes to interview the person about the job, using the list of tasks provided in this lesson as an interview guide. Ask for any special advice or tips this paralegal might have for you at this stage in your education. Jot down notes from the interview and then write a brief essay in which you summarize the interview and comment on aspects of the interview that surprised you. Note finally the tips and how they will be useful to you throughout the course and program.
7. Locate the federal government Web site and then find sections related to paralegal employment opportunities. Explore the site and the variety of opportunities. Also look at some corporate employment sites, electronic job search sites, and the local newspaper classified sections to see the demand for paralegals both in your local community as well as nationally.
8. Refer back to your materials on freelance paralegal practice. Refresh your recollection, and explore additional materials related to this topic. Prepare a brief discussion essay commenting on the position, definition, and requirements. If your research uncovers little if any information from the professional organization, draft a brief statement and discussion you would present to have this information added to the organization's materials, including the Web site.

Portfolio Assignment

To gain a better understanding of the process of timekeeping for billing purposes, keep a record of everything that you do throughout two or three days of the week. Everything means everything, and it should be detailed. For example, when an entry is made such as watching a television program, specify when the activity began and ended and which program. If study time is entered, specify both time spent and topic(s). With meal entries, you do not necessarily need to describe what you ate, but which meal and time taken should be entered. At the end of your recordkeeping period, organize the entries into categories to see how time was spent and what you did. This will give good insight into the process as well as providing a great practice opportunity. Discuss the process, tips, and comments with your classmates.

Vocabulary Builders



Across

2. Legal encyclopedia.
5. Statutes, constitutions, rules of procedure, codes, and case law.
6. Record of time and tasks performed sent to client.
7. Analysis using question-and-answer technique.
9. American Association for Paralegal Education.
12. Judge-made law.
13. Systematic movement of client case from first interview through trial or other final resolution.
18. Paralegal working for attorney to complete defined task under a contract.
20. Master schedule of activities, case time deadlines, and appearances related to client case.
21. Legal encyclopedia.
22. Detailed record of time and task performed maintained by paralegal and attorney for use with client billing and firm accounting.

Down

1. Commentaries, restatements, encyclopedias, law review articles, legal dictionaries.
3. National Association of Legal Assistants.
4. Organization and tracking of case progress, timelines, and activities.
8. Alternative dispute resolution.
10. Unauthorized practice of law
11. Certified Legal Assistant.
14. National Federation of Paralegal Associations.
15. American Bar Association.
16. Explanations of law and legal theory relied upon by judge interpreting the law.
17. Computer-assisted legal research.
19. Standards of behavior.

Chapter 3

Courts and Law

CHAPTER OBJECTIVES

Upon completion of this chapter, the student will be able to:

- Discuss different sources and types of law.
- Describe the structure of the American judicial system.
- Explain the purpose and process of levels of the judicial system.
- Distinguish the types of jurisdiction and criteria for each.
- Describe the structure of the state and the federal judicial system.
- Explain the structure and process of the appellate court.
- List and describe methods of alternative dispute resolution (ADR).

The focus of this lesson is the structure and operation of the court with attention to the relationship between the legal system and the U.S. and state Constitutions. As you already know, the U.S. Constitution is the basis of our legal theory and generally sets out the general structure of the government. The legal system falls under the judicial branch of the government and includes state and federal courts, both of which have civil, criminal, and administrative divisions.

appellate courts
The court of appeals that reviews a trial court's record for errors.

verdict
Decision of the jury following presentation of facts and application of relevant law as they relate to the law presented in the jury instructions.

Appellate courts review the application of law by the lower or trial court upon request of a party following an adverse decision. Appeals challenge the decision of the lower court based on errors of law, while the **verdict**, or decision reached by the jury, is not subject to appeal. We also look at the rapidly expanding field of *alternative dispute resolution (ADR)*, a more informal but no less binding dispute resolution mechanism than the full trial process.

SOURCES OF LAW

primary sources
The most fundamental place in which law was established.

constitutional law
Based on the federal Constitution and arising from interpretations of the intent and scope of constitutional provisions.

There are four **primary sources** for American law. A primary source is the most basic or fundamental source establishing the relevant law. The *U.S. Constitution* is the ultimate source; all other sources flow from the concepts therein. **Constitutional law** develops from U.S. Supreme Court interpretations of constitutional sections following challenges as to the application of the provisions in real-life controversies. The federal Constitution is superior in the case of a conflict with state law. State constitutions are equally binding as the federal in cases where there is no conflict with the federal Constitution. No state constitution can conflict directly with the federal, nor can the states make material changes to essential parts of the Constitution, including but not limited to the individual and fundamental rights, or modification of powers of the three branches as applied within the state boundaries.

FIGURE 3.1
Classifications of Primary Law

Statutory law	Enacted by state and federal legislatures
Constitutional law	Produced by Supreme Court interpretation of federal and state constitutions
Regulatory law	Passed by administrative agencies and court interpretations
Common law	Judge-made law or interpretations of law contained in case opinions

statutory law
Derived from the Constitution in statutes enacted by the legislative branch of state or federal government.

administrative agency regulations and rules
Processes and guidelines established under the particular administrative section that describe acceptable conduct for persons and situations under the control of the respective agency.

regulatory law
Laws passed by administrative agencies and court interpretations.

Office of Safety and Health Administration (OSHA)
Government agency established to set standards and enforce regulations aimed at protection of citizen safety and health.

common law
Judge-made law, the ruling in a judicial opinion.

judicial opinions
Analysis of a decision issued by an appellate court panel.

secondary sources of law (secondary authority)
Authority that analyzes the law such as a treatise, encyclopedia, or law review article.

Example:

State A enacts a constitutional provision prohibiting free exercise of religion and further mandating sun worship as the official state religion. This would be an impermissible state abridgement of federal constitutionally guaranteed rights and, thus, would be invalidated following challenge and court review.

Example:

State B enacts legislation whereby the governor is given powers otherwise granted to the president of the United States, specifically the power to nominate Supreme Court justices. Further, the state law declares that, in the case of conflict between a presidential and governor nomination, the nominee of the governor must be accepted. If challenged, this provision would be invalidated as an impermissible redefinition of state rights and abridgement of presidential power.

Statutory law includes enactments passed by federal or state legislatures. Both federal and state statutes are of equal legal authority, providing there is no conflict between the two, in which case the federal statute is followed. The statute typically enunciates the rule of law as well as compliance requirements and sanctions for violation. **Administrative agency regulations and rules** are binding law. These **regulatory laws** result from enactments and regulations promulgated by the agencies. These regulations have the same force and effect of statutory law. An Environmental Protection Agency (EPA) regulation is an example of an administrative agency regulation. If your workplace has signs in employee areas related to safety in the workplace, these comply with **Office of Safety and Health Administration (OSHA)** requirements, a properly authorized federal agency. (See Figure 3.1.)

The remaining primary source of law is **common law**, which develops through judicial decisions that interpret the law as applied to the facts of particular cases. Common law is sometimes referred to as judge-made law. Do not be confused by this term. Under the U.S. Constitution, the judicial branch interprets law. Thus, common law is the interpretation found in **judicial opinions**, written when the application of the law to facts has been challenged on appeal and the judge makes an interpretation or finding and explains the rationale for the interpretation. Both state and federal law recognize the same primary sources of law.

Secondary sources of law expand or explain more fully the primary law sources. Among the secondary sources are legal encyclopedias, for example, *Corpus Juris Secundum*; treatises on law, for example, *Prosser on Torts*; law review articles; and other materials such as *Restatement of Law of Contracts*. Secondary sources are an excellent source of interpretation as well as scholarly discussion and provides the historical background and evolution of a particular area or type of law.

RESEARCH THIS!

Check in your workplace for notices of OSHA requirements related to the safety and health of employees. Your human resources director or department also could give insight into the requirements within your particular workplace, including compliance requirements, violations, and notices of incidents. Research how the regulations are promulgated, notice requirements, and the procedure when an incident occurs.

STRUCTURE OF THE U.S. COURT SYSTEM

advisory opinion
Statement of potential interpretation of law in a future opinion made without real case facts at issue.

U.S. district courts
Trial or lower court level in the federal system.

U.S. Bankruptcy Code
Defines the rules related to bankruptcy filing, process, and adjudication.

Court of International Trade
Part of the federal lower-court level authorized to hear matters related to international trade agreements and disputes.

U.S. Court of Federal Claims
Part of the lower or trial court level of the federal court system in which disputes with the U.S. government are heard.

Now that you have some insight into where courts and attorneys look to find the relevant law, you need to know what the system does and generally how it operates. Whether state or federal courts, they typically perform one of three tasks: (1) resolving conflicts between individual citizens for civil matters and the state and individuals for criminal matters; (2) interpreting law, both federal and state, as appropriate; and (3) determining the constitutionality of a statute or administrative regulation. Neither a federal nor a state judge can create a law or legislate. Doing so would put the judiciary in the position of enacting law, which clearly violates the constitutionally authorized scope of judicial authority. Interpreting the law is the authorized scope of judicial power, whether state or federal. Under certain clearly defined circumstances, a court may give an **advisory opinion**, which determines in advance the interpretation the court might make regarding the application of a statute to specific facts before a problem or controversy actually arises. More normally, however, a court will only answer the specific questions presented in appeal documents.

In the federal system, the lower or trial courts are the **U.S. district courts**. There are 94 federal judicial districts, including at least one district in each state, the District of Columbia, and Puerto Rico. In addition, the three territories of the United States—the Virgin Islands, Guam, and the Northern Mariana Islands—have federal district courts. These courts hear federal cases, including cases filed under the **U.S. Bankruptcy Code**. In addition to the district trial courts, the **Court of International Trade** and the **U.S. Court of Federal Claims** have limited jurisdiction and are part of the lower court level of the federal system. The Court of International Trade hears issues related to international business and customs matters, while the Court of Federal Claims is empowered to hear only those cases seeking money damages against the federal government. These include contract cases, tort claims, and unlawful taking of private property by the federal government. The next level in the federal system is the **U.S. courts of appeals**. There are 12 appellate circuits, with each assigned district courts from the system. This level is the intermediate level in the federal system. Most federal appeals, heard by a three-judge panel, are disposed of at this level. The federal system provides an additional level of appellate review **en banc**, which means by the entire circuit appeals judiciary. (See Figure 3.2 for a map of the boundaries of the U.S. district courts and courts of appeal.)

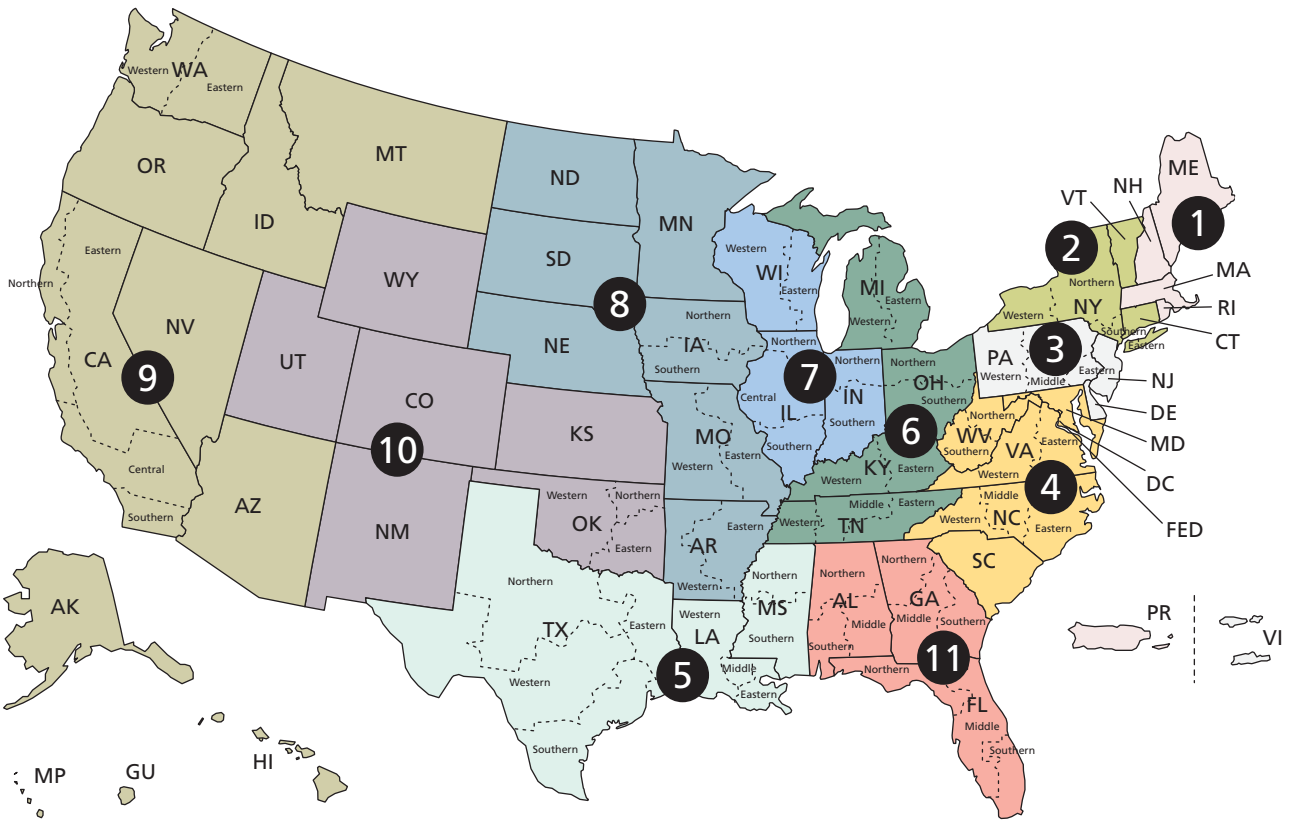


FIGURE 3.2 **Geographic Boundaries of the U.S. District Courts and the U.S. Courts of Appeals**

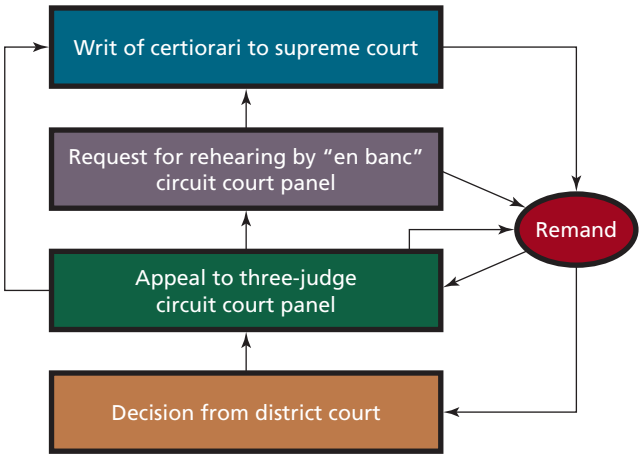


FIGURE 3.3 **Case Flow through Judicial System (read from bottom up)**

Source: Retrieved November 6, 2006, from http://www.catea.org/grade/legal/structure.html#return2. Used with permission from Georgia Tech Research Corporation (GTRC), the copyright owner.

U.S. courts of appeals
Intermediate review level of the federal court system that reviews the decisions of the district or trial court level.

en banc
Appellate review by the entire circuit appeals judiciary after review by the intermediate panel.

writ of certiorari
Granting of petition, by the U.S. Supreme Court, to review a case; request for appeal where the Court has the discretion to grant or deny it.

remand
Disposition in which the appellate court sends the case back to the lower court for further action.

A miniscule number of the total cases filed annually move to the highest level, which is the U.S. Supreme Court. In this court, there is one chief justice and eight associate justices. Unlike trial courts, and similar to other appeals courts, both federal and state, the Supreme Court can accept or reject a petition for hearing on any particular issue. A petition for hearing by the Supreme Court is made with a **writ of certiorari**, or request for permission to proceed on appeal to the highest court in the land. The scope of cases the federal Supreme Court entertains is limited to federal questions or issues. An example of a federal question or issue would be one alleging government infringement on fundamental rights involving a federal question, specifically the breadth or limitations of the fundamental right, such as the previously presented sun worship case scenario. This is the type of case the Supreme Court might entertain. Another example would be if a state challenges the reach of a federal statute claiming the federal statute impermissibly invades state rights to legislate. No Child Left Behind (NCLB) (2000) is an example of the federal government stepping into an otherwise state matter and attempting to set national standards. The right to legislate and control education is a state right. However, the national educational environment has been troubled and quality has significantly decreased in many sectors to the point where the federal government chose to make a policy statement. While NCLB is a federal law, individual states have generally ratified its provisions and policies. NCLB provisions avoid conflict between federal and state rights with the inclusion of provisions whereby the state can elect to embrace the legislation or waive compliance for good cause shown.

The flow of a case in the federal court system progresses as shown in Figure 3.3. The steps in the process are sequential and none can be omitted. When court review of the proceedings on appeal confirms error in the proceedings, the appellate court remands the case for additional proceedings. **Remand** is the process of sending back for additional proceedings to cure the error. The order of remand is typically specific so the lower court judge understands precisely what was at fault. Appeals, whether in the state or federal system, raise issues of law. The jury verdict or decision per se is not subject to question unless the verdict resulted from clear and convincing evidence of error in the law applied. In that case, the judgment is stayed pending appeal, but that is not the same as invalidating or changing the jury verdict. The verdict is based on an improper application of law and thus cannot be enforced.

CYBER TRIP

Review the appellate decision at this Web site: www.judiciary.state.nj.us/opinions/a6992-03.pdf. Review the contents and then make note of the key elements. Identify the issue, court decision, and evidence relied upon by the court in reaching the decision.

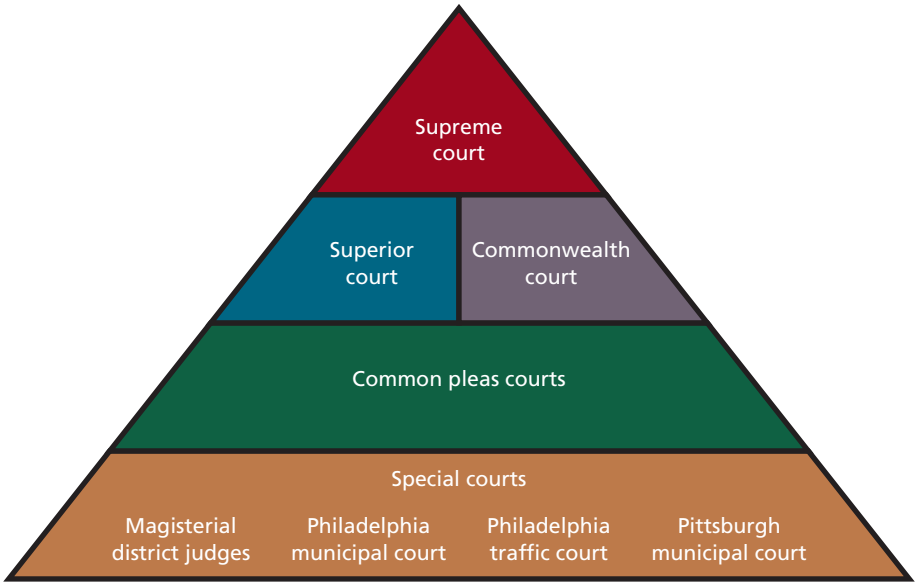
STRUCTURE OF STATE COURT SYSTEM

State courts have an organizational structure similar to that of the federal system. As an example, the Pennsylvania unified court system structure design is provided in Figure 3.4. In Pennsylvania, the court of Common Pleas is the trial court. The Commonwealth court hears issues in which the Commonwealth is a party. It also has jurisdiction to hear appeals from final orders issued by specified state agencies. For example, a case involving payment of unemployment compensation

FIGURE 3.4

Structure of State Court System, Commonwealth of Pennsylvania

Source: Retrieved from www.courts.state.pa.us/.



or denial of such payments would be heard in this court. The magisterial district courts are local courts authorized to hear cases related to county matters such as zoning. The diagram shows the progression of cases from the trial to the state supreme court. Under federal constitutional design, a state may authorize special or limited jurisdiction courts, providing the court does not otherwise violate federal or state constitutional provisions.

CYBER TRIP

Research your home state judicial system, either manually or electronically. Determine whether the system has one clerk of the court for all levels or separate offices for various kinds of cases. Also, confirm the subject matter each court of limited jurisdiction is authorized to hear, as well as the court to which appeals may be taken. Retain this information in your PRM for easy future reference.

RESEARCH THIS!

Visit the Commonwealth of Pennsylvania state judiciary Web site and search for Eagles Court and Drug Court. Review the scope of authority.

Research your home state judiciary for courts of limited jurisdiction. Discuss your findings and criteria with your classmates.

TYPES OF LAW

You are undoubtedly familiar with criminal law in which the defendant is charged by the state with an infraction of a specific criminal statute. Civil law involves private disputes between individual citizens, corporations, or, in some cases, citizens and governmental agencies, with the citizen as plaintiff. An example of a typical civil action would be an injury case resulting from an automobile accident. Another example would occur if a customer slipped on a wet floor in the local supermarket and brought an action against—that is, sued—the storeowner for damages incurred as a result of the injury. Damages might include out-of-pocket expenses for medical treatment, time lost from work, and taxicab costs to go to therapy, among other things.

preponderance of the evidence
The weight or level of persuasion of evidence needed to find the defendant liable as alleged by the plaintiff in a civil matter.

plaintiff
The party initiating the legal action.

defendant
The party against whom a lawsuit is brought.

beyond a reasonable doubt
The requirement for the level of proof in a criminal matter in order to convict or find the defendant guilty. It is a substantially higher and more-difficult-to-prove criminal matter standard.

procedural law
The set of rules that are used to enforce the substantive law.

substantive law
Legal rules that are the content or substance of the law, defining rights and duties of citizens.

executive order
Order issued by the U.S. president having the force of law but without going through the typical process for enacting legislation.

commencement of action
The formal document filed in the court describing the plaintiff, the party bringing the action, and the wrongdoing alleged by the plaintiff against the defendant, or the party against whom the claim is made.

In a civil suit, the jury is instructed that they must find that the **preponderance of the evidence** points to finding the defendant liable as alleged by the **plaintiff**. This is a lower or less stringent level than in a criminal case. When a jury finds the **defendant**, or accused party, guilty of violating criminal statutes, jail or prison time can result. In order to prove the criminal violation, the jury must believe **beyond a reasonable doubt** that the defendant violated the statute and conviction is appropriate. In a civil matter, liability is punishable by a monetary award or verdict payable by the losing party to the prevailing party. Prison or jail time is unavailable with civil actions, regardless of the damages incurred by the plaintiff.

Procedural law involves the steps or methods for enforcing a duty or right through the court system empowered to hear such disputes. The federal and state Rules of Civil Procedure are both examples of procedural law. Likewise, an administrative agency—for example, the state licensing board for professionals—has guidelines and processes to follow in all cases. The rules guiding the process of an administrative agency are included as binding procedural law. The rules of procedure are important under the constitutional form of government. The underlying principle is that any constitutionally guaranteed right—for example, freedom of religion—or statutory requirements—for example, rules related to obtaining and using a driver's license—cannot be fully enjoyed if the scope and limitations for exercising that right are not clear. Absent clear process guidelines, the right is illusory. Neither the citizens nor the judiciary could know what is adequate compliance or clear violation. When a procedure is unclear or a lawsuit is filed challenging a particular aspect of the procedure, the judiciary hears all available evidence of fact and law and interprets or reiterates the law related to the procedure.

Substantive law, on the other hand, defines and regulates individual rights, duties, and powers. Thus, criminal law is substantive as it defines and describes criminal behavior and related punishment for violations. The substantive provisions of criminal law protect both individual citizens and society as a whole. In a civil law context, the common law defines the scope and limitations of the relevant legal concept.

Example:

The statute or common law offenses defined as murder and manslaughter are commonly considered crimes against the person.

Example:

Statute or common law offenses against property, larceny, embezzlement, and robbery are considered crimes against property. These are defined clearly in statutory provisions.

Statutory law is law enacted by the legislative branch and must be applied in the case types to which it applies. This law is explicit and must be observed as stated to avoid violation and prosecution. *Administrative agency regulations and rules* have the full force of law and are mandatory in those issues to which they apply. An example would be the procedural requirements and other rules promulgated by the Florida Department of Professional Regulation related to each profession under the authority of the bureau such as hairdressers or funeral directors. The procedures include processes for everything from qualifying for a license to practice the profession through conclusion of a consumer complaint procedure.

An **executive order** from the office of the president of the United States is an example of a special type of binding law that was neither enacted by a legislature nor developed through judicial

RESEARCH THIS!

Locate the Federal Rules of Civil Procedure (FRCP) and your home state's rules of civil procedure. Note the number of general topics. Select any particular section, for example, **commencement of action**, or bringing an action into the court. Read both the federal and state rules related to commencement. Make note of any differences as well as similarities. An excellent source of information and background for the federal rules is located at www.uscourts.gov/rules/index.html.

RESEARCH THIS!

Research any lawsuits related to either President Richard M. Nixon or President William Jefferson Clinton to become more familiar with the nature of challenges involving sitting presidents, as well as court opinions in such cases. Several cases are listed in the chapter bibliography to help in your research. Review the case opinions and determine the nature of the dispute and legal opinion rendered.

Retain a copy of the case opinion along with your comments and notes in your PRM for easy future reference.

interpretation in common law. The president is subject to the same rights and duties and legal action as other citizens. The Constitution applies to the president of the United States as it does to other citizens. Whether acting in an official capacity or as a private citizen, the president is included in the constitutional provisions pertaining to all citizens and the rights and protections afforded citizens. There is no immunity from legal challenge granted the president acting in an official capacity, nor is the president immune from obligations otherwise applicable to citizens. There are relatively few instances when the legality of a presidential exercise of power has been challenged. The system of checks and balances is one explanation for the relative scarcity of legal challenge to the president and other members of the executive branch when acting in an official capacity.

A notable exception—*Mississippi v. Johnson*, 71 U.S. 475 (1867)—set the standard for review of presidential exercises of power. The Court refused to issue an injunction against a sitting president and ordered enforcement of a statute. The Court determined that requests to interpret the exercise of presidential power, as a means of providing judiciary oversight of acts of the presidential power, was inconsistent with the role of the judiciary. The Court found this kind of review was tantamount to the judiciary usurping the powers of the president. This decision does not grant the president immunity from judicial challenge, however. It does reiterate that the judiciary looks to the language of the law. Particularly in constitutional issues, the interpretation will be narrow rather than broad to avoid overreaching and rewriting the intent of the relevant provision. During both the Nixon and Clinton presidential terms, the courts were extensively involved in a number of actions regarding sitting presidents.

COURT JURISDICTION

jurisdiction
The power or authority of the court to hear a particular classification of case.

Prior to filing a lawsuit, the *plaintiff*, or complaining party, must decide the appropriate court to hear the controversy. **Jurisdiction** is the power or authority of the court to hear a particular classification of case. There are several ways for the court to gain jurisdiction over the issue. Jurisdictional authority renders a judgment or decision binding. If for some reason, after a decision at a lower level, an appeal based on lack of jurisdiction is filed and a finding that the court lacked jurisdiction is made on appeal, then any order issued would be unenforceable and essentially void. In such cases, which fortunately are extremely rare, the entire process would become a useless exercise.

The types of jurisdiction include subject matter, personal, or authority over the property. (See Figure 3.5.) Subject matter jurisdiction imposes a limitation on judicial authority based on limits established as to types of cases the particular court is allowed to entertain. In a dispute involving real estate, court jurisdiction would be conferred on the basis of the precise location of the property in dispute.

subject matter jurisdiction
A court's authority over the res, the subject of the case.

When the substantive issue involved in a particular case must be filed in a specific court, this is **subject matter jurisdiction**. In matters where court jurisdiction is conferred by virtue of the subject matter, the court also is known as the *court of competent jurisdiction*. An example would be a court of limited jurisdiction, such as tax or landlord-tenant courts. The only issues over which these courts have power must involve the respective subject.

in personam jurisdiction
A court's authority over a party personally.

If the court has power because the person is within the geographical boundaries for that court, this is an example of **in personam jurisdiction**. For example, in a divorce action, where both parties reside in the same county, the court has personal jurisdiction over the parties.

FIGURE 3.5
Types of Jurisdiction

Subject matter	Court has authority over the type of case or legal issue
In personam	Court has authority over the people involved
In rem	Court has authority over the property
Quasi in rem	Court takes authority over property to gain authority over the person
Original jurisdiction	Based on court authority to hear the case issues first, before any other tribunal
Concurrent jurisdiction	More than one court has authority to hear the dispute
Appellate jurisdiction	Court has authority to review decision made in lower or different court

general jurisdiction
The court is empowered to hear any civil or criminal case.

limited jurisdiction
The court is empowered to hear only specified types of cases.

in rem jurisdiction
A court's authority over claims affecting property.

A court of **general jurisdiction** is empowered to hear any civil or criminal case. Examples would be the federal district court or state circuit courts. On the other hand, certain courts within both the state and federal systems have **limited jurisdiction**, which means they are empowered to hear only specified types of cases. Examples of courts of limited jurisdiction would be tax, bankruptcy, juvenile, and probate courts. While both the federal and state systems have courts of limited jurisdiction, there is no requirement that both federal and state have the same limited jurisdiction courts. Thus, while the state system has a probate court, there is no such limited jurisdiction division in federal court because the federal system has no law on that issue.

Jurisdiction based on the person, *in personam jurisdiction*, is required to ensure the enforceability of any judgment issued. A concept related to in personam jurisdiction is **in rem jurisdiction**, which is power over the thing. When the court has in rem jurisdiction, then personal jurisdiction over the property owner is automatically conferred.

Example:

Three brothers own a piece of property in county X, but each of the brothers lives in another county. When a disagreement arises as to percentage of ownership, jurisdiction is conferred on the county in which the property, or rem (thing), is located. The brothers become subject to the court and any order issued because the property is within the jurisdictional boundaries of the court.

The *plaintiff*, or complaining party, may choose the court in which to file an action when all other relevant requirements are satisfied. When the plaintiff chooses to file in a specific location or venue, jurisdictional objections are waived. By voluntarily bringing the action in the particular court, the plaintiff subjected him- or herself to the court's jurisdiction and thus cannot subsequently object to the rulings of that same court.

Example:

Sam owns a car-cleaning business. Jack is the owner of a small business in the neighboring county. Jack hires Sam to wash his delivery trucks. Jack agrees to pay by the month and agrees that he will pay $200 per week for the service. For three months, Jack has refused to pay, even though the trucks were cleaned each week. Sam decides to file suit and elects to file in the county where Jack's business is located, even though he could have filed in his home county. As such, the neighboring county acquires in personam jurisdiction over Sam. If the court rules against Jack, a jurisdictional objection is unavailable to Jack.

quasi in rem jurisdiction
The court takes authority over property to gain authority over the person.

Quasi in rem jurisdiction occurs when the court has neither subject matter nor personal jurisdiction, but property related to a suit is located within the jurisdiction.

Example:

A borrower defaults on a bank loan after making a few payments and moving to another state. The bank files suit against the individual and discovers property owned by the individual in a third state. The bank would petition the court to exercise *quasi in rem jurisdiction* over the property so the bank can get the property, sell it, and satisfy the outstanding amount due under the loan.

competent jurisdiction
The power of a court to determine the outcome of the dispute presented.

A court with the power to hear the cases is a court of **competent jurisdiction**. This authority may result from subject matter jurisdiction, that is, the substantive issues presented fall within the authority of the court. Another jurisdictional consideration is whether the case is filed in the court authorized with **original jurisdiction**, which is the power to decide a case prior to any other court. If a court hears and disposes of or decides a case without competent jurisdiction or authority to do so, the judgment of the court is unenforceable.

original jurisdiction
The power of a court to be the first to review and try case issues.

Occasionally when reading court opinions, you will see an issue identified but not resolved by the court. This occurs if several issues are presented to the court, but a judicial interpretation of one issue entirely disposes of the case. When this occurs, because decision on the first issue makes anything else under consideration void, the court stops at that point and need not proceed to analyze other issues. An example of this kind of decision making happens if a federal question and an issue of state jurisdiction were raised on appeal. The court may not decide the federal issue if deciding the state issue disposes or decides the case definitively.

You also may read opinions in which the court mentions facts not presented, or frames a question based on hypothetical additional facts or law that would result in a different decision. If the parties did not specifically challenge or raise that specific issue, the court cannot issue a legally binding judgment. This is because the court can interpret but not legislate law. However, the potential of the hypothetical presented ultimately getting to the court is sufficiently strong to provoke some discussion by the court.

venue
County in which the facts are alleged to have occurred and in which the trial will take place.

Questions of **venue** relate to the location or place where the action is filed. Venue relates to jurisdiction but differs in that it is limited to the correct location within the court's jurisdiction. A venue inquiry would look to the courthouse closest to the site of the complained-of action or contract breach.

Example:

A particular federal district court has three venues: the northern, middle, and southern district courts. The appropriate venue would always be the courthouse closest to the plaintiff. This would be the proper venue in which to file and litigate the issue.

There are both federal and state rules of procedure related to the appropriate choice of venue. Federal venue rules are contained in 28 U.S.C.A. § 1391. FRCP 1.14 reiterates that the only venue considerations applicable in federal cases are those set by the legislature. The rule adds that state rules and legislation may establish conditions beyond the scope of the federal rules, which alerts the paralegal and attorney of the need to check the rules to ensure no modifications or revisions have been enacted since last filing a similar case. In either case, however, selecting where to file a complaint is not an arbitrary decision. There are rules to help in assessing the propriety of the choice. The rules prevent **forum shopping**, or selecting a venue based on considerations other than the provisions of the rules of procedure, such as believing that juries in a particular county are typically more generous to plaintiffs than in the legally appropriate jurisdiction.

forum shopping
Plaintiff attempts to choose a state with favorable rules in which to file suit.

RESEARCH THIS!

Locate the federal and your home state rules of procedure related to venue. Compare both and briefly summarize the provisions of both, commenting on differences. Prepare a checklist with elements of both for use in practice. Retain copies of each rule and checklists in your PRM for easy future reference use.

diversity of citizenship
Federal jurisdiction conferred when the case involves citizens of different states.

Federal jurisdiction is proper only in those cases raising issues involving federal statutes, Constitution challenges, or other federal questions. A possible exception occurs when the parties reside in different states. In such a case, the controversy may be heard in federal court based on **diversity of citizenship**. The rules for determining true diversity are established in the Federal Rules of Civil Procedure according to 28 U.S.C.A. § 1391(a) and related case law. A case involving citizens of different states may rightly be resolved in the federal system based on the potential for state law differences that would create difficulty with enforcement and other aspects of the process.

removal
Moving a case from the state court to the federal court system.

forum non conveniens
Venue is inconvenient despite the otherwise appropriateness of a jurisdiction choice.

The rules also provide for the process of **removal**, or moving a case from the state court to the federal court system. The rules of procedure and 28 U.S.C.A. § 1441 specify the procedures for requesting and completing the process. In some cases, the defendant asserts **forum non conveniens**, a legal position based on claims that the venue is inconvenient despite the otherwise appropriateness of a jurisdiction choice. Following full judicial hearing and consideration of the facts and law, including the legally sufficient argument as to why a move is appropriate and opposing argument, the judge may, but is not required to, grant the request. A request of this kind is appropriate only when compelling reasons exist, and simple imposition on a party is insufficient cause. The rules of procedure describe the reasons that would be legally adequate including "the interest of justice," as stated in the FRCP provisions.

CYBER TRIP

Research to find one case from your home state in which forum non conveniens was raised. Read the decisions to get an idea of the bases for such requests as well as the court discussion of the doctrine.

RESEARCH THIS!

Research federal and your home state rules of procedure related to forum non conveniens. The federal rules can be located at 28 U.S.C.A. § 1404, 1412. Compare both and briefly summarize the contents, including comment on the differences. Retain copies of each rule in your PRM for easy future reference use.

Example:

A Georgia resident sues a product manufacturer based in Michigan. The Georgia resident has a procedural basis for filing in Georgia state court. The defendant manufacturer petitions the court for a change of venue based on a claim of forum non conveniens. The defendant presents evidence that all witnesses, documents, manufacturing equipment, and corporate individuals are in Michigan. The defendant claims that the cost of taking the materials would be cost prohibitive and overly burdensome. The court might grant the petition and order the case removed from Georgia to Michigan in the interests of justice.

COMMENCEMENT OF ACTION

complaint
Document that states the allegations and the legal basis of the plaintiff 's claims.

summons
The notice to appear in court, notifying the defendant of the plaintiff 's complaint.

service of process
The procedure by which a defendant is notified by a process server of a lawsuit.

Once the decision to file a suit is made and the proper jurisdiction is chosen, it is important to know the requirements for forms used. As you might guess, there are specific requirements in both federal and state courts related to the appearance and content of legal documents. The **complaint** is the document that sets forth the issue(s) or legal claims the plaintiff makes against the defendant. The contents of the complaint will be discussed in greater detail in later sections of this book and course. For now, however, we will look at the form required to set forth the parties involved and the jurisdiction and venue locations as required under the rules of procedure.

Filing a complaint in the appropriate office of the clerk of the court serves notice of the claims raised. However, this is only part of the commencement. A **summons** must be filed and served or delivered to the defendant according to the procedure in the rules, whether state or federal. The procedure for official notification is **service of process**, which makes clear that the filing of a complaint begins the process of adjudicating the dispute. The summons is the official notice from the court that a lawsuit has been filed. The summons also states clearly and unequivocally that the defendant must respond and appear before the court designated in order to defend the action. The summons makes clear that failure to respond according to the rules of procedure may result in court action against the defendant, including a judgment entered. If the defendant fails to defend his or her interests, the court may award a judgment in favor of the plaintiff that could include an order to pay or otherwise compensate the plaintiff. Our system assumes the defendant is innocent or not liable until proven otherwise. The system also assumes that a defendant unwilling to defend his or her position can be liable and subjected to the order of the court for sitting on the rights otherwise granted under the Constitution and substantive and procedural law provisions.

The first page of a complaint and summons contains the information that identifies the parties, jurisdiction, case number, and, in some jurisdictions, type of case involved, for example, family law, contract, or personal injury. Check your local rules of procedure to confirm if any additional information is required. Incorrect drafting of the forms could result in the office of the

State Court
In The Circuit Court for the
17th Judicial Circuit Broward County, Florida

John H. Doe)
Address,)
Plaintiff)

v.) Civ. Action No. _____

Harriet D. Person)
Address,)
Defendant)

FIGURE 3.6 **Sample Case Caption for State Lower (Trial) Court**

FEDERAL DISTRICT COURT
In The United States District Court
For the Southern District of New York

John H. Doe)
Address,)
Plaintiff)

v.) Civ. Action No. _____

Harriet D. Person)
Address,)
Defendant)

FIGURE 3.7 **Sample Case Caption for Federal District (Trial) Court**

PRACTICE TIP

Most state rules require the complete name and address of the parties only on the initial filings, which include the summons and complaint. Subsequent filings require only the names of the plaintiff and defendant. When filing the complaint and summons, the clerk of the court assigns the case number. It is your responsibility to ensure the number appears on all subsequent filings. Check your local jurisdictional requirements for the form of the caption in the first and all subsequent filings.

clerk refusing to accept the documents for filing. This could result in serious consequences for the client, attorney, and paralegal. If the form is incorrect and refused by the office of the clerk, and the time for filing ends prior to refiling, the client's right to assert the claim has been waived. This potential risk should make clear the importance of compliance with both the substantive and procedural rules requirements.

The rules of procedure in federal, state, and local courts specify the contents of the case caption, which is the portion setting forth the relevant information about parties and jurisdiction. In general, the contents for the state lower court are as shown in Figure 3.6 and the contents for the federal district court are as shown in Figure 3.7.

PERSONNEL IN THE SYSTEM

Not only do you need to know where to file the action, it is also helpful to know the various job titles and roles of the personnel in the process. While there may be individual state or federal district court differences, the general structure is similar in both federal and state jurisdictions.

RESEARCH THIS!

Contact your local state court administrator for the civil division and inquire about the scope of the job. Also, prepare a listing or chart identifying specific people filling various personnel roles. Depending on the size of your particular district, there may be too many bailiffs or clerk assistants to name individually, but you would want to know the supervisor and the number of assistants in each role. If your jurisdiction publishes a court personnel directory, you would also want to keep a copy for future permanent reference.

FIGURE 3.8

Personnel and Job Titles in the Court System

Clerk of the court	Responsible for maintaining all case files and for accepting and docketing filings
Bailiff	Maintains order and assists the judge in the courtroom
Justice of the peace	Magistrate performing judicial role in limited cases and proceedings
Committing magistrate	Empowered to conduct preliminary criminal hearings, for example, arraignment and bail hearings
U. S. magistrate	Appointed to assist federal judges hearing preliminary trial matters and motions in civil and criminal cases
Judge	Presides in court proceedings and ultimately responsible for the law and conduct of each case assigned, including issuing orders, both interim and final; holding pretrial conferences; and facilitating pretrial settlements.
Chief justice	Most senior judge in the division. May be responsible for administrative matters related to the judiciary.
Court administrator	Responsible for all nonjudicial matters related to the business of the court
Judicial assistant	Works with the judge in administrative functions, including calendaring, setting hearings on motions and other matters, and maintaining chamber processes
Judicial clerk	Works on legal matters related to the cases assigned to the judge, including researching and drafting pleadings and decisions, reviewing trial transcripts, and performing similar legal-based functions for the judge

A common variation occurs when the state and local courts have several clerks and administrators with one for each division, such as probate, family, and landlord-tenant. The duties are the same but limited to the division to which they are assigned in those cases with multiple divisions. Figure 3.8 outlines the various officers of the court and provides a brief description of the role filled.

APPELLATE REVIEW PROCESS

While the right to an appeal is constitutionally protected, there are some limitations and procedural requirements related to that right. A case reaches the appellate court if a final decision is filed of record at the trial court level. Under the American jury system, the jury is the trier of fact. As a result, the jury decision or verdict per se is not subject to appeal. This means that a losing defendant cannot appeal an adverse decision solely on the basis that he or she does not like the decision. However, if an error of law in the process is identified and arguably would have changed the outcome, an appeal on this point of error in law may be raised on appeal. Another example of a decision not subject to appeal occurs when the prevailing party believes the amount of money damages awarded is insufficient, but there is no issue of law to account for this error in award amount. The decision as to amount was a factual one, albeit guided by applicable law. Once the jury has spoken, the decision is sacrosanct. However, an appeal may proceed if the jury decision is based on an inappropriate interpretation or

RESEARCH THIS!

Research your state rules related to interlocutory appeals. Then research 28 USCA § 1292(b) and the Interlocutory Appeals Act of 1958 for rules regarding these appeals. Prepare a checklist of elements required in both federal and state courts. Retain your checklist in your PRM for easy future reference.

application of law. Appeals raise claims of errors of law at the trial court level, not dissatisfaction with the award or verdict alone.

An appeal to the intermediate appellate court level most often is permitted following entry of the final order of the court in the office of the clerk of the court. There are limited circumstances in which interim or **interlocutory appeal** may be decided by the court. The rules and requirements for petition to file interlocutory appeal are set forth in the applicable rules of procedure. In general, however, an interlocutory appeal is considered in those cases where a trial court judge issues an order indicating that the decision relies upon a controlling rule of law. When the appeal for interim or interlocutory review is made, the petitioner must show that there is compelling and substantial evidence of a difference in interpretation *and* that review of the decision may substantially change the ensuing conduct and arguably terminate the litigation.

The Rules of Appellate Procedure require posting a bond when the court accepts an appeal. The applicable rules set forth the requirements in terms of amount and procedure. Among other things, this requirement ensures that appeals are not filed frivolously or for purposes of delay. The purpose of an appeal is to question the law applied in the lower court. In a trial, the attorneys are required to preserve the issue for appeal. This means that they must state an objection to the particular point when it occurs in the proceedings, which allows the judge an opportunity to consider the point during the trial. If an objection is made during the proceeding, the judge has an opportunity to review the issues at that time. In many instances, the question is decided, thus eliminating the issue in an appeal. Conversely, if not raised during the trial process, the issue may be waived for purposes of subsequent appeal.

Appellate case captions are similar to those in the lower court. An example is provided in Figure 3.9. The uppermost section states the specific court in which the appeal is filed. Both state and federal filing requirements are similar in this respect. Next, the parties are listed with the **appellant**, or the party filing the appeal, listed first and the **appellee**, or the prevailing party in the lower court, second. The nature of the dispute, that is, a civil action, is noted along with the docket number assigned when the case is filed. Once the docket number is affixed to the case caption, it is required to be displayed on subsequent pleadings filed in the action. In appellate actions, the address of the parties is typically not required. The local rules of appellate procedure contain the specific requirements.

Review on appeal in the federal system may be requested *en banc* before the entire panel of judges in the circuit. An appeal may be taken directly to the Supreme Court, but the more typical process involves exhausting each step prior to going to the Supreme Court. Only in the most egregious cases of severe violation of constitutional fundamental rights would the attorney reasonably consider skipping any level. If the issue is taken to the Supreme Court, whether in or out of normal sequence, the request is made with a *writ of certiorari*, a formal request to the court justices to issue an order approving the issue for hearing on appeal.

If a majority of the justices concur, the writ of certiorari issues, which sets the case on the court calendar for hearing and decision without hearing at the intermediate level. The Court could remand the case to either the district court or the circuit court, rather than agree to hear the issue. This would be determined based on the facts, law, and complained-of error in the case.

The process commences in both the state and the federal court system with the filing of a **notice of appeal**, which puts the trial court, the appeals court, and the opposing party on notice

CYBER TRIP

Visit the federal appeals court Web site section relating statistical data regarding the volume of case filings, decisions, and individual judicial caseload. There is a wealth of additional information also worth exploring at www.uscourts.gov/cgi-bin/cmsa2005.pl. You also may want to explore the similar Web sites and data from your home state. Discuss the results of your research with your classmates.

interlocutory appeal
Appeal entered prior to entry of a final order by the trial court judge.

appellant
The party filing the appeal; that is, bringing the case to the appeals court.

appellee
The prevailing party in the lower court, who will respond to the appellant's argument.

notice of appeal
Puts the trial court, the appeals court, and the opposing party on notice that the judgment entered is challenged.

FIGURE 3.9
Sample Case Caption for Federal Court of Appeals

FEDERAL COURT OF APPEALS
In The United States Court of Appeals
For the Third Circuit

Alligator Protection League,)
)
v.) Civ. Action No. _____
)
Environmental Protection Agency)

RESEARCH THIS!

Research federal and your home state Rules of Appellate Procedure requirements for filing a notice of appeal. Note the scheduling requirements following the filing of a notice of intent to appeal. Note specific format requirements. Compare the two and prepare a chart that contains lists of each requirement, that is, the notice of intent to file appeal and the time criteria for the respective court. Retain your chart in your PRM for easy future reference.

final judgment
The last possible order or judgment entered in the lower court; the required threshold for filing a notice of appeal.

stay(ed)
Extraordinary relief suspending the process in one court while the appellate court reviews the legal issue, which may result in dismissal of the case from the lower court.

briefing schedule
Timetable for various required filings by both parties throughout the appeal process.

that the judgment entered is challenged. The notice cannot be properly filed unless and until the **final judgment** of the lower court is entered. When errors occur in the trial or other stages of the process, unless the error directly and irreparably impairs the rights of the party against whom the order was entered, an appeal during the process may not be raised. Upon filing a notice of appeal, execution or finalizing the decision of the court is **stayed**, or suspended, until the decision on the appeal is entered.

Filing the notice of appeal does not guarantee that the appellate court will accept the issue. It likewise is no guarantee that the lower court decision will be overturned. Following filing of the notice of appeal, the issues are presented for court consideration. The court accepts the appeal if the issues are determined by the court to be appropriate and ripe for review. If the court accepts the appeal, the clerk of the appellate court prepares a **briefing schedule** for the parties and panel involved in the case. The schedule provides precise dates for filing documents with the court. The clerk may include copies of the applicable rules of procedure and the formatting for appeals, which also are contained in the applicable rules of appellate procedure in the jurisdiction. Whether or not the clerk of the court forwards copies of the rules of procedure, the parties are responsible for compliance with the rules. Calendaring the appellate dates and other requirements is one of the routine job tasks for a paralegal in practice.

PRACTICE TIP

Research the rules of appellate procedure for your home state and a federal court. After your review, contact local firms that prepare appellate briefs. Discuss the cost, process, inclusions, and how the firm works with the paralegal to complete the process. Note any particular local requirements. Retain the notes and tips as well as copies of the rules in your PRM for easy future reference.

Typically, documents related to the appeal come from the parties to the action. However, in some situations, an interested party may wish to file documents for court consideration in connection with the issue raised in the form of amicus curiae, or friend of the court, briefs. These become part of the record that the court may review and consider. However, the position argued does not dictate the court decision.

The paralegal working on a client appeal participates in the process of collecting, organizing, and preparing the documents related to the appeal. Among the documents routinely included are the trial transcripts and exhibits and other relevant materials produced during the procedure in the lower court. All of these documents accompany the appellate brief and become the record on appeal. The rules specify acceptable appearance, content, and length of the appellate package. There are firms that will prepare the package in proper form once the briefs and other materials are gathered. It may be advisable, despite the cost, to engage such firms to ensure strict compliance with the requirements. Even if these firms are hired, the supervising attorney and paralegal are responsible for procedural compliance. Errors could result in serious sanctions that could include dismissal of the appeal prior to decision. This risk underscores the importance of an understanding of the process, careful review of the process, and substantive considerations underlying the job performed by the paralegal.

The appellate briefs and related documents must comply with the specification in the rules of procedure. Review the appendix, where you will find the opinion *Lehr v. Afflito*, an opinion from a New jersey divorce action handed down in January 2006, to become familiar with an appellate opinion.

oral argument
Oral presentation by attorney of key issues and points of law presented in the appeals documents and written legal argument.

The parties may request an **oral argument**, presenting the key points verbally to the court. The panel questions the attorneys on points or issues raised. The questions, however, may ask for interpretation and most often do not merely request a repeat of the contents of the written submissions. The attorney has limited time to make the presentation. If the questions and responses take too long, the oral argument will not be delivered as planned. If the documents

are well prepared and organized, however, nothing new is raised orally that is inadequately covered in the research and documents submitted to the court. Thus, the presentation of the argument in the documents is extremely important and typically provides a more useful tool than the oral argument for the panel and, as such, demands outstanding research, analysis, and presentation.

The court may decide to review the documents and rule without oral argument. Prejudice does not result from the court refusing oral argument. If the court entertains oral argument, the attorney should be prepared to address questions related to the positions presented. Thus, in researching appellate cases, the opposing position is as important to understand as the position advanced for your client. Often the questions from the appellate panel relate to the opposing position and why the position presented on behalf of the appellee is appropriate. This potential illustrates the importance of critical thinking and analysis when doing the research and presenting the various documents and research findings by the paralegal to the supervising attorney at the conclusion of the research assignment.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

alternative dispute resolution (ADR)
Method of settling a dispute before trial in order to conserve the court's time.

Increasingly, courts are encouraging parties to use **alternative dispute resolution (ADR)** methods rather than a formal trial as a mechanism of dispute resolution. ADR refers to any means of resolution completed outside of the courtroom or trial setting. Success with this choice depends on a number of factors, including the nature of the dispute, the motivation of the parties, and the willingness of the parties to negotiate rather than accept an imposed resolution. With any ADR method, all parties should be prepared to negotiate and give up something in exchange for the benefits. Among the benefits of ADR are

1. Efficiency.
2. Time saving.
3. Cost savings.
4. Active participation of the parties in resolution.
5. Third-party guidance and assistance.

arbitration
Alternative dispute resolution method mediated or supervised by a neutral third party who imposes a recommendation for resolution, after hearing evidence from both parties and the parties participated in reaching, that is fully enforceable and treated in the courts the same as a judicial order.

arbitrator
Individual who imposes a solution on the parties based on the evidence from both parties.

In some cases, arbitration is elective and in others, mandatory. Arbitrator intervention has been applied in labor disputes for many years. The Securities and Exchange Commission (SEC) requires that disputes between clients and brokers be resolved through arbitration. The position of the federal government regarding use of ADR is set forth in 9 U.S.C. § 2 and 3. The process is encouraged in domestic disputes. The federal government has further recognized the utility of arbitration with international disputes and has undertaken enforcement obligations with international arbitration awards.

In **arbitration**, the third party also fills the role of intervener, but, at the conclusion of the session(s), the **arbitrator** imposes a recommended solution based on consideration of all evidence and information from both parties.

Mediation

mediation
A dispute resolution method in which a neutral third party meets with the opposing parties to help them achieve a mutually satisfactory solution without court intervention.

mediator
Individual who facilitates a resolution by the parties using methods designed to facilitate the parties' reaching a negotiated resolution.

The most significant difference between **mediation** and arbitration is the role of the third party. A **mediator** facilitates a resolution by the parties, with more subtle intervention than arbitration. When a situation reaches a stalemate in mediation despite good-faith efforts, cooling off periods, and other interventions, the matter proceeds to litigation.

Mediation presumes the best resolution is one that both parties assist in reaching. It further assumes the parties understand that reaching a resolution may require negotiating how much flexibility the parties will both offer to move from stalemate to solution. When mediation succeeds, the parties often assist in drafting a legally enforceable agreement. If the courts require mediation, such as in family matters in many jurisdictions, the mediator files the agreement, which is as binding and enforceable as a judicial order.

Mediation is particularly useful in situations when the parties may continue dealing with each other after the dispute. In a tort case, where liability is obvious, and may even be uncontested, mediation is often a practical option for determining the amount of damages.

CYBER TRIP

To learn more about mediation, visit the Web site at www.mediate.com. Another good resource link is located at www.mediationnetwork.net/practitioners/ membership.cfm. Check specific requirements in different dispute types using mediation. See if you can interview a local mediator for additional information about the process, their role, and the place for a paralegal in a mediation practice.

Just as some cases are particularly appropriate for mediation, some disputes are not good candidates for mediator facilitation. Domestic violence cases would not be good candidates for mediation. It is clear from the nature of the dispute that the parties have reached a point where communication and negotiation are impossible. Thus, asking these same individuals to negotiate a solution is impractical and success is improbable. In cases involving overwhelming issues of social, legal, and political impact, such as the school segregation cases that ultimately changed the national relationship between the races, mediation is an inappropriate resolution mechanism. The gravity and complexity of the underlying issues cut against private resolution. The mediation model cannot work because the reach of the problem and its complexity are not conducive to easy resolution. Thus, mediation at best could resolve but a miniscule portion of the overall dispute.

Generally, mediations follow a similar format, although individual mediators may develop their own style. Given the underlying assumption that the parties will have a continuing relationship, in the first session they openly discuss the dispute with the mediator. The parties then separate and the mediator visits each, facilitating delivery of messages between the two and recommendations to move the process along. The parties are the mechanism of resolution and the mediator fills the role of facilitator only.

Often in mandated mediation such as family matters, the rules prohibit attorney intervention, including giving legal advice to the parties. When this is the procedure after presentation of the legal issues and facts, the attorneys take a passive role in the remainder of the process. The mediator participates actively and the attorney becomes an observer. At the conclusion of the process, the mediator makes findings and a recommendation is presented to the judge for signature and filing as a formal order of the court. The objective is for the parties to reach an agreement they can both accept. The process assumes that if the parties sincerely believe they can accept the solution, it is preferable to involuntary or forced third-party intervention and order. It is important to check the specific requirements for mediation in your home state as to procedure and any other applicable provisions. Use of mediation and other alternative dispute resolution mechanisms is within the authority of the state judiciary; thus, each state establishes the process, including rules, regulations, scope, and limitations.

Arbitration

Arbitration may use either one individual or a panel in the role of arbitrator. The parties agree prior to process commencement in the selection of panel members. Often a panel of three is involved, so each party selects one of the three, and the parties agree on the final member. Arbitrators are increasingly required to take training programs. The American Arbitrator Association (AAA) is the oldest and largest, but it is not the only organization from which to select an arbitrator.

RESEARCH THIS!

Contact the local office of a stock brokerage firm. Ask about the documentation typically exchanged with the client. Discuss the conditions under which arbitration is required in a dispute. If you can review copies of any documents, do so, paying particular attention to those sections related to disputes and dispute resolution. Also, contact a local office of the AAA and ask to speak to a representative about the same subject. Summarize your findings and retain them in your PRM for easy future reference.

Team Activity

The class will be divided into teams. Each team will then divide into two sections, one representing mediation and the other representing arbitration. Review the research information each individual team member locates about the resolution method represented and discuss the results. Formulate a list of pros and cons of your method including the purpose, goals, and recommendations to improve the system as you understand it to operate in your home state jurisdiction. Include in your research information about the role of paralegals in the process as mediators or arbitrators and working with clients. After each team completes its discussion and lists, debate the two methods between the respective teams. Retain any research data, lists created in the discussion, and debate notes in your PRM for future easy reference.

CYBER TRIP

Explore the Web site for the American Arbitration Association at www.adr.org. Look at the sections regarding criteria for arbitrators, as well as the types of cases heard in arbitration. Contact individuals on the list of arbitrators and ask them to discuss the process, evidence handling, and questions typically asked when the arbitrator is considered for a panel. Also discuss whether the person has acted as a mediator, and, if so, the differences and similarities between the roles.

Depending on the setting and the election of the parties, the decision of the arbitrator may be binding by agreement of the parties prior to process commencement. An example is disputes related to securities or stock transactions. The contract entered between the buyer/client and the broker expressly states that if disputes arise, the parties agree to arbitration using the American Arbitration Association guidelines and arbitrators. The parties also agree in the initial contract prior to the first session that the decision is not subject to appeal or rejection by either party. The parties affirmatively agree to act in accordance with the arbitration decision.

An aspect of arbitration that is often particularly attractive to the parties is the confidentiality of the proceedings. Nothing discussed, including negotiations and terms of any agreement reached, will be disclosed in any public or subsequent judicial proceeding. This kind of understanding provides an inducement to present information that otherwise the parties might hesitate to discuss or volunteer. This simply means that the arbitration environment encourages frank, direct, and unfettered discussion of relevant information as a means of facilitating voluntary agreement.

In ADR, evidence is handled more informally than in trial proceedings. In some jurisdictions, when parties elect ADR, a conference takes place in which the attorneys discuss the scope and type of evidence, if any, that will be entertained. The Rules of Civil Procedure also may contain guidelines for handling evidence, so it is important to check there as well. With even a fundamental understanding of the concept and goal of ADR, the lack of formality and the nature of negotiations involved become clear. If the process exactly duplicated trial proceedings, there would be no incentive to engage in any form of ADR.

Eye on Ethics

In the confirmation hearings for Supreme Court Justice Samuel Alito, an ethical question was raised regarding an issue in which Judge Alito **recused** himself, or stepped down from a case, following a challenge based on a claim of **conflict of interest.** Judge Alito showed that when the challenge was raised, he contacted the judicial ethics board and presented the question for their recommendation. Judge Alito also obtained two independent opinions on the ethical implications of the challenge and sought a recommendation as to whether stepping down was appropriate under the facts. Judge Alito considered each, none of which recommended stepping down. Nonetheless, Judge Alito recused himself from the case because of his concerns over the appearance of conflict.

Review the judicial code of ethics for your home state, paying particular attention to the sections relating to conflict of interest. Using your home state rules and ethical guidelines, comment on the situation faced by Judge Alito. Does your judicial code of ethics address appearance of conflict, and does it contain guidance for determining what may or may not meet the definitions?

Review at least one of the paralegal codes of ethics and briefly comment on similarities and differences between the paralegal and judicial code. Also, briefly summarize your understanding of the concept appearance of conflict and strategies you might engage to avoid challenges along those lines.

Retain a copy of your responses in your PRM in a section marked Ethics for easy future reference.

recuse or recusal
Voluntary disqualification by a judge due to a conflict of interest or the appearance of one.

conflict of interest
Clash between private and professional interests or competing professional interests that makes impartiality difficult and creates an unfair advantage.

Paralegals are becoming more interested in filling the role of the mediator or arbitrator. Not all jurisdictions require the arbitrator be admitted to the bar; thus, individuals with a good understanding of the substance and procedure of the legal system are particularly attractive candidates. Training programs are typically required for both mediators and arbitrators, and regular refresher sessions are recommended when not required under the law. The role of the third party is to assist the parties in reaching a mutually acceptable resolution. As such, the wishes of the parties are the fundamental consideration in the operation and enforceability of the agreements resulting from ADR. Assuming the resolution is not on its face prohibited under the law, the court accepts the agreements resulting from these procedures because they represent the voluntary will of the parties.

Summary

This lesson reviewed the structure of state and federal courts as well as aspects of the legal system related to the operation and the role of the various levels within that system. We also explored how to go about entering the legal system formally, or commencing an action, and what options and procedures to consider when the dispute is beyond informal resolution. You learned the levels and jurisdictions of the court system, both state and federal, and the options for guided resolution and ADR options after the filing of the complaint and the service of process are completed. You looked into the role of the paralegal in the courts and the legal process as well as alternative dispute resolution, which is used more frequently as an option to trial for dispute resolution.

Key Terms

Administrative agency regulations and rules
Advisory opinion
Alternative dispute resolution (ADR)
Appellant
Appellate courts
Appellee
Arbitration
Arbitrator
Beyond a reasonable doubt
Briefing schedule
Commencement of action
Common law
Competent jurisdiction
Complaint
Conflict of interest
Constitutional law
Court of International Trade
Defendant
Diversity of citizenship
En banc
Executive order
Final judgment
Forum non conveniens
Forum shopping
General jurisdiction
In personam jurisdiction
In rem jurisdiction
Interlocutory appeal
Judicial opinions
Jurisdiction
Limited jurisdiction
Mediation
Mediator
Notice of appeal
Office of Safety and Health Administration (OSHA)
Oral argument
Original jurisdiction
Plaintiff
Preponderance of the evidence
Primary source
Procedural law
Quasi in rem jurisdiction
Recusal
Regulatory law
Remand
Removal
Secondary sources of law
Service of process
Statutory law
Stayed
Subject matter jurisdiction
Substantive law
Summons
U.S. Bankruptcy Code
U.S. district courts
U.S. courts of appeals
U.S. Court of Federal Claims
Venue
Verdict
Writ of certiorari

Review Questions

TRUE AND FALSE

Respond to each of the following. For those statements that are false, rewrite as a true statement.

1. Original jurisdiction is the court power to hear the kind of issue raised.
2. Under the doctrine of forum non conveniens, if the parties do not like the decision of the courts in a particular jurisdiction, they can petition to move the case elsewhere.
3. A court could have subject matter but lack in personam jurisdiction.
4. Mediators may impose a binding resolution in the dispute.
5. The rules of evidence related to ADR are less stringent or formal than in a trial.
6. A paralegal filling the role of arbitrator does not violate UPL criteria.
7. An appellate court may exercise original jurisdiction if the controversy is too complex for the lower court.
8. Parties who voluntarily place themselves within the jurisdiction of a court cannot later object to the enforceability of the judgment entered.
9. Appeals may be filed following entry of the final order disposing of all issues before the court.
10. Any lower court decision remanded by the appellate court invalidates the decision of the lower court.

Discussion Questions

1. Read the following fact pattern; then, decide the appropriate jurisdiction in which to commence the action. Explain your choice and then draft a case caption.

   Mr. Jetson owns a business manufacturing rapid pressure swimming pool cleaners. He sells his product door to door and makes each pool cleaner after he gets a firm order. The business is located in Utah, so after several winters struggling to make ends meet during the winter months, he has the bright idea to go to Arizona in the winter months and sell the machines there. Mr. Rubble purchases two cleaners, one for his own use and the other for his neighbor, Mr. Kramden. Both are delivered on the same day. About two months later, both Messrs. Rubble and Kramden realize their pools look dirtier than ever. They want to return the cleaners and let their children, Bam-Bam and Pebbles, clean the pools manually. Mr. Jetson refuses to take the cleaners back or issue a refund, so the purchasers decide to sue.

2. Research the rules of the court related to mediation and arbitration in your home state. After reviewing the rules, prepare a brief statement for use in training other paralegals in your office. Discuss benefits and risks of the process. If your research indicates that some case types might benefit more than others from either process, discuss which process should be used for each case type and why.
3. Prepare a chart that you will retain in your PRM outlining the various types of law. Be sure to include a description of each and whether each can be heard in either state or federal proceedings. If not, explain why. If so, also indicate special circumstances that would indicate a court of limited jurisdiction and include those in your chart.
4. Your firm has been asked to represent a client who believes there is an appellate issue following an adverse decision in the lower court. The client gives you the following facts:

   The client, Mr. Smith, was sued in an auto accident case. Mr. Jones was the plaintiff. The accident involved a trolley car and a man riding a bicycle. Mr. Smith claims that his car was hit by a trolley car when it jumped the track after stopping abruptly to avoid the man crossing the same street while riding a bicycle. Mr. Jones' car was declared a total wreck, but miraculously he sustained no injuries requiring medical attention. The man riding the bicycle was not so lucky and died shortly after the ambulance took him to the hospital. Mr. Jones was awarded only $10,000. The

family of the deceased bicyclist, on the other hand, was awarded $250,000. The issues Mr. Jones wants raised on appeal include the following:

a. The amount is unfair and should have been more than $10,000.
b. The judge never told the jury there was a maximum jury award of $200,000 in such cases in your home state.
c. The trolley driver did not deserve any money since he was driving the trolley and thus was also at fault.
d. Mr. Smith's lawyer did not let him talk about emotional distress, so the case should be tried again with that evidence included. Mr. Smith says that should be easy to prove since it is not like a broken leg, so no one can really prove or disprove it.

Identify in list form issues that may be presented on appeal. Also, indicate which cannot be taken up on appeal. In each instance, state why the issue may or may not be appealed.

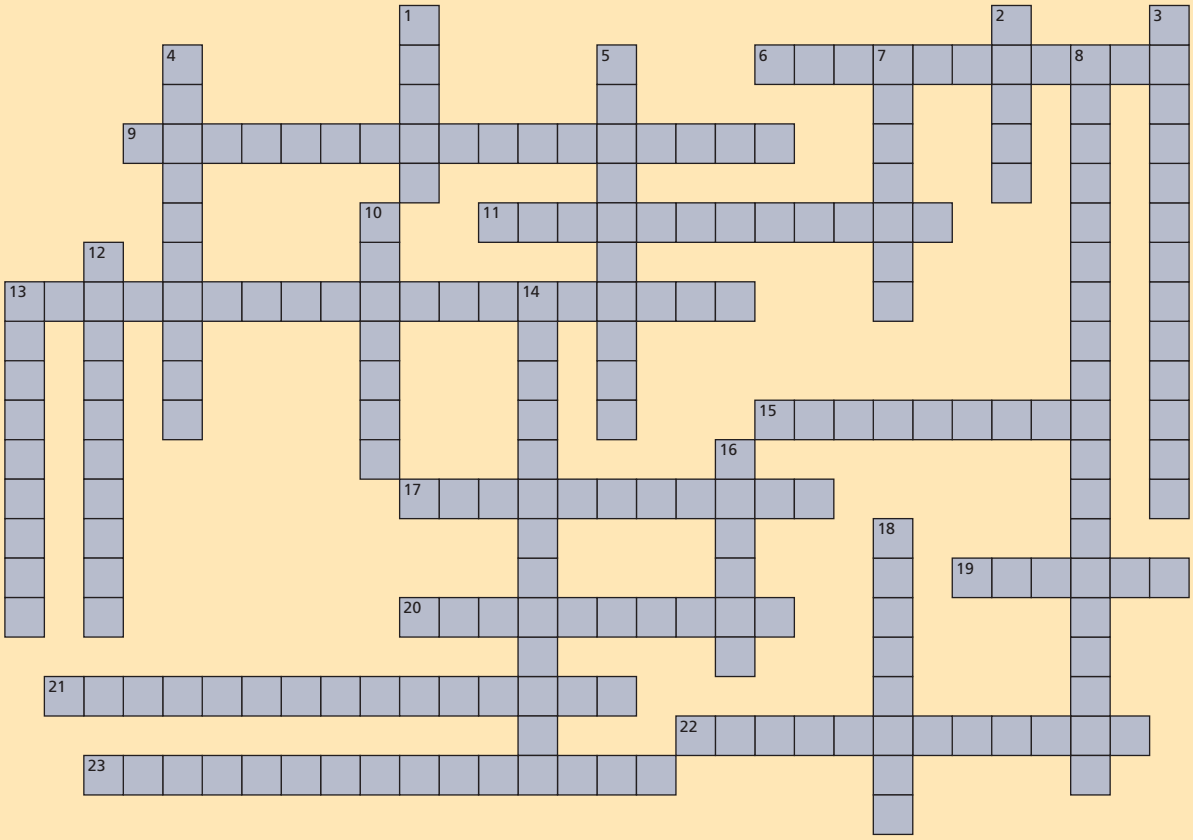
5. Review the diagram of the Pennsylvania state courts. Research the structure, including names, of the various courts within your home state. Create a similar chart for your home state. Include the names of each part, along with a statement of the types of cases the court division may hear.
6. If your home state has a formal arbitrator training program, provide a brief description of where it is located, who is eligible for the training, and the type of matters eligible for ADR in your home state. If there is nothing in your home state, locate the information from neighboring jurisdictions with such programs.
7. a. Local your local and state rules of civil procedure. Make note as to exactly where to locate them within the state codes or statutes and keep the information in your PRM in a section of procedures and rules of court.
   b. Read the rules relating to jurisdiction within the state system to locate precisely what agency or court has original jurisdiction over the following matters:
      i. Zoning dispute.
      ii. Complaint about a hairdresser licensed by the state.
      iii. Civil tort action.
      iv. Support action.
   c. Now locate the section of the rules related to time for filing and locate the section that describes the time it is permitted to file the following actions:
      i. Zoning dispute.
      ii. Complaint about a hairdresser licensed by the state.
      iii. Civil tort action (auto).
      iv. Civil tort action (personal injury, nonauto).
      v. Environmental claim against a gas station owner for permitting gasoline leaks and spills.

Retain the notes and tips as well as copies of the rules in your PRM for easy future reference

Portfolio Assignment

Research the list of judges in each division of your home state court system. Be sure to include the administrative agency judiciary as well as criminal courts, civil courts, and courts of limited jurisdiction. Contact the personnel director for the court and discuss the role of paralegals within the system. Inquire about professional development programs within the system. After getting a brief description of the kind of programs available, discuss plans for expanding the program. If you can, interview a paralegal within the system. Try to get a better idea of the scope of the position and tasks routinely performed by the paralegals. Prepare a brief summary of your findings. Retain both your written paper and a directory, if one is available from the court or, in the alternative, that you prepare, in your PRM for easy future reference.

Vocabulary Builders



Across

6. Law related to rights.
9. Develops from the U.S. Constitution.
11. Authority of the court.
13. Legal encyclopedia.
15. Document describing cause of action.
17. Authority over person.
19. Return case to lower court.
20. More than one court could rule on the issue.
21. Court review and analysis.
22. Develops from interpretation of statutes.
23. Speculates on the outcome prior to a real dispute.

Down

1. Location of trial court.
2. Jurisdiction over thing.
3. Rules and regulations of government agencies.
4. Law related to process.
5. Jurisdiction based on location of real property.
7. Notice of legal action commencement.
8. Decision on appeal prior to the completion of the case.
10. Maintains order in the courtroom
12. Gathers facts and makes a ruling on dispute resolution.
13. Derived from case opinions.
14. Facts and legal basis for bringing a case to court.
16. Review by the entire appellate court.
18. Facilitates resolution between parties.

Chapter 4

Introduction to Legal Research

CHAPTER OBJECTIVES

Upon completion of this chapter, the student will be able to:

- Identify primary and secondary research sources and their use.
- Discuss the function of primary and secondary research sources.
- Explain the research process.
- Conduct a research project locating primary law sources.
- Research case law opinions.
- Identify components of a legal citation.
- Demonstrate an understanding of the ethical issues related to legal research.

traditional (manual) legal research
Uses libraries, books, and other materials in paper format.

computer-assisted legal research (CALR)
Research method using electronically retrieved source materials.

Understanding where to find the law and the tools to help you expand your understanding is discussed in this chapter. We explore various sources of law and steps in the research process. Once you locate the relevant law, the process entails engaging critical-thinking and analytical skills to organize the materials, whether for written or oral communication, such that the points are made clearly and persuasively. Having a general research strategy in mind makes the research process a much less daunting task. The chapter presents general strategy approaches to help you as you begin to learn the process. This lesson introduces the fundamentals; developing the skill takes application and repetition. We look at **traditional legal research** (or manual research) and **computer-assisted legal research (CALR)** research methods, both of which you need to use in your research projects.

FUNDAMENTALS OF LEGAL RESEARCH

research
Process of locating law.

analysis
Applied after finding the law and interpreting the application to the facts to formulate a persuasive argument supporting your position.

Legal research is a process that involves understanding the issue to research, knowing how to find the law, analyzing the law you locate, and using the research results to frame a persuasive argument. You will become familiar with the difference between **research** that locates the law and **analysis**. The analysis process cannot be applied until you have located the law and interpreted how it applies to the facts of your case. Upon completing both processes, you will be equipped to formulate a persuasive argument supporting your position.

The importance of questioning and critical thinking at every stage of the process cannot be stressed enough. As a rule of thumb, each case fact pattern has unique characteristics. Thus, locating law related to the case issue is merely step one. The process requires analyzing what

research memorandum
Reviews case facts, presents the research question, summarizes the research findings, and answers the research question with a legal analysis of the applicable law.

you find in your research. Good research leads to good writing. When writing a **research memorandum**, which reports the findings of the research, you want to identify the law related to your case facts or on point, but you also want to analyze why that law applies. As you build your skills, you will learn to argue why the position of the opposing side should not be accepted. Whether you use a traditional library or electronic sources, you need to begin with a clear understanding of the value of each source and how to apply it appropriately.

PRIMARY SOURCES OF LAW

The most important sources of law are primary sources, as you may recall from your reading in Chapter 3. Both state and federal law define sources the same way. As such, once you learn the research steps for federal law, you do not then need to relearn a separate system for each state.

binding authority (mandatory authority)
A source of law that a court must follow in deciding a case, such as a statute or federal regulations.

The most persuasive legal support for any argument comes always comes from primary sources, whether federal or state. These sources are considered legal or **binding authority**, which means they are the law that must be applied. When searching case law related to statutes, codes, and rules, even in cases where the opinions are clear, it is always advisable to reread the section(s) and guarantee that the reference made in the case opinion is accurate.

Code of Federal Regulations (C.F.R.)
Federal statutory law collection.

United States Code (U.S.C.)
The published collection of all federal law created by statute from all legislators, agencies, and other sources within the government.

Federal primary sources include the **Code of Federal Regulations (C.F.R.)**, Supreme Court opinions, the **United States Code (U.S.C.)**, regulations, and administrative rules. Whether reading statutes or codes, there are often two versions of the same source. One source presents the law as enacted without comment. The **annotated version** presents the enacted law as well as commentary and additional information such as revisions, related cases or legal issues, and points from other districts. Annotations are particularly helpful when beginning your legal research because they provide insight that may not be easily identified in the original version. You will easily identify the annotated version from the citation by the additional letter "A" at the end of the source abbreviation.

annotated version
Presents the law as enacted or case opinion as stated along with discussion and commentary.

Comprehensive publication with all regulations, policies, laws and standards published by the federal government and bearing the weight of law

Example:

United States Code is U.S.C.
United States Code Annotated is U.S.C.A.

The Code itself presents the sections precisely as passed, while the annotated versions explain the process, relevant legal opinions, and decisions important in the formulation or repeal.

loose-leaf, binder, or pamphlet service
A service that publishes recently decided court decisions in loose-leaf binders, such as U.S. Law Week.

The C.F.R. is the most up-to-date and comprehensive source of information on federal statutory law. On a daily basis, the government publishes updates to the C.F.R., including rules, suggested regulations, executive orders, and notices of value when researching regulatory powers, agencies, and operational issues about government functions. These additions can be accessed instantly through the Web site at www.gpoaccess.gov/fr/index.html. Law libraries, for those doing traditional research, have volumes from **loose-leaf or binder services** that are updated daily or as inserts are received to ensure information is current prior to rebinding and reprinting a traditional book. Depending on the legal topic, these often provide substantially more detailed information than is found in the pocket part addenda.

Federal Register
Pamphlet service that records the daily activity of the Congress.

The ***Federal Register*** is a **pamphlet service** that records the daily activity of the Congress. With the tremendous explosion of information and the volume of work in both houses of Congress,

CYBER TRIP

Check out this Web site for information on proper reference format for *Federal Register* entries: www.archives.gov/federal_register/publications/document_drafting_resources.html.

For materials related to congressional proceedings and records from proceedings, see www.archives.gov/records_of_congress/information_for_researchers/citing_the_records_of_congress.html.

RESEARCH THIS!

Locate the rules of criminal and civil procedure both federal and for your home state. Find the rules related to answering a complaint and the time for filing the response. Compare the requirements in each. Write a brief description of what you found, including similarities and differences. You may want to retain these rules and your commentary in a section of your PRM for future ease of reference.

RESEARCH THIS!

Locate the state and regional reporter series for your home state. Note the other states included in the regional reporter. Select one case in the state reporter and locate the same case in the regional reporter. Provide the correct case citation for each, along with a brief description of the case facts and decision.

the *Federal Register* and the C.F.R. are available electronically. Facility with Internet research is an effective and necessary skill and tool for both the student and the practicing paralegal.

Agency regulations and rules have the full authority of law in matters related to the respective agency. Some examples of these agencies would be the Environmental Protection Agency (EPA), the Nuclear Regulatory Agency (NRA), and the Federal Communications Commission (FCC).

The rules of procedure and evidence, whether federal or state, are also considered primary sources of law, as are agency procedural rules.

In practice, the law you locate arose from real controversies and people. As such, the context, facts, theory, and law contribute to both the issue and the solution. Your research is intended not only to familiarize you with the law, but also to provide the legal tools for making persuasive arguments on behalf of the clients and issues represented. Therefore, pay some attention to the facts of the cases read and comments on facts made in the opinions. Think about your client's case facts when doing your analysis and take note of particularly significant points of discussion that may be applicable to your research project.

As a beginning researcher, you may be inclined to check the law in your state and, when you find one case on point, tell yourself the research is complete. The opinion tells you the law, so all you need to do is write the memorandum and move along to the next task. This is not the case at all. To get a better understanding of civil law surrounding the relevant legal issues, you need to check more than one case.

case reporters
Publish opinions of the appellate courts that serve to interpret the law. They contain opinions from every case heard and published within the relevant jurisdiction.

Use the **case reporters** to find the case law in the jurisdiction, whether state or federal. The reporter series contain opinions from every case published within the jurisdiction. The reporters are organized by states and regions. Thus, the case law for the state of Florida appears in the Florida Reporter as well as the Southern reporter series, cited as So. 2d, which contains all cases reported within the region.

RESEARCH THIS!

Locate any professional legal publication online or in the library. Look through several of the issues and then write a brief summary of the contents and discuss the strengths and weaknesses of each publication. Examples of these publications include *Legal Assistant Today*; *The Verdict*, published by the Maryland Bar Association; and *Florida Bar Journal*.

RESEARCH THIS!

Locate Am. Jur. 2d and Cor. Jur. 2d. Find the sections regarding "bystander liability," "medical malpractice," "breach of contract," or "counteroffer." Review the same sections in each encyclopedia. Compare the treatment of any one topic in each volume. Provide a summary and explanation of which source you found more adaptable to your personal style and why. Comment on the strengths of each.

SECONDARY SOURCES OF LAW

***American Jurisprudence* (Am. Jur. and Am. Jur. 2d)**
Legal encyclopedia organized by topics and subheadings presenting law and scholarly discussion from multiple jurisdictions.

***Corpus Juris Secundum* (Cor. Jur. 2d)**
Legal encyclopedia organized by topics and subheadings presenting law and scholarly discussion from multiple jurisdictions.

digest
A collection of all the headnotes from an associated series of volumes, arranged alphabetically by topic and by key number or summary of testimony with indexed references of a deposition.

Secondary research sources include legal encyclopedias, textbooks, restatements of law, publications from professional legal organizations such as state bar associations, professional journals, and periodicals, to name a few sources. Secondary sources are never considered controlling law, but, nonetheless, they are often helpful in a research project.

Legal encyclopedias such as ***American Jurisprudence* (Am. Jur., Am. Jur. 2d)** and ***Corpus Juris Secundum* (Cor. Jur. 2d)** are invaluable sources of background information and scholarly analysis of the legal issues. Both are organized by topics and subheadings and present law and scholarly discussion from multiple jurisdictions. When distinguishing your case from established law, it is extremely useful to read what others have discussed on the same topic. It is also useful to know if nearby jurisdictions have taken a position on the topic and, if so, what that position may be.

Legal **digests** are organized and indexed by legal categories or topics of law. They are comparatively easy to use and useful law locators. The digests repeat what is found elsewhere and presents the law by topic and then the interpretation from various states and sources in one place. A digest is an excellent source for an overview and should not be used as a definitive source of the law. Any source included should always be reviewed in the primary source document to ensure accuracy.

A digest presents definitions from various encyclopedias, legal dictionaries, state statutes, and constitutional sources as well as common or case law. The materials come from federal and state sources. The topics are presented in broad sections and subsections within each section similar to topic outlines you may have used in other research sources. In some sources, for example, Westlaw, a numbering system is included that allows the user to refer to the number in any source published by Westlaw, whether traditional or electronic, to facilitate cross-referencing between sources. As with other secondary sources, the numbering system should not be considered authoritative, nor should a researcher cite to a reference from a digest that has not been verified in the primary source.

PRACTICE TIP

A digest topic may be personal injury, and the subtopics are automobile cases and bystander rule. *Driver v. Passenger* from your home state is included as a case supporting the bystander rule as authority for damages awards. However, if you go to your home state case reporter pocket part, you may find the case has been either overturned or superseded! You would have incorrectly cited the case and current law in your home state if you failed to follow the process.

Digests are extremely helpful in looking at a broad overview of case law on a specific topic. The digests typically list the case name, date, and jurisdiction within the state and then provide a brief summary of the holding of the case. As with other secondary sources, it is helpful to have the synopsis, but reading the original, full case report is preferable.

RESEARCH THIS!

Read some or all of the following landmark Supreme Court case decisions at the following link: www.landmarkcases.org/ to develop a better understanding of the kinds of cases that qualify for this classification.

FUNDAMENTAL TOOLS OF LEGAL RESEARCH

stare decisis
Decisions from a court with substantially the same set of facts should be followed by that court and all lower courts under it; the judicial process of adhering to prior case decisions; the doctrine of precedent whereby once a court has decided a specific issue one way in the past, it and other courts in the same jurisdiction are obligated to follow that earlier decision in deciding cases with similar issues in the future.

precedent
The holding of past court decisions that are followed in future judicial cases where similar facts and legal issues are present.

landmark case
A decision of the Supreme Court that significantly changes existing law.

You may be familiar with the legal concept of **stare decisis** and **precedent**. Both are the cornerstones of our system of legal decision making. The doctrine of stare decisis means that the law previously decided within a jurisdiction relevant to the facts of similar cases must be applied to cases with similar facts. All courts within the jurisdiction apply similar law to similar cases. After completing an analysis of existing law, the judges may determine that new law is needed. Those decisions are **landmark cases**. An example of a landmark case and its citation is

Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 1954 U.S. LEXIS 2094, 53 Ohio Op. 326, 38 A.L.R.2d 1180.

The case opinion interpreted the meaning of equal education and the application to education of the Equal Protection Clause in the Constitution. The decision marked the end of legal school segregation and created the environment in which schools became desegregated. It is significant that the number of cases considered landmark cases is miniscule compared to the total number of cases heard in the judicial system. This relative rarity indicates the import of stare decisis and the reticence of the judiciary to change existing or settled law. The case decision in *Brown v. Board of Education* established legal precedent, or a legal principle, applicable to all educational opportunity cases to follow.

CYBER TRIP

Locate *Brown v. Board of Education,* 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 1954 U.S. LEXIS 2094, 53 Ohio Op. 326, 38 A.L.R.2d 1180, at www.landmarkcases.org/ and read the case opinion and companion cases. Use this case as a discussion point in the class.

If you want to develop your research and analytical skills, you should give some thought to the opposing position when performing your research. Look for some law related to the opposing position, even if it is not the majority position. In so doing, you will strengthen your own position and include points in your argument addressing those arguments. You may develop some tips for issues or concepts that, while relevant to your research, you may not have considered in your initial preparation.

LEGAL RESEARCH PROCESS

Case management and organization from the time the client file opens prepare you for the legal research process better than anything else. Maintaining organized, current, and clear client files makes the process much easier. Secondary sources are helpful in gaining an understanding of the primary sources and should not be ignored when doing your research. Primary sources, which are binding, are the foundation for your legal argument and research analysis. Both Lexis and Westlaw have access to the sources listed in Figure 4.1.

It is important to consider that, in all your research projects, electronic resources contain much more comprehensive materials from the federal than the state systems. As such, you need to develop your skills in both traditional and electronic research.

FIGURE 4.1
Sources of Law and Legal Research

Primary Sources	Secondary Sources
Constitutions	Encyclopedias
Statutes	*American Jurisprudence* (Am. Jur. 2d)
Administrative law	*Corpus Juris Secundum* (Cor. Jur. 2d)
Regulations	State-specific Mass. practice
Federal (e.g., EPA)	Digests
State (e.g., zoning)	*Index to Legal Periodicals*
Local ordinances	Legal dictionaries
Court rules	Legal thesauruses
Case reporters (e.g., Atlantic Reporter)	*American Law Reports* (ALR)
Loose-leaf services	Annotations
	Journals

PRACTICE TIP

Review the chart of legal research sources. Identify the regional reporters for your home state as well as local state sources such as county reporters. Also, locate reporters for specialty areas of practice such as evidence or tax law. Note the correct citation format for each source and retain in your PRM for easy future reference.

The individual paralegal develops his or her personal style when performing legal research. Regardless of style, however, paralegals need to follow the basic steps in the legal research process for every project. (See Figure 4.2.) If a step is skipped or is given inappropriate attention, the risk of misstatement of the law or, worse yet, misrepresentation of client interests becomes a stronger probability. Attention to detail and process minimizes this potential problem. The chart of source categories can be an invaluable tool. Learning how to navigate the research process is also important.

Step 1. Gather All Relevant Information

At step one you will gather all relevant information. The kind of material you should have includes the client case file, the issues raised and questions posed for the research assignment, additional documents, or the evidence collected and the notes from your legal issues section in your client file. Witness statements, client intake interviews, documents in the client file, videotapes, and expert witness opinions or statements also would be relevant. If either side has provided responses to **interrogatories**, which are written questions presented by the parties to the other, the responses would be extremely relevant.

interrogatories
A discovery tool in the form of a series of written questions that are answered by the party in writing, to be answered under oath.

Example:

You are researching a personal injury claim filed against your client, Tuna's Bait and Tackle Shop. The plaintiff claims severe back injury and has presented medical bills totally $100,000. Your case file also contains medical records indicating the plaintiff has a history of back injuries and has been treated by a variety of medical practitioners over the years for back-related problems. At the point of preparing for the research, this is significant because you also would want to look at preexisting conditions and possible relevance to damages in similar cases.

PRACTICE TIP

The more organized your client file, the easier it will be to organize your research project and formulate meaningful lists of **key search terms** and research issues.

key search terms
Words or phrases used in legal research to help focus the research.

FIGURE 4.2
Steps in the Legal Research Process

1. Gather all relevant information.
2. Prepare for research.
3. Identify the legal issue or question.
4. Identify key words.
5. Explore secondary sources.
6. Locate the primary authority.
7. Review and update source information.
8. Draft your research memorandum.

PRACTICE TIP

Include a section in the client file that you label "research" or "legal issues." Collect your notes on issues and questions that arise as you work with the client file. This file is also a good source for key words and research issues when you begin to formulate your research strategy.

Step 2. Prepare for Research

Step two of the process begins when the relevant materials are gathered and organized. You may be asking yourself whether reviewing the relevant materials and jotting down what the supervising attorney wants you to research, that is, the law regarding personal injury resulting from a dog bite, is sufficient preparation. You may even have considered that, once you understand the research assignment, you really need only go to one source and look at law related to that topic. If this is your approach, there is only one sure outcome. The research will be at best cursory and, more likely, inadequate and ineffective to the client's case facts. Gathering and reviewing relevant material is the only way to ensure that the research you conduct actually relates appropriately to the research question.

If your supervising attorney asks for research on personal injury related to a dog bite, adequate preparation would include reviewing what you know about dog bite cases and related damages. Then think through where to begin looking. If you are confident in your knowledge of the law from primary sources, you may begin there. If, on the other hand, you need to develop a better understanding, you should begin by exploring some secondary sources. Without reviewing the client's case facts, you may miss some facts that prove **mitigating** (minimizing) or **aggravating** (enhancing) under the law. You should know the facts of the client prior to commencing the research. Regardless of your organizational style, get into the habit of taking notes either manually or electronically and keeping them somewhere for future reference. As your workload increases, you will find that you may occasionally forget some details. Those forgotten items could make enormous differences in the argument crafted and the client outcome.

mitigating
To lessen in intensity or amount.

aggravating
Enhancing.

Step 3. Identify the Legal Issue or Question

Step three, identifying the legal question, extends the research topic into a more specific issue relevant to the unique facts of your client's case. This stage points to another indication of the utility of developing the skill of asking questions and learning from the answers received how to ask the right follow-up questions. The right question is always the question you remember to ask. If questions occur while conducting the research, jot them down. If you are unclear as to the significance of a particular source, make a note and review with your supervising attorney. If you are asking the client questions, and something unexpected comes up in the discussion, be sure to make a note and go back to it.

You may begin your research with one question, but, as you develop your results, you may need to modify the initial approach. What is important is having a question that relates to the research topic closely enough to make the results meaningful without eliminating an area of investigation. Be careful to avoid using a question that is so general you spend a great deal of time researching materials that prove ultimately to be irrelevant to your issue.

Step 4. Identify Key Words

key words
Terms used in legal research to identify the law related to your case facts and legal issues.

Step four of the process is to identify **key words** to use for starting your research investigation. Pick out words or word groups that relate to the general scope of the project. Create your key words by focusing on the people, places, things, and other aspects of the material gathered at the preparation stage such as expert witnesses. Using general categories such as injuries, damages, liability, product liability, and pet owner responsibility to organize your key word search also helps you keep your results organized and relates the law you research with the case facts.

Let's look at an example to apply the research steps.

Example:

Charlie Tuna owns a small business, Tuna's Bait & Tackle Shop. A customer, Chuck Caster, came into the store early one Saturday morning to purchase bait for the fishing tournament he entered later that day. After picking out his bait and two lures, Chuck was on his way out of the store when he slipped and fell. As he hit the floor, the hooks in the lures stuck into his right index finger, and he bled onto the floor. While Charlie was calling an ambulance, Bertha entered the store and slipped on the pool of blood beside Chuck's body, which was still lying on the floor and bleeding a great deal.

Looking for key words for the above case scenario fact pattern starts with the people, place, events, and relief any of the people might seek.

PRACTICE TIP

As you refine your skills and gain experience, you will find terms used regularly so that formulating key word lists becomes easier. Nonetheless, take as much time as you need to develop a list that adequately targets the law and your case facts to ensure that you develop your research effectively and efficiently.

Team Activity Exercise

Work with your team members to develop a key word list for the Tuna's Bait and Tackle Shop case. Develop lists individually and then compare what the members have developed. Discuss the choices you made as well as your comments on the choices of others. Also, discuss the process sand the analysis your team members applied to the task.

Example:

People key words:
- Business
- Business owner
- Customer
- Business invitee

Event key words:
- Slip and fall
- Customer injury
- Negligence

Relief key words:
- Compensatory damages
- Business slip and fall
- Punitive damages
- Damages and negligence

This list of terms provides a starting point and is not intended to represent an exhaustive list. Your personal style may direct you to another approach, but, in some fashion or manner, using key words in your legal research is an efficient way to target your research quickly.

To start a list of key words, first go to the case facts and focus on people, the persons involved, not merely by name, but rather in terms of relationships. This means if the facts arise in a business, and the injured party is a customer, use customer and businesses. Place investigations look at where the acts or complained-of behavior occurred. Use specific references, such as a store, a restaurant, or a neighbor's yard. When looking at injury, specific details of nature and cause of injury will be helpful. Chuck had a bleeding index finger, fishhook stick, slip and fall, blood, and injury. You can begin generating your key words by looking at things involved in the case. In the Bait Shop example, relevant things might include the lures and perhaps fishing gear. In the final analysis, this may be an unnecessary fact, but for now include it. You may eliminate it after other research indicates it is not a key issue. The incident occurred when the fishhook stuck into the finger when the customer was leaving the store. This might indicate negligence in packaging of the lures and hooks purchased. Consider these only as suggestions to get you thinking.

compensatory damages
A payment to make up for a wrong committed and return the nonbreaching party to a position where the effect or the breach has been neutralized.

punitive damages
An amount of money awarded to a nonbreaching party that is not based on the actual losses incurred by that party, but as a punishment to the breaching party for the commission of an intentional wrong.

The plaintiff in a lawsuit typically wants to be compensated for payment of medical bills and any other expenses incurred as a result of the injuries sustained. In the Tuna's Bait and Tackle Shop case, the plaintiff also may seek reimbursement for the lost tournament entry fee and repayment of monies spent that day for the bait and lures. These expenditures are **compensatory damages** because they compensate for expenses incurred that are directly related to the incident.

Note in the list above that *punitive damages* is among the key words. **Punitive damages** are monetary awards to the plaintiff made to punish the wrongdoer. Check the law in your home state to determine when punitive damage awards are permitted. Whatever you learn about this kind of damage award is valuable information. Knowing the law enables you to professionally discuss the elements of relief with the client as early as the intake interview and to ask questions targeting information related to all available damages. When writing the research memorandum, include discussion on punitive damages in your jurisdiction.

On the other hand, if you fail to research this point and punitive damage awards are permitted in your home state, your memorandum would be incomplete and, more important, misstate the law. The supervising attorney has the ultimate responsibility for the work done by the paralegal,

PRACTICE TIP

You want too many key words when starting your search rather than too few. As you begin to work through the process, you will eliminate some words entirely or replace them with others. That is a better option than starting with too few.

RESEARCH THIS!

Locate the *West's Annotated Case Digests* for your home jurisdiction related to negligence. Go through the index and find sections related to negligence and businesses. Read some of the case opinions to become familiar with key words and the status of law in your home state.

so he or she would have to check that the statement of law is correct. However, you diminish your value to the attorney if he or she learns that your research is either incomplete or inaccurate.

Begin to become familiar with common key words. Many of your legal research sources include index sections of key words used. Annotated case reporters also include terms used regularly and commonly understood by researchers. This is not to say that you will match your search terms only to those terms. However, the commonly used terms are an excellent research starting point and often are extremely useful.

Step 5. Explore Secondary Sources

Step five of the legal research process entails exploring secondary sources. This is helpful when researching an unfamiliar legal issue. Secondary sources are valuable for gaining an understanding and overview of the theories and concepts. Another benefit to researching secondary sources is expanding your understanding and facility with legal conceptualization and framing issues and arguments. As you read through the materials, you learn about how legal arguments are constructed and how the concepts relate to one another.

secondary sources of law (secondary authority)
Authority that analyzes the law such as a treatise, encyclopedia, or law review article.

Secondary sources include treatises, law school journals, and other professional publications such as bar journals. Research in these sources begins in much the same way as your primary source research. First, target your general topic and then rely on the key words list to refine your search. Take notes to help you integrate the concepts and theories with the facts. If yours is a state rather than federal issue, focus your attention on state law. Target the most appropriate sources first, including local, state, and federal secondary and primary law. To expand your own understanding of the law, when you have time available, do some research in broad topic areas using these secondary source materials.

Step 6. Locate the Primary Authority

primary sources of law
State the law in the state or federal system and can be found in statutes, constitutions, rules of procedure, codes, and case law; that is, the most fundamental place in which law was established.

In step six of the legal research process, you move from secondary to **primary sources**, which you may recall include statutes, case law, agency regulations and rules, and the constitutions. In many cases, as you conduct your secondary source research, primary sources are mentioned. Note any references of that kind because they will surely be of value later in the process.

PRACTICE TIP

Review! Review! Review! Question! Question! Question! Analyze! Analyze! Analyze! In every step along the way, you need to analyze as well as when you are at the end of the research process. Do not try to read everything you find, and begin the analysis, critical thinking, and synthesis of concepts as you go along.

CYBER TRIP

Visit then NFPA Research Web site for tips and information about the research process: www.paralegals.org/displaycommon.cfm?an=1. Keep this link and refer to it regularly for updates from your professional peers and other research experts.

PRACTICE TIP

When doing traditional or manual research, you must check the pocket parts, or back section addenda, to be certain the law you refer to is the most current.

pocket parts
Annual supplements to digests.

CYBER TRIP

For a variety of articles discussing legal research and the writing format and recommendations, you should visit the following: www.outreach.utk.edu/ljp/publications/cites.html.

Team Activity Exercise

One-half of the team members should represent the traditional locators and the other, the electronic searchers. Each group should retrieve one case from each of the sources listed in Figure 4.1. When you have completed your searches, compare the results and prepare a brief description of the process and results, including any tips you can share with your colleagues.

Step 7. Review and Update Source Information

Step seven entails evaluating, analyzing, and updating your information from all sources. Assess where you are and what you have and check that you have the most current source. When doing traditional or manual research, you *must* check the **pocket parts** addenda in the back section of every volume of primary law sources. Pocket parts are updated regularly while the bound volumes are revised at less-frequent intervals. When researching, it is your responsibility to cite to the most current law. A good way to remember to check the pocket part is to start the research there and then go to the bound text.

Step 8. Draft Your Research Memorandum

Step eight is the point at which you begin drafting your legal memorandum. The most important tip for this step is to be sure to cite your legal sources. Plagiarism is unacceptable in school and professional writing as well as in a legal setting that requires source citations. This is a mandatory and not an elective rule. Ensuring that you properly cite your sources begins with noting the source in your research. It is extremely frustrating to make a notation on a point of law without the citation and weeks later, when reviewing the material, you realize that you have no idea where the information came from, so you have to redo the research.

Not only must you cite to your reference sources, but you also must state the law accurately. If you read a case that stands for a particular proposition or point of law and an exception is mentioned, be sure to make note of the exception in your memorandum with the correct legal citation. Even though the supervising attorney has the ultimate responsibility for the accuracy of the research and the statement of law, this does not change your responsibility to scrupulously cite and report what you find in your research.

LEGAL CITATIONS

citation
Information about a legal source directing you to the volume and page in which the legal source appears.

Another important paralegal tool involves understanding the system of legal citation, both the design and navigation through the system. A **citation** tells the reader the precise location of the legal case, regulation, article, or statute. The form of the references may appear somewhat peculiar at first glance, but you will quickly master the system. No matter what country or state you are in, if you look at the citation, you can find the case. This is the purpose of the system.

Properly attributing the legal issue, opinion, or conclusion is mandatory in all legal research and writing. Consistency is critical. Everyone who reads a case should know where to find and

PRACTICE TIP

Checklist for legal citations:

Accuracy:	Cite the source as you find it exactly.
Consistency:	Use the format recommended.
Attribution:	Always insert the source.
Uniformity:	Keep your writing and citing uniform as to style and content.

RESEARCH THIS!

Refer to a copy of *The Bluebook* or *ALWD Citation Manual* and locate the various sources represented by the citations in the string cite above. Make note of the complete name of the source. When you locate the case, read the case opinion.

review the cases cited within the case opinion. Finally, accuracy is essential. A heavy burden is placed on the writer to properly interpret the law. In legal writing, the reader may wish to check the cases cited. Thus, the source must be easy to locate. The opinions you report must accurately reflect what you actually read.

***The Bluebook: A Uniform System of Citation,* 17th ed.**
Widely used legal citation resource, published by the Harvard Law Review Association, that is regularly revised and updated.

ALWD Citation Manual
A legal citation resource, published by the Association of Legal Writing Directors, that contains local and state sources that may not be found in The Bluebook.

You do not need to memorize each reference code. There are two main sources for everything you need to know about legal citations, including lists of the abbreviations and resources. The most widely used resource authority is ***The Bluebook: A Uniform System of Citation,* 17th ed.**, and it is regularly revised and updated. The ***ALWD Citation Manual*** does a similar job but contains more interpreting explanation. Published by the Association of Legal Writing Directors, the ALWD contains local and state sources that may not be found in *The Bluebook*. The primary difference between the two is the degree of explanation and the state source reference material in the *ALWD*. Both sources have sections listing abbreviations used in legal citations. It is a reasonable assumption that, if nothing is mentioned specifically directing use of *ALWD Citation* format, *Bluebook* format applies. While the differences are small, nonetheless, there are some. Your supervising attorney may have a preference, so be sure to check that as well.

Cases get reversed, overturned on appeal, or superseded by different interpretations of law. Any of these actions render a case holding inapplicable and certainly not persuasive. As such, you must continually review your research results, particularly in cases that extend over a long period, to ensure that the law is current. Likewise, you must ensure the citation relates to the most current activity on the case. This means that, in all instances, you must use the citation from the highest level within the system that considered the case.

The first step in effective legal research is understanding what the citation means and where it directs the researcher to look. Figure 4.3 contains a legal citation from an actual case. The first step in effective citation use is identifying the parts of the citation format. Look at Figure 4.3 to identify the discrete parts of the citation. *Meritor Savings Bank* is the name of the **appellant**, or party presenting the issue for review. Note that *v.* is used. You also may see *vs*. or even *versus*. In all cases, however, what follows identifies the second-named or opposing party. Thus, *Vinson* is the last name of the second-named party, the **appellee**, who responds to the appellant's argument. Remember, the defendant is the party against whom the action is brought at the trial or lower-court level. The appellant is the responding party, or the party who prevailed at the lower-court level. The next number to appear, *477*, is the volume of the source book in which the case is located. The next letters, *U.S.*, tells you the book collection to search, which, in this case, is the United States Reporter series. The number following the letters, *57*, tells you the number of the first page on which the case is located within the volume. The next number, if there is a second number in the citation, in this example *60*, is the exact page on which the reference cited is found. If nothing from the case opinion is quoted directly, the second page number is not used. The last portion of the citation in Figure 4.3, in parentheses, is the year in which the case was decided.

appellant
The party filing the appeal; that is, bringing the case to the appeals court.

appellees
The prevailing party in the lower court, who will respond to the appellant's argument.

To recap the story in a citation, visualize yourself standing at the door of the local law library. Your supervising attorney has asked you to find the case. U.S. tells you to go to the United States

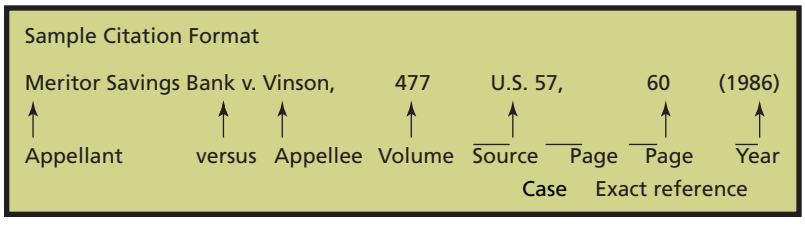


FIGURE 4.3
Case Citation, U.S. Supreme Court (Federal)

FIGURE 4.4
Multiple Reference Source Citations

COMMUNITY FOR CREATIVE NON-VIOLENCE ET AL. v. REID
No. 88-293
SUPREME COURT OF THE UNITED STATES
490 U.S. 730; 109 S. Ct. 2166; 104 L. Ed. 2d 811; 1989 U.S. LEXIS 2727; 57 U.S.L.W. 4607; 10 U.S.P.Q.2D (BNA) 1985; Copy. L. Rep. (CCH) P26, 425; 16 Media L. Rep. 1769
March 29, 1989, Argued
June 5, 1989, Decided
PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.
DISPOSITION: 270 U. S. App. D. C. 26, 846 F.2d 1485, affirmed.

Supreme Court Reporter series; 477 is the volume and 57, the precise page in the United States Reporter. Sure enough, when you open the page, you will find *Meritor Savings Bank v. Vinson*. Typically, the case report starts with a summary of the facts in the first section or two, followed by legal analysis of the facts and law. Lastly, you will read the **case holding**, or the statement of law the case opinion supports.

case holding
The statement of law the case opinion supports.

The example in Figure 4.4 shows a case citation reported in several sources. All of the citations relate to the history of the case and the various levels of review for the case. For purposes of legal writing, the long list or string of case citations may be condensed to the following:

Cmty. for Creative Nonviolence v. Reid, 490 U.S. 730 (1989).

Both the complete or *string citation* and the second, shorter version tell you everything you need to know to locate the case. When you use the shorter form to locate the case, the case history is included so you will learn the same information about the history of the case when you locate it using the short form as you do from reading the entire string of citations.

The court generally renders an opinion on an actual controversy. When a court is asked to render an opinion on the law as it *may be applied* to facts or issues that have not yet occurred, the result would be an **advisory opinion**. Courts can only render such opinions in a narrowly defined set of circumstances. In most instances, however, the case opinions you read relate to a real controversy, actual people, and case facts. In the event the opinion is advisory, the source would clearly and unambiguously note the unusual circumstances and limited purposes for which the opinion was delivered.

advisory opinion
Statement of potential interpretation of law in a future opinion made without real case facts at issue.

Team Activity Exercise

Locate each of the materials identified in the Figure 4.5 chart of commonly used citations (see p. 76). Identify specifically the complete name of the source, as well as the legal subject matter in the opinion or other source. Use either *The Bluebook* or *ALWD Citation Manual* to guide your search for the full name represented by the abbreviations.

RESEARCH THIS!

Locate this case in a traditional library: *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111 (7th Cir. Ill. 1986). Check any history or additional citations to other court levels that entertained the case and locate those sources as well. Briefly, summarize the steps you took to find the case using traditional research methods.

FIGURE 4.5
Commonly Used Citation Examples

Constitutions

U.S. CONST. amend. XIV, § 1.
U.S. CONST. art. III, § 2, cl. 2.
U.S. CONST. amend. XIII, § 2.
N.Y. CONST. art. I, § 9, cl. 2.

Statutes

15 U.S.C. § 1414 (2000).
IOWA CODE § 259A.5 (2005).

Court Rules

FED. R. CIV. P. 12(b)(6).
FED. R. CRIM. P. 7(b).
HAW. FAM. CT. R. 106.
N.J. CT. R. 3:8-3.

Case Citations

Wilson v. Mar. Overseas Corp., 150 F.3d 1, 6–7 (1st Cir. 1998).
Beale v. Sec'y of State, 1997 Me. 82, ¶ 7, 693 A.2d 336, 339.

Courts of Appeal

Antonov v. County of Los Angeles Dep't of Pub. Soc. Servs., 103 F.3d 137 (9th Cir. 1996).
Chatchka v. Soc'y for Concerned Citizens Interested in Equal., 69 F.3d 666 (5th Cir. 1996).

Court of Appeals, Federal Circuit

Oregon Steel Mills, Inc. v. United States, 862 F.2d 1541 (Fed. Cir. 1988).

Supreme Court (Federal)

Brown v. Helvering, 291 U.S. 193, 203 (1934).
John Doe Agency v. John Doe Corp., 493 U.S. 146, 159–60 (1934) (Stevens, J., dissenting).

Court of Federal Claims

Youngstown Steel Equip. Sales, Inc. v. United States, 20 Cl. Ct. 517 (1990), *rev'd*, 935 F.2d 281 (Fed. Cir. 1991)

RESEARCH THIS!

Locate and review 42 U.S.C. § 1395. Briefly summarize what you find. Now locate the same section in the annotated version. Take some notes on the differences and discuss both the process and the results with your classmates.

RESEARCH THIS!

Locate the statute, 23 Vt. Stat. § 1185, using traditional research sources. Briefly, describe the contents of the statute as well as the process involved in locating the statute. If your search required looking into federal statutes, you may be asked to find the following:

42 U.S.C. § 1395.

The federal statutory references are in the same format as state statutory citations. Begin by going to the United States Code (U.S.C.). Then locate section or title 42, then more specifically section 1395. Remember to use the annotations for more explanatory material to enhance your understanding of the law located.

Federal and State Statute Citation Forms

Your may research either state or federal statutes. Locating the statute you need might begin with your supervising attorney giving you a note that looks something like the following:

23 Vt. Stat. § 1185

To find the cited statute, go to Vermont Statutes, signified by the abbreviation *Vt. Stat.* If you have no idea where to start looking for *Vt. Stat*., *The Bluebook* and *ALWD Citation Manual* contain lists of abbreviations. The specific section is the number before the state abbreviation, which, in our example, is 23. This is the also often referred to as the *title* or sectional division within the statute. The title number denotes an entire section or body of law on that subject, for example, Domestic Relations or Real Property. If any law is changed, added, or repealed, it will be added to that title or section. With traditional libraries, the pocket part of the volume reports recent changes, repeals, additions, or modifications. Once you find the exact title, turn to section or § 1185 and you will be exactly where you need to go. Remember to check in both the pocket part and the bound volume.

Electronic Citation and Reference Research Sources

concurrence
Another view or analysis written by a member of the same reviewing panel.

concurring opinion
An opinion in which a judge who agrees with the ultimate result wishes to apply different reasoning from that in the majority opinion.

holding
That aspect of a court opinion which directly affects the outcome of the case; it is composed of the reasoning necessary and sufficient to reach the disposition.

majority opinion
An opinion where more than half of the justices agree with the decision. This opinion is precedent.

The trend toward using electronic research sources and the enormous amount of material available through this means mandates that you become familiar with finding and citing this material. Generally, legal opinions located through electronic research are cited the same as traditional citations. With secondary sources located on the Internet, you must note exactly where on the Web you found the material. Examples of electronically retrieved nonlegal research formats are provided in Figure 4.6.

The examples in Figure 4.6 include the URL or other specific location from which the materials were retrieved. It is not necessary to reproduce the entire URL if it is several lines long. Reproduce sufficient segments to get the reader to the site, and through the links within the site, to locate the article.

Materials reproduced electronically often have no page numbers. When quoting from specific parts of electronically retrieved materials that have no page numbers, insert the paragraph number where the page would appear in traditional reference citations.

Reading Case Opinions

Legal writing encourages liberal use of citations. The law relies heavily on precedent, that is, prior similar case decisions. Liberal use of citations to precedent enhances the impact of your legal argument.

When reading some case opinions, you will find several sections: some are labeled *dissenting opinions* and others, *concurring opinions*. A **concurrence**, or **concurring opinion**, is another view or analysis written by a member of the same reviewing panel. The **holding** is the legal point or proposition the case decision supports. Only a majority of the judges is required to decide a case. The opinion they present is the **majority opinion**. There may be an opinion

FIGURE 4.6
Reference Format for Nonlegal Materials Located through Electronic Research

Periodical

Author, A. A., Author, B. B., & Author, C. C. (2000). Title of article. Title of Periodical, xx, xxxxxx. Retrieved month day, year, from source: [add exact URL].

Document

Author, A. A. (2000). Title of work. Retrieved month day, year, from [add exact URL].

PRACTICE TIP

Discuss the dissent in your research memorandum and note the facts mentioned in the opinion that might have caused the majority to join with the dissent.

PRACTICE TIP

Pay close attention to the dissenting opinions. They are invaluable tools. You may even want to retain copies of compelling dissenting opinions in your PRM or other research file for future use and reference.

PRACTICE TIP

When facing a legal fact scenario and law that do not match the question, then question again. Why not? How can they be made consistent? What could be done to make them compatible? How can the law support the argument favoring an exception or different outcome? Then frame your key words and begin the research process.

or position statement by one or more of the judges who disagree with the majority opinion, known as **dissenting opinions**, and these also may be included in the case report. There is often as much value in the dissents as in the majority. Case opinions contain a great deal of discussion and analysis that may not be directly related to the issue presented. **Dicta** is the comment or discussion included by the judge writing the opinion that has no authoritative or persuasive value. It is important to develop skill in distinguishing dicta from relevant portions of the case opinion.

dissenting opinions
Opinion in which a judge disagrees with the result reached by the majority; an opinion outlining the reasons for the dissent, which often critiques the majority and any concurring opinions.

dicta
Discussion included in the opinion with no authoritative or persuasive value; they are without legal weight but, nonetheless, valuable.

distinguishing
Explaining why the factual differences call for a decision differing from established law.

Sometimes, a dissent tells the readers about another issue closely related to the facts and law of the case that should be addressed. Such a dissent alerts the reader that if a case closely related to the position of the dissent comes before the court, the law may be different than the majority opinion.

Understanding why precedent does not fit your facts is as important as understanding why it does. If your facts do not match the current law, it does not necessarily signify that your position cannot prevail. It means your argument may be more difficult to frame persuasively. There are techniques to support legal positions for which there is no precise law on point.

Suppose, when conducting your research, it is clear there is no law related to the facts and issues. You find law that, while close, is not exactly what your case requires. In that case, you cite to the law that is not on point with the facts of your case and why existing law does not apply. This is **distinguishing**, or separating, your case from existing law.

To effectively distinguish your case, explain why your case facts should be seen as sufficiently different to support a different decision. Next, use existing law to support the discrete parts of your argument. This may be an opportunity to present analysis from dissenting opinions in some of the holdings of existing law. Finally, your argument should make clear that the facts are sufficient to support the modification.

As with other aspects of legal research, the supervising attorney ultimately decides if the argument will be presented. You will be more likely to make sophisticated and more complex legal arguments as you gain experience.

TYPES OF LAW TO RESEARCH AND CITE

mandatory authority
Authority that is binding upon the court considering the issue—a statute or regulation from the relevant jurisdiction that applies directly; a case from a higher court in the same jurisdiction that is directly on point; or a constitutional provision that is applicable and controlling.

There are many types of law to research and cite. Some of the major classifications are criminal, civil, administrative, constitutional, and procedural, with both federal and state law in each classification. You may recall from the chart in Figure 4.1, presented earlier, that sources are generally primary or secondary. The primary sources are **mandatory authority** in their influence on legal decision making. A judge is bound to rule with existing law. The judge cannot decide he or she does not like a particular statute and, thus, will not apply it. With a statute on point, the judicial opinion must be consistent with that law. An example would be as follows: If the Rules of Civil Procedure in your jurisdiction require filing the answer to a complaint within 30 days of service, the judge cannot decide that an answer may be filed 42 days after the complaint and still considered timely filed because that puts less pressure on the attorneys.

Similarly, if the case or common law establishes that someone who actually sees an accident and is related to the parties can recover damages under the bystander rule, then the judge cannot decide that a third cousin living in another state also can recover damages. The judge may be emotionally touched. However, that is an insufficient basis for making an exception. In fact,

persuasive authority
A source of law or legal authority that is not binding on the court in deciding a case but may be used by the court for guidance, such as law review articles; all nonmandatory primary authority.

if the judge did make the exception, that would be legislating and not interpreting the law. You will recall from Chapter 3 that the legislative branch legislates and the judiciary interprets the law.

On the other hand, there are situations in which there is no law applicable to the facts, but there are case opinions that are close. In those cases, the law not directly applicable is **persuasive authority**, or influential, and may be considered. However, it is not mandatory for the judge to apply.

SHEPARD'S CITING

Shepard's Citations
Reference system that reports the legal authority referring to the legal position of the case and making reference to the case opinion.

Shepardizing cases
Using *Shepard's* verification and updating system for cases, statutes, and other legal resources.

When doing legal research, once one case is located, the research is not complete. You then need to recheck the current status of the law and the history of the case. You may remember that this process is included in step seven of the research process. At this step, ***Shepard's Citations*** become an invaluable tool. *Shepard's* is an index or citator resource containing citations to legal authority discussing, analyzing, or referring to the legal position of the case.

Shepardizing cases is a technique of checking the citation to ensure the status of the case as law has not changed. Through *Shepard's* traditional volumes and electronic search tools, you can track the history of any case including when the case is referenced in other cases. You also can determine if and when the case was reviewed on appeal and any pertinent information related to the case. As with many other sources in legal research, Shepardizing initially may appear to be too complex to be useful. As you have found with other sources, once you know the rudiments, you will have an easy time of it. The rewards of producing concise and well-reasoned legal research projects more than validate the time you take to perfect your skills. The electronic version of *Shepard's* citators is more current than the traditional volumes, but the text volumes remain an excellent research tool. Always check the pocket parts with this text material as with all other research sources.

Shepard's has citator series for both state and federal law. The beginning section of each volume provides a list of the abbreviations used and the word replaced. Shepardizing is valuable for a number of reasons. First, of course, you can determine if your law is still current. You also may be directed to secondary sources in which the law in the case was discussed. Therefore, *Shepard's* is also an excellent tool for contextualizing the law and enhancing your analysis in legal argument and writing.

COMPUTER-ASSISTED LEGAL RESEARCH (CALR)

Manual or traditional research uses real books or text materials. On the other hand, *computer-assisted legal research (CALR)* uses electronically reproduced materials. As with every other aspect of our lives, legal research relies on electronic databases for enormous and readily available sources of information. CALR is a great tool once you understand its value and limitations. You should develop skill with this tool only after getting comfortable with traditional research. In so doing, you will develop a good understanding of the sheer volume of information in any subtopic of law and the process of relating one to another. Both traditional and CALR research are only as valuable as your understanding of how they are used.

Electronic legal resources are derived from, but do not replace, traditional books, magazines, journals, and other paper-based sources. The most important aspect of effective CALR is framing your issue and key words. This is no difference between the process for manual and CALR research. Each step is important in both. You also must bear in mind that state-based materials are not nearly as well represented in electronic sources as in traditional library settings. See Figure 4.7 for a comparison of CALR and traditional research methods.

uniform resource locator (URL)
Precise location of a specific document retrieved from an electronic source or the Web address for the referenced source.

Electronic sources are organized similarly to traditional sources and use the same legal citation form. However, when using some sources retrieved electronically, you will add the **uniform resource locator (URL)** to the citation to ensure the reader can locate the material. The electronic databases are so volatile that the URL is needed to confirm the date and precise location of the reference. Even if the URL should that change in the future, that was correct the day on which you performed the research.

FIGURE 4.7
Comparison of CALR and Traditional Research Methods

CALR Recommended Uses	Traditional Research Recommended
Project required quickly	Research for historical data
Print resource unavailable or incomplete	Print source preferred
No known paper resource	Online sources may not be reliable
Ease of electronic access and use	Online produced too much or irrelevant material
Research on current issue or legal dispute	Learning about the legal area
Unique or novel fact situations	Complex legal issues
Relatively obscure or rare search terms and subject matter	Search terms too general to produce meaningful online results
Checking legal citations	

Lexis
Commercial electronic law database service.

Westlaw
Commercial electronic law database service.

Two well-known commercial electronic law database services are *Lexis* and *Westlaw*. The **Lexis** database contains the full text of federal and state cases, statutes, and administrative regulations. There also are extensive secondary law source materials such as law journals and specialty publications such as tax law or agency materials. **Westlaw** contains similar data to that found on the Lexis service as well as appellate decisions in full-text format. Westlaw uses the key numbering system for both electronic and traditional consistency. The system is internal to West's publications, but nonetheless is a good cross-referencing tool. Both databases are constantly updated and expanded and are valuable resources for CALR.

The list of electronic legal resources is enormous. The federal government, various agencies and departments as well as the judiciary have a wide variety of informational and specific sources. On the other hand, electronic access of state materials is inconsistent and not nearly as comprehensive as for federal materials.

CALR is also a useful investigation tool. For example, you can look for information considered to be in the public domain such as address information or corporation registered agent lists. (See Figure 4.8.) Certain legal liabilities or legal public records—for example, tax liens, judgments against individuals, or bankruptcy filings—are available in some states. A word of caution, however, is in order. These are all compilations and only as good as the information received, so rechecking is certainly advised.

Despite the expanding use of CALR, it is not without some drawbacks. If you experience the electronic system being down and must complete a research project, but you have not done traditional research, you will be unable to complete the task. Courts will not accept late document filings based on an electronic system being down. Particularly if you waited until the relatively last minute to begin the project, most likely you would not even reach anyone with the authority

FIGURE 4.8
Useful Public Domain Databases

Public Domain Databases	Contents
Autotrack XP **www.autotrackxp.com**	Criminal records Traffic violations Property records Driver's license and auto registration Professional licenses
Choicepoint **www.choicepoint.net**	Federal public records data Criminal records and convictions Corporate business records Tax information
Corporate **Information** **www.corporateinformation.com**	U.S. foreign company data Industry profiles Business, scientific, and technical information
Dialog and Datastar **www.dialogweb.com**	Industry-specific scholarly publications Financial data
Dun & Bradstreet **www.dnb.com**	Stock ratings and reports

Eye on Ethics

As with every other aspect of paralegal practice, research also is subject to ethical guidelines. The ABA Model Rules of Professional Conduct can be retrieved at www.abanet.org. The guidelines make clear that the lawyer shall be responsible for the conduct of nonlawyer professionals working with the lawyer, including in the research projects the nonlawyer may perform.

Under the NALA Guidelines for Utilization of Legal Assistants and Paralegals, Guideline 1.3. (refer to Appendix B for the NALA Guidelines), the paralegal should "[u]nderstand the attorney's Rules of Professional Responsibility and these Guidelines in order to avoid any action which would involve the attorney in a violation of the Rules, or give the appearance of professional impropriety."

Given the responsibility of both attorney and paralegal to conduct legal research appropriately and the paralegal ethical obligation to understand the attorney's rules of professional responsibility, it is clear the paralegal is held to a level of performance similar to the attorney when performing legal research.

to grant the extension of time, nor would there be sufficient time to prepare and file the documents required under the rules of procedure when making such a request.

Despite the enormous amount of material that can be retrieved electronically, every research resource may not be generally available. There are some services available for a fee, such as *The Bluebook*. Fee-for-service arrangements present another drawback to CALR. Many of the legal resources still charge fees for access and time used. As such, the cost may outweigh the value as a business decision in the practice. The drawbacks support using CALR to augment rather than replace traditional research methods.

The paralegal ethical codes require the utmost professional care in every task related to the practice, including the quality of the legal research. Particularly with unfamiliar areas of law and research, it is easy to omit relevant material. When a question presents itself, you need to make a note and discuss it with your supervising attorney if you cannot satisfactorily resolve it. It is not good practice to assume that others will correct an error in your analysis or report. Asking questions, analyzing the answer, and applying the response to the project are the best insurance plan for developing your skills.

Read the NALA and one other ethical code or ethics guideline published either by the ABA or other professional paralegal organizations. Briefly, summarize the contents of each, and formulate a list of strategies you could employ to avoid ethical compromise while conducting legal research. Use code sections to support the strategy selected. Retain the codes and your discussion paper in your PRM for easy future use and reference.

Research ethics opinions for paralegals and/or attorneys in your home state. Select one case, and then write an office memorandum that includes summary of the facts, the rule violated, and the case outcome. Recommend a specific strategy based on provisions of a code that will avoid similar situations.

Retain your memorandum, including the case citation or a copy of the case opinion in your PRM for easy future reference.

PRACTICE TIP

Review the NALA and ABA Guidelines for Utilization of Legal Assistants and Paralegals, paying particular attention to the sections related to research. Become familiar with the scope and limitations and discuss any comments or questions with your professional peers and supervising attorney to ensure compliance with ethical guidelines

Summary

In this lesson, you began the process of building legal research and citation skills. You also have explored both primary and secondary sources used in the process. You have learned how to prioritize various sources and the value, in terms of influence on legal reasoning, of the sources in your analysis and legal argument. You should have an understanding of the steps and tools available in the research process to ensure complete and current research results. Finally, you examined the ethical concerns with legal research and looked at some strategies for avoiding ethical compromise.

Key Terms

Advisory opinion
Aggravating
ALWD Citation Manual
American Jurisprudence (Am. Jur. and Am. Jur. 2d)
Analysis
Annotated
Annotated version
Appellant
Appellee
Binding authority
The Bluebook: A Uniform System of Citation, 17th ed.
Case holding
Case reporters
Citation
Code of Federal Regulations (C.F.R.)
Compensatory damages
Computer-assisted legal research (CALR)
Concurrence
Concurring opinion
Corpus Juris Secundum (Cor. Jur. 2d)
Dicta
Digest
Dissenting opinions
Distinguishing
Federal Register
Holding
Interrogatories
Key search terms
Key words
Landmark case
Lexis
Loose-leaf, binder, or pamphlet service
Majority opinion
Mandatory authority
Mitigating
Persuasive authority
Pocket parts
Precedent
Primary sources of law
Punitive damages
Research
Research memorandum
Secondary sources of law (secondary authority)
Shepard's Citations
Shepardizing cases
Stare decisis
Traditional (manual) legal research
Uniform resource locator (URL)
United States Code (U.S.C.)
Westlaw

Review Questions

TRUE AND FALSE

In each of the following, indicate whether the statement is true or false. For each false answer, rewrite the statement to make it true.

1. Precedent does not have to be followed in similar cases in the same jurisdiction.
2. Step three of the research process suggests looking at primary source material.
3. Judges cannot apply new law even when the case facts justify a new interpretation.
4. *The Bluebook* and *ALWD* both contain legal citation information and formats.
5. Secondary research sources provide general information and scholarly discussion of law.
6. Many legal research projects can be performed using CALR.

7. Landmark legal cases determine new law.
8. Often case opinions contain a number of concurring opinions, but there are never any dissents.
9. There are three steps in the research process, but it is unnecessary to apply every one.
10. Legal encyclopedias are considered locators in legal research projects.

Discussion Questions

1. Go to the library and locate the following. In each case, note the exact location in proper citation format.
   a. Federal statutes related to bribery.
   b. Your home state statutes on automobile container laws.
   c. Your home state law on adoption.
   d. A federal statute related to civil procedure.
   e. A Department of Agriculture statute related to federal subsidies for farmers.
   f. A state bureau of professional regulation. Find statutes related to regulation of hairdressers and barbers.
2. Locate *American Jurisprudence* and then the section on duress. After reading through the material, prepare an office memo giving the correct citation format and a brief summary of the contents. Your standpoint should be to provide an outline of the contents of the section, including citation format for the section. Refer to *The Bluebook* or *ALWD* for guidance.
3. Scavenger hunt.
   - Either electronically or manually, find one law review article on original jurisdiction written after 2000; cite the article in appropriate citation format and copy the article. Briefly summarize the contents.
   - Manually locate the *Corpus Juris Secundum* and find the section related to intentional infliction of emotional distress. Record the correct citation for the most recent case used in the definition. Properly and correctly cite the first case relied upon in the definition section (by date).
   - Manually locate your state laws of civil procedure in the state statutes. Make note of the precise location.
   - Find the state reporter digest for your home state. Locate the section related to simple battery. Note the most recent case included and the exact citation, and then go to the case. Briefly summarize the holding.
4. On the Internet, locate your major hometown newspaper. Locate the most recent article dealing with a trial for murder in your state. Note the exact reference citation for the article, then copy the article and retain both in your PRM.
5. On the Internet, locate the Web site for your home state. Next, find your state judiciary. Locate the list of state supreme court justices. Now visit the courts section of the Web site and find one opinion authored by the chief justice of your state supreme court. Briefly summarize the case facts and the holding of the opinion, including correct case citation. List each citation in the opinion. If the first case you locate has no other cases in the opinion, locate another one that does cite to other cases.
6. Select a partner and each of you read the following case facts and create a list of key words for a research project:
   a. The victim was working in his own garage when the owner's dog ran into the garage and bit the victim's left index finger. The injured finger required surgery, swelled considerably after surgery, and caused an uncontrollable spasm; the victim had a 50 percent limitation of active motion in his left forefinger. The superior court denied the owner's requested jury charge that the jury could draw an adverse inference from the victim's failure to call a witness from his last employer to testify as to the availability of work for the victim, who had been a crane operator. The court found that there was no error

because the owner could have called the witness to testify and there was nothing to indicate that the witness would have been more favorable to the victim. The victim received unemployment benefits while he was off work because of his injury. The court held that the unemployment benefits were from a collateral source and, thus, were not to be deducted from the award of damages to the victim because such benefits were not considered in mitigation of the damages. The victim introduced evidence of his steady background, so it was proper to submit a claim for lost earnings to the jury. *Apuzzo v. Seneco*, 178 Conn. 230 (1979).

b. Plaintiff-appellant Joyce Harris appeals from the summary judgment granted in favor of defendant-appellee, United Parcel Service, arising out of her fall on defendant's premises. Plaintiff argues that disputed issues of fact as to defendant's negligence precluded summary judgment. We find no error and affirm for the reasons stated below.

On August 8, 1991, plaintiff entered UPS premises to send a parcel. She passed through automatic doors and started walking on the cement floor of the sales area. It had been raining and water had been tracked in by the patrons [*2] or dripped from raincoats and umbrellas. About ten feet from the door, she slipped and fell injuring her wrist and knee. Plaintiff did not look at the floor, but noticed that her hands and legs were wet after she fell. She concluded water had been tracked in but had no knowledge of how long the condition existed or how extensive it was. *Harris v. United Parcel Serv*., 1994 Ohio App. LEXIS 4841.

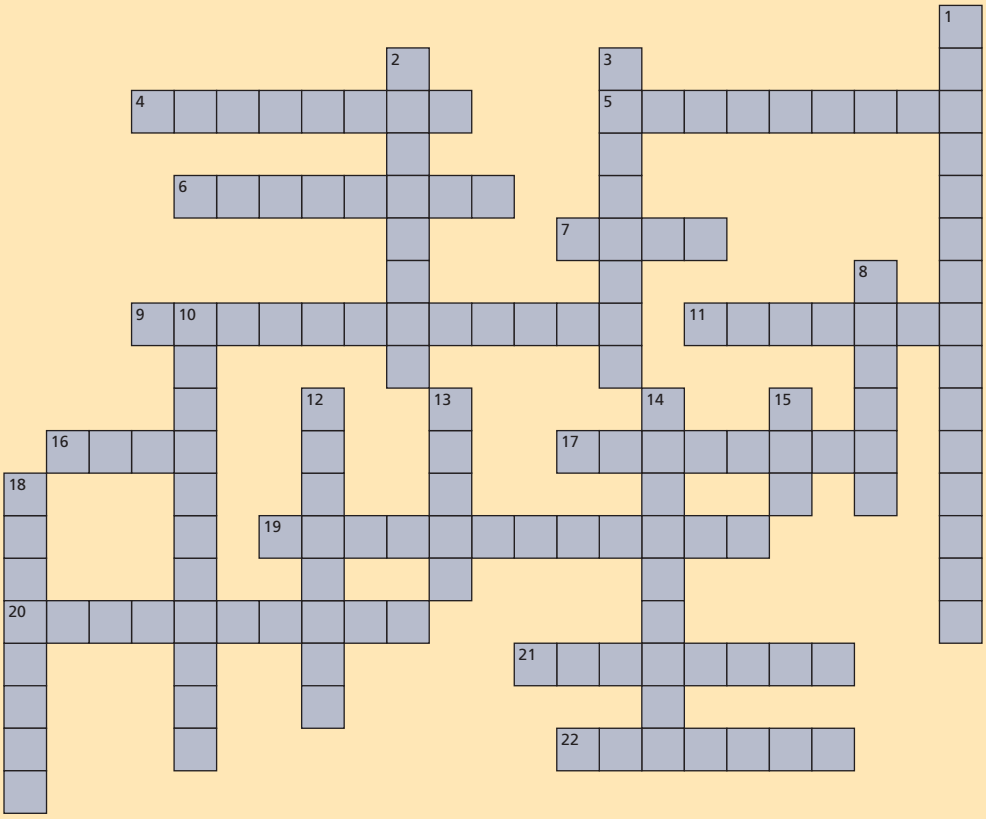
When you have completed your lists, exchange with your partner for review and comment and discuss what each found and the process of creating the lists used by each. Make changes or additions to your own list based on your discussions. Retain the completed assignment in your PRM for easy future reference.

7. Reread the facts from the Tuna's Bait and Tackle Shop scenario presented earlier in the chapter. Using only the information presented, list the primary and secondary sources you would use in your research using your home state for both and cite to specific sections or cases.
8. Locate *Shepard's Citations, Federal*, either electronically or in traditional text volumes, and then find 42 U.S.C. § 1395. Explore how the section is presented and the variety of references contained. Then select one or two of the cases or other statutes that make reference to the Code section. Go to the case, find the reference, and read how it is presented, as well as the general facts of the case. Prepare a brief statement of what you did to find the reference.

Portfolio Assignment

Visit the Web site for the U.S. Supreme Court at www.supremecourtus.gov/ctrules/rulesofthecourt.pdf. Click on the Rules link and locate the rules regarding filings, procedure, and formatting documents submitted to the court, Rules 29–39. After reviewing all of the rules, prepare a chart of the format requirements. Assume the chart will be included in your PRM for future use. Then read Rule 37 regarding amicus briefs. Summarize the contents, including procedures for requesting, filing, and formatting requirements for such briefs. Retain your completed project in your PRM for easy future reference.

Vocabulary Builders



Across

4. Legal research locator method.
5. Legal authority that must be applied.
6. Punish wrongdoer.
7. Association of Legal Writing Directors citation manual.
9. Overrules existing law.
11. Legal principle upheld in case opinion.
16. Electronic legal research.
17. Citation locator service.
19. Award that repays injury-related expenses.
20. Original law with discussion.
21. Manual of legal citation formats.
22. Disagree with appellate decision.

Down

1. Questions exchanged by parties to a lawsuit.
2. Opinion predicting application of law.
3. Respondent in appeal.
8. Topically organized secondary law source.
10. Enhancing.
12. Opinion with analysis of deciding panel.
13. Presents issue raised on appeal.
14. List cases from multiple states within a region.
15. Electronic resource locator or address.
18. Describes library location of legal resource.

Chapter 5

Legal Writing and Analysis

CHAPTER OBJECTIVES

Upon completion of this chapter, the student will be able to:

- Define *legal analysis.*
- Identify discrete parts of a legal memorandum.
- Describe writing rules for professional paralegal writing.
- Discuss tone in legal writing.
- Illustrate an understanding of the IRAC legal analysis model.
- Formulate basic case brief facts and legal questions.
- Write a legal case summary and analysis.
- Demonstrate an understanding of ethics in writing and challenges.

Two of the most important tools in the successful paralegal tool kit are thinking analytically and critically about the law and applying ethical and legal principles to the facts of the case. The written work of a successful paralegal should be a well-organized argument supported by adequate research. The paralegal trained to think as a lawyer thinks will attain personal and professional writing success much more easily. Reaching this goal requires an understanding of the research process, balanced writing about each aspect, and appropriate emotional management to ensure the argument is based on the law and not on personal reactions or beliefs.

In this chapter, we present skills, tools, and the structure with which to begin developing your written legal analysis skill. We will explore basic rules and concepts. It is up to you to refine, moderate, and expand your application of the techniques. This can be an interesting and continuing learning experience if you define your approach, recognize your personal style traits, and relax enough to learn and enjoy the experience.

THINKING ABOUT LAW

persuasive
Influential presentation or interpretation of law that may guide decision but the law does not mandate the interpretation when applied to facts at issue.

Exploring the difference between emotionally driven analysis and rational, fact-based, sound legal analysis will help you develop the most professional, insightful, and **persuasive** legal positions and analytical skills. Emotion and rationality are not mutually exclusive. Both have a place in good legal analysis, but appropriate management of both is essential. They are interrelated and, as such, it is your responsibility to manage each element carefully. While you may have a clear understanding of the proper legal standard, if you cannot communicate that understanding effectively, your knowledge is useless. As we go through the following materials and exercises, you may want to set up a section in your PRM in which you keep materials related to how to think critically and perform legal analysis.

Team Activity Exercise

With your team members, form a list of the seven principles of good legal writing and explain each briefly. Provide an example of the principle as well as an example of writing that fails to meet the principle. Explain the difference. Exchange your paper with a partner, who should then provide a brief critique of each.

memorandum of law
Analysis and application of existing law setting forth the basis for filing the motion.

LEGAL WRITING RULES AND TIPS

PRACTICE TIP

The goal of the communication is presenting what you know.

Do not set a goal of changing your adversary's mind.

Do set the goal of presenting a clear, well-reasoned, and organized analysis.

Some basic concepts in legal writing may be new to you, at least those related to analysis and presentation of the documents. However, the general principles of good writing apply equally in legal writing as they do for all other types of professional writing. General good writing principles will help in all of your legal writing, whether office memoranda, case briefs, research summaries, client opinion letters, or motions with **memoranda of law**. Your writing should clearly state the issue and your position in relation to that issue as well as a clear analysis supported by the law.

Nothing you will learn about writing replaces rules you previously may have learned, so refresh your recollection of good writing skills and rules. You should add the principles we discuss to ensure concise, persuasive, and professional presentations. It is one thing to think through an idea or dilemma clearly, but it is quite something else to express your thoughts in writing. Bear in mind that the reader has nothing else to rely upon other than what appears in black and white. Unlike verbal communications that include body language, intonation, pauses, and such, written communication has only two elements: words and paper. Thus, what you present must be well crafted and explicit. Do not assume your reader knows the specific case facts contributing to your position. If your writing is not explicit, you cannot hope to have the position understood as you intended. See Figure 5.1 for the principles of good legal writing.

Another important communication tool, whether written or verbal, is to embrace the standpoint of telling the reader what you know about the issue. Do not fall into the trap of trying to figure out what the reader would like to know on the topic. Tell your audience how the analysis was

FIGURE 5.1
Principles of Good Legal Writing

Principle One	Think through what you intend to say. This includes thinking about the facts and determining those that have legal significance and those that are compelling if not more emotionally significant.
Principle Two	Organize your thinking. This entails ordering the facts appropriately, deciding what is most important as well as what is a supporting or independent secondary issue.
Principle Three	Determine precisely what question you need to answer. Give a precise, clear, direct answer first, *and then* explain your answer.
Principle Four	Use short, direct simple sentences. The longer the sentences, the greater the likelihood the reader will lose interest and thus miss the point.
Principle Five	Use words with which you are familiar. Do not try to pack as much legalese as possible into your writing. Even lawyers tend to get lost in legalese. So use language you know and understand. This way the reader will also understand.
Principle Six	Use **critique** rather than **criticism**. Briefly, criticism is just an opinion, while critique represents a position that is presented with supporting evidence.
Principle Seven	Do not assume. If a fact or point of law is significant to your argument, state it and explain why. The fact that the reader is familiar with the law is no excuse for assuming the reader already knows some or all of what you need them to know to find your argument persuasive.

critique
A position that is presented with supporting evidence.

criticism
An opinion.

constructed and the conclusion reasonably drawn from the analysis. In short, tell the reader what you know about the issue based on your research and analysis.

Legal argument is a well-reasoned presentation of your position. The dictionary does not include changing the other person's mind in the definition of argument, regardless of which dictionary you use. If that is your goal rather than constructing a well-reasoned argument, you cannot possibly succeed. You undoubtedly do not actually know what is in the reader's mind and, if you do not know what is there, you absolutely cannot change it! Therefore, if you set that goal, you define an unattainable target. If you set a goal of constructing a persuasive argument, that is attainable.

PRACTICE TIPS

Think about what it is you want to express before beginning.

Write some notes, or an outline, to keep your focus.

Review your notes before beginning.

General Writing Tips

Legal writing is similar to any other professional writing in many ways. You will have an introduction, body, and conclusion in legal writing as with any other professional writing. This principle is also true for letters, memos, briefs or other written communication, and e-mails. Think about what you want to say before saying it. Understand the research you have done, and keep to the structure you establish.

If you indicate there are three points, be sure to include three points. Do not announce a number for anything and then fail to deliver or deliver more than stated. Avoid first-person writing. Legal writing should not remind the reader that this is the conclusion or use expressions such as "In my opinion . . ." Regardless of how well constructed or even brilliant the argument, these expressions devalue your writing and neutralize any positive impact the statements made.

PRACTICE TIP

An extremely good rule to apply in legal research and writing is to state, *in one sentence,* precisely what conclusion you want the court to reach. This technique is also helpful when framing issues. This technique gives you a narrowly defined target. Knowing the target or goal is extremely helpful as an organizational tool.

Writing Persuasively

An equally important tool in legal writing is persuasiveness. Developing the skill of writing persuasively takes time and organization. Understanding how to locate the law and critically assess what you read in relation to your case facts is a skill developed over time. Legal analysis is much easier when you relate it to facts. You as the communicator must do that clearly to be effective. If your research is haphazard or your analysis merely cursory, then your argument will not be persuasive.

Put yourself in the reader's position. After completing your research, think about the appropriate relief you wish to secure under the existing law. Think about how you want the court to decide the question. If you use the one-sentence method previously suggested, develop the habit of rereading the one sentence.

When you have completed your first draft, reread your one-sentence statement. As you do so, put yourself in the position of the reader. Whenever you get a sense that you need additional information to make your meaning clear, add it. Ask yourself what would support or explain your presentation more fully. As the answers take shape, jot them down. Then provide the missing information and complete additional research on the law if needed.

While reviewing, verify that your presentation is well organized and logical. Your argument should proceed systematically. Answer one question, which then leads into the second, and so on. With this method, you will not forget any points. Be concise and direct. Complicated arguments tend to lose the reader.

As you organize your writing, start with your strongest point. Then, add your next point. Be sure the additional points can stand alone. Do not add material that only shows you know law in general but adds nothing specific to the analysis and writing.

PRACTICE TIPS

Do not get discouraged! You will master both legal writing style and substance with practice.
Understand the specific task before you start.
If you are not clear, the project results will also be unclear.

FIGURE 5.2
Tips for Setting the Tone in Legal Writing

Tone Tip 1.	Establish the tone you want to use before beginning the actual writing.
Tone Tip 2.	Make direct, not implied assertions. State what you mean and mean what you state.
Tone Tip 3.	Avoid humor in professional writing as a rule.
Tone Tip 4.	Avoid oversimplification or attempts to make any other interpretation but your own utterly ridiculous.
Tone Tip 5.	Avoid informality by eliminating familiar, colloquial language.
Tone Tip 6.	Avoid using "I" and "you" in legal writing. Use instead "we" and, if it is essential to refer to the opposing side, make those references using phrases such as "opposing counsel" or "the opposing position . . ."

Setting the Tone

In the past, as you learned more about writing technique, you developed your own style. This tool should be useful in your legal writing. However, you need to use a professional approach or tone, even as your personal style emerges. If the tone is inconsistent with the message and audience, the argument may fail, regardless of how well crafted.

tone
Language and style used to present an argument; the way a writer communicates a point of view.

What is **tone**? It is the language and style used to present the argument. Some words often associated with tone include stuffy, highbrow, arrogant, comic, informal, casual, tense, and condescending. There are many more, but these examples should be helpful in gaining insight on legal tone. The language, the writer's attitude, his or her analytical skill in applying law to facts, and the organization all contribute to tone. A few tips will help you set the tone for your writing.

The tone you use sustains or extinguishes the reader's interest. See Figure 5.2 for tips on setting tone in your legal writing. All writing submitted should convince without dictating or lecturing. A well-reasoned argument written with an inappropriate tone may fail, regardless of the soundness of the elements and reasoning.

As pointed out in second tip for setting tone, do not assume that, because the reader knows the law, you do not have to state your meaning clearly. The reader should not assume or draw inferences from your writing other than those you want drawn. The risk is substantial that the wrong inference will be drawn. Therefore, state precisely what you mean and do not make any assumptions without clearly stating those assumptions. Regularly remind yourself of the substantial risk of being misunderstood. If your argument requires a bridge between parts one and two, state the bridge so the argument remains consistent and logical. This technique guides the reader's understanding and minimizes unwarranted assumptions or interpretations.

Establishing the appropriate tone also is related to how well you write your argument. A few tips will help you avoid looking both uncertain and unprofessional in your writing. Everyone has experienced a professional meeting or presentation where the speakers say things like "um . . ." or "You know . . ." or "You guys . . ." These are called oral throat clearing or place markers. The speaker is mentally not at the same place with the words, so to get both together again, these devices creep into the presentation. We often do a similar thing in our writing.

Some examples of these written tics or devices are given in Figure 5.3. These dilute the value of what you write. Avoid them in all writing, even your personal correspondence or e-mail communications.

FIGURE 5.3
Phrases to Avoid in Professional Writing

A certain amount of	In fact
Due to the fact that	All intents and purposes
In case of	The nature of the case is
In regard to	The necessity of
The fact of the matter is	With reference to
In conclusion	In my opinion

FIGURE 5.4
Wordy Phrases and Replacements

Wordy Phrase	Replacement
Am hopeful that	Hope
At that point in time	Then
By means of; by reason of	By
Despite the fact that	Although, even though
Give recognition to	Recognize
Have or has knowledge of	Know or knows
In accordance with	By, under
In order to	To
In relation to	About
In the majority of instances	Usually
Is applicable to	Applies to
Is dependent on	Depends on
Make application to	Apply to
Make provision for	Provide for
Provides with an example of	Exemplifies
Until such time as	Until

Wordy phrasing is a related writing problem. We hear wordiness so frequently that it automatically comes into our writing. However, you need to become aware of using more professional and effective replacements, as shown in Figure 5.4

RESEARCH THIS!

Go to the library or search the Internet to find tips on reducing wordiness in writing. Expand on the lists found in Figures 5.3 and 5.4 to create a handy reference guide to use when drafting legal documents.

WRITING ABOUT LAW

argument
Section of the brief where the issues are analyzed through citation of legal authorities.

legal argument
A well-reasoned presentation of your position.

PRACTICE TIPS

Think about what it is you want to express before beginning.

Write some notes, or an outline, to keep your focus.

Evan A. Davis, counsel for Governor Mario Cuomo of New York, had an illustrious legal career in private practice, including working with many beginning legal writers to help them develop and expand their writing skill. He always gave this advice to his students, and seasoned legal writers: "Plunge in."* Mr. Davis does not advocate ignoring the steps and tips, but he does advocate preparing properly and then writing. Acknowledge the difficulty and then tackle the project! You cannot finish the project that you do not start.

To begin, be sure you understand what legal argument really means. **Argument** is a position supported by fact and law. The most effective argument is concise, clear, and direct. Use an organized, readable, understandable form. In some respects, **legal argument** is the same as any other well-written essay. If you have not prepared your research, analyzed your argument, and used the appropriate tone and form, you cannot expect to produce a persuasive argument.

Legal argument commences with an introduction telling the reader what will be done. This section presents the research question and the issue. The body analyzes the question or issue stated in the introduction. The conclusion recaps the issue and the analysis with an answer to the question posed. The conclusion summarizes the research and the legal position resulting from the application of law to the case facts.

The conclusion states unequivocally what the writer wants from the court. If you do not clearly state the relief sought or the legal conclusion from your research, there is little likelihood the

* Tom Goldstein and Jethro Leiberman, *The Lawyer's Guide to Writing Well* (Berkeley: University of California Press, 1989).

FIGURE 5.5
Rules of the Writing Road

1. Decide the purpose of the writing task. Is it informational, analytical, or critique?
2. Know your audience. A memo to your supervising attorney necessarily is written in a very different style than a letter to the client.
3. Identify clearly what you want to say in the written presentation.
4. Relate the facts to the law as you understand it.
5. Recognize the different kinds of facts, that is, causation, damages, case facts related to each possible party.
6. Read before you write; take notes if something appears to have significance, but you are not able to define precisely for what or whom.
7. Simple sentence construction usually works better.
8. Be careful not to overgeneralize.
9. Never assume that the mere fact of reading something makes it true.
10. Never hesitate to state a position, as long as you can support it with fact and/or law.

decision will be as you envisioned. The relief requested should follow logically from the law. This illustrates yet another example of the dangers in assumption with legal writing and analysis.

This is a good place to reiterate the importance of writing clearly and specifically. Do not assume the reader knows what is in your mind or the relief sought; tell the reader to avoid any confusion.

A few rules will help you write effectively about the law. See Figure 5.5 for the rules of the writing road.

There is an enormous difference between having an opinion and taking a supportable position. While both have value, taking a supportable **position** carries more weight because it is supported by law and fact. On the other hand, the **opinion** is merely what you feel. Opinions more often come from an emotion, while positions are supported by fact.

position
Analysis supported by fact.

opinion
Analysis supported by emotion.

It is completely understandable that you hesitate about interpreting the law. The sense that others are more knowledgeable can have an intimidating effect, particularly in the beginning of your legal-analysis and critical-thinking experience. You can do it. Read carefully. Analyze realistically. State your position clearly and directly. Your writing will be satisfying for you and valued by the reader if you follow the guidelines. Case law and legal documents often have an emotional element in the issue. The law, however, relies on critical thinking and analysis.

When you see words that immediately create a strong morally based outrage, more than likely you have **do-gooder arguments** that appeal to the save-the-world attitude. While this approach may be well intentioned, it is insufficient support for persuasive legal argument. Particularly with social issues such as child custody or abortion, it is relatively easy to fall into the trap. Use legal analysis, not emotional appeal, to make your points.

do-gooder arguments
Appeals to the save-the-world attitude.

The case scenario in Figure 5.6 includes many details deliberately. Often, you need to work at teasing out facts with legal significance. In your legal writing, you need to personalize the parties using some facts without irrelevant detail.

FIGURE 5.6
Legal Writing and Analysis of Case Facts

Sample Case Facts

Your office is asked to represent Harry Hamilton in his case against Flossie Smithe, who smashed into his fire-engine-red Edsel. Harry hastens to tell you that the Edsel was really a 1960 Special Edition that he has maintained in flawless condition since that time. The car has all original parts, thus making it almost impossible to place a value on it. You, of course, have never heard of an Edsel so this means virtually nothing to you. On the day in question, the sun was shining brightly as Harry took his "baby" out for some sun and fun. Flossie Smithe rounded the bend and could not stop her Hudson Road Tracker fast enough to avoid smashing into Harry's Edsel. Harry was dumbfounded. His Edsel was smashed on the side from one end to the other. To add insult to injury, when Flossie finally stopped, her car tore down the fence of Beulah Battle's heifer farm. The herd went galloping onto the road and the flying heifer hooves dented the Edsel. Beulah was yelling to her prized heifers to return since they were fattening up for the 4H show starting the following week. The hysteria was harmful to the heifers, or so she screamed repeatedly. Harry was a wreck. The car was ruined, or so he thought. The cows were milling around while Beulah tried desperately to herd them all together and get them back to the barn.

damages
Money paid to compensate for loss or injury.

concurring opinion
An opinion in which a judge who agrees with the ultimate result wishes to apply different reasoning from that in the majority opinion.

holding
That aspect of a court opinion which directly affects the outcome of the case; it is composed of the reasoning necessary and sufficient to reach the disposition.

dissenting opinions
Opinion in which a judge disagrees with the result reached by the majority; an opinion outlining the reasons for the dissent, which often critiques the majority and any concurring opinions.

dicta
A statement made by the court in a case that is beyond what is necessary to reach the final decision.

Example A:

Plaintiff sued defendant in this auto accident case.

Example B:

Harry Hamilton, the plaintiff in this auto accident case, was driving his Edsel, which was in mint condition. The car is old but nonetheless valuable because it has been meticulously maintained.

Which of the above is more engaging and informative? Harry becomes a real person in the Example B. More important, we know he is the owner of the car that has been maintained meticulously, and also the plaintiff in this auto accident case. There is a strong possibility that, before the accident, the car was in perfect condition. While this fact may not per se change the applicable law, it may have an impact on computation of **damages** and, thus, could be significant in the legal research.

The same principle of humanizing applies for the defendant.

Example A:

Defendant is sued by plaintiff claiming she hit his car and that she was the cause of the accident.

Example B:

Flossie Smithe, the defendant, has been sued in this auto accident case. Harry Hamilton, the plaintiff, claims that Flossie's negligence caused substantial damage to his antique Edsel.

Again, which of the above tells us more about the defendant? Using names tends to make the case facts more real and allows for a better flow of the information. When naming the parties, use the more formal form, that is, Mr. Plaintiff and Mrs. Defendant. Using first names creates an informal tone. Case briefs referring only to plaintiff and defendant throughout may even become confusing. Using names makes following the argument much easier, providing they are not overused.

Review the fact pattern related to Harry Hamilton in Figure 5.6 once again. What other facts may have some legal significance and should be included in the analysis and research? A hint is that the fence was broken and the heifers ran wild. They kicked and dented Harry's car. These were no ordinary heifers; they were prizewinners. This may be significant. In the initial research stage, assume facts have relevance, and rule them out later.

CRITICAL ANALYSIS

majority opinion
An opinion where more than half of the justices agree with the decision. This opinion is precedent.

distinguishing
Explaining why the factual differences call for a decision differing from established law.

precedent
The holding of past court decisions that are followed in future judicial cases where similar facts and legal issues are present.

settled law
Established law.

Critical does not mean finding fault or bullying. Critical analysis means understanding the elements of the client issue, reading and reporting the law accurately, identifying why the existing law applies, or distinguishing case facts from existing law.

Identifying the significance of each section of the opinion is an important skill for the paralegal. Fortunately, there are some signs to help the identification process. For example, **concurring opinions** agree with the majority supporting argument for the **holding**, or statement of law, in the case. **Dissenting opinions** disagree with the majority and explain why. **Dicta** in the opinion do not bear the weight and persuasive impact of the **majority opinion** but, nonetheless, have value as supporting discussion. In some cases, dicta alert the reader to situations or fact variations that would have led to a different holding. **Distinguishing** means explaining why the factual differences call for a decision that differs from established law. Once you have facts identified, research and analysis of relevant law can begin.

You may recall from your reading in Chapter 3 that law is based on **precedent**, which is followed in similar matters once the courts have interpreted the applicable legal theory in an opinion. You also may recall that precedent ordinarily must be followed. Your legal issue may be inconsistent with **settled**, or established, **law**. When this occurs, your persuasive argument is constructed by using settled law and your case facts to persuade the judge that your position on the law is correct for this client and these facts. Your facts, citation to law, and understanding of

underlying legal principles and social policy are crucial to drafting an effective argument of this kind especially.

BEGINNING YOUR LEGAL ANALYSIS

IRAC
Issue, rule, application, and conclusion.

Legal analysis is a challenging exercise that requires identifying the key facts, researching the law, and then applying the law to the facts to reach a persuasive conclusion. While it sounds relatively easy, it is a wonderfully challenging and interesting exercise. The most commonly applied approach to legal analysis is the **IRAC** model, which means *i*ssue, *r*ule, *a*pplication, and *c*onclusion. (See Figure 5.7.)

The IRAC model has several advantages, with the organizational aspect perhaps the most important. The organizing principle guides you to complete the steps in order, which enhances the soundness of the resulting position. If an issue is identified in step one, when you proceed to step two, you should limit the rule applied to the law most closely on point. Introducing several other principles that might apply, if one or two of the facts were changed, will confuse the reader. When more than one issue is involved in your research, apply steps one through four to each issue before proceeding to the next.

Step three of the IRAC process is the appropriate place to insert alternative arguments or law that applies. If you apply the model, you will produce organized documents and the analysis presented will likewise be organized and more understandable. Another benefit in this reasoning framework is that it facilitates maintaining control of the argument.

In step four, present the conclusion that flows from the facts and relevant law. When concluding in a multiple-issue case, recap the conclusion for each issue in the sequence presented. Therefore, introducing loosely related alternative arguments is confusing rather than helpful. Practice staying on target and progressing methodically and consistently with your organizational plan to avoid any of the pitfalls.

The following example is based on a real legal controversy. The fact scenario will help illustrate how to apply the IRAC method to the facts and legal issues.

PRACTICE TIP

Resist the inclination to demonstrate that you have a wide command of diverse legal topics when doing targeted legal research for a specific client and case issue. Discipline yourself to stay on target within your organizational and analytical framework.

FIGURE 5.7
IRAC Legal Analysis Model

- **I** *Issue*. Either you can either present the issue as a question or you can present a brief statement that provides a glimpse of what the analysis you are about to do will uncover.
- **R** *Rule*. In this phase, you present the relevant rule(s) of law found in the research. This section is more effective if multiple cases are cited and the rules in each are integrated rather than set forth in list format without discussion. This section should include some analysis of the law, but it is not the place to apply the rule to the facts and reach a conclusion. This section calls for analysis, so merely inserting large blocks of case quotations is not an effective way to make the analysis.
- **A** *Application*. In this section, the rule of law is applied to the case facts. This is also the place to raise alternative arguments, distinguish your case, and discuss relevant rules of law and counterarguments.
- **C** *Conclusion*. Each legal rule or issue raised in the analysis requires a conclusion in this section. The conclusions here should be more rule of law than fact based and should contain concise statements the reader can identify and understand.

Example:

Legal Analysis Demonstration

INS
Immigration and Naturalization Service, which has been reorganized into part of the Department of Homeland Security.

noncustodial parent
Parent with whom the child(ren) stays or visits some of the time but not as primary residence.

political asylum
Immigration status available under some circumstances when the party seeking asylum claims political persecution. Not commonly and broadly available without a clear showing of oppression.

Under the guidance and legal authority of then attorney general Janet Reno, after days and months of conflict and legal wrangling, the **Immigration and Naturalization Service (INS)*** forcibly removed Elian Gonzalez from his uncle's house in Miami, Florida, and sent him back to his father in Cuba. At that time, the Cuban government was a communist regime under dictator Fidel Castro. The boy and his mother had escaped with others on a raft to seek political asylum in the United States. While en route, however, Elian's mother died. When he arrived on U.S. soil, Elian was taken to live in Miami, Florida, by his relatives. Attorney General Janet Reno faced deciding between the emotion-driven concerns of taking the child from his relatives in favor of keeping him in the United States as his mother wanted and proved by her flight from Cuba or returning the child to communist Cuba where his father still resided. The father was Elian's **noncustodial parent** when he left Cuba with his mother. The practical solution dictated returning the child to his father, who never surrendered parental rights, notwithstanding the divorce from Elian's mother. Superimposed on those emotional-legal concerns, of course, were the international implications of the United States getting involved in what was legally characterized as a custody battle. The tensions and legal wrangling were compounded by issues related to **political asylum**, Elian's minor status, the continuing communist affiliation of Elian's father, and the naturalized relatives pleading to the U.S. government to allow Elian to remain in this country. It was their position that the mother's acts clearly supported the intent to bring the child here to seek asylum and ultimately citizenship. (*Gonzalez v. Reno*)

Many government officials and individuals tried persuading the U.S. government to act one way or the other. After months of heated legal challenge, the child was forcibly removed from his uncle's home in Miami and returned to his father in Havana. *Question*: How would you decide the issue?

Take note of your initial reaction to the Elian Gonzalez facts. Jot down questions and your proposed answers. This is an important tool in reviewing and organizing for legal analysis. This technique is an important aspect of your legal research process. An emotionally charged issue such as the Elian Gonzalez case helps you learn the process of considering emotions and the law, and balancing personal and public considerations in framing an equitable, legal response to some difficult legal analysis.

The IRAC analytical model steps must be completed. (See Figure 5.8.) If any of the process steps are skipped or given too little importance, the resulting argument will have weak spots.

You may ask yourself why step one is part of the process. Your gut reaction, or inner voice, or whatever label applies to the mechanism that triggers an almost reflexive response to the case facts, gives a reliable measure of your emotional involvement to the facts and legal issues. Law is based on human interactions and evolves from applying law to facts. Your reactions, therefore, are important to consider.

In Chapter 4, we discussed asking the right questions and developing the skill of taking notes when something triggers a thought or question. If you maintain a place in the client's file for notes and legal questions, then you will already have some points to investigate, or at least be aware of, in your legal research.

Step two is to identify the relevant facts. Whether they cut in favor of your position or not, the relevant facts must be considered. Facts are part of your analysis as you write your memo. Under any circumstances, as mentioned in Chapter 4, do not assume the reader knows that you asked about the facts and considered them in your analysis unless they are mentioned. Avoid misinterpretation by expressly stating anything relevant.

FIGURE 5.8
Process of Legal Analysis

Step 1. Note your initial reaction to the question posed.
Step 2. Identify relevant facts.
Step 3. Identify relevant legal theories.
Step 4. Assess the impact of jurisdictional issues, if any.
Step 5. Consider and analyze opposing arguments.
Step 6. Formulate a reasonable legal conclusion.

* Since these events, the INS has been consolidated into the Department of Homeland Security.

Review the facts from the Elian Gonzalez case presented earlier in this chapter.

Example:

The facts that Elian was cold, wearing a torn shirt, and hungry are important for context, but they certainly are not particularly compelling in the fact-finding analysis and legal application facets of the process.

The fact is that Elian's parents were divorced. The father retained partial custody and visitation while continuing his fierce support and practice of communism. Elian's mother sought political asylum because she strenuously opposed the communist regime. All of these facts are compelling for your analysis. Analyze the extent to which they have legal significance as your research develops.

The facts raise the issue of the dissolution of marriage. This should trigger checking divorce and custody in communist Cuba. An additional issue is the impact this has on immigration policy and law as well as political asylum petitions. In your research and analysis, you should address the status of each party given the mother's manifest desire for asylum status. The mother died before reaching American soil and the child was in a foreign country without a guardian to assert his right to ask for political asylum. This fact undoubtedly raises relevant legal issues.

custodial parent
Parent with whom the child(ren) resides primarily following dissolution of the marriage.

distinguishing facts
Facts that establish the different analysis and application of settled law.

new law
A novel interpretation of established law.

novel interpretation
New interpretation of law as applied to specific facts.

The issues relate to the authority of the INS, which is important. You should look into INS policy on minors asserting a right to political asylum when the parents are divorced. The **custodial parent** seeking to assert the child's right to seek political asylum is dead and the *noncustodial* parent clearly holds a different political position and is undoubtedly opposed to asylum for the minor.

Do not ignore potential ethical challenges. There may be some ethical considerations raised by returning the child to the communist regime. At this early stage in your research, noting the issue and framing some key words to guide your research are advisable.

Question: Based only on the information presented above, what other facts may be important? Jot them down and include them as you organize your research.

The case facts should be reviewed several times to ensure that anything of legal significance is researched. If relevant facts and circumstances are ignored, the wrong law may be applied or, worse yet, the correct law may be overlooked in the research.

There may be facts obviously separating a case from established law. These are the **distinguishing facts** that establish the different analysis and application of settled law. Distinguishing facts provide the basis upon which **new law** or a **novel interpretation** of established law is made. The facts make new interpretation possible. The new facts must have legal rather than emotional significance. Emotionally, we feel badly for Elian, who was left floating on the water with fellow refugees after their makeshift boat capsized. Elian watched his mother die. While these facts are emotionally compelling, they may have relatively little legal significance except to the extent of establishing context. Do not underestimate this value, but, at the same time, do not fall victim to emotionally deciding issues. Your job is to be analytical, neutral, and professional.

Example:

The color of the coat the passenger was wearing when the vehicle in which he was riding was hit by the speeding car is not significant. The color of the car that sped away from the scene is legally significant for investigating but insignificant for purposes of legal analysis.

Example:

The color of the tile in the kitchen of the new house the buyer put a deposit on is insignificant legally. The fact that the tile in the kitchen was only half complete at the date of closing is legally significant. However, if the tile installed in the kitchen has two different colors when only one was ordered, then there is legal significance.

Example:

The fact that the doctor is 5'10" tall is legally insignificant in a civil action for medical malpractice. The fact that the doctor fell asleep while waiting for the anesthesiologist to confirm the patient was ready may be legally significant. The fact should be noted and developed in your research to determine why; then you will know if it is a legally significant fact or not.

PRACTICE TIPS

A legally significant fact is one that has impact on the theory and ultimate court interpretation.

Situations may change the legal significance of and relevance of facts, so be sure to read carefully and in the right context.

PRACTICE TIP

When writing legal correspondence, it is best to address one issue or topic in each letter. Mixing several issues is confusing for both reader and writer.

PRACTICE TIP

Have the *Bluebook* or *ALWD Citation Manual* available whenever doing legal research and writing projects. Develop the habit of checking the resource when any question arises regardless of how relatively small it may seem. Inaccurate citing can have serious repercussions.

Example:

The fact that the waves in the Bahamas the day of the cruise ship collision were a fabulous aqua blue and sparkling like diamonds is not legally significant. The fact the waves were 20-foot swells is legally significant.

After organizing the case facts, you are ready to proceed to step three, in which you frame the legal theories. The Elian Gonzalez case presented a number of legal theories for research, including INS rules and regulations, which you recall are binding law. There are questions related to international law, treaties, or agreements between Cuba and the United States to research. There will be some jurisdictional issues involved as well. As you complete the research, you may eliminate some of the issues noted initially.

Step four involves critically looking into jurisdictional issues related to your case. In the Elian Gonzalez matter, some of the jurisdictional issues raised relate to Florida, international treaties, and INS law and policy. Refer to the materials on jurisdiction in Chapter 3 to refresh your recollection of this issue. The refugees touched U.S. soil in Florida. The INS detained the refugees. International treaties and law arise based on the citizenship of Elian, his father, and his deceased mother. Likewise, political asylum issues may indicate yet other tribunals. Ultimately, jurisdictional issues are a matter of matching the facts to the issues and selecting the court empowered to hear such issues. When the facts present issues of both federal and state significance, you need to be particularly careful in this step to make appropriate recommendations.

In step five, before constructing your legal theory and arguments, be sure to consider analysis of the argument from the other side. This step is critical. No matter what happens, do not be lulled into a false sense of security. Regardless of the clarity of your argument, the opposing side has researched and framed its argument as well. Consider the opposing position and include the theory as you frame your argument.

Knowing the other side of the coin, as it were, is precisely what makes your argument persuasive. In highly emotional issues, the opposing position is often difficult to frame unless you manage your emotional relationship with the client, the facts, and the law. If you recognize this challenge, you are well ahead of the game and more effectively armed to make the persuasive argument.

There are as many sources for the other side as for your own. Likely sources include dissenting case opinions, reversed case law, and other comments on law contained in legal journals, restatements, or other sources of analysis and scholarly legal writing. While our law is readily ascertainable, it is also flexible and reflects the values, societal needs, and adequate governance for the times in which the law is applied.

FORMATTING LEGAL WRITING

Legal complaints are but one of the vast number of document types the paralegal writes. You will learn more about drafting complaints as you cover each. Depending on the firm size, structure, and practice type, some paralegals primarily write internal office memoranda. In other settings, drafting legal documents for filing may be the major thrust of the paralegal's writing assignments. You should be familiar with the various formats.

Case Brief

A legal case brief analyzes the case opinion and the legal issues related to the research question asked. The memo reports the decision of the court in a particular case as well as the process and analytical theories applied in reaching that decision.

The brief writing checklist in Figure 5.9 is useful for all research assignments. For purposes of writing a legal brief, the analysis is based on the case opinion and the holdings located in your research. The legally significant facts should always be included in your written presentation. This makes your analysis more meaningful and focused and helps the reader follow the research and conclusions reached. It also eliminates the reader making unwarranted assumptions. Your analysis is guided and the reader knows precisely what and why you structured the argument as you did. See Figure 5.10 for a sample legal brief.

FIGURE 5.9
Checklist for Legal Brief Writing

When doing legal research and writing legal memoranda or case briefs, the following are the key parts of the final product. Use this list to help organize your preparation, research, analysis, and writing.

1. *Case facts*. A concise statement of the facts that includes only legally relevant facts.
2. *Case issue*. A statement of the legal question posed and the legal theories involved in the case and research.
3. *Case decision*. The case holding is the first part presented, but be sure to include a brief presentation of both the concurring and dissenting opinions.
4. *Court reasoning*. An analysis used by the court to set the rule of law in cases cited as precedent.
5. *Case precedent citations*. Include only key cases, not every case mentioned in the opinion.
6. *Rule of law*. A concise summary of the case holding or the rule of law (precedent) the case established.
7. *Dissent*. Other rules of law cited and analyzed in the dissenting opinions.

FIGURE 5.10
Sample Legal Case Brief

Sample Brief

Name of Case
Citation of Case

Facts: Include all legally relevant facts and avoid facts having no legal significance.
Issue: The issue raised is . . . (Follow this opening phrase with a direct statement of the legal issue the court was asked to decide. Note that the issue is often fact specific or the decision applies to a narrow set of facts, in which case those facts cited in the case issue statement should be included in this portion of your brief.)

The issue is whether . . . is corroborated to the extent indicated in the affidavit . . ., sufficient to provide a basis for . . ., justifying a finding of . . .

Decision of the court:

Previously, the Court has decided . . . Reversed and remanded (if applicable).

Reasoning of the court: (Sample language, suggested not mandated)
The previous Court(s) has/have determined that . . . was insufficient to justify . . . The Court said, however, that . . ., and there can be no question that . . . has a fundamental impact on . . . The Court turned to the case of . . . in which . . . was found inadequate under the test developed in that case. The test that the Court turned to in this case was . . . and the proper discharge of that test, as applied to . . ., does (or does not) constitute sufficient fulfillment of that test; however, . . . In holding as the Court does, the explanation required for . . . can (or cannot) retreat from the legal reasoning in . . . that upheld (or did not uphold) the reasoning in . . ., and that the explanation required is justified only on probability and not on prima facie showing of . . .

Citations to support judgment:
. . . v . . ., 378 U.S. 108, 108 S. Ct. 1509 (1964)
. . . v . . ., 386 U.S. 300, 87 S. Ct. 1056 (1967)

Rule of law:
. . . can only be satisfied by . . . An effort to . . . by the government can (or cannot) enable (or constrain) . . . to satisfy the requirements of . . . to support a claim of . . . This ruling will have significant impact on the following kinds of cases: . . .

Dissent:
Justice . . ., along with Justices . . . and . . . dissented. They felt that the . . . in this case was . . . and supported (or was unsupported by) a showing of . . . Therefore, the . . . should have been upheld (or denied), and subjected to a . . . validation or test which would have been judged as . . . This minority opinion could be used in these kinds of cases in the future: . . .

Internal Office Memorandum

Your research may entail writing an office memorandum for internal use. An internal memorandum of law contains the same elements as a brief. Some firms prefer the fact summary first in an office memorandum and others the legal question asked first, followed by the facts. These differences are not important so long as the key content appears. See Figure 5.11 for a sample internal office memorandum.

Legal Memorandum

legal memorandum
Summary of the case facts, the legal question asked, the research findings, the analysis, and the legal conclusion drawn from the law applied to the case facts.

The first section of the **legal memorandum** is fairly straightforward. It identifies the addressee and contains a brief but direct statement of the point of law the research addressed. Avoid including any argument in this section.

The questions asked section sets forth the most important facts and the applicable law. The question is meaningless unless the facts of the particular case are included. The brief answer

FIGURE 5.11
Internal Office Research Memorandum

Source: Modeled on the format suggested by Barger on Legal Writing, available at www.ualr.edu/cmbarger/SAMPLE_MEMO.HTML.

TO: Supervising Attorney
FROM: Phillip Paralegal
DATE: January 21, 2006
RE: Breach of contract to marry

Question Presented

Should our client, Sam Sharpie, be held to have breached a contract to marry his ex-girlfriend when there was no contract in writing, and the girlfriend left the common residence claiming she was going to go for a run and failed to return until seven months later, when a neighbor was vacationing in Las Vegas and spotted the girlfriend in the casino playing a slot machine. The couple had been living together for eight years at the time she left for the run.

Brief Answer

No. A contract to marry, pursuant to the statute of frauds, must be in writing to be enforceable under the law.

Statement of Facts

Our client and his girlfriend had been living together and planning to marry for a period of eight years. The invitations for the wedding were in the mail, the rings and other deposits were paid for the ceremony and the party following, and they had put a down payment on a new house. One day, the girlfriend announced she was going out for a run, and she simply did not come back. The community joined the search, which turned up nothing.

Our client, Sam, continued living in the shared residence but, of course, canceled the wedding and the party since there was no bride. About seven months after she disappeared, a neighbor of the couple was vacationing in Las Vegas and spotted the girlfriend. The neighbor immediately notified Sam, who asked that the casino security be summoned to detain the girlfriend until he could get to Las Vegas.

When Sam arrived in Las Vegas and spoke to his girlfriend, she said she was just a nervous bride and the pressure of preparation for the wedding was too much for her. She decided to leave and escape from the pressure. She insisted she still loves him and wants to get married immediately. Sam, however, is concerned and has refused to go through with the marriage. His girlfriend wanted to go to the Elvis Wedding Chapel in Las Vegas and get it over with to avoid additional pressure.

Sam has refused to marry his girlfriend, who is now suing him for breach of contract to marry.

Discussion

In this section, you discuss the law in relation to the facts, citing to your primary sources for authority and supporting your position with additional information and case law from primary law sources. If there are exceptions, or other relevant mitigating factors or legal opinions, be sure to include discussion of those elements in this section. This section should have a conclusion.

FIGURE 5.12
Legal Memorandum Discussion Section Checklist

1. Statement of rule of law.
2. Case law interpreting the rule of law.
   a. Case citation.
   b. Facts from the case cited.
   c. Specific rule of law from the case decision that applies to your client's case.
   d. Discussion of why the rule applies.
3. Application of the rule of law to the facts of your client's case.
4. Counter analysis.
   a. Objections, exceptions, or other factors that might change or modify the law application.
   b. Discussion of the facts or legal consequences with minor changes in facts and why they are inapplicable to your case.
   c. Discussion of the presumed position or defense of the opposing side and why it is counter to the rule of law.

CYBER TRIP

Visit the federal government writing site at www.archives.gov/federal-register/write/handbook/chapters.html. Explore the various sections, including formatting and writing style and format recommendations.

section begins with a one-word answer to the question presented. Some qualifying statements follow this short answer, briefly explaining the analysis of why this answer is appropriate. If several questions are asked, then each would be answered in a similar manner to ensure the reader knows precisely which part relates to the yes response and which to the no.

The discussion section of the memorandum contains a complete answer to the question posed, including the research presented comprehensively enough to support the legal analysis and the position held. The elements of the discussion section are listed in Figure 5.12.

The discussion section always has a conclusion. The elements of the conclusion are similar to those of an essay. The conclusion reminds the reader what was said, that is, the rule of law applied, and why. This does not mean you rewrite the entire argument. It is the opportunity to give the reader one more concise statement of the law and how it applies to your case facts. The elements of the conclusion are provided in Figure 5.13.

There are many resources available to help hone your writing skills. The federal government has a Web site recommended for use by not only attorneys but also paralegals and others in government service. The government employees as well as those who have dealings with the federal government are urged to take advantage of the site and apply the contents to written communications.

Learn the value of writing resources early in your career. Dictionaries and thesauruses are invaluable even with spell checkers in your software programs. Bear in mind that spell checkers in general have limited databases. Many do not have legal language, so you need to add words as you use them. If your spelling is incorrect when you enter the word, it will always be incorrect! There are many books by and about writing and writers. They can be extremely helpful to the beginning writer or accomplished practitioner.

Opinion Letter

An opinion is another example of using legal research. The attorney sends the letter to the client, and, although the format is somewhat different, legal research and analysis are presented. The letter may, but need not, recommend optional legal choices based on the applicable law and facts.

opinion letter
A letter that renders legal advice.

Opinion letters differ from more routine client correspondence because they contain legal analysis. The opinion letter presents the results of legal research and the position recommended by the attorney based on the facts and the law. Note in the sample Figure 5.14 that the opinion letter recommends but does not demand following the advice contained. The attorney advises the

FIGURE 5.13
Checklist for Legal Memorandum Conclusion

1. Include a brief summary of each legal argument made.
2. Include specific reference to both statutory and case law used in the discussion section for each legal point.
3. Do not introduce new matters in the final paragraph. Recap only what has been presented and discussed in the body.

FIGURE 5.14
Sample Opinion Letter

July 30, 2003

Mr. Dino Joseph Drudi

Re: Secrecy of Member Ballot in Federal Credit Union Elections.

Dear Mr. Drudi:

You have asked if it is permissible under the Federal Credit Union (FCU) Bylaws for an FCU to require its members' signatures on their annual election ballot. We believe the FCU Bylaws require a secret ballot and that a member's signature on the ballot destroys the secrecy.

You have explained that your FCU's election procedures this year, for the first time, requires the members to sign their names on the ballot and then submit the ballot to an independent auditing firm to be tallied. In the past, the FCU provided each member with a ballot and a separate identification form that was submitted at the same time with the ballot but removed from the mailing envelope before opening the ballot. The procedure allowed the FCU to verify the identity of the voter while maintaining the secrecy of the ballot. The FCU advised you by e-mail dated April 25, 2003, that, because the signed ballot is only seen by an independent auditing firm and not by any member or employee of the FCU, "it remains a secret ballot."

The current and former versions of the FCU Bylaws, as well as ROBERT'S RULES OF ORDER, support the interpretation that an FCU's balloting process must remain secret. ROBERT'S RULES OF ORDER states that "[e]lection by ballot is preferable, as the ballot allows the members to vote in secrecy." ROBERT'S RULES OF ORDER 172 (1983). Our conclusion is also supported by NCUA's prior sample instructions for a sample mail ballot. Those instructions provided:

> Sign the voter identification form and enter your credit union account number. The ID form will be separated from your ballot when it reaches the credit union, and before any ballots are opened. Federal Credit Union Standard Bylaw Amendments and Guidelines, Sample Ballot, p. 41, October 1991 (emphasis added).

The FCU Bylaws state that, if one form is used, it must be "properly designed." FCU Bylaws, Article V, Option A4, Section 2(d)(5). We interpret this to mean that the ballot must remain secret. The next section in the bylaws also supports the conclusion by requiring the election teller, in the case of disputed identification forms, "to retain the identification form and sealed ballot envelope together until the verification or challenge has been resolved." Id. at Section 2(d)(6) (emphasis added).

The FCU appears to concede that the intent of the ballot process is secrecy. The FCU maintains that, because only an independent auditing firm is viewing the ballots, they are secret even if members are required to put their names on the ballot. We do not agree. Secrecy in voting is interpreted to mean that "the elector may conceal from every person the name of the candidate for whom he voted." 29 C.J.S. Elections § 1(1) (1965). Maintaining actual secrecy is important for two reasons. First, if the members believe the balloting process is susceptible to a breach in secrecy, this may have a chilling effect on the voting process. Second, a process that allows tellers, even if they are independent, to know both the identity of the voters and how the voters have cast their ballots is susceptible to a breach in the secrecy.

Finally, we note NCUA's longstanding policy is not to become involved in election or bylaw disputes unless the alleged violation poses a safety and soundness concern to the FCU or is a violation of the FCU Act or NCUA regulations. This is discussed in the Office of General Counsel legal opinion 03-0106, dated February 6, 2003, available on the agency's website, www.ncua.gov. You may wish to raise your concerns and share this legal opinion with your board of directors or supervisory committee but we suggest you consult with your own local, legal counsel if you wish to pursue other legal remedies.

Sincerely,

Sheila A. Albin

Associate General Counsel

GC/MFR: bhs

03-0510

Eye on Ethics

Legal research and writing pose ethical challenges just as serious as those in other aspects of the paralegal practice do. Accurate citations and correct documenting of sources are two examples. Appropriate and liberal use of reference citations avoids even the slightest hint of impropriety. **Plagiarism** is taking the thoughts of another and presenting them as one's own without properly crediting or citing the source. Properly citing your sources is mandatory. Paraphrasing may not eliminate the need for a citation to source. As with academic writing, liberal use of citations eliminates challenge. A paralegal researches the law, analyzes what is found, and formulates persuasive argument from the research findings and analysis. The law values precedent. As such, do not hesitate to cite precedent to support your argument.

plagiarism
Taking the thoughts of another and presenting them as one's own without properly crediting or citing the source.

client to seek additional legal counsel prior to adopting any position. These are especially important aspects of an opinion letter. The client relies on the content when making decisions. As such, the letters should be as complete as possible to ensure the analysis and the resulting recommendations are clear and comprehensive.

Compare the opinion letter in Figure 5.14 to the internal office legal memorandum, Figure 5.11. Both present legal analysis and both answer a legal question. In the opinion letter, client understanding is essential, so the format differs from the more formalized and often longer internal office memo. Often, the opinion letter follows an internal office memorandum. The discussion and analysis sections of the opinion letter may condense the analysis in the memo depending on the subject, recipient, and specific issue of law addressed. Both pose a question and provide a brief answer followed by analysis.

The conclusion in the opinion letter in Figure 5.14 refers to a specific supporting document the writer recommends the reader review to enrich the recipient's understanding of the opinion. This may or may not be included for a number of reasons, but, in any case, your attorney would make the decision. An opinion letter is a formal communication, so avoid using casual comments or addressing issues frivolously.

You have been asked to draft a legal memorandum related to the client X issue. As you prepare your research project, you realize this is a relatively common point of law. You realize there must be some research related to the issue in other client files. You have a tight deadline and decide to look in the files. You read over the materials and the research is thorough, so you borrow parts of the memos for the one you are drafting for client X. Since the materials all came from someone in your office, you see nothing wrong with this approach.

Question: Is there an ethical challenge in the above scenario? Analyze the situation, and then briefly discuss in written office memorandum format the potential challenges. Include strategies you would employ to avoid similar situations. Comment on the code or guidelines in the appendix you rely upon in framing your position and the differences between this approach and using a "boilerplate" memorandum of law in support of a motion.

Summary

This chapter introduced the process of legal research and how to approach the task. You learned about formatting, once the research is complete, for a brief, an internal office memorandum, and a client opinion letter, which are three fairly routine legal research projects. The process of the research remains the same regardless of the final presentation. You learned that effective research is organized, incorporates both facts and relevant law, and contains the same basic good writing elements that you already know about from your previous education. Practice and focus are important in developing your skill at research. You looked at some of the ethical implications of writing and legal research. From here, you move along into the substantive areas of law. You will have much to write about and the skills to begin effective legal research in the various topics.

Key Terms

Argument
Concurring opinion
Criticism
Critique
Custodial parent
Damages
Dicta
Dissenting opinion
Distinguishing
Distinguishing facts
Do-gooder arguments
Holding
INS
IRAC
Legal argument
Legal memorandum
Majority opinion
Memorandum of law
New law
Noncustodial parent
Novel interpretation
Opinion
Opinion letter
Persuasive
Plagiarism
Political asylum
Position
Precedent
Settled law
Tone

Review Questions

TRUE AND FALSE

In each of the following, indicate whether the statement is true or false. For each false answer, rewrite the sentence to make it a true statement.

1. Settled law need not be followed in similar cases in the same jurisdiction.
2. Step three of the research process suggests looking at primary source material.
3. Judges cannot apply new law even when the case facts justify a new interpretation.
4. *The Bluebook* and *ALWD* both contain legal citation information and formats.
5. Opinion letters provide general information and scholarly discussion of law.
6. Many legal research projects are completed without using citations to document law used.
7. The goal of legal argument is to change the reader's mind.
8. Often, case opinions contain a number of concurring opinions, but there are never dissenting opinions included.
9. Dicta have the weight of law.
10. Persuasive legal arguments rely on emotional analysis when the issues involve socially sensitive topics.

Discussion Questions

1. Select a partner with whom to work. Agree with your partner on selecting a current legal issue that you find in the local newspaper. Each partner is to assume the position of one of the parties; thus, one partner would be the complaining party, or plaintiff, and the other the defending, or defendant. (For this assignment, do not use a criminal matter.) Collaborate with your partner to determine the basic facts of the controversy. Prepare a memorandum for your supervising attorney in which you summarize the case facts and recommend to your attorney that you take the case should either party request representation. The partners should make the presentation from the standpoint of the party represented, that is, the plaintiff or defendant. After completing your draft memorandum, exchange with your partner and read the opposing presentation. The partners will then prepare a critique of the position taken by the other partner, including a persuasive rationale explaining why that position is inconsistent with the law as reported in the press coverage. For this assignment, you are not expected to complete research of the law in your home state. Present the critique and memorandum to your instructor for comments along with the news articles.

2. Read the following case facts, which are elaborations of the Harry and Flossie facts presented earlier in the chapter.

   Sample case facts: Your office is asked to represent Harry Hamilton in his case against Flossie Smithe, whom he claims smashed into his fire-engine-red Edsel. Harry hastens to tell you that the Edsel is a 1960 Special Edition that he has maintained in flawless condition since that time, including all original parts, thus making it almost impossible to place a value on it. You have, of course, never heard of an Edsel, so this means virtually nothing to you. On the day in question, the sun was shining brightly as Harry took his "baby" out for some sun and fun. Flossie Smithe rounded the bend coming from the opposite direction on the country road. She was unable to stop or swerve out of the roadway, so her Hudson Road Tracker smashed into Harry's Edsel. The car was smashed on the side from one end to the other. When Flossie finally stopped, she crashed into the fence of Beulah Battle's farm and the herd of heifer cows grazing in the field galloped onto the road. Harry's Edsel also sustained hoof damage from the stampeding herd of heifers. Harry quite simply fell apart. Flossie meanwhile was singing wildly and senselessly. Beulah was screaming for her prized heifers to return since they were being fattened up for the 4H show starting the following week. The hysteria was harmful to the heifers, Beulah kept telling Harry and Flossie. Harry was a wreck; the car was ruined; Flossie was jabbering incoherently; and the cows were milling around while Beulah tried desperately to herd them back to the barn. In the midst of the chaos, Harry spied a bottle of Willie's Wild Turkey Mash lying on its side on the seat of Flossie's smashed sedan.

   Your firm represents Harry. Following the client interview, your supervising attorney has asked you to write an outline of the legally significant facts about the accident, which will form the factual basis of your legal research when preparing the complaint and litigating the case.

   Prepare your memorandum in the recommended style, without completing the issue or legal discussion sections, but indicating where they would appear in the document. For each fact listed, indicate why you believe it may have legal significance.

3. Use the following case outline to prepare the requested documents:

   This is a lawsuit based upon a slip-and-fall accident in which your client, Sam Slipper, claims he was injured while shopping in Frank's Fix-'Em-Up Discount Store, owned and operated by Frank Fixer. Opposing counsel is Attorney Bill Baxter, 123 Main Street, Your Home City, ST. Your attorney is Jill Jacobs, Esq., 789 West Elm Street, Your Home City, ST.

   a. Your attorney has asked you to write a letter to opposing counsel requesting dates available to depose both plaintiff and defendant. The time frame for taking the depositions imposed under the pretrial scheduling order is about to expire, so your standpoint is to be assertive without becoming disrespectful.
   b. You have a date arranged for the deposition, so you are advising your client of the date, time, and place. In your letter, confirm with the client that you will be meeting to prepare the client two hours prior to the scheduled deposition.
   c. Confirm to opposing counsel in another letter that you will be taking his client's deposition on one of the dates offered in his response to your prior request. Include in your letter a request for counsel to instruct his client to bring copies of any accident reports, current medical bills outstanding, and complete contact information for any witnesses the plaintiff expects to call in trial.

4. Prepare a checklist of tips when researching and drafting an opinion letter. Assume you would be sharing the document with other paralegals in the firm. Be sure to explain the significance of each tip and any terms so key words are clearly understood. Retain a copy of your finalized checklist in your PRM.

Portfolio Assignment

Read the following case, *Palmore v. Sidoti*, 466 U.S. 429 (1984). After reading the case opinion, prepare a case brief using the format recommended in the lesson. Your memo should present the facts, identified legal issues, and list of cases cited in the opinion. For purposes of this exercise, complete analysis is not requested. Each case cited should identify the complete name of the source as well as the citation. Finally, present the case holding.

U.S. Supreme Court
PALMORE v. SIDOTI, 466 U.S. 429 (1984)
466 U.S. 429
PALMORE v. SIDOTI
CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT
No. 82-1734.
Argued February 22, 1984
Decided April 25, 1984

When petitioner and respondent, both Caucasians, were divorced in Florida, petitioner, the mother, was awarded custody of their 3-year-old daughter. The following year respondent sought custody of the child by filing a petition to modify the prior judgment because of changed conditions, namely, that petitioner was then cohabiting with a Negro, whom she later married. The Florida trial court awarded custody to respondent, concluding that the child's best interests would be served thereby. Without focusing directly on the parental qualifications of petitioner, her present husband, or respondent, the court reasoned that although respondent's resentment at petitioner's choice of a black partner was insufficient to deprive petitioner of custody, there would be a damaging impact on the child if she remained in a racially mixed household. The Florida District Court of Appeal affirmed.

Held:

The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother. The Constitution cannot control such prejudice, but neither can it tolerate it. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. Pp. 431–434.

426 So.2d 34, reversed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Robert J. Shapiro argued the cause and filed a brief for petitioner.

John E. Hawtrey argued the cause and filed a brief for respondent.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review a judgment of a state court divesting a natural mother of the custody of her infant child because of her remarriage to a person of a different race.

I

When petitioner Linda Sidoti Palmore and respondent Anthony J. Sidoti, both Caucasians, were divorced in May 1980 in Florida, the mother was awarded custody of their 3-year-old daughter.

In September 1981 the father sought custody of the child by filing a petition to modify the prior judgment because of changed conditions. The change was that the child's mother was then cohabiting with a Negro, Clarence Palmore, Jr.,

* Briefs of amici curiae urging reversal were filed for the United States by Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Solicitor General Wallace, Deputy Assistant Attorney General Cooper, Kathryn A. Oberly, and Brian K. Landsberg; for the American Civil Liberties Union Foundation et al. by Burt Neuborne, William D. Zabel, Marcia Robinson Lowry, Thomas I. Atkins, Ira G. Greenberg, and Samuel Rabinove; for Leigh Earls et al. by Jay L. Carlson, James P. Tuite, Roderic V. O. Boggs, James D. Weill, Justin J. Finger, Jeffrey [466 U.S. 429, 430] P. Sinensky, Leslie K. Shedlin, and Marc D. Stern; and for the Women's Legal Defense Fund et al. by Sally Katzen, Lynn Bregman, and Nancy Polikoff. [466 U.S. 429, 430]

Source: Retrieved September 12, 2006, from http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=466&invol=429.

whom she married two months later. Additionally, the father made several allegations of instances in which the mother had not properly cared for the child.

After hearing testimony from both parties and considering a court counselor's investigative report, the court noted that the father had made allegations about the child's care, but the court made no findings with respect to these allegations. On the contrary, the court made a finding that "there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent." App. to Pet. for Cert. 24.

The court then addressed the recommendations of the court counselor, who had made an earlier report "in [another] case coming out of this circuit also involving the social consequences of an interracial marriage. Niles v. Niles, 299 So.2d 162." *Id.*, at 25. From this vague reference to that earlier case, the court turned to the present case and noted the counselor's recommendation for a change in custody because [466 U.S. 429, 431] "[t]he wife [petitioner] has chosen for herself and for her child, a life-style unacceptable to the father *and to society*. . . . The child . . . is, or at school age will be, subject to environmental pressures not of choice." Record 84 (emphasis added).

The court then concluded that the best interests of the child would be served by awarding custody to the father. The court's rationale is contained in the following:

> "The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. *This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come*." App. to Pet. for Cert. 26–27 (emphasis added).

The Second District Court of Appeal affirmed without opinion, 426 So.2d 34 (1982), thus denying the Florida Supreme Court jurisdiction to review the case. See Fla. Const., Art. V, 3(b)(3); Jenkins v. State, 385 So.2d 1356 (Fla. 1980). We granted certiorari, 464 U.S. 913 (1983), and we reverse.

II

The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court. However, the court's opinion, after stating that the "father's evident resentment of the mother's choice of a black partner is not sufficient" to deprive her of custody, then turns to what it regarded as the damaging impact [466 U.S. 429, 432] on the child from remaining in a racially mixed household. App. to Pet. for Cert. 26. This raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race.

The Florida court did not focus directly on the parental qualifications of the natural mother or her present husband, or indeed on the father's qualifications to have custody of the child. The court found that "there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent." *Id.*, at 24. This, taken with the absence of any negative finding as to the quality of the care provided by the mother, constitutes a rejection of any claim of petitioner's unfitness to continue the custody of her child.

The court correctly stated that the child's welfare was the controlling factor. But that court was entirely candid and made no effort to place its holding on any ground other than race. Taking the court's findings and rationale at face value, it is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability.

A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed[1] discrimination based on race. See Strauder v. West Virginia, 100 U.S. 303, 307–308, 310 (1880). Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. See Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 272 (1979). Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be "necessary . . . to the accomplishment" of their

[1] The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1 (1948); Ex parte Virginia, 100 U.S. 339, 346–347 (1880).

[466 U.S. 429, 433] legitimate purpose, McLaughlin v. Florida, 379 U.S. 184, 196 (1964). See Loving v. Virginia, 388 U.S. 1, 11 (1967).

The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved. Fla. Stat. 61.13(2)(b)(1) (1983). The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.

It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not.[2] The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held." Palmer v. Thompson, 403 U.S. 217, 260–261 (1971) (WHITE, J., dissenting).

This is by no means the first time that acknowledged racial prejudice has been invoked to justify racial classifications. In Buchanan v. Warley, 245 U.S. 60 (1917), for example, [466 U.S. 429, 434] this Court invalidated a Kentucky law forbidding Negroes to buy homes in white neighborhoods.

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Id.*, at 81.

Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.[3]

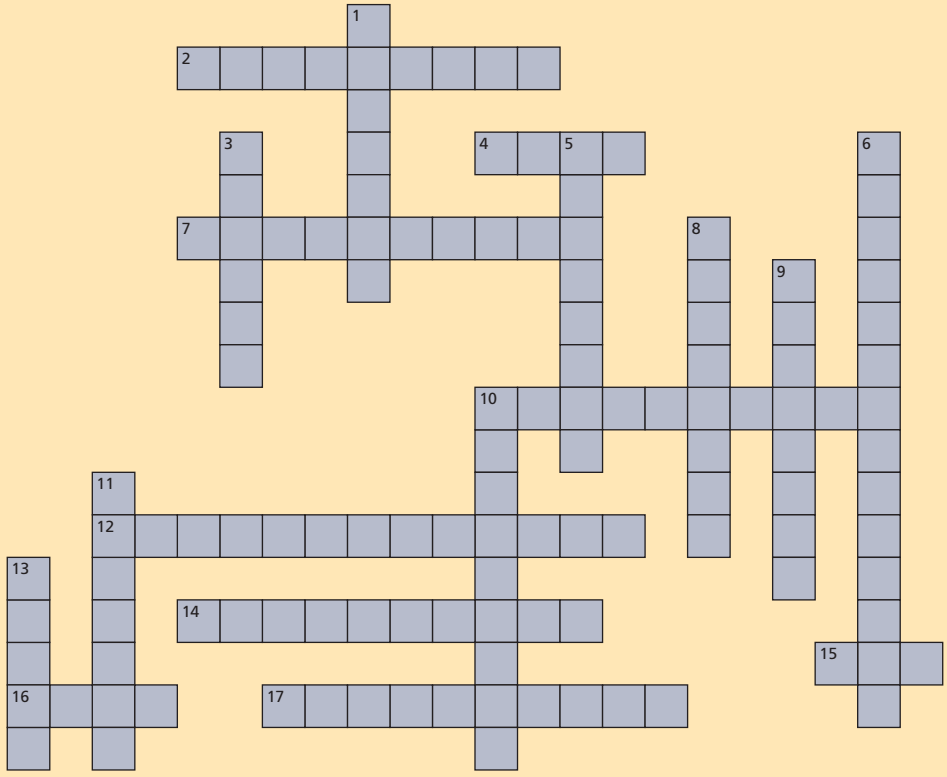
The judgment of the District Court of Appeal is reversed.

It is so ordered.

[2] In light of our holding based on the Equal Protection Clause, we need not reach or resolve petitioner's claim based on the Fourteenth Amendment's Due Process Clause.

[3] This conclusion finds support in other cases as well. For instance, in Watson v. Memphis, 373 U.S. 526 (1963), city officials claimed that desegregation of city parks had to proceed slowly to "prevent interracial disturbances, violence, riots, and community confusion and turmoil." *Id.*, at 535. The Court found such predictions no more than "personal speculations or vague disquietudes," *id.*, at 536, and held that "constitutional rights may not be denied simply because of hostility to their assertion or exercise," *id.*, at 535. In Wright v. Georgia, 373 U.S. 284 (1963), the Court reversed a Negro defendant's breach-of-peace conviction, holding that "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present." *Id.*, at 293. [466 U.S. 429, 435]

Vocabulary Builders



Across

2. Legal principle establishing the law that must be applied.
4. Analytical model.
7. Disagrees with the majority.
10. Agrees with the majority.
12. Summary of legal research sent to the client.
14. Summary of the law, the facts, and the research conclusion.
15. Immigration and Naturalization Service.
16. Style and language used.
17. Using thoughts of another without citation.

Down

1. Law that is established.
3. Emotional response.
5. Position based on analysis of fact and law.
6. Sets apart from settled law.
8. Opinion supporting the case holding.
9. Supported by fact and law.
10. Parent with whom child resides.
11. Point of law established in case opinion.
13. Nonbinding discussion of legal principles.

Chapter 6

Contracts and Sale of Goods

CHAPTER OBJECTIVES

Upon completion of this chapter, the student will be able to:

- Identify the elements of a valid contract.
- Define *offer* and *acceptance*.
- Distinguish valid, void, voidable, and unenforceable contracts.
- Discuss the requirements of contractual competence.
- Explain contractual consideration, including adequacy, and exceptions.
- Demonstrate knowledge of contracts that must be in writing.
- Distinguish unilateral and bilateral contracts.
- Explain the purpose and application of the UCC, Article 2, Sale of Goods.
- Identify and discuss the ethical challenges arising from client contract disputes and strategies for managing the challenges.

Virtually everything one does involves an agreement of some kind. However, not all agreements are contracts. To be enforceable at law as a contract, the agreement must contain certain elements and meet legally established requirements. There are almost as many variations of contract forms as there are agreements. In all cases, each element must be readily identifiable to be fully enforceable. In this lesson, we begin exploring the essential aspects of contract law. We investigate the elements and legal requirements, including a brief exploration of the Uniform Commercial Code, which relates to contracts involving commercial transactions and the sale of goods. Much of what you will encounter in your professional dealings will involve agreements and contracts in some form or another. The engagement letter commencing the relationship is a form of contract and is just one example of the role of contracts in your professional life. It is important to have some familiarity with basic concepts and to develop an understanding of contract principles as part of your analytical framework and tool kit as you get into your paralegal career pursuits.

Uniform Commercial Code (UCC)
Unified code used to govern all commercial transactions including sale of goods, negotiable instruments, and secured or collateralized transactions.

OVERVIEW OF CONTRACT LAW

Restatement (Second) of Contracts
Treatise on contracts considered authoritative but not mandatory guidance in contract law.

There are three sources of contract law in our legal system. The first is common law, which you may recall develops from the body of judicial case opinion interpretation. Second is the **Uniform Commercial Code (UCC)**, which applies to all commercial transactions. The third source of contract law is the ***Restatement (Second) of Contracts***, a legal treatise on contracts. The *Restatement* is not mandatory in judicial decision making, but, nonetheless, it is authoritative. When reading contract case law, you will routinely see citation to the *Restatement*. Regardless of

agreement
Understanding mutually reached between two parties in which rights and obligations of both parties are clearly defined.

contract
A legally binding agreement between two or more parties.

mutual assent
Concurrence by both parties to all terms.

consideration
The basis of the bargained-for exchange between the parties to a contract that is of legal value.

promise
Indication of intention to act or not conveyed in a manner such to make clear to another the intention.

duty
A legal obligation that is required to be performed.

promisor
The party who makes a promise to perform under the contract.

damage
Detriment, harm, or injury.

the source, there is agreement in the law that a contract is an **agreement** and could be classified a relationship.

A **contract** is an agreement between two or more parties creating enforceable obligations recognized at law. To be enforceable, a contract or agreement requires **mutual assent** following an offer and signifying acceptance, bound by exchange of **consideration**. The exchange must be something of value given by one party for a **promise** to do or refrain from doing something by the other party. A binding contract forms when the parties exchange consideration. A **duty** then arises for the **promisor**, or promising party, to perform. If the promising party fails to perform, the injured party incurs **damage**. If this happens, the injured party may complain and seek enforcement under the law.

Since the beginning of time, people have formed agreements. Every agreement is not a contract, and therefore enforceable under the law. Agreements categorized as contracts include certain elements. Whether oral or written, the essence of the contract is an exchange voluntarily given by the parties. Every *contract* must contain the following elements to be enforceable at law:

1. Offer
2. Acceptance
3. Mutual agreement
4. Consideration
5. Competent parties
6. Legal purpose

Think for a moment about the last time you and your friend or significant other decided to go to the movies. The scene may have been similar to the following:

Example:

You asked your friend to go to the movies. You had discussed the newest flick, *Godzilla and the Army of Ants*, and agreed you had to see the picture. You assumed your friend agreed to see *Godzilla* . . . When you arrive at the MegaPlex 50, each of you dash to a ticket line and, after waiting for one hour, you each triumphantly exit with two tickets in hand. You head toward theater 43, on the left, and notice your friend has turned right and is heading toward theater 27. You rush over, shouting, "Where are you going?" to which your friend replies, "*Bambi the Boar Falls for Elvis the Elephant*," the latest art flick winner of the Most Bizarre Movie of the Year Film Festival. It is promoted as the ultimate animal love film of the century! *Question*: Is there a cause of action against your friend to repay you for the cost of the second ticket to see *Godzilla* because you are going to see that movie. *Answer*: No.

While there was an agreement to go to the movies, there was no agreement as to *which* movie. You assumed the choice was *Godzilla*, but obviously your friend understood the agreement to mean seeing the new art flick, *Bambi*. Thus, the essential element of mutual assent is missing. The agreement is legally flawed and unenforceable. This agreement has no bargained-for exchange or consideration. Assumption does not constitute **meeting of the minds**. This is a failed agreement but not a contract because the essential elements were not established. Matching the facts to the elements of an enforceable contract may help illustrate why this agreement is not a contract.

meeting of the minds
A legal concept requiring that both parties understand and ascribe the same meaning to the terms of the contract; a theory holding that both parties must both objectively and subjectively intend to enter into the agreement on the same terms.

First, there was no actual agreement to see the movie *Godzilla*. Thus, no mutual assent was established. The element of *mutual assent* is also known as meeting of the minds. It means the parties have similar understanding. You and your friend agreed to go to the movies, but you did not agree to see the movie *Godzilla.*

The next missing element is *consideration*, defined legally as something of value exchanged between the parties. You exchanged nothing of value. Driving to the theater following a vague agreement to go to the movies is not a legally adequate bargained-for exchange. Neither a promise for action nor a promise for a promise was exchanged.

The next missing element is identifiable *duty*. There was no duty on your part to buy that ticket just as there was none for your friend. Based on past practice, it is reasonable for your friend to think that he or she would pay for one ticket, that is, the ticket he or she would use to see the movie.

Finally, there are no identifiable *damages*. Each of you paid for two movie tickets, which you can return for full refund if unused; thus, there are no compensable damages.

OFFER

offer
A promise made by the offeror to do (or not to do) something provided that the offeree, by accepting, promises or does something in exchange.

offeror
The person making the offer to another party.

offeree
The person to whom the offer is made.

mirror image rule
A requirement that the acceptance of an offer must exactly match the terms of the original offer.

counteroffer
A refusal to accept the stated terms of an offer by proposing alternate terms.

The **offer**, or suggestion of terms, is extended by the **offeror**, the party extending the offer, and must be accepted without any change whatever by the other party, the **offeree**. This is also called the **mirror image rule**, which requires acceptance by the *offeree* to be the exact image of, or identical in every respect to, that extended by the offeror.

In some cases, the offer is made but the offeree agrees to accept under a different set of circumstances. This is a **counteroffer**. When that occurs, the initial offeror must either accept the counteroffer exactly as presented or counter again with another variation. Until the offeree accepts verbatim without modification, there may be negotiation, but no firm contract is established.

Example:

Chuck, the crocodile trainer, offers Al his autographed copy of the hot best-selling book, *Confessions of a Lounge Lizard*, for $100 [*offer*]. Al tells Chuck that he would like to add the book to his collection. However, he only wants to pay Chuck $75 because the book had some water damage [*counteroffer*]. Chuck hisses his distaste and complains bitterly, but, since he is ready to move, he tells Al that he accepts the offer to buy the book for $75 [*acceptance*].

In the above scenario, Chuck extended an offer that Al did not accept. Instead, Al changed the conditions under which he would accept. He presented a counteroffer. The initial offeror, Chuck, must accept the conditions as changed by Al, the initial offeree. When Chuck agreed to sell the book for the price Al suggested, the acceptance was the mirror image of the counteroffer; thus, the contract was formed. If the rule did not apply, enforcing a contract would be difficult because determining which of the elements was accepted would be a challenge. There were two prices suggested in the negotiation stage. Thus, specificity must be incorporated so both parties understand what they mutually assented to do, thus satisfying the mirror image rule.

Example:

Sarah promises to sell Harriet her priceless Carnaby Street Beatle's ring for $100. Harriet tells Sarah that she will buy the Beatle's ring for $100. Harriet accepted Sarah's offer without change. Thus, a meeting of the minds has occurred and an enforceable contract created.

Example:

Sarah promises to sell Ginger her portrait of Elvis for $200. Ginger responds, saying she will buy it but also wants the signed photo of Graceland with the Colonel Tom Parker signature replica.

There is no acceptance because Ginger added another condition. Ginger conditionally accepted Sarah's offer and made a counteroffer. Adding terms operates as a rejection. The additional terms in the response are the counteroffer.

Mirror Image Rule: the principle of contract law requiring that the acceptance mirror every aspect of the offer.

The original offeror has no legal obligation to do anything when a counteroffer is made. If indeed Sarah made no response, then no contract forms. On the other hand, to perfect the contract, Sarah must respond to Ginger's offer affirmatively, indicating that she accepts the counteroffer exactly as made.

CONSIDERATION

Consideration is something of value exchanged by the parties. It can take a variety of forms, but must always meet the value test. Something of value could be an act, a forbearance, or a return promise. Of course, without integrity in the other contract elements, an exchange of value alone

may be insufficient to establish a legally binding contract. Meeting the value test does not mean that only money or goods qualify. An individual can give consideration as a promise to do or refrain from doing something otherwise legal and available to the party. In each instance, there is an exchange of value, albeit intangible

An example of consideration should clarify the principle.

Example:

At his yard sale, Jackson has a handkerchief actually used by Tom Jones that he had preserved for many years. The handkerchief has Tom Jones' brow sweat still on it, unwashed since Tom tossed it into the audience at his Farewell United States Concert. Jillian, the president of the Waikiki Tom Jones Fan Club, pays Jackson $1,000 for the unwashed, carefully preserved handkerchief.

In this case, the consideration is the $1,000 exchanged for the unwashed Farewell Concert Tom Jones handkerchief.

Example:

Frankie Arbuckle offered to pay Thelma $1,000 per week if she left school to travel with him as his personal hairdresser and clothier in his upcoming tour. Thelma jumped at the chance, quit school, and accepted the offer.

There was no compelling reason for Thelma to leave school. Therefore, quitting school and accepting the position to travel as personal hairdresser is the consideration for the agreement. Thelma had no legal obligation to continue in school and the purpose of the agreement with Frankie was legal. Thus, the contract acceptance is valid, and the contract enforceable at law.

If a court looks at the type of consideration and determines it is inadequate under the law, that does not necessarily mean that the court is attempting to determine value. What it means is that, after assessing all of the facts, the nature of the consideration may render the contract unenforceable. It is one thing at a family yard sale to sell a picture for $25 that ultimately turns out to be a priceless masterpiece. It is something else for a dealer to sell for $25 a painting that is supposedly an original work of Rembrandt. The consideration in that case fails the sufficiency test. In a transaction between an art dealer and a knowledgeable art connoisseur, $25 would be **insufficient consideration** for the purchase of a priceless masterpiece. The price is simply unreasonable.

insufficient consideration
Inadequate value exchanged to form a enforceable contract.

Executory consideration: exchange of value completed over time.

Express consideration: stated clearly and unambiguously.

Insufficient consideration: inadequate under the facts and circumstances.

Continuing consideration: Extends over time.

Sufficient consideration: Value exchanged is adequate and reasonable.

executory consideration
An exchange of value completed over time.

Executory consideration continues over time. The contract, by its very terms, cannot end before a period of time elapses. The obligations and performance continue throughout the established term.

express consideration
Stated clearly and unambiguously.

Example:

Jill hires Max to teach her to draw. The agreement calls for one two-hour lesson each week, for which Jill will pay Max $100 at each session. The agreed term of the lessons is one year.

continuing consideration
Extends over time.

This contract cannot be complete prior to year's end. Each installment earns a payment, but the installments continue. This agreement also contains **express consideration** because the contract described the consideration clearly. Even if expressly stated, past performance is inadequate consideration for a contract.

sufficient consideration
The exchanges have recognizable legal value and are capable of supporting an enforceable contract. The actual values are irrelevant.

Example:

Grandpa promised to give Lenny a car because Lenny got an A on his algebra test last month. Six months later, Lenny went to Grandpa to remind him of the contract. Lenny cannot sue

FIGURE 6.1
Types of Consideration

Continuing	Extends over time for both parties
Express	Stated clearly and unambiguously in writing or verbally
Sufficient	Value exchanged is adequate and reasonable
Executory	Exchanged value completed over time

Grandpa for breach of contract because the consideration or value was past performance; thus, there is no enforceable contract formed.

RESEARCH THIS!

Adequacy of consideration has been the subject of scholarly analyses, including *Restatement (Second) of Contracts* § 71 and 17A Am. Jur. 2d §§ 1–15. These are two good sources of discussion on the nature and the type of sufficient and inadequate consideration.

gratuitous promise
A promise in exchange for nothing.

Another example of flawed consideration is a **gratuitous promise**, or a promise made in exchange for nothing. A gratuitous promise may be a gift, but it is not an enforceable contract.

PRACTICE TIP

When researching a contract issue, be sure to identify the consideration and then compare it to the checklist of types. Be sure the consideration meets the adequacy test and is consistent with the contract type.

Example:

Grandpa met Larry, his grandson, for lunch one afternoon. As they entered Eddie's Eatery, Grandpa noticed a help-wanted sign in the window. During lunch, Grandpa told Larry that if he got a job, and remained employed, whether at Eddie's Eatery or anywhere else, for two years, Grandpa would give Larry a new car of his choice. Two years later, on the anniversary date of the luncheon, Larry called Grandpa to remind him of the promise made at the lunch. Grandpa told Larry he would not give him the car after all. *Question*: Is there an enforceable contract? *Answer*: No.

The agreement may have contributed to Larry's motivation to get a job. However, the performance was not legally sufficient exchange of consideration, or value. Grandpa incurred no legal obligation to Larry under the conditions discussed at lunch. Grandpa made an offer of a gift, or a gratuitous promise that is unenforceable at law.

See Figure 6.1 for types of consideration.

RESEARCH THIS!

Research **adequacy of consideration** in a legal encyclopedia and your home state case reporter. Select and review one or two case opinions. Note the key points discussed regarding the standard for adequacy of consideration.

adequacy of consideration
Sufficient under the circumstances to support the contract.

ACCEPTANCE

acceptance
The offeree's clear manifestation of agreement to the exact terms of the offer in the manner specified in the offer.

When an offeree agrees to the terms presented by the offeror, **acceptance** has occurred. On the one hand, acceptance seems to be extremely straightforward. The offeror extends the offer, and the offeree must accept the precise terms and conditions offered. The acceptance must be the mirror image of the offer to become enforceable. However, there are a few variations to recognize when analyzing the legal sufficiency of acceptance under the law.

FIGURE 6.2
Types of Acceptance

Acceptance	Agreement to the terms presented by the offeror, thus creating a binding contract
Conditional acceptance	A counteroffer in which additional terms or conditions are added to the original offer
Express acceptance	Stated or, if applicable, written statement from the offeree operating to form an enforceable contract; must be precisely the same as the offer
Implied acceptance	Acceptance of the offeror's terms and conditions with actions or words indicating intention to accept

express acceptance
Stated or, if applicable, written statement from the offeree that mirrors the offer; that is, it is precisely the same as the offer.

conditional acceptance
A refusal to accept the stated terms of an offer by adding restrictions or requirements to the terms of the offer by the offeree.

In the language of contracts, a counteroffer is a **conditional acceptance**. This means that the statement signifies potential for acceptance but with changed conditions for acceptance. Under the mirror image rule, the newly framed statement and conditions must mirror the offer to meet the legal standard for acceptance. Modifications or new conditions create a counteroffer.

If the offeror performs consistently with the offer, there is **implied acceptance**. The action taken indicates clearly that the offeree wants to form a contract by willingly undertaking to act. The action creates *duties* and expectation of a **benefit**.

See Figure 6.2 for types of acceptance.

COMPETENCE OF PARTIES

implied acceptance
Acceptance of the offeror's terms and conditions by actions or words indicating clearly the intention to accept.

benefit
Gain acquired by a party or parties to a contract.

contractual capacity
Legal capability to enter a contract.

avoid
The power of a minor to stop performance under a contract.

disaffirm
Renounce, as in a contract.

avoid the contract
Legally sufficient excuse for failure to complete performance under the contract.

The law understands there may be contractual impairments that, while not obvious, nonetheless render the agreement unenforceable. **Contractual capacity**, or *competence*, is one such element. In the eyes of the law, a minor is incapable of understanding the full ramifications under contract, and thus lacks contractual capacity. Likewise, persons with a mental impairment, under the influence of alcohol or drugs, or having a disability that renders them incapable of meeting the requirements are examples of persons lacking legal contractual capacity.

Individual states determine the age of majority, but, in most cases, it is age 18. In cases where a minor enters a contract, the minor also gains the power to **avoid** the contract by **disaffirming** the terms. A minor is not legally competent to contract. This means that the minor can simply stop performing under the contract. The right of avoidance rests only with the minor. If the minor continues to act or perform consistently with the contract terms, the other party remains bound to performance as well.

Example:

Helga Hipster, a 16 year old, signed a contract with Polly Promoter to perform her famous harmonica solo "When the Big Bear Comes Home" at a July 4th celebration. As the date of the concert approached, Helga contacted Polly, claiming she would not be performing because her parents do not allow her to stay up late at night. Polly became hysterical. There was no one else available and she was counting on Helga to spark up her celebration concert. *Question*: Will Polly win if she sues for breach of contract? *Answer*: No.

Helga can legally **avoid the contract** because, at age 16, she is not legally competent to enter contracts. Polly has no performer, and her concert may be a real flop.

Unfortunately, when she consults her lawyer, Polly gets even more bad news. She cannot sue Helga's parents or otherwise force them to let Helga stay up late just that one night to give the concert. The concert is not necessary for Helga's safety and well-being. A legal necessity is housing or food but not entertainment. If and only if the contract with the minor was for maintenance necessities would the court enforce the contract as against the parents. However, the concert simply is not within the exceptions, so Polly has no recourse.

If the minor performs under the contract, the terms remain in full force and effect as to both parties. Where the minor entered a contract and continued performance until reaching majority, the contract should be executed again. The minor has become competent to contract under the law and the document should conform to this change in status. This would occur in situations such as when the minor signed a loan or installment agreement with a car dealer. If the minor met the payment obligations and reached majority, the dealer would prepare a new agreement for signature.

RESEARCH THIS!

Visit your home state case reporter series and locate cases related to contractual capacity. Select a case involving a contract entered by a minor that the minor chose to avoid. Discuss among the class the opinions and holding, including points related to contracting with or by minors, and obligations of the offeror in such situations. Create a checklist of points to consider that emerges from the discussion. Retain your list in your PRM for future easy reference.

CONTRACT CLASSIFICATIONS

Some contracts are more structured and complex than others. Regardless of the formality, simplicity, or complexity, basic contract principles always apply. The contract can involve an exchange of promises, in which case there is a **bilateral contract** formed. If the agreement is a promise exchanged for an action or forbearance, then it is a **unilateral contract**. Some examples should help clarify the difference.

bilateral contract
A contract in which the parties exchange a promise for a promise.

unilateral contract
A contract in which the parties exchange a promise for an act.

Example:

Stephan promised to pay Boris $100 if Boris would pick up spinach that was bagged and ready for delivery at the grocery store. Boris promised to do so the next day at 3:00 p.m.

Offer: Pick up the spinach for $100.
Promise: Stephan will pay for the pick up.
Acceptance: Boris picks up the spinach.
Consideration: $100.00 and delivery of the spinach.
Mutuality of agreement: Pick up and payment, at a date and time certain.
Competence of both parties to contract is accepted in this example.

A bilateral contract is formed the moment Boris promises to make the pickup. When Boris delivers the spinach, Stephan will make the payment. Each party has made a promise to the other; thus, the contract is formed. Boris has an unfettered right to cancel at any time and has forfeited nothing until he picks up the spinach. The contract does not mature until performance commences.

As soon as Boris promised to deliver the spinach, a *bilateral contract* formed because both parties made a promise to do something. Stephan agreed to pay something of value in exchange for Boris's promise to deliver the spinach, which had value for Stephan. In contracts involving a promise exchanged for a promise, consideration and agreement, contractual capacity, and legality of purpose also must be present.

On the other hand, a *unilateral contract* involves one party making a promise in exchange for performance. Until performance is completed, a unilateral contract has no force and effect. An example is as follows.

empty promise
A promise that has neither a legal nor a practical value.

detriment
A loss or burden incurred because of contract formation.

illusory promise
A statement that appears to be a promise but actually enforces no obligation upon the promisor because he retains the subjective option whether or not to perform on it.

Example:

Olga promised to bake spinach soufflé for Stephan when spinach season began so he would have it when the season ended. Stephan promised to pay Olga $100 when she delivers the finished soufflés.

The contractual agreement forms when Olga delivers the soufflés. Stephan gave a promise in exchange for Olga's act. In this example, it is more difficult to identify the act and promise. There are some situations in which it is not easy to identify whether a unilateral, promise for an act, or bilateral, promise for a promise, contract formed. When ambiguity occurs, the legal presumption is that a bilateral contract has formed.

An **empty promise** has no value. Neither party incurs **detriment**; thus, the promise is inadequate under the law. Any agreement containing an empty or valueless promise is void on its face. In other words, there is no contract. The basis of the agreement must be a real, not an illusory, promise. An **illusory promise** is insufficient because conditions make acceptance

good faith (contractual good faith)
The ability, competence, and intent to perform under the contract; the legal obligations to enter and perform a contract with honest and real intentions to complete performance and other conditions; fair dealing, integrity, and commitment to perform under the contract in an appropriate, timely, and responsible manner.

quasi contract
Where no technical contract exists, the court can create an obligation in the name of justice to promote fairness and afford a remedy to an innocent party and prevent unearned benefits to be conferred on the other party. (Also know as quasi-contract/pseudo-contract/ implied-in-law contract.)

RESEARCH THIS!

Determining if a quasi contract exists is not always easy. Locate the case of *Gould v. American Water Works Service Co.*, 52 N.J. 226, 245 A.2d 14 (1958). After reading the case opinion, write a case summary. Create a list of key points raised in the analysis, and comment on the legal analysis, e.g., if you agree, why or if you disagree why.

impossible. No meeting of the minds can occur because it is impossible to determine what is intended and the other elements of contract.

On occasion, one party acts in reliance on the promise of another in **good faith** and performs as promised, but the offeror refuses to perform his or her obligation, typically payment. In such cases, the courts enforce the contract after first establishing that a contract existed. This is a case of **quasi contract**, that is, an *implied-in-fact* or *implied-at-law contract.* The actions of one party operate to confer a *benefit*. The totality of the circumstances makes it clear that one party has incurred detriment for which the other reasonably should compensate. The theory relies on the principle of avoiding **undue enrichment** of one party and **unfair detriment** to the other. For example, the bus driver enters a contract to drive the passengers to their destination. The passengers pay the fare as consideration for performance. If the passengers use the service but fail to pay, the courts would enforce the obligation to pay under the legal theory of quasi contract.

CONTRACT TYPES

undue enrichment
Gain experienced without related duty or obligation of performance.

unfair detriment
A burden incurred for which there is no compensation.

formal contract
An agreement made that follows a certain prescribed form like negotiable instruments.

informal contract
Can be oral or written and executed in any style acceptable to the parties.

express (written) contracts
An agreement whose terms have been communicated in words, either in writing or orally.

parol evidence rule
A court evidentiary doctrine that excludes certain types of outside oral testimony offered as proof of the terms of the contract.

A **formal contract** often uses somewhat formal language and format. For example, in a contract to purchase a vehicle from an automobile dealership, among the many things that appear in the contract is an exact description of the vehicle including the precise mileage at the time of purchase and the Vehicle Identification Number (VIN). The forms create a formal contract because they conform rigidly to certain conditions, terms, provisions, and style of writing.

On the other hand, an **informal contract** can be oral or written. Natural language and terms are used. A letter, memo, or even something simpler such as a list or phrases can be used with a fully enforceable informal contract. Under all circumstances, informal contracts require clear and unambiguous terms and an exchange of consideration and they must commence with an offer, an acceptance, and identifiable consideration.

Express or **written contracts** recite every term and condition. Frequently, express contracts utilize forms such as contracts for sale and purchase of real estate. The form incorporates all mandated terms and conditions and leaves blanks for details such as the exact address and the legal description of the subject parcel that is written in for each transaction. Such forms eliminate the possibility of omitting one or more of the essential clauses and help eliminate confusion or misunderstanding as to the terms and conditions.

Under the **parol evidence rule** typically applied with written contracts, all terms, conditions, representations, and other elements of the agreement are presumed included. (See Figure 6.3.) In the event of a dispute, the courts will not entertain any oral evidence of modifications, additions,

RESEARCH THIS!

Locate the section of the *Restatement (Second) of Contracts* related to the parol evidence rule. After reading the materials, review some of the more recent case opinions to get a better idea of how the courts analyze and apply the rule.

FIGURE 6.3
Parol Evidence Rule

1. Applies only with written contracts.
2. With evidence of fraud, duress, or mutual mistake of fact, the rule will not be applied.
3. The writing must be the final form and so state in the body of the contract (integrated contract).
   a. If the contract does not state that it is the final form, then the rule will not be applied for those terms and conditions admittedly not in final form.
4. The rule operates only in relation to oral statements and representations made prior to or contemporaneous with execution of the final form document.
5. If the oral evidence explains, rather than adds to or contradicts, the written document, then it may be presented.

or deletions furnished prior to or contemporaneously with the final execution or signing of the document. The rule eliminates confusion and puts contracting parties on notice to read before signing to avoid after-the-fact misunderstandings.

Example:

Willard and Wanda entered a contract under which Wanda would deliver handmade chocolate chip cookies no less than eight inches in diameter. Willard would advertise Wanda the Cookie Lady when he sold the cookies at the Hometown Park at Saturday afternoon baseball games. The weekly order was for 10 dozen cookies, wrapped individually, and arriving no later than 11:00 a.m. on Saturday morning. In week four, Wanda delivered 10 dozen six-inch cookies and 2 dozen eight-inch cookies. Each of the next four weeks, she delivered the same order, despite Willard reminding her that the contract required eight-inch cookies and that he lost money on the smaller cookies. Wanda responded that since he sold out anyway, it made no difference.

Ultimately, Willard stopped paying the outstanding invoices and Wanda sued. At trial, Wanda told the judge that while they were signing the documents, Wanda told Willard she would deliver six-inch and eight-inch cookies and Willard said that that was no big deal, as long as they were at his house no later than 11:00 a.m. on game day.

Question: Should the judge rule in Wanda's favor and order Willard to pay? *Answer*: The judge probably will not rule in Wanda's favor.

The evidence of modification was oral and occurred contemporaneously with the signing of the agreement. The contract did not discuss substitution. Thus, the parol evidence rule applies. The rule is based on the theory that if the parties took the time to execute a written agreement, then it is inconsistent to add conditions or contract modifications orally. Many formal contracts include statements that the terms and conditions in the writing represent the totality of the agreement between the parties, but this language is not essential for enforceability.

implied contract
An agreement whose terms have not been communicated in words, but rather by conduct or actions of the parties.

An **implied contract** arises after performance of some kind by one of the parties, which results in benefit to the other and detriment to the actor. This legal mechanism is used to enforce what otherwise may be defective agreements or to ensure that performance in circumstances without written agreements is not unprotected. The courts look at the reasonableness of the performance and the surrounding circumstances to evaluate whether the implied contract is legally enforceable. The reasonableness standard is used as one analytical tool.

Example:

Boris wanted to ask for Olga's hand in marriage. Boris overheard her telling Stephan she would love to have her house painted, but could not afford it. Boris decided to paint house in her favorite colors; he was sure this would win her over to accept his proposal.

Boris decided to surprise Olga and paint her house while she was out of town. Boris showed up at 123 Little Lovers Lane and began the job after she left on her trip. During the day, the real owner of 123, Willy, did a little landscaping and lazed in the hammock enjoying the warm sunshine and watching Boris paint. Willy assumed his wife had hired Boris, so he said nothing. Boris finished the job and waited for Olga to return, confident she would agree to marry him. Later that evening, Olga arrived home and began lugging the spinach into 128 Little Lovers Lane, across the street from 123, while Boris watched in shock. He rushed over to ask Olga why she went to that house. She looked at him quizzically and said, "Because I live here, Boris." At that moment, Boris realized he had painted the wrong house!

Boris rushed home, quickly wrote out a bill for the painting, and presented it to Willy, who refused to pay but thanked Boris profusely for the sensational spruce up. What else could Boris do to collect payment but sue Willy? Olga was lost. He spent time and money painting Willy's house only to have Willy refuse to pay. *Question*: Will Boris win? *Answer*: Most likely yes.

Of course, Boris reasonably expects payment. After all, Willy watched him paint the house and said nothing. A court would rule in Boris's favor for several reasons, based on the theory of implied contract. First, Willy watched virtually the entire process and failed to say anything to alert Boris to the error. However, since absolutely no agreement between Boris and Willy existed, a court would rely upon the theory of implied contract to support some payment to Boris for the time and money expended even though he painted the wrong house. Boris can recover reasonable costs from Willy although he would not also recover the reasonable profit had he completed the job under contract with a customer.

CONTRACT ENFORCEABILITY

Courts assume that contracts are entered with mutuality of agreement. This presumption is rebuttable upon a showing of competent evidence that one or several elements of contract are either missing or defective—that is, there are **exceptions to contract enforceability**.

exceptions to contract enforceability
Legally adequate reasons for nonperformance of contract obligations.

Courts assume the parties have equal bargaining power and integrity of intent. The elements of *good faith* are ability, competence, and intent to perform under the contract. "One should not be permitted to avoid the consequences of a contract freely entered into simply because he or she elected not to read and understand its terms before executing it, or because, in retrospect, the bargain turns out to be disadvantageous; to sanction such a result would be to render contracts worthless as a tool of commerce". *Gainesville Health Care Center, Inc. v. Weston*, 857 So. 2d 278, 28 Fla. L. Weekly D2201 (Fla. 1st DCA 2003).

equal bargaining power
Both parties have the same position in terms of strengths and weaknesses.

Equal bargaining power means that each party is equal to the other in all respects and the rights, risks, and requirements for each weigh equally. Similarly, the law assumes that once the elements are confirmed and the contract consummated, both parties should be held to performance of their respective contractual obligations. If the nonperformer has second thoughts and fails to perform without consequence accruing, then contract law would be unnecessary and meaningless.

good faith dealing
Doing the best possible to complete the contractual obligations.

Notwithstanding the obligation of **good faith dealing**, situations can arise where all of the contract elements appear to be present, but the contract is nonetheless unenforceable. If a contract does not include an identifiable offer, a definite acceptance, exchange of valuable consideration, **competent parties**, and **legal purpose**, it is not enforceable at law.

competent parties
Ability or legally adequate qualification of an individual to do something.

If each contract element is present, an enforceable contract is formed. Failure by either party to perform creates breach of contract. When breach occurs, litigation frequently results to compensate the party who incurred loss or damage based on nonperformance.

legal purpose
Ultimate goal or objective must be within the law under all circumstances.

At times, **void contracts**, which may sound like a contradiction, are formed. If the agreement is *void*, then how can it be a contract? The answer, quite simply, is that while it appears all required elements are present, at least one of the elements is fatally flawed. These elements could be illegality of purpose or incompetence of contracting parties or other similar circumstances.

Example:

Manny and Moe reach an agreement under which Manny will deliver two Road Rolling tires for Moe's Camaro. Moe promises to pay Manny $200 for each tire when delivered. Unbeknownst to Moe, the tires Manny promises to deliver have been stolen.

void contract
Agreement that does not meet the required elements and therefore is unenforceable under contract law.

The contract does not meet the legal purpose requirement and is therefore void. Initially, it appears all contract elements are present and the contract should be enforceable. Because the tires are stolen, however, it would be ridiculous for a court to enforce this agreement. In so doing, the court would order Manny to deliver stolen tires in satisfaction of the contractual agreement! A contract formed for an illegal purpose is one type of void contract.

voidable contract
Apparently fully enforceable contract with a defect unknown by one party.

A **voidable contract** may or may not be enforceable. In this contract variation, the contract is valid and fully enforceable because the party's performance is consistent with the obligations under the contract. However, if one party is technically unable legally to enter a contract and decides to avoid the contract, under the law the incompetent party may disaffirm the contract, regardless of prior performance.

RESEARCH THIS!

Locate the section on void contracts in Am. Jur. 2d or Cor. Jur. 2d Read the materials and select two or three of the cases cited. Prepare a brief summary of the case holdings and the points emphasized in the opinions when assessing whether a contract is enforceable or void. Be sure to include the proper case citation as well as citations to the specific sections of Am. Jur. 2d or Cor. Jur. 2d used in your research. Retain in your PRM copies of the cases, your summary, and anything else on the topic that is particularly useful.

Example:

Samantha, age 16, went into Elite Dance Studio for a tour of the facility. While there, she talked with the owner, Eloise, and decided to take a series of ballet lessons. Eloise told Samantha that the lessons were $300 for a series of 10. Samantha paid for the first series, signed the contract, and left dreaming of a career as a professional ballet dancer.

The night before her first session, Samantha decided she did not need help from Eloise and resolved to go back the next day to get her money back. When she arrived at the studio the following day, Samantha told Eloise she was not going to take the lessons. She also showed Eloise her Police Department identification proving that she was just 16 years old. Eloise had no choice but to return the money for the lessons.

Samantha was a minor at the time of the contract. As such, the contractual agreement is voidable. Samantha can avoid any obligations arising under the contract. However, if she decided to take the lessons, the contract terms would remain in full force and effect. A contracting minor who wishes to continue the contract once reaching majority has an obligation to reaffirm the contract at that time.

CONTRACTS REQUIRING WRITING

Contracts need not be in writing to be enforceable under the law. Oral agreements are indeed enforceable in many situations. In the examples throughout this chapter, an oral contract forms the basis of the agreement. It is important to bear in mind that oral contracts can be enforceable under the law.

Under some circumstances, the courts require a writing to create contract enforceability. Those entering into oral agreements in each of the exceptional situations enter at their own risk. If breach occurs, the injured party cannot generally rely on judicial intervention.

Statute of Frauds
Rule that specifies which contracts must be in writing to be enforceable.

Under the requirements of the **Statute of Frauds**, writing is required in situations relating to legally unique categories of agreements. The Statute of Frauds comes from old English law, which required certain contracts in writing to prevent perjury and fraud.

The following categories of contract *must be in writing* to be enforceable:

1. Contracts to answer for the debts of another.
2. Contracts that will not be performed within one year.
3. Agreements made by executors of estates.
4. Contracts for the sale of goods with a purchase price more than $500.
5. Contracts for the sale and purchase of real estate.
6. Prenuptial agreements.

For example, all real estate transactions involve something unique. No piece of real estate or house and lot can be duplicated exactly. Thus, the courts require a writing that includes a specific description of the one and only piece of real property involved. The law assumes that writing eliminates confusion.

A prenuptial agreement is a unique situation. The same bride and groom simply cannot enter another contract for the same marriage. Additionally, the interplay of emotion and practical business considerations has led the courts to require such agreements in writing to be enforceable. With the requirement of writing, when the parties face dissolution, there is no disagreement as to what the parties agreed upon when things were in the blush of first love!

UNIFORM COMMERCIAL CODE (UCC)

goods
Movable items under the UCC definition.

The Uniform Commercial Code (UCC) is a primary law source applied to commercial transactions. Various sections or articles of the UCC have particular relevance to aspects of contracting and commercial transactions. For purposes of our exploration of contract law, UCC Article 2, Sale of Goods, is the most important section. This section governs any sale of **goods**, defined in the UCC as movable items that are the subject of the contract.

In a contract for the sale of goods, the UCC supersedes common law. After determining the code applies, you need to select the appropriate code provisions. Sales of goods governed by Article 2 of the UCC typically have substantial documentation. Even in relatively informal agreements for the sale of goods between parties other than major retailers, the provisions of the UCC could control the transaction. An enormous benefit of the UCC is that it includes a comprehensive section of definition at the beginning of each article or section.

The UCC drafters assumed the parties to transactions have equal bargaining power. Nonetheless, there are myriad provisions protecting the disadvantaged party. In cases of breach in covered transactions and contracts, the code includes both definitions of breach as well as remedies available.

Classification of Sale under the UCC

sales contract
The transfer of title to goods for a set price governed by the UCC rules.

absolute sale
The title transfers upon delivery and payment.

conditional sale
Terms other than delivery and payment must be met to transfer title of the goods.

bulk sale
Agreement to transfer all or substantially all the goods to the buyer.

private sale
A sale between the buyer and the seller without notice or advertisement.

public sale
A sale advertised to the public and subject to UCC provisions.

executed contract
The parties' performance obligations under the contract are complete.

A **sales contract** under the UCC provisions involves the transfer of ownership of goods for a set price, either with payment at the time of transfer or a promise to pay at a definite time subsequently. The contract may involve a future sale and nonetheless be enforceable.

An **absolute sale** involves transferring title when all the transaction conditions are met. The contract terms are used to guide decision making as to completed performance. With a **conditional sale**, there are conditions imposed that must be satisfied prior to the transfer of ownership and the completion of the contract. In a **bulk sale**, the seller agrees to transfer all of the goods, or substantially all, to the buyer.

Example:

Ginger walks into Beauty Supplies Unlimited and purchases a case of Beautiful Blondes Hair Rinse. Ginger pays for the goods and leaves the store. This is an *absolute sale*.

Example:

Bill agrees to sell the latest high-top sneakers, the ones with the reversible shoelaces that glow in the dark. He will sell them for half price to any buyer who can produce the ticket stub from a professional basketball game. This is a *conditional sale*. The half price will only apply to those with the ticket stub.

Example:

Bill contacts Ray and advises that he will buy all of the high-top sneakers Ray has on hand at his Sports Goods World store. If a price and other necessary terms were mutually agreed, this would be a *bulk sale*.

A **private sale** is between the buyer and the seller without notice or advertisement; a **public sale** is advertised to the public and subject to UCC provisions. An **executed contract** is one in which all terms and conditions are met, performance is completed, payment is made, and the title transfer is final.

CYBER TRIP

Locate the Uniform Commercial Code either in traditional text form or through electronic sources. Navigate through the various sections of Article 2 to get an insight into the scope of coverage and the detail of the provisions as well. Also, look carefully through the definitions section to enhance your understanding of how the UCC operates.

RESEARCH THIS!

Locate the Article 2, Sale of Goods, definitions section. Read the definitions of each sale type included in Article 2. Prepare a list or chart presenting the types of sale, the requirement for each type, and the remedy available for breach of contract. Retain the materials in your PRM for future easy reference.

Team Activity Exercise

The class will be divided into teams with each team divided into two sections. One group of each team will represent common law contracts and the other, Article 2, Sale of Goods, contracts. The teams will research their contract type and discuss the strengths and weaknesses of their respective type. As an entire group, prepare a chart or list of the strengths and weaknesses of each as well as strategies to minimize potential harm from the weaknesses. When all teams have finished, discuss as a class the findings of each and prepare a master list of the all identified strengths and weaknesses. Strategies discussed for avoiding problems and enhancing the strengths should be included on your chart. Retain your individual team and class materials for future easy reference in your PRM.

Eye on Ethics

Contract issues are no different from any other law in terms of potential for ethical challenges. There are research and interpretation issues as with any other legal dispute. In some client interactions, it is relatively easy to get emotionally involved in an issue and the effect it may have on the client. The paralegal must manage his or her personal reactions appropriately to ensure professional detachment, while at the same time effectively working for the client. The longer the relationship with the client has endured, the more prone to emotional and ethical challenge both the paralegal and the attorney become.

The facts in your case are very complex, but the one thing not in dispute is that $1 million is at risk, and the potential for the client to lose his business if the contract is not enforced and completed. Your firm has worked with this client for many years. You are organizing the file for depositions in the upcoming trial. Reading and summarizing the 30-page contract, delivery receipts, and documentary evidence produced by the opposing side are part of deposition preparation. As you plow through the materials, you notice that one of the conditions of the contract requires your client to provide proof of inspection of the goods upon receipt and delivery, but in no case more than 72 hours after signing the delivery receipt. You cannot find any evidence of such confirmation going to the seller. You understand this could present an enormous obstacle to the client. If the client failed to meet legal obligations under the contract, the opposing side could possibly enter a winning defense based on your client's nonperformance.

Before you complete the project and deliver your memoranda to the supervising attorney, you call the client to discuss what you found in the contract and advise the client that you cannot find evidence of his compliance. You also tell the client that the omission could be a huge problem in the case and advise him to prepare a story. You instruct him to be sure to indicate that he knew about the clause and complied. Your theory in doing so was that your client needed to address the issue before opposing counsel raises the issue in the deposition, putting your client on the defensive. Your motive was to ensure the client was prepared because of the enormous loss he might incur.

QUESTION:

What, if any, ethical challenge is presented? Review the facts, and the applicable code of ethics and guidelines using materials from Appendix B as well as your home state codes and guidelines. Respond using the provisions of the code to support the position you present. Also, discuss what, if any, ethics problem may arise for the attorney by the situation.

Summary

This chapter introduced you to legal aspects of contracts. You are familiar with some contract terms and provisions in your everyday life. You have now explored the legal requirements for valid contracts and enforceability at law. Contract formation, types of contracts, and issues of concern when a dispute arises were discussed. You have guidelines for evaluating sufficiency of the promises involved and consideration exchanged. We have looked at circumstances that impair contracts, both at the formation and the performance stages. The lesson included discussion of contracts that must be in writing, including theory and conditions imposed for such contracts. Ethical challenges for the paralegal arise in contract issues as with any other practice specialty, and you had the opportunity to think through one such challenge.

Key Terms

Absolute sale
Acceptance
Adequacy of consideration
Agreement
Avoid
Avoid the contract
Benefit
Bilateral contract
Bulk sale
Competent parties
Conditional acceptance
Conditional sale
Consideration
Continuing consideration
Contract
Contractual capacity
Contractual good faith
Counteroffer
Damage
Detriment
Disaffirm
Duty
Empty promise
Equal bargaining power
Exceptions to contract enforceability
Executed contract
Executory consideration
Express acceptance
Express consideration
Express (written) contracts
Formal contract
Good faith
Good faith dealing
Goods
Gratuitous promise
Identifying the goods
Illusory promise
Implied acceptance
Implied contract
Informal contract
Insufficient consideration
Legal purpose
Meeting of the minds
Mirror image rule
Mutual assent
Offer
Offeree
Offeror
Parol evidence rule
Private sale
Promise
Promisor
Public sale
Quasi contract
Restatement (Second) of Contracts
Sales contract
Statute of Frauds
Sufficient consideration
Undue enrichment
Unfair detriment
Uniform Commercial Code (UCC)
Unilateral contract
Void contract
Voidable contract

Review Exercises

TRUE AND FALSE

Respond to each of the following either true or false. For those marked false, include another sentence making the sentence true.

1. A bilateral contract involves exchange of a promise for an act.
2. The offeree must tell the offeror if he or she will not accept the counteroffer.
3. All contracts must be in writing.
4. Voidable contracts are always formed with minors.
5. The parties are expected to act in good faith in the contract formation stage.

6. Certain contracts for an illegal purpose are fully enforceable under the law.
7. If a contract is fully integrated, every aspect of the agreement is contained in the writing.
8. Under some circumstances, a contract does not require mutual assent to the terms.
9. Quasi contract is formed when the court imposes a contractual agreement to protect a party from incurring detriment.
10. Courts will not apply promissory estoppel unless there is evidence of performance.
11. The UCC governs sales of some goods but in no case in excess of $500.
12. Private sales for goods in excess of $500 are governed by the provisions of the UCC.
13. The Statute of Frauds governs only oral contracts.
14. Written contracts do not require evidence of exchange of consideration of value.

Discussion Questions

1. Read the following list and respond to the questions posed. Be sure to indicate those cases in which UCC Article 2 applies. In each instance, explain why or why not.
   a. John asks his hairdresser, Larry, to agree to cut John's hair every Thursday at four o'clock for the next year. Three weeks later, John arrives and Larry is not there. Can John sue Larry? Why or why not?
   b. Sam agrees to sell Isabel his stereo television entertainment center along with two side chairs designed to go with the piece. They agree to a sales price of $600. Sam delivers only one chair. Isabel does not want the rest because she cannot replace the missing chair. Can Isabel sue Sam?
   c. Zeke goes to Home 'n Hearth and purchases $2,000 worth of living room furniture. The furniture is promised for delivery seven business days later. The delivery arrives and Zeke accepts it.
2. Respond to the following:
   a. What is the practical difference between a unilateral and a bilateral contract?
   b. Define and provide an example of an implied-at-law contract.
   c. What contract types are governed by the Statute of Frauds?
   d. List the six elements of a contract and provide a definition for each element.
   e. Create a fact pattern including all of the elements and identify which facts satisfy which element.
3. Read through the following list and indicate those governed by the Statute of Frauds provisions and explain why.
   a. Jennifer needs to rent an apartment and goes to the rental office of Delirium Estates. They have the perfect apartment. The manager asks for a deposit of $600. Moreover, the manager tells Jennifer she can move in two weeks later. Jennifer arrives on the appointed move-in date. The apartment is not available. She has already terminated her lease on the old apartment.
   b. Jane, owner of Pet Stuff, goes to her annual trade show and orders $6,000 worth of kitty coats, rain boots, and jeweled collars. The seller asks Jennifer if she really wants to wait for a contract and Jennifer asks you, since you have accompanied her to the show, what she should do.
   c. Don tells you that he is really beside himself worrying over his son at college.
4. Go to the section in Am. Jur. 2d related to quasi contract. Read the sections on bilateral and unilateral contract formation. Then prepare a memo to the new paralegals in your division who are assigned contract cases. Explain the differences between the two types of contract and cite at least two cases for each. Briefly summarize the reason why the court opinion found the contract to conform to the provisions of each type. Retain copies of the materials, including the relevant sections read, the case citations, and your memo, in your PRM for future easy reference.
5. Read each of the following fact patterns and respond to the questions following each:
   a. Annabel contracted a carpenter to build a deck onto her house. She received a written estimate from the contractor but nothing else in writing. Does the parol evidence rule

apply in the event of breach? If so, what extrinsic evidence would be helpful for Annabel?

b. Mack and Jack contracted to build a house for Tim and Tammy. The price of the job was $200,000. While negotiating the contract, Tim and Tammy asked about adding a pool. Mack and Jack advised it would be an additional $10,000 to make the pool. When the contract is executed, the price indicated is $200,000. Is the pool part of the contract? If so, why and what legal theories apply? If not, why and under what legal theories?

c. When Jackie was 16, Gramma promised her that if she did not smoke or drink until she graduated from college, Gramma would buy Jackie a brand new car of Jackie's choice. Was an enforceable contract formed? If so, why and, if not, why not? Include relevant theories of contract law to support your response.

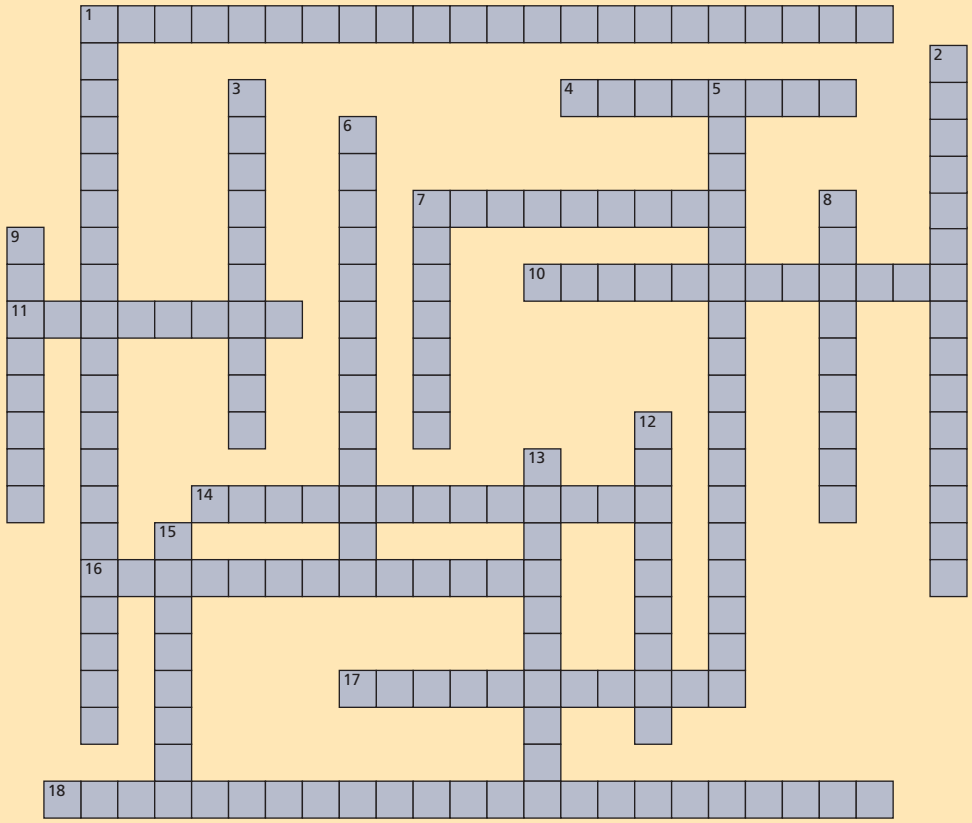
d. Danny, the lifeguard, agreed to teach Annie's son Trevor how to swim. They agreed that every Saturday morning during summer school vacation, Trevor would take a two-hour lesson. The lesson price was $50 per week, or the entire series for $500. After 8 of the 10 lessons, Annie told Danny she was revoking her offer and would not pay for the lessons remaining. Discuss whether a contract was formed and whether there is any cause of action by Danny to collect for the remaining lessons.

6. Prepare a checklist to retain in your PRM that identifies each of the following:
   a. Elements of contract.
   b. Types of contract.
   c. Requirements of the Statute of Frauds.
   d. Classifications of sales under the UCC.
   e. Types of consideration.
7. Select any one of the cases listed in the case bibliography for this lesson. Prepare a case brief. Also, create a checklist of key points raised related to the key issue in the case that you will use in your practice to identify the various elements in similar client fact patterns. Retain your case brief and checklist in your PRM for easy future reference.

Portfolio Assignment

Create a visual display in either chart, table, or text style that clearly sets forth the elements of contract under common law and the UCC. For example: acceptance and then include conditional, implied, and so on, and include definitions that are adequate for your learning style. The goal is to create one place in which you will find the elements of contract and any subset elements. This will be an excellent tool for your studies as well as professional paralegal workplace use, so be sure the elements and definitions are complete enough that you will understand them weeks or months from now. Be prepared to make an oral presentation of your display to your classmates. Retain your final product in your PRM for easy future reference.

Vocabulary Builders



Across

1. Both parties' contract obligations extend over time.
4. Makes a promise.
7. Contract involving a promise for a promise.
10. Offeree accepts with changes to offered conditions.
11. Party receiving promise.
14. Contract implied in fact or law.
16. Disaffirming contract terms.
17. Offeree agreement to a mirror image of the offer.
18. Performed over time.

Down

1. Stated specifically.
2. Lacks sufficient clarity to form a contract.
3. Contract involving a promise in exchange for action.
5. Offeree accepts by action rather than by words or in writing.
6. Value exchanged.
7. Gain incurred by a party to a contract.
8. Enough to be considered legally binding.
9. Competence to form a contract.
12. Loss or cost incurred by a party to a contract.
13. Promise made in exchange for nothing.
15. Agreement between two or more enforceable at law.

Chapter 7

Contract Performance, Termination, and Breach

CHAPTER OBJECTIVES

Upon completion of this chapter, the student will be able to:

- Explain contract performance.
- Discuss conditions excusing contractual performance.
- Illustrate understanding of discharge prior to complete performance.
- Compare and contrast equitable and legal remedies for breach of contract.
- Identify and describe defenses to breach of contract.
- Explain UCC, Article 2 breach and remedy provisions.
- Discuss ethical considerations in client communications related to contract issues.

good faith
The ability, competence, and intent to perform under the contract; the legal obligations to enter and perform a contract with honest and real intentions to complete performance and other conditions; fair dealing, integrity, and commitment to perform under the contract in an appropriate, timely and responsible manner.

Following formation of valid contracts, complete performance terminates or discharges the contract. Under certain conditions, contracts may be legally terminated even if performance is incomplete. If termination occurs prior to complete performance, and it is not mutually agreed, one party may suffer injuries compensable at law or equity. In this chapter, we explore contract performance as well as conditions creating breach of contractual duties and performance. We will explore exceptional circumstances that may excuse completed performance, and remedies available with breach of contractual agreements.

CONTRACT PERFORMANCE

Regardless of intent of the parties upon formation, contractual duties may not always be completed. The law imposes on contract parties the obligation to deal in **good faith**. According to the *Restatement (Second) of Contracts* § 205: "Every contract imposes upon each party the duty of good faith and fair dealing in its performance and its enforcement." Contract law assumes the parties entered the initial stage and each subsequent stage from a position of fair dealing, integrity, and commitment to acquit the required performance and duties under the contract in an appropriate, timely, and responsible manner. The duty to deal in good faith applies whether the contract is between two individuals, a business and a consumer, or a business and a business. The doctrine is essential to the integrity of contracts.

adequacy of performance
An obligation meets the minimum or completeness test.

Whether the parties have a unilateral or bilateral contract, the law looks at performance as a measure of completion. The contract terms and the agreement of the parties guide the court in determining the **adequacy of performance**.

discharged
Contract completion as to every requirement; that is, completed and terminated.

full performance
Completed exactly as set forth in the contract.

terminated
Performance is complete and the contract is discharged.

substantial performance
Most of the contracted performance is complete.

partial performance
Some of the contract performance has been completed.

reformed (reformation)
Changed or modified by agreement; that is, the contracting parties mutually agree to restructure a material element of the original agreement.

discharge of duties
Recognition by both parties that contract obligations are completed whether by performance or by agreement of the parties.

tender of performance
Acts in furtherance of performance.

Example:

Your neighbor entered a contract with Larry's Lawn Service to prepare the garden for summer after the long cold winter. The contract included delivery and planting of specified types and amount of plants, shrubs, and trees. Larry presented the bill to your neighbor and announced that the job was completed. Before making payment, your neighbor counted all of the shrubs, trees, and plants to ensure that everything was there.

The law would consider your neighbor's contract **discharged** by **full performance**. When questions arise as to the adequacy of performance, the entirety of the agreement dictates what has been completed and whether the contract terms have been completed. If such is the case, performance is complete. The contract is discharged or **terminated** based on completed performance.

Contract performance issues are not always easy to decide, however. For example, let us revisit Bubba and Pieter.

Example:

When Bubba arrived at the market, he picked up all but five of the 100 spinach bunches Pieter needed. When he arrived at Pieter's house, Bubba told Pieter there was five bunches left at the store. His bag was not big enough, so he had left some there. Bubba asked for payment in full, but Pieter refused to pay in full because he did not get the entire amount.

This is an example of incomplete performance, notwithstanding that most of the agreed performance is complete. What is the result? Bubba delivered almost all of the spinach. Therefore, Bubba may have **substantially performed** under the contract terms and, as such, payment in full may be appropriate.

An alternative solution also may be chosen, however. Neither Bubba nor Pieter denies that the contracted terms have been partially performed. There is no dispute that **partial performance** was completed. Bubba and Pieter could agree that the amount delivered will be paid for and the remainder paid for upon delivery. In that case, Pieter should pay Bubba $95.00 and withhold the remaining $5.00 until delivery is complete. The technical term is that the contract has been **reformed** to permit two payments upon completion of each delivery.

There is a third option. Pieter and Bubba could agree that the contract has been *discharged by partial performance*. When substantially all of the agreed-to goods are delivered, the contracting parties may agree to terminate the remaining obligations. In that case, the contract is *discharged* and any remaining obligations are no longer expected.

In any case, the agreement of the parties would supersede any court-recommended resolution. Just as the parties voluntarily agree to form the contract, the parties also may agree to discharge the agreement, that is, to a **discharge of duties**, and thereby excuse any remaining performance.

Under a contractual agreement, if **tender of performance**, or manifestation of acts in furtherance of performance of duties, is refused, the contract is discharged as to the tendering or performing party. On the other hand, the party refusing to accept tender remains obligated to perform and, thus, may be sued to recover payment. An example may be helpful to clarify this concept.

PRACTICE TIP

When assessing contract case facts, be sure to analyze the nature of any performance to determine what, if any, partial performance remains.

CYBER TRIP

Visit the Web site http://profs.lp.findlaw.com/contracts/contract_7.html and read the article "Tips for Contracts" by D. Reed Freeman Jr. of the Arent, Fox, Kintner, Plotkin & Kahn, PLLC, law firm. After reading the article, summarize the tips related to partial performance and potential risk. Identify and list strategies mentioned that minimize the possibility of litigation if partial performance and payment issues arise. Your audience is the paralegal trainees in your firm. A formalized legal memorandum is not required, but a chart or list that covers the important points would be appropriate.

Example:

Francesca hired Robbie's Remodeling Services to convert her laundry room into a Jacuzzi and in-house spa. The project would begin on June 23, 2005, in time for the hot blazing July days. Francesca agreed to pay $5,000 for the job. Robbie ordered the materials and hired an extra laborer for demolition and cleanup. Francesca's friend, Willard, told her that she was paying entirely too much money. His nephew, owner of Rickie's Rapid Remodeling, would do the same conversion for $2,000. When Robbie arrived to start the project, Francesca told him she was no longer interested and he could not start. Robbie was prepared to perform and Francesca refused to accept tender. Thus, the contract was discharged as to Robbie. *Question*: Will Robbie win if he sues? *Answer*: Yes.

Robbie had a reasonable expectation that he would complete the work and recover costs for the equipment and other monies spent. If Francesca refuses tender of performance, Robbie can sue Francesca for breach of contract. Robbie relied on Francesca's promise to pay upon completion. He purchased supplies and equipment to complete performance. He had a reasonable expectation, under the law, that performance would be accepted when tendered.

mutual release (mutual recission)
An agreement by mutual assent of both parties to terminate the contractual relationship and return to the pre-contract status quo.

When both parties agree to terminate or discharge contractual obligations, the law respects such an agreement. In legal terms, a **mutual release** has occurred. Consideration for the release of one party from all remaining duties and obligations is the release by the other party of the remaining obligations and duties for the other.

Example:

Leo and Bella contract for Leo to build a deck and barbeque area at Bella's Deer Valley home. They agreed to a price of $1,000. When the deck was installed, but the barbeque area not yet started, Bella asked Leo to stop the project. While Leo was disappointed, he agreed to stop. Both agreed that all obligations and completion originally agreed upon was discharged and the contract complete at that point. Bella paid Leo for the completed portion, $650. Neither the remaining $350 nor the barbeque area was due.

time is of the essence
A term in a contract that indicates that no extensions for the required performance will be permitted. The performance must occur on or before the specified date.

Many commercial contracts, notably contracts for sale of real estate, include a clause stating that **time is of the essence**. Informal contracts tend to be less exacting in this requirement. The clause is important in contracts where commercial risk is substantial; thus, performance not only is expected by the date stated in the contract, but indeed required by that date. Inserting a clause to that effect eliminates the potential for dispute over whether the time to perform was reasonable and excusable if later than the date for performance otherwise indicated.

See Figure 7.1 for a summary of contract performance and effect.

FIGURE 7.1
Performance and Effect on Contract

Performance Description	Contract Effect
Complete performance	Contract discharged; both parties released from additional duty under contract terms
Substantial performance	Minor but incomplete breach of duty; breaching party may be sued for damages resulting *or* contract payment amount may be adjusted by agreement of the parties
Incomplete performance (a/k/a inferior)	Creates material breach of contract duties; options available for injured party: • Rescind the contract and sue the breaching party for damages accruing from the breach (restitution for incomplete portion) *or* • Affirm the contract and recover damages from the breaching party
Partially completed, balance discharged	By mutual agreement, the original contract terms are changed and incomplete performance according to the original terms is agreed to and accepted by both as complete and payment for completed portion discharges all duties

RESEARCH THIS!

Locate and review Am. Jur. 2d or Cor. Jur. 2d sections on performance. Review one or two of the case opinions to gain a better understanding of that analysis of incomplete performance. Note the key points in the decisions and class discussion and retain your notes in your PRM for easy future reference.

Unavoidable Nonperformance

impossibility of performance
An excuse for performance based upon an absolute inability to perform the act required under the contract.

From time to time, despite the good-faith intent of the contracting parties, conditions beyond the control of either party may occur that render contract performance impossible. **Impossibility of performance** requires more than merely changing one's mind. When natural disasters, fluke accidents, or unforeseen and unwelcome situations prevent completion of performance, it may be appropriate to invoke the doctrine of *impossibility of performance*.

Situations may arise making contract performance difficult to complete, but whether they render the contract legally impossible to perform is quite a different inquiry. The law requires that performance be impossible due to circumstances not known, preventable, or foreseen at the time of contract execution.

Example:

You have signed a contract to take a hot air balloon ride. When you arrive, you are told the flight will not take off because there are tornado warnings in the area. You insist that your contract requires you to take that ride, but the owner of the balloon simply will not budge. He claims there is nothing he can do to change the facts, so he will not jeopardize his life and license. *Question*: Will you win if you sue for breach of contract? *Answer*: No.

The intervening reason for nonperformance, which, in this case, is the tornado warning, is superior to your contractual agreement to ride the hot air balloon on that day and time. Nothing whatever could change the fact of the tornado warnings or the excusable nonperformance based on the **force majeure**, or the tornado warnings.

force majeure
An event that is neither foreseeable nor preventable by either party that has a devastating effect on the performance obligations of the parties.

Example:

Geoff meets Dicky in the parking lot of their apartment complex. Geoff raves about his new radio/TV console set but tells Dicky that he has to sell it because he is about to marry Mindy, who has a similar unit. Dicky has been looking for a radio/TV combination, so he offers Geoff $400 for the set and Geoff accepts Dicky's offer. The friends agree that Geoff will deliver the unit the night before the wedding two weeks later. On the day of the scheduled delivery, a raging fire engulfs the entire building, burning Geoff's building to the ground. When Geoff failed to deliver the system, Dicky went to the apartment building and found Geoff sitting on the curb. Geoff explained that he could not deliver the unit because the fire destroyed everything in the apartment.

Although a contract ostensibly formed, it is impossible for Geoff to perform. Thus, the contract is void. Nothing can make the unit available for delivery. Dicky may be disappointed, but

RESEARCH THIS!

Go to the *Restatement (Second) of Contracts* § 265. After reading the section and one or two of the case opinions cited, prepare a chart or checklist in which you identify the conditions under which impossibility of performance applies. Retain the finished document in your PRM for future easy reference.

he cannot enforce compliance with the contract terms. Impossibility of performance legally extinguishes the underlying contract.

Legally sufficient nonperformance would occur if a hurricane developed or the threat of tornadoes resulted in state-ordered evacuations of the area. In legal terms, this event is a *force majeure*, an intervening event that renders completion of performance impossible and further falls within the category of an act of God or war. The buyer or purchaser would not prevail in a lawsuit based on breach of contract for nonperformance under these circumstances. Nothing could have changed the intervening occurrence.

In addition to natural disaster conditions rendering contract performance impossible, the law also recognizes that some conditions develop after contract execution such that failure to complete contractual performance is not actionable under the law.

Example:

John and Jake enter a contract for John to manufacture and deliver 1,000 left-handed golf putters. The clubs take six weeks to manufacture. One of the ingredients is a rare type of Thai bamboo that makes the balance more precise. However, the Federal Trade Commission (FTC) has been conducting independent studies that verify the bamboo is also useful in the manufacture of illegal drugs. The government passed emergency legislation outlawing the use of bamboo for any product manufactured in the United States. This new law prevents John from legally performing under the contract.

Under these circumstances, the federal legislation supersedes the good faith of the contracting parties. Contract performance, therefore, is legally avoided and excused. There are no circumstances under which Jake could force John to deliver the contracted goods without violating federal law. Even if John and Jake decided to go forward with their agreement, since the bamboo is illegal under federal law, the contract would be void on its face because of the illegality. Therefore, under either theory, the contract fails.

A review of legally sufficient conditions rendering performance impossible is provided in Figure 7.2.

Commercial Impracticability under the UCC

commercial impracticability
Impossibility of performance in a commercial context and contracts governed by UCC Article 2.

Article 2 of the UCC governs contracts for the sale of goods and contains provisions for circumstances when performance becomes impossible, just as with common law contracts. (See Figure 7.3.) Impossibility of performance in a sale of goods transaction is **commercial impracticability**, and it operates similarly to impossibility of performance in a common law context.

Commercial impracticability arises when circumstances beyond the control of either party to the agreement occur that render performance either more difficult or expensive than originally contemplated. The intervening circumstance or occurrence reasonably could not reasonably have been contemplated by the contracting parties to be legally sufficient. Using objective assessment, it is evident the contract no longer can be fulfilled under the terms and conditions agreed upon by the parties. Under Article 2, sections 2-614 and 2-615, substitution of reasonable product is not only permitted, but a condition of recovery under certain circumstances. This is similar to the common law obligation for the injured party to mitigate damages. Article 2 provides that, if the contract conditions reasonably modified enable completion or partial completion, modification is required. This provision assumes that, if the impossibility results from a government-imposed

FIGURE 7.2
Impossibility of Performance (Discharge of Duties)

Destruction of the subject matter	Actual product, or a commodity of material required for completion, is no longer available or irretrievably unavailable
Death of the promisor	The party making payment in exchange for performance by the other party dies or the performance cannot be completed by virtue of the death of the party
Illegality	Either the type of contractual arrangement, the product or a substantive aspect of the contract, or the purpose of the agreement is declared illegal by law subsequent to contract

FIGURE 7.3
UCC Article 2 and Commercial Impracticability

Source: Copyright held by National Conference of Commissioners of Uniform State Laws and The American Law Institute.

§ 2-614. Substituted Performance.

(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment, which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive, or predatory.

§ 2-615. Excuse by Failure of Presupposed Conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production, and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

circumstance, the buyer has some obligation to accommodate partial delivery or other modification.

Example:

Harriet and Henry contract with Sam's Speedy Spa for an in-ground pool. Henry and Harriet are satisfied that Sam's indeed is the best possible contractor. Unbeknownst to anyone, however, the backyard covers an ancient dinosaur burial ground. Federal law clearly states that any time dinosaur remains are discovered during excavation, they must be removed and catalogued prior to any further excavation. The reclamation project is expected to take between five and seven years. Under these circumstances, Sam's president writes to Henry and Harriet invoking the doctrine of commercial impracticability and requesting that the contract be terminated by mutual agreement. No reasonable modification is available.

anticipatory breach
Party provides notice, or otherwise it becomes known, that the anticipated performance will not be completed.

Anticipatory breach occurs when one party provides notice or otherwise makes known that performance will not be completed. The injured party cannot do anything to remediate, or

RESEARCH THIS!

Explore *Restatement (Second) of Contracts* or legal encyclopedias for materials related to anticipatory breach. Make notes of the various points raised and guidelines for assessing the impact and recourse available when anticipatory breach occurs. Include in your discussion comment on the fairness of the law and analysis of why the legal position should be changed, or enhanced with more severe penalties.

CYBER TRIP

Locate case law related to anticipatory breach in your home state. Review one or two case opinions and comment in writing on the application of the doctrine and the legal analysis supporting application. Include comment on the fairness of the doctrine as well as recommendations to minimize not only the risk of such occurrences but also assessment of damages when it does occur.

breach of contract
A party's performance that deviates from the required performance obligations under the contract; a violation of an obligation under a contract for which a party may seek recourse to the court.

otherwise ensure completion, unless the breaching party agrees. If the breaching party fails to agree, nothing is available to the wronged party until the date of performance expires and the breach has actually occurred. This legal theory relies on the concept that, if the date set for final performance passes, and the performance remains incomplete, and the contract breached. Prior to the date of expected performance completion, there is no legal certainty that the breach is real. Even in cases where extrinsic evidence leads one party to believe the breach will occur, without formal notice, normally no legal intervention is available until the anticipated nonperformance fails to occur.

REMEDIES FOR BREACH OF CONTRACT

When performance is incomplete or duties are terminated under a contract prior to completion, there is a **breach of contract**. The nonbreaching party may seek legal remedy, most typically through filing a lawsuit seeking damages. The breach must be material to support legal intervention by the courts.

material breach
Substantial and essential nonperformance.

A **material breach** requires substantial and essential nonperformance that leaves the nonbreaching party in the position that the completed portion is useless or otherwise flawed without completed performance. For example, there is no material breach of a contract requiring delivery to a particular place on a certain day and at a certain time if the delivery arrives a few minutes late. On the other hand, the breach could be material if the delivery arrives two days late, and, in the interim, the ship on which the goods were to be loaded for delivery to the islands has already sailed. The buyer cannot sell the goods in his resort shop in the Caribbean islands, so the breach is material.

After determining the breach is material, the next inquiry entails assessing the nature and scope of the injury or loss. Courts have established several essential categories to consider when calculating the extent of damages resulting from breach of contract.

equitable relief
A remedy that is other than money damages, such as refraining from or performing a certain act; nonmonetary remedies fashioned by the court using standards of fairness and justice. Injunction and specific performance are types of equitable relief.

Equitable relief involves a court order directing performance or refraining from performing the acts set out clearly and unequivocally in the court order. To win equitable relief, the petitioning party must specifically request the relief sought. Such remedies are typical when money alone will not adequately recompense the wronged party.The petitioning party is also required to state specifically what is sought other than money; the court will not speculate on what might be a satisfactory equitable resolution.

restitution
Returns the injured party to the same position enjoyed prior to the breach.

specific performance
A court order that requires a party to perform a certain act in order to prevent harm to the requesting party.

injunction
A court order that requires a party to refrain from acting in a certain way to prevent harm to the requesting party.

Equitable relief can take several forms—**restitution**, **specific performance**, **injunction**, and **reformation**—as discussed in Figure 7.4.

Monetary damages, on the other hand are based on an investigation of the circumstances and an assessment of the nature and extent of the injury suffered. Typically, the award compensates the individual for all reasonable monetary losses incurred as a direct result of the breach.

PRACTICE TIP

Determine if your local and state courts maintain separate courts in equity. Then determine specifically how the caption for an action in equity should appear on the complaint as well as the caption for an action in law. Retain copies of the format in your PRM for easy future reference.

FIGURE 7.4
Equitable Remedies

Restitution	Returns the injured party to the position he or she had prior to the breach; consideration is typically is returned along with related expenditures until the breach
Specific performance	Orders parties to perform pursuant to the original contract; applies solely to the sale of real estate or other absolutely unique property that cannot be replaced
Injunction	Court order mandating one party to perform or refrain from continuing an action in violation of contract terms
Reformation	A rarely used court-imposed remedy through which specific changes or modifications to the contract are ordered.

reformation
An order of the court that "rewrites" the agreement to reflect the actual performances of the parties where there has been some deviation from the contractual obligaton.

compensatory damages
A payment to make up for a wrong committed and return the nonbreaching party to a position where the effect or the breach has been neutralized.

mitigate damages
The obligation to offset or otherwise engage in curative measures to stop accrual of unreasonable economic damages; that is, to minimize the damage incurred through affirmative actions.

speculative damages
Harm incurred by the nonbreaching party that is not susceptible to valuation or determination with any reasonable certainty.

Compensatory damages cover all direct losses incurred. This entails simple calculation of monetary damages directly related to the breach. The injured party has an absolute legal obligation to **mitigate damages**, that is, minimize the damage incurred. This duty prevents reliance on the courts to order resolution. The duty encourages the injured party to do whatever is reasonable to minimize the damages incurred and move forward while awaiting judicial intervention. You can imagine the chaos created if, every time a civil injury occurred, the parties did nothing until the courts took action. The doctrine also prevents baseless suits from clogging the legal system. With the responsibility to mitigate, the plaintiff must show evidence of such efforts to recover. An example illustrates how the principle applies.

Example:

Lester failed to deliver 50 of the 100 pair of bicycle pedals agreed to in the contract. Byron needed the pedals to take with the team competing in the Tour de Sea Shore East Coast bicycle challenge. Byron could have called another delivery service or driven to get the pedals himself. He also could have called the pedal manufacturer to see if they could help with the delivery. However, Byron did nothing other than sue Lester for the incomplete delivery. He claimed as damages the lost winnings for the team, lost of hotel deposits, stress resulting from missing the event, and lost revenue from selling the winner's jersey T-shirts with the team autographs. *Question*: Will Byron win? *Answer*: No.

Byron failed in his obligation to mitigate damages. The court will not assess those losses against Lester because they were avoidable. The courts do not function to punish the defendant inappropriately. The courts look at all the facts to reach a fair resolution either as equitable relief or money damages or, in still other cases, a combination of equitable and monetary damages.

Courts will not award **speculative damages**. In so doing, the courts would merely award an amount based on the plaintiff assuming the money amount requested rather than demonstrating with evidence the validity of the amount claimed. In his complaint, Byron computed damages on the assumption that his team would have won. There was no guarantee of a win, so the courts will not include the amount sought for that element of the damages as a fair measure of compensable injury. The party alleging a breach must show evidence of good-faith efforts to mitigate damages. This requires evidence of good-faith effort to decrease or otherwise minimize losses or damages incurred.

The client knows the subject matter of the contract. Nonetheless, the paralegal has an obligation to do enough research to develop an understanding of the subject matter to ensure the facts are consistent with law and fact. The legal strategy and research are based on understanding at least the basics of the issue. The client has an emotional relationship to the events so the facts may

PRACTICE TIP

When interviewing a client with a claim of breach of contract, inquire about efforts made to mitigate damages. Make notes on the responses, particularly if you are unfamiliar with the contract subject matter, for example, components used in the manufacture of helicopter blades. Research enough to become familiar with the topic and support your legal research with factual information.

appear somewhat differently from objective evaluation. As an example, the client claims that, when the delivery of Super Putty did not arrive per agreement, there was no other source to turn to, nor was there a substitute that would be equally as serviceable. Check out the facts in your research. You may find that, indeed, options were available. In all likelihood, the client did not intend to mislead you. The client may not have exhausted every possibility and reacted to the panic he personally experienced. In the client's perception, there was no other source at that time.

DAMAGES AVAILABLE FOR BREACH OF CONTRACT

The most common damages awarded for breach of contract are monetary awards. Once the contract breach has occurred and the nature of the resulting damages determined, calculating compensation is based on the documentation for all claimed losses.

Monetary damages can be either one or a combination of four different types, as described in Figure 7.5.

The court looks at evidence supporting the amount of damages allegedly incurred. The evidence relates specifically to the claimed amounts. With extremely complex calculation formulae or relatively unusual industries that would not be within the normal experience of the court, extrinsic evidence supporting damage claims and calculations may be entertained. Such information assists in making a reasonable assessment as to the viability of the claimed amount of damages and the amounts requested.

In computing reasonable inclusions in a damages award, the courts use the preponderance-of-evidence standard. Part of your responsibility as the paralegal preparing the file would be to ensure sufficient supporting documents are available and requested in the pretrial preparation phase to support the reasonableness of any damages computation presented. The evidence must demonstrate the reasonableness of the elements sought in computing compensatory damages. The injured party must meet the preponderance-of-evidence standard when presenting the calculations to the court for determination. All available law, business custom, evidence of losses, and related considerations must support the award. The court will not order an amount merely because the injured party says it is adequate.

liquidated damages
Set forth in the contract so the parties have a clear idea of the risk of breach.

Liquidated damages are set forth in the contract so the parties have a clear idea of the risk of breach. The U.S. government routinely includes liquidated damages provisions in its contracts with suppliers. A sample of the provision appears in Figure 7.6. In both the UCC and common law contract issues, the amount awarded must be reasonable, not punitive. Courts consistently hold that, despite the liquidated damages clauses, the award must meet the reasonableness test and not operate as punishment, notwithstanding the contract language. When the provisions of

RESEARCH THIS!

Research to find *Braun Elevator Co. v. Thyssenkrupp Elevator Corp.*, — F. Supp. 2d—, 2005 WL 1155292, W.D. Wis., May 16, 2005. The opinion addressed the issue of calculating damages and offers some good analytical strategies to apply for similar calculations.

FIGURE 7.5
Monetary Damages

Compensatory	Compensates the nonbreaching party for losses sustained; legally returns the nonbreaching party to his or her position prior to the breach
Consequential	Foreseeable damages flowing reasonably from factors beyond the terms of the contract
Nominal	Awarded when no de facto monetary loss was incurred by the nonbreaching party, who sued the breaching party; typical amount is $1.00
Liquidated	Amount of damage payments agreed to in advance by the contracting parties; typical in contracts where actual damages would be difficult to calculate, but, nonetheless, the amount must be reasonable under the circumstances

FIGURE 7.6
Liquidated Damages Clause

FAR 52.211-11. Liquidated Damages—Supplies, Services or Research and Development (April 1984).

(a) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, or any extension, the Contractor shall, in place of actual damages, pay to the Government as fixed, agreed, and liquidated damages, for each calendar day of delay the sum of $*[amount to be determined during negotiations]*.

the clause result in a clearly punitive award, they are unenforceable, despite the contractual agreement of the parties.

Equitable Relief

CYBER TRIP

Locate case law regarding liquidated damages in your home state. Review several case opinions and comment on the legal points and theory on which the award was decided. Pay particular attention to mention of the punitive nature of the damages.

In cases when money alone will not cure the breach, the court awards *equitable relief*. This type of award commonly appears with real estate contracts. The buyer, for example, refuses to complete the purchase at the designated time and place, with the required documents and other materials necessary to complete performance. The injured seller would typically petition the court to order specific performance. Specific performance is appropriate because the property is unique and cannot be replicated or reasonably substituted. Equitable relief is appropriate because each piece or parcel of real estate is considered unique and irreplaceable. Thus, the only remedy that places the seller in the position contemplated when the contract was executed is to receive payment from the buyer for the exact piece of real property involved.

Equitable relief also may be appropriate when one party wishes to prevent performance or action that cannot be translated readily into a monetary award. Assessment of the appropriateness of this remedy rests solely with the court, after reviewing all the facts, options, and relevant law. The fact that an equitable relief is available under the law does not mean the judge must make such an award.

Balancing interests is the job of the court when deciding on a remedy for the dispute. The individual rights of the injured party are considered in the award, as are those of the breaching party. An equitable remedy cannot be overly punitive or vengeful.

While relief in the form of specific performance is a common remedy in the sale and purchase of real estate, the law is clear that the property description must be absolutely clear in every regard or the relief cannot be granted. The law assumes that the specific property is the only one that can satisfy the contract terms. If the slightest question arises as to the description, the court will refrain from interpreting what is not clear on the face of the available documents. Even if reasonable speculation about vague details could clear up ambiguity, the court will deny an award of equitable relief with any ambiguity.

Contract Discharge by Agreement of the Parties

Occasionally, the contracting parties agree to terminate the contract prior to complete performance. The reason is immaterial. If the parties agree to terminate the contract and release each other from all remaining duties and obligations, for whatever reason, the law will enforce such termination by agreement. **Rescission** is a mutual agreement to discharge or terminate remaining duties.

rescission
Mutual agreement to early discharge or termination of remaining duties.

RESEARCH THIS!

Research to locate *McAllister v. McAllister*, 147 Fla. 647, 3 So. 2d 351 (1941). Review the opinion and determine the issue raised and the key points in the analysis. Prepare a brief statement in which you summarize the findings and the key analytical elements.

Example:

George decided that, as he approached retirement, he would like to take up boating. After looking all around, he decided on a 57-foot yawl, *Pack o' Trouble*. He decided to go for a

PRACTICE TIP

Accuracy is an essential requirement for the professional paralegal. If mistakes are not caught and your editing is not accurate, the impact on the client could be substantial. It is always a good idea, even with spellcheckers, to have someone else edit a document. When editing our own material, the natural tendency is to see what we think it is rather than what is actually written.

ride after signing all of the documents. George had always been terrified of water and swimming, but he thought that, with such a big boat, he could overcome the fear. However, he simply could not get his feet off the dock and onto the deck. He tried for three days, with the same results. He was totally terrified and could not move. He went back to the dealer and told his story. He asked if they would take *Pack o' Trouble* off his hands. The paperwork was still on the dealer's desk, so he agreed to return the purchase monies and George agreed to hand over the keys.

The parties reached an amicable resolution. Both parties were put back into their position prior to the sale. George was happy and fearless, and the dealer could easily resell the yawl. The contract was terminated by *rescission*.

From time to time, parties to a contract may be unable or unwilling to complete contract performance but also may find a substitute to complete the contract under the terms and conditions in the contract. The nonbreaching party is under no obligation to accept the substitution but may do so. When a substitution of a party to complete performance occurs, there has been a contract **novation**.

novation
An agreement that replaces previous contractual obligations with new obligations and/or different parties.

Example:

The contract agreement calls for Speedy Delivery Service to deliver the party supplies on the morning of the gala event. The night before the delivery, the owner of Speedy Delivery calls to say that the delivery truck was in an accident earlier that day and will be unable to make the delivery. However, arrangements have been made for Snail Delivery to replace Speedy. Speedy assures the hostess that Snail has an unusual name but is every bit as reliable and prompt as Speedy Delivery. The hostess agrees to the substitution if and only if the same charges and other terms and conditions remain as agreed. The owner of Speedy Delivery assures the hostess this is the case.

An agreed discharge of contract obligations prior to complete performance is an *accord and satisfaction.* The changes are considered substitution of performance, not termination prior to completion. **Accord** means agreement, but it must be agreement to substitute, while **satisfaction** is the legal term for the resulting changed agreement. Figure 7.7 provides a summary of the different forms of discharge by agreement.

accord
Agreement, but it must be agreement to substitute.

satisfaction
Changed agreement resulting from agreed discharge of obligations.

Example:

Ginger needs new zebra-striped seat covers for her Mercury Comet after her friend Patsy spilled a large-sized café cinnamon on the seat. Ginger does not have the money, so she borrows it from her brother Craig and agrees to repay him in six weeks. When the time came, Craig asked Ginger for the money, but she did not have it. She did have a Freddie Fender

FIGURE 7.7
Discharge by Agreement of the Parties

Novation	Parties agree that one party may be substituted for another and contract performance completed by the substituting party
Rescission	Contracting parties mutually agree to withdraw the contract and mutually discharge any and all remaining duties and performance
Reformation	Contracting parties mutually agree to restructure a material element of the original agreement
Accord and satisfaction	Mutual agreement of the contracting parties to modify the remaining performance and other related duties and obligations under the original contract

autographed guitar that Craig always wanted to use with his band. Craig took the Freddie Fender guitar. Ginger had the zebra seat covers, and the debt was satisfied.

In the preceding example, the law considers the Freddie Fender guitar the accord for repayment of the debt. When Craig accepted the guitar, he acknowledged that Ginger no longer owed him for the zebra seat covers. This aspect of the solution is what the law calls satisfaction. The contract is not avoided, but, rather, the consideration and performance are modified and the parties agree to the new terms.

DEFENSES TO COMPLAINT FOR BREACH OF CONTRACT

Notwithstanding the obligation of good faith, there are times when the conditions surrounding contract formation are less than ideal. Often these issues focus on the element of intent of the parties entering the agreement. When one party allegedly breached a contract, the party may raise a *defense*, or legally sufficient reason to explain why the complaint lacks sufficient legal basis. The defenses present evidence of flaw in an essential element of contract formation.

In breach of contract actions, legally recognized defenses for nonperformance include *duress*, *fraud*, *mistake*, *misrepresentation*, and *undue influence*. If the defendant can show evidence to support the defense, the plaintiff will not win the suit. The evidence must show specific facts to make clear that the complaining party should not recover based on the evidence proving the contract was fatally flawed.

duress
Unreasonable and unscrupulous manipulation of a person to force him to agree to terms of an agreement that he would otherwise not agree to.

The defense of **duress** rests upon evidence that the actor exerted pressure or force so emphatic as to leave the other party no choice but to enter the agreement. Clearly, the resulting contract is flawed because one party did not enter voluntarily and the other violated the duty of good faith.

misrepresentation
A reckless disregard for the truth in making a statement to another in order to induce a desired action.

If the defense of **misrepresentation** is raised, evidence must be introduced showing that a false or misleading statement known to be deceitful was made. The classic example is in a real estate sale in which the vacation lot sold is under water and the seller knew it at the time of the sale. A reasonable person would not purchase a lot under water for a retirement home. The evidence must support both parts of the test to succeed.

fraud
A knowing and intentional misstatement of the truth in order to induce a desired action from another person.

Fraud is another defense to a claim for breach of contract. Evidence must show proof that false statements were made that, at the time made, were known to be false *and* the falsehoods were made specifically for the purpose of inducing performance under the contract. The defendant raising a fraud defense must show that they detrimentally relied on the false statement to support a recovery. If the evidence shows false statements were made for purposes of inducing reliance but no evidence of acting in reliance on the statement can be produced, there is no viable claim for recovery.

mutual mistake
An error made by both parties to the transaction; therefore, neither party had the same idea of the terms of the agreement. The contract is avoidable by either party.

When the defense of **mutual mistake** is raised, the courts typically take an especially careful look at the facts. If a party decides, after entering a contract, it may not have been such a good idea, this does not mean there was a mutual mistake. Legally sufficient mutual mistake must be shown through objectively clear evidence that the parties did not have a similar understanding of a material aspect of the contract.

In the context of the UCC, buyer's remorse is not the same as mutual mistake; thus, it does not rise to the level of a legally sufficient defense for contract breach. Courts are sensitive to what may sometimes be a difficult assessment as to where buyer's remorse begins or ends and legal mutuality of mistake is at issue.

undue influence
Persons who do not have the capacity to understand a transaction due to overconsumption of alcohol or the use of drugs, either legal or illegal, and, therefore, who do not have the requisite mental intent to enter into a contract.

Undue influence arises where one party takes advantage of or otherwise misuses his or her power over another to enter an agreement. The resulting agreement is not voluntarily entered and is not done for the benefit of the contracting party. Evidence supporting this defense must show that the influence was such as to deprive the party influenced of exercise of free will. Raising

RESEARCH THIS!

To become familiar with the legal perspective on mutual mistake, read through the *Restatement (Second) of Contract* sections located at www.scu.edu/law/FacWebPage/Neustadter/e-books/abridgedcontracts/main/Restatement/index.html#Section 151-54.

CYBER TRIP

To help develop your understanding of contract defenses, visit the following Web site and read the article: www.scu.edu/law/FacWebPage/Neustadter/e-books/abridgedcontracts/main/commentary/MistakeMisrepDuress.html. Note the cases cited within the article as examples of precedent supporting the various aspects of the defenses and legal adequacy of the defenses.

RESEARCH THIS!

Research either manually or electronically to locate the case Bond Drug Co. of Illinois v. Amoco Oil Co., 274 Ill. App. 3d 630 (Ill. App. 1995). Read the case opinion. Take notes on the key points raised that enhance your understanding of the legal issue.

CYBER TRIP

Raising defenses is not a new concept in law. The standard or precedent for this legal strategy was established as far back as 1864 in *Raffles v. Wichelhaus,* 2 Hurl. & C. 906 (Court of Exchequer 1864). The case decision established precedent that endures today.

You can read *Raffles v. Wichelhaus* at www.scu.edu/law/FacWebPage/Neustadter/e-books/abridgedcontracts/main/cases/Raffles.html. Note the key points supporting the court opinion. Retain your notes and the case opinion in your PRM for easy future reference.

defenses in response to a complaint for breach of contract does not mean the case automatically ends. It does mean the defendant puts the plaintiff on notice that evidence will be presented; no valid contract exists for the specified reasons.

UCC ARTICLE 2, SALE OF GOODS AND BREACH OF CONTRACT

UCC Article 2, section 6, deals with breach of contract for contracts covered by the code. The conditions, remedies, and requirement for mitigation by the nonbreaching party are discussed and codified. In many respects, this approach puts the contracting parties on notice, prior to signing, of the conditions of performance. More importantly, the code sets forth the standards of performance and excusable breach or nonperformance. The remedies for breach are set forth in detail.

CYBER TRIP

UCC Article 2, Sale of Goods, can be accessed in its entirety at www.law.cornell.edu/ucc/2/overview.html. Review the provisions of Article 2, § 6, to get a better understanding of breach in the UCC and common law contract cases. Retain this link and your notes on the section contents in your PRM for easy future reference.

Team Activity Exercise

The class should be divided into teams. Your teams have each been asked to participate in a round-table presentation at a local paralegal association chapter meeting. The focus of your presentation is breach of contract and defenses available to such claims. The teams should collaborate to reach a clear definition of breach of contract and the elements that must be shown to support the claim. The teams should formulate a clear definition of each available defense and provide a fact pattern illustrating each defense. Review the defenses both at common law and under the UCC and include an example of both settings. Retain a copy of your final presentation in your PRM for future easy reference.

Eye on Ethics

The paralegal has an ethical obligation to avoid crossing the boundary into the UPL territory. The key concept in remaining within the bounds of acceptable practice is to give information and avoid appearing to give legal advice. Written communications between the client and the paralegal present myriad opportunities to develop skills with the client information exchange. Read the following case facts and respond to the questions posed in a letter to the client. Remember the distinction between client information and giving the appearance of practicing law in your client communication.

Melanie has come to the firm for representation. Her problems began when she opened her beauty salon. She purchased the larger pieces of equipment such as furniture, fixtures, and hair dryers from Sam's Supplies and the smaller items from a local super discount center. The linens, capes, and towels came from Sam's sister at Rosie's Dry Goods. The initial order cost her $5,000 plus an additional $2,000, one-time cost to tool up and set the monogram. When the store was just about to open for business, none of the linens had been delivered, along with the monogramming template. Melanie made one frantic phone call after the next to locate the missing goods and could only leave messages on voice mail.

When it was clear the supplies would not arrive on time, Melanie went to the neighborhood paper supply company and purchased replacement paper products so she could open. This was a costly temporary solution. Clearly, she could not operate without the supplies from Rosie's Dry Goods. Melanie also admitted that, while she was hesitant, she paid an extra $800 to expedite completion and delivery of the paper goods. She is concerned about running out of money prior to getting enough cash flow. She has no linens and the template for the monogram was given to Rosie, so that must be replaced if Rosie fails to respond and deliver per the agreement. The substitute paper goods cost Melanie $5,700 because she needed a great many in a relatively short time.

After reviewing the case facts and preparing the draft letter, it suddenly strikes you that your prior firm represented a client with the same problem and suppliers. You recognize a potential conflict issue. At the same time, you want to warn your client about the risks of ever getting delivery of the goods. You became aware of a particular tactic involving revealing specific personal information that your prior firm and client used when dealing with the other situation. Your firm is in a very small town. You immediately raise this issue with your supervising attorney. The attorney asks that you outline the potential ethical challenges, the strategy you think most appropriate, and the rationale you applied for the strategy options you rejected. Use the issues and claims raised in Melanie's case to support the specific details of your assertion of potential ethical challenge.

Summary

In this lesson, we discussed events following contract formation, including performance and discharge, as well as breach and remedies available to the nonbreaching party. You learned the requirements for actionable breach of contract. We also discussed the various kinds of damages and available remedies, whether monetary or equitable, available in the event breach is not cured, whether under common law contract or a UCC transaction. Ethical challenges that could arise in contract disputes were discussed and strategies to avoid any professional compromise also were explored.

Key Terms

Accord
Adequacy of performance
Anticipatory breach
Breach of contract
Commercial impracticability
Compensatory damages
Discharge of duties
Discharged
Duress
Equitable relief

Force majeure
Fraud
Full performance
Good faith
Impossibility of performance
Injunction
Liquidated damages
Material breach
Misrepresentation
Mitigate damages
Mutual mistake
Mutual release
Novation
Partial performance
Reformation
Reformed
Rescission
Restitution
Satisfaction
Specific performance
Speculative damages
Substantial performance
Tender of performance
Terminated
Time is of the essence
Undue influence

Review Questions

TRUE AND FALSE

Read each of the following and mark true or false. For those marked false, provide a sentence that makes the statement true.

1. A party who wishes to breach a contract prior to full performance can do so at any time without concern for the impact on the other party.
2. When one party anticipates the other will breach the contract duties, then the party suspecting breach can make immediate arrangements to have the other replaced so the contract is completed.
3. The parties can determine if equitable relief or relief at law is a better solution when breach occurs.
4. The nonbreaching party has a duty to mitigate damages.
5. For a breach to be actionable at law, it must be material and essential to contract completion.
6. If unforeseen circumstances arise making the contractual duties impossible to perform, the contract may be fully discharged prior to performance.
7. Complete performance is the only acceptable method of contract discharge.
8. The party to a contract must always accept tender of performance.
9. Conditions may arise making a commercial contract impossible to perform as initially agreed, but reasonable substitution may be made in replacement.
10. Damages for breach of contract can only take the form of a monetary award.

Discussion Questions

1. Prepare an informal office memo for your supervising attorney in which you briefly discuss the defenses to contract. Include the available defenses, a definition of each, and comments on when they are available. Be sure to include a case citation in which each of the defenses was raised in your home state to support each defense.
2. Prepare a case brief of *Bond Drug Co. of Illinois v. Amoco Oil Co.,* 274 Ill. App. 3d 630 (Ill.App. 1995). Retain your completed brief in your PRM for easy future reference.
3. Reread the fact pattern in the Eye on Ethics exercise. Prepare an office memorandum outlining the possible causes of action and the facts that support each possible claim, including reference to relevant source law. In each potential claim, if additional facts would

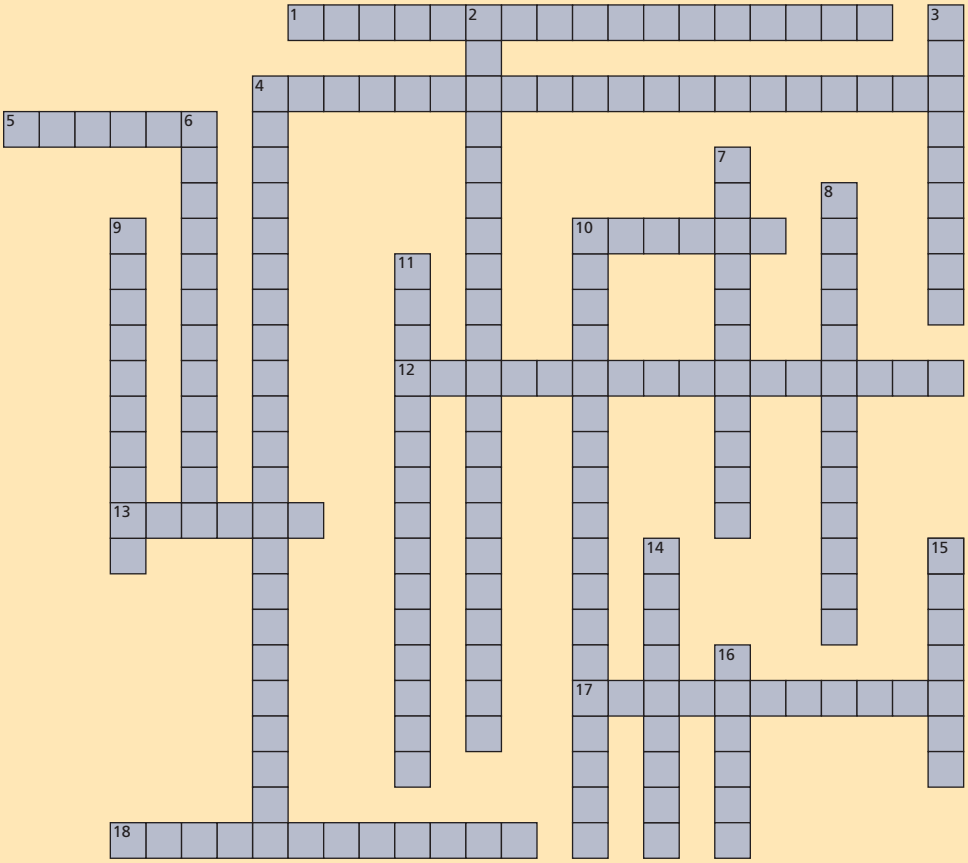
be necessary to confirm the viability of the particular claim, make note of those facts. Be sure to include the kind of damages you believe might be appropriate.

4. Review UCC, Article 2, Sale of Goods, provisions from your home state. Focus on the issue of breach in a sale-of-goods context and prepare an outline of the conditions or elements of breach in transactions involving the sale of goods. The outline should include available remedies and, finally, note any strategies to engage in the drafting of the agreement that would minimize the potential for such problems to arise. Retain in your PRM for easy future reference.
5. Explore the business section of your local newspaper or, if you prefer, the electronic version and locate articles related to breach-of-contract issues that may result in litigation if there is not litigation ongoing. Research the facts to ensure you have a good understanding of what happened that resulted in the dispute. Retain a copy of the article(s) and prepare a brief office memo to your supervising attorney in which you summarize the case facts and then recommend strategies to put in place to avoid repeating similar problems in the contract you are drafting for a client considering a similar contractual arrangement. Retain the article(s) and memo in your PRM for easy future reference.
6. Research to find one case involving the contractual defense of misrepresentation and another involving duress from your home state. Read each case opinion and take notes on the points raised by the court supporting the finding of misrepresentation and duress. Now compare and contrast the two and also comment on whether both could occur in the same case. Explain your response and include discussion of strategies that might prevent such circumstances from being repeated.
7. Review the material on impossibility of performance at common law and impracticability of performance under the UCC. Prepare a chart and checklist for the new summer law clerks that will provide an overview of the requirements to meet each standard; the exceptions, if any; and the remedies available. When discussing the remedies, be sure to comment on the similarities as well as the differences in the approaches of both common law and the UCC.

Portfolio Assignment

You have just been promoted to lead paralegal in the contract litigation section of the firm. You are responsible for your own client caseload as well as for the other paralegals in the department, all of whom must present their work to you for final review prior to submitting to the supervising attorney. You are concerned about both ethical challenges and substantive legal issues that might arise. You create a checklist or tickler to remind the department paralegals of the various elements of damages they should be aware of and the type of contract to which each applies. Your chart includes a factual scenario illustrating the application. Include in your diagram conditions under which failure to complete contract performance is acceptable under the law. Explain each circumstance and provide an example of each. Briefly discuss the contents in a legal memo to ensure the materials are clear for the paralegals using the documents as a reference tool.

Vocabulary Builders



Across

1. Nonperformance right of incompetents.
4. Time allowed for filing complaint or completing obligations.
5. Pressure or force.
10. Agreement.
12. Condition making contract completion unreasonable.
13. Offer.
17. Changes to original contract terms.
18. Intervenes to make contract completion impossible.

Down

2. Sufficiency of action under a contract.
3. Termination.
4. Greatest portion of expected performance is completed.
6. Completing contract by agreement prior to complete performance.
7. Ending prior to full performance under contract terms.
8. Both parties misunderstand an element of a contract.
9. Renders contract unenforceable.
10. Notice through word or action of the probability of nonperformance under a contract.
11. Nonmonetary remedy for breach.
14. Obligation to perform to the best possible standard.
15. Legally permitted reason excusing contract performance.
16. Failure to perform as agreed under the contract.

Chapter 8

Real Property Law

CHAPTER OBJECTIVES

Upon completion of this chapter, the student will be able to:

- Distinguish real and personal property.
- Identify classifications of real property concurrent ownership.
- Define common real property ownership interests.
- Distinguish types of deeds.
- Summarize methods of real property acquisition.
- Describe the doctrine of adverse possession.
- Discuss eminent domain.
- Demonstrate an understanding of ethical challenges related to real estate issues and strategies for managing the risks.

Real property, or real estate, as we often hear it called today, has a long, revered history not only in our legal system, but also throughout history. Early in recorded history and for a long time thereafter, only royalty or the privileged class was entitled to own property, including real estate. Ownership of a piece of ground was the basis of wealth, rights, and social position. Thus, before *real property* was the correct term, *royal property* was the name. This changed over time to real estate or real property, which we use today.

Real estate is an enormous field within the law. Transfers of title and interest, as well as leasehold or tenancy, and alienation are all terms that relate to legality and real estate. Many general-practice attorneys practice some form of real estate law, while others specialize in the law of real property. Under any circumstances, it is important to be familiar with the language, intent, and structure of real property law and estates. Deeds are the official document of deed transfer. Mortgages and property liens may be used in legal transactions as security for business transactions or bank loans and these also are recorded on specific documentation.

In this lesson, we will begin to explore basic aspects of real property law. We will look at documents of transfer, significance of ownership rights, as well as user and owner relationships and rights.

HISTORICAL BACKGROUND

property
Rights a person may own or be entitled to own, including personal and real property.

Real property law is the oldest continuously practiced legal specialty. As early as the Norman Conquest in 1066, available historical documents refer to property rights, definitions, and benefits. Consistently since that time, real property issues, ownership, rights, and benefits have occupied a prominent position in legal practice and thought.

In a legal context, **property** refers to all rights a person may own or may be entitled to own in the future. Over time, however, the definition has been refined. The universally recognized

personal property
Movable or intangible thing not attached to real property.

real property
Land and all property permanently attached to it, such as buildings.

definition of *property* at both law and equity is that property is the right to ownership of a tangible, real object.[1] Property law includes personal and real property interests and rights. **Personal property** is any movable or intangible thing not attached to the real property of the owner. Personalty or personal estate is used interchangeably for personal property.

Real property, on the other hand, specifically includes land, or anything attached to, growing on, or erected upon the land that would inherently change or damage the land if removed. You may see this property right or interest referred to as realty or real estate. Historically, the land owned and controlled by the king was more valuable than personal, movable property, which at death most often came under the control of the church. Money per se had less perceived value than land. As such, the personal or movable property often went to church-related institutions upon the death of the owner, while the land inured to the king or remained with the owner's family. Feudal land estates and perceived wealth were measured in terms of real property owned.

From this general background, the law of real property evolved into the current form and practice. One of the interesting aspects of real estate law is that it has always been exacting in terms of document contents, filing, and recording. This is as real a consideration today as it was many years ago. While we can now produce documents electronically, the content remains remarkably similar to that which deeds and documents of transfer contained hundreds of years ago.

Judicial opinions dating from as early as 1795 interpreted real property rights. Justice William Paterson, writing the opinion in *Van Horne's Lessee v. Dorrance*, reiterated the prevailing view, which endures until today, that the right to acquire and possess property and have it protected is one of the natural, inherent, and inalienable rights of man, which remains good law today.

The Fifth Amendment of the U.S. Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." This constitutional reference makes clear that the framers of the Constitution believed protection of individual property rights was an important governmental responsibility both as to the right to ownership as well as to the quality enjoyment of the owned property.

REAL PROPERTY DEFINED

Unlike personal, movable property, *real property* is fixed and immovable and includes land. An important legal maxim is that each piece of land is unique. No two are alike. Two parcels may be similar, but they are not identical. As such, the law has always been extremely careful when dealing with property owner's rights to ownership and enjoyment of that property. The property owner's rights extend to both the land itself and any **fixtures**, those things or pieces of personal property attached to the ground. If, when removed, the thing defaces or otherwise alters the appearance permanently, you can safely assume it is legally a fixture.

fixtures
Personal property that has become permanently attached or associated with the real property.

Example:

Moe lives in a house located at 369 Apple Way. The house is decorated along the sidewalk in the front and around the sides with flower boxes that he moves from time to time depending on the season and the angle of the sun. The house also has a green driveway on which Moe has created a concrete picture of his hero, Superman. To ensure that the picture of Superman is never stolen, Moe poured the concrete six inches deep into the land. *Question*: Are the flower boxes fixtures? *Answer*: No, because they are movable. *Question*: Is the Superman embossed concrete driveway picture a fixture? *Answer*: Yes. Moving it would permanently alter the appearance and topography of the property.

CYBER TRIP

Visit your home state statutes related to real property title requirements. Then locate case law related to defects in property description. Briefly summarize the definitions section of the statute and note the case citations for easy future reference.

CYBER TRIP

Locate your home state statutory code section related to the Statute of Frauds and real estate transactions. Summarize the provisions in a brief essay with new office paralegal trainees as your target readers. Also, create a checklist for real property transactions that covers all basic requirements for real estate transactions. Retain your essay and checklist in your PRM for easy future reference.

tenant
A person, or corporation, who rents real property from an owner; also called a lessee.

The landowner has the right not only to the land and fixtures attached thereto but likewise to the air above and the space below the surface. The property owner conditions bind the user or **tenant**. The nature of the relationship of real property ownership and use relates closely to contract law theories and principles. See the sample residential lease at the end of this chapter.

Statute of Frauds
Rule that specifies which contracts must be in writing to be enforceable.

Under the **Statute of Frauds**, contracts related to real property, whether lease, sale, or otherwise, must be in writing to be enforceable. If the real estate is unique, then each related transaction is likewise unique. Real estate contracts must be written to be enforceable and they must contain signatures of the parties to be fully enforceable.

REAL PROPERTY OWNERSHIP

real property ownership
Legally recognized interest in land, fixtures attached thereto, and right to possession, transfer, or sale.

Real property ownership includes not only ownership per se of the land, and fixtures attached thereto, but certain other rights, including possession, transfer, or sale. Additionally, ownership rights include allowing others to use some or all of the property under conditions established by the owner. Even in situations such as leasing, in which a nonowner has possession of the real property, the rights of the owner remain superior to those of the user.

fee simple absolute
A property interest in which the owner has full and exclusive use and enjoyment of the entire property.

The specific nature of ownership can take a number of forms. The simplest form of real estate ownership is **fee simple absolute**. With this ownership form, the owner of record alone holds the absolute right to use, to possess, and to dispose or divide. Owner's rights in their entirety are superior to those any other individual may assert or request. No additional permissions or approvals are required when a fee simple owner decides to sell or lease the real property.

fee simple defeasible
An interest in land in which the owner has all the benefits of a fee simple estate, except that property is taken away if a certain event or condition occurs.

Under some circumstances, conditions of ownership in real property are contained in the deed. When conditions are imposed, ownership becomes **fee simple defeasible**. If certain conditions occur, the original ownership rights may be transferred or extinguished. Under this form, the original owner retains some interest despite the conveyance to the new owner of record. If the conditions of transfer fail to occur, then the absolute right to ownership **reverts**, or transfers back, to the original owner.

revert (reversion)
Right to receive back property in the event of the happening of a certain condition.

Example:

Olive is the owner of record of the Sparkly Spritzer Farm. Business has been bad of late, so, to get some relief from the obligation to maintain the premises, Olive conveys (transfers) the property use rights to her nephew, Sassy. The conveyance requires that Sassy operate the business continuously and donate all proceeds from visitor contributions to the Oscar and Moe Home for Aged Sailors. Sassy revitalizes the premises and business is booming once again. Sassy decides to donate only one-half of the annual proceeds from visitors' contributions. *Question*: What type of ownership does Sassy have in the property? *Answer*: Fee simple defeasible. Failure to honor the conditions of the transfer causes the ownership rights to revert to the original owner, in this case, Olive, or her heirs.

grantee
The person receiving the property.

concurrent ownership
More than one individual shares the rights of ownership.

community property
All property acquired during marriage in a community property state, owned in equal shares.

Real property may have more than one **grantee**, or person(s) to whom an interest of record is transferred on the deed. When this occurs, the ownership is **concurrent**, meaning that more than one individual shares the rights of ownership at the same time. When concurrent ownership occurs, it can take the form of either *joint tenancy*, tenancy in common, tenancy by the entirety, or **community property**. The deed expressly sets forth the nature of the co-ownership and serves notice to all of the status of the ownership, use, and right to the property. As such, when preparing legal documents including the deed related to real estate transactions, they must be checked carefully for accuracy. Vigilance at the beginning can save costly correction after the fact.

tenancy in common
A form of ownership between two or more people where each owner's interest upon death goes to his or her heirs.

Tenancy in common refers to circumstances in which two or more persons each owns a clearly defined fractional piece of the entire real property parcel or estate. The interests of each co-owner need not be equal, or acquired at precisely the same time. Upon the death of a co-tenant, the interest of that tenant passes automatically to his or her heirs, in the same amount and under the same conditions, if any, applicable to the first co-owner. Co-tenancy applies for either personal or real property. When personal property is involved, the professional paralegal would ensure there is some document of title drafted. If the co-tenancy begins with the conditions and terms expressly established, any subsequent difficulties or challenges are minimized, if not eliminated.

PRACTICE TIP

When preparing a deed or other instrument of conveyance, be certain you understand the type of ownership interest you are creating. The language in the instrument must reflect precisely which type of ownership is conveyed.

Example:

Olive and Oscar are traveling the country together. Oscar is looking for memorabilia related to the history of spinach farming in the United States. When they stopped for lunch at a covered bridge restaurant in Spinachalia, State of Growth, Oscar spotted the artifact of his dreams—a solid-gold spinach-splicing sickle! He was ecstatic until he heard the price, which was well beyond his means. Olive, who had been trying to snare Oscar into marrying her for years, immediately volunteered to pay one-half the price. Oscar agreed. The owner accepted their offer. Olive finished lunch in love-struck bliss. Oscar finished his lunch content in knowing he had a one-of-a-kind, solid-gold spinach sickle. *Question*: If Olive dies before Oscar, does Oscar get Olive's interest in the sickle? *Answer*: The one-half interest that Olive had in the sickle passes to her heirs under her will and the heirs become tenants in common with Oscar. Likewise, if Oscar predeceases Olive, his interest passes to his heirs, who become tenants in common with Olive.

joint tenancy
The shared ownership of property, giving the other owner the right of survivorship if one owner dies.

The second type of concurrent property ownership is **joint tenancy**, in which each co-owner owns an *undivided interest in the property*, the exact amount of which is set forth clearly in the deed. Upon the death of the co-owner(s), the interest share passes to the co-owners and is distributed equally among the surviving owners. The heirs of the deceased co-owner have no interest in the property, thus no right to an ownership interest.

In a joint tenancy, the co-owner can transfer, sell, or otherwise use his or her interest as he or she sees fit throughout the period of ownership. Because the interest held is undivided, the co-owner is free to use, enjoy, or transfer his or her interest at his or her sole discretion. Clearly, however, practical concerns might affect what is actually done with the property. Note that even in those situations where the co-owner may wish to transfer the joint tenancy interest to his or her heirs upon death, with a joint tenancy, this cannot happen.

Example:

Poppa Pickle has long wanted to buy the farm where he has kept the beehives used for his honey business. The owner, Big Bubba, approaches Poppa Pickle and advises Poppa that he will sell an interest that must be maintained as a joint tenancy. Poppa is thrilled and sees this as an opportunity to give his family an estate in the future should he predecease them. The papers are drawn up, the deed recorded, and Poppa continues running his hive 'n honey business. One day, a wasp and the queen bee get into a terrible battle, and Poppa, who was trying to separate them, was stung on his nose by the wicked wasp. Later that day, sad to say, Poppa Pickle died from the sting. When Momma Pickle read the will, she saw that she and Poppa Pickle were the heirs to the estate, including the hive 'n honey business and property on the farm. *Question*: May a joint tenant interest be passed to Poppa Pickle's heirs by will? *Answer*: No. In a joint tenancy, upon the death of one of the concurrent owners, the interest passes to the surviving owners. The interest cannot be passed to the heirs of the deceased co-owner.

tenancy by the entirety
A form of ownership for married couples, similar to joint tenancy, where the spouse has right of survivorship.

Concurrent ownership also can take the form of **tenancy by the entirety**, in which a husband and wife take an ownership interest and title. During the lifetime of either spouse, the interest of the spouse is not transferable. The only circumstances that can extinguish the tenancy are divorce, a written agreement of the parties, or the death of one of the spouses. One tenant or joint owner cannot transfer an ownership interest in the property, such as for loan collateral, without the written consent of the other spouse. Likewise, terminating ownership interest requires the express written consent of the other spouse.

FIGURE 8.1
Real Estate Concurrent Ownership Interests

Joint tenancy	Owned with others, any one of whom can transfer or encumber the owned interest without the assent of the other owners. One owner may separate his or her interest from the others' and, if consent is withheld, a court can order a partition.
Tenancy in common	Each joint owner has an undivided interest, as indicated in the whole piece of real property. Upon death, the co-owner's share is distributed among the surviving co-owners. No interest inures to the heirs or the estate of the deceased co-owner.
Tenancy by the entirety	Between husband and wife only. When one spouse dies, the remaining spouse has the rights of survivorship. Neither party can transfer an interest during the life of the other.

Figure 8.1 summarizes the three types of real estate concurrent ownership interests.

Life Estates

So far, we have looked at real property conditions under which the ownership may be shared or transferred.

Ownership, possession, and use are different aspects of real property relationships. An individual may have the right to use and other benefits of property that otherwise would be reserved to the owner. The user, however, does not acquire ownership rights. However, when the use conditions are completed, or the obligations of the user met, the right to use reverts entirely to the original owner or designed successor of the original owner. This kind of real estate interest creates a **life estate**, which effectively limits the interest in the land and the fixtures to the lifetime of the designated user.

life estate
An ownership interest in property for a designated period of time, based on the life of another person.

To transfer interest under a life estate, the deed or document of conveyance needs to state clearly the name of the individual, followed by the phrase "for his [or her] life." Thus, if Olive gave Moe a life estate in her Spider Farm, she would need to state the following on the deed: *Moe, for his life.* In this instance, Moe is the *grantee*, or recipient, and Olive, the **grantor**, or giver.

grantor
The person transferring the property.

As long as the life tenant has use of the property, some rights typically associated with property ownership, including mortgaging or leasing to another tenant, can occur at the discretion of the life tenant. Remember, however, that the life tenant cannot grant an interest or rights greater than those he or she has. Thus, the life tenant cannot convey a fee simple absolute interest because a life tenancy is not a fee simple absolute interest in the property.

Having a life estate brings with it obligations as well as benefits. When a life estate is conveyed, the life tenant assumes legal responsibility to maintain the property in good repair. Unless otherwise excluded in the contract, the life tenant also has the absolute responsibility to ensure timely payment of all taxes, whether state, federal, or local, as they come due on the property. Failure to maintain the property and keep the tax liability current can result in extinguishing the rights otherwise available. To the extent the obligation to maintain the property is not performed, the life tenant may be held liable by the grantor for any decrease in value directly related to the failure to perform the obligations undertaken with the life estate.

Future Interests

Creating a *life estate* is a **conditional transfer**, as is a fee simple defeasible interest. The conditions stated at the time of the conveyance must be honored specifically to ensure that the

CYBER TRIP

Visit Web sites related to real estate and real estate law. Look through various links provided to find materials related to joint tenancy issues that may arise in the ownership model. The following is a good site to start your research: www.law.cornell.edu/wex/index.php/Real_estate_transactions#State_Material/

RESEARCH THIS!

Locate articles in scholarly or professional journals discussing types of real property ownership. Select one article and summarize the key points. Use the article contents and the key points as a guide for preparing a checklist to use when you are drafting that type of ownership document. Retain your checklist and the article in your PRM for easy future reference.

conditional transfer
Conditions stated at the time of the conveyance; the original owner, despite the conveyance, retains an interest.

interest created continues for the period and in the manner contemplated. The original owner, despite the conveyance in which the name of another individual(s) appears, nonetheless retains an interest. The interest vests following a future event. Legally, the future interest is either a *remainder interest* or a **reversionary interest**. Upon completion of the terms under the conditional estate, the remainder of the real property reverts to the original owner, or his or her estate, consistent with the type of ownership originally held by the owner.

reversionary interest
Upon completion of the terms under the conditional estate, the remainder of the real property reverts to the original owner, or his or her estate, as appropriate and consistent with the type of ownership originally vested in the owner.

With a **reversionary future interest**, the conveyance states that, upon completion of the life estate, the property, in its entirety, *reverts*, or passes back again, to the original owner. The reversion occurs upon either the death of the life tenant or the completion of the conditions under which the fee simple defeasible interest was conveyed. Review the example of Olive's transfer of the farm to her nephew, Sassy. The conveyance in that case was in fee simple defeasible. As such, Olive retained a reversionary interest in the property. As you saw in the example, the property did revert to Olive because Sassy took some of the visitor contributions and did not give all the donations as per the condition of the conveyance and life estate interest.

reversionary future interest
Upon completion of the life estate, the property, in its entirety, passes back again to the original owner.

On the other hand, the **remainder interest** arises when the original owner transfers the remaining portion of the interest and property upon termination of the life estate following the death of the life tenant. While the conveyance of the remainder can occur during the life estate, possession may not occur unless and until the life estate extinguishes under the law.

remainder interest
The original owner transfers the remaining portion of the interest and property upon termination of the life estate.

Example:

Olive transfers a life estate interest in her Spider Farm property to her niece Twiggy. Olive placed no conditions on the estate other than that Twiggy was the owner of record and title, for her life. Several years later, when Sassy and Olive resolved the terrible disagreement that had occurred following Sassy's breach of his fee simple defeasible right, Olive conveyed some interest in the real estate to Sassy. However, this time, she conveyed the remainder to Sassy when and if Twiggy either dies or otherwise renounces her use, interests, right, and duties as life tenant. *Question*: What interest did Sassy acquire? *Answer*: A remainder future interest. The conveyance to Sassy vested if and only if the life estate vested in Twiggy was extinguished.

executory interest
Following the termination of the life tenant's possession, other conditions or circumstances become complete at some designated future date or occurrence.

The final type of real property interest is similar to the remainder future interest. It is an **executory interest**, as distinguished from the remainder in that it does not "vest" or become complete immediately upon the termination of the life estate. With the executory interest, at a date in the future, when the rights of the life estate tenant in possession terminate, additional conditions, or circumstances, if any, are met. At that time, the executory or future interest becomes a completed interest. The deed for an executory interest is valid. However, the rights do not become complete until the future event, or the condition is satisfied following the life estate termination.

Example:

Olive executes a deed to Sassy that states in relevant part as follows:

> To Twiggy for her life, and one year and one week following Twiggy's death or termination of her life estate, providing Sassy has not stolen any more visitor donations, to my nephew, Sassy.

Note that the life estate vested in Twiggy must expire first. Then, if Sassy remains honest and does not steal any visitor donations for one year, then and only then does Sassy acquire complete ownership. He has a future interest, dependent on conditions over and above those of Twiggy's life estate.

Other Interests in Real Property

nonpossessory interests
The holder does not have per se possession of the property but may have use interests such as easements, profits, and licenses.

Our discussion so far has related to possession and possessory interests or use of real property. However, there are other interests as valid as those of the ownership forms. These are **nonpossessory interests** because, while they have a legal and cognizable impact on the form or extent of ownership, the holder typically does not have per se possession of the property involved. Nonpossessory interests include easements, profits, and licenses. Under this limited real estate interest, property may be entered by the license holder under established conditions set forth in the document of license. However, if the owner revokes the license or the license otherwise expires, rights to use are extinguished entirely unless and until the owner licenses the use again.

RESEARCH THIS!

Research your home state case law related to easements. Determine if there are mandatory and elective easements and the terms of each. List the types recognized under the statute and prepare a chart of the characteristics and a fact pattern example of each. Retain a copy of your materials in your PRM for easy future reference.

easement
A right to use another's property for a specific purpose, such as a right of way across the land.

The first of the nonpossessory rights is an **easement**. Under this interest, the owner of record grants to another a limited, clearly defined right of use of the property. The right of easement specifically requires the limited use and excludes any right to remove things from the property or otherwise make a modification to the property. If the local electric utility company, for example, needs to read electric meters and the homeowner has a locked privacy fence surrounding the entire property, the utility asserts a right to an easement for access to walk onto the property through the gate for access to the meter. The right conferred is limited to this function only.

profit interest
The grantee has the right to enter the property of another and remove a specified thing or things from the premises.

Another kind of easement, or temporary possessory interest, which in some sense is the opposite of the utility type, is a **profit interest**. In this form of ownership, the grantee has the right to enter the property of another and remove a specified thing or things from the premises. An example of a profit interest occurs if, for example, you buy a new house with beautiful, lush trees. When you realize the beautiful trees are actually avocado trees, you are horrified. You are allergic to avocados, even in guacamole. Nonetheless, the fruit is so beautiful that you do not want to waste it. You contact all of the neighbors and invite them to come and remove the avocados whenever they wish. In so doing, you have granted a profit interest to your neighbors.

license
The original owner and the grantor retain the right to revoke or withdraw the rights conferred.

The final type of nonpossessory interest is a **license**. This is similar to the profit interest with the exception that, under a license, the original owner and the grantor retain the right to revoke or withdraw the right in the owner's sole discretion. The interest in the real property arises at the discretion and with the consent of the original owner. The unique nature of the license is a revocable privilege to enter. You may not realize it, but you have a long history of having a license to use the property of another. If you have ever seen a movie in a theater or gone to a museum exhibit, you have enjoyed a licensed use of the real property of another.

Team Activity Exercise

For this exercise, the class should be divided into teams. Each team will prepare an oral and visual presentation on the various interests in real property. The presentation should include the terms, definitions, and specific examples of each type taken from case law researched in your home state reporter series. When each team has completed the research and presentation preparation, each team will make a presentation, followed by a discussion of the various points among the entire class.

TRANSFERRING OWNERSHIP IN REAL PROPERTY

The *Statute of Frauds* requires that transfers of an interest in real property be in writing to be enforceable under the law. Similarly, contracts related to real property such as the license interest must be evidenced in writing. You receive a ticket after paying the cost of your seat. The ticket is your proof of the licensed right to sit in the theater and watch the film.

deed
The written document transferring title, or an ownership interest in real property, to another person.

The document providing evidence of the transfer and/or ownership is the **deed**. It contains the terms, conditions, and specific details of the transfer of a real property interest from one party to another. Real estate law requires absolute clarity and careful attention to detail in document preparation. A seemingly minor detail, if omitted, can have an enormous negative impact in the future.

FIGURE 8.2
Deed Requirements

1. Name of seller or transferor (*grantor*) and buyer or transferee (*grantee*).
2. Words specifically stating the original owners' *intent to transfer or convey* an interest in the property.
3. Adequate, accurate, and clear *description of the legal address* and parcel of land.
4. *Signature of the grantor* and, if held in tenancy in the entirety, the grantor's spouse as well. If the ownership is held by a number of co-owners, each also must sign the document of conveyance.
5. *Delivery of the deed* to the person to whom the interest is conveyed.

Regardless of stylistic differences, a deed is valid and enforceable at law if and only if it contains the elements listed in Figure 8.2. A deed missing any of the required elements is defective and, if filed in the courthouse, may create an impaired title or deed. Correcting an impaired or defective deed is not always a simple issue, so the easier course of action is to exercise care when drafting. When the property has a mortgage lien recorded, a copy of the deed may be delivered to the grantee, and the mortgage lender holds the original deed. Deed delivery and recording requirements are set forth in the local rules of procedure, which you should review both now and periodically when in practice.

warranty deed
A deed guaranteeing clear title to real property

conveyance
A transfer.

A deed can be either *warranty* or *quitclaim*, depending upon the specific details of the transfer and the intent of the original owner. When a **warranty deed** is used, the *grantor* makes certain guarantees to the *grantee*. See Figure 8.3 for a sample warranty deed. The most often seen guarantee is from the grantor, the person making the transfer, making a representation to protect the grantee from any claims arising related to the real property upon transfer. A warranty deed is the most effective document of **conveyance**, or transfer, in that it gives the grantee the maximum guarantees as to the condition and interest transferred when executed.

Example:

Olive was so impressed with the offer to refurbish the house and land use presented by her niece, Twiggy, that she decided to convey the property in fee simple to Twiggy. Olive asked her lawyer to draft a warranty deed for the conveyance. Naturally, Twiggy anticipates that the property would be free from problems or other claims of ownership. A month or so after the conveyance is recorded, Bankers First Bank notifies Twiggy of their interest in the property which arose when Sassy was operating the Sparkly Spritzer Farm on the property. Twiggy contacted Olive, who advised she knows absolutely nothing about the bank interest. Both Olive and Twiggy contact Sassy, who claims to have no idea about the interest claimed by the bank. *Question*: Does Olive, the original owner, have an obligation to assist in clearing the asserted right to possessory interest made by Bankers First Bank? *Answer*: Yes. The conveyance was by warranty deed. As such, Olive has an obligation to assist in clearing the matter, thus ensuring Twiggy's right to peaceful enjoyment and ownership challenge. *Question*: Does Sassy have any obligation to clear the asserted claim? *Answer*: Perhaps so. More facts are needed to respond adequately, but, on the facts presented, he may not.

quitclaim deed
A deed transferring only the interest in property of the grantor, without guarantees

PRACTICE TIP

Executing a deed entails placing detailed information in the various parts within the document. It is also important to ensure that the deed form conforms to the type of ownership interest conveyed. It is paramount to exercise care and execute instruments accurately.

A **quitclaim deed** makes no express or implied guarantees other than that the grantor transfers all interest in the property. See Figure 8.4 for a sample quitclaim deed. Any defects in title are neither expressly stated nor, more importantly, construed as defects rendering the transfer void. The grantee has no protection from defects or problems with the title, ownership, or possession. In operation, this means that, should the grantee receive notice following execution of a quitclaim deed of a lien or another superior right in the same property, there is no recourse to the original grantor. The grantee is subject to any perfected prior claims or superior interests in the property. In effect, while the quitclaim transfers all interest the grantor may have, it does so with a warning to the transferee. The quitclaim may be legally used, but the grantee is on notice of the limitations that may exist on the ownership interest transferred.

Acquiring Property Interest through Adverse Possession

In our discussions thus far, we have looked at documentary evidence as proof of interest and ownership in real property. There is an exception to the requirement for a document of title to

FIGURE 8.3
Sample Warranty Deed

For good consideration, we (I) _____ of _____, County of _____, State of _____, hereby bargain, deed and convey to _____ of _____, County of _____ _____, State of _____, the following described land in _____ _____county, free and clear with WARRANTY COVENANTS; to wit:

Grantor, for itself and its heirs, hereby covenants with Grantee, its heirs, and assigns, that Grantor is lawfully seized in fee simple of the above-described premises; that it has a good right to convey; that the premises are free from all encumbrances; that Grantor and its heirs, and all persons acquiring any interest in the property granted, through or for Grantor, will, on demand of Grantee, or its heirs or assigns, and at the expense of Grantee, its heirs or assigns, execute an instrument necessary for the further assurance of the title to the premises that may be reasonably required; and that Grantor and its heirs will forever warrant and defend all of the property so granted to Grantee, its heirs, against every person lawfully claiming the same or any part thereof.

Being the same property conveyed to the Grantors by deed of _____ _____, dated _____, 20____.

WITNESS the hands and seal of said Grantors this _____ day of _____, 20____.

_____
Grantor

_____

Grantee

STATE OF _____

COUNTY OF _____

On _____ before me, _____, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature_____

Affiant _____Known _____Unknown

ID Produced_____

(Seal)

adverse possession
The legal taking of another's property by meeting the requirements of the state statute, typically open and continuous use for a period of five years.

evidence a possessory interest in real property. Under the doctrine of **adverse possession**, a property user and possessor under the law may ultimately acquire title to the property despite a document indicating another owner's interest.

The doctrine of adverse possession has a long history. Perfecting ownership and property interest by adverse possession requires the user to demonstrate clear proof of open, continuous, and notorious occupation of the land of another, in most states for a period of at least 20 years. The use must be continuous. Any period of **abandonment**, or quitting the use, by the adverse user terminates the tolling of the required time. If the user recommences the adverse use and possession, the clock starts ticking again from the beginning. It is not enough to say there is an interest by virtue of adverse possession. There must be clear indication of the use by the party asserting the right to the adverse possession period.

abandonment
Quitting the use by the adverse user, which terminates the tolling of time.

It is easy to understand how one owner could allow another, or at least not exclude another from, use of land in the growth period of our country back in the 18th and 19th centuries. One owner might have title and deed to property in the west but another might actually homestead on the property and use the land to develop a farm and livelihood. The original owner may have no opportunity or reason to visit the property or investigate the actual status of use or occupation.

FIGURE 8.4
Sample Quitclaim Deed

THIS QUITCLAIM DEED, Executed this ____ day of _____, 20____, by first party_____ whose post office address is _____ to second party,_____ _____ whose post office address is_____ _____.

WITNESSETH, That the said first party, for good consideration and for the sum of $ _____ paid by the said second party, the receipt whereof is hereby acknowledged, does hereby remise, release and quitclaim unto the said second party forever, all the right, title, interest and claim which the said first party has in and to the following described parcel of land, and improvements and appurtenances thereto in the County of_____, State of_____, to wit:

IN WITNESS WHEREOF, The said first party has signed and sealed these presents the day and year first above written.

Signed, sealed and delivered in presence of:

_____ _____

Witness First Party

_____ _____

Witness Second Party

STATE OF }

COUNTY OF }

On _____ before me,_____, personally appeared_____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

_____

Signature

Affiant: _____Known _____Unknown

ID Produced: _____

[Seal)

waste
Deterioration of the property.

If the title owner failed to assert any rights, including in some states paying the taxes on the property for the adverse period, the law allows the user to assert superior ownership. The theory is that the user maintained the property and prevented **waste**, or deterioration. Thus, the law recognized the contribution of the adverse possessor and rewarded the possessor, who over time preserved the integrity of the property as it were.

You may be asking yourself if this doctrine is relevant today. Indeed, the doctrine is relevant, alive, and well.

Example:

Geranium is the title owner on the deed to property located at 123 Blossom Place. The total property area is 10 acres. Her neighbor, Rhonda, owns a smaller neighboring property located at 456 Blossom Place, adjacent to the back of Geranium's lot. Rhonda has title to a mere three-quarter-acre plot. Once Rhonda built her house, there was no space for a driveway so she drove to the property every day and, in so doing, carved out a driveway of sorts that was actually four feet wide along the border of Geranium's land. Rhonda had used this access every day for 33 years. Geranium decided to sell her property and retire to Arizona.

FIGURE 8.5
Ownership by Adverse Possession

1. The asserted possession must be obvious and exclusive to the user asserting the right.
2. There must be evidence of actual possession.
3. The asserted possession must meet the minimum time period required and must be continuous.
4. The use and the claim of right must be without the permission of the owner and must be exclusive to the party asserting the right.

CYBER TRIP

Research case law from your home state related to adverse possession. Review a number of the case opinions and select one for which you prepare a case brief, including the key points relied upon by the court to make the finding. Retain the case brief in your PRM for easy future reference.

When the plat and survey were presented at the closing table, the buyer realized that the property was smaller than he had originally contemplated buying. The property line had changed to accommodate the driveway space, which was effectively an easement that Rhonda used for 33 years. *Question*: Does Rhonda have any right to title to the driveway area by virtue of the doctrine of adverse possession? *Answer*: Yes. The use made of the four-foot strip was open, notorious, and long term, 33 years. As such, Rhonda can assert possessory interest and can demand a deed of title for the four-foot strip of Geranium's property.

Just as there are certain specific requirements for legal title, deed contents, and transfer, a right to assert a property interest by virtue of adverse possession must meet a number of specific conditions.

If each of the requirements listed in Figure 8.5 is met, the court may issue a document of title to the adverse user of the subject property. The process for issuing a deed acquired by adverse possession is strictly defined in local and state rules of procedure. As with every other document related to real estate transactions, the requirements must be satisfied, and the deed to the property claimed by virtue of adverse possession must meet every legal requirement.

RESEARCH THIS!

Locate and review materials related to adverse possession from secondary sources such as encyclopedias. Also, review your home state statutes for provisions, including the time required and other conditions imposed under the statute. Prepare a checklist for use in your practice when the issue arises. Retain your document in your PRM for easy future reference.

Acquiring Property Interest through Eminent Domain

eminent domain
The government can take land through the process of condemnation when the taking is for public use.

condemnation proceedings
The process by which state or federal government obtains property.

The government retains a superior right to all real property within the territory covered by the various states even if parcels are deeded to individuals. Under the right of **eminent domain**, the government can take land through the process of condemnation when the taking is for public use. The governmental taking is perfected through **condemnation proceedings** described in state or federal sources as appropriate. State law defines the specific process, consistent with the requirements of due process, notice, and other constitutional guarantees of individual rights to ownership and enjoyment of property owned. The Fifth Amendment of the U.S. Constitution contains the takings clause. The Amendment requires that no such government taking may occur without just compensation to the property owner. The state must show that the taking serves the public good when the state asserts the right of eminent domain.

Eminent domain proceedings occur commonly when the government needs land for public roadways such as interstate highways. Certainly, this is not the only situation under which the government may exercise its power, but it is frequently asserted as urban sprawl and increased populations tax our existing roadways. In these proceedings, the courts decide if the public good and use are greater than the individual right to continued use and enjoyment. The court strikes a compromise or balance between the public need for the contemplated project and the individual right.

CYBER TRIP

Locate case opinions in your home state related to paralegal ethics issues in real estate transactions. Review the opinions to get an idea of the type of challenges faced when working in a real estate setting.

RESEARCH THIS!

Research your home state case law regarding eminent domain and then locate cases related to property within your home county or parish. Review the case opinions and select one, preferably for a property that you are familiar with, and prepare a case brief. Retain your brief in your PRM for easy future reference.

Eye on Ethics

Paralegals often work in real estate practices or other related business offices such as title companies. There is an enormous need for paralegals in the field because the volume of work is constantly growing. The real property transfer process is closely controlled by statutory and case law provisions. The enormous demand does not change the obligation of paralegals to observe the guidelines of the code of ethics. There is typically more client contact in a real estate practice than other legal settings, so a relationship is established with the supervising attorney and the clients are more relaxed in some respects.

Petitioner Florida Bar charged a paralegal employed by an attorney with the unauthorized practice of law. Respondent, as president of a title company, gave legal advice to a client without the supervision of his employer and signed a letter to another attorney on his employer's letterhead without disclaimer of his non-attorney status.

Question: How should the court rule on this issue?

Prepare an essay explaining your position, supported by references to specific parts of the NALA, NALS, or NFPA ethics guidelines found in Appendix B. Finally, present strategies that would be effective in minimizing the potential for similar challenges in the future.

Summary

In this lesson, we have discussed individual property rights both real and personal. You learned about the various ways of asserting the related possessory rights and interests, as well as concurrent ownership of property. The lesson discussed deeds, the document used to transfer or allocate real property interests. Ownership interest types were discussed and distinguished. The lesson described voluntary and involuntary transfer of property rights processes, including classifications of real property and concurrent, common, and individual ownership interests. The ethical concerns and approach for paralegals working with real estate issues and strategies for managing those risks were covered.

Key Terms

Abandonment
Adverse possession
Community property
Concurrent ownership
Condemnation proceedings
Conditional transfer
Conveyance
Deed
Easement
Eminent domain
Executory interest
Fee simple absolute
Fee simple defeasible
Fixtures
Grantee
Grantor
Joint tenancy
License
Life estate
Nonpossessory interests
Personal property
Profit interest
Property
Quitclaim deed
Real property
Real property ownership
Remainder interest
Reversionary future interest

Reversionary interest
Revert (reversion)
Statute of Frauds
Tenancy by the entirety
Tenancy in common
Tenant
Warranty deed
Waste

Review Questions

TRUE AND FALSE

Respond to the following by marking true or false. For those responses marked false, provide a sentence that makes the false statement true.

1. The landowner can restrict an easement to a particular use.
2. The landowner can object to a property taking by eminent domain and the government cannot take the property regardless of the public interest served.
3. Concurrent ownership interest can be transferred in all cases.
4. Fee simple defeasible interests may be terminated upon the occurrence of certain events.
5. Fee simple absolute confers an absolute right to use, possess, and transfer an interest in real property.
6. Small mistakes in deed property descriptions make no difference from a legal enforcement perspective.

Discussion Questions

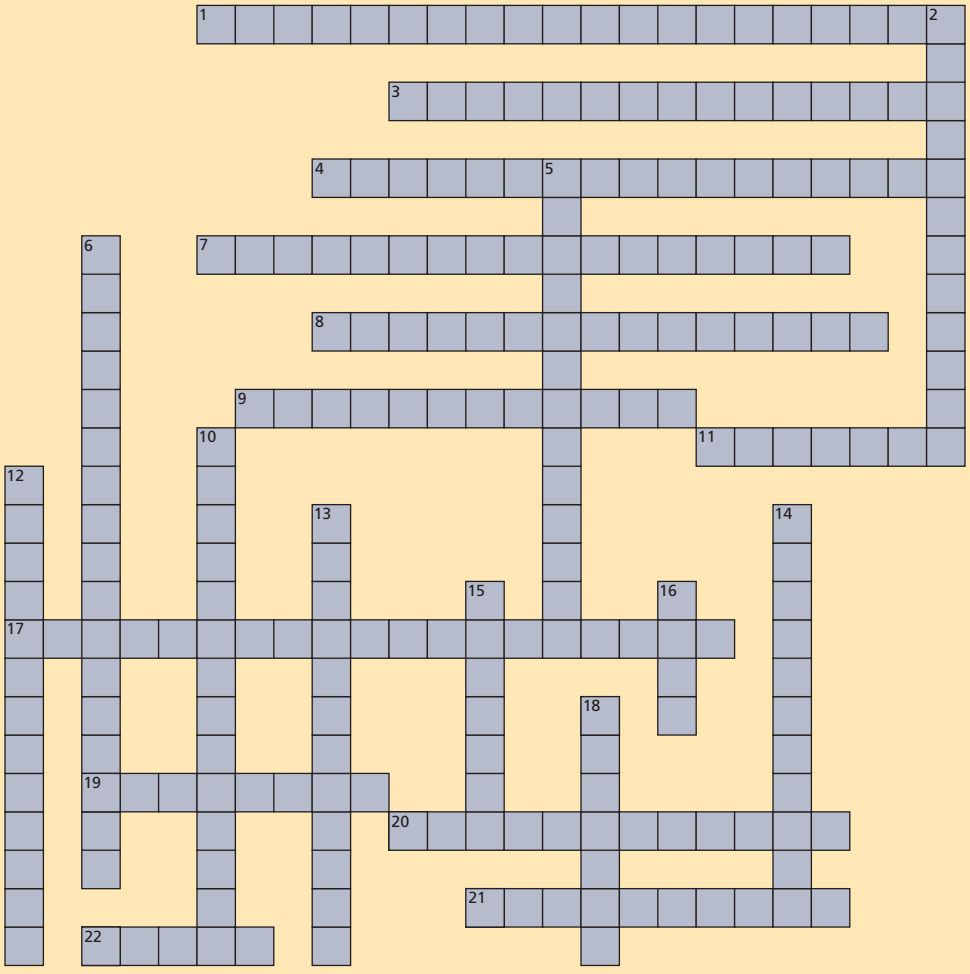
1. Review the ethics opinions from your research for the Eye on Ethics exercise. Prepare an office memorandum to the other paralegals in your office highlighting the type of challenges they face in this practice specialty. Include in your memo recommended specific strategies to employ that will help minimize the possibility of violating the code of ethics. Retain your completed memo in your PRM for future easy reference.
2. Review recent issues of eminent domain controversy in your local community, county, or home state reported in your local newspaper. If any of the issues involve property with which you are familiar, visit the location and assess whether an option was available. Prepare a brief essay in which you discuss the issue. If you cannot find anything in your local community, select another example and discuss the needs, the interest served, and the compensation formula, if available, for the original owner.
3. Prepare a brief essay in which you discuss the concurrent ownership of a husband and wife. Comment on whether one interest is superior to another. Include discussion of the interests protected and whether a life estate can be created for either party. If so, how is such interest created and what happens to the estate and the real property when the spouse with a life estate dies.
4. Your client, Stella, gave her neighbor an easement to use her driveway while the addition to his house was completed. However, the addition was completed six months ago, but the neighbor continues to use the driveway. What options will your attorney discuss with Stella and what are the risks and benefits of the options.
5. Your supervising attorney has asked that you review the deed and recommend the type of ownership that will be taken. The deed was transferred from ABC, Inc. to Bill Collector, Mary Collector, and Sam Harris. Look at the sample deed forms (see Figures 8-3 and 8-4) and the Sample Lease Agreement, in this lesson, select the correct form, and then indicate the grantor, the grantee, and the ownership interest vested in the grantees.
6. Ginger grants the mineral rights on her property to Max, and his company, Mineral Rights R Us. After completing the agreement, Max decides to lease a piece of the property to Ned for farming purposes. What rights does Max have in the property? What rights does Ned have? What recourse, if any, would Ginger have if she discovers that Max has created waste to the property by over-farming, thus making the property no longer arable? Discuss the various issues in a brief office memorandum addressed to your supervising attorney. Refer to specific legal concepts to support the positions taken.

7. Lynda and Lorenzo purchase a property; the deed of conveyance was a quitclaim deed. At the closing of the purchase, they inquire about liens or other issues related to the property and are assured there are no problems with the title. Prepare a brief essay discussing the potential problems and the specific strategy steps that could be in place to avoid any problems with title to the real property.

Portfolio Assignment

You have just been promoted to lead paralegal in your office, which is the real estate division of your firm. Your first obligation entails assessing the organization and tools made available to your colleagues in the department. The managing partner advises you of a chronic problem with missing elements in contracts and sloppy analysis of real estate rights and obligations. You make an assessment that checklists are the best remedy to this problem, so you design a checklist that outlines definitions and applications of real estate interests. You prepare a similar document outlining the types of deeds available for transfers of a real estate interest, whether partial or complete interest and transfer.

Vocabulary Builders



Across

1. Portion of interest reverting upon termination of a prior interest.
3. Joint tenants with an undivided interest.
4. Real property ownership acquired through use.
7. Portion of interest in real property remaining following the use by another.
8. Requires transfers and other transactions in real property to be in writing.
9. Process of government taking in eminent domain proceeding.
11. Limited right to real property use.
17. Terms or provision of interest in real property.
19. Limited and defined use of real property of another.
20. Certain guarantees given by the grantor to the grantee with the transfer of a real property interest.
21. Land interest terminating at death.
22. Property deterioration.

Down

2. Husband and wife take joint ownership interest.
5. Government right to take property from a private owner for public use.
6. Future time and conditions attached to ownership interest.
10. Right to enter and remove a specified thing from the property of another.
12. Transfer without warranty or guarantee.
13. Undivided ownership interest in real property.
14. Quitting use.
15. Transfers interest in real property.
16. Document evidencing transfer of real property interests.
18. Recipient of land transfer.

Florida Residential Lease Agreement

THIS LEASE AGREEMENT (hereinafter referred to as the "Agreement") made and entered into this _____ day of _____, 20____, by and between _____ (hereinafter referred to as "Landlord") and _____ (hereinafter referred to as "Tenant").

W I T N E S S E T H:

WHEREAS, Landlord is the fee owner of certain real property being, lying and situated in _____ County, Florida, such real property having a street address of _____ (hereinafter referred to as the "Premises").

WHEREAS, Landlord is desirous of leasing the Premises to Tenant upon the terms and conditions as contained herein; and

WHEREAS, Tenant is desirous of leasing the Premises from Landlord on the terms and conditions as contained herein;

NOW, THEREFORE, for and in consideration of the covenants and obligations contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

1. **TERM**. Landlord leases to Tenant and Tenant leases from Landlord the above described Premises together with any and all appurtenances thereto, for a term of _____ [specify number of months or years], such term beginning on _____, and ending at 12 o'clock midnight on _____.
2. **RENT**. The total rent for the term hereof is the sum of _____ _____ DOLLARS ($_____) payable on the _____ day of each month of the term, in equal installments of _____ DOLLARS ($_____), first and last installments to be paid upon the due execution of this Agreement, the second installment to be paid on _____. All such payments shall be made to Landlord at Landlord's address as set forth in the preamble to this Agreement on or before the due date and without demand.
3. **SECURITY DEPOSIT**. Upon the due execution of this Agreement, Tenant shall deposit with Landlord the sum of _____ DOLLARS ($_____) receipt of which is hereby acknowledged by Landlord, as security for any damage caused to the Premises during the term hereof. Such deposit shall be returned to Tenant, without interest, and less any set off for damages to the Premises upon the termination of this Agreement.

   Landlord will hold Tenant's security deposit in an account in the following Florida banking institution: _____. Landlord will not commingle the security deposit funds with those funds in the Landlord's primary bank account. Rather, Landlord will maintain the security deposit funds in a separate non-interest bearing account for the benefit of the Tenant. Accordingly, Tenant will NOT receive any interest on the security deposit.

   In accordance with Florida law (Florida Statute Section 83.49), Landlord is required to include in Tenant's lease the following provisions regarding return of security deposits. Florida Statute Section 83.49(3):

   (a) Upon the vacating of the premises for termination of the lease, if the landlord does not intend to impose a claim on the security deposit, the landlord shall have 15 days to return the security deposit together with interest if otherwise required, or the landlord shall have 30 days to give the tenant written notice by certified mail to the tenant's last know mailing address of his or her intention to impose a claim on the deposit and the reason for imposing the claim. The notice shall contain a statement in substantially the following form: This is a notice of my intention to impose a claim for damages in the amount of $_____ upon Tenant's security deposit, due to _____. It is sent to you as required by s.83.49(3), Florida Statutes. You are hereby notified that you must object in writing to this deduction from your security deposit within 15 days from the time you receive this notice or I will be authorized to deduct my claim from your security deposit. Tenant's objection must be sent to (landlord's address). If the landlord fails to give the required notice within the 30-day period, he or she forfeits the right to impose a claim upon the security deposit.

   (b) Unless the tenant objects to the imposition of the landlord's claim or the amount thereof within 15 days after receipt of the landlord's notice of intention to impose a claim, the landlord may then deduct the amount of his or her claim and shall remit the balance of the deposit to the tenant within 30 days after the date of the notice of intention to impose a claim for damages.

   (c) If either party institutes an action in a court of competent jurisdiction to adjudicate the party's right to the security deposit, the prevailing party is entitled to receive his or her court costs plus a reasonable fee for his or her attorney. The court shall advance the cause on the calendar.

   (d) Compliance with this section by an individual or business entity authorized to conduct business in this state, including Florida-licensed real estate brokers and sales associates, shall constitute compliance with all other relevant Florida Statutes pertaining to security deposits held pursuant to a rental

agreement or other landlord-tenant relationship. Enforcement personnel shall look solely to this section to determine compliance. This section prevails over any conflicting provisions in chapter 475 and in other sections of the Florida Statutes, and shall operate to permit licensed real estate brokers to disburse security deposits and deposit money without having to comply with the notice and settlement procedures contained in s.475.25(1)(d).

4. **USE OF PREMISES**. The Premises shall be used and occupied by Tenant and Tenant's immediate family, consisting of _____ _____ _____, exclusively, as a private single family dwelling, and no part of the Premises shall be used at any time during the term of this Agreement by Tenant for the purpose of carrying on any business, profession, or trade of any kind, or for any purpose other than as a private single family dwelling. Tenant shall not allow any other person, other than Tenant's immediate family or transient relatives and friends who are guests of Tenant, to use or occupy the Premises without first obtaining Landlord's written consent to such use. Tenant shall comply with any and all laws, ordinances, rules and orders of any and all governmental or quasi-governmental authorities affecting the cleanliness, use, occupancy and preservation of the Premises.
5. **CONDITION OF PREMISES**. Tenant stipulates, represents and warrants that Tenant has examined the Premises, and that they are at the time of this Lease in good order, repair, and in a safe, clean and tenantable condition.
6. **ASSIGNMENT AND SUB-LETTING**. Tenant shall not assign this Agreement, or sub-let or grant any license to use the Premises or any part thereof without the prior written consent of Landlord. A consent by Landlord to one such assignment, sub-letting or license shall not be deemed to be a consent to any subsequent assignment, sub-letting or license. An assignment, sub-letting or license without the prior written consent of Landlord or an assignment or sub-letting by operation of law shall be absolutely null and void and shall, at Landlord's option, terminate this Agreement.
7. **ALTERATIONS AND IMPROVEMENTS**. Tenant shall make no alterations to the buildings or improvements on the Premises or construct any building or make any other improvements on the Premises without the prior written consent of Landlord. Any and all alterations, changes, and/or improvements built, constructed or placed on the Premises by Tenant shall, unless otherwise provided by written agreement between Landlord and Tenant, be and become the property of Landlord and remain on the Premises at the expiration or earlier termination of this Agreement.
8. **NON-DELIVERY OF POSSESSION**. In the event Landlord cannot deliver possession of the Premises to Tenant upon the commencement of the Lease term, through no fault of Landlord or its agents, then Landlord or its agents shall have no liability, but the rental herein provided shall abate until possession is given. Landlord or its agents shall have thirty (30) days in which to give possession, and if possession is tendered within such time, Tenant agrees to accept the demised Premises and pay the rental herein provided from that date. In the event possession cannot be delivered within such time, through no fault of Landlord or its agents, then this Agreement and all rights hereunder shall terminate.
9. **HAZARDOUS MATERIALS**. Tenant shall not keep on the Premises any item of a dangerous, flammable or explosive character that might unreasonably increase the danger of fire or explosion on the Premises or that might be considered hazardous or extra hazardous by any responsible insurance company.
10. **UTILITIES**. Tenant shall be responsible for arranging for and paying for all utility services required on the Premises.
11. **MAINTENANCE AND REPAIR; RULES**. Tenant will, at its sole expense, keep and maintain the Premises and appurtenances in good and sanitary condition and repair during the term of this Agreement and any renewal thereof. Without limiting the generality of the foregoing, Tenant shall:
    (a) Not obstruct the driveways, sidewalks, courts, entry ways, stairs and/or halls, which shall be used for the purposes of ingress and egress only;
    (b) Keep all windows, glass, window coverings, doors, locks and hardware in good, clean order and repair;
    (c) Not obstruct or cover the windows or doors;
    (d) Not leave windows or doors in an open position during any inclement weather;
    (e) Not hang any laundry, clothing, sheets, etc. from any window, rail, porch or balcony nor air or dry any of same within any yard area or space;
    (f) Not cause or permit any locks or hooks to be placed upon any door or window without the prior written consent of Landlord;
    (g) Keep all air conditioning filters clean and free from dirt;
    (h) Keep all lavatories, sinks, toilets, and all other water and plumbing apparatus in good order and repair and shall use same only for the purposes for which they were constructed. Tenant shall not allow any sweepings, rubbish, sand, rags, ashes or other substances to be thrown or deposited therein. Any damage to any such apparatus and the cost of clearing stopped plumbing resulting from misuse shall be borne by Tenant;

(i) And Tenant's family and guests shall at all times maintain order in the Premises and at all places on the Premises, and shall not make or permit any loud or improper noises, or otherwise disturb other residents;
(j) Keep all radios, television sets, stereos, phonographs, etc., turned down to a level of sound that does not annoy or interfere with other residents;
(k) Deposit all trash, garbage, rubbish or refuse in the locations provided therefore and shall not allow any trash, garbage, rubbish or refuse to be deposited or permitted to stand on the exterior of any building or within the common elements;
(l) Abide by and be bound by any and all rules and regulations affecting the Premises or the common area appurtenant thereto which may be adopted or promulgated by the Condominium or Homeowners' Association having control over them.

12. **DAMAGE TO PREMISES**. In the event the Premises are destroyed or rendered wholly untenantable by fire, storm, earthquake, or other casualty not caused by the negligence of Tenant, this Agreement shall terminate from such time except for the purpose of enforcing rights that may have then accrued hereunder. The rental provided for herein shall then be accounted for by and between Landlord and Tenant up to the time of such injury or destruction of the Premises, Tenant paying rentals up to such date and Landlord refunding rentals collected beyond such date. Should a portion of the Premises thereby be rendered untenantable, the Landlord shall have the option of either repairing such injured or damaged portion or terminating this Lease. In the event that Landlord exercises its right to repair such untenantable portion, the rental shall abate in the proportion that the injured part bears to the whole Premises, and such part so injured shall be restored by Landlord as speedily as practicable, after which the full rent shall recommence and the Agreement continue according to its terms.
13. **INSPECTION OF PREMISES**. Landlord and Landlord's agents shall have the right at all reasonable times during the term of this Agreement and any renewal thereof to enter the Premises for the purpose of inspecting the Premises and all buildings and improvements thereon. And for the purposes of making any repairs, additions or alterations as may be deemed appropriate by Landlord for the preservation of the Premises or the building. Landlord and its agents shall further have the right to exhibit the Premises and to display the usual "for sale", "for rent" or "vacancy" signs on the Premises at any time within forty-five (45) days before the expiration of this Lease. The right of entry shall likewise exist for the purpose of removing placards, signs, fixtures, alterations or additions, but do not conform to this Agreement or to any restrictions, rules or regulations affecting the Premises.
14. **SUBORDINATION OF LEASE**. This Agreement and Tenant's interest hereunder are and shall be subordinate, junior and inferior to any and all mortgages, liens or encumbrances now or hereafter placed on the Premises by Landlord, all advances made under any such mortgages, liens or encumbrances (including, but not limited to, future advances), the interest payable on such mortgages, liens or encumbrances and any and all renewals, extensions or modifications of such mortgages, liens or encumbrances.
15. **TENANT'S HOLD OVER**. If Tenant remains in possession of the Premises with the consent of Landlord after the natural expiration of this Agreement, a new tenancy from month-to-month shall be created between Landlord and Tenant which shall be subject to all of the terms and conditions hereof except that rent shall then be due and owing at _____ DOLLARS ($_____) per month and except that such tenancy shall be terminable upon fifteen (15) days' written notice served by either party.
16. **SURRENDER OF PREMISES**. Upon the expiration of the term hereof, Tenant shall surrender the Premises in as good a state and condition as they were at the commencement of this Agreement, reasonable use and wear and tear thereof and damages by the elements excepted.
17. **ANIMALS**. Tenant shall be entitled to keep no more than _____ (____) domestic dogs, cats or birds; however, at such time as Tenant shall actually keep any such animal on the Premises, Tenant shall pay to Landlord a pet deposit of _____ DOLLARS ($_____), _____ DOLLARS ($_____) of which shall be non-refundable and shall be used upon the termination or expiration of this Agreement for the purposes of cleaning the carpets of the building.
18. **QUIET ENJOYMENT**. Tenant, upon payment of all of the sums referred to herein as being payable by Tenant and Tenant's performance of all Tenant's agreements contained herein and Tenant's observance of all rules and regulations, shall and may peacefully and quietly have, hold and enjoy said Premises for the term hereof.
19. **INDEMNIFICATION**. Landlord shall not be liable for any damage or injury of or to the Tenant, Tenant's family, guests, invitees, agents or employees or to any person entering the Premises or the building of which the Premises are a part or to goods or equipment, or in the structure or equipment of the structure of which the Premises are a part, and Tenant hereby agrees to indemnify, defend and hold Landlord harmless from any and all claims or assertions of every kind and nature.

20. **DEFAULT**. If Tenant fails to comply with any of the material provisions of this Agreement, other than the covenant to pay rent, or of any present rules and regulations or any that may be hereafter prescribed by Landlord, or materially fails to comply with any duties imposed on Tenant by statute, within seven (7) days after delivery of written notice by Landlord specifying the non-compliance and indicating the intention of Landlord to terminate the Lease by reason thereof, Landlord may terminate this Agreement.
    If Tenant fails to pay rent when due and the default continues for seven (7) days thereafter, Landlord may, at Landlord's option, declare the entire balance of rent payable hereunder to be immediately due and payable and may exercise any and all rights and remedies available to Landlord at law or in equity or may immediately terminate this Agreement.
21. **LATE CHARGE**. In the event that any payment required to be paid by Tenant hereunder is not made within three (3) days of when due, Tenant shall pay to Landlord, in addition to such payment or other charges due hereunder, a "late fee" in the amount of _____ _____ DOLLARS ($_____).
22. **ABANDONMENT**. If at any time during the term of this Agreement Tenant abandons the Premises or any part thereof, Landlord may, at Landlord's option, obtain possession of the Premises in the manner provided by law, and without becoming liable to Tenant for damages or for any payment of any kind whatever. Landlord may, at Landlord's discretion, as agent for Tenant, relet the Premises, or any part thereof, for the whole or any part of the then unexpired term, and may receive and collect all rent payable by virtue of such reletting, and, at Landlord's option, hold Tenant liable for any difference between the rent that would have been payable under this Agreement during the balance of the unexpired term, if this Agreement had continued in force, and the net rent for such period realized by Landlord by means of such reletting. If Landlord's right of reentry is exercised following abandonment of the Premises by Tenant, then Landlord shall consider any personal property belonging to Tenant and left on the Premises to also have been abandoned, in which case Landlord may dispose of all such personal property in any manner Landlord shall deem proper and Landlord is hereby relieved of all liability for doing so. BY SIGNING THIS AGREEMENT, TENANT AGREES THAT UPON SURRENDER OR ABANDONMENT, AS DEFINED BY CHAPTER 83, FLORIDA STATUTES, LANDLORD SHALL NOT BE LIABLE OR RESPONSIBLE FOR STORAGE OR DISPOSITION OF THE TENANT'S PERSONAL PROPERTY.
23. **ATTORNEYS' FEES**. Should it become necessary for Landlord to employ an attorney to enforce any of the conditions or covenants hereof, including the collection of rentals or gaining possession of the Premises, Tenant agrees to pay all expenses so incurred, including a reasonable attorneys' fee.
24. **RECORDING OF AGREEMENT**. Tenant shall not record this Agreement on the Public Records of any public office. In the event that Tenant shall record this Agreement, this Agreement shall, at Landlord's option, terminate immediately and Landlord shall be entitled to all rights and remedies that it has at law or in equity.
25. **GOVERNING LAW**. This Agreement shall be governed, construed and interpreted by, through and under the Laws of the State of Florida.
26. **SEVERABILITY**. If any provision of this Agreement or the application thereof shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this Agreement nor the application of the provision to other persons, entities or circumstances shall be affected thereby, but instead shall be enforced to the maximum extent permitted by law.
27. **BINDING EFFECT**. The covenants, obligations and conditions herein contained shall be binding on and inure to the benefit of the heirs, legal representatives, and assigns of the parties hereto.
28. **DESCRIPTIVE HEADINGS**. The descriptive headings used herein are for convenience of reference only and they are not intended to have any effect whatsoever in determining the rights or obligations of the Landlord or Tenant.
29. **CONSTRUCTION**. The pronouns used herein shall include, where appropriate, either gender or both, singular and plural.
30. **NON-WAIVER**. No indulgence, waiver, election or non-election by Landlord under this Agreement shall affect Tenant's duties and liabilities hereunder.
31. **MODIFICATION**. The parties hereby agree that this document contains the entire agreement between the parties and this Agreement shall not be modified, changed, altered or amended in any way except through a written amendment signed by all of the parties hereto.
32. **WAIVER OF JURY TRIAL**. LANDLORD AND TENANT HAVE SPECIFICALLY WAIVED THE RIGHT TO A JURY TRIAL CONCERNING ANY DISPUTES WHICH MAY ARISE CONCERNING THIS AGREEMENT, SPECIFICALLY BUT NOT LIMITED TO, ANY ISSUES INVOLVING TENANT'S TENANCY.
33. **RADON NOTIFICATION**. Pursuant to Florida Statute 404.056(8), the following disclosure is made: "RADON GAS: Radon is a naturally occurring radioactive gas that, when it has accumulated in the building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon gas that exceed federal and state guidelines have been found in buildings in Florida.

Additional information regarding radon and radon testing may be obtained from your County Public Health Unit."

34. **NOTICE**. Any notice required or permitted under this Lease or under state law shall be deemed sufficiently given or served if sent by United States certified mail, return receipt requested, addressed as follows:
If to Landlord to:

_____
[*Landlord's Name*]
_____
_____
[*Landlord's Address*]
If to Tenant to:
_____
[*Tenant's Name*]
_____
_____
[*Tenant's Address*]
Landlord and Tenant shall each have the right from time to time to change the place notice is to be given under this paragraph by written notice thereof to the other party. TENANT HEREBY WAIVES HIS OR HER RIGHT TO NOTICE PURSUANT TO FLORIDA STATUTE 715.104.

35. **ADDITIONAL PROVISIONS; DISCLOSURES**.

_____
_____
_____
_____
_____
_____
[Landlord should note above any disclosures about the premises that may be required under Federal or Florida law, such as known lead-based paint hazards in the Premises. The Landlord should also disclose any flood hazards.]

As to Landlord this _____ day of _____, 20_____.
LANDLORD:

Sign: _____ Print:
_____ Date: _____
As to Tenant, this _____ day of _____, 20_____.

TENANT ("Tenant"):

Sign: _____ Print:
_____ Date: _____.

TENANT:

Sign: _____ Print:
_____ Date: _____.

TENANT:

Sign: _____ Print:
_____ Date: _____.

TENANT:

Sign: _____ Print:
_____ Date: _____.

Chapter 9

Civil Procedure and Litigation

CHAPTER OBJECTIVES

Upon completion of this chapter, the student will be able to:

- Summarize the history and the purpose of rules of civil procedure.
- Identify pleadings and other documents in the civil litigation procedure.
- Demonstrate an understanding of the form for complaints, counterclaims, and responsive pleadings.
- Distinguish interrogatories and depositions.
- Define and explain the stages of the pretrial litigation process.
- Explain the appeal aspect of civil procedure.
- Identify strategies for ensuring ethical compliance in civil procedure aspects of paralegal work.

This chapter introduces civil procedural process and rules. After looking briefly at the history of civil law and procedure, we will explore how the forms relate to substantive law as well as the appropriate forms at various stages in the process. The process of civil litigation begins when the client enters the office and should continue in a well-ordered manner from that point. If you are not already familiar with the rules of civil procedure for both federal and state law, you will develop an understanding of the rules. You also will become familiar with how the substantive rights of the client are ensured through proper administration of the procedural guarantees and process. Civil procedure is as critical to client representation as the substantive legal issues. In any practice setting, the paralegal is most often the individual with the primary burden in procedural aspects of client representation.

HISTORICAL OVERVIEW

The facts, parties, and evidence differ in each case while the rules of civil procedure provide a structure and basic organizational framework for a civil action in the American legal system. The structure imparts efficiency and order without which the system could easily become ungainly and fail to serve the parties.

Originally, each state applied a civil procedural code that was consistent with constitutional requirements and guarantees, but nonetheless differed dramatically between local and state jurisdictions. The lack of consistency and the difficulty in interpreting expectations for a particular process became not only cumbersome, but, more important, potentially damaging to the mission, ideals, and goals of the American government and judicial system.

In 1848, New York State enacted legislation to simplify and abridge the Practice, Pleadings, and Proceedings of the Courts (Laws N.Y. 1848, ch. 379). Even then, there was concern about complexity in the procedure, the potential for abuse of the process, and overwhelming detailed paperwork. The goals of the legislation were clarity, predictability, and simplicity in operation and application. The **Field Code** emerged from this effort. Ironically, other states adopted the code more quickly than New York, despite the New York State commitment to process streamlining before any other state joined the effort.

Field Code
The forerunner to our present code of procedure; developed in New York in 1848.

Perhaps the greatest contribution of the Field Code, the forerunner to our present code of procedure, was proving that the process could be streamlined without sacrificing rigorous protection of client rights. Consistency and clarity ensure both the predictability of the process and ease of application. In law, particularly in our legal system, procedure is as important as substance. Errors in application of either aspect of the law can have serious implications for the client. Prior to the mid 1800s, matters in civil, equity, and criminal law had different processes in New York and every other state. These variations created, essentially, three separate court systems. The rules of civil and criminal procedure as now designed created universality and consistency within the system and more consistent protection of individual rights.

The procedural rules are not overly complex. Rather, it is abuse or failure to adhere to the rules that often creates the complexity. There is a logical construct to the rules, an easy sequencing, and rules to cover any eventuality in a civil matter. Understanding how the rules operate and apply is the essence of the paralegal's relationship with the law. From client interview through pretrial, trial, or appeal, protecting client procedural rights is critical.

Considering the complexity of some trials, both civil and criminal, there are relatively few rules. The state rules track or follow the federal rules, so, in your home state, the rules should be relatively few, concise, and straightforward. In any legal practice, the paralegal is the key to understanding and ensuring scrupulous adherence to the rules of procedure.

CYBER TRIP

The Federal Rules of Civil Procedure can be electronically accessed at http://judiciary.house.gov/media/pdfs/printers/108th/civil2004.pdf. You may want to bookmark this site for easy future reference.

CYBER TRIP

Explore your home state government Web site to see if the rules of civil procedure are available electronically in your state. If so, bookmark the site for easy future reference.

RESEARCH THIS!

Research your home state and local rules of civil procedure. Familiarize yourself with the flow of the litigation process, organizational stages, categories subject to rules, and other elements of particular interest. Make note of any obvious differences, such as a category in the local rules that may not be in the state rules.

FEDERAL, STATE, AND LOCAL RULES

Federal Rules of Civil Procedure (Fed. R. Civ. P.)
The specific set of rules followed in the federal courts.

Because most state rules of procedure closely follow the format and requirements of the federal rules, throughout this chapter, we will use the **Federal Rules of Civil Procedure (Fed. R. Civ. P.)** in both our discussions and illustrations. From time to time, however, you will look at state rules on the same topic for purposes of comparison, or specific research. When in practice, you must become familiar with state and local requirements as soon as possible. Developing this skill ensures maximum ethical and legal representation for the client, the ultimate responsibility of both the attorney and the paralegal.

The trial is the culmination of a process that relies very strongly on the talents and hard work of the paralegal. Each variable affects the ultimate decision of the jury or alternate dispute

resolution method chosen. At the same time, however, the procedure remains consistent. The flow and application of the rules are the same despite the different facts.

procedural law
The set of rules that are used to enforce the substantive law.

substantive law
Legal rules that are the content or substance of the law, defining rights and duties of citizens.

judge
Trier of law.

jury
Trier of fact.

service of process
The procedure by which a defendant is notified by a process server of a lawsuit.

pleadings
Formal documents filed with the court that establish the claims and defenses of the parties to the lawsuit; the complaint, answer to complaint, and reply.

pretrial motions
Used to challenge the sufficiency of evidence or the suppression of allegedly tainted evidence or other matters that could impact the focus, the length, and even the need for trial.

discovery requests
Requests from one party to another for responses to questions or production of documents or other evidence related to issues in dispute.

motion in limine
A request that certain evidence not be raised at trial, as it is arguably prejudicial, irrelevant, or legally inadmissible evidence.

motion to compel
Request for the production of information or testimony for use at trial.

pretrial phase (pretrial stage)
The steps in the litigation process before trial, to accomplish discovery and encourage settlement.

The *rules of civil procedure* are the **procedural law** governing the process of the law. Criminal law has a similar set of rules. Under the American legal system, procedural law and process is the mechanism that ensures due process of law along with substantive law. If the **substantive law** of rights protected is incorrectly applied according to the relevant procedural requirements, the client's rights are violated to the same extent they would be without any law.

The **judge** is the trier of law, which means that the judge ensures that the trial complies with the rules of procedure and other law related to the issue. On the other hand, the **jury**, as the trier of fact, has the responsibility of assessing the persuasiveness of the evidence and the interpretation to be made of the testimony presented. Comprehensive, detailed preparation for trial is the best means of assuring a persuasive presentation of the client's legal and factual position. If the case is not conducted in a manner consistent with the procedural requirements, it becomes difficult to determine clearly and precisely what and how to apply the law. On the other hand, if the process and evidence related to the substantive law of the case are improperly documented, organized, and presented, the job of assessing the facts becomes difficult, if not impossible.

Title 28 U.S.C.A. § 471 et seq. codifies the Federal Rules of Civil Procedure (Fed. R. Civ. P.). The rules describe each step of the process and the application of the step in context. Legal interpretation of each rule results from litigation resulting from disputes over the application and ultimate impact of the rule on the substantive rights of the parties to the trial. Each individual has the absolute right to constitutionally mandated protections, which is impossible absent scrupulous adherence to the rules of procedure.

CYBER TRIP

Research 28 U.S.C.A. § 471 et seq. and compare the presentation and content of the rules contained therein with the rules of procedure you located earlier. Make note of the differences, if any.

To begin our exploration, we look at how the rules are organized. The first part of the rules deals with process at the pretrial stage. This pretrial stage also includes sections related to drafting of the complaint, the filing of the complaint, and the **service of process**, or the delivery of the complaint and summons to the defendant.

The rules address the form as well as the content of the complaint. Additionally, **pleadings** encompassing all papers filed by either side with the clerk of the court following the complaint, and throughout the pretrial stage, also are subject to the rules. Some of the **pretrial motions** include, but are not limited to, **discovery requests**; **motions in limine**, or petitions to exclude certain evidence or testimony from the trial; and **motions to compel** production of information or testimony for use at trial.

The discovery stage of the process defines the scope of the trial. It is through discovery that evidence is disclosed and identified, witnesses deposed, and the parties questioned about the events and other relevant information. The actual evidence and supporting law upon which each party relies is presented and confirmed.

In the **pretrial phase**, the paralegal often researches the law and rules related to the legal and factual issues. This is an important responsibility and one at which the paralegal should develop his or her skills as well as possible. Pretrial preparation is an exciting phase of paralegal work. In

PRACTICE TIP

The pretrial process is the opportunity for the paralegal to demonstrate an understanding of the law, procedural competence, and organization skills, which are the essence of competent, appropriate legal representation and paralegal interactions with the court and supervising attorney. The skills needed to excel in your work within the process should be consistently honed, enhanced, and raised to higher level.

CYBER TRIP

Explore your home state government Web site to see if the rules of civil procedure are available electronically in your state. If so, bookmark the site for easy future reference.

RESEARCH THIS!

Research in your state and local county the rules of civil procedure related to pretrial discovery. Pay particular attention to both the types of discovery motions and the requirements for such motions. Note carefully the format and procedural requirements under local, state, and federal rules in your jurisdiction. Retain your notes or other visual learning aids in your PRM for easy future reference.

PRACTICE TIP

Prepare a checklist in which the permitted pretrial motions are listed along with the time permitted for response. Finally, note the sanctions, if any, mentioned in the rules. Create a checklist or reminder system for both the rules and the specific dates related to each. Retain your checklist of requirements in your PRM for easy future reference and use in practice.

this phase, the paralegal organizes the evolution and development of the law, evidence, and witness preparation. Any materials deemed irrelevant or otherwise inappropriate for case presentation are eliminated prior to the trial through the pretrial motion practice.

Your home jurisdiction also may have local rules of procedure. The local rules cannot change the substantive operation or intent of the rules, but they can include certain additional procedures not included in either the federal or state rules. The local rules are equally as binding as the relevant federal and state rules, so you need to become familiar with them as well.

PROCESS OVERVIEW

client intake
Basic demographic and case-specific information developed in the first meeting with the client following the formal engagement.

The first step in the trial process commences when the client comes into the office to discuss the legal issue he or she believes requires judicial intervention. As such, you must remember the importance of setting the tone of the relationship at the initial interview, gathering relevant facts, and establishing rapport with the client. It is preferable to use a form for **client intake** that covers basic and case-specific information. There are a wide variety of forms, and often your firm will have a form prepared that each attorney and paralegal uses. You should be familiar with the flow and contents to facilitate a more conversational first meeting with the client. It is not a good idea to give the form to the client as the client often interprets or skips information that ultimately you need to get and follow up. Be sure that each section is complete before the client leaves the office.

PRACTICE TIP

If your client needs to provide documents, at the end of the client interview, give the client a list of the anticipated documents and retain a copy for yourself.

Initial Client Interview

An important skill when conducting the initial client intake is good listening. If listening is important, then it follows that the client should not fill in the blanks and return the form when complete. You need to ask the questions and listen for the answer. Everyone has his or her individual style when interviewing and each style works, providing it facilitates getting all necessary information.

You must get client demographics and issue facts. Complete name, address, or contact information is always the starting place, along with date of birth, social security number, employment, and details of where to contact the client and at which telephone number. Next, you want educational background and work experience. Remember, you want to know not only the employer, but also the nature of the job(s) your client held and earnings history.

Naturally, you need the details, in the client's words, of the issue that brings the client to your office. The more facts and details you elicit, the better. The story should include specific details such as names and contact information of witnesses or others who could give supporting evidence and collaboration for your client. In a case involving personal injury, you need to take complete

Team Activity Exercise

The class should be divided into project teams. The teams each should develop a comprehensive client intake form appropriate for use in your firm. Be sure the form includes all aspects of demography, such as name; address; basic identifying information; date; employment; facts related to the case; client contact information; relatives; family; medical history, both injury related and general prior historical data; and other elements that are important to developing a comprehensive picture of the client and the reason for the representation. Include a section for identification of documentary evidence and witness contact information. Identify the kinds of information that may require a release of information from the client and have appropriate written request for information release forms available for client signature.

When the teams have finished their individual project, collaborate as a class to develop one final form based on the individual draft developed by each, augmented to include additional information included by others that your team may have overlooked. Construct a final collaborative draft and retain in your PRM for easy future reference and use.

medical information both related to the injury complained of and the treatment history as well as prior medical history. It is very important to get details of all prior lawsuit involvement, whether as plaintiff or defendant. Likewise, get any contact information for all persons named in the interview regardless of the relationship that person may have to the case.

There are subtle differences in the profile sought if the case is a business issue such as breach of contract, but, nonetheless, the basic format and the outline of information remain relatively similar. Instead of eliciting information about the accident, you would develop a full picture of the nature of the contract. If other people are mentioned, be sure to get contact information. To the extent possible, you need to get a chronology from the client, as well as a description of the losses or the economic damage incurred because of the problem.

preliminary matters
Determining the legal issues, parties, venue, and jurisdiction.

statute of limitations
Establishes the applicable time limits for filing and responding to certain claims or legal actions.

complaint
Document that states the allegations and the legal basis of the plaintiff 's claims.

summons
The notice to appear in court, notifying the defendant of the plaintiff 's complaint.

Preparing the Case for Filing the Complaint

Preliminary matters include determining the legal issues, parties, venue, and jurisdiction. Part of making these decisions entails understanding the limitations imposed by the relevant **statute of limitations**, which establishes the time allowed by law for filing a type of action. This should be the very first thing determined to ensure that the client does not get false hopes when the statute has expired prior to the client even coming to the first appointment. If the statute has expired, regardless of the seriousness of the complained-of injury, the complaint cannot be filed.

Pleadings are documents used in legal proceedings to set forth or respond to allegations, claims, and related matters in preparation for dispute resolution through litigation. The first pleadings filed are the *complaint* and *summons*. The **complaint** contains the description of the legal issues, the facts supporting those claims, and identification of the parties involved in the suit. The **summons** is that legal document that gives official notice to the defendant that he or she has been sued.

In the *pretrial motions* phase, which essentially runs concurrently with *discovery*, certain requests may be made to the court, such as a *motion in limine*, which asks the court to determine a specific legal reason to eliminate certain evidence. When a motion in limine is filed, the opposing party responds at a hearing presenting oral argument. The actions may or may not be stayed while awaiting the court's ruling on the motion, but without a specific request by the party, the court will not enter an order of stay on its own initiative.

PRACTICE TIP

Be certain that you keep records of significant dates in a calendar, tickler file, or some other specific place or system to ensure that the process benchmarks are met according to the timing requirements of the applicable rules of civil procedure.

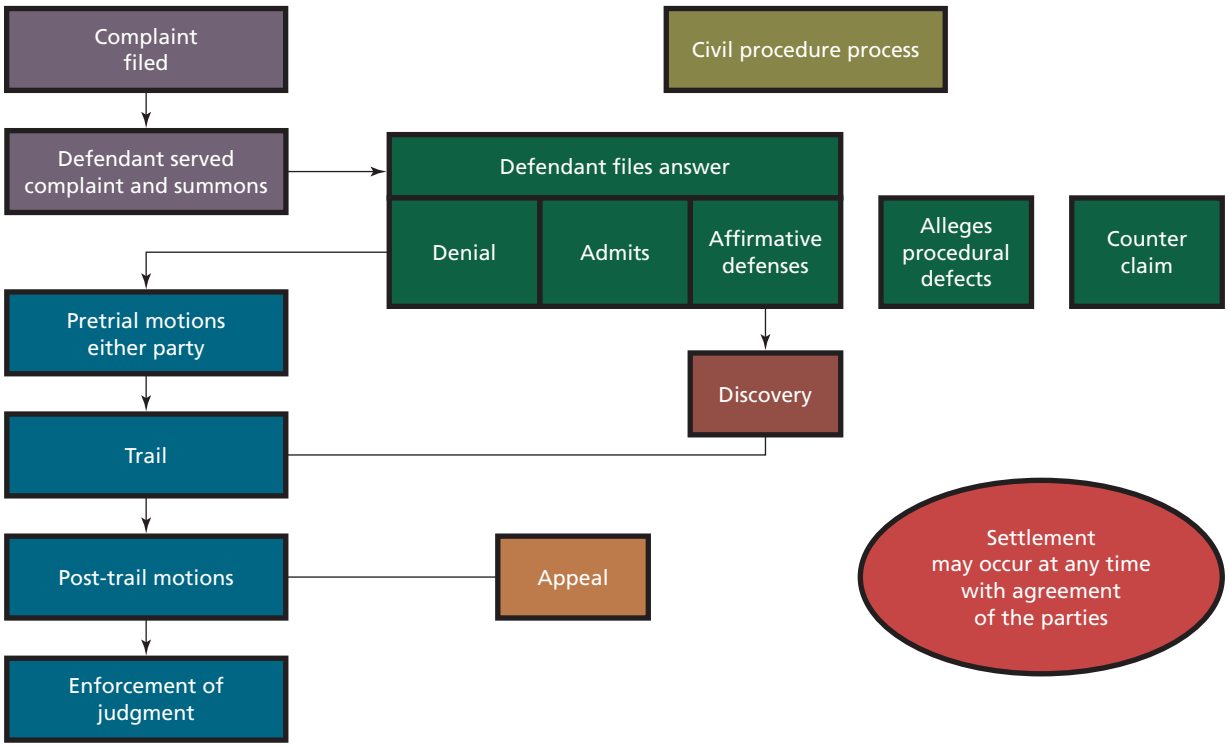


FIGURE 9.1 **Civil Procedure Process**

pretrial conference
The meeting between the parties and the judge to identify legal issues, stipulate to uncontested matters, and encourage settlement.

appeal
Tests the sufficiency of the verdict under the legal parameters or rules.

tickler file
System of tracking dates and reminding what is due on any given day or in any given week, month, or year.

jurisdiction
The power or authority of the court to hear a particular classification of case.

subject matter jurisdiction
A court's authority over the res, the subject of the case.

in personam jurisdiction
A court's authority over a party personally.

Once discovery closes and outstanding motions are decided, there is a **pretrial conference** attended by the attorneys and judge. Settlement or alternative dispute resolution attempts, if any, are discussed. The evidence for each side is reviewed in general terms along with other trial issues such as the time needed for the plaintiff and the defendant to present their respective witnesses.

At trial's end, the verdict is delivered, which the parties may accept, comply with, and thus close the case, or an **appeal** may be taken or other *post-trial motions* filed. Figure 9.1 provides an illustration of the civil procedure process.

Whether your client issue is litigation, appellate, or consultative, the dates of relevant events must be tracked so nothing is overlooked. The **tickler file** or system is the manual precursor to the more elaborate electronic systems used now by many firms. Whether manual or electronic, be sure you understand the importance of tracking dates and sequencing and that your reminder system works well with your working style, firm work flow, and client needs. Also, remember that, in this age of electronic sophistication, systems sometimes crash or freeze, so you need to have a failsafe backup in place.

Framing the Complaint and the Cause of Action

Two threshold issues when drafting the complaint are determining what cause of action there may be and who should be sued. As a layperson, the client may understand that something happened; it is up to the paralegal and the attorney to put the details into the legally acceptable form and language and file the complaint. Likewise, the specific cause of action type is not client driven. The attorney weighs the information from the client and makes the decision.

Deciding who to sue is a critical threshold issue. Many of the controversies that clients present involve relatively simple issues to identify and frame in the complaint. The facts will determine whether state or federal court has authority, or **jurisdiction**, over the controversy. This will not always be the case. Sometimes the parties live in different states than the one in which the issue arose. The most commonly applied concepts regarding jurisdiction relate to *subject matter* and *personal jurisdiction*.

To assess **subject matter jurisdiction**, your research should focus on what court can hear a case involving the facts presented. For example, if your client claims that she slipped on the wet floor at her local grocery store, your cause of action sounds in negligence. Therefore, it is appropriately filed in state court. **In personam**, or personal, **jurisdiction** addresses the ability of the court in question to bring the individual into court to appear before the court in answer to a complaint. A

RESEARCH THIS!

International Shoe v. Washington, 326 U.S. 310 (1945), is the seminal legal analysis of jurisdictional considerations and requirements. Locate the case either electronically or manually and review the opinion. Develop a brief interoffice memo in which you present the facts, key legal issues, holding, and analysis in the decision. Review the individual memos with your classmates and discuss the implications and the rule of law the case established. Retain your memo and notes of the discussion in your PRM for future easy reference.

court can properly assert in personam jurisdiction over a party who resides within the state. As an example, if an individual does considerable business in one state actually resides elsewhere, in personam jurisdiction may be exercised by the court in which the business is conducted. The individual must meet the minimum contacts test, established by the court in *International Shoe v. Washington*, 326 U.S. 310, 316 (1945), and reiterated in *Worldwide Volkswagen v. Woodson*, 444 U.S. 286, 291 (1980), and subsequent cases testing the same issue.

Once the information on the client intake is reviewed and jurisdiction is decided, the next step is to determine the cause of action that may be available given the facts and the state of law in the applicable jurisdiction related to such facts. As you know, criminal law and infractions are contained in the statutes, whether federal or civil. On the other hand, statutes may codify civil wrongs such as civil assault or tortious interference with business. When investigating torts and negligence, you may need to do some research to determine the most reasonable claim given all the facts presented.

The power of a particular court to hear the controversy is *subject matter jurisdiction*. As a quick reference tip, generally, federal courts hear controversies in which a federal question is at issue, with all others reserved to the state systems.

Example A:

If the controversy arises involving a matter of federal environmental protection under the EPA, the matter would be under the federal court based on subject matter jurisdiction.

Example B:

A controversy between individuals regarding employment harassment can be filed in either federal or state courts, depending on a number of variables, including the specific law within the state. The decision would rest upon the statutes in the state related to the matter as compared to federal legislation on the same issue. The supervising attorney determines the better **forum**, or jurisdiction, for your client issue.

forum
The proper legal site or location.

Example C:

Two parties, both licensed drivers in the state of Chaos, are involved in an accident. The matter would fall under the subject matter jurisdiction of the court of general jurisdiction in the state in which the incident occurred. Why? There is no apparent federal issue involved.

Example D:

Ned and Nelly have decided to dissolve their marriage. They are both residents of the State of Unbliss and have a limited marital estate to divide since both are flower children who believe material possessions are poison to the spirit; thus, they have nothing of consequence to distribute. This is a matter heard by the family court within the State of Unbliss court system. There are no federal issues involved. Thus, subject matter jurisdiction rests with the state court.

RESEARCH THIS!

Research to locate cases related to the statute of limitations and the calculation formulas and limitations for the different states. If you wish to check other states as well, be sure that your home state is included. Read the case opinions to gain an insight into the analysis of why the time is established and to gain an insight into the functional and legal utility of the statute.

RESEARCH THIS!

In the rules of civil procedure for your home state, research arbitration or other ADR means in the rules. Determine when arbitration is mandatory and elective with the parties. Contact your state court administrator for detailed information such as filing requirements, timing, and anything else of importance about the process if your jurisdiction provides for arbitration or other alternative dispute resolution measures. Take notes on the discussion and retain them along with the relevant rules in your PRM for easy future reference.

An individual does not have an unlimited amount of time in which to file a complaint. The *statutes of limitations* establish the applicable time limits for filing and responding to certain claims and other legal documents. The limits are set by legislation and the rules of procedure whether civil, criminal, or appellate and filed in federal, state, or administrative court divisions. Understanding the relevant statute of limitations is an essential aspect of the paralegal responsibility. It is the most important question to resolve when completing a client intake interview. If the statute of limitations has expired, no matter how intense the controversy, a complaint cannot be filed on behalf of the client.

Plaintiffs who believe their civil rights have been violated to the extent they must resort to the legal system for resolution need to assert those rights and claims within a reasonable period. Defendants likewise are entitled to reasonable expectations as to when, if ever, they may be named in a lawsuit. The statutes place the burden of timeliness and efficiency on the plaintiff to assert his or her claims. Statutes of limitations also serve the goal of judicial efficiency by establishing dates certain when the parties must do something throughout the litigation process. If a specific date is overlooked, the process may move toward dismissal of the complaint as permitted and provided under the respective rules of civil procedure. To eliminate unfairness in excusable situations, the rules do provide for exceptions and enlargement of time, but the circumstances must be presented to the court for approval and opposing argument prior to approving such request.

exhaustion of administrative remedies
Provision that a nonlitigation process to informally resolve disputes must be attempted prior to filing a complaint.

When researching any kind of civil action, the paralegal must determine if the law requires **exhaustion of administrative remedies** prior to filing a complaint. This means that, for example, if mediation is required in a discrimination-based issue prior to taking an issue to trial, the court will dismiss a complaint in which there is no affirmative evidence and sworn statement asserting that attempts at resolution, pursuant to the requirements of law, have failed to resolve the issue.

Pleadings

first pleading
Complaint.

The **first pleading** in any civil action is the complaint. Fed. R. Civ. P. 10 sets forth the requirements for preparing and filing the civil complaint and each state has a similar rule. The goal of the rule is uniformity and consistency. The complaint begins with the case caption, which generally looks like the sample in Figure 9.2.

FIGURE 9.2
Sample Case Caption

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

John Q. Citizen 123 State Street Blisstown, FL 33333, Plaintiff	Civil Action File Number
VS. COMPLAINT	
Jack Sons Mother 456 Capital Trail Blisstown, FL 33333 Defendant	

FIGURE 9.3
Sample Jurisdiction Clause, Federal Rules of Civil Procedure

Form 2. Allegation of Jurisdiction

(a) Jurisdiction founded on diversity of citizenship and amount.

Plaintiff is a [citizen of the State of Connecticut][1] [corporation incorporated under the laws of the State of Connecticut having its principal place of business in the State of Connecticut] and defendant is a corporation incorporated under the laws of the State of New York having its principal place of business in a State other than the State of Connecticut. The matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332.

(b) Jurisdiction founded on the existence of a Federal question.

The action arises under [the Constitution of the United States, Article __, § __]; [the Treaty of the United States (here describe the treaty)][2] as hereinafter more fully appears.

(c) Jurisdiction founded on the existence of a question arising under particular statutes.

The action arises under the Act of __, __ Stat. __; U.S.C., Title __, § __, as hereinafter more fully appears.

(d) Jurisdiction founded on the admiralty or maritime character of the claim.

This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears. [If the pleader wishes to invoke the distinctively maritime procedures referred to in Rule 9(h), add the following or its substantial equivalent: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

[1]Form for natural person.
[2]Use the appropriate phrase or phrases. The general allegation of the existence of a Federal question is ineffective unless the matters constituting the claim for relief as set forth in the complaint raise a Federal question.

CYBER TRIP

Research the state rules of civil procedure related to complaints. Determine if the rules require notice of intent to file. If so, what are the requirements as well as the case types to which this requirement applies? Make copies of the rules and retain them in your PRM for easy future reference.

Following the caption, the complaint sets forth the jurisdiction, the identity of the parties, the legal issue, the claim for relief, and the facts upon which the claim relies. Each statement related to the legal issue is set forth in separate numbered paragraphs at the beginning of the complaint. The federal rules of procedure embrace the **notice pleading** form. In notice pleading jurisdictions, the complaint contains sufficient facts to support the elements of the cause of action, but detail of every possible event and related fact is not included. Some states require more detail in the complaint, so again this would be something you need to check in your local and state rules of procedure.

notice pleading
A short and plain statement of the allegations in a lawsuit.

The **jurisdictional clause** establishes that the court in which the action is filed is properly authorized and empowered to hear the type of case and has jurisdiction over the parties. (See Figure 9.3.) When the jurisdictional statement is missing, the complaint form is incorrect and, in most jurisdictions, the clerk of the court will return the defective pleading for correction prior to accepting for filing.

jurisdictional clause
Establishes that the court in which the action is filed is empowered to hear the case and has jurisdiction over the parties.

The body of the complaint sets forth information required for the defendant to understand the nature of the claim and the facts relied upon to support the claim. From a procedural perspective, the complaint also establishes the legal issues, and thereby limits the nature and scope of evidence and addresses the type of damages sought and the basis for the requested relief.

FIGURE 9.4
Sample Complaint Seeking Monetary Damages, Federal Rules of Civil Procedure

Form 13. Complaint on Claim for Debt and To Set Aside Fraudulent Conveyance Under Rule 18(b)

A. B., Plaintiff
v.
C. D. and E. F., Defendants
} *Complaint*

1. Allegation of jurisdiction
2. Defendant C. D. on or about _____ executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant C. D. promised to pay to plaintiff or order on _____ the sum of five thousand dollars with interest thereon at the rate of _____percent. per annum].

FIGURE 9.5
Sample Complaint Seeking Specific Performance, Federal Rules of Civil Procedure

Form 12. Complaint for Specific Performance of Contract To Convey Land

1. Allegation of jurisdiction.

2. On or about December 1, 1936, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

3. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

4. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of one thousand dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of _____ dollars.

NOTE

Here, as in Form 3, plaintiff may set forth the contract verbatim in the complaint or plead it, as indicated, by exhibit, or plead it according to its legal effect. Furthermore, plaintiff may seek legal or equitable relief or both even though this was impossible under the system in operation before these rules.

PRACTICE TIP

Failure to respond timely and properly is a serious error. The paralegal needs to check the rules of procedure to ensure that response according to the rules is filed if your client is the responding party at any phase. The paralegal ensures the time does not expire without the appropriate responsive pleading. The courts do not ignore being only one day late. Late is late in the state and federal judicial systems. The best approach therefore is vigilance and careful attention to the rules. Maintaining your tickler system, whatever system you select, eliminates the possibility of missing the important dates.

A sample complaint seeking monetary damages and a complaint seeking specific performance or equitable relief appear in Figures 9.4 and 9.5.

The *summons*, served on the defendant with the complaint, provides formal notice of the filing of the civil action and the notice of the need to respond or otherwise enter some document with the court. (See Figure 9.6.) Even if the defendant believes there is no liability or that he or she is named in the suit improperly, some paper must be filed of record in order to preserve all rights the defendant may have. Failure to respond appropriately may result in the court entering a default judgment. This step precludes any formal dispute and says, in effect, that the defendant failed to answer so judgment in favor of the plaintiff is appropriate. Both federal and state rules make clear that failure to respond to each paper and/or claim is legally an admission. Thus, if the defendant fails to enter a response, the court rightly assumes the claims made are true and takes the legal step of entering a judgment against the defendant in favor of the plaintiff. The summons, rather than the complaint, is technically the document that triggers the official commencement of the action.

Following receipt of the complaint and the summons, the defendant must file a response or **answer** that serves a variety of purposes. First, it acknowledges that the defendant is entering the litigation process. Second, it contains any permissible defenses available to the defendant. The defenses serve the additional purpose of alerting the plaintiff to the legal position and strategy reasonably anticipated should the case go to trial. Third, the defendant agrees or disagrees with the allegations or statements in each paragraph of the complaint. Lastly, the answer or responsive pleading officially commences the civil litigation process.

As shown in Figure 9.1, the defendant may exercise any of several options when filing the response. First, the defendant may deny the facts as set forth, which is the **denial** of the allegation in the complaint. The defendant may enter an **admission** acknowledging the facts as true but then raise claims that the facts fail to support a legally recognized cause of action. The defendant also might raise additional facts not set forth by the plaintiff that may operate as an affirmative defense to the claims.

answer
The defendant's response to the plaintiff 's complaint.

denial
Defendant may deny the facts in the complaint.

admission
Acknowledge the facts as true.

RESEARCH THIS!

Locate the rules of civil procedure for your home state. Read the rules related to defenses. Compare the state with the federal rules. Note the differences and discuss with your classmates.

FIGURE 9.6
Summons in Federal Civil Action

United States District Court

_____ DISTRICT OF _____

SUMMONS IN A CIVIL CASE

V.

CASE NUMBER:

TO: (Name and address of defendant)

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

an answer to the complaint which is herewith served upon you, within_____ days after service of the summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable perio of time after service.

CLERK _____ DATE _____

(BY) DEPUTY CLERK _____

RETURN OF SERVICE

Service of the Summons and Complaint was made by me[1]	DATE
NAME OF SERVER *(PRINT)*	TITLE

Check one box below to indicate appropriate method of service

☐ Served personally upon the defendant. Place where served: _____

☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left: _____

☐ Returned unexecuted: _____

☐ Other *(specify):* _____

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing Information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ _____

Date — Signature of Server

_____

Address of Server

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

FIGURE 9.7
Sample Defenses under Fed. R. Civ. P. 12(b).

Form 20. Answer Presenting Defenses Under Rule 12(b)

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G. H. G. H. is alive; is a citizen of the State of New York and a resident of this district, is subject to the jurisdiction of this court, as to both service of process and venue; can be made a party without depriving this court of jurisdiction of the present parties, and has not been made a party.

Third Defense

Defendant admits the allegation contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge of information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

Fourth Defense

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

Counterclaim

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint. No statement of the grounds on which this court's jurisdiction depends need be made unless the counterclaim requires independent grounds of jurisdiction.)

Cross-Claim Against Defendant M. N.

(Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a complaint. The statement of grounds upon which the court's jurisdiction depends need not be made unless the cross-claim requires independent grounds of jurisdiction.)

NOTE:

The above form contains examples of certain defenses provided for in Rule 12(b). The first defense challenges the legal sufficiency of the complaint. It is a substitute for a general demurrer or a motion to dismiss.

The second defense embodies the old plea in abatement; the decision thereon, however, may well provide under Rules 19 and 21 for the citing in of the party rather than an abatement of the action.

The third defense is an answer on the merits.

The fourth defense is one of the affirmative defenses provided for in Rule 8©.

The answer also includes a counterclaim and a cross-claim.

CYBER TRIP

Research and review the Federal Rules of Civil Procedure and your home state rules related to defenses. Locate additional information from a secondary source such as a legal encyclopedia to develop a better understanding of how defenses operate.

affirmative defense
An "excuse" by the opposing party that does not just simply negate the allegation, but puts forth a legal reason to avoid enforcement. These defenses are waived if not pleaded.

An **affirmative defense** is a claim by the defendant based on the facts and law that would defeat the plaintiff's claims. Fed. R. Civ. P. 8(c) sets forth the permitted affirmative defenses, which include duress, contributory negligence, and the statute of limitations, among others. See Figure 9.7.

The fact of filing a complaint does not mean the defendant has no legal options or other means available to respond and present evidence that would tend to mitigate, if not eliminate, liability. Affirmative defenses are one such tool for defendants.

The pleadings do not operate as a decision on the facts. The jury tries the facts. The pleadings set forth the legal points and the facts of the respective parties.

When filing an answer, the defendant can raise issues of procedural defects in the complaint. Under Fed. R. Civ. P. 13, a defendant also may also raise a **counterclaim**, bringing forth claims

counterclaim
A claim made by the defendant against the plaintiff—not a defense, but a new claim for damages, as if the defendant were the plaintiff in a separate suit; a countersuit brought by the defendant against the plaintiff.

RESEARCH THIS!

Read the rules related to counterclaims in your state rules of civil procedure. Compare them with the requirements in the Fed. R. Civ. P. Note the differences and discuss with your classmates.

CYBER TRIP

Research the ***Federal Rules Decisions*** **(F.R.D.)** and sections related to discovery and evidence. After reviewing the rules, refer to several of the cases mentioned to gain insight into court analysis of the admissibility of evidence in the discovery phase.

RESEARCH THIS!

Research your home state rules of civil procedure for the rule related to Fed. R. Civ. P. 26(b)(1). Read carefully to determine what, if any, differences there are between that and the federal rules.

that he or she may have against the plaintiff. The purpose of the counterclaim rule is to ensure that all issues related to the same basic facts are disposed of at one time. This avoids filing consecutive complaints that relate to essentially the same core issues or facts.

The rules distinguish *compulsory* and *permissive* counterclaims. **Permissive counterclaims** may, but need not, be raised under all circumstances. On the other hand, **compulsory counterclaims** not raised in the first responsive pleadings are forever barred. In application, the counterclaim rules are important for the paralegal to recognize and understand.

Discovery

In the **discovery** phase of litigation, the parties exchange evidence relevant to the issues and their respective legal positions. Testimony from witnesses and other relevant evidentiary material obtained are then organized for use at trial. As you might expect, the rules describe concisely what may be discovered as well as how the process operates. Fed. R. Civ. P. 26(a) sets forth the requirements in terms of disclosures that must be made by both parties, including the identity and the scope of testimony for expert witnesses who will be used and the general disclosures required in the pretrial period of litigation. Fed. R. Civ. P. 26(b) also sets the scope of discovery. In this process, the law and the rules require focus and reasonable relation to the facts and law at issue.

Discovery is an orderly process. The rules essentially support and guide the parties' rights and needs to obtain relevant information not otherwise protected by a privilege or exception to discovery. In the revisions to the Fed. R. Civ. P. in 2000, discovery was limited to "subject matter involved in the action." In order to obtain information or evidence from the opposing party, a showing of "good cause" is the benchmark legal standard. This eliminates "blind fishing exercises." The court expects the parties to understand the law, facts, and rules. They are likewise expected to prepare for trial in an appropriate, organized, efficient, and legal manner. Discovery is not available to try to get evidence that might support the plaintiff's claims. The facts should be clear to the attorney and the paralegal prior to filing the complaint.

Under the Fed. R. Civ. P., **evidence** requested in discovery is not exclusively what will be presented to the jury at trial. However, it must be "reasonably calculated to lead to the discovery of admissible evidence." Recognize that discovery is a skill. Careful attention to detail and clarifying issues is the key to professional paralegal practice. When doubt or question arises, a memo to the supervising attorney that spells out the issue is the appropriate step for the paralegal to take.

If one particular aspect of discovery is consistent throughout the rules, it is **relevance**. Fed. R. Civ. P. 26(b)(1) makes clear that the information sought must be relevant to the claim or defense of either party and, further, that it must be relevant to the subject matter of the dispute. The sense that the process was too liberal has led to a narrowing of the scope of relevance. The 2000 revisions to the Fed. R. Civ. P. limited relevance to the claim or defense of any party, thus eliminating the subject matter relevance component previously embraced under the rules.

When attorneys have concerns that requests for documents or other evidence are in violation of the rules or overreaching, a discovery motion may be made to the court expressly stating what is sought and why it is objectionable or beyond the reasonable scope of discovery. The narrower

Federal Rules Decisions **(F.R.D.)**
Contains decisions of the federal district courts relating to the rules of civil and criminal procedure.

permissive counterclaim
A counterclaim that is not required to be filed with a complaint because the facts do not arise out of the same set of circumstances as the complaint.

compulsory counterclaims
A counterclaim that is required to be pleaded because the facts relate to the same transaction as that set forth in the original complaint.

discovery
The pretrial investigation process authorized and governed by the rules of civil procedure; the process of investigation and collection of evidence by litigants; the process in which the opposing parties obtain information about the case from each other; the process of investigation and collection of evidence by litigants.

evidence
Must be reasonably calculated to lead to the discovery of admissible evidence.

relevance
Reasonably related or associated with the ultimate facts and legal theories.

CYBER TRIP

Research Fed. R. Civ. P. 26(b)(1) and review the rule provisions. Review the *Federal Rules Decisions* (F.R.D.) and the ***Federal Rules Digest*** sections related to the rule, looking for cases decided after 2000 for a current analysis of relevance.

Federal Rules Digest
Digest of opinions related to rules of procedure in the federal court system.

interpretation embraced in the rules changed in 2000 eliminates much of the potential for disputes regarding evidence unnecessarily requested that may be only tangentially related to the core legal issues.

In discussing the scope of relevance and discovery, the rules state clearly that **nonprivileged information** is discoverable. However, the precise meaning of **privilege** does not appear in any state or federal rules. Typically, then, the courts interpret this to mean the commonly identified and legally recognized privileges, with communications reasonably expected to be protected by privacy and confidentiality in furtherance of the relationship such as attorney–client, doctor–patient, husband–wife, psychotherapist–patient, and priest–penitent. The privilege also has been interpreted to include trade secrets and other commercially sensitive information. When a request is made for what appears to be privileged information, pretrial motions requesting judicial interpretation on the question are appropriate. The motions and responses present argument as to relevance and why the information falls within the privilege exception to disclosure requirements. The judge makes the determination as to production or not.

PRACTICE TIP

When researching the *Federal Rules Decisions* (F.R.D.), be sure to note the date of the decision. Prior to the year 2000, decisions may differ from the analysis and comment currently applied. Thus, the rule to use the most current decisions applies when researching the F.R.D. as well as other legal research.

Example:

Communications between a doctor and his or her patient are privileged when exchanged in the context of the doctor–patient relationship, for example, during an office visit and consultation when it is reasonable for both parties to assume the confidentiality and other terms of the doctor–patient relationship exist. However, if the doctor and patient are both out to dinner in the same restaurant and spend some time socializing, those communications are not subject to privilege protection. They are not made in furtherance of the doctor–patient relationship nor is it reasonable for either party to assume that a public dining room would provide adequate expectation of privacy.

The paralegal should develop an awareness of the scope of potential opposing arguments when drafting a discovery motion. As has been mentioned elsewhere, appropriate client representation entails knowing not only what the client's position or issue may be, but also what is reasonably anticipated by the other side. When both aspects of the argument are considered, the document prepared will appropriately address the opposing party's position.

nonprivileged information
Discoverable information not protected by confidentiality provisions even when exchanged between parties who may enjoy privileged communications in certain circumstances.

privilege
Reasonable expectation of privacy and confidentiality for communications in furtherance of the relationship such as attorney–client, doctor–patient, husband–wife, psychotherapist–patient, and priest–penitent.

interrogatory
A discovery tool in the form of a series of written questions that are answered by the party in writing, to be answered under oath.

Interrogatories

Interrogatories are written questions presented by one party to the other. Typically, they are exchanged between the parties and presented at the earliest possible time to enable efficient and complete investigation and case preparation. Under certain narrow exceptions, special interrogatories may be used with nonparties. The rules in your home state set forth how this exception may be requested and under what circumstances.

State rules may limit the number or frequency of requests for interrogatories. They also may provide what are called *form interrogatories*, which are customized for the particular kind of litigation such as automobile accident, civil negligence, or medical malpractice. Sample form interrogatories are provided on this book's Web site (www.mhhe.com/paralegal) for your reference. When form interrogatories are required, they are typically comprehensive because the rules of procedure limit the number of questions that may be served. You should check your home state requirements regarding interrogatories as well as the federal rules and requirements.

The purpose of *interrogatories* is to locate evidence, witnesses, and other information that will be helpful in preparing a meaningful case for trial. The best way to view the responses is to see them as a beginning rather than an answer. This means that while the response does indeed answer a question, it provides the starting point of the investigation and confirmation process. Ultimate use of the information in trial depends on the results of the investigation and the

RESEARCH THIS!

Research to find the rules of procedure related to special interrogatories in your home state. When are they permitted and what limitations, if any, are imposed? Retain a copy of the rule and your notes in the appropriate section in your PRM for future easy reference.

RESEARCH THIS!

Research in your local law library and find form interrogatories used in the jurisdiction. Look at the kinds of cases to which they apply, as well as the content, including general categories and other aspects of particular interest to you.

confirmation of the data provided. Thus, when the responses are received, some action should follow. Merely filing the materials in the appropriate client file is an insufficient paralegal response.

Paralegals often catalogue interrogatory responses and summarize the information received. Typically, the paralegal will be asked to follow up, whether by developing additional witness lists, additional questions for investigation, depositions, or otherwise to ensure a complete and detailed preparation for the client case. As with all other aspects of the paralegal practice, the supervising attorney has the ultimate decision-making authority. However, the paralegal should develop a work and organizational style that keeps the process moving along efficiently and effectively to avoid last minute scrambling, which ultimately could lead to below-standard representation.

Depositions

deposition
A discovery tool in a question-and-answer format in which the attorney verbally questions a party or a witness under oath.

Unlike interrogatories, which are limited to parties, **depositions** are taken with oral questioning of witnesses and parties. The questions are based on the materials and information gathered through the discovery process. Timing of the depositions is critical. The parties cannot randomly decide to set a witness for deposition. The both federal and state rules establish parameters. As such, it is critical to plan what each witness can contribute and when it is best to take the testimony. Deposition testimony is given under oath, with a court reporter transcribing verbatim the questions and responses. The purpose of the deposition is to get the version of the facts and the details of the case that the witness will give at trial. As such, the better the preparation, the more meaningful the testimony provided. This is not an opportunity to put a witness on trial, nor is it a good time to display trial tactics and, under all circumstances, it is impermissible to be overbearing, rude, annoying, or aggressive. The objective is to get information professionally and efficiently. The most effective depositions are those for which the parties are well prepared and the attorneys' questions planned and drafted well.

Additional Discovery Tools

Requests for Admission Depositions and interrogatories are invaluable for getting information, testimony, and evidence. Likewise, there are a number of pretrial motions equally as valuable as the evidence provided in the interrogatories and depositions. **Requests for admission**, for example, are written requests made by one party asking for specific admission to certain facts. (See Figure 9.8.) The admissions eliminate the need to prove the facts admitted or acknowledged at trial and make for more efficient trial preparation by eliminating additional work on behalf of all parties. Again, planning, drafting precision, and efficient followup are key elements to effective use of the requests.

requests for admission
A document that provides the drafter with the opportunity to conclusively establish selected facts prior to trial.

FIGURE 9.8
Sample Request for Admission, Federal Rules of Civil Procedure

Form 25. Request for Admission Under Rule 36

Plaintiff A. B. requests defendant C. D. within _____days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at trial:

1. That each of the following documents, exhibited with this request, is genuine.
(Here list the documents and describe each document.)
2. That each of the following statements is true.
(Here list the statements.)

Signed: _____.
Attorney for Plaintiff.
Address: _____.

FIGURE 9.9
Sample Request for Production of Documents, Federal Rules of Civil Procedure

Form 24. Request for Production of Documents, etc., Under Rule 34

Plaintiff A. B. requests defendant C. D. to respond within _____ days to the following requests:

(1) That defendant produce and permit plaintiff to inspect and to copy each of the following documents.

(Here list the documents either individually or by category and describe each of them.)

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

(2) That defendant produce and permit plaintiff to inspect and to copy, test, or sample each of the following objects:

(Here list the objects either individually or by category and describe each of them.)

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

(3) That defendant permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph, test or sample (here describe the portion of the real property and the objects to be inspected).

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

Signed: _____,
Attorney for Plaintiff.
Address: _____.

Requests for Documents and Physical Examinations Throughout discovery, various documents will be requested and mentioned. Some, if not all, of the documents may be of great use to either side in preparing for trial. The rules allow for securing documents by filing a **request for production of documents**. (See Figure 9.9.) This request must specify the document sought. The rules require efficient and specific requests. If, for example, there was an automobile accident that led to a period of unemployment for which the plaintiff seeks compensation, evidence of earnings is appropriate information for the defendant to request. However, evidence of earnings for the prior 10 years would be excessive. Such a broad request violates the relevance standard. Further, on its face, the request goes beyond the issue before the court. Remember that the scope of discovery was narrowed by the Fed. R. Civ. P. revisions in 2000, and, as such, an overly broad request will be denied absent showing of good cause for such a request. A good-cause showing means that the requesting party must present specific reasons to the court for making what might otherwise appear to be an overbroad request.

request for production of documents
Must specify the document sought.

Enforcement of Discovery and Pretrial Right Under Fed. R. Civ. P. 37, a party may request that the court order **sanctions** or penalty against a party who ignores a request for discovery materials. The rule permits the court to issue an order to compel or other sanctions deemed appropriate based on the request and the nature of the refusal to comply. There are several available sanctions for failure to comply with an order to compel. The most serious is an order requiring that the facts supporting the request be taken as true and thus in favor of the requesting party. There are other remedies and sanctions available under the rules up to and including finding contempt of court, which can result in monetary penalties for the offending attorney. The available remedies and cures should indicate the seriousness of the discovery process as well as the need to exercise extreme caution in compliance.

sanctions
Penalty against a party in the form of an order to compel, a monetary fine, a contempt-of-court citation, or a court order with specific description of the individualized remedy.

Trial

At the conclusion of the discovery process, the case is ready to take before a jury. There are pretrial settlement options available to the parties, either voluntarily chosen or court ordered, depending on the rules for your home state. Some jurisdictions require mediation or ADR, while still others require a conference and settlement procedures with a magistrate judge who presents a recommendation to the court.

The Fed. R. Civ. P. and state rules govern the process up to trial. So too the rules guide the trial and post-trial process to ensure consistency, efficiency, and preservation of the rights of both parties to the controversy as guaranteed under the federal Constitution.

Eye on Ethics

When conducting the research for the trial, as in any other phase of client representation, ethical compromise must be avoided. Doing so requires careful reading of the law. It further involves asking questions and alerting the supervising attorney to any confusion or contradictions seen in the law. The attorney has the ultimate responsibility for decisions relating to the law, but the paralegal has an equal responsibility to frame the issue or questions that arise accurately and concisely.

QUESTION

You are researching the current state of the law in relation to negligent infliction of emotional distress in an automobile accident case. The case law shows that your jurisdiction has conflicting decisions. One court held that damages could be recovered for relatives of the accident victim showing evidence of emotional distress following the incident. Other cases held that no damages could be recovered by relatives claiming emotional distress under the same facts. You have not seen this kind of conflict of law, so you have no previous experience for guidance. One solution that occurs to you is to call the client and explain the differences so the client understands that the law is unclear. You also tell the client that when that happens, the amount of distress suffered makes the decision as far as the court decision is concerned. Given the traumatic impact on your client and the relatives, you are confident they can recover. You then prepare the memo to your supervising attorney clearly outlining the case holdings and a summary of the trend in the state following the second case decision. You do not mention to your attorney the discussion with the client, nor the interpretation of law you have given the client. After all, you reason, this helped calm the client and manage the pretrial stress normally experienced by the parties and their relatives in such situations.

Based on your understanding of paralegals' ethical obligations, write an essay in which you comment on the situation. Include in your essay comments related to the way in which the law was presented to the client and any potential violations of ethical codes and guidelines in specific detail so the reader is clear on why you indicate the particular issues. Finally, include a statement of strategies to engage to avoid falling into a similar challenge in your career practice. Be sure to refer to specific code or guideline sections to support your various points of discussion.

Following the trial decision, the losing party *may* file an appeal of an adverse decision. Appellate practice is similar to civil procedure in terms of rules, time limits, and other procedural elements. However, it differs substantially in terms of the issues that may be entertained and the scope of the decisions the appellate court may make in a given controversy.

Under all circumstances, the appeal must raise issues of law. The appellate court cannot and will not review issues solely based on a factual difference such as an appeal based on an award that is too small. The jury decision cannot be changed. The jury has the sole responsibility to try facts. Our system does not permit an appeal claiming, for example, that the award was too small.

Summary

In this chapter, we explored the rules of civil procedure with emphasis on the pretrial aspects of civil procedure. You learned the importance of the procedure in protecting the individual citizen's individual rights whether the plaintiff or the defendant in civil litigation. We discussed various aspects of case preparation and commencement of the formal process in filing a complaint. You learned about the rules of trial preparation, including jurisdiction, formatting the complaint, and gathering evidence in the pretrial process. The paralegal is typically the person in the firm with responsibility for understanding and properly applying the rules of civil procedure in all aspects. You reviewed ethical challenges and concerns when working in the litigation process and strategies for ensuring remaining within the scope of the paralegal role.

Key Terms

Admission
Affirmative defense
Answer
Appeal
Client intake
Complaint

Compulsory counterclaim
Counterclaim
Denial
Deposition
Discovery
Discovery requests
Evidence
Exhaustion of administrative remedies
Federal Rules Decisions (F.R.D.)
Federal Rules Digest
Federal Rules of Civil Procedure (Fed. R. Civ. P.)
Field Code
First pleading
Forum
In personam jurisdiction
Interrogatory
Judge
Jurisdiction
Jurisdictional clause
Jury
Motion in limine
Motion to compel
Nonprivileged information
Notice pleading
Permissive counterclaim
Pleadings
Preliminary matters
Pretrial conference
Pretrial motions
Pretrial phase (pretrial stage)
Privilege
Procedural law
Relevance
Request for production of documents
Requests for admission
Sanctions
Service of process
Statute of limitations
Subject matter jurisdiction
Substantive law
Summons
Tickler file

Review Questions

TRUE AND FALSE

Read each of the following and mark true or false. For those marked false, provide a sentence that makes the statement true.

1. Defendant need not file any documents after receiving the complaint and the summons because the matter has already commenced.
2. Relevance in discovery includes materials reasonably presumed to assist in discovering evidence to be presented in trial.
3. A lawsuit can begin with the filing of a complaint with no other documents.
4. Notice pleadings only need to state the legal definition of the complaint, without providing any details.
5. Following the year 2000 revisions, the court rules permit a more relaxed attitude regarding filing papers; thus, the timelines are only approximations.
6. Interrogatories may be served on parties or witnesses.
7. Depositions are limited to parties and must be conducted only in writing.
8. An admission in the request for admissions need not be proven by evidence in trial.
9. Discovery is a very loosely guided process to which no time limits apply.
10. When making discovery requests, information regarding the nature and the extent of damages should be requested.

Discussion Questions

1. Locate the Federal Rules of Civil Procedure and the state rules for your home state. Look carefully at the sections related to
   a. Service of process.
   b. Venue.
   c. Jurisdiction.
   d. Time for filing a responsive pleading after receipt of the complaint.
   e. Certificate of service.

   Compare each and comment on the similarities and any differences. Be sure to look at the forms as well as the substance. In the jurisdictional response, be sure to check the

jurisdictional requirements for filing in the local courts or the magisterial districts as well as the administrative agency courts of original jurisdiction. Determine the key points in each. Next, prepare a checklist containing the elements of each including applicable timelines, if any. Retain your completed document in your PRM for future easy reference.

2. Pair project. Each student pair should research client intake and locate sample client intake forms. After reviewing the material, design a general client intake form, as well as a specific section for each of the following types of practice:

   The pairs should discuss their individual forms with the class and add to their own, based on useful suggestions from the class, and contribute recommendations from their own sample. Upon completion of the discussion, retain the sample forms in the PRM for future easy reference.

3. Read the following fact pattern, prepare the requested documents, and respond to the questions.

   Sam and Bill are both traveling salesmen, but each works for a different firm. They cover the same territory, so they often travel together on the road. On this particular trip, Sam, who works for Hasty Postal Options, is traveling to meet the vice president of the company to discuss a promotion and possible relocation. Bill, who works for Dick's Delivery Depot, is traveling to meet the key national account manager to discuss establishing a distribution terminal in Other State, USA. Both Sam and Bill live in This State, USA. The trip is about three miles and covers three states. After traveling all day long, just as Sam and Bill are driving over the state line between states two and three, which is Other State, a 16 wheeler comes barreling down the hill approaching the state line, fails to see the "Slow Curve Ahead" sign, and slams into Sam and Bill. The 16 wheeler was transporting chickens from Chicken State to Other State. The truck had a driver and a helper in the cab. Fortunately, none of the people was killed, but all were seriously injured. On impact, the doors of the trailer flew open and all of the chickens escaped and flew away, so the entire load of chickens was lost. Sam and Bill each decides to file suit when they are out of bed following their respective hospitalizations. The truck driver also decides to file an action. Both Sam and Bill are key employees and, without their services, their firms lose substantial amounts of income. Sam was out of work for 12 weeks, and Bill for six months.

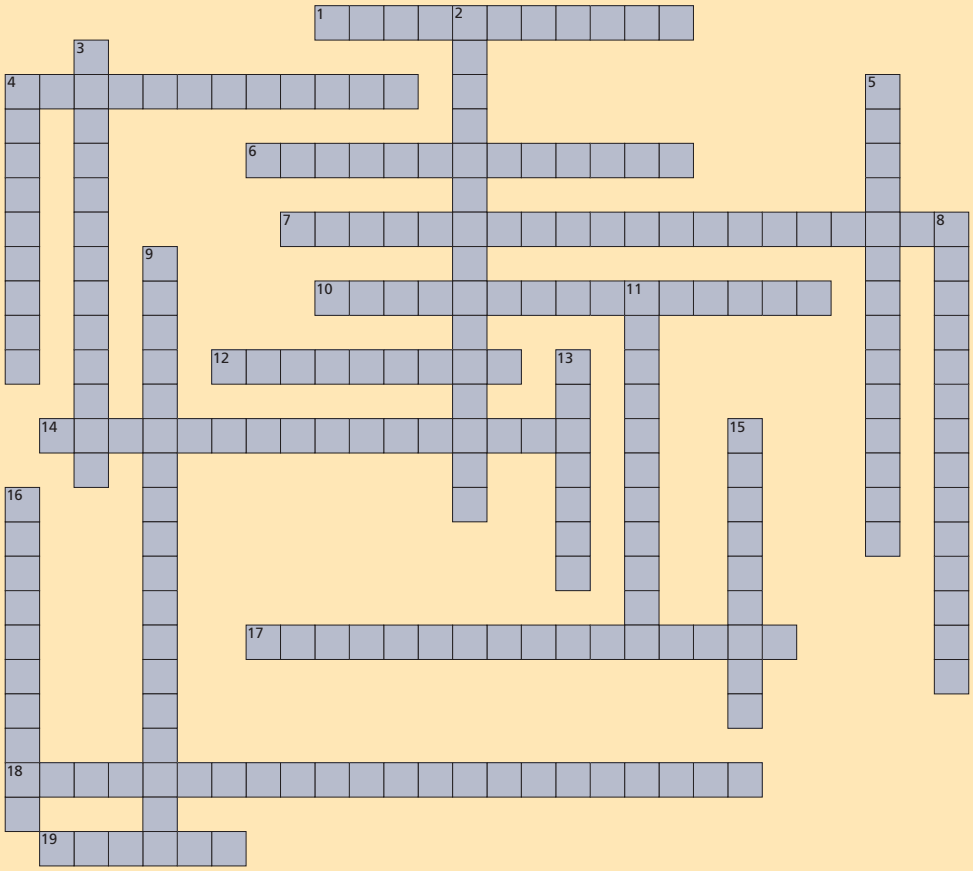
   a. Decide the proper parties to file claims.
   b. Determine the appropriate jurisdiction.
   c. Prepare a case caption with all the necessary information. (If the federal courts are chosen, use your federal district and, if the state, use your local jurisdiction.)
   d. Prepare the beginning sections of the complaint in which the personal data of the plaintiff(s) and the defendant(s) and the jurisdiction are set forth.
   e. It is unnecessary to continue with the complaint sections for each count(s) of the complaint, but list the possible causes of action.

   Retain all of the materials in your PRM for easy future reference.

Portfolio Assignment

Your supervising attorney has been in trial for three months and expects to continue for another two, so your time is limited both during the day and on weekends because you are assisting at trial. The paralegal department in your firm functions extremely well under normal circumstances, but you are concerned about questions arising during the days when you are in trial and not readily reachable. You decide to put together a folder or PowerPoint, whatever works best with your personal style, that will walk the other paralegals, as it were, through the discovery procedure including the order of the process and documents related to each step. You decide that the visual presentation all in one place is the best for you and the others in your department who rely on you throughout the day. Include timing for filing, document names, and general description of the purpose and contents, as well as the method of service or presentation. If your local judiciary has unique filing or formatting requirements, please be sure to include those in your presentation. Any differences between state and federal requirements should be included. Include examples of draft forms. The class should present and discuss the individual folios and add or modify each as appropriate. Retain your finished project for future easy reference.

Vocabulary Builders



Across

1. Sets forth the identity of the court parties and case docketing information of record.
4. Raises legal claims the defendant may have against the plaintiff.
6. Describes the process of protecting individual rights.
7. Asking the opposing party to agree to certain facts prior to trial.
10. Questions exchanged between parties seeking evidence related to claims.
12. Relatedness and appropriateness.
14. May, but need not, be raised.
17. Matters, including appeals and extraordinary relief requests, raised after trial.
18. Dispute resolution methods prior to and in place of filing a formal complaint commencing the litigation process.
19. Petition for judicial review above the trial court level.

Down

2. Must be raised or it is forever barred.
3. Topic or legal issue.
4. Sets forth allegations of wrongdoing and legal theories on which claims rely.
5. Petition to exclude evidence or testimony from trial.
8. Defines the rights of individuals.
9. Claim based in law and fact to defeat plaintiff's allegations in a complaint.
11. Jury.
13. Official commencement of legal action notice.
15. Papers filed by parties to a lawsuit with the office of the clerk of the court.
16. Judge.

Chapter 10

Trial, Alternative Dispute Resolution (ADR), and Remedies

CHAPTER OBJECTIVES

Upon completion of this chapter, the student will be able to:

- Describe the stages of trial.
- Discuss jury instructions, selection, and role.
- Distinguish criminal, equitable, and legal remedies.
- List and define damages available for tort liability.
- Describe each classification of remedy and damages.
- Apply various damages classifications to fact settings.
- Demonstrate an understanding of alternative dispute resolution (ADR) options.
- Identify ethical challenges related to litigation practice and strategies for handling such challenges.

Appropriate remedies for civil or criminal wrongs are determined at the conclusion of either the trial or the alternative dispute resolution (ADR) option elected by the parties. In a civil matter, cases that reach the trial court resolve the issue of liability first. Then, the extent of monetary award or damages is determined. Whether a trial endures for merely a day or two, weeks, or even a year, the process is the same. Preparation for the trial is the subject of this chapter. The phases of the trial and the assessment of damages are introduced and described in this chapter. ADR is growing in popularity for the legal system as a whole, clients, and paralegals. It provides a wide variety of employment options for the paralegal. This lesson investigates voluntary ADR methods and processes as well as statutorily mandated ADR in both government and the private sector. Categories of damages and proper application of the categories based on the type of dispute area also are presented.

PRELIMINARY MATTERS

While it is commonly agreed that the legal system and formal dispute resolution through an adversarial system are chosen more often than ever, at the same time, the vast majority of legal issues never go to trial. Given that many disputes settle on the eve of trial, it is important to be

organized, methodical, and proficient at file management and trial preparation. The fact of settlement increasingly occurring prior to formal trial does not mean the paralegal does less work, or that file preparation and management are less important. The burdens on paralegals remain the same whether cases resolve at trial or prior to trial through settlement. The more organized and complete the file at any given moment, the more effectively the client is represented and the greater the likelihood of effective, fair, and appropriate settlement. The equity of settlement is directly related to the efficiency and organization of the client file and the availability of current, organized information for review and consideration in relation to settlement negotiations.

Many of you undoubtedly have had some exposure to high-profile trials either in the press or other media. Supreme Court rulings in many states have opened the courtroom to the public via television cameras. The print and radio media likewise have responded to the public wish to know about the previously secret proceedings through increased coverage of the process, decisions, and public reactions to both.

You are also undoubtedly aware that some trials take a very long time, but this is not the norm. The majority of cases filed are resolved in substantially less time. Whether the trial is a relatively brief or substantially long one, like some of the tobacco litigation or some of the high-profile, celebrity trials, the process involves the same stages, proofs, and courtroom proceedings. The sole difference is the length. Thus, if the paralegal understands the process, then he or she is ready to work with the attorney on a one-day or eleven-month proceeding.

trial notebook
Started and organized prior to the pretrial conference, it contains all documentary and other tangible evidence or materials used by the attorney in trial.

documentary evidence
Any evidence represented on paper that contributes to supporting the legal position and/or verbal testimony of witnesses, for example, medical billing records, physician treatment notes, bank statements, and canceled checks.

trial order
Also called a trial schedule order; issued by the judge assigned to the case.

sua sponte
On his or her own motion; rarely exercised right of the judge to make a motion and ruling without an underlying request from either party.

A key element of the trial paralegal's job involves preparing the **trial notebook**, which should be started and organized at some point prior to the pretrial conference. The notebook contains the **documentary evidence**, evidence on paper that contributes to supporting the legal position and/or verbal testimony of witnesses, for example, medical billing records, physician's treatment notes, bank statements, canceled checks, for use at trial along with additional items the attorney includes depending on the work style and litigation techniques of the individual attorney. Under any circumstances, the tool is invaluable to the smooth, orderly, and legally appropriate trial flow.

In the federal system, the trial judge often issues a **trial order** or trial schedule order relatively early in the process following assignment of the case. In federal cases, then, the general flow and timing are set in some respects by the trial judge. Some federal circuit judges request a scheduling meeting with the attorneys and then issue the order, while others dispense with this step and issue the order **sua sponte**, that is, on his or her own initiative without attorney participation.

PRACTICE TIP

A good rule of thumb is that documents should always be preserved in the form received so there are clean, unchanged, notated, or otherwise unmarred versions available for the judge and opposing counsel at trial. Develop the art of cataloguing the materials upon receipt and making several copies of the document to ensure the pristine original is available for trial or settlement conference.

Likewise, an organized trial notebook helps prepare for ADR and the settlement issues that will undoubtedly come up at some point in the process.

PRACTICE TIP

When organizing the trial notebook, any documentary evidence anticipated for use at trial is included and organized consistently with the flow of expected witnesses. Be sure to include copies of the request for admission responses as well as copies of orders related to discovery matters including interrogatories and responses. You will develop your skill as you establish your relationship with your supervising attorney and perform the tasks over time.

PRACTICE TIP

Begin organizing a file or checklist system for use in planning and preparing trial case files and discovery materials. If you establish a system that works for you now, when you start in practice, you will be seasoned in your system and much more comfortable in the law office setting as a new paralegal.

PRACTICE TIP

Be sure you understand the local rules regarding trial-scheduling orders, conferences, and the filing of trial memoranda in both the federal and state jurisdictions. Also, if local judges have specific additional requirements, be sure to make note of these requirements. Retain the information in your PRM for easy future reference.

RESEARCH THIS!

Research your home state rules regarding scheduling trials and informal and formal pretrial conference timing and content. Note the relevant rules and, if possible, call the office of the clerk of the court to determine whether there are any special policies or other noteworthy aspects of planning that you also should know. Retain notes on the issue in your PRM for easy future reference.

State courts are inconsistent in the practice of scheduling trials. In Philadelphia County, it is not unusual to file a case and be assigned a trial date that is close to two years away. Naturally, in smaller, less-busy courthouses, the time between filing and trial would be reduced substantially. In any case, it is your responsibility to know the practice in your local area, understand the timing, and plan your file work accordingly.

pretrial conference
The meeting between the parties and the judge to identify legal issues, stipulate to uncontested matters, and encourage settlement.

pretrial memo
Outlining the legal and factual issues, as well as the recommended jury instructions, and other matters related to trial conduct.

motion in limine
A request that certain evidence not be raised at trial, as it is arguably prejudicial, irrelevant, or legally inadmissible evidence.

As you also might suspect, prior to opening statements, there are a few procedural matters required to ensure orderly conduct of the trial. The **pretrial conference** is the first formal opportunity to determine the details of the trial as prescribed by local rules. The attorneys and the judge in the case attend the conference and discuss the status of the preparation, legal issues, and settlement, as well as how the trial will proceed. You may wonder why this is necessary if the rules describe the process. This is actually a great question, and, after reviewing the sample pretrial scheduling order in Figure 10.1, you may have a better idea of what occurs.

In the *pretrial conference,* matters related to the trial such as the time each attorney needs for witnesses, admissions, and other matters agreed to in discovery and the pretrial phase are reviewed. Settlement possibilities and options are covered as well. In those cases where no formal alternative resolution process has taken place, the judge may schedule procedures in furtherance of settlement. In some jurisdictions, the judge requires a **pretrial memo** outlining the legal and factual issues, as well as the recommended jury instructions, and other matters related to trial conduct. This is also the time to present **motions in limine** requesting elimination of certain evidence and providing the legal basis for the requested exclusion. As you may recall, motions in limine may be filed during the pretrial stage as well. Often, however, as the trial nears and the legal issues become clearer, the attorney may determine that some evidence seemingly not particularly contentious earlier in the process may be inappropriate. Thus, a motion may be submitted at the pretrial conference.

RESEARCH THIS!

Research federal district court rules in your local area and find the materials on trial scheduling orders and pretrial conferences. You may wish to call the office of the clerk to verify whether a conference with the judge occurs early in the process or only immediately before trial. Take notes on the discussion and retain in your PRM for easy future reference.

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Plaintiff,

v. CV.

Defendants.

ORDER ESTABLISHING THE TRIAL AND PRETRIAL CONFERENCE DATES AND PROCEDURES

1. Trial date: 9:00 AM on March 21, 2001 in Courtroom 12A
2. Pretrial conference: 8:30 AM on February 1, 2001 in Chambers.
3. Not later than _____ days before the pretrial conference, file and serve on all parties:
   a. **Exhibits and Exhibit List.**
   Plaintiff's exhibits should be numbered and listed starting with "1". Defendant's exhibits should be numbered and listed starting with "101". If multiple parties or numerous exhibits, contact the assigned judge's courtroom deputy clerk for exhibit number assignments.
   Impeachment exhibits will be marked, sealed, and delivered only to the court. Each party shall separately identify exhibits the party expects to offer and those the party may offer if the need arises.
   b. **Depositions.**
   One copy of any deposition to be offered as substantive evidence to opposing counsel with those portions sought to be admitted underlined. (Not applicable to depositions used to refresh recollection or for impeachment.)
   c. **Witness Lists.**
   List all witnesses to be called, showing names, addresses, telephone numbers, and occupations, together with a brief statement setting forth the substance of the testimony and a time estimate for the direct testimony of each witness. Each party shall separately identify witnesses it expects to call and those the party may call if the need arises. Names and statements of impeachment witnesses may be sealed and delivered only to the court.
   d. **Expert Witnesses.**
   A copy of the previously exchanged expert disclosures submitted to counsel pursuant to LR 16.7 setting forth qualifications, any opinions to be expressed, the facts and data upon which the opinions are based, any exhibits to be used by the witness, a list of all publications authored by the expert in the last 10 years, the compensation to be paid for the study and testimony, and a listing of any other cases in which the witness testified as an expert in deposition or at trial in the last 4 years.
   e. **Itemized List of Special Damages** [if any].
   f. **Voir Dire Questions** [jury trials only].
   g. **Requested Jury Instructions** [jury trials only]. if more than 20, attach index.
   h. **Verdict Forms** [jury trials only].
   i. **Suggested Findings of Fact and Conclusions of Law** [non-jury trials only]. If more than 20, attach index.
   j. **Trial Briefs.**
4. The following are examples of the subjects the court may want to discuss and schedule at the pretrial conference:
   a. Exhibit objections.
   b. Deposition testimony objections.
   c. Verdict forms [jury trials only].
   d. Voir dire questions [jury trials only].
   e. Jury instruction objections [jury trials only].
   f. Findings of Fact and Conclusion of Law [non-jury trials only].
   g. Settlement.
   h. Other matters which may arise.
5. Except for good cause shown, no exhibits or testimony will be received in evidence at trial unless presented in accordance with this order.

IT IS SO ORDERED.
DATED this _____ day of _____, 20_____.

OWEN M. PANNER
Senior United States District Judge

cc: Counsel of Record
Courtroom Deputy Clerk

FIGURE 10.1 Sample Pretrial Conference and Scheduling Order

Source: U.S. District Court of Oregon, Local Rules of Civil Practice, http://ord.uscourts.gov/Rules/2006/LR16.htm (September 18, 2006).

CYBER TRIP

Investigate the procedure for arbitration in your U.S. district court. Determine how and when to request the option, whether any cases are subject to mandatory arbitration, and under what cases mediation with a magistrate judge is used. Be sure to check the rules in the Fed. R. Civ. P. as well as local district court policies.

RESEARCH THIS!

Research your state law regarding alternative dispute resolution and the related process to notify the court of this election. Determine when the notices are due and other aspects of the process. Take notes of the discussion.

In some jurisdictions, settlement discussions occur prior to the pretrial conference, while in others, settlement discussions do not begin in earnest until all evidence and actual legal issues are finalized. In either case, the paralegal is an important part of this process. The paralegal should understand the local rule requirements and the calendar timelines to ensure maximum preparation time.

One of the issues at the pretrial conference is the **jury instructions** each side wishes to submit. These are the directions for the jury regarding what law applies and how it applies to the facts. You also may hear jury instructions called **points of charge**. In either case, they are the specific directions provided to the jury by the judge, who, as the trier of fact, has the responsibility of ensuring the correct law is applied and understood by the deliberating jury. Many jurisdictions have forms drafted for the various specific legal issues in the trial. Some judges prepare their own instructions and submit those to the attorneys for review, while other judges ask the attorneys to submit their recommended instructions. In either case, the final choices are made at the pretrial conference where the attorneys and the judge discuss the choices of each party. The paralegal needs to understand the relevant instructions and also any exceptional issues or points that may require drafting individual or special instructions for consideration at the conference and ultimate presentation to the jury at the close of the presentation of evidence.

jury instructions
Directions for the jury regarding what law applies and how it applies to the facts; also known as ***points of charge.***

The *judge as the trier of law* is responsible for presenting the instructions to the jury. The system allows the parties to submit their instructions based on the strategy and interpretation of the facts each party may make. The judge makes the final selections to ensure both attorneys understand those chosen and the reason for the choices. Bear in mind that jury instructions never tell or suggest to the jury what evidence to accept, reject, or question. The jury alone determines the weight of the evidence. The jury instructions advise how the law applies and operates under the facts. This is an important distinction.

CYBER TRIP

The federal government has a form bank of proposed criminal and civil jury instructions, as well as specific instructions for various case types. Explore some of the resources listed to get an idea of how they are drafted and related to the type of cases for which they are recommended:
www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/civ00105.htm
www.juryinstruction.ca8.uscourts.gov/civilman05.pdp
www.llrx.com/columns/reference19.htm
http://state.ak.us.courts/crimus.htm
www.nmcourt.fed.us.web/DC/DOCS

RESEARCH THIS!

Research to find the form of jury instructions used in your state. Look through the various options and the variety of issues addressed. Determine if any local judges give their own charge instructions to the jury and, if not, what process is engaged to select which are submitted to the jury.

FIGURE 10.2
U.S. Constitution Amendments VI and VII

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.

JURY SELECTION

As you may recall from your review of the U.S. Constitution, the right to trial by a jury of peers is a fundamental right guaranteed by the Sixth Amendment in relation to criminal matters and the Seventh Amendment for civil disputes. (See Figure 10.2.)

voir dire
The process of selecting a jury for trial.

Once the pretrial conference is finished, and the trial date nears, **voir dire**, or *jury selection*, is the next stage for the paralegal to understand. The process operates similarly in all jurisdictions. A pool of potential jurors is selected, typically by mail notification of their selection for jury duty. The entire pool available for selection gathers and then they randomly are assigned to the various judges hearing trials that day. Typically, the number chosen exceeds the number needed for the trial. This is because the attorneys may *object* to some of the jurors *for cause.* An **objection for cause** requires the attorney making the objection to state the reason. The reason must be such as to impair the juror's ability to rule impartially on the evidence. One example of an objection for cause would be if a juror admitted knowing the judge, the attorneys, or the parties to the action. On the other hand, each attorney is allowed to exercise **peremptory challenges**, for which no reason or cause is necessary. The number of available peremptory challenges is limited. This is another local and state requirement the paralegal must research. The attorney makes the decision whether a particular juror seems questionable, based on experience coupled with the responses and nonverbal communications of the juror, among other considerations.

objection for cause
The attorney making the objection states the reason, which must be such as to impair the juror's ability to rule impartially on the evidence.

peremptory challenge
An attorney's elimination of a prospective juror without giving a reason; limited to a specific number of strikes.

RESEARCH THIS!

Most states have a well-defined jury education program. The following link goes to the California Web site: www.courtinfo.ca.gov/jury/step2.htm. If your state does not have an electronic link to jury education and information materials, research at the local courthouse to get specific details about the process. If written materials or training programs are available, make an appointment to observe, if not complete, the training yourself to get a detailed understanding of that aspect of the legal system.

RESEARCH THIS!

Verify the number of peremptory challenges available in the state and the local rules for civil and criminal matters. Review the rules related to the objections to get an understanding of the scope as well as the limitations on jury challenges.

Locate the three **seminal** cases related to jury selection challenges and opinions regarding what the process entails as well as what is prohibited: *Batson v. Kentucky*, 476 U.S. 79 (1986); *Georgia v. McCollum*, 505 U.S. 42 (1992); and *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

seminal
Most important, fundamental.

When all the jurors are selected and seated, those not chosen either are dismissed or return to the jury lounge to await reassignment for potential selection. Once voir dire is complete and the jury seated, the trial can begin.

TRIAL

We have already discussed the pretrial stages and procedure, in which phases the case evolves and evidence is developed, as required under the applicable rules of procedure. A trial is no different. There are phases and procedures, governed by the rules of procedure, both federal and state. See Figure 10.3.

You may recall that procedural and substantive law are equally binding sources of protections under the Constitution. As such, both must be properly applied throughout the trial process. The judge is therefore responsible not only to ensure the correct application of the substantive law, but also that the procedure is followed and applied correctly.

CYBER TRIP

To get an idea of how an opening statement actually is presented and organized, visit either of these Web site links to read some of the opening statements presented: www.courttv.com and www.lectlaw.com/boys.html.

Opening Statements

Following jury selection, the trial is ready to begin. Often the judge gives a brief statement to open the trial, but not always. The official beginning is the **opening statements** in which the attorneys for each party present their position on the issues and facts. This not only gives the jury a framework, but it also enables easier following of what is about to occur. The plaintiff in a civil matter and the prosecution in a criminal one have the burden of proof; thus, they make the first statement. While the defendant's attorney may make his or her opening immediately following, there are often circumstances where the defense waives the opening until a later time.

If you have watched any popular television series trials, you may have a less-than-accurate view of the opening. It is not the time for the attorneys to attack each other's case. It is the opportunity to present a well-reasoned, professional, and persuasive version of the case facts.

opening statements
An initial statement by a party's attorney explaining what the case is about and what that party's side expects to prove during the trial.

Presentation of Evidence

As outlined above, the plaintiff presents his or her evidence and case first. This includes exhibits, documents, and witness testimony. The presentation should flow logically and should be as brief as needed to present the issues thoroughly. It should not be so long and involved that the jurors get either bored or confused. Proper development and presentation is a real art. The paralegal is often a critical team member when preparing for trial in that the organization of the file is a critical element in presenting the case to the jury.

A witness subpoena is one of the forms the paralegal will use in practice (Figure 10.4). The subpoena commands the individual named to appear before the court at the set time and place. This is similar to the function of subpoenas in other legal contexts. While the paralegal prepares the document, the signer must be a person properly authorized by the Court and jurisdiction to do so. You need to understand who is so authorized and who can properly serve the individual named. Again, your rules of civil procedure, both state and federal set forth the specific procedure.

direct examination
Occurs when the attorney questions his or her own witness.

leading
Attorney objection based on the question creating the desired answer.

Direct examination occurs when the attorney questions his or her own witness. This is when you will hear the objection "**leading**." With this objection, the attorney finds the form of the question objectionable because it creates the desired answer. When you hear this kind of objection, the testimony is not considered to be from the witness but rather the attorney, who makes the question flow such that the witness must give only the answer the attorney wants.

FIGURE 10.3
Stages of Trial

1. Opening statements
2. Plaintiff case presented, including witness testimony
3. Defendant presents evidence and witnesses
4. Plaintiff rebuttal witnesses
5. Closing arguments
6. Jury instructions
7. Jury deliberations
8. Jury verdict delivered

FIGURE 10.4
Sample Witness Subpoena

Issued by the
UNITED STATES DISTRICT COURT
DISTRICT OF _____

V. **SUBPOENA IN A CIVIL CASE**

Case Number:[1]

TO:

☐ YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on next page)

PROOF OF SERVICE

DATE	PLACE
SERVED	

SERVED ON (PRINT NAME)	MANNER OF SERVICE

SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in th Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

ADDRESS OF SERVER

[1]If action is pending in district other than district of issuance, state district under case number.

If the witness is properly prepared prior to taking the stand, there is no need to lead the witness. It is perfectly acceptable to prepare a witness for the experience and to practice how to present the evidence at trial. What is not acceptable is telling the witness what to say.

Witness preparation frequently is delegated to the trial paralegal. Preparation should include both review and preparation for testimony as well as discussion of the experience the witness can reasonably expect. Regardless of the content of the testimony, with the exception of some expert witnesses, most people have never had the experience. Thus, the normal anxiety provoked by the unknown is typically high. If the witness has a better understanding of the process from the perspective of the practitioner rather than some of the popular television law show witnesses, then the anxiety is relieved and the witness can focus on the content.

cross examination
Occurs when the opposing attorney asks the witness questions.

Cross examination occurs when the opposing attorney asks the witness questions. The attorney conducting the cross examination does so primarily for purposes of clarification. In this segment of the witness testimony, the attorney hopes to bring to light any biases, confusion, or other issues that would lead the jury to believe the testimony provided is less helpful and straightforward than initially appeared in direct examination.

redirect examination
The attorney who originally called the witness asks more questions.

When the attorney finishes the *cross examination,* the attorney who originally called the witness asks more questions, or conducts **redirect examination**. No new information may be introduced during redirect. The testimony and the questions must relate closely to matters already presented. As with many other portions of the trial, experience makes this procedure easier and reduces the objections from opposing counsel. It cannot be stressed enough how vital the role of the paralegal is in preparing the materials on which direct, cross, and redirect examination are based. The sheer volume of work has made many attorneys become much more reliant on their paralegal to assemble and organize material that has a direct impact on the trial evidence and verdict.

Prior to the pretrial conferance, the attorney often asks the paralegal to provide a list of witnesses (see Figure 10.5). Along with a catalogue, digest, or summary of the expected testimony included in the trial notebook. Each attorney has a unique style, but, more often than not, the notes and preparation of the paralegal make an enormous difference in the flow of the trial and the presentation of effective questions and redirect examination.

rebuttal witness
Refutes or contradicts evidence presented by the opposing side.

From time to time, evidence presented at trial may be unanticipated, or the opposing party may produce evidence that may not have been available pretrial. In these instances, the party may call a **rebuttal witness**, whose purpose is to refute and contradict evidence presented by the opposing side. When the rebuttal witness is used, the testimony elicited should be direct, clear, and never rambling and the issue to which the testimony relates clearly identified.

You may be curious as to the role of the paralegal in the actual conduct of the witness examination segment of the trial. The role includes organizing the materials as well as preparing the witnesses and any written materials your supervising attorney may require in connection with the examination process. Often the trial paralegal works closely in preparing the expert witnesses and again in organizing the presentation of materials, scheduling the witnesses, and similar functions.

RESEARCH THIS!

Call a local litigation law firm and ask to speak with a trial paralegal. If he or she has the time, ask about his or her role at trial as well as the pretrial duties and preparation involvement. You may also inquire about preparing the trial notebook and how it is typically organized and used in the trial.

Closing Statements

closing statements (closing arguments)
A statement by a party's attorney that summarizes that party's case and reviews what that party promised to prove during trial.

When both parties have presented all evidence and testimony, they rest their cases. The case is then ready for **closing statements**. In this portion of the trial, the attorney presents statements that summarize the case, review important facts and issues, and present the evidence consistently in relation to the facts and law. This is a final opportunity for the attorney to persuade the jury that the case presented on behalf of the party is the one for which they should deliver a verdict. You also may hear this segment referred to as *legal argument* or *closing argument*. Bear in mind, however, this is the opportunity to persuade the jury about your position. It is not, however, an

FIGURE 10.5
Sample Witness List

AO 432
(Rev. 2/84)

Administrative Office of the United States Courts

WITNESS AND EXHIBIT RECORD

DATE	CASE NUMBER	OPERATOR				PAGE NUMBER
NAME OF WITNESS		DIRECT	CROSS	REDIRECT	RECROSS	PRESIDING OFFICIAL

EXHIBIT NUMBER	DESCRIPTION	ID	ADMITTED IN EVIDENCE

opportunity to convince the jury the other side is wrong. The standpoint and purpose of the closing argument makes an enormous impact on the jury as they begin their deliberations and is therefore crucial to the trial for both parties.

In closing arguments, the attorney presents for the last time the position held by his or her client, the weight of the evidence as related to the law, and the rationale or reasoning to apply in the jury room to deliver a verdict in favor of the client. There are many views of how to make the most effective closing argument. Some will say long is better, while others believe that shorter is better. There simply is no easy answer to determining one best approach. Regardless of length, this is persuasion. As such, the closing presentation should make the greatest impact on the jurors.

RESEARCH THIS!

Look at the jury instructions from Judge Ito to the O.J. Simpson jury. Review the document. Note any question you may have as well as other elements of particular interest. Discuss your general reactions and comments with your classmates.

RESEARCH THIS!

Victor v. Nebraska, 511 U.S. 1 (1994), is a case involving challenges to jury instructions. Read the case opinion to gain an insight into the process, the court standard for evaluating challenges, and the sufficiency of the charges as well as another perspective on the research responsibility of the paralegal in a trial practice.

Jury Instructions

After the closing arguments, the judge once again speaks with the jury. This time, the judge reviews the responsibility the jurors have at this point and instructs the jury in the law. The points of charge or jury instructions are read to the jurors. The jury instructions presented to the O.J. Simpson jury by Judge Ito at the conclusion of the trial are provided on this book's Web site (www.mhhe.com/paralegal) for your reference. The instructions advise the jury of the applicable law, how the facts are to be weighed in relation to the law (burden of proof applicable to the type of case), and the charges or claims to ensure that the jury understands the various issues to consider during deliberations. In some respects, once this occurs, the attorney has finished with his or her trial responsibilities. Once this stage is finished, all parties and the judge can only wait for the jury to complete their deliberations and deliver the verdict.

As with any other issue of law throughout the trial, the content and the presentation of the instructions may form the basis for an appeal if all other criteria are met. The likelihood of such appeal is substantially minimized if the proposed instructions are discussed at the pretrial conference or included in the pretrial memo.

verdict
Decision of the jury following presentation of facts and application of relevant law as they relate to the law presented in the jury instructions.

criminal verdict
Finds the defendant guilty or not guilty of the criminal offense charged and tried.

civil verdict
Finds liability.

jury deliberations
Confidential discussions and review by jury members of the evidence, law, and instructions from the judge resulting in verdict or decision in the case heard.

motion for a new trial
Post-trial relief that requests a new trial on the same issues for specific reasons that must be clearly explained and argued in the motion.

Verdict, Judgment, and Post-Trial Motions

Once the jury completes its deliberations, the verdict is delivered. The jury is the trier of fact; thus, the **verdict** represents the opinion of the jury on the issues of fact presented as they relate to the law presented in the jury instructions. In a **criminal** matter, the **verdict** finds the defendant guilty or not guilty of the criminal offense charged and tried. In a **civil** issue, the **verdict** finds the defendant liable or not liable. Regardless of the verdict, the **jury deliberations** are strictly secret and can be neither transcribed nor publicized. This is the essence of the jury system in our country. When the jury speaks, the decision is final.

A **motion for a new trial** may be filed under certain narrowly defined conditions pursuant to Rule 59 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), shown in Figure 10.6.

The conditions are clearly set forth, and the element of judicial discretion in moving for such remedy also is provided in the rules. While Fed. R. Civ. P. 59(e) provides for filing a motion to alter or amend a judgment, this is not exactly the same as a motion for a new trial. Under a rule 59(e) motion, the moving or requesting party may seek only partial relief and necessarily such request does not include a request to disturb the evidence presented, other trial proceedings, or rulings. Significantly, the rule allows for a judge on his or her own initiative to make a request for a new trial. While this can occur under the rules, it is an extremely rare event. The error of law on which such a motion relies would be such that it was clear that, but for the error, there is no question the verdict would be different. Further, the error complained of must be material and clearly overwhelmingly important to the trial outcome.

FIGURE 10.6
Motion for a New Trial or Amendment of Judgments, Federal Rules of Civil Procedure

Rule 59. New Trials; Amendment of Judgments

(a) Grounds.

A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion.

Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

(c) Time for Serving Affidavits.

When a motion for new trial is based upon affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court.

No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Motion to Alter or Amend a Judgment.

Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

judgment notwithstanding the verdict (judgment N.O.V.)
Asks the judge to reverse the jury verdict based on the inadequacy of the evidence presented to support the law and the verdict.

Another remedy available to the losing party is a motion for entry of a **judgment notwithstanding the verdict (judgment N.O.V.)**. This motion asks the judge to reverse the jury verdict based on the inadequacy of the evidence presented to support the law and the verdict. Filing a motion for judgment N.O.V. is rare. A court granting such a motion is even more unusual. The legal standard for grant of such a motion is extremely high; thus, it is an extremely rare remedy.

Having stated the decision of the jury is final, there are nonetheless circumstances in which the losing party may decide to *appeal* the jury verdict. Such an appeal is based on an error in the application or interpretation of the law, not the weight of the evidence or the manner in which the jury decided the facts. Because an appeal is based on an error of law, the rules require the attorney to "preserve the issue for appeal" by making an appropriate objection when the error occurs in the trial proceedings. The appellate panel uses the transcripts of the proceedings to support the arguments raised in the appeal. No additional evidence, information, or other extraneous data accompanies the appellate filing. (See Figure 10.7.) The record and the argument supporting the assertion of the **appellant**, the appealing party, is all the reviewing court has to analyze when rendering their decision. The appellate attorney may request oral argument, which is limited likewise to the record and the applicable law. However, the court may elect to rule based on the written submission without oral argument.

appellant
The party filing the appeal; that is, bringing the case to the appeals court.

RESEARCH THIS!

Review the *Federal Rules Digest* (F.R.D.) and your home state rules on new trial and post-judgment relief. Research specific case decisions and formulate a brief outline of reasons that resulted in the grant of a new trial as well as cases where the request was denied.

FIGURE 10.7
Sample Notice of Appeal

United States District Court

USCA8 No

for the district of

_____

NOTICE OF APPEAL

United States of America, *

*

Plaintiff, * District Court Docket Number

*

vs. *

*

*

*

_____, * District Court Judge

*

Defendant. *

Notice is hereby given that _____ appeals to the United States Court of Appeals for the Eighth Circuit from the: ☐ Judgment & Commitment ☐ Order

_____ entered in this action on _____.
(Specify)

_____ _____
Signature of Defendant's Counsel Typed Name of Defendant's Counsel
( )

_____ _____
Street Address Room Number Telephone Number

_____ _____
City State ZIP Date

TRANSCRIPT ORDER FORM

TO BE COMPLETED BY ATTORNEY FOR APPELLANT

☐ **Please Prepare a transcript of:**
- ☐ Pre-trial proceedings
- ☐ Testimony or
- ☐ Portions there of
- ☐ Sentencing
- ☐ Post Trial Proceedings
- ☐ Other (Specify)

☐ **I am not ordering a transcript because:**
- ☐ Previously Field
- ☐ Other (Specify)

CERTIFICATE OF COMPLIANCE

Appellant hereby certifies that copies of this notice of appeal/transcript order form have been filed/served upon U.S. district Court, court reporter, and all counsel of record, and that satisfactory arrangements for payment of cost of transcript ordered have been made with the court reporter (FRAP 10(b)). Method of payment, ☐ Funds ☐ CJA From 24 complete and attached.

Attorney's Signature _____ Date _____

Note: Complete all Items on Reverse Side

FIGURE 10.7 (Concluded)

INFORMATION SHEET

TO BE COMPLETED BY ATTORNEY FOR APPELLANT

1. Defendant's Address: _____

2. Date of Verdict: _____ Jury ☐ Non-Jury ☐ _____
   Offenses: _____
   Trial Testimony - Number of Days _____ Bail Status _____

3. Sentence and Date Imposed: _____

4. Appealing: Sentence ☐ Conviction ☐ Both ☐
   Challenging; ☐ Application of Sentencing Guidelines
   ☐ Constitutionality of Guidelines
   ☐ Both Application and Constitutionality

5. Date Trial Transcript ordered by Counsel or District Court: _____
   Stenographer in Charge: _____
   (Name, Address, Phone) _____

6. Trial Counsel was: ☐ Appointed ☐ Retained
   Does Defendant's financial status warrant appointment of counsel on appeal?
   ☐ Yes ☐ No
   Affidavit of Financial Status filed: _____
   Is there any reason why trial counsel should not be appointed as counsel on appeal?
   ☐ Yes ☐ No
7. Assistant U.S. Attorney Name and Phone Number: _____

Court Reporter Acknowledgment

Date Order Received | Estimated Completion Date | Est. Number of Page

Court Reporter's Signature | Date

TRIAL OPTIONS

alternative dispute resolution (ADR)
Method of settling a dispute before trial in order to conserve the court's time.

More than 95 percent of all cases filed resolve prior to formal trial, according to recent statistical data from the federal judiciary. For more information about the federal judiciary, visit the Web site at www.uscourts.gov/caseload2005/tables/C01mar05.pdf. The resolution rate includes both state and federal matters, so, clearly, the optional methods continue to be useful and satisfactory. As a practicing, professional paralegal, you will understand the complexity and time-consuming nature of the trial. You also will know the potential options available for resolving the dispute and thus avoiding a trial. You can appreciate the emotional and time investment of trial and, as such, should be aware of the **alternative dispute resolution (ADR)** methods that your client may elect. ADR embraces the concept of dispute resolution methods to replace the use of the trial courts and the related time, expense, and risk burdens. The most common means of ADR are *negotiation, mediation,* and *arbitration*.

Despite the growth in ADR, preparation of case files remains a large and important part of the paralegal's duties. While some states have adopted arbitration legislation, in others the process is voluntary with the disputing parties. In some industries such as the securities or stock industry, disputes must be resolved through arbitration rather than trial. The stock purchase agreement contains plain and unambiguous language setting forth

CYBER TRIP

Visit the Web site of the American Arbitration Association, www/adr.com, to get comprehensive information and insight into the process utility, procedures, standards, and other relevant data.

CYBER TRIP

Visit the Nebraska mediation Web site, www.nemediation.org/TrainingInstitute.htm, to explore the scope of the mediation programs and training in the state. Then locate a similar site for your home sate and compare the programs.

For purposes of comparison, visit the Florida state Web site related to arbitration and ADR located at www.flcourts.org/gen_public/adr/index.shtml.

this requirement. Some jurisdictions mandate mediation or arbitration in civil disputes below a certain minimum dollar amount in controversy.

Certain discrimination and other Equal Employment Opportunity Commission (EEOC) issues are mandated to go through mediation or arbitration prior to trial. In fact, the EEOC will not certify a matter for trial unless and until proof of attempts to resolve the underlying issue through recognized alternatives is shown. You must know the ADR requirements in your jurisdiction to ensure proper client representation. If your jurisdiction does not require arbitration alternatives, the parties may nonetheless elect this option.

A major advantage of the alternative methods of dispute resolution is the elimination of much of the adversarial nature of the process by getting the parties to participate in crafting a resolution in which both have a part; therefore, both parties are more motivated to be flexible, to negotiate, and to adhere to the term of the final agreement. The two most common types of ADR are mediation and arbitration.

Mediation is the more informal of the two most common types of ADR. With this process, the **mediator** functions to bring the two parties together through a **negotiation** process. The objective is to arrive at a settlement that both parties agree to and accept. While evidence may be presented, the means and use are somewhat less strictly defined. The mediator is typically the go-between, with the parties encouraged to make contributions, recommendations, and compromises. With both ADR methods, whatever the parties say in the process is inadmissible in a trial if ADR fails to effect resolution. The confidentiality surrounding the procedure encourages settlement and assures the participants that their efforts cannot subsequently hurt their trial presentation if the process fails to reach the desired end. One of the particularly important reasons for the success rate of the alternative methods is the candid and open discussions that take place, all of which are completely confidential and may not be introduced in trial should the process fail.

The National Alternative Dispute Resolution Advisory Council (NADRAC) takes the position that mediation is purely a facilitative process. The position is consistent with the legal view of the *mediator* as the *go-between*. The mediator does not make recommendations or attempt to convince one or the other party to accept a recommendation. The mediator communicates between the two parties. Often, in fact, mediation keeps the parties in separate rooms, with the mediator going between the two.

Arbitration involves a neutral third party appointed to hear the presentations of each party, inquire as to the facts, and make various suggestions with a focus on resolution. The resolution process is conducted under the supervision or oversight of a neutral third party, the **arbitrator**, whose final decision is enforceable and treated in the courts the same as a judicial order at the end of a formal trial. Arbitration more closely resembles a trial than mediation. Evidence is

mediation
A dispute resolution method in which a neutral third party meets with the opposing parties to help them achieve a mutually satisfactory solution without court intervention.

mediator
Individual who facilitates a resolution by the parties using methods designed to facilitate the parties' reaching a negotiated resolution.

negotiation
Voluntary discussions in which parties to dispute evaluate various issues and optional solutions to reach agreement that satisfies both parties and avoids litigating matter in formal trial court setting.

arbitration
Alternative dispute resolution method mediated or supervised by a neutral third party who imposes a recommendation for resolution, after hearing evidence from both parties and the parties participated in reaching, that is fully enforceable and treated in the courts the same as a judicial order.

arbitrator
Individual who imposes a solution on the parties based on the evidence from both parties.

CYBER TRIP

On November 4, 2005, in a reaffirmation of the State of Florida judiciary to the alternative dispute programs, an opinion was handed down detailing the process, benefits, and utility for law. The opinion endorses use of senior court judges as mediators. Click on the link for the entire opinion: www.floridasupremecourt.org/decisions/2005/sc04-2482.pdf.

CYBER TRIP

The following link to NADRAC, www.nadrac.gov.au/adr/HTML/introduction.html, provides some useful information, including the standards for mediation and arbitration.

Click on this link to see how the Australian government has committed to ADR and the specific standards and toll recommended for the process and practitioners: www.ag.gov.au/agd/www/agdHome.NSF.

RESEARCH THIS!

Research the arbitration and mediation rules and applications within your state judicial system. Pay particular attention to the use of both modalities in family law matters as well as civil matters and business-related contract dispute issues.

presented and testimony given, but in a substantially more relaxed manner than will occur in a trial. If arbitration is selected, depending on the timing and other circumstances, there may be limited discovery. However, there is testimony and other documentary evidence presented, albeit in a less formal way. The limitations imposed on discovery do not imply less meticulous preparation by the legal team. The better the case is prepared, the greater the likelihood of reaching a satisfactory resolution.

There are circumstances in which a panel of arbitrators is used. However, whether an individual or panel is used, the parties agree on the member(s). There are a great many private companies providing arbitration service, with the most established being the American Arbitration Association. Arbitration has been an important resolution mechanism in construction, labor, and securities disputes, but it is gaining popularity across industries and dispute types. In some arbitration agreements, the arbitrator selection process is predetermined by the parties in the documents and agreements executed at the commencement of the relationship. Self-selection processes can be an inducement to participate in ADR in those instances where a preset agreement is not in place.

The *arbitrator* hears the evidence and presentations of each side and then makes a determination. This is unlike the mediator, who cannot make a recommendation or order a result. In some circumstances, an arbitrator may be used early in a dispute to assess and recommend the key issues, from the perspective of an uninvolved neutral party. The early intervention also may ask the arbitrator to recommend the best resolution, based on the facts presented and any other considerations.

A perceived advantage of arbitration is that the individual or panel members can be selected because they have some understanding and experience of the underlying issues, business, or other factors related to the dispute. The rationale is that a third party familiar with how things should operate in a general sense will be more competent to render a decision than one with no understanding at all of the underlying context. This decision is unique to each individual and situation. Many people believe, in the obverse, that an arbitrator without any preconceived notions best serves a fair resolution. Under either circumstance, the decision ultimately would rest with the client and attorney working together.

CYBER TRIP

Visit the Web site for the U.S.C., www.gpoaccess.gov/uscode/, and locate the Family Law Act, the Federal Magistrates Act, and the Federal Arbitration Act. Research to find other federal laws in which arbitration is mandated as the means of dispute resolution.

Federal law has established arbitration as a viable alternative under Title 9, United States Code. Marine disputes are subject to arbitration under 9 U.S.C. § 2. In this section, the arbitration award is legislated as irrevocable, fully enforceable, and given the full force and effect as if the resolution resulted from a court or trial verdict. Arbitration is also a recognized method of dispute resolution with certain international disputes. In 1970, the United States joined the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In so doing, the message was clear that findings and awards resulting from arbitration are binding and enforceable. The United States also shows deference to any specific customs or processes that ultimately result in arbitration agreement.

Another kind of ADR is gaining popularity in a number of jurisdictions. With primary dispute resolution (PDR), mandated, for example, under the Family Law Act (1975) § 14, the parties to family disputes are encouraged to resolve issues that would otherwise be presented to a court through methods prior to or in place of traditional trial settings. PDR was defined in the Federal Magistrates Act of 1999, section 21, as

> *Procedures and services for the resolution of disputes otherwise than by way of exercise of judicial power of the Commonwealth, and includes: (a) counseling; and (b) mediation; and (c) arbitration; and (d) neutral arbitration; and (e) case appraisal; and (f) conciliation.*

RESEARCH THIS!

Locate your home state laws requiring arbitration or other ADR for dispute resolution. Make copies of the relevant provisions and a checklist for your PRM that can be used in your practice.

In a criminal context, victim–offender mediation is growing in popularity. In this process, while the mediator has no binding authority to enter an order, the mediator can work with the parties to identify clearly what the actual issues or violations might be, what optional punishment or other measures are available, and how to approach the options and develop disposition processes. The process can be especially helpful in juvenile issues or first-offender matters involving relatively minor infractions.

Perhaps the most significant aspect of the growth of ADR for the paralegal is the increased demand for paralegals to fill the role of arbitrator or mediator. The legal background and practitioner experience are invaluable training and background to bring to the position. Likewise, when the client is faced with arbitration, detailed understanding of how it operates and what the options, benefits, and risks of each might be helps the client make an informed decision and helps the attorney manage his or her caseload effectively and efficiently.

REMEDIES AND DAMAGES

Now, we turn to breach of contract actions frequently brought to the civil courts. There are a variety of remedies available depending on the nature of the breach, the facts of the case, and any law—statutory or common—related to contract damages in your home jurisdiction. Remember that you should not expect to find federal legislation related to civil breach of contract because this is most often a matter reserved to the state court systems.

Whether a matter is resolved through jury verdict or ADR, we need to look into how the jury decides what verdict amount is adequate and appropriate under the circumstances and the law related to the dispute. As you might well imagine, different kinds of disputes call for different awards.

First, we will look at a relatively easy classification of remedy typically associated with equity and real estate disputes. The theory behind these particular awards is that money damages will not return the wronged party to the place he or she would have occupied prior to the injury.

Example:

Crystal and Jacko have entered an agreement for the sale and purchase of real estate. After signing the agreement to sell her property to Jacko, Crystal decides that she would prefer to give the property to her niece and nephew. Therefore, when the closing date came, Crystal simply never went to the office to sign the documents and receive the payment from Jacko. *Question*: What does Jacko really want the court to do when he files suit against Crystal? *Answer*: Jacko wants the court to order Crystal to sell the property according to the terms and conditions of the agreement.

Jacko should file an action in equity seeking specific performance. The court would enter an order requiring Crystal to appear for the closing on the real estate transaction according to the terms and conditions previously agreed to in the agreement. No other piece of property will put Jacko where he intended to be upon completion of the contract. Staying in his present home will not be an adequate remedy because he also has entered an agreement to sell that property. Thus, the only reasonable resolution is to have Crystal do what she agreed to do when she voluntarily entered the agreement.

compensatory damages
A payment to make up for a wrong committed and return the nonbreaching party to a position where the effect or the breach has been neutralized.

In a contract action, the available damages are *compensatory, consequential, incidental,* and *nominal*. Punitive damages are not available in a contract action. **Compensatory damages** function to return the injured party to the position he or she would have enjoyed had the contract breach not occurred. This aspect of damage awards also has been called giving the injured party

RESEARCH THIS!

Atlas Machines contracted with Universal Ball Bearings to deliver five pallets of ball bearings each month for one year. Atlas contracted to pay Universal $5,000 per pallet to ensure consistent and timely deliveries. Atlas gave advance deposits in the amount of $60,000 for one pallet per month upon contract execution. Universal made the deliveries and received payments due through July. However, in August, Universal simply stopped delivering the ball bearings. Atlas could not get the advanced deposits nor did Universal deliver the remaining amounts due under the contract. Atlas sued Universal. *Question*: What damages did the jury award and why?

At the conclusion of your research, prepare a brief memo describing the available types of damages, how the damages in that category are computed, and the reasons for such damages in the case.

the benefit for which he or she bargained at the inception of the contract. Regardless of the specific descriptive language, the injured party is compensated by the party found liable for an amount that will accomplish what would otherwise have occurred had the contract not been breached.

consequential damages
Damages resulting from the breach that are natural and foreseeable results of the breaching party's actions.

The breaching party pays **consequential damages** if the injury is reasonably foreseeable. Consequential damages, then, include costs, expenses, or other measurable consequences directly related to the injury in an identifiable chain evaluated with the reasonableness standard. This actually sounds easier than it may be in application.

The premier case establishing the scope and availability of consequential damages is *Hadley v. Baxendale,* 9 Exch. 341, 156 Eng. Rep. 14 (1854). The facts of the case are that the Hadleys operated a flourmill. When the crankshaft broke in their mill, they hired Baxendale to repair the crankshaft and deliver it back when repaired so they could restart the mill. Although he agreed to make the delivery immediately, Baxendale in fact did not do so for several days. During that time, the Hadley mill was closed. The customary practice in the trade at that time was to have a spare crankshaft. Thus, it was reasonable for Baxendale to assume that Hadley also had a spare. When Hadley sued Baxendale for interrupted business and resulting damages, the court found that since Hadley had not advised Baxendale of the unique circumstances, that is, that there was no spare crankshaft, Baxendale was not liable.

The court ruled that it was a reasonable consequence for the late delivery to interrupt business throughout the period. Any reasonable person would rightly assume that the mill had a spare crankshaft. As such, the court found no liability for business interruption and the relief requested unreasonable. Thus, consequential damages could not be included in the award. Consequential damages analysis and assessment require application of the reasonableness standard. When the amount awarded is deemed excessive, in operation the award becomes punitive rather than reasonably consequential to the injury.

incidental or nominal damages
Damages resulting from the breach that are related to the breach but not necessarily directly foreseeable by the breaching party.

Incidental or nominal damages occur in both contract and tort actions in which the breach is clear according to the evidence and the testimony, but there are no provable actual damages. This would not often occur, but there are some cases when the jury delivers a verdict of this kind. Nominal damage awards are made to perfect the judgment of the trial, not for compensatory or other purposes typical with damage awards.

Punitive damages are available in tort actions but typically not in contract issues. If a claim raises multiple claims, in contract and tort, and punitive damages are awarded, they apply only to the tort claims. Punitive damages are a form of punishment for the wrongdoer. These

punitive damages
An amount of money awarded to a nonbreaching party that is not based on the actual losses incurred by that party, but as a punishment to the breaching party for the commission of an intentional wrong.

RESEARCH THIS!

Research jury instructions in your home state and select representative instructions for each category of damages. Compare those from your state with the federal recommended instructions for similar legal issues.

RESEARCH THIS!

Research your home state law regarding punitive damage awards. Determine if these recoveries are *capped* and any other conditions that must be met to legally support such an award.

awards do not appear in relatively simple negligence or other tort cases. Rather, punitive damages occur in cases of outrageous, egregious behavior for which the jury decides to punish the wrongdoer as well as award compensatory and other permissible damages to the prevailing party. Note that various statutes related to tort reform and damage award may vary in how the conduct for which punitive damage awards may be appropriate is described. The professional paralegal would be well advised to research regularly any developments or case law on this issue to ensure no mistakes in discussions with clients, or the supervising attorney. Most often, punitive damages awards are made in product liability, defamation, and malicious prosecution cases.

While on the one hand, the rationale is understandable, the trend seems to be moving away from excessive punitive damage awards. Many states have passed legislation limiting these awards. The laws are routinely referred to as **caps on damages**. The caps may apply to other damages categories depending on the specific law of the jurisdiction. It is essential to become familiar with the requirements as well as the limitations within your home jurisdiction.

cap on damages
Limit established by statutes.

The Alaska Tort Reform Act of 1997 is a good example of the legislation regarding noneconomic and punitive damage awards. (See Figure 10.8.) This example from Alaska is for reference purposes as an example of how tort reform legislation has modified existing tort and damage awards.

Fed. R. Civ. P. 9(g) does require that any special damages related to the claim be stated specifically. **General damages** are those that normally would be anticipated in a similar action. These, of course, should be included when drafting the complaint, but they may be stated in broad terms. A good example would be an assault-and-battery case, in which it is expected the plaintiff would experience pain and suffering resulting from the incident. As such, no specific details and a long list of this kind of damages need to be included in the complaint.

general damages
Those that normally would be anticipated in a similar action.

Special damages are those damages incurred beyond and in addition to the general damages suffered and expected in similar cases. In our assault-and-battery case example, it is not generally accepted that a broken arm would routinely result. Thus, if monies were spent to set a broken arm and related therapy when the cast was removed, these would be special damages. As such, they should be stated separately to ensure inclusion in the consideration and calculations made by the jury.

special damages
Those damages incurred beyond and in addition to the general damages suffered and expected in similar cases.

FIGURE 10.8
Outline of Tort Reform Act 1997 Provisions

The default cap for punitive damages under the 1997 Tort Reform statute is the greater of three times the amount of compensatory damages or $500,000. AS 09.17.020(f). In cases where the wrongful acts were motivated by financial gain, and where the "adverse consequences of the conduct were actually known by the defendant or the person responsible for making policy decisions on behalf of the defendant," punitive damages are capped at the greater of $7,000,000, four times compensatory damages, or four times the aggregate amount of financial gain received as a result of the misconduct.

It should be noted that the 1997 Tort Reform statute incorporates a lower cap for punitive damages where the action involves unlawful employment practices. The cap for punitive damages involving unlawful employment practices is based on the number of employees working in Alaska.

Employees in Alaska	Punitive Damage Cap
Fewer than 100 employees	$200,000
100–200 employees	$300,000
200–500 employees	$400,000
Over 500 employees	$500,000

Eye on Ethics

Similar to attorneys, paralegals are regularly asked for comments and advice on the law when they are in social situations. It is not always an easy matter to change the subject or avoid getting into detailed discussion without appearing to be rude. These situations challenge all professionals, but they are particularly difficult when the person asking is a friend or relative. The ethics codes and guidelines apply in these situations just as they do in any other.

You are attending a family party and one of the neighbors whom you have known since childhood approaches and asks if you have time. She tells you that her daughter has been constantly harassed by her boss where she works after school. The neighbor tells you this is routine behavior for the boss, but, other than verbal harassment, there is no evidence that anything more than that has ever occurred. He also pays more for his part-time help, so the youngsters try to stick it out for the sake of the extra money. However, the neighbor just thinks this is wrong. She has decided to write him a letter threatening to take legal action and to expose him in the press regardless of the consequences. The neighbor wants information about the probability of succeeding in trial and what the damages would be. She is also interested in a civil action because she has heard that is a better route than an EEOC complaint. She asks you to help her locate specific statutory references so the letter looks serious. She also asks if you would review her letter when she finishes it and before she sends it off. What should you do? In your response, support your position with reference to specific aspects of the code and guidelines that apply to the facts. Also include comment on strategies to apply to avoid ethical error while at the same time not offending the parties requesting the information.

Summary

In this chapter, we discussed the trial process, including the various stages and the role of the paralegal in each stage. As a trial paralegal, whether occasional or as a practice specialty, you should feel confident to begin the process of organizing the trial notebook, selecting form jury instructions, drafting recommendations to the client to use ADR rather than trial to resolve the issues, and other general issues related to trial preparation and dispute resolution. You should understand the voir dire process as well as the flow of the trial. You also should be able to research and select jury instructions, case law supporting the various available types of damages awards, and related jury instructions. You also have had an opportunity to consider ethical challenges routinely facing paralegals and attorneys in social situations, and strategies to minimize the possibility of ethical error.

Key Terms

Alternative dispute resolution (ADR)
Appellant
Arbitration
Arbitrator
Cap on damages
Civil verdict
Closing statements (closing arguments)
Compensatory damages
Consequential damages
Criminal verdict
Cross examination
Direct examination
Documentary evidence
General damages
Incidental or nominal damages
Judgment notwithstanding the verdict (judgment N.O.V.)
Jury deliberations
Jury instructions
Leading
Mediation
Mediator
Motion for a new trial
Motion in limine
Negotiation
Objection for cause
Opening statements
Peremptory challenges
Points of charge
Pretrial conference

Pretrial memo
Punitive damages
Rebuttal witness
Redirect examination
Seminal
Special damages
Sua sponte
Trial notebook
Trial order
Verdict
Voir dire

Review Questions

TRUE AND FALSE

Read each of the following and mark true or false. For those marked false, provide a sentence that makes the statement true.

1. The parties can question the jurors during voir dire after the judge and the attorneys.
2. The pretrial conference is used to plan the trial, organize the order of witnesses, and resolve any outstanding issues or motions.
3. If the judge disagrees with the amount of the award made by the jury, he or she may change it.
4. ADR may be elective or mandatory depending on the law and the type of issue.
5. The mediator facilitates a resolution negotiated by the parties.
6. The closing statements provide an opportunity for each attorney to tell the jury why they should ignore the evidence presented by the opposing side.
7. As trier of fact, the judge has the opportunity to decide if the facts have been weighed properly for the decision made by the jury.
8. Peremptory challenges must be explained by the attorney raising the challenge.
9. In opening statement, the attorneys present the client's position and character witnesses on behalf of their respective clients.
10. The role of the paralegal in trial practice includes preparing the trial notebook and selecting jury instructions recommended for use in the trial.

Discussion Questions

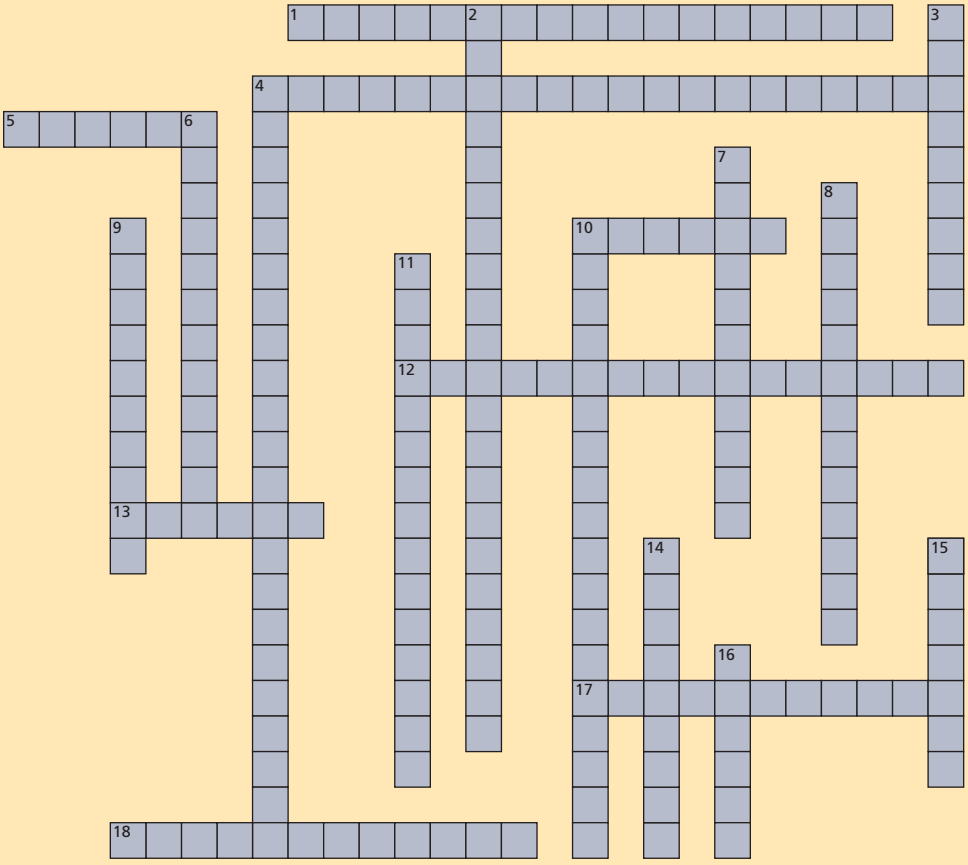
1. Prepare an office memorandum for circulation to the various litigation paralegals in your office. Your supervising attorney is concerned that the trial preparation phase of client files is getting a little relaxed. He has asked that you give an overview of discovery as a refresher for the paralegals organizing files for either trial or ADR. Describe the stages of trial and the documents the paralegal would be responsible for organizing for the attorney. Be sure to make your presentation in logical order and note those aspects of the process that would be the responsibility of the paralegal to complete. Alternatively, you may prepare a PowerPoint presentation.
2. *Pair Project*. Select a partner and then each person should visit either the American Arbitration Association or his or her home state judicial ADR Web site location. Explore each in detail and then prepare a presentation for the class in which you highlight the strengths of each and compare the state-sponsored program with the AAA. If there are recommendations for the AAA or the state judicial program borrowed from the other site, include a recommendations section. If your home state has an informal program that may be recommended, be sure to spotlight the reason(s) for including a more expressly defined program. As an alternative, you may prepare a presentation using PowerPoint. In either case, retain your completed project in your PRM for easy future reference.
3. Write a brief summary of the jury selection process, including the role of the judge, the attorneys, and the paralegal. What tools are available for the attorney and the judge? How can the paralegal facilitate the process?

4. Visit the following link to the complaint filed by Paula Corbin Jones against President Bill Clinton: www.washingtonpost.com/wp-srv/politics/special/pjones/docs/complaint.htm. Review the document and respond to the following questions:
   a. In which court was the case filed?
   b. What claims are made in the complaint?
   c. What is the amount of damages requested, and what type of damages might each request be?
   d. Was a jury trial demanded?
5. Locate the federal jury instructions that would be appropriate for the various claims and damages sought in the *Paula Jones v. Bill Clinton* case using the link provided in Question 4 above. Retain copies of each and provide a brief explanation to support your choice. You may want to visit the jury instruction applicable in the jurisdiction in which the case was filed.
6. Evaluate the claims made in the case, and any other materials you may review on the Web site. Now prepare a recommendation to Ms. Jones as though you are the paralegal working with her attorney for ADR rather than trial. Identify specific reasons for the recommendation, including benefits to Ms. Jones, and potential risks, if any, from continuing to full trial on the issues.
7. Select one of the cases from the text including Discussion Questions and prepare a case brief in proper format. Retain your brief in your PRM for easy future reference and use.

Portfolio Assignment

Research your home state statutes related to damages in civil tort actions. Also look for exceptions to the rule, as it were, and circumstances in which exceptions may be entertained by the courts. Now review the exceptions provisions in the Federal Tort Claims Act, 28 U.S.C. § 2680. After reviewing the exceptions, compare the exceptions to any cap on damages statutes you have located to determine both similarities and differences. Comment on the provisions of both. If you agree with the statutes, provide comment on why. If you do not agree with those provisions, comment on why not as well as the alternative that you believe would be more equitable. Retain your completed document and any materials you find that may be helpful for future use in your PRM.

Vocabulary Builders



Across

1. Refutes or contradicts the evidence presented by the opposing side.
5. Present legal issues to the jury prior to deliberation.
6. Jury selection process.
7. Summarize case presentation.
13. Responding party in appeal process.
15. On his or her own without request from others.
16. Small but nonetheless identifiable damages.
19. Trier of law.
20. Create answer.
21. Jury instructions.

Down

2. Organized evidence file.
3. Normally expected in similar actions.
4. Criminal trial verdict.
7. Reasonable to flow from injury presented.
8. Refusing to accept juror without stating reason.
9. Repay party for out-of-pocket expenses incurred in direct relation to injury.
10. Party appealing the verdict.
11. Monetary verdict intended to punish the wrongdoer.
12. Questions to witness by party not calling the witness to testify.
14. Fundamental.
17. Judgment requested in spite of or inconsistent with the verdict.
18. Civil trial verdict.

Chapter 11

Criminal Law and Procedure

CHAPTER OBJECTIVES

Upon completion of this chapter, the student will be able to:

- Distinguish civil and criminal law and define crimes.
- Identify and describe sources of criminal law, including constitutional provisions and amendments.
- Describe stages of criminal case.
- Explain warrant use, requirements, and exceptions, including USA PATRIOT Act provisions.
- Explain the criminal appeal process and requirements.
- Illustrate an understanding of Fourth Amendment protections and probable cause requirements.
- Demonstrate an understanding of exceptions to constitutional protections.
- Discuss ethical challenges in criminal law practice and practical strategies for managing challenges.

Criminal law is typically the aspect of the American legal system most people first identify. The press, television, and other popular media sources cover criminal law issues on a regular basis. While much of the coverage relates to real-life issues, much of it is seen through the prism of the popular television series. Even as far back as ancient Rome, the good of the people was the highest law. If the people's good is the highest law, then we could reasonably say that violating the good of those same people is the most serious offense. We treat the accused in our country much differently than they did in ancient Rome. We continue to treat the accused much differently than most other government forms developed subsequent to ancient Roman times. A procedural violation of the individual rights of the accused is as serious as a substantive violation and, additionally, has a negative impact on the substantive questions and vice versa. Constitutional protections govern both the procedure and the substance of the criminal law. In this chapter, we will explore an overview of the foundation of criminal law as well as the basic procedural structure and requirements under our system. The form and substance of our criminal law ensures maximized protections for society and the accused, both of which are valued under our constitutional form of government.

CRIMINAL LAW DISTINGUISHED FROM CIVIL LAW

criminal law
The legal rules regarding wrongs committed against society.

Criminal law deals with wrongs against society, or the community. Unlike civil law, which involves private disputes between citizens, in criminal law, the **plaintiff**, or complaining party, is the state, or government, whether state or federal. The attorney representing the government is the **prosecutor**, who is like the plaintiff's attorney in a civil suit. In criminal matters, the

FIGURE 11.1
Civil and Criminal Law Procedural Differences

	Civil Law Cases	Criminal Law Cases
Commencement	Civil complaint and summons filed requesting monetary damages or injunctive relief	State obtains indictment or citation following arrest of defendant
Parties	Private parties bring action against other private parties making claim of a civil wrong	State prosecutes following an investigation and finding of possible breach of public law
Burden of proof	Preponderance of evidence	Beyond a reasonable doubt
Result	Losing party may be assessed monetary amount to pay winning party	Guilty party may be sent to prison and/or fined a monetary sum

plaintiff
The party initiating the legal action.

prosecutor
Attorney representing the people or plaintiff in criminal matters.

conviction
Results from a guilty finding by the jury in a criminal trial.

Federal Rules of Criminal Procedure (Fed. R. Crim. P.)
Rules governing the procedural issues in criminal prosecutions.

burden of proof
Standard for assessing the weight of the evidence.

preponderance of the evidence
The weight or level of persuasion of evidence needed to find the defendant liable as alleged by the plaintiff in a civil matter.

wronged party is not actually the victim alone, but, rather, the citizens represented by the victim. In a criminal issue, the victim may provide testimony, but the state seeks **conviction**, that is, a finding by the jury of wrongdoing. When the jury makes such a finding, the judge imposes a sentence consistent with the statute.

As with the civil process, there are both **Federal Rules of Criminal Procedure (Fed. R. Crim. P.)** and state rules governing the procedural issues. You may recall that, under our government system, substantive and procedural protections and rights are equal, and, therefore, each must be considered and accommodated in any legal matter.

A criminal trial procedurally resembles a civil trial in many respects. Similarly, when the defendant is found guilty, the judge imposes a remedy or sentence on the guilty party. In a civil trial, the jury awards damages to the prevailing party and against the losing party.

Civil and criminal trials have a different **burden of proof**, or standard for assessing the weight of the evidence. You may recall that, in civil matters, the standard for assessing the evidence is **preponderance of the evidence**. In a criminal matter, however, the burden the prosecutor must meet is **beyond a reasonable doubt**, substantially higher and more difficult to prove. Figure 11.1 shows the main differences between civil and criminal actions.

SOURCES OF CRIMINAL LAW

beyond a reasonable doubt
The requirement for the level of proof in a criminal matter in order to convict or find the defendant guilty. It is a substantially higher and more-difficult-to-prove criminal matter standard.

Supremacy Clause
Sets forth the principle and unambiguously reinforces that the Constitution is the supreme law of the land.

statutory law
Derived from the Constitution in statutes enacted by the legislative branch of state or federal government.

common law
Judge-made law, the ruling in a judicial opinion.

Under our federalism system of governance, there are both federal and state criminal offenses. While criminal offenses fall more often squarely within the state realm, there are some instances when the offense is both a federal and a state one. In these instances, either state or federal law may be applied and the conflict is resolved under the principles of the **Supremacy Clause** of the U.S. Constitution. This provision, in Article VI of the U.S. Constitution, states that when such a conflict occurs, the federal law always takes priority. Federal criminal law is **statutory law** derived from legislated statutes, unlike state criminal law, which comes from both **common law** and statutory sources.

Many states also have common law criminal offenses, which are a carryover from the English law on which the framers modeled our system. In old England, the judges actually did make law and create rules for society through their decisions, prior to the extensive written, reproduction, and communication skills that have made the world smaller, at least in respect to communicating and sharing information. Our judges do not ride through their circuits and make decisions on the spot, which then apply in that area. Under our system, the complaining parties, the accused, and the victims go to the judges, who use statutory law that is patterned on the common law and easily accessed manually or electronically. Whether a conviction results from a statutory offense or a common law offense of the same name, the result is the same. However, while the defendant could be convicted of both a common law and a statutory offense, the sentence can be for only one of the two.

While the duplication may seem redundant, and even wasteful of judicial resources, nevertheless, there are many who believe common law criminal offenses serve a valuable purpose in our system. They argue for preserving it for the following main reasons:

1. When the statute is unclear on the sentence, then common law can guide the selection of appropriate sentences.

RESEARCH THIS!

Research your home state statutes related to criminal acts and review the definitions and other element of the statutes. Also, verify whether your home state is a statutory criminal law state or has both common law and statutory crimes.

PRACTICE TIP

Research your state criminal code to verify whether the Model Penal Code (MPC) has been embraced in the statutory provisions. Either way, it is a good idea to make the MPC a regular criminal law reference source in your academic and practice life.

2. Common law can assist a judge faced with a novel point of law.
3. Case law related to common law criminal offense is useful in analysis and application of statutory law.

Model Penal Code (MPC)
A comprehensive body of criminal law, adopted in whole or in part by most states.

The **Model Penal Code (MPC)** is a secondary source of criminal law that is often relied upon in opinions and argument related to criminal issues. The MPC was drafted as a paradigm for a consistent approach to law for use in all states. While 34 states have embraced its provisions in their statutes, others have not done so.

mens rea
"A guilty mind"; criminal intent in committing the act.

actus reus
The guilty act.

Whether using a common or statutory definition, to rise to the level of a crime, two specific elements or components are required: *mens rea* and *actus reus*. The **mens rea** element is the mental aspect of the crime. Proof that the defendant had the required intention or "guilty mind" to commit the act voluntarily is essential for the act to rise to the level of a crime. The **actus reus** element is the physical or movement aspect. Without clear evidence supporting both elements, a conviction cannot be delivered. Each crime has a mental or intent element. As an example, the elements of criminal battery are (1) unwanted (2) touching (3) of another (4) with intent to cause harm and (5) that causes injury**.** In this example, the touching satisfies the actus reus element and the intent to cause harm satisfies the mental or mens rea.

CRIMINAL PROCEEDINGS

Any criminal proceeding has eight stages. (See Figure 11.2.) In each, rigorous adherence to constitutional process and procedure is mandated to ensure the appropriate conclusion, whatever that may be. The process does not guarantee incarceration and a guilty finding. The jury determines guilt or innocence. The process ensures protection of the co-equal rights of society, prosecution, and the accused.

Arrest

arrest
The formal taking of a person, usually by a police officer, to answer criminal charges.

Arrest is the first step in criminal proceedings. The arrest warrant issues based on legally sufficient probable cause supporting the *warrant affidavit*, a sworn statement from the officer

FIGURE 11.2
Stages of the Criminal Case

STAGES OF THE CRIMINAL CASE	
1. Arrest	5. Pretrial Discovery
2. Initial Charge	6. Trial
3. Initial appearance	7. Sentencing
4. Preliminary Hearing	8. Appeals

FIGURE 11.3
Miranda Warnings

Miranda Warnings

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to an attorney present prior to questioning.
4. If you cannot afford an attorney, one will be appointed to represent you prior to questioning.
5. Do you understand these rights?

warrant
Issued after presentation of an affidavit stating clearly the probable cause on which the request is based.

seeking the **warrant**. The actual arrest requires the arresting officer to protect all rights of the arrestee as articulated in the Bill of Rights. The mere fact of arrest does not operate to deprive the individual of protections under the law and the Constitution. Our system rests on the presumption of innocence until proven guilty. In furtherance of this presumption, each step of the process is clearly defined with guarantees in place to ensure adherence to all required process steps and rights.

The standard for seizure of person, otherwise called *arrest*, is whether or not a reasonable person would believe that he or she was free to leave and voluntarily chooses to do so (*United States v. Mendenhall*, 446 U.S. 544 (1980)). Effectively, therefore, prior to actually being put into a cell or other space associated with incarceration, an individual in police custody who reasonably believes that he or she cannot voluntarily terminate the situation and go about daily life activities is construed to be under arrest. Therefore, the Miranda rights attach and the arresting officer must advise the detainee of his or her rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)).

Miranda warnings
Mandatory notice given detainees specifically advising that anything said while in custody can be used subsequently as trial evidence.

The **Miranda warnings** are mandatory notice given detainees at the time of arrest and require specifically advising the detainee that anything said while in custody and unable to leave can be used as trial evidence. (See Figure 11.3.)

Arrest is not the end of the process of finding legal guilt, despite the evidence and probable cause presented in support of the arrest warrant and the seizure of the person. An arrest without adequate cause is invalid. Such cases would rarely, if ever, get as far as trial.

Initial Charge

Following the arrest, the formal charges are published and announced for the court, the accused, and the prosecution. Trial and its preparation are based on the formal charges made against the accused. In some instances, the formal charge document is filed prior to the arrest. The specific process in your home state jurisdiction should be located, copied, and retained in your PRM for future ease of reference.

CYBER TRIP

To see a sample of an indictment, go to the following Web site to retrieve the indictment in the Moussaoui terrorist prosecution: www.usdoj.gov/ag/moussaouiindictment.htm.

RESEARCH THIS!

Research in your home state law to find cases where the arrest process and/or sufficiency of the supporting arrest warrant was raised. Read the case opinions to get an understanding of how the standard is applied.

RESEARCH THIS!

Research whether your home jurisdiction uses information or indictment in criminal matters. Next, review your home state rules of criminal procedure related to formally serving the defendant with the complaint. Retain the information and your notes in your PRM for easy future reference.

indictment
A written list of charges issued by a grand jury against a defendant in a criminal case.

information
States that the magistrate determines there is sufficient cause to make an arrest and also sets forth the formal charges sought by the prosecution.

arraignment
A court hearing where the information contained in an indictment is read to the defendant.

bail
Court-mandated surety or guarantee that the defendant will appear at a future date if released from custody prior to trial.

preliminary hearing
An appearance by both parties before the court to assess the circumstances and validity of the restraining application.

exculpatory evidence
Supports the possibility of the defendant's innocence.

The charges are contained in either an *indictment* or an *information*. In those jurisdictions in which a grand jury must convene, an **indictment** issues at the conclusion of the process. This document formalizes the charges and passes on the adequacy of the probable cause affidavit filed by the state attorney or U.S. attorney on behalf of the federal government. In grand jury jurisdictions, there is no preliminary hearing as the procedure before the grand jury accomplishes the same objectives and determines the charges' adequacy.

In jurisdictions not using grand juries, **information** is handed down that states that the magistrate hearing the matter determines there is sufficient cause to make an arrest. The information also sets forth the formal charges sought by the prosecution.

Initial Appearance

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*
>
> *—U.S. Constitution, Eighth Amendment*

The next step in the trial process is the initial appearance, or **arraignment**, at which the charges are read and the defendant's plea to the charges recorded in the trial record. In some instances, the defendant waives reading of the charges. Nonetheless, in all cases, a plea to the charges is entered. The defendant is advised of the right to counsel and the appointment process should the defendant claim an inability to retain and pay for private counsel. Lastly, the matter of bail is determined. If the court grants the bail request, the court establishes the amount. If the court denies bail, the reasons become part of the record.

The Eighth Amendment relates to setting bail and determining the amount in the context of avoiding excessive bail. Of course, the question becomes what is excessive, and the answer is that it depends on the entirety of the circumstances. It seems on the popular television series that the defendant most frequently is denied bail, but, in the real world, this is not the case. **Bail** is a court-mandated surety or guarantee that the defendant will return to appear at a future date if released from custody prior to trial. If the defendant fails to appear when ordered, the bail amount is forfeited. On the other hand, if the defendant performs and appears, the bail is released and collateral for the surety is returned to the party posting the collateral. In a handful of cases, the defendant may be released on his or her own recognizance, which simply means the defendant is still under the obligation to appear for trial, but the judge determines there is no need for the additional incentive, if you will, and thus no bail amount is set or paid to the court.

Preliminary Hearing

The **preliminary hearing** serves the purpose of reinvestigating the probable cause upon which the arrest warrant relies and investigating through evidence and testimony whether there is sufficient evidence to proceed with the prosecution. While the arrest warrant requires documented probable cause per se, that means sufficient evidence has been presented to validate issuing a legally sufficient arrest. Moving forward to prosecution requires reassessment of that and other evidence. Live witnesses are called and evidence is presented other than the testimony of the witnesses. At this proceeding, the defendant has the right to confront his or her accusers and question them on matters relevant to probable cause and the evidence presented. Note that the defendant can confront his or her accusers in these proceedings but may not do so at the grand jury proceedings.

This is not the trial, nor should it proceed in the same manner. The purpose is limited; thus, the process differs from full trial. If the defendant has **exculpatory evidence** available, this may

PRACTICE TIP

The paralegal typically has some role in a criminal practice related to bail. Often, the bondsman is actually contacted by the defense attorney and the paperwork organized and collected for processing by the paralegal. As such, you need to know the process in general terms to organize the materials related to bail and secure the release upon case termination.

RESEARCH THIS!

Research to find some bail bondsmen in the local telephone directory. Speak to one or two to inquire about their role, the process, and any other questions of interest on the topic that you may have. Take notes on any particularly important comments and retain in your PRM for easy future reference.

FIGURE 11.4
Sample Waiver of Speedy Trial

Exempt From VRA Certification

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA

AT _____

☐ STATE OF ALASKA)
☐)
)
Plaintiff,)
)
vs.)
)
) CASE NO. _____ CR
)
Defendant.) WAIVER OF SPEEDY TRIAL
DOB: _____)

I have a right to a speedy trial under the Constitutions of the United States and the State of Alaska and under Rule 45 of the Alaska Rules of Criminal Procedure. I hereby request and consent that the following period be excluded in computing the time for speedy trial provided in Criminal Rule 45:

☐ ____ days

☐ from _____ to _____ .

_____ _____
Date Signature of Defendant

_____
Signature of Counsel for Defendant

_____
Type or Print Counsel Name
and Alaska Bar No.

speedy trial
Begins within a reasonably prompt time which time is related to adequacy of time to permit appropriate preparation; rules of civil and criminal procedure as well as Speedy Trial Act (18 USCA §§3161-3174) set forth precise timing provisions.

pretrial motions
Used to challenge the sufficiency of evidence or the suppression of allegedly tainted evidence or other matters that could impact the focus, the length, and even the need for trial.

double jeopardy
Being tried twice for the same act or acts.

motion to suppress
Asks the court to eliminate allegedly tainted evidence.

be the point at which the attorney introduces the evidence. Exculpatory evidence shows the possibility of the defendant's innocence. Note that in grand jury jurisdictions, the preliminary hearing is not a formal stage of the process.

The Sixth Amendment provides, *inter alia*, for the "right to a speedy and public trial . . ." Under some circumstances, the defendant may choose to waive that right. Often the decision results from concern that there is sufficient time for trial preparation based on the admitted complexity of the issues. In those cases, the defendant may affirmatively request an enlargement of time through a waiver of **speedy trial**. (See Figure 11.4.) You may have wondered why there was a long delay between the arrest and the trial in some of the high-profile celebrity criminal trials in recent years. The delay is a direct result of an affirmative request by the defendant to waive speedy trial to allow adequate time to prepare the case for trial.

Pretrial Discovery

In the discovery or pretrial phase of criminal prosecution, both sides gather evidence. If either side requires **pretrial motion** rulings, this is the time they are filed. The defendant, for example, may assert a **double jeopardy** claim or a sufficiency of evidence motion or a **motion to suppress** allegedly tainted evidence. On the other hand, the prosecution may respond to such requests. The prosecution has an absolute obligation to disclose and produce all evidence intended for trial use against the accused. Under the Constitution as reaffirmed in *Brady v. Maryland*, 373 U.S. 83 (1963), this is a continuing obligation. As such, the defense should not be required to remind or request the information, but, similarly, the diligent and alert paralegal would monitor and catalog the evidence received and follow up for additional information as deemed appropriate. When a

PRACTICE TIP

Design a chart and a checklist comparing the various permitted pretrial motions in the federal district and state courts. Also, include periods for response and sanctions for failure to comply. Retain in your PRM for easy future reference.

CYBER TRIP

Research the Fed. R. Crim. P. for the rules pertaining to pretrial discovery motions. Now locate the rules for your state jurisdiction and compare the two. Comment on differences, if any. Then locate the rules related to sanctions for failure to comply with discovery requests. Again, compare the federal provisions with the state rules.

suspicion arises that information may be outstanding, judicious use of motions to request or compel production should be judiciously filed. However, all informal efforts to resolve the issue should be exhausted prior to filing such motions.

Trial

As mentioned several times in this and other chapters, the trials in the real world bear little resemblance to those often depicted in the popular media. Further, the televised celebrity trials often give a distorted view for people who have never been in a real courthouse and witnessed a real trial.

As a paralegal working in a criminal trial practice, the trial format given in Figure 11.5 will soon become an important organizational and planning tool. As with the civil practice, there are rules of criminal procedure in both the state and federal systems. In terms of procedure, the paralegal is as critical to a successful attorney in the criminal arena as in the civil. The attorney most often relies upon the paralegal to prepare everything needed. This includes anticipating what is missing, drafting the motions or letters to secure the missing materials, and organizing the files, trial notebook, and other evidence.

trial
The forum for the presenting of evidence and testimony and the deliberation of guilt.

trier of law
Judge.

trier of fact
Jury.

The **trial** is the forum for presenting evidence, testimony, and deliberation of guilt. The judge is the **trier of law**. In this connection, he or she does not weigh the evidence presented but, rather, ensures the jury understands the applicable law and, of course, rules on objections and other matters that arise during the proceedings. The jury is the **trier of fact**. As such, the responsibility for deter-

PRACTICE TIP

Contact a local criminal trial practice and ask to speak to one of the paralegals. Ask if he or she would have some time to explain the process, tasks routinely assigned to the paralegal, and other aspects of the job and law specialty that would help you gain greater insight and understanding of the specialty practice area. Retain your comments and notes of the interview for future review and guidance when looking for employment and identifying the aspect of law most interesting to you.

FIGURE 11.5
Criminal Trial Format

CRIMINAL TRIAL FORMAT

- Reading of charges
- Prosecutions opening argument
- Defense opening argument
- Prosecutions case in chief
  a. Direct examination
  b. Cross examination
  c. Redirect examination
  d. Recross
  e. Rebuttal
- Prosecution rests
- Motion for judgment
- Defense case in chief
- Defense rests
- Prosecution rebuttal testimony
- Defense response
- Closing arguments
- Prosecution summation
- Defense summation
- Prosecution rebuttal
- Jury instructions
- Jury deliberations
- Reading of the verdict

bench trial
A case heard and decided by a judge.

Confrontation Clause
Sixth Amendment guarantee that the accused has the absolute right to confront his or her accusers and all evidence.

RESEARCH THIS!

Research to determine whether your home state permits bench trials in criminal misdemeanor cases. If so, under what circumstances or classifications of crime.

mining, beyond a reasonable doubt, guilt or innocence rests with the jurors. Some misdemeanors, even if criminal in nature, may be tried in the absence of a jury, otherwise called a **bench trial**. In a bench trial, the judge wears the hat of both the trier of fact and the trier of law. It does not imply any less vigorousness in the process but, rather, different roles assigned to one individual.

At trial, the accused has the absolute right to confront his or her accusers and all evidence supporting the allegations. This right is preserved in the Constitution under the **Confrontation Clause** in the Sixth Amendment. The right is absolute. The right is so absolute that, if the defendant is too ill to sit at trial, the judge will customarily continue the trial until the defendant can attend. Following presentation of all evidence by the prosecution and the defense, including evidence and witness testimony, the trial judge instructs the jury on the law and their obligations as well as the charges. At that point, deliberations commence. The jury continues its deliberations until they reach the required majority votes.

When the jurors complete deliberations and agree on the verdict, they advise the judge. The parties reconvene in the courtroom where the jury foreman or leader reads the verdict and thereby makes it public. If the jury acquits the defendant, he or she is released, bail monies are returned, and the case ends.

If, on the other hand, the jury *convicts* the defendant, bail may be continued and a date for sentencing set. The jury may recommend a sentence in some jurisdictions, but the judge actually sets the sentence. The defendant may be released on bond pending sentencing and appeal depending on jurisdictional requirements, status prior to the verdict, the gravity of the crime convictions, and other factors weighed by the judge and presented by the respective attorneys for the state and the defendant. Defense counsel may announce the intent to take an appeal from the verdict at that time. In any case, if an appeal is considered, the formal notice is filed of record in the court within the statutorily prescribed time or the right is waived.

PRACTICE TIP

If you have a bench trial, misdemeanor jurisdiction, be sure to have the rules and the applicable code sections retained and filed to ensure that you can prepare for these proceedings appropriately.

Sentencing

On the date set by the judge, the defendant is sentenced. Again, the judge may allow the defendant to remain free on bail between the trial verdict and the sentencing at the judge's discretion. There are many factors considered in making the decision, but the likelihood is greater that, if the defendant was incarcerated pending trial, the same conditions will apply between the verdict and the sentencing.

PRACTICE TIP

Nothing prepares you better for a career as a paralegal than visiting the local federal and state courthouses and actually observing a trial in process, jury selection, and any other aspect of the process open to the public. The experience is invaluable for those interested in legal careers, even if not in a litigation practice.

CYBER TRIP

Click on the link to read the jury instructions in the O.J. Simpson criminal trial proceedings: www.llrx.com/columns/reference19.htm.

CYBER TRIP

Research the sentencing guidelines in the federal and your home state statutes. Compare the provisions of both. Note similarities and differences. Retain notes or copies with comments in your PRM for easy future reference.

CYBER TRIP

Review the provisions of 22 U.S.C. § 2254 and then locate and review the state's analogous provision. Now visit your home state's supreme court Web site to find cases in which such relief was granted, such as a case of a death row inmate freed based on DNA evidence. The ACLU is an excellent source, as is the death penalty law section of the state and federal judiciary.

PRACTICE TIP

Research some firms in your local area practicing appellate law. Contact the firms and ask to speak to one of the paralegals. Ask about his or her responsibilities within the firm and the nature of writing and investigation involved as well as any general information that would help you formulate a clear idea of what that practice area is like on a day-to-day basis.

Some states have mandatory sentencing guidelines, while others continue to allow judicial discretion in setting the sentence. Even in discretionary jurisdictions, there are certain guidelines and principles applied to ensure some level of consistency so that the same or virtually similar crimes have similar sentences in every district or circuit within the state.

Note there may be differences in sentencing guidelines between federal and state jurisdictions. The procedure and the general process stages are similar. As a practicing paralegal, you need to be aware of procedural differences between state and federal jurisdictions in which the attorney practices. Failure to meet procedural requirements can ultimately result in serious prejudice to the client/defendant. You also should be aware of the procedural differences particularly in cases where the crime may be prosecuted under either state or federal jurisdictions. In those cases, the sentencing guidelines for each jurisdiction become critical aspects of any deliberations or negotiations regarding jurisdictional election. Clearly, this aspect of the practice is an attorney decision, but, nonetheless, the professional paralegal should be familiar with the issues.

Appeal

In the event the defendant wishes to file an **appeal**, the issue has undoubtedly been raised during the trial and an objection entered, thus preserving the issue for appeal. An appeal cannot attempt reversal of the verdict based on inappropriate jury analysis or allocation of weight of the evidence. The appeal tests the sufficiency of the verdict under the applicable legal rules and case law parameters. When the jury presents the verdict to the court, one of the attorneys may ask to poll the jury to determine specifically how each juror voted. Other than getting that information on the record, no second-guessing or challenge to the verdict per se is permitted under our system. If the verdict itself were subject to appeal and challenge and, effectively, renegotiation, the fundamental concept of jury of one's peers, drawn from the pool of citizens in the community in which the defendant lives and works, would be invalidated.

appeal
Tests the sufficiency of the verdict under the legal parameters or rules.

In the rare event of newly discovered evidence, a jury verdict may be reversed on appeal and the case remanded for retrial. Be sure you understand, however, this does not change the validity of the first verdict. It does say that there is a possibility with the newly discovered evidence that the verdict would have differed because the evidence differs. The first step in seeking appeal based on newly discovered evidence is to file a motion seeking extraordinary relief or a petition for **writ of habeas corpus**. The process and grounds are codified at 22 U.S.C. § 2254. The court will assess the newly discovered evidence and determine if indeed it is so compelling that fundamental fairness requires that a jury have the opportunity to see this new evidence, along with that which was known at the time of the original trial.

writ of habeus corpus
Literally "bring the body"; application for extraordinary relief or a petition for rehearing of the issue on the basis of unusual facts unknown at the time of the trial.

Another form of extraordinary relief arises when the defendant files for a **writ of certiorari** with the U.S. Supreme Court based on federal questions, including issues such as misapplication of the standard or other constitutionally guaranteed fundamental rights resulting in an improper abridgement of freedom. As with the petition for a writ of habeus corpus, these issues are relatively rare and even more unusual for the Supreme Court to entertain.

writ of certiorari
Granting of petition, by the U.S. Supreme Court, to review a case; request for appeal where the Court has the discretion to grant or deny it.

SUBSTANTIVE CRIMINAL LAW ISSUES

The Fourth, Fifth, Sixth, and Eighth Amendments are particularly important in criminal law matters. These sections specifically address the rights of defendants in criminal matters, including protections against unreasonable search and seizure in the Fourth Amendment and

Sixth Amendment
Protections include a speedy trial, the right to confront the accuser, a jury trial, and the assistance of counsel.

protection for self-incrimination and double jeopardy in the Fifth Amendment. Trial-related matters such as a speedy trial, the right to confront the accuser, a jury trial, and the assistance of counsel are within under the **Sixth Amendment** protections. The Eighth Amendment deals with cruel and unusual punishment, including prohibiting excessive bail, as discussed previously in this chapter. We will now look more closely at some aspects of the Fourth Amendment protections and issues that may arise in relation to the fundamental rights involved.

FOURTH AMENDMENT

> *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.*
>
> *—U.S. Constitution, Fourth Amendment*

Fourth Amendment
Prohibits unreasonable searches, seizures and warrants issued without reasonable probable cause.

The meaning, scope of protection, and limitations imposed and granted under the **Fourth Amendment** have been the subject of extensive litigation and interpretation. Read the above and then contemplate its meaning. The Fourth Amendment in the Bill of Rights articulates certain specific citizen rights, including

1. Guarantee of probable cause underlying any warrants issued.
2. Oath or affirmed, sworn statement supporting the request for issuance of a warrant, which must set forth the specific details of the cause underlying the requested arrest warrant.
3. Reasonableness as the benchmark standard for issuance.
4. Privacy protections extended to persons, but necessarily not all places.

In theory, therefore, the amendment protects individual citizen rights to their own personal space and personal entitlement to live without fear of random, unfounded, and intrusive searches for no apparent reason.

The protection and articulated individual rights differ substantially not only from the British system at the time of our ancestors, but also present-day governments in other countries. Citizens in many government forms are subject to random personal property search as well as property seizure. If a search results in discovery of incriminating evidence, an arrest ensues and incarceration results. Under our system, on the other hand, the individual must manifest identifiable and suspicious behavior or other suspicious evidence prior to search, seizure of property, or detainment of the person.

Search and Seizure under the Fourth Amendment

Violations of Fourth Amendment search and seizure are measured against principles of both the reasonable person standard and the constitutionally defined scope and limitations on such individual guarantees. A person considered innocent until proven guilty is viewed through a different prism than one assumed guilty until innocence can be shown.

Team Activity Exercise

Form teams and research current case law on the Fourth Amendment as applied or analyzed in the context of the heightened security requirements based on the threats of terrorism. Specifically focus your consideration on airport security and the relationship between the need to screen travelers in relation to the individual Fourth Amendment rights to personal freedoms. Each team should prepare a brief paper analyzing the reason for the searches, the Fourth Amendment provisions called into question, and recommendations for a procedure and government position that best serve the needs of all travelers both as a society and as individuals. When formulating your position, be sure to reference the materials researched. Feel free to include properly referenced and cited current news articles or other current materials.

RESEARCH THIS!

Research either manually or electronically to find the case opinion in *Katz v. United States*, 389 U.S. 347 (1967). Review the opinion; identify the two prongs of the test and the supporting legal argument. Briefly summarize the elements relied upon to formulate the rule of law in an internal legal memorandum and retain your memo in your PRM for easy future reference and use.

standing
Legally sufficient reason and right to object.

Merely not liking the fact of a search per se does not confer adequate legal sufficiency and the right to object. To have sufficient **standing** to object, the party objecting must show that (1) actual injury to the complaining party has resulted and (2) the interest violated was rightly within the protections otherwise applicable. However, one can object to a search if, as a threshold issue, the defendant can assert and support with evidence that a reasonable expectation of privacy applied as to the searched premises or personal property. Unfortunately, not every assertion of unreasonable expectation of privacy violation is legally adequate. Determining the adequacy of assertions of a reasonable expectation of privacy is made easier following the court opinion in *Katz v. United States*, 389 U.S. 347 (1967), which defined the standard and continues as law. Under the *Katz* two-pronged expectation of privacy test, the court assesses both a subjective and an objective standard.

Katz expectation-of-privacy test
Two prongs: (1) reasonableness of the expectation of privacy—the subjective prong; (2) efficacy of the expectation asserted based on community standards—the objective prong.

The **Katz expectation-of-privacy test** has two prongs: (1) **reasonableness** of the expectation of privacy—the subjective prong and (2) efficacy of the expectation asserted based on community standards—the objective prong.

On the *subjective* side, it must be clear on the face of the evidence that the plaintiff acted consistently with a reasonable expectation of privacy.

Example:

If an individual continually strolls through the neighborhood with a gun tucked into his or her waistband, in a jurisdiction that outlaws carrying guns, even if plainly seen, then the individual cannot later assert a reasonable expectation-of-privacy argument to defeat a search and seizure of the gun. *Why*? By carrying the gun in plain sight, the defendant waived his or her reasonable expectation of privacy because the gun was flaunted and plainly visible.

reasonableness
Requires that under the surrounding circumstances action taken is fair, appropriate, and within scope of expected action or inactivity as understood by any person in similar situation.

The objective side of the Katz expectation-of-privacy test measures the efficacy of the assertion using a community standard test. Essentially, this prong of the test says that the expectation should be analyzed in terms of its reasonableness as others in the community see it. The courts offer three points in defining the scope of the reasonable expectation:

1. The nature of the property, that is, a personal residence is more reasonably a privacy location than would be a park or an open field at the back of a residence.
2. No protection is available for information knowingly exposed to society by the defendant. Thus, the outcome in the gun example above is predictable. Upon showing the defendant articulated to others the information to be protected, such expectation, no matter how otherwise reasonable, is forever waived.
3. Settled black-letter law, which means that, if a particular circumstance or setting has been presented to the court and a ruling either for or against protecting the expectation of privacy has been given, then such applies regardless.

open-fields doctrine
The personal residence per se is protected from unreasonable search; the open fields surrounding the property are not equally protected.

Notwithstanding a legally sufficient rationale justifying the search, individual privacy and other rights defined under our constitutional system remain intact. During the search, therefore, the same protections of fundamental rights are protected and respected.

The scope and limitations of reasonable privacy expectations are established with a number of legal tests. The **open-fields doctrine** maintains that while the personal residence per se is protected from unreasonable search, the open fields surrounding the property are not equally protected. In *Oliver v. United States*, 466 U.S. 170 (1984), the court was asked to decide if real property titled to

RESEARCH THIS!

Research on the U.S. Supreme Court Web site to find *Oliver v. United States*, 466 U.S. 170 (1984). Review the case opinion and then briefly summarize the analysis, including the test that articulates or provides legal support for the rule of law stated.

the owner, albeit uncovered, is subject to search. The court held that while viewing is not unreasonable, a seizure or entry absent a warrant might be illegal based on the exigency or urgency of the situation and the totality of the facts. The test applied is whether the area is construed as being immediately proximate to the home, the extent to which any small enclosures appurtenant to the home may be present, the use made of the subject property, and, finally, the precise steps taken by the home owner to ensure privacy (*United States v. Dunn*, 480 U.S. 294 (1987)). While commercial or business property and luggage are protected property, trash is not. Thus, if trash is placed in publicly accessible positions, the reasonable expectation of privacy is waived.

pen register
Records telephone numbers for outgoing calls.

A **pen register** records telephone numbers for outgoing calls. There is no legal expectation of privacy for telephone monitoring accomplished with a pen register. The underlying theory on which the courts rely is that the use of the telephone is a privilege that is also part of the public domain, and thus within the purview of the government to monitor to ensure maximized public welfare and safety. The conversation may be perceived as private; nonetheless, it is transmitted over wires and mechanisms within the public domain. Thus, there is no legally recognized expectation of privacy for such discussions.

To summarize all of the foregoing, the keystone concept is reasonableness. Anything that occurs within the reach of or partial exposure to the public domain becomes suspect in terms of asserting any violation of a constitutional right to privacy. In addition, nothing discovered through routine processes can violate the privacy rights or expectations of the individual asserting such violation.

Example:

Three struggling comedians decided that comedy just did not pay enough, so they decided to go into bank robbing as a more consistent and ultimately profitable enterprise. While they were funny as comedians, they were at best inept as crooks. The big mistake they consistently made was discussing their plans in the diners of the cities where they planned their next heist. They also discussed that their top banana costumes were a perfect disguise. The thinking was that no one would suspect it really was him or her so they could breeze into town, don the costumes, rob the bank, stash the costumes, and leave at their convenience.

Unfortunately for the trio, when they arrived in Twin Bank City, according to their preplanned itinerary, they went for breakfast to discuss last-minute details. They started reminiscing about their last three heists, which netted them $200.00, and laughed uproariously over the looks on the tellers' faces when they arrived in their costumes. Sitting in the booth behind them was the sheriff's deputy, who was so fanatical about his uniform that he never wore it to breakfast to be sure he didn't get egg yolk or catsup stains on it. The trio of robbers finished eating and went out to the parking lot to finish gassing up the car, check the tire pressure, and begin their day at the bank. *Question*: Can the sheriff's deputy follow them out to the parking lot and request permission to search the bags they have placed on the ground beside the car? *Answer:* Yes, in most jurisdictions. The conversation the trio had was in a public place, overheard by the person in the next booth, who, as luck would have it, was a deputy sheriff.

seizure
Personal exercise of the possessory right to particular property is interrupted or denied by virtue of government action.

Seizures and the Fourth Amendment Guarantees

Legally, **seizure** occurs when personal exercise of the possessory right to particular property is interrupted or denied by virtue of government action. A mere distraction or brief interlude does not constitute legal interruption sufficient to meet the seizure standard. *U.S. v. Jacobsen*, 466 U.S. 109 (1984), articulated the legal requirements and the standard for seizure with a court

RESEARCH THIS!

Research your state criminal law related to reasonable expectation of privacy as embodied in your state criminal code.

challenge. Destruction, deprivation of use, or removing from actual or constructive possession all qualify within the ambit of seizure law. Constructive possession occurs when an individual has effective control, possession, care, and custody over specific property.

Example:

Bright Bobby and Nasty Ned have been terrorizing young punk rockers. Bright and Nasty have robbed many rockers of their leather jackets and hair dye. Thus, the rockers cannot go out in public making their fashion statements without fear of being robbed. When Bright and Nasty finish their daily pillaging of the punkers' stuff, they take it to a large warehouse where they store it to ship to foreign ports for resale at extraordinary profits.

One of the punk rockers robbed by the duo, an undercover police officer, rallied immediately after the robbery. The officer followed the two and saw them running down the alley leading to the warehouse. Next, the officer interviewed them and learned details of the stolen goods' location and planned use.

Bright always kept the key to the warehouse. Nasty was arrested one day for jaywalking and, in the process of booking, was asked about the warehouse and how to get access. Nasty refused to answer, claiming that Bright had the information. Bright, on the other hand, fled the city after Nasty's arrest. *Question*: Does withholding the key to the warehouse meet the constructive possession standard as to Nasty? *Answer*: Yes. Even though Nasty does not have per se possession, he nonetheless has control and custody of the goods in the warehouse; thus, he is considered constructively in possession. When arrested, he is unable to access the goods directly, but nonetheless he retains constructive possession.

Exclusionary Rule

exclusionary rule
Circumstances surrounding the seizure do not meet warrant requirements or exceptions; items seized deemed *fruit of the poisonous tree* are excluded from trial evidence.

fruit of the poisonous tree
Evidence tainted based on illegal seizure may not be used in a trial.

The law defines the remedies for illegal search and seizure under the **exclusionary rule**, established in the opinion rendered in *Wong Sun v. U.S*, 371 U.S. 471 (1963). Briefly, this case challenged the seizure of certain items pursuant to a legal warrant and search. The court found that, in circumstances that do not meet warrant requirements or exceptions, items seized are deemed **fruit of the poisonous tree** and thus may not be used.

Once the court finds the evidence falls within the exclusion, the evidence is excluded from the proceedings. Regardless of how damaging the exclusion may be to the prosecution's case, it simply is not admissible. The practiced professional understands the potential for exclusion and further understands the potential for harm to the prosecution; thus, it most often operates appropriately. However, there are some circumstances that may arise that ultimately result in exclusion. The fruit of the poisonous tree doctrine, however, is a powerful tool to ensure scrupulous adherence to the requirements of law in the conduct of police business.

Example:

A police officer executes an illegal warrant at Jumbo's house. In the course of the search, the officer discovers three timers, fuses, and other bomb-making equipment. Additionally, there are maps on the table with large red "x" marks at the site of several high-rise office buildings. However, none of this evidence is available if the warrant was illegally secured and/or executed. Several days later, however, Jumbo appears at the police station carrying the disputed material and states to the desk sergeant that he is there to confess that he was planning to bomb certain sites throughout the city. *Question*: Is any taint to the materials cured? *Answer*: Yes. Jumbo admitted the intended use and may be arrested based on his own statements. The materials are available for evidentiary purposes.

Probable Cause under the Fourth Amendment

probable cause
The totality of circumstances leads one to believe certain facts or circumstances exist; applies to arrests, searches, and seizures.

Undoubtedly, you have heard of **probable cause**, whether in the media, on television, or at a movie. It is an enormously popular and greatly misunderstood principle of criminal law. On the one hand, it is relatively easy to define. It exists when the totality of the circumstances lead the police officer to believe certain facts or circumstances exist based on facts, knowledge, and reliable information the officer may have. The doctrine applies to arrests, searches, and seizure.

In relation to arrests, the officer must reasonably believe and have sufficient facts to support the belief that a crime has been committed. Further, there must be sufficient legal cause to believe the person committed the crime. The test for probable cause sufficiency is beyond merely a hunch or experience as a police officer. The facts and information must be specific and supportable.

In relation to searches, the probable cause requirement mandates that the item for which the search is conducted must be at a specific place on a specific date and at a specific time. A possibility that something may be found is a fishing expedition, not a reasonably supported probable cause to conduct a search. In addition, the item for which the search is conducted must fall into any one or more of the following categories:

1. It is obtained directly from the proceeds of illegal activity (*fruit of the poisonous tree*).
2. It was used in committing a crime **(instrumentality of crime)**.
3. It is bona fide evidence of or from a crime that has been committed.
4. It is **contraband**.

instrumentality of crime
Used in committing a crime.

contraband
Commodity that cannot be legally possessed.

Analysis of the soundness of a search must be done on a completely *objective basis*. If the evidence presented cannot stand on its own absent a great deal of explaining, discussion, and exceptions, then the search will not pass the constitutional tests. In the event the search has been completed, any materials and other evidence from that search are excluded at trial.

reliability
Confidence of soundness.

sufficiency
Adequacy.

The starting points for assessing the quality of a probable cause application are **reliability** and **sufficiency**. Actually qualifying under these two conditions is essential and often the cause for exhaustive litigation. Information secured from third parties can be used at trial if and only if it meets the truth or **veracity test**. The information also must meet the test of the integrity of the source. The integrity is measured in terms of the probability and reasonableness that the source would or could know, provides adequate corroboration, or can provide information relating the identity of the source to the third party, which ensures the veracity.

veracity test
Meets truth or strict correctness in process and content.

The court established the **totality of circumstances test** in *Illinois v. Gates*, 462 U.S. 213 (1983). The test remains good law even today. In addition to veracity, the evidence offered must be sufficient in terms of quantity or comprehensiveness. Again, if the information provided is more appropriately described as a fishing trip, it is insufficient under the law. Reflect on why the requirement is as exacting and specific. When a warrant issues, the ultimate result can be seizure of personal property, entry on privately owned property, and, perhaps, even arrest.

totality of circumstances test
Evidence offered must be sufficient in terms of quantity or comprehensiveness.

Another aspect of probable cause was articulated in *Spinelli v. U.S.*, 393 U.S. 410 (1969). Under the *Spinelli* test, "bald and unilluminating" assertions are not considered by the magistrate in assessing the weight of support for a finding of probable cause. In operation, this means that overarching and conclusory statements, regardless of the source, are insufficient under the law. Remember that **probable cause for a search** requires identifying the thing(s) sought and assertions that it (they) will be at a particular place and time on a date certain. If the statements made in the warrant affidavit are conclusory and vague, it is more probable that a fishing trip, in hopes of finding the evidence, is the goal of the warrant, which is specifically impermissible under the law.

probable cause for a search
Thing(s) sought and assertions as to location, date, and time are correctly represented and researched prior to a search.

RESEARCH THIS!

Research to find *Spinelli v. U.S.*, 393 U.S. 410 (1969), and review the case opinion for the discussion related to the appropriate standard as well as the reasoning for rejecting "bald and unilluminating" assertions as insufficient. Briefly summarize the analysis and retain a copy in your PRM for easy future reference and use.

Warrants and Fourth Amendment Guarantees

affidavit
A sworn statement.

Under our system, a *warrant* is valid if and only if the requisite conditions are met. The first essential element of a perfected warrant is an affidavit stating clearly the probable cause for securing the warrant. An **affidavit** is a sworn statement, signed by the securing officer, setting forth with detailed specificity the basis upon which the reasonable expectation for seeking such relies.

A neutral, unbiased magistrate reviews the warrant application. A neutral reviewing magistrate ensures that the facts presented are indeed clear and meet the specificity test and that the facts, rather than emotional or other bias, support the proceeding. The magistrate questions the officer to ensure consistency and accuracy. The questioning and review process minimizes the potential for presenting inconsistent or inaccurate information in support of the application. Once the review of the written and oral responses is completed, the magistrate issues the warrant, thus creating the legal document sought. Following issuance, the warrant is executed by the appropriate officer(s) under conditions required or otherwise consistent with the law.

Having completed the search, the officer is required to report to the issuing magistrate the results of the search. The report must include itemized lists of the property seized, if anything, as well as persons involved and, lastly, the places searched, again specifically. The address of the place searched is inadequate. The precise places within that address are required. If the search is not completed within 10 days of the date the warrant issues, a new application is required. Arrest warrants, however, are not subject to the same rule and remain in full force regardless of the passage of time.

Obtaining a valid warrant does not allow the officer unrestrained access to the subject premises. The law requires knocking and announcing the purpose and the identification of the person seeking admission. There are exceptions to the knock rule. The officer must have a reasonable belief that

1. A knock would be futile.
2. Knocking would create dangerous circumstances for the executing officers.
3. Knocking may endanger some or all of the persons inside the location.
4. Knocking would have the effect of permitting time for the evidence sought to be destroyed, thus negating the value of the warrant.

The reasonableness of the condition(s) for waiving the knock is determined by the facts. Each circumstance differs, and the courts respect the discretion of the officer, but nonetheless all required tests and standards are verified to ensure consistency.

Once inside the premises, the warrant authorizes the officer(s) to search the itemized locations, providing, of course, that the reasonable expectation of productive results is established. The search is not implicit permission to search anything. The warrant indicates the subject or target of the search; anything else selected must reasonably relate.

exigent circumstances
Compelling reason to believe the evidence may be destroyed or otherwise removed.

In rare occasions, under **exigent circumstances**, that is, there is compelling reason to believe the evidence may be destroyed or otherwise removed in the time it takes to process a written affidavit and warrant application, the written warrant requirement may be waived and a **warrantless search** permitted. The exceptions are listed in Figure 11.6.

warrantless search
Compelling reasons support search without a written warrant.

Under any circumstances, if consent to the search is given voluntarily, the right to subsequent objection is waived. Likewise, if an item is clearly visible in the area of the officer, then a reasonable expectation of privacy no longer applies. In the situation when an officer stops and detains an individual and conducts a pat down or external touch procedure, the court in *Terry v. Ohio*, 392 U.S. 1 (1968), found that anything causing reasonable concern that it may be a weapon, or the like, may be legally seized. A related exception concerns situations when there is an arrest and subsequent search. The theory is that, without taking this precaution, the officer may be endangered if a weapon is concealed. In circumstances where the evidence may disappear such as when a driver is arrested for suspected drunkenness, no search is required for administration of a blood alcohol test.

FIGURE 11.6
Warrantless Search Exceptions

WARRANTLESS SEARCH EXCEPTIONS	
• Consent to search	• Preservation of evidence
• Plain view	• Emergency searches and hot pursuit
• Stop and frisk	• Border searches
• Search incident to arrest	

If the officer waited for a warrant, even if obtained on an expedited basis, the evidence in support of the arrest could evaporate. In emergencies, an officer does not need a warrant. If, while responding to the emergency, instrumentalities of crime are identified, no search warrant is needed. The final exception applies at the borders into and out of the country. The law specifically provides for warrantless searches since, by definition, the border patrol functions to protect the borders from an influx of threats to the safety of the citizens. Thus, the professional judgment of the officer determines the judgment as to when searches are reasonable.

TERRORISM AND CRIMINAL LAW

CYBER TRIP

Research the USA PATRIOT Act of 2001. Review the provisions and search for secondary sources interpreting and discussing the provisions of the act. Pay particular attention to the sanctions or sentencing and punishment provisions and guidelines.

A relatively high-profile aspect of the criminal law emerged following the terrorism attacks on September 11, 2001. The governmental approach to intervention and prevention relies heavily on the provisions of the Foreign Intelligence Surveillance Act of 1978 (FISA). Under the provisions of the act, the government has wide discretion to authorize surveillance on suspected terrorists or persons suspected of terrorism without a probable cause showing and warrant. The USA PATRIOT Act, officially known as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (18 U.S.C. § 1) strengthened and augmented the provisions of the prior similar acts. The act authorizes roving wiretaps, use of pen registers, and other surveillance implementations that otherwise may be excluded and illegal under both state and federal statutory provisions. Under the broad category of foreign intelligence, the government has broad discretion to design and implement strategies to intercept and prevent terrorism.

The act has become somewhat controversial and remains a hot topic within legal circles. The relative newness and scarcity of formal legal challenges create relatively little case law of interpretive opinions to date. Nonetheless, the provisions and implementation are a reality of this day and time, and well worth becoming familiar with as a professional paralegal.

Eye on Ethics

Criminal law, by its very nature, presents a wide array of ethical challenges for the paralegal and the attorney. One of the most-often-asked questions for professionals in this specialty is how they can defend a guilty person. The nature of criminal law practice introduces a great many more deep-seated issues and potential conflicts than other types of law because so many of the issues touch deeply held, morality-based social values as well as alleged breaches of legal principles of social order.

You are the paralegal assisting lead counsel for an accused serial rapist and murderer. The crimes are particularly heinous and the graphic evidence collected at the scenes is both disturbing and repugnant in the incredible depravity demonstrated. You have accompanied your attorney on a number of client interviews and have met a number of the potential witnesses and family members. You are increasingly troubled by the almost charismatic manner of the client, which is in stark contrast to the horrific crimes. As more of the evidence develops, the conflict becomes more pronounced. You cannot get the case details out of your mind; you are experiencing difficulty focusing on your job tasks related to assembling the case for trial, which is expected to last at least four months, so there is an enormous amount of evidence involved. You are increasingly disturbed by the contrast between the person and the depravity of the crimes. The defendant has been the major motivator for you to continue working on the file whenever your doubts become too pronounced. As you near the trial date, however, the conflict is the only aspect of the case in your mind. Your job is suffering, the trial preparation is falling behind, and you are terrified at the thought of sitting in the courtroom assisting your attorney day in and day out reliving the details. When you get to the point that you call the doctor to get a prescription to help you cope and relax, you realize that things have gone too far. You face the truth that is at the core of the conflict. You know that you are unable to continue because your deeply held moral values make it impossible for you to continue to do the best that you must do for the client. You decide to tell your attorney that you must be replaced on the case because your conflict is so overwhelming you simply cannot go on. You believe the defendant is guilty, and you want no part in the defense of this client.

Discuss the code sections you would rely on to frame your presentation to the attorney and any guidelines for the attorney that should assist in resolving this conflict.

Summary

In this chapter, we have investigated the criminal process and trial procedure. You analyzed a few of the major Fourth Amendment opinions related to criminal defendants and how the law is applied in a variety of situations. Exceptional circumstances in which the strict requirements for warrants prior to search and seizure may be waived also were discussed. In addition to the Fourth Amendment, you looked at other amendments applied to the criminal arena. You had an opportunity to see how the courts balance the interests of the individual detainee, the arresting officer, and society in making not only the exceptions but the rules as well. You were introduced to the post-conviction phase of the trial process when appellate challenges are filed and processed, including extraordinary petitions for case reconsideration. The relatively recent USA PATRIOT Act was presented, which, by virtue of the focus on terrorism, is clearly designed to protect society from impairment of the individual and collective rights through acts of subversion and terrorism. The potential ethical challenges and conflicts in criminal practice were introduced for consideration. Upon completion of the materials, cyber trips, and other research activities and assignments, you should feel competent in your understanding of this area of law and professional performance in a firm handling criminal matters.

Key Terms

Actus reus
Affidavit
Appeal
Arraignment
Arrest
Bail
Bench trial
Beyond a reasonable doubt
Burden of proof
Common law
Confrontation Clause
Contraband
Conviction
Criminal law
Double jeopardy
Exclusionary rule
Exculpatory evidence
Exigent circumstances
Federal Rules of Criminal Procedure (Fed. R. Crim. P.)
Fourth Amendment
Fruit of the poisonous tree
Indictment
Information
Instrumentality of crime
Katz expectation-of-privacy test
Mens rea
Miranda warnings
Model Penal Code (MPC)
Motion to suppress
Open-fields doctrine
Pen register
Plaintiff
Preliminary hearing
Preponderance of the evidence
Pretrial motions
Probable cause
Probable cause for a search
Prosecutor
Reasonableness
Reliability
Seizure
Sixth Amendment
Speedy trial
Standing
Statutory law
Sufficiency
Supremacy Clause
Totality of circumstances test
Trial
Trier of law
Trier of fact
Veracity test
Warrant
Warrantless search
Writ of certiorari
Writ of habeus corpus

Review Questions

TRUE AND FALSE

Respond to the following by marking true or false. For those responses marked false, provide a sentence that makes the false statement true.

1. In a criminal trial, jury instructions are presented prior to taking evidence so the jury understands the law of the issues.
2. A criminal defendant waives any fundamental rights protections upon completion of the initial appearance.

3. A crime must have both a mens rea and an actus reus component to be completed.
4. In a criminal matter, the jury determines guilt and the sentence for the crime charged.
5. The judge in a misdemeanor bench trial fills the role of both trier of fact and of law.
6. Under the Eighth Amendment, the defendant is entitled to a speedy trial in criminal matters.
7. Under Fifth Amendment guarantees, the criminal defendant has no protection against forced self-incriminating statements.
8. There are no exceptions to the warrant requirement in arrest, search, and seizure instances.
9. Under the expectation-of-privacy test, an individual has no rights to assert protection from unreasonable search when detained for questioning prior to arrest.
10. Probable cause has been universally interpreted to mean that the police may check into situations they believe could lead to criminal activity or materials useful in committing a crime.

Discussion Questions

1. Visit the following Web site for the U.S. Supreme Court, www.supremecourtus.gov/opinions/opinions.html. Navigate through the site and find the slip opinions section. Then go to recent (2005) slip opinions. Select and read several to get an idea of how the Court reaches its decisions. Click on the links to the following cases: *Kane v. Garcia Espitia, Bradshaw v. Richey*, and Eberhart v. United States, all of which were reported on October 31, 2005. Select one of the opinions and write a case brief, including the decision in the lower court and any salient facts you believe support the decision of the Supreme Court to hear the case. Be sure to identify the nature of the criminal infraction as well as the specific legal issue raised on appeal.
2. Review the Moussaoui indictment (www.usdoj.gov/ag/moussaouiindictment.htm). Based on the contents, identify the claims or criminal charges you would expect to see in the criminal complaint filed. After identifying the claims, research federal law to determine the elements of the crime that must be shown at trial to support a conviction.
3. Read the following and respond to the questions posed:

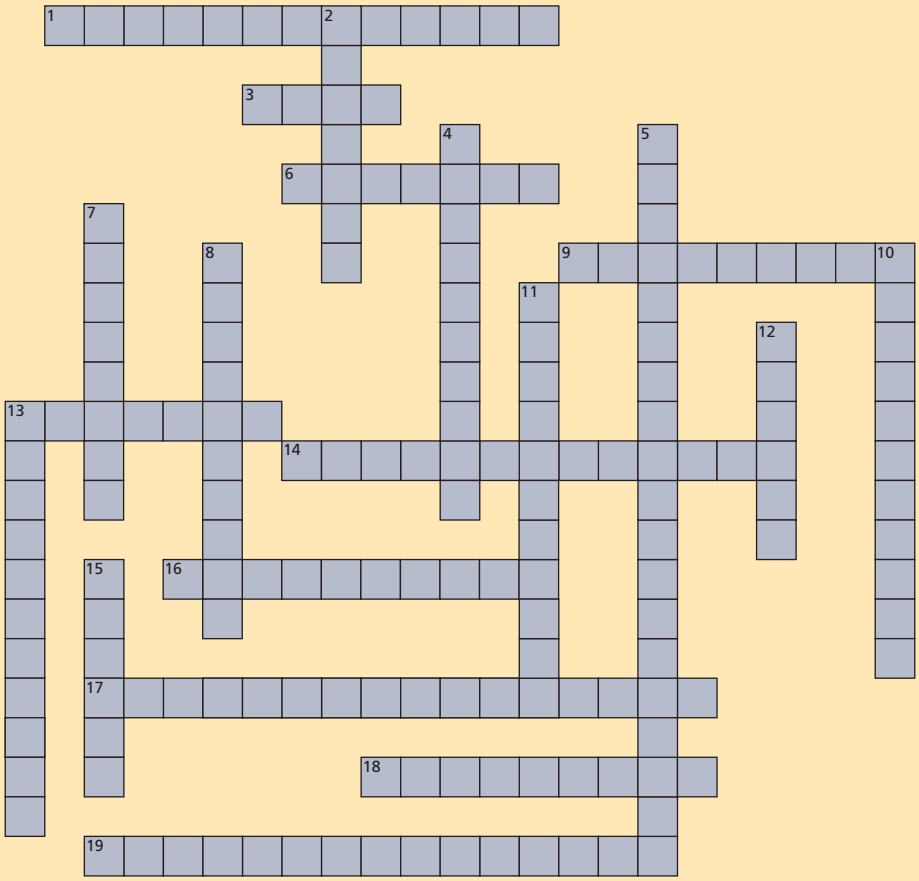
   If a neighbor continually uses the regular trash containers, collected at the curbside, to dispose of illegal drug h, including ingredient labels from known illicit drug by products, then he or she cannot assert a right to privacy and attempt to void or overturn a search warrant.

   Has your neighbor effectively waived his or her right to privacy? Identify the case on which you rely in your response and why. What standard applies in assessing the merits of the assertion of a right to privacy?
4. Read the jury instructions from the O.J. Simpson trial once again. Prepare a brief summary of the key points raised, the evidence supporting those points, and a critique of the form and substance. Use your points as discussion points in a class discussion. Retain your completed document in your PRM for easy future reference.
5. Pair project. Read the opinion in *Victor v. Nebraska*, 511 U.S. 1 (1994). Discuss the opinion with your partner and then collaborate to write a summary of the major points, the case law relied upon to support each point, and the holding of the case.

Portfolio Assignment

Select one of the cases mentioned in the chapter and read the case opinion. Prepare a brief summary of the case facts, including identifying the charges against the defendant. Now locate the federal criminal jury instructions and select the instructions most appropriate for the charged crime. In the event you find several similar charge points, identify the strengths and weaknesses of each. Retain your completed summary, including the jury instructions selected, in your PRM for easy future reference.

Vocabulary Builders



Across

1. Greater weight.
3. Monetary guarantee of appearance.
6. Guilty mind.
9. Sworn statement.
13. Taking.
14. Legally sufficient reason.
16. Issued by a grand jury.
17. Omit evidence.
18. Action.
19. Prioritizes federal and state law when in conflict.

Down

2. Compelling or pressing.
4. Judge.
5. Right to face accuser and evidence.
7. Legal position.
8. Illegal material or things.
10. Jury.
11. Excuses or contradicts potential guilt.
12. Tests legal adequacy and basis.
13. Adequacy.
15. Detain involuntarily.

Chapter 12

Introduction to Intentional Torts

CHAPTER OBJECTIVES

Upon completion of this chapter, the student will be able to:

- Discuss the history and evolution of tort law.
- Describe tort law theory and principles.
- Identify intentional torts to a person and the elements of each.
- Explain the defenses to intentional torts and the elements of each defense.
- Explain legal strict liability.
- Research case law related to elements of intentional torts and defenses.
- Demonstrate an understanding of the facts required to support claims and defenses.
- Illustrate an understanding of ethical principles with clients and tort claims.

The subject of this chapter is tort law, which governs civil wrongs, or noncriminal matters. If the French monarch King Louis XIV were correct when he announced to his subjects that he was the state, expressing this belief by making law to suit his unique needs regardless of the impact on others or inconsistency with previously passed law, we would have no tort law or civil wrongs. Law in the tradition of Louis XIV was inconsistent and designed to advance narrowly defined rather than societal needs. It is clear under our system of law that merely wanting to do something does not mean it is legal. In our legal system, **tort** law theory and principles apply to civil wrongs. In this chapter, you will become familiar with intentional torts and the elements of each as well as legal defenses available with claims involving intentional torts. You will learn how to apply the elements of each tort to determine the viability of legal defenses, effectively frame client interview questions, and draft persuasive comprehensive legal documents. A brief historical overview begins the chapter to help you develop an appreciation of the evolution of tort law as well as its social function, legal role, and value.

tort
A civil wrongful act, committed against a person or property, either intentional or negligent.

HISTORY OF TORT LAW

Tort law is a relatively recent legal development. You may recall, in ancient times, the *Law of Hammurabi*, based on the concept of an eye for an eye, was the prevailing legal theory. In practice, the law served ideals of strict retribution and punishment for misdeeds. As an example, if a man looked immorally at the wife of another, gouging out the offending eyes was the appropriate punishment. Thus, the eyes could not offend again. If someone stole, the offending hand or

FIGURE 12.1
Types of Torts

Intentional:	Tortfeasor acted voluntarily to commit the act
Negligent:	Tortfeasor did not intend for the wrongful act to occur, but nonetheless acted in a way to create the environment in which the harm or injury occurred
Vicarious liability:	An action by one person is imputed to be the responsibility or shared responsibility of another; thus, both may be held liable
Strict liability:	The complained-of wrong is such that the plaintiff need not prove liability; it is understood at law to be the responsibility of the actor by its very definition

fingers were cut off to prevent repetition, and so on. No distinction between civil and criminal offenses existed. One system handled all offenses. As society evolved, the law and the related punishments also evolved. In our system, taking the offending body parts has given way to the concept of restitution in the form of monetary awards for civil wrongs and incarceration for criminal or societal wrongs.

Tort law evolved more rapidly in the latter part of the 20th century than ever before in history. That is not to say there were no civil actions prior to the late 1900s, but the population growth, technology explosion, industrialization, increased social sophistication, diversification, and expanded legal thought and practice all contributed to the growth of tort law.

paternalism
One person looked out for another; companies took care of their employees.

Prior to the 20th century, relationships between employer and employee, neighbor and community, and citizen and society were quite different than they are now. A sense of **paternalism** existed, which means that one person looked out for the well-being of another. Employers took care of their employees, and the community took care of its individual members. With increased industrialization, the union movement, established specifically to protect the rights of workers, replaced paternalism. The union movement's goal was to enhance rather than interfere with industrialization by protecting the workers directly responsible for implementing the planned national growth.

The legal eradication of slavery was another important influence on the expansion and development of tort law. Prior to the Civil War, many otherwise-legitimate legal claims arose between slaves and owners. Civil courts never adjudicated such disputes because they were solely within the purview of the slave owner. Once those relationships were eliminated, dispute resolution between private citizens more aggressively moved into the courtroom and the judicial system.

The original tort actions were largely related to employer–employee relations. As the number of actions grew, the law recognized that courts should not be required to adjudicate issues between employers and employees if the growth of the country was to continue. Thus, workers' compensation and labor legislation were enacted, setting the stage for the master–servant principle to become the law of the land. Employees could no longer sue employers either for injury incurred in the workplace or for actions of fellow employees. A separate division or specialty area focusing on employer–employee rights and recompense developed to adjudicate these disputes, with the twin goals of unclogging the legal system and providing legal remedy and compensation for injured workers. This cleared civil courts of general jurisdiction to focus on the growing tort law caseload.

intentional
Voluntarily and knowingly undertaken.

negligent
Careless or unintentional act or omission.

strict liability
The defendant is liable without the plaintiff having to prove fault.

tortfeasor
Actor committing the wrong, whether intentional, negligent, or strict liability.

preponderance of the evidence
The weight or level of persuasion of evidence needed to find the defendant liable as alleged by the plaintiff in a civil matter.

There are several distinct categories of *torts*, including **intentional**, **negligent**, *vicarious* (*respondeat superior*), and **strict liability**. (See Figure 12.1.) In every class of tort, however, the **tortfeasor** is the actor committing the wrong complained of, whether intentional, negligent, or strict liability. In cases that go to trial, the plaintiff must meet the legal standard of proof of showing through a **preponderance of the evidence** that the defendant bears liability for the complained-of wrong.

OVERVIEW OF INTENTIONAL TORTS

intentional torts
An intentional civil wrong that injures another person or property.

Intentional torts require an act or omission, committed voluntarily with some intent, causing some injury resulting in damage to the plaintiff. The ultimate consequence of a finding of **civil liability** is never incarceration. Thus, in that respect, tort law differs substantially from criminal law. In criminal law, the jury finds the defendant guilty, while in tort actions, the defendant is liable and the remedy available to the plaintiff is payment for damages or money.

civil liability
Finding that the defendant acted or failed to act, resulting in damages or harm. It cannot be punished by incarceration.

The standard for establishing civil liability is *preponderance of the evidence*. In a criminal context, the burden of proof is much higher than in civil matters. The standard for finding a criminal defendant guilty is *beyond a reasonable doubt*. In criminal law, the plaintiff is the state because criminal wrongs are construed as against society, while civil wrongs are against an individual citizen. The state or government has an interest in civil wrongs only to the extent that they occurred within this country. At the same time, the state has no right to redress private harms. The government responsibility with civil wrongs ends with ensuring an environment conducive to resolving such disputes when the parties are incapable of resolution themselves.

Intentional torts are often difficult to distinguish from criminal wrongs because they are similar in many respects. A tort is a wrong against an individual rather than the state or societal values such as murder. The nature of the underlying issue is such that the harm inures to only one individual and has no real consequence to the society as a whole or the rights of society under our constitutional form of government. A defendant could be charged criminally and then face civil suit for similar acts in many cases. In criminal cases, conviction may result in a period of incarceration. In a civil action, liability may result in a monetary judgment. The standards of proof differ between civil and criminal actions. The standard or degree of certainty is lower in civil actions, thus it is somewhat easier to prevail in a civil than in a criminal action.

proximate cause
Defendant's actions are the nearest cause of the plaintiff 's injuries.

overt act
Identifiable commission or omission, an intentional tort requirement.

With claims of negligence, which we will discuss more fully in the following chapter, the plaintiff must show the defendant owed a *duty* and breached the identified duty. The *breach* must be both the factual and **proximate cause** of the *injury* or harm, and *damages* arose directly from the alleged breach. Intention of the actor is not an element in a negligence claim, but it is essential with intentional torts.

GENERAL REQUIREMENT FOR INTENTIONAL TORTS

intent
Having the knowledge and desire that a specific consequence will result from an action.

transferred intent
The doctrine that holds a person liable for the unintended result to another person not contemplated by the defendant's actions.

causation
Intentional act resulting in harm or injury to the complaining plaintiff.

Intentional torts require an identifiable or **overt act**. This tells us that, without visible evidence, it will be difficult if not impossible to sustain the claim. The next element is some form of **intent**. In tort claims, evidence of intent to do an act to one person, but that in fact injures another, known as **transferred intent**, is adequate to meet this requirement. The next element is **causation**, which means the act was intentional and did result in harm or injury to the complaining plaintiff. If the act and the injury claimed are unrelated, then the causation element will be difficult if not impossible to show to the degree needed to meet the preponderance of evidence standard.

The category of intentional torts includes **torts against the person** such as assault and battery; false imprisonment; defamation, whether libel or slander; and intentional infliction of emotional distress. The other category of intentional torts is **against property**, including trespass to land and chattel, interference with business relations, and conversion. (See Figure 12.2.) In addition, there are torts of nuisance and malicious prosecution. The fundamental distinguishing element between intentional and negligent torts is the intent. Without a persuasive showing of intent, the plaintiff cannot prevail in claims involving any of the intentional torts.

FIGURE 12.2
Intentional Torts against Property and Persons

TORTS AGAINST PERSONS	TORTS AGAINST PROPERTY
Tortious assault	Trespass to land
Tortious battery	Trespass to chattel
Intentional infliction of emotional distress	Conversion
False imprisonment	Interference with business relations
Defamation	
a. Libel	
b. Slander	

TORTS AGAINST PERSONS

torts against the person
Assault and battery; false imprisonment; defamation, either libel or slander; and intentional infliction of emotional distress.

torts against property
Trespass to land and chattel, interference with business relations, and conversion.

assault
Intentional voluntary movement that creates fear or apprehension of an immediate unwanted touching; the threat or attempt to cause a touching, whether successful or not, provided the victim is aware of the danger.

The vast majority of civil suits involving injuries to persons are personal injury cases in which a negligent act caused injury to the persons. However, there are also torts against persons that bear a remarkable resemblance to criminal actions of similar type. You may recall that negligence or an absence of malicious intent is a characteristic of civil actions. The civil codes of the past included civil tort actions against persons suich as defamation, assault and/or battery, intentional infliction of emotional distress are good examples of these torts against persons. Claims for civil torts frequently accompany another civil claim against the same defendant. While these tortious claims against persons are comparatively rare, you must apply the appropriate analysis of the elements, defenses and reasonable person standard as the measure of liability for such claims, just as you would with other civil actions. Bear in mind that the standard of proof for torts against persons is the same as any other civil action, i.e. preponderance of the evidence.

Tortious Assault

No per se touching is required in a claim for tortious assault. What is required for the tort of **assault** is an act, the overt act element, which results in the plaintiff reasonably fearing immediate danger of a battery. Of course, the plaintiff must show the act was the cause of the harm, which is fear of an imminent battery and damages resulting. Assessing whether the act complained of rises to the standard of tortious assault is measured by the reasonable belief of the complaining party. When evaluating the claim of tortious assault, the entire situation is assessed as a whole and as discrete parts. The mere fact of a threat alone is insufficient to make a finding of assault. (See Figure 12.3.)

Realistically, if a battery never subsequently occurred, it becomes difficult to prove tortious assault based on the preponderance of the evidence standard. On the other hand, fear is the essence of the claim. Thus, evidence showing that the plaintiff was fearful as a direct and reasonable consequence of the assault is important. Without such evidence, proving the complained-of behavior rose to the level of a tort causing harm, which was fear of an immediate battery, is virtually impossible. After establishing fear sufficient to meet the preponderance of the evidence standard, the plaintiff still needs to show harm or injury sufficient to support an award of monetary damages.

Example A:

Rhonda was the scourge of the neighborhood. She roamed the area looking for trouble, or so the neighbors believed. Grezelda lived in the same house for 30 years, so her behavior was well known to everyone in the area. One day on her daily search, Rhonda walked in front of Grezelda's house as she completed planting her annual fall flowerpots. Rhonda took one look at Grezelda's handiwork and started yelling and screaming: "I hate those ugly orange things! You killed your beautiful summer snapdragons to plant these ugly things!" While going through all of this, Rhonda was madly waving her umbrella and screaming several times: "If you do this again next year, I will bop you on the head, swing at the blooms with my umbrella, and lop off their heads." *Question*: Can Griselda sue for tortious assault? *Answer*: No. The threat of a battery was not present because the threatened touching would not occur until the distant future, if at all. As such, no cause of action arises.

Example B:

Another day, Rhonda was in front of Dan's home while he decorated his front lawn. He had painted the picket fence a lovely shade of purple with green trim. Rhonda saw Dan's new color scheme and started yelling and screaming: "I hate those colors! You know we are not allowed to use those colors on our houses. You have ruined my neighborhood." While

FIGURE 12.3
Elements of Tortious Assault

1. Overt act
2. Causing fear of immediate danger
3. In another
4. Of imminent battery
5. Resulting in damage or injury

RESEARCH THIS!

Research your home state case law related to intentional tortious assault. Pay particular attention to the factual setting and proof shown. Read opinions in which the claim failed and the rationale in the opinion describing why the evidence failed to meet the applicable legal standard of proof.

ranting and raving, Rhonda was madly waving her umbrella while repeatedly screaming: "If you don't stop it now, I will bop your brains out with my umbrella." Dan became more upset and frightened as Rhonda continued her screaming fit. He had never seen such behavior. Rhonda wildly flailed her arms and her umbrella narrowly missed Dan's head and arms repeatedly. "Stop! You are scaring me!" Dan screamed repeatedly, but to no avail. Rhonda kept screaming, and Dan became more frightened with each swing. He was afraid that she would beat him to death, and the more she ranted, the more fearful he became. *Question*: Can Dan sue Rhonda for tortious assault? *Answer*: Very probably yes, since he feared an immediate battery.

battery
An intentional and unwanted harmful or offensive contact with the person of another; the actual intentional touching of someone with intent to cause harm, no matter how slight the harm.

Tortious Battery

The elements of the tort of **battery** are similar to those of criminal battery. That is, the cause of action requires evidence of an *unwanted* and *intentional touching*. The touching must be intentional and result in causing harm or injury; determining if the touch was unwanted applies the **reasonable person standard**. This is a more objective standard and enhances both legal consistency and community expectations of the scope of permitted and prohibited behavior. This means that when objectively assessed, a reasonable person would consider the complained-of activity both unwanted and the cause of harm. (See Figure 12.4.)

reasonable person standard
When objectively assessed, a reasonable person would consider the complained-of activity both unwanted and the cause of harm.

Example:

While waiting in line at the newest yuppie coffee café, Suave Steve turned around to check his grooming in the freshly cleaned window and bumped into Eloise Entwhistle. She squealed, "You hit me! You touched me! I will sue you. My newly pressed blouse is wrinkled, and I spilled my coffee on my new high-heeled sneakers." *Question*: Should Eloise sue? *Answer*: No. The touching may have been unwanted and indeed caused some damage, but it was not intentional. A reasonable person looking at the facts could not find intentional, unwanted touching sufficient to meet the preponderance of the evidence standard.

intentional infliction of emotional distress
Intentional act involving extreme and outrageous conduct resulting in severe mental anguish.

Intentional Infliction of Emotional Distress

In the tort of **intentional infliction of emotional distress**, the plaintiff must show that he or she suffered damage caused by an intentional action by the defendant to create extreme duress. (See Figure 12.5.) A fundamental inquiry looks at the nature of the conduct causing the alleged injury. The conduct must be **outrageous**, which legally means exceeding all bounds of decency and propriety. Merely annoying behavior does not meet the standard. The behavior must be

outrageous conduct
Exceeding all bounds of decency and propriety.

FIGURE 12.4
Elements of Tortious Battery

1. Overt act
2. Causing fear of immediate danger
3. In another
4. Of imminent battery
5. Resulting in damage or injury

FIGURE 12.5
Elements of Intentional Infliction of Emotional Distress

1. Overt outrageous act
2. Causing extreme emotional upset
3. Through extreme duress
4. To another
5. Resulting in damage or injury

reckless (recklessness)
Lack of concern for the results or applicable standards of decency and reasonableness.

intentional on the part of the actor. In some instances, conduct that is **reckless** and/or performed with **recklessness** and lack of concern for the results meets the standard. Chronic, public, consistent, and outrageous or reckless conduct is potentially included in the class of behavior sufficient to base claims. In any case, the court finds that the conduct caused the resulting distress. A dispute that causes annoyance, inconvenience, and even stress is an insufficient basis for filing a lawsuit.

fragile class
Group considered particularly susceptible to harm such as the very old or the very young.

As law has evolved, certain classes of individuals, termed **fragile classes**, such as the very old or the very young, are viewed as particularly susceptible to this tort because the law assumes that class members lack the competence and the capacity to withstand the same stressors as the reasonable objective person. These are not the only individuals to maintain these claims. Innkeepers and other public entities or individuals are frequently defendants in such claims. These special classes are not the only parties involved in claims for intentional infliction of emotional distress. These classes are mentioned to reiterate the necessity of being particularly vigilant when the issue arises as these classes may be implicitly included in the facts presented.

Example:

Throckmorton was feuding with his neighbor for 20 years. His neighbor, Horrendia, had a pet macaw, Max, that screeched and squawked most of the day and well into the night. Throckmorton regularly complained to Horrendia and constantly threatened to do something about the noisy bird.

One night, after an especially difficult day, Throckmorton had a dream in which he carefully planned macaw stew, including how he killed and cooked Horrendia's pet. Throckmorton's dream was so vivid that, when he awoke the following morning and went into the kitchen for his morning coffee, he fully expected to find the bones, feathers, and beak in the trashcan. No such luck! Throckmorton was crestfallen; when he went out to get his morning paper, he was shocked to hear utter, complete, absolute silence. Suddenly, he heard Horrendia wailing and screaming that Max was dead! *Question*: Can Throckmorton be sued for intentional infliction of emotional distress? *Answer*: No. While he wanted to do the deed, and, in fact, his dream was so vivid he thought he did act, the fact is that he did not. The only cause of Horrendia's emotional distress was Max's death, not Throckmorton's wish to have macaw stew!

False Imprisonment

false imprisonment
Any deprivation of a person's freedom of movement without that person's consent and against his or her will, whether done by actual violence or threats.

The tort of **false imprisonment** includes an act of restraint that restricts a party within a defined or confined area without consent of the restrained party. (See Figure 12.6.) The imprisonment must occur in a space from which there is no identifiable means of exit or escape. Thus, forcing someone to sit in a chair in a hotel lobby, with no force or threat used and from which the individual could easily move, does not meet the standard. On the other hand, if the room is small, the individual is made to sit without moving with the door to the room closed, and the door cannot be opened from the inside, false imprisonment may be a cause of action. Not only must the act restrain the party, but identifiable damages or harm directly related to and caused by the imprisonment must ensue. Mere verbal orders and even threats fail to meet the legal standard regardless how long the person was in the particular place.

Example:

Ricky Rich was waiting in the train station for his friend. They were leaving on their annual vacation train trip through the Rocky Mountains. Ricky's friend Oscar called and advised Ricky he was detained and unsure when he would arrive, but, for sure, he was still going on the trip. Ricky fell asleep at 9:00 p.m. that evening, slid down in the seat, and was still there when the station was locked for the night and the employees went home. Ricky did not

FIGURE 12.6
Elements of Intentional False Imprisonment

1. Overt act of restraint
2. Restricting another
3. To confined space
4. With fear or force
5. Resulting in damage or injury

FIGURE 12.7
Elements of Defamation

1. Statement made (overt act)
2. Either orally or in writing
3. Causing harm to the reputation
4. Of another
5. With reckless disregard for its falsity
6. Resulting in damage or injury

wake up until the following morning when the first trainmen arrived at 5:30 a.m. It was only then that he realized he had been locked in the train station for the entire night. *Question*: Can Ricky sue? *Answer*: No. Ricky had no idea he was locked in the station. The plaintiff must both be aware of the imprisonment and suffer demonstrable injury. Neither appears to be the case under these facts.

While Ricky unquestionably spent the night locked in the station, he apparently slept well and was not there unwillingly and resulting from undue force or threat. He was fast asleep and unaware of the situation during the entire incident. Therefore, no claim can be sustained.

Defamation

The tort of *defamation* involving celebrities is often in the news media and the press. While celebrities are certainly targets of sensationalized headlines and other statements, they are not the only class of individuals for whom this tort action might be available. **Defamation** involves the oral or written publication of statements known to be false that result in harm or injury to the person's reputation. Written defamatory statements are **slander**, while oral statements are **libel**. Note that, even when oral, the statement may satisfy the overt act requirement in the tort of defamation. (See Figure 12.7.)

defamation
An act of communication involving a false and unprivileged statement about another person, causing harm.

slander
Written defamatory statements.

libel
Oral defamatory statements.

Without publication, neither libel nor slander occurs. By the very nature of their position and relatively high profile, public figures are more susceptible to claims of defamation. In fact, the landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), established special circumstances with obvious public figures in defamation actions. The *New York Times Co.* court established that

> *[t]he constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.*

CYBER TRIP

Locate information about some of the celebrity defamation suits. A good source for beginning your search is the Court TV Web site under the celebrity lawsuit link. Review some of the materials to get a better insight into the nature of the statements giving rise to the suits. Write a summary of the type of statements the courts have permitted to proceed to suit. Also, indicate any special circumstances that would render the otherwise defamatory statement not actionable under the law.

RESEARCH THIS!

Research federal and state law related to the tort of defamation. Pay particular attention to the nature of the statements and the means of publication. Shepardizing either the *New York Times Co.* or the *Welch* citations and reviewing cases referring to one or both cases provide an excellent research approach. Retain notes of your search, case descriptions, and comments clarifying the legal basis for the claim and case citations in your PRM for easy future reference.

The *New York Times Co*. standard linked with the *Welch* opinion expands the class of public officials to include public figures or celebrities. Note that actual malice is not required when the evidence shows a reckless disregard for the falsity of the statements.

In 1974, *Gertz v. Welch*, 418 U.S. 323, expanded the class of public figures, thereby making the cause of action more readily available for celebrities. Sensationalized statements presented in such a way as to damage individuals, including a celebrity's reputation or standing in the community, were included in the class of potential defamatory statements actionable under the law.

TORTS AGAINST PROPERTY

In addition to the intentional torts against persons, there are also claims against individual property within the classification of intentional torts. In practical terms, this means that, under certain circumstances, a tort action may be commenced when real property, typically understood to mean real estate, or personal **chattel**, which is anything movable, is involved.

chattel
Tangible personal property or goods.

Trespass to Land

trespass to land
Intentional and unlawful entry onto or interference with the land of another person without consent.

The tort of **trespass to land** occurs when evidence shows the defendant physically invaded the plaintiff's land. (See Figure 12.8.) The entry must be intentional and must cause the complained-of harm or injury. As with other torts, the relationship between the entry and the damages alleged must be proximate, or closely related.

Example:

In June, Mitzi looked out her living room window and saw Polly walk across the swale in front of Mitzi's house, rather than using the designated crosswalk. As Mitzi ran to get her umbrella to scare Polly, the telephone rang and Mitzi answered it. When she finished talking to her brother, Mitzi ran to the front door, but Polly was nowhere to be seen.

In late September, Mitzi realized that her lawn was turning from lush green to brown, spotty, sparse stalks with lots of dirt. At that same moment, she remembered the afternoon in June when Polly walked on the swale. Mitzi called Polly and calmly announced that she would finally be able to sue her and wipe her out financially. *Question*: Can Mitzi properly bring a claim for trespass on land? *Answer*: No. The damages are neither proximate to the trespass nor reasonably related to Polly walking on the swale. Thus, there is no viable cause of action.

Trespass to Chattel

trespass to chattel
Interfering with the right to freedom of possession of chattel, or personal property, rightly owned and possessed.

Trespass to chattel involves interfering with the plaintiff's right to freedom of possession of chattel or personal property, rightly owned and possessed by plaintiff. (See Figure 12.9.) Chattel, being movable, includes everything within the individual's possession or control. The complained-of interference must cause actual identifiable damage to support the cause of action. Kitchen cabinets attached to the floors and walls are not movable; thus, they are not

FIGURE 12.8
Elements of Trespass to Land

1. Uninvited
2. Intentional entry (overt act)
3. Onto the property
4. Of another
5. Resulting in damage or injury

FIGURE 12.9
Elements of Trespass to Chattel

1. Uninvited
2. Intentional interference
3. With right of another's
4. Possession of personal property
5. Resulting in damage or injury

RESEARCH THIS!

Research your home state law on the intentional tort of trespass to chattel. Look for case opinions describing exceptions, if any. Create a checklist for determining the scope of covered property and exceptions. Retain your checklist in your PRM for easy future reference.

considered chattel. If the cabinets are damaged or removed, redress is still available, but a cause of action for trespass to chattel would be the inappropriate theory of recovery.

Tortious Conversion and Interference with Business Relations

conversion
An overt act to deprive the owner of possession of personal property with no intention of returning the property, thereby causing injury or harm.

To find liability for **conversion**, the jury must find that the defendant engaged in an overt act to deprive the owner of possession of personal property with no intention of returning the property, thereby causing injury or harm. In cases of conversion, the taking is coupled with the intention to deprive the owner of permanent possession. If both elements are not shown persuasively, liability cannot be found against the defendant. While the result may appear to support the claim, in practice it is often challenging to prove the intent element. In conversion claims, the plaintiff must show the intent to deprive the owner of possession at the time of the taking.

Example:

You and your neighbor have always enjoyed a good relationship, including giving one another unlimited access to the various tools each respectively kept in the garage. You needed the leaf blower one fall afternoon and so, as usual, you went to your neighbor's garage and took his blower. Five months later, as you both prepared to get your spring gardens ready, you opened your garage door and your neighbor yelled, "You took my leaf blower. I had to buy another one, so I am suing you for conversion." You tried telling your neighbor it was unintentional and that you simply forgot to put it back when you finished the job the previous fall. *Question*: Can your neighbor prevail in a claim for conversion? *Answer*: Most likely, the jury will rule against your neighbor. The totality of the circumstances seems to support that you inadvertently forgot to return the leaf blower. Your neighbor would be unable to prove the elements of the tort by a preponderance of the evidence.

interference with business relations
Overt act causing disruption or interruption to a business done with the intent to harm the business.

The tort of **interference with business relations** requires a showing of an overt act on the part of the defendant that causes disruption or interruption to the business of the plaintiff and is done with the intent to harm the business. The action also must be the proximate cause of harm or injury to the business. An enormous challenge in cases of intentional interference with business relations is proving the damages. Often the business owner believes the complained-of act caused a decrease in business revenues. From a practical standpoint, proving that something did not take place is enormously difficult, if not impossible. To prevail, therefore, extrinsic and other evidence directly relating the act to the decline are essential.

CYBER TRIP

Research the tort of intentional interference with business relations in Am. Jur. 2d, the *Law (Second) of Torts,* and your home state statutes and case law. Pay particular attention to the award of damages and the factors used by the courts to determine the amount of the award. Prepare a summary of the factors considered, the cases cited, and the key points supporting the findings from the case opinions. Retain your completed materials in your PRM for easy future reference.

DEFENSES TO INTENTIONAL TORTS

defense
Legally sufficient reason to excuse the complained-of behavior.

The mere fact the plaintiff files an action does not necessarily say that the defendant is liable. The law has made several defenses available, which, if applicable and persuasive, may articulate an exception to the law, thus removing the possibility of a finding of liability. (See Figure 12.10.) What exactly is a **defense**? A defense is a legally sufficient reason to excuse the complained-of behavior. Both facts and law must support the contention that, while the overt act occurred, the tortuous intent was wholly absent and the defendant tortfeasor should not be liable for the resulting harm or injury. We will look at the acknowledged defenses one at a time.

In practical terms, defenses enable the defendant to show evidence that, while the act occurred, it was the result of one of the conditions under which force or injury is permitted under tort law principles. The possibility of a defense being raised does not in and of itself defeat your client's claim. The possibility imputes an obligation to get the facts from your client and further, as the case develops, be aware of the law and, particularly, the evidence required to succeed with such defense.

Protection as a Defense to Intentional Tort

protection defense
Includes self-defense, defending another, and defending one's own property.

The defense of **protection** includes self-defense, defending another, and defending one's own property. The defense is available if and only if the evidence shows that the act of protection took place concurrently with the complained-of act or situation. The force and vigor of the defense must be reasonable to the situation and performed out of a sense of duty, not casually or in a manner unfitting and overwhelming for the situation. Deadly force may not be used when real property is at issue and only threats to use deadly force are permitted in situations involving

PRACTICE TIP

As a paralegal in practice, it is important to recognize there may be defenses raised when your client files a tort claim. Therefore, in the client interview, get all of the facts reasonably necessary not only to support the claim but to counter the possibility of any defenses the defendant might raise. Developing a clear understanding of the defenses related to each cause of action is essential to the professional paralegal.

FIGURE 12.10
Intentional Torts and Available Defenses

TORT	DEFENSE
Assault	Consent Self-defense Defense of others Perhaps defense of property (limited)
Battery	Consent Self-defense Defense of others Perhaps defense of property (limited)
False imprisonment	Consent Justification
Defamation	Truth Privilege
Intentional infliction of emotional distress	Consent
Trespass to land	Consent Private necessity Public necessity
Trespass to chattel	Rightful retention Necessity
Conversion	Rightful retention Necessity

FIGURE 12.11
Tort Defense of Protection

- To prevail when raising the defense of self-defense, the deadly force must be reasonable and must be supported by proof of a reasonable belief that the actor is facing imminent danger. If the facts prove that ultimately the defendant made a mistake about the pending threat, nonetheless, the defense may prevail if the defendant can show that the beliefs of imminent danger were reasonable.
- On the other hand, in raising the defense of others to a tort claim, the defendant had the burden of showing that there was a real danger. Mistakes about the existence or intensity of the alleged threat are not persuasive when the underlying issue is the defense of others.
- When the defense of property is raised, deadly force is simply impermissible regardless of the circumstances. The plaintiff must raise a reasonable claim of fear of injury to the subject property.

deadly force
Defense available in cases involving the defense of persons, oneself, or another.

personal property. **Deadly force** is available in cases involving defense of a person, either oneself or another. The facts must clearly indicate the defense was both necessary and appropriate. (See Figure 12.11.)

Defense of Consent

defense of consent
The plaintiff consented fully, knowingly, and willingly to the act or acts.

complete defense
The individual entered the relationship knowingly with legal capacity.

With tort actions raising a claim that an overt act caused harm or injury, the defendant may raise a **defense of consent**, showing the plaintiff consented fully, knowingly, and willingly to the act or acts. While harm to the plaintiff did occur, nonetheless, the plaintiff willingly participated. In the language of tort, this is a **complete defense**; thus, the plaintiff is considered a willing participant neither forced nor compelled through use of force and legal capacity to enter the agreement. Thus, the plaintiff forfeits the right to find the defendant liable for the unintended results.

A minor, impaired, or incapacitated person cannot give legally sufficient consent. Thus, even if the defense is raised, upon a showing of the legal impairment of the person giving the consent, the defense fails. As with all other defenses, the evidence must be persuasive.

You may well be asking yourself how a person could consent to a particular act and then sue the other party. Essentially, the plaintiff affirmatively agrees to participate in an activity, but, in the course of the action, something goes wrong and the outcome is not what was desired.

Example:

Mitzie went to the circus with her friend, Ada. While strolling through the fairway, they decided to play basketball toss to win a huge stuffed Heffalump just like the ones they loved as children. Each woman was asked to pay, read, and agree to the terms, which, *inter alia*, stated that they voluntarily participated and the barkers did nothing to entice them into participating. Giggling and squealing with delight, the women stepped up to the counter, signed, and waited their turns. Mitzie approached the counter, picked up the first ball, heaved mightily, and actually hit the attendant. With the second try, she made a perfect basket, and did the same with ball number three. She won the Heffalump. She jumped up and down, squealing with delight, and promptly fell onto the filthy floor, getting mud, sawdust, and elephant droppings all over her adorable pink plaid pinafore. *Question*: Can Mitzie sue for damages incurred both to her pinafore and her pride? *Answer*: No. Mitzie willingly consented to participate. Thus, she cannot raise a claim against the operator because she slipped in the mud.

Defense of Necessity

defense of necessity
Available with invasion of property when such occurs in an emergency.

public necessity defense
The invasion is necessary to protect the community and therefore is a complete bar to recovery.

The **defense of necessity** is available only for torts involving *invasion of property* when such occurs in an emergency. There are two distinct classifications of necessity: *public* and *private*. The **public necessity defense** is available in those situations when the property invasion is needed to protect the community. This is a complete bar to recovery.

Example:

During a fire in an apartment, the adjacent units are damaged when the firefighters axe down the doors to release the buildup of toxic fumes. The owners cannot seek recompense from the firefighters for the damages incurred. However, there may be a recovery for costs of replacement under the apartment dwellers' insurance, so the wronged party is not left without any recourse.

private necessity
Invasion into property of another was for purposes of protecting the property.

On the other hand, **private necessity** is rarely invoked and, under all circumstances, is limited in availability as a viable defense. There must be clear evidence that the invasion into the property of another was for purposes of protecting the property. No punitive damages can be assessed against the trespasser, but, to the extent damage to the property occurs, the defendant may be required to pay costs to recompense for the actual damages caused.

Defense of Arrest

defense of arrest
In situations involving police officers or, rarely, private citizens with evidence that the arrest was in furtherance of the reasonable duties of the officer.

The **defense of arrest** may be raised in situations involving *police officers* or, much more rarely, *private citizens*. With police officers, the defense is a complete bar to private recovery by the arrestee for damages allegedly resulting from the activity surrounding the arrest. The arrest otherwise must be appropriate, the procedure consistent with all the requirements under the law, and, where required, the arrest occurs only with an arrest warrant. If the evidence shows any requirements are not met as legally prescribed, the defense fails. If evidence shows that the force related to the arrest was excessive or otherwise unreasonable, the defense fails.

In cases of private citizens asserting the defense, the citizen bears an absolute burden of showing evidence that the arrest was made because the defendant committed a felony. If the plaintiff cannot meet that burden, the defense fails per se. The only misdemeanor for which private citizens may raise this defense occurs in cases of breach of the peace. The breach must occur when the defendant is present. If the defendant is mistaken and no felony occurred, there is no legal right to assert the defense of private arrest. The message is clear that the societal preference is for police officers to take care of arrests in general, but, in compelling circumstances, a private citizen may do so, providing all of the conditions are met.

Defense of Discipline

defense of discipline
Requires the discipline be reasonable under the circumstances.

The **defense of discipline** relates to the societal need to preserve the parental right to select the appropriate discipline for children. The law requires reasonable discipline under the circumstances. Likewise, with military officers training their troops, not only is discipline assumed to be necessary, but the right to discipline is recognized, assuming, of course, it is reasonable under the circumstances. Assessing the appropriateness is relatively simple if the actions complained of are excessive; for example, hanging the child out the window by his or her thumbnails after the child has an accident in his or her bed while sleeping. Under any circumstances, this would be excessive. Thus, the defense of discipline fails regardless of the severity of the bedwetting problem, the age of the child, or any other circumstances.

RESEARCH THIS!

Research your home state law for a case or cases in which the defense of arrest was raised successfully and one in which the defense failed. Note the rationale applied in both case opinions.

Team Activity Exercise

The class should be divided into teams. Research the use of citizen arrests for people attempting to cross the U.S. borders illegally, sometimes called private border patrols. Review any statutory authority or other authorization for private citizens protecting our national borders from illegal entry. Research the authority for citizen arrest in your home state, paying particular attention to circumstances in which citizen arrest is authorized. Make note of the statutory citation and the case law reviewed. Compare your state legislation with the conditions imposed for private border patrols. Develop a policy statement, including statutory reference citations that would fulfill the purpose of the patrols while remaining consistent with your state statutory and case law authority supporting citizen arrest. The teams should discuss and debate the respective findings and team positions. Finally, collaborate in writing a policy that embraces the majority position of the class members at the conclusion of the debate discussions. Retain your individual team and collaborative policies in your PRM for easy future reference.

RESEARCH THIS!

In light of social policies related to child abuse, reconciling the difference between abuse and legally appropriate discipline may be extremely challenging. Research information and publications related to both child abuse and the legal defense of discipline. Include researching both in your home state statutes. Formulate proposed language for your legislature that would preserve the parental right to discipline the child and, at the same time, avoid abusing the child without mandating elimination of all forms of parental discipline. Include in your policy some guidance in terms of measuring reasonable intensity and reporting requirements in cases of allegedly excessive force.

VICARIOUS LIABILITY FOR TORTS (RESPONDEAT SUPERIOR)

In the material discussed thus far in this chapter, the focus has been intentional torts and permissible defenses when such claims are raised. The circumstances thus far have related to instances in which a defendant commits or omits the act. However, there are circumstances in which the concept of *vicarious liability* may apply.

vicarious liability (respondeat superior)
One person, or a third party, may be found liable for the act of another or shares liability with the actor.

Vicarious liability, legally **respondeat superior**, applies in situations where a principal–servant relationship exists. This means that one person may be found liable for the act of another. This does not change the fact of either the tort or the harm. Nor does it change the other elements of the tort. What differs, however, is who may be held legally liable. The circumstances in which claims of vicarious liability may be raised include employer and employee, independent contractor agreements, and certain automobile accident cases in which the vehicle owner and the driver are not the same.

If the actor is employed by a third party and the act causing the injury is committed within the scope of employment, the employer may be held liable under the principles of vicarious liability. The complained-of activity must be reasonably construed as connected with employment.

Example:

Jack Sprat is a salesperson for the newly opened neighborhood spa, Wild Wellness Workout. Frumpy Frank goes to check out the spa and Jack gives him a tour. Jack invites Frank into his office to discuss membership costs and plans. Frank decided during the tour that the concept

RESEARCH THIS!

Research the law of strict liability in secondary sources and find case law from your home jurisdiction related to strict liability. Review a few of the opinions to form a clear idea of the kind of activities courts characterize as ultrahazardous for purposes of the strict liability doctrine. Compile a description of the key points and exceptions, if any. Retain your completed assignment in your PRM for easy future reference and use.

PRACTICE TIP

Product liability cases are a specialty area of tort law. Often, the paralegal is vaguely familiar with the product but has no detailed understanding of the product and the particularly unique aspects of the manufacture, distribution, and uses. The professional paralegal should do some research as soon as the product case comes into the office when the underlying product is unfamiliar. Developing a relationship with experts in the specific field would be extremely helpful. A comprehensive directory or other resource should be developed and periodically updated to ensure an understanding of the state of the art.

simply was not for him because he could not wear the leotards and chartreuse sneakers required of all guests. He tells Jack he is not interested, but Jack becomes insistent. The more insistent Jack becomes, the more convinced Frank becomes that he has made the correct decision. Seemingly out of nowhere, Jack grabs Frank by the collar, throws him down onto the couch, and begins yelling and berating Frank about the dangers of being a timid wimp for the rest of his life. Frank remains solid in his decision, but Jack is also determined. Suddenly, Jack jumps up, storms out of the office, locks the door, and tells Jack that he can get out only if he agrees to join the Spa. *Question*: Can Frank sue Jack and Wild Wellness Workout for the intentional tort of false imprisonment? *Answer*: Yes. Frank can raise the claim against both Jack and Wild Wellness Workout because the action was committed in relation to Jack's employment as the salesperson for Wild Wellness Workout.

STRICT PRODUCT LIABILITY PRINCIPLES

product liability theory
The manufacturer and the seller are held strictly liable for product defects unknown to consumers that make the product unreasonably dangerous for its intended purpose.

In cases of a defective product, strict liability theory applies under the legal principle of **product liability theory**. In this application, the manufacturer and the seller are held strictly liable for the defective product in which defects unknown to the consumer make the product unreasonably dangerous for its intended purpose.

As with other aspects of law, the doctrine of product liability has specific applications and rules related to the defective product. The doctrine is applied primarily in three clearly defined aspects of the process of bringing the product to the consumer: (1) failure to warn, (2) design defect, and (3) unknown hazard. (See Figure 12.12.)

RESEARCH THIS!

Find some of the products used on a regular basis in your home such as coffee maker, hair dryer, irons, lawn mowers, and child car seats. Read the warning labels on the products. Next, research case law in your home state and find a case related to each of the products. Read the court opinion and then reread the warning label on the product. Prepare a brief paper for your fellow paralegals in which you describe the following: the product, the warning label, the case law opinions related to that product, and whether the warning label is adequate under the law. Explain why you believe the warning label may or may not be adequate and, if not, include recommended language.

Team Activity Exercise

The class should be divided into teams with each team assigned a different product category such as automobiles, airplanes, small appliances, or medical devices. Research directories of expert witnesses, product information, and key case opinions in each specialty area. Discuss the findings among the team members and then create a directory of resources with product information, case opinions, and other resources your team agrees would be helpful for a paralegal in practice. The teams may then exchange directories. Retain your complete directories in your PRM for easy future reference and use.

FIGURE 12.12
Strict Liability Theories in Product Cases

1. Failure to warn:	Manufacturer knew of risks with the use but failed to adequately warn the consumer of the potential and the limitations on use imposed by the risks.
2. Design defect:	The design of the product renders it unfit for the contemplated use and the defect causes the malfunction, causing harm to the user.
3. Unknown hazard:	Dangers arising in normal use of the product are not obvious and, therefore, could not be prevented or cured by the consumer.

CYBER TRIP

For information about product safety, visit the Consumer Product Safety Commission at www.cpsc.gov.

PRACTICE TIP

A *Physician's Desk Reference (PDR)* is an excellent resource to help navigate the medical language often involved in tort cases. However, the medical terms and the client description are not the only tools available for these purposes. Remember to use your common sense and critical thinking.

In the context of product liability cases, the reasonableness test is not eliminated, but it is applied differently. In the product context, consumer expectations are the measure of reasonableness and, thus, part of the legal standard for evaluating whether the strict liability standard reasonably applies.

There are a number of high-profile product recall cases such as the defective tires manufactured and distributed by a major tire manufacturer. The law is clear that the manufacturer bears the burden of fault. In product liability cases, the presumption of fault implies causation. Therefore, at trial, evidence is not needed to support the element of causation. In such instances, the trial addresses the extent and the scope of the damages and the appropriate recompense for injuries caused. Product liability law is designed in part to send a message to manufacturers as well as others involved in product production or hazardous activities. The social policy message gives notice that ensuring maximum safety and health features is expected and should be inherent in the manufacturing process and activity.

The plaintiff in a product defect case must show that the product was defective at the time it was no longer within the care and control of the manufacturer. Cases involving defective products, i.e. those products presumed damaged or below acceptable standards at the time they leave the manufacturer premises and entered into the stream of commerce, assess liability differently than negligence cases do. Liability for defect includes such aspects as design, manufacturing, and warnings obviously placed and easily understood as advising the user of any potential risk intrinsic to the product per se or the use of it. *Greenman v. Yuba Power Products, Inc*., 59 Cal. 2d 57 [13 A.L.R.3d 1049] (1963), is a seminal case in defining the law of product liability. The opinion key points and analysis were adopted in the *Restatement (Second) of Torts* § 402A, considered authoritative secondary law on the law of torts.

It is certainly reasonable to ask why the law has made a distinction between product liability and negligent tort liability that might arguably apply. In a product liability case, the burden of proof is more closely aligned with that of intentional torts than it is with negligence. This question was presented to the court in *Jiminez v. Sears, Roebuck & Co*., 4 Cal. 3d 379 [52 A.L.R.3d 92] (1971). The court discussed shifting the burden to the manufacturer in product liability cases to prove the product was not inherently defective and, therefore, a danger to the plaintiff that reasonably could not have been known about and therefore protected against.

CYBER TRIP

Research the full case opinion *Greenman v. Yuba Power Products,* Inc., 59 Cal. 2d 57 [13 A.L.R.3d 1049] (1963). After reading the case opinion, research cases of product liability in your home state and compare the analysis in that case with the *Greenman* opinion. Use the materials as a discussion point in class discussion. Retain notes of the class discussion along with your notes and comments in your PRM for easy future reference.

RESEARCH THIS!

Research to find *Jiminez v. Sears, Roebuck & Co.*, 4 Cal. 3d 379 [52 A.L.R.3d 92] (1971). Read the case opinion and briefly summarize the facts, the holding, and the points raised related to product liability cases and the manufacturer. Retain your notes along with the case summary in your PRM for easy future reference.

Eye on Ethics

In tort issues, the wrongful act of the defendant caused physical injury or harm that resulted in the plaintiff incurring damages. The injury is often physical. As such, you need to develop familiarity with medical terms and resources when handling cases with such injuries claimed. The medical notes often are written in almost indecipherable handwriting, thus making understanding even more complicated. Assuming your layperson's knowledge of a medical issue is sufficient can create enormous problems if your assumptions are incorrect or your research into the issue insufficient. Likewise, failure to read medical treatment notes and records carefully, notwithstanding the difficulty in doing so, can cause enormous problems in the case strategy and ethical challenges as well.

One of your clients claims to have been injured by another customer at the day-after-Thanksgiving sale in a local department store outlet. The client contends the customer beat him mercilessly trying to get the shoes, sweaters, and handbag your client was holding. You have all the case facts and have started gathering medical records and cataloguing the injuries. Among other things, the client claims the beating was so brutal, his back was severely injured and the pain remains even until today. The debilitating pain and injury prevent your client from working regularly. The client's medical bills are close to $100,000. You go to the local gym one evening after work and literally run into the client. You are going one way on the indoor track and he is running toward you. Your first impression is that there is nothing whatever wrong with his running stride. As you leave the gym, you see the client in the parking lot carrying his twin babies to the car. When you read the medical notes and records, you were unfamiliar with many of the terms but believed your client would never misrepresent the facts because it was clear there was some injury.

What is your recommended course of action?

Write a brief description of the challenge, if any; the recommended course of action; and the ethical obligation at issue. Include your recommendations for other paralegals to ensure that misunderstanding does not cause an error in client representation and case understanding.

Summary

We have explored the general history of tort law and introduced the two general categories of torts, intentional and negligence. This chapter centered on intentional torts, which require proof of a mental state in which the actor chooses the act underlying the claim of tortious behavior. We looked at available defenses and circumstances in which the defenses are available. Upon completing the reading and exercises in this chapter, you should feel comfortable identifying the intentional torts and defenses, distinguishing strict liability and product liability claims, and defining and applying property and personal tort theories to the appropriate fact settings. You also should feel competent to match available defenses with the appropriate tort claims and describe complete defenses.

Key Terms

Assault
Battery
Causation
Chattel
Civil liability
Complete defense
Conversion
Deadly force
Defamation
Defense
Defense of arrest
Defense of consent
Defense of discipline
Defense of necessity
False imprisonment
Fragile class
Intent
Intentional
Intentional tort
Intentional infliction of emotional distress
Interference with business relations
Libel

Negligent
Outrageous conduct
Overt act
Paternalism
Preponderance of the evidence
Private necessity
Product liability theory
Protection defense
Proximate cause
Public necessity defense
Reasonable person standard
Reckless (recklessness)
Slander
Strict liability
Tort
Tortfeasor
Torts against the person
Torts against property
Transferred intent
Trespass to chattel
Trespass to land
Vicarious liability (respondeat superior)

Review Questions

TRUE AND FALSE

Read each of the following and mark true or false. For those marked false, provide a sentence that makes the statement true.

1. The tort of intentional infliction of emotional distress need not be supported by evidence of injury.
2. The tort of battery requires creating fear in the victim of the threat of imminent assault.
3. In strict liability claims, fault is not an issue; thus, proof of injury is not required.
4. The defense of arrest requires a citizen to prove a crime was committed.
5. The tortfeasor is the actor in a tort action and would be the defendant.
6. Respondeat superior relies on the legal theory of transferred intent.
7. The increased industrialization as the country developed contributed to the expansion of tort law.
8. Conversion and trespass onto chattel are both examples of tort to property.
9. Intentional torts do not require a showing of duty but must be supported by evidence of intent.
10. Intentional torts resemble criminal claims of similar name but are not punished by imprisonment.

Discussion Questions

1. Pair project. Working with your partner, prepare a list or chart presenting the definition of each intentional tort. Next, the partners should decide which of them will be the plaintiff and which the defendant. They should then work to prepare case facts for each of the intentional torts with one party representing the plaintiff and the other the defendant, who will raise the available defenses to the tort claim. Each tort should be matched with one case citation from your home state in which the issue was tried.
2. Each student should explore various Web sources and locate a case representing each of the intentional torts. The student should select two of the cases and briefly present the facts, the intentional tort at issue, whether a defense was raised, and, if so, a brief summary of the court analysis and the finding related to the use of a defense with the facts given.
3. The student should prepare a brief summary of the rules of civil procedure and the substantive law in his or her home jurisdiction related to intentional infliction of emotional distress. The student should make copies of the relevant statutes, including the correct legal citation. If the claim is not available for certain fact patterns or claims, be sure to include that information. Include reference citation to key cases in your jurisdiction on the law of the tort of infliction emotional distress. The copies should be filed in the appropriate section of the PRM for easy future reference in the course of work.
4. The student should prepare a brief discussion stating a position on the application of the intentional infliction of emotional distress in his or her home state. The discussion should

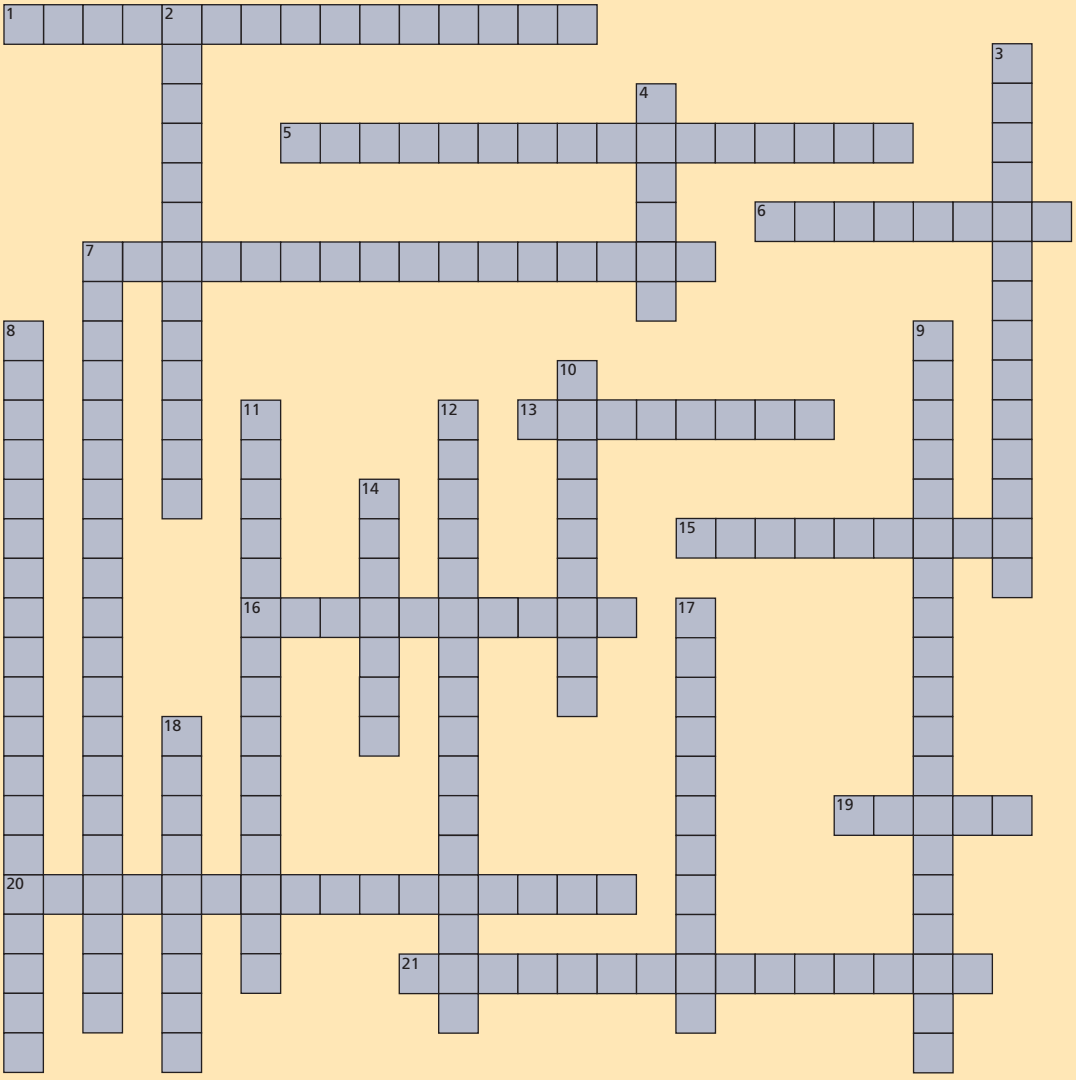
include a statement of the student's position on the issue and support for the position gleaned from the statutory language and history, the common law principles, and, lastly, the idea of fundamental fairness.

5. Pair project. Both partners should review the material on false arrest and arrest as a defense to tort claims. Also, review the materials on the illegal border crossing that you researched. Now, assume the client in your office claims a citizen arrested him as he crossed the border. However, the client is a legal resident, so the client believes the citizen had no right to do so. Working with your partner, prepare an office memorandum in which you present your research on the issue to your supervising attorney. One of the partners should take the position that the act of border crossing was legal. Therefore, the arrest was a tort. The other should take the position that the border crossing was illegal; thus, the arrest is a complete defense to the claims.
6. Review the intentional torts and the elements of each. Now, go to the form jury instructions in your home state and select the appropriate jury instructions for two torts against persons, two torts against property, and one product liability action. Briefly describe how the instructions match the elements of the tort. Retain your completed project in your PRM for easy future reference.
7. Review a strict product liability case selected from your home jurisdiction. You may use the case selected for Question 6 above or a different case. Prepare a case brief in proper form, including a section in which you comment on your position as to the application in this case of the elements discussed in the *Greenman* decision doctrine of strict liability. Retain your case brief and comments in your PRM for easy future reference.
8. Team project. The class should be divided into two teams. Each team will be assigned one of two popular films, *Erin Brockovich* and *A Class Action*. The respective teams should be divided in half, with each taking one side of the argument. Prepare a defense of the position taken by each and argue against the position taken by the court on behalf of each side. Also, prepare a checklist of the functions of the paralegal in the case preparation from intake through to conclusion. Support the items on the list with facts and law.

Portfolio Assignment

You have been asked to prepare an internal office memorandum to the new associate lawyer describing the various intentional tort actions your firm handles. Discuss briefly the theory of liability and significant points of analysis. For each tort, present the elements of the action, along with permitted defenses and proofs related to each. Present the relevant standard and analytical elements for each defense, including a case citation for each defense from your home state case law. Present a section on calculating damages and classifications of intentional torts for which each may be available. Also include any particular points that will help the new clerk become more easily familiar with the actions and unique features of legal analysis. Retain your memorandum in your PRM for easy future reference and use.

Vocabulary Builders



Across

5. Unfit for distribution and use.
6. Personal property, easily moved.
8. Permitted defense against tort involving an individual or another person.
11. Actor committing a civil wrong.
13. Objective measure.
14. Legally considered causation per se.
15. Written remarks tending to destroy a reputation.
16. Per se considered too dangerous for normal untrained users.
17. Careless or reckless.
18. Private party creating fear of imminent battery in another.
20. Plaintiff's voluntary participation defeating a tort claim of wrongdoing.

Down

1. Civil wrong.
2. Transferred or shared liability by the employer for an act of an employee.
3. Exceeds the boundaries of decency.
4. The intent element of tort imputed to one other than the actor.
7. Considered particularly susceptible.
9. Legally adequate excuse for behavior otherwise considered tortious.
10. Statements known to be untrue that damage a person's reputation.
12. Taking care of another voluntarily.
19. Verbal defamatory comments about another.

Chapter 13

Negligence Law and Damages

CHAPTER OBJECTIVES

Upon completion of this chapter, the student will be able to:

- Define the elements of negligence torts.
- Discuss the scope of proximate cause as an element of negligence.
- Discuss the duty standard for negligent actions.
- Identify the degrees of duty and damages available for each level.
- Define strict liability principles.
- Illustrate understanding of the application of defenses in negligent tort actions.
- Describe damages in negligence actions.
- Discuss the ethical implication for paralegals in negligence practice.

negligence
Careless or unintentional act or omission.

This lesson investigates tort actions in negligence. Unlike the intentional torts, the plaintiff needs no evidence of intent to harm or proof the actor wanted harm to occur. In tort claims under the *negligence* theory, the plaintiff need not prove intent. By definition, **negligence** means failure to exercise the standard of care a reasonably prudent person would exercise under similar circumstances. Damages, nonetheless, may be assessed following a finding of liability for a negligent act or omission. In this chapter, we will discuss negligence law and damages available in cases where the defendant is found liable. The lesson also discusses the tort reform movement, which seeks to establish caps, or limits, on the amount of damages awards for certain types of cases.

GENERAL DISCUSSION OF NEGLIGENCE

Justice Benjamin Cardozo, who served on the U.S. Supreme Court from 1932 to 1938, pointed out that, without supporting information and facts, the case opinion, regardless of how interesting, is useless. This is certainly an appropriate maxim when analyzing negligence law and the elements of such actions. Without supporting facts and adequate research of applicable law, a viable claim could result in a verdict that fails to serve the parties appropriately. The caution from Justice Cardozo also reminds paralegals of the need to get the facts and organize them well when working with clients. Facts of each case are important regardless of the type of law. In negligence cases, the prevailing reasonable person standard imputes a responsibility to have as the paralegal preparing the case for the attorney every situational fact at your fingertips to ensure an appropriate presentation to the trier of fact and the application of law by the trier of law.

PRACTICE TIP

Without sufficient evidence supporting each element of the negligent tort, there is little likelihood a viable cause of action actually exists. Begin now to refine your skill in analyzing the facts presented along with researching how the facts, law, and defenses interact.

1. Duty
2. Breach
3. Causation
4. Injury

FIGURE 13.1 **Elements of a Tort Claim in Negligence**

Injury
In legal context, violation of right protected by and enforceable under the law, that can be physical or other harm such as loss of business income.

Negligence theory is similar to other areas of law in that the elements must be supported by evidence to sustain a finding of liability. Claims of negligence derive from the fundamental requirement of a *relationship* in which an identifiable *duty can be shown*. If there is absolutely no relationship between the plaintiff and the defendant, there is no duty created; thus, recovery for damages incurred may not be available under tort theory despite evidence of some **injury**.

The elements of a negligence cause of action include the following: (1) *duty*, (2) *breach*, (3) *proximate causation*, and (4) *injury*. (See Figure 13.1.) While it may appear this is a fairly straightforward analysis, proving each discrete element is often challenging. For example, in cases where special training may be required to act appropriately under a given set of circumstances, someone without that training may nonetheless be liable for a bad result even if the motive for acting was to rescue someone who clearly needed help. There are other cases where a number of factors appear to be appropriately called the *cause* and the proximate or most closely related factor must be determined and applied. There are still other cases in which the defendant raises a legal *defense*, which is a legally acceptable reason for acting that may eliminate or at least minimize the liability for damages resulting from the act or omission. These are but a few of the reasons that tort law has become more complex in some respects, and why legal opinions have been written in support of an enormous number of fact patterns all within the ambit of tort law. Despite the challenges, however, once you identify a negligent tort at the core of the client issue, you must start your analysis with the four elements to ensure there is a viable cause of action.

DUTY ELEMENT IN NEGLIGENCE ACTIONS

duty
A legal obligation that is required to be performed.

Without persuasive evidence that the defendant had a legal **duty** to the plaintiff, no negligent tort can occur. In the context of negligence law, you can think of a duty as an obligation to act reasonably under the surrounding circumstances. The more compelling question in a great deal of negligence litigation is when the duty actually arises. The facts of each situation provide the only reasonable definition. The threshold issue with negligence is that some identifiable relationship between the parties must be shown. This relationship is the basis of the legal duty.

standard of care
Criteria for measuring appropriateness of behavior.

You may be familiar with the term **standard of care**, which is the measure of how a duty was performed or breached. Courts created this means of analyzing performance and appropriateness by measuring the performance against reasonable expectations of a similarly skilled, trained, and competent person in a similar situation. This standard avoids assessment inconsistency and also establishes a benchmark against which any analysis can be measured without risk of serious error or misunderstanding. The professions or other special skill groups have published materials setting standards that the courts often rely on to guide the analysis.

Determining the legal duty relies on a number of factors related to the facts of the relationship and the resulting duty. The factors used include

- Foreseeability.
- Proximate cause.
- Economic considerations.
- Preventing future harm.
- Social implications of creating a new standard.

You may be asking yourself why any of the above factors are relevant to establishing a duty. The reasonable or ordinary man standard is applied when determining a duty just as in other

ordinary person standard
The reasonable behavior for an ordinary individual in a similar situation.

aspects of negligence law. The **ordinary person standard** looks at reasonable behavior for an ordinary individual in a similar situation. No special training, skill, or knowledge is required when this is the legal standard.

Example A:

Gilda was out walking her pet iguana along the beach in south Florida. She had the iguana leashed according to the local ordinances. Val was building a sandcastle on the beach. He needed to clear the seashells, stones, and other debris from the area for the castle in order to set it off well enough. Val found several large conch shells and just tossed them backwards out of his way. One of the shells hit Gilda in the head and immediately knocked her out. She dropped the leash for her iguana, which then ran out onto the roadway behind the beach and was run over by a truck. *Question:* What standard will be applied to assess the negligence, if any, of Val's actions? *Answer:* The ordinary person standard.

Nothing in the facts suggests that Val did anything other than enjoy a day at the beach. As many others have done before and since, Val built a sandcastle to pass the time. While there may even be instances where sandcastle building is done by professionals paid for their castles, under the facts of the example, none of these variations or unique circumstances exists. As such, the ordinary or reasonable man or person standard applies.

PRACTICE TIP

Some issues are difficult to define because the underlying facts are such that a sense of moral outrage is provoked. This sense of personal outrage cannot influence the legal or professional approach of the practicing paralegal under any circumstances.

Example:

Priscilla was driving through the national park in Washington, D.C. admiring the new spring cherry blossoms. She saw a baby squirrel jumping into a tree with its mother, which was carrying a nut. She was so enchanted by the scene that she failed to realize she was about to slam into the rear of Hortense, who also was driving through the park admiring the beautiful new spring flowers. *Question:* Can Hortense sue Priscilla under a negligence theory based on a breach of duty? *Answer:* Yes. As the driver, Priscilla had a legal obligation to operate her vehicle safely and within the requirements of all applicable traffic laws and rules.

The springtime scenery is fabulous in Washington, D.C. Driving along the Potomac River to admire the cherry blossoms is a springtime ritual for many Americans. Nonetheless, drivers must operate their automobiles within the reasonable standard of care expected of all drivers. Beautiful scenery is not a legally adequate defense for negligent operation of a motor vehicle. The duty to safely operate a motor vehicle is not altered by extrinsic facts, including the distraction caused by the cherry blossoms.

Read the next example and compare the analysis with the Example A results.

Example B:

Priscilla was out a few days later. On this trip, however, she was driving toward the seaside. As she was driving along, Priscilla saw a canoe overturn and two people flailing about wildly in the water screaming for help. While Priscilla did slow down to look to be sure she actually was seeing this unfortunate event, she then drove off. One of the people in the capsized canoe had extremely good eyesight, read her license plate number, and later found out that the car belonged to Priscilla. *Question:* Can the person in the capsized boat sue Priscilla for breach of duty to rescue people from capsized canoes? *Answer:* No. There is absolutely no legal duty for Priscilla to stop and rescue people from capsized boats.

Does the response to Example B surprise you? The legal analysis may help clarify the issue. The law imposes no duty on citizens to rescue others. If this was the case, then the law would effectively say that every citizen has an absolute obligation to put him or herself at risk, and in some cases risk of death, to rescue another. In setting this as the reasonable standard, the law would establish that the person in trouble has a greater life value than the observer placing him-or herself in the same or a greater peril to attempt rescue.

gratuitous undertaking
An act undertaken for reasons other than duty and measured with the same legal standard reasonably attributable to those with appropriate training.

Our legal system defines situations where there is no duty, but a task is nonetheless undertaken, as **gratuitous undertakings**. The act may be undertaken for reasons other than duty, but, once an individual assumes the risks inherent in undertaking the act, all legal responsibilities reasonably attributable to those undertaking that act are assumed as well. On this analysis, then, if the actor fails to perform reasonably under the unique circumstances, because the undertaking

RESEARCH THIS!

Research the case of *Riss v. City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968), related to gratuitous undertaking. After reading the case, prepare a brief including case facts, holding, and key points in the court analysis and the legal consequences when gratuitous undertaking is the core issue.

was voluntary, in spite of the risks, then the actor must be held to a reasonable standard for people who are capable of such acts.

Example:

Wiley was out with his friends on the first warm day of spring. When he came to the old swimming hole, he could not resist the urge to jump in and take a swim. His friends urged him not to do it since the debris from the long winter was still in the swimming hole and everyone knew it was difficult to move and could even tangle in the swimmer's legs. Wiley ignored his friends' advice and jumped in. Petey was strolling on the banks of the opposite side and saw Wiley in the hole, screaming at the top of his lungs for help. Petey at first did nothing, but, when the screams continued, he decided to help. He jumped into the swimming hole with a tree branch he intended to use to pull Wiley to safety. Petey simply could not reach Wiley because he was tangled up in the underbrush so ultimately, he gave up, turned around, and swam to shore. Wiley eventually calmed down enough to float and reach the shore. However, he incurred frostbite and several broken bones and missed a week of school. *Question:* Can Wiley sue Petey for abandoning his efforts to help rescue Wiley? *Answer:* Yes. Once Petey undertook the rescue, he became legally obliged to complete the rescue.

Petey undertook all responsibilities and risks associated with performing according to the standard of care normally applied to trained persons attempting a rescue under the circumstances. Even though the rescue was gratuitously undertaken, without an identifiable legal duty, the law says that Petey breached a duty by giving up, thus becoming liable for the damages incurred.

professional duty
Exercising a reasonable level of skill, knowledge, training, and understanding related to the specific profession.

If a professional swimmer undertook to rescue the canoeists, the law would hold the professional to a reasonable standard based on measuring how the rescue efforts measure up to the standard of care expected for professional swimmers rescuing others. The legal **duty for professionals** is most often described as reasonable in terms of level of skill, knowledge, training, and understanding related to the specific profession. The courts assess breach of duty in terms of the special standard of care for a similar professional in similar circumstances.

Example:

Helen was visiting her local community center to take pie making and cake decorating classes. The community center classes were conducted by the world-renowned baker and decorator Simon the Pieman. Each class member had a work space and oven to bake the cakes and pies. Helen followed Simon's instructions to the letter, as did the other students. When the time came, the students put their pies in the oven, with the temperature set at 750° as Simon instructed. He wanted a quick bake since the class period was running late. Helen decided to check on the pie. As she opened the door, the pie exploded all over her. She raced to the hospital ER because her face and arms were burned terribly and her eyes nearly blinded with the hot, unbaked pie. *Question:* What standard will be applied to Simon

RESEARCH THIS!

Research secondary law sources such as encyclopedias or scholarly journals to get a better understanding of the standard of care expected of professionals. Then research your home state case law for opinions related to the professional standard of care in negligence actions.

RESEARCH THIS!

Research secondary sources and your home state law related to the reasonable person standard in negligence cases. Determine how the courts analyze the duty in the context of the ordinary man standard of care. Prepare a brief essay comparing and contrasting the ordinary person and the professional standard of care including case reference citations for each type. Comment on your position related to using different standards depending on fact circumstances.

when assessing his actions for purposes of finding liability for negligence? *Answer:* The standard of care applied is the standard for professional bakers. The law evaluates the professional assuming the special skill, knowledge, and understanding reasonably expected of such professionals.

invitees
People wanted on the premises for a specific purpose known by the landowner.

Landowners have a legal duty to their **invitees**, or those who, by definition, are wanted on the premises. There are essentially three classes into which persons fall: *trespassers*, *licensees*, and *invitees*. (See Figure 13.2.)

The landowner has the right to determine the extent, if any, to which he or she chooses to have persons use the premises. The law has conferred legal status on these visitors commensurate with the relationship with the owner. With these status classes, if you will, it is easy to see that a relationship is established with the owner, even if limited. Thus, a duty arises.

Example:

Harry Houseguest visited Oscar Owner for a weekend in the summer season. While Harry and Oscar were enjoying a casual snack, Harry suddenly choked and gagged violently. He was absolutely blue in the face when Oscar regained his composure enough to jump up behind him and squeeze Harry in a Heimlich maneuver. As soon as Oscar applied the pressure, a huge button from Oscar's designer yachting jacket popped out of Harry's throat. Of course, the choking stopped, but Harry was sick for the remainder of the weekend and unable to sing his old college tunes at the country club show on Sunday afternoon. Harry therefore missed his first paid gig as a cabaret singer. *Question:* Can Harry sue Oscar under a negligence theory? *Answer:* Yes. As an invitee, Harry had a reasonable expectation that the food served would be edible and free from jacket buttons or other items that could cause choking. He also had a reasonable expectation that he would rest for the weekend prior to his singing debut. Thus, the negligent food preparation arguably caused the injury and Oscar could be reasonably held liable.

breach of duty
The failure to maintain a reasonable degree of care toward another person to whom a duty is owed.

Negligence claims involving trespassers on a landowner's property present unique challenges to juries. In general, determining **breach of duty** is tied to the relationship between the parties. In cases involving trespass to real property, the known user—that is, the invitee, licensee, or other permitted user—is treated one way, while the unwanted and unknown trespassers are viewed in a somewhat different light.

However, the duty that arises under the law extends only to those segments of the premises that would reasonably be used by the particular invitee. Thus, a pool excavation in the back of the residence is not within the ambit of coverage of the duty of the landowner when the invitee is a tile setter on the premises to repair the tile in the entry hall. It is unreasonable to expect the

FIGURE 13.2
Classifications of Landowner's Duty

Licensees:	Reasonable safety precautions and conditions in the area
Invitee:	Reasonable conduct and conditions for the type and the scope of purpose and the duty to warn of the scope of the invitation
Trespassers:	Unknown and unwanted users, for which duty inures to remove attractive nuisances

RESEARCH THIS!

Research landowner liability in secondary sources such as Am. Jur. 2d or Cor. Jur. 2d This should help you develop better insight into the formulation and application of the law.

landowner to protect the invitee against an injury that may arise in relation to the excavation because there is absolutely no reason to assume the tile setter would be in the back section of the property. On the other hand, the landowner has the reasonable duty to ensure that pictures hanging on the walls are properly secured to avoid having them fall onto the tile setter working on the premises.

trespassers
Uninvited guests on the property of the landowner.

Trespassers are uninvited guests on the landowner's property. Typically, the landowner has no duty toward unknown trespassers, unless certain exceptional circumstances apply. However, once the landowner is aware of the trespasser, in many jurisdictions; this awareness creates the obligation. This class of unknown and unwanted property users does not have permissive use status. However, if the evidence shows the landowner knows of the potential for trespassers, the law imputes or infers a duty to the landowner for purposes of negligence law.

Example:

Jake owns a large tract of land that formerly was used for cattle grazing. For the last 10 years, the cows have not used the land, so the fields have become lush and the trees full and leafy. In several places, there are small lakes that Jake discovers are used for swimming and camping in the warm weather. Jake does not want trespassers on the property and particularly swimmers and campers. Jake is particularly concerned because he has spotted coyotes several times and, after watching them for long periods, he has determined they are wild and potentially vicious. Jake knows to avoid them but fails to do anything to alert others to the potential problems with wild coyotes. One day while he is out riding the tract, Jake sees a wild coyote with blood dripping from his teeth run wildly across the far field. Jake investigates to find a camper has been seriously bitten and maimed by the coyote. Jake calls for an ambulance to take the camper to the nearest hospital. Fortunately, the camper recovers after weeks in the hospital and immediately thereafter serves Jake with a lawsuit claiming that Jake had an obligation to keep wild beasts off the property or, in the alternative, to hang warning signs to notify trespassers of the potential harm from the coyotes. *Question:* Does the lawsuit raise at least a colorable claim? *Answer:* Yes. The campers were trespassers on Jake's land, but he knew people used the lakes and land; thus, arguably, a legal duty exists under which Jake had at least a duty to warn, if not a duty to rid the property of the wild coyotes. The jury, as the trier of fact, makes the ultimate decision.

landowner's duty
To warn of known unsafe artificial conditions on the property.

The **landowner's duty** is to warn of known unsafe or artificial conditions on the property. The most reliable point of reference for this issue is to assume that anything, for example, a sinkhole in the property, must be made known to trespassers or licensees on the property. This duty may be fulfilled by appropriate signage, adequate and reasonable barriers surrounding the area, or similar measures making clear there is something in the area that requires special attention by anyone on the premises. There are state-to-state variations in the law, so each jurisdiction must be looked at independently.

RESEARCH THIS!

Research case law in your home state and find one recent case each of trespasser, invitee, and licensee liability. Prepare a chart or other summary of the key factors in the analysis of each, comparing the features in your analysis. Comment on the different standards and your position on the law related to each. Retain the case opinions and your notes on the case opinions in your PRM for easy future reference.

RESEARCH THIS!

Research your home state law regarding a landowner's duty to each class of users. Prepare an outline and brief discussion of the scope of duty and exceptions or limitations. Include citation to cases representing each user class. Retain in your PRM for easy future reference.

attractive nuisance doctrine
The doctrine that holds a landowner to a higher duty of care even when the children are trespassers, because the potentially harmful condition is so inviting to a child.

When a landowner reasonably knows or should know there is a risk of *children* trespassing on the property, a special duty also arises to warn and effectively protect to the extent possible from any potential injury arising from artificially created conditions on the premises. Some property features are legally considered **attractive nuisances**, for example, swimming holes or hills that would be good for skiing or rope swings on big trees. These are examples of features that are reasonably attractive to children. When such conditions exist, the landowner can be liable for injury that occurs, whether on the attractive feature or any other aspect of the property. The landowner's duty is to *correct the attractive nuisance*, thereby protecting minor children, assumed under the law to be incapable of protecting themselves.

licensee
One known to be on the premises but whose presence gives no benefit to the property owner.

social guest licensee
Property owner derives no benefit or economic gain from the individual's presence and legal use of the property.

Licensees are a special class of property users who occasionally visit the premises for purposes such as performing services. A licensee is one known to be on the premises but whose presence gives no benefit to the property owner. A known trespasser creates a special duty in the landowner under the licensee category. A **social guest** is construed as a **licensee** since the property owner derives neither benefit nor economic gain from the individual's presence and legal use of the property, regardless of the scope of the use.

The legal duty to licensees is to warn of any known or potential natural and artificial circumstances or conditions that reasonably could cause harm to the licensee. The standard is reasonableness and both natural and artificially created conditions are encompassed in the scope of the duty to licensees. The duty requires warnings. The reasonableness and appropriateness of the warnings would be the target of landowner liability litigation.

In some instances, the legal duty may be less than appears obvious under the facts. As an example, the professional golfer whose golf ball hits a bystander may be sued in some states for breaching the duty of care reasonably imputed to a professional golfer. On the other hand, however, a casual weekend golfer whose ball hits a bystander may not be sued for breaching the duty for two reasons. First, the ordinary reasonable person standard is applied. Both the golfer and the bystander are amateurs out for an afternoon of casual play. It could be argued persuasively that the other amateur golfers or bystanders assumed the risk of being hit by the golf ball; thus, a claim of negligence could not be legally maintained.

negligence per se
Results from statutes establishing that certain actions or omissions are impermissible under any and all circumstances; the failure to use reasonable care to avoid harm to another person or to do that which a reasonable person might do in similar circumstances.

prima facie
A case with the required proof of elements in a tort cause of action; the elements of the plaintiff 's (or prosecutor's) cause of action; what the plaintiff must prove.

There is a class of exceptions to the negligence element of breach: **negligence per se**. In actions related to this type of negligence, the law recognizes neither a defense nor an excuse. Negligence per se results from statutes establishing that certain actions or omissions are impermissible under any and all circumstances. Thus, any breach of such an express statute or other binding legal determination must be held as **prima facie** proof of negligence. The legal theory is most often applied in cases of product manufacture, such as automobile tires, or medications. Under most cases, the seminal analytical point is whether the product is designed to protect the party claiming injury, which most typically is the user. The courts have regularly held that the user has a reasonable expectation that the product will perform as promised and

RESEARCH THIS!

Research case law in your home state related to golfing injury cases. Also, research the approach with other professions; for example, casual or professional motocross riders or casual and professional skiers on the same slopes. Compare and contrast the applicable legal standard for each unique professional. Also comment on the application of the standards and the recommendations you may have to enhance the equitability of the law in these issues.

anticipated for the use intended. Further, the defect causing the malfunction is not reasonably detected by the user. Negligence per se can arise in cases where the landowner has a swimming pool that is properly maintained, but the pool may be in a jurisdiction in which there must be a child fence immediately around the lip of the pool and fencing around the property. Thus, in cases where an accident occurred, if the owner did not have the required fence, then the proper claim would be negligence per se. However, if the accident occurred while the family or invitees of the owner were using the pool, the fence requirement may not apply because the users, both owner and invitees, were using the pool for the intended purpose.

In some cases—for example, parent and child, landowner and invitees, shopkeepers and their customers—a special, albeit limited duty arises. As such, the courts confer the duty to act reasonably according to a reasonable standard of care for the circumstances.

Example:

Beulah was out for her daily shopping trip for fresh fruit, vegetables, and meat for her supper. She visited George Greengrocer to get his suggestions about the best produce that day. When Beulah was in George's shop, she failed to notice the puddle of water in front of the lettuce table, slipped, and fell flat on her face. While she could get up with incredible difficulty, she had trouble walking away, and later that day was in such pain that she went to the doctor. *Question:* Can Beulah sue George for her injuries under a negligence theory? *Answer:* Yes. George Greengrocer was a shopkeeper. As such, George had an absolute obligation, or duty, to maintain the premises in safe conditions for the clientele.

George did not deliberately put the water puddle in front of the lettuce counter. As such, negligence theory applies. George owed a duty to his patrons to operate the store free from foreseeable risks to customers and safe for the intended purpose. Failure to clean up the water puddle is an omission to act when a duty to do so clearly exists. Risk of a customer slipping is both foreseeable and reasonable; thus, a finding of liability is reasonable under the circumstances.

BREACH ELEMENT OF NEGLIGENCE CLAIMS

Having established a duty in the defendant regardless of which classification applies, the next step in the legal analysis requires establishing a *breach of the defined duty*. The reasonable person standard is applied to determine if the established duty is breached to the extent necessary to support a negligence finding.

Breach is measured first by establishing what the reasonable conduct is given the facts of the case. Having analyzed the conduct, the actions are compared to whether or not the defendant's actions were consistent with the *reasonable standard of care* in relation to the condition(s) allegedly responsible for creating the breach and the applicable legal standard of care.

Operationally, the analysis is based on what is reasonable and customary in similar situations. This standard in normal circumstances is neither illusory nor flexible. It is what reasonably would be considered effective without rising to the level of extraordinary intervention or other measures. On its face, negligence law does not impose an extraordinary duty of care on the defendant. The reasonable person standard in the unexceptional case is comprehensible and readily identifiable. Any reasonable person could ascertain the scope and limitations. No special talent or care is needed to make that determination. In certain extremely limited circumstances, however, an exception can be made to the reasonable person standard, but these exceptions are few and rare. A person with certain **limiting physical conditions** such as blindness or deafness is held to the standard of reasonableness for a person with this limitation.

limiting physical conditions
Class considered for purposes of the standard of care to be reasonable for an ordinary person with those limiting physical conditions, for example, blindness or deafness.

At the other end of the exceptions list are individuals with certain unique, professional competence or qualification, regardless of the profession. In situations where injury resulted from experience with certain professionals, proof of breach of duty is measured in terms of the special talents required and expected from such professionals. The legal standard is reasonable care of the ordinary professional within that category. In practice, this simply means that, if there is a cause of action filed against a professional, breach of duty is determined based on reasonable expectations of the behavior for a similar professional. Consistent with this classification, someone in the profession with *extraordinary credentialing and expertise* such as a master mechanic or an expert marksman would be measured by the reasonable expectations and behavior of a similarly credentialed professional.

RESEARCH THIS!

Review your home state case law related to professional malpractice. You will find cases involving doctors, accountants, even attorneys, but there are other professions such as printers, or health club trainers or nutritionists, and, yes, even paralegals. Select some unusual profession case opinions. Review the court analysis of the liability and proof presented by the plaintiff as well as any defense or excuse that may have been raised by the defendant. Create a policy statement that embraces both the unique as well as the more commonplace situations in which legal liability has been established for professionals.

PRACTICE TIP

When working on a client file involving a landowner, ask sufficient questions to get comprehensive information. Guide your research according to the nature of the relationship and the resulting duty imposed. Comprehensive information includes enough details about the specific nature of the issues to make a determination of foreseeability, substantial cause, and reasonableness of harm resulting from the complained-of act or omission.

Good client interviewing enhances the quality of research and organization and saves follow-up time throughout the client relationship.

FORESEEABILITY

foreseeability
The capacity for a party to reasonably anticipate a future event.

Cardozo test
Zone of foreseeability and proximate cause analysis as a test of the scope of damages.

causation
Intentional act resulting in harm or injury to the complaining plaintiff.

Justice Cardozo and many other noted jurists have written extensively on the issue of foreseeability in negligence cases, whether in terms of the scope of liability or the likelihood of prevention. Justice Cardozo succinctly articulated the zone of the foreseeability standard, which remains good law today. The scope of liability reasonably attributed to the defendant is an important element of the analysis when negligence is at issue. While Justice Cardozo vigorously defended the rights of individuals to appropriate redress, at the same time he maintained that defendant liability was not limitless. Once again, reasonableness is an integral aspect of the analysis of foreseeability as analyzed by Justice Cardozo.

Foreseeability is an often-litigated issue in claims of negligence. When this issue arises, the decision for the court is whether the complained-of event could have been reasonably predicted, and as such prevented. The principle of *foreseeability* establishes the requirement for a reasonable connection and a close rather than extremely attenuated relationship. The law requires that the breach is the proximate cause of the complained-of injury. This is also known as the **Cardozo test**.

Palsgraf v. Long Island Railroad Co., 248 N.Y. 339 (1928), remains the prevailing law on the issue of foreseeability and proximate causation. The case established conclusively that, when the complained-of injury is too attenuated or removed from the precipitating event, damages cannot be reasonably assessed against the defendant. The dissent in *Palsgraf* looks at the issue of **causation** in general, which is related to the concept of foreseeabilty. While the dissent is *dicta*, thus nonbinding law, at the same time it is valuable in terms of analysis.

RESEARCH THIS!

Research the case of *Palsgraf v. Long Island Railroad Co*., 248 N.Y. 339 (1928). After reading the opinion, prepare a case summary including the facts, the holding, and key elements in the analysis. Comment also on your position regarding the rule of law established. Should the rule be what it is and, if you agree, explain in your own words why you believe the finding is correct. If the law should be modified, how would you do so, and why?

Justice Cardozo established the zone of foreseeabilty standard to limit application of liability in negligence cases. *Palsgraf* established how the doctrines of foreseeability and proximate cause relate and interact to establish the scope of possible liability as well as the limitations to application when a chain of results follows a negligent act. Under this analysis, the defendant must be the direct cause of the complained-of injury, providing, of course, that the injury was reasonably *foreseeable by the defendant* under the specific circumstances applicable.

Under the Cardozo test, the jury must look at whether the defendant reasonably could foresee the consequences. The second prong of the test involves assessment of the foreseeability of the injury sustained. The reasonableness of the injury is determined by looking carefully at the conduct and the reasonable assessment that the risk of harm created could be determined and, implicitly therefore, avoided by the defendant.

Example:

Cedric was walking down Main Street when his long-time ladylove, Beulah, distracted him. As always, he became transfixed by the sight of Beulah and promptly walked into the bicycle rack on the curbside, knocking over all of the bikes, which in turn caused the groceries in Mrs. Hotten's bicycle to overturn and spill all over the street. Several oranges rolled into the street. Nelly tripped and hit her head on Annie's baby stroller, which was on the opposite side of the street. *Question:* Can Nelly sue Annie for damages? *Answer:* No. Under the Cardozo proximate cause test, the chain of events created a distance that would be too attenuated under the law.

When Cedric walked into the bicycle rack, knocking over the bicycles, at the same time, it was completely *unforeseeable* that the chain of events that followed could have occurred. As such, it was simply impossible for Cedric to prevent those events. Cedric therefore cannot reasonably be held liable for everything in the chain.

When courts look at the duty in relation to tort actions, they look at the totality of the facts. The issue is often relatively straightforward, as in the case of an automobile accident, where it is established that an absolute duty exists for the driver of a vehicle to exercise care in the operation of the vehicle. The exercise of reasonable care is the standard in assessing both liability as well as damages.

In other cases, however, the duty is created, so to speak, by the operation of law and fact. The courts resist finding liability when an individual fails to act. Thus, in the example of the overturned canoe presented earlier, there was no duty on the part of the observer to stop the car and attempt to rescue the swimmers. On the other hand, if the observer decides to help and undertakes an activity specifically in furtherance of the rescue, the law considers that the actor assumed the relevant legal responsibility. Thus, the law imposes the absolute responsibility to carry through to completion and measures performance by the standards applicable to a trained person undertaking similar responsibilities. The principle operating in these circumstances is that once an individual voluntarily assumes the task, so to speak, the actor understands the ramifications, risks, and benefits and willingly agrees to shoulder both risks and benefits.

RES IPSA LOQUITUR EXCEPTION

res ipsa loquitur
Doctrine in which it is assumed that a person's injuries were caused by the negligent act of another person as the harmful act ordinarily would not occur but for negligence.

The plaintiff bears the burden of showing by a preponderance of the evidence that the conduct leading to the injury fell below the applicable standard of care. Any relevant, direct, circumstantial, or documentary evidence can be used to support the claim. You may suspect that the reasonable person standard should be applied. ***Res ipsa loquitur*** is an exception to this rule in cases where the plaintiff cannot specifically identify the nature of the specific act, but nonetheless can identify the defendant as the actor.

If and only if each of the conditions in Figure 13.3 is met can a claim of negligence under the theory of *res ipsa loquitur* survive and liability be attributed to the defendant. After assessing the evidence presented, the jury must find that the inference of wrongdoing on the defendant's part is so clear, it must be the cause of the negligent act resulting in the injury. If and only if the defendant presents dispositive evidence that the defendant did not commit the act or omission will the burden shift back to the plaintiff to show that, notwithstanding evidence refuting the claim, a finding of liability is both reasonable and equitable.

FIGURE 13.3
***Res Ipsa Loquitur* Exception**

- It must be extremely probable that, without some act of negligence, the injury would not have occurred
- It must be demonstrated that the instrument of the injury was in the sole control of the defendant
- Neither the plaintiff nor any other third party may be involved or capable of a finding that he or she contributed in any way to the injury claimed

PRACTICE TIP

Notwithstanding the relative rarity of *res ipsa loquitur* claims, it is nonetheless important that you understand how the doctrine operates and the types of fact patterns in which it would be applicable.

RESEARCH THIS!

Looking at examples will help clarify the doctrine of *res ipsa loquitur* as it applies in real life. Research your home state law to find a relatively recent case in which *res ipsa loquitur* was raised. Review the opinion to get an idea of how the court analyzed the inference, rather than per se tangible evidence, to establish that liability for the defendant is appropriate. Make note of the case citation and retain a copy of the opinion for easy future reference.

These cases are few and far between. There are few instances in which all elements of *res ipsa loquitur* can reasonably be found. This legal theory of recovery permits inference rather than documentary evidence. It is rare to have a situation that meets the criteria, so you rarely have this kind of claim presented when working as a professional paralegal.

Example:

Bettina was sitting on a bench in front of the neighborhood cul-de-sac when she was slammed in the face and shoulders by a long pipe hanging off the back of the truck driven by the plumbers who had just left her neighbors' house. Unless evidence can be shown to the contrary, the law assumes that, but for the negligence of the plumbers in packing the materials onto the truck and driving out of the cul-de-sac street, Bettina would not have been injured.

CAUSATION ELEMENT OF NEGLIGENCE CLAIM

"but for" test
If the complained-of act had not occurred, no injury would have resulted.

substantial-cause test
Analysis of which of the possible factors was the real cause.

joint and several liability
Shared responsibility, apportioned between all of the defendants, but in no case can the plaintiff recover more than 100 percent of the damages awarded.

In claims of negligence, the plaintiff must show a link between the act and omission claimed responsible for the injury and the resulting damage. In some cases, the courts apply the **"but for" test** in assessing liability and causation. This means that, if the complained-of act had not occurred, no injury would have resulted. In some instances, more than one fact may appear to be the legal cause. When that occurs, the "but for" test may become difficult to apply and interpret, particularly if the cluster of related causes is somewhat intertwined or interrelated. Courts have responded to this challenge with the **substantial-cause test**. The substantial-cause analysis requires analysis of which of the possible factors was the real cause. Thus, the one most reasonably related to the actual injury is construed as the factual cause of the injury.

There may be *multiple defendants*, all of whom could be causative factors of the injury. A number of apportionment plans are available when both the plaintiff and the defendant are shown to have engaged in the negligent activity. The simplest way to think of them for our current purposes is to think in terms of the defendant's responsibility balanced against that of the plaintiff in terms of the injury resulting from the negligence. With the doctrine of *several liability*, the courts have taken the position that, when multiple defendants are named, then *liability must be apportioned*. To the extent liability is apportioned, no one defendant can be required to compensate the plaintiff for all of the damages assessed but, rather, solely for that amount proportionately assessed based upon the actor's degree of participation and causation.

While it seems logical to use the substantial-cause test, courts prefer to apply a theory based on the doctrine of **joint and several liability**. This means the responsibility is shared or apportioned between all defendants. The plaintiff can nonetheless never recover more than 100 percent

of the damages awarded. Courts hold this is more equitable. The doctrine recognizes that, where there are multiple actors, every one of them contributed in some degree. The challenge, of course, is determining the percentage or portion of liability. Under this apportionment formula, however, the jury first determines the monetary award and then apportions shares based on the jury's determination of the share of responsibility.

If and only if there are multiple defendants, all of whom agreed in advance that a particular defendant(s) would not bear liability regardless of the verdict, then the defendant(s) so indemnified can seek a formal declaration of immunity from liability through suit against the other defendants.

Example:

Missy went out on a lovely spring day to join her friends on a leisurely boat ride on the Brandywine River. In all, seven young men piled into the canoe with Missy. Each was vying for exclusive attention from Missy. The seven friends, for sake of convenience called A., B., C., D., E., F., and G. by Missy, who had a reputation for forgetting names, were having a riotous good time. They were singing, drinking root beer, and eating peanut butter and jelly sandwiches. As the afternoon progressed and the behavior became more raucous, the boat rocked more and more. Suddenly, the boat capsized! Missy's newly styled hair was ruined; she looked scraggly and soaking wet. The picnic supplies she purchased all floated away, along with the food and the pillows. She could not swim and screamed for help. A., B., C., D., E., and F. all swam toward shore as quickly as possible. Only G., as luck would have it, who was Missy's least favorite, remained to save Missy. *Question:* Can Missy sue A., B., C., D., E., and F. for negligently capsizing the boat and the damages incurred, including her fright, under a joint and several liability theory? *Answer:* More than likely no.

All of the defendants were in the boat; all of them participated in the raucous behavior equally, including Missy. Thus, no identifiable actor or act can be isolated as causal. Missy participated, as did G., and, under the circumstances, it would be unfair to lay all the blame on everyone except Missy and G. Undeniably, G. was the only one who attempted to help Missy, but, prior to the rescue, he too participated in the rowdy behavior that gave rise to the accident. After-the-fact measures are legally unacceptable as a defense or waiver of liability.

PROXIMATE CAUSE

proximate cause
Defendant's actions are the nearest cause of the plaintiff 's injuries.

The issue of **proximate cause** has been the subject of much litigation. In the proximate-cause analysis, the court looks at the fairness of fixing liability under the facts of the case. The measure or standard for attaching proximate causation to any defendant relies on the question of *foreseeabilty*. The analysis looks at the closeness of the relationship between the causal factors and the injury as well as segments in a chain of results fact setting.

eggshell skull theory
A plaintiff with a preexisting condition does not change or diminish the defendant's liability.

When the plaintiff is uniquely fragile or otherwise susceptible to injury under the circumstances, then the defense of foreseeabilty cannot legally apply. This exception, called the **eggshell skull theory**, says that a plaintiff with a preexisting condition does not change or diminish the defendant's liability. Again, the reasonable person approach applies. Under this theory, if Missy had taken an oar and smacked A., B., C., D., E., and F. as hard as she could when she finally got to shore, clearly this is an act of negligence. However, assume that, while five of the six suffered injury, D. actually ended up in the hospital for six months because he had a rare medical disorder that made him unusually sensitive to any kind of hard blows. While one would reasonably not expect Missy's hit with the oar to do that much damage, nonetheless, she can be found liable.

DAMAGES IN NEGLIGENCE CAUSE OF ACTION

After all evidence has been presented, the trier of fact deliberates on the elements of liability and damages. If liability attaches to the defendant, an award is made for damages or a verdict against the defendant is reached. While it is abundantly clear the wrongdoer has a legal obligation to compensate the injured party, it is less clear but nonetheless a legal duty of the plaintiff to

FIGURE 13.4
Classification of Damages

Compensatory:	Sum equivalent to the total expenses incurred for physical, property and even in some cases, emotional injury sustained
Punitive:	Complained of behavior is so egregious, monetary award sends the message the behavior is unacceptable and if repeated will be at the actor's peril
Nominal:	Jury cannot find a substantial loss accruing from the injury and awards a sum sufficient to confirm the judgment of record, neither unduly enriching the plaintiff, nor unnecessarily burdening the defendant

mitigate damages
The obligation to offset or otherwise engage in curative measures to stop accrual of unreasonable economic damages; that is, to minimize the damage incurred through affirmative actions.

compensatory damages
A payment to make up for a wrong committed and return the nonbreaching party to a position where the effect or the breach has been neutralized.

punitive damages
An amount of money awarded to a nonbreaching party that is not based on the actual losses incurred by that party, but as a punishment to the breaching party for the commission of an intentional wrong.

mitigate damages. This duty confers an obligation to do whatever would be reasonable to offset or otherwise engage in curative measures to avoid accumulating unnecessary or disproportionate economic harm for the injury sustained. As such, while deliberating, the trier of fact must consider the reasonableness of the injury claimed as a result of the breach of duty. The duty to mitigate arises from the rights of all individuals to fair and equitable protection under the law. Permitting the plaintiff to recover for damages that are clearly avoidable not only is unfair, but, in ratifying such awards, the courts would perpetuate an unnecessarily punitive justice model. This approach is contrary to the ideals and theory of our constitutional form of law and government.

Under the duty of *mitigation*, the plaintiff cannot simply sit around and wait for a windfall. The plaintiff is not obligated to eliminate any and all burden resulting directly and proximately from the complained-of injury. Often the jury challenge is to translate, as it were, the injury into a form or amount of money that will recompense the plaintiff for the injury sustained, while at the same time reasonably relating the amount to the entirety of the circumstances, including the plaintiff's mitigation. The amount of the award, hypothetically at least, should never be either excessive or unduly punitive.

Three types of damages—*compensatory*, *punitive*, and *nominal*—are described in Figure 13.4 and discussed more fully in the following sections.

Compensatory Damages

In cases where it is a comparatively simple matter to calculate the full economic losses resulting from the breach of duty, the jury makes a **compensatory damages** award. In this setting, the jury awards a sum equivalent to the total expenses incurred for physical, property, and even, in some cases, emotional injury sustained. As a practicing paralegal, careful record keeping, investigation, and calculation of any and all bills incurred are important aspects of case file preparation and maintenance. Every expense incurred, regardless of the amount, must be carefully recorded and documented. You need to be particularly careful to ensure that you include all reasonable expenses when you prepare the list of damages. As an example, in an automobile case where the client lost use of the car for six weeks, be sure to explore the alternative means of transportation during that period and calculate the expenses incurred.

Punitive Damages

In those circumstances where **punitive damages** are specifically permitted by statute or common law, the amount of the punitive award component needs to be clearly indicated. The rationale for permitting punitive damages is simple and logical. When the behavior complained of is so

PRACTICE TIP

As difficult as it may be to recognize, the plaintiff often fails to account for expenses. Gentle reminding and systematic updating comprise an art the paralegal is well advised to develop and apply.

RESEARCH THIS!

Review secondary sources to develop a full understanding of the types of damage awards and situations in which the various categories apply. Note case references to support each award category, along with a brief discussion of the court analysis of the award. Prepare a chart or other presentation format that summarizes the categories of damages, unique characteristics of each, instances when appropriately awarded, and elements on which courts base the decision to make such awards.

RESEARCH THIS!

Research your home state law related to punitive damage awards. Determine when these awards are permitted as well as prohibited. Locate one case for each instance when the awards are legally permitted. Summarize the key elements in the court opinion supporting the award.

egregious, the law makes provisions for monetary awards to send the message, as it were, that the behavior is unacceptable and, if continued or repeated, it will be done not only at the actor's peril, but at the risk of substantial monetary burden as well.

Example:

Tobacco company litigation has yielded what at first blush may seem as excessive amounts. Often, these awards have been in multiple millions of dollars. The jury verdict or award distinguishes the amounts representing punitive damages for the manufacturer's wanton disregard for health and safety of consumers. When the awards are appealed and reduced, under the special powers of the trial court judge, the reduction is solely to the punitive damages sum; nonetheless, the sums awarded remain multiple millions of dollars.

Example:

In a Chicago case, a consumer went to a drive-in service window of a major fast food chain, ordered coffee, placed it between her legs, and drove off into the morning rush-hour traffic. The coffee spilled, burning the customer. She sued the fast food chain, winning an enormous verdict. The jury made it clear the award was punitive to send a message to the chain to monitor the temperature of the coffee more carefully and all other aspects of its customer service operations or face similar monetary consequences.

Punitive damage awards are the exception rather than the rule in most negligence cases. The statutes in each jurisdiction articulate clearly the circumstances under which punitive damages are appropriate as well as the cases under which they simply may not be included in the award.

Nominal Damages

nominal damages
A small amount of money given to the nonbreaching party as a token award to acknowledge the fact of the breach.

In those cases where injury is evident but the amount of damages illusory, or, more specifically, translating the effect, scope, and unwarranted burden into monetary terms is especially difficult for the jury, **nominal damages** may be the appropriate remedy. In those cases, the jury cannot find substantial loss accruing from the injury. This results in an award in a sum sufficient to confirm the judgment of record but, at the same time, neither unduly enriching the plaintiff nor unnecessarily burdening the defendant. It is extremely rare to have a case in which nominal damages are awarded. The biggest challenge in sustaining a case that could result in such an award rests in the practical reality of reducing the damages to a monetary sum. If this amount is negligible, then arguably the breach of duty is inconsequential and, thus, not ripe for judicial review. Nonetheless, there have

Team Activity Exercise

The class will be divided into two teams, one representing a pro punitive-damages position and the other opposed. Discuss the individual research and findings of the respective team members. Formulate a policy statement, including specific elements that would serve the needs of the various interests, society, and plaintiffs. Comment on the social and legal implications of the policy your team formulates. Both teams should present their recommendations to the class, followed by discussion including the entire class.

RESEARCH THIS!

Research nominal damages award case opinions in your home state. After reading several case opinions, prepare a brief analysis of the case types in which the jury made nominal damages awards. Comment on the rationale in the court opinions for finding against the defendant but awarding only nominal damages. Retain your essay in your PRM for easy future reference.

been times when such awards were made and upheld on appeal. The issue of nominal damages is rarely seen in practice, but the claims can be viable and, as such, should be understood.

NEGLIGENCE CLAIMS DEFENSES

consent
All parties to a novation must knowingly assent to the substitution of either the obligations or parties to the agreement.

contributory negligence
The plaintiff played a large part in causing the injury thus, fundamental fairness precludes assigning liability to the defendant.

clean hands doctrine
A plaintiff at fault is barred from seeking redress from the courts.

comparative negligence
Applies when the evidence shows that both the plaintiff and the defendant acted negligently.

In tort claims based on negligence, a limited number of defenses are available. (See Figure 13.5.) You should be aware of those that may pertain despite the relatively limited availability. You may recall from prior chapters that a defense is a legally acceptable excuse for the complained-of acts or omissions. In some cases, the defenses operate as a complete bar to recovery, while in others a partial bar. As with intentional torts, the defense of **consent** is available for negligence claims. The nature of the defense is such that it may be difficult to prevail, but, nonetheless, the defense is available.

Contributory negligence occurs with evidence showing the plaintiff played a large part in contributing to the injury and, thus, is foreclosed from collecting damages. With the defense of contribution, the evidence must show clearly that, even if the defendant acted negligently, the plaintiff acted equally negligently; thus, fundamental fairness precludes assigning liability to the defendant. Contributory negligence is a complete bar to any recovery. The plaintiff who fails to take reasonable care to protect him- or herself is ineligible for recovery from the defendant. Courts are unwilling to set strict formulae or thresholds that state unequivocally that if the plaintiff is a participant, he or she is legally less wrong than the action of the defendant. Excusing one who clearly acts negligently is quite obviously inequitable and unfair under our legal system.

The doctrine of contributory negligence at first blush may appear harsh. However, when analyzed in the light of the clean hands doctrine on which it is based, then it may become easier to understand. Under the **clean hands doctrine**, a plaintiff who obviously is at fault is barred from seeking redress from the courts, which in whole or in part would act to excuse the wrongs of the plaintiffs and lay all fault at the feet of the defendants.

Comparative negligence, on the other hand, applies when evidence shows that both the plaintiff and the defendant acted negligently. However, the plaintiff's behavior was not equal to that of the defendant, but it was substantial enough to reduce the jury award according to the proportion of liability borne by the plaintiff's acts. Comparative negligence law has three apportionment plans: (1) pure, (2) New Hampshire rule, and (3) Georgia rule, as illustrated in Figure 13.6. Under any plan, the plaintiff's negligence reduces the amount of damages recoverable from the defendant. In the verdict form, the jury actually designated the percentage of liability attributable to the plaintiff.

FIGURE 13.5
Negligence Defenses

1. **Consent:** Plaintiff willingly agreed to participate in the activity or situation complained of thus barring recovery from defendant for injuries.
2. **Contributory negligence:** Plaintiff played a large part in causing the injury thus defendant cannot be liable for plaintiffs injury.
3. **Comparative negligence:** Plaintiff's negligence reduces damages recoverable from defendant.
4. **Assumption of the risk:** Plaintiff voluntarily assumed the risk of injury.
5. **Defense/self-defense:** Defendant actions done in self-defense thus cannot support award for plaintiff's injury.

FIGURE 13.6
Comparative Negligence Plans

1. **Pure comparative:** Plaintiff is entitled to recover regardless of the percentage of fault the jury finds plaintiff contributed
2. **New Hampshire rule:** Plaintiff entitled to recover if and only if jury finds plaintiff 50% or less responsible
3. **Georgia rule:** Plaintiff must always be less than 50% negligent to recover

CYBER TRIP

Research secondary sources and case law to get some insight into assumption of the risk and when it has been successfully raised, as well as when the jury failed to be persuaded. Prepare a summary of the doctrine and key aspects considered when courts accepted the defense as well as rejected it.

RESEARCH THIS!

Research your home state law to determine what comparative negligence plan applies. Find case opinions in which comparative negligence was raised as a defense. After reading the opinions(s), locate special jury questionnaires used when comparative negligence is raised. Prepare a summary of the rule in your state, key points in court analysis of the doctrine, and, finally, what, if any, special jury questionnaires or instructions are incorporated in your state law and rules of civil procedure. Retain your completed document, including copies of supporting documents and case opinion citations, in your PRM for easy future reference.

The defense of **assumption of the risk** is premised on the fact that the plaintiff knowingly undertook the conduct giving rise to the claim. When the participation is voluntary, particularly with known hazardous activity, the law assumes the plaintiff understood the nature of the activity, including the potential harm and risk. Success with the defense relies upon showing the plaintiff understood the nature and the scope of the potential risks.

TORT REFORM

assumption of the risk
The doctrine that releases another person from liability for the person who chooses to assume a known risk of harm.

tort reform law
Limiting or capping the monetary awards juries can make for specific classes of tort actions such as personal injury or automobile liability.

In many areas of the country, there have been active movements toward restricting the amount of jury awards available in negligence actions. The tort reform movement has met as much resistance from those opposed as it has acceptance from those in favor. If universally embraced, the tort reform movement will result in substantial reduction to damages awards. However, it is important to realize the arguments on both sides have merit and bring out many points worth consideration. As a practicing paralegal, you should be aware of the movement and, more particularly, the position taken in your state. A number of resources are available to help define and clarify the movement and positions of the various sectors impacted, whether attorneys, plaintiffs, defendants, or insurance carriers.

Stated in simplest terms, **tort reform law** focuses on limiting or capping the monetary awards juries can make for specific classes of tort actions, such as personal injury or automobile liability. Understanding the analysis on both sides of the issue enhances appreciation for the difficulty in reconciling competing interests while serving those interests equitably.

The American Trial Lawyers Association (ATLA) has a great deal of information on tort reform and the impact of capping damages. The material is well worth reviewing on both sides of the debate. The ABA also has a good deal of information on the topic. It is advisable that you research the position in your home state.

Each state contemplating the action has a different proposal. In some instances, the limitations are recommended only for punitive damages, while others recommend limiting rewards across the board. One important consideration is whether the judge can deviate or change from the cap established under the law. Typically, when such provisions are included, an opinion from the judge is required explaining the deviation. If, however, state law permits no deviation, this would not be available.

In the Figure 13.7 case, Person A, whose injuries were worse than those of Person B, nonetheless takes home the same compensation as Person B. Even though the jury thought Person A deserved far more compensation, the jury's judgment was overruled by a cap placed by the legislature long before Person A's case ever arose.

FIGURE 13.7
ATLA Illustration of How a Cap on Recovery Would Operate

Source: Reprinted with permission of the Association of Trial Lawyers of America.

	Injuries/Losses	Original Jury Award (what the juries think should be awarded)	Award after Legislature's Cap (what the plaintiffs go home with)
Person A	After being hit by a drunk driver, Person A's car caught fire. Her husband (a passenger) was killed, she was burned and left disfigured, and she lost the use of her right arm. She was a homemaker, and can no longer work.	$1.2 million non-economics	$250,000 non-economics
Person B	After being hit by a drunk driver, Person B suffered two broken legs, had to have surgery to repair them, and was forced to wear a full body cast for 2 months.	$250,000 non-economics	$250,000 non-economics

CYBER TRIP

Research the tort reform movement in your state and nationally. Explore the Web to find information and discussion on both sides of the issue. A good place to begin your research would be with the American Tort Reform Association, which can be located at the following Web address: www.atra.org/reforms/. You should also search in www.abanet.org and your professional organizations' publications.

CYBER TRIP

Visit the ABA Web site at www.abanet.org/irr/hr/fall02/eid.html for an interesting article about tort reform. Use the article as a thought provoker to help you get a broad understanding of the many issues raised by the concept.

Team Activity Exercise

The class should be divided into two sections, one of which is pro tort reform and the other, opposed. Each team should research the position assigned in articles, legislative proposals, and other materials supporting the respective position. The teams should then debate the issue, with the instructor as moderator. At the conclusion of the debate, an information paper should be prepared with the class members collaborating to determine the salient points for both sides. Each class member should retain a copy of the final written paper, including reference citations, for future easy reference.

Eye on Ethics

Client interaction is often a focal point of the paralegal job in practices representing negligence actions, whether as plaintiff or defense counsel. The difference between properly giving the client information and legal counsel often blurs. To avoid crossing the sometimes blurry line into UPL, you must know the law and the legal issues involved in the client matter in particular and the specialty practice area as well.

The client was on a camping trip with four other friends in which your client sustained injury. Your firm has been retained to file suit against the fellow campers. The facts are that the campsite was on the riverside under a stand of lovely old trees from which several rope swings were hanging. The group decided to have a contest to see how many could get onto the rope swing and jump the river to the other side. Your attorney has asked that you explain to the client the difference between contributory and comparative negligence. You complete some research to refresh your understanding, call the client, and meet to give the details. When the client leaves, you realize that you did not give the client correct definitions. You confused the definitions and left the impression that punitive damages were also available. You never said that directly, since you are careful not to give legal counsel, but, nonetheless, you are concerned that the impression given is inconsistent with the law. Prepare a memo to your supervising attorney discussing the ethical implications of the situation and the specific issues involved. As part of the memo, be sure to include a definition of both comparative and contributory negligence so your attorney has all of the relevant information to guide your ethical dilemma. Also include a proposed strategy for handling the issue with your client.

Summary

Upon completion of this chapter, you should have gained an insight into the law of negligence. You should understand that, while it may appear the number of cases is growing tremendously, the law remains consistent and protects both the injured individual as well as the defendant. You have had an opportunity to explore application of the reasonable person standard and other elements of negligence claims, including defenses and damages. You should feel competent applying professional paralegal skills without crossing into UPL or ethical violations when dealing with clients and negligence claims.

Key Terms

Assumption of the risk
Attractive nuisance
Breach of duty
"But for" test
Cardozo test
Causation
Clean hands doctrine
Compensatory damages
Comparative negligence
Consent
Contributory negligence
Duty
Eggshell skull theory
Foreseeability
Gratuitous undertaking
Injury
Invitees
Joint and several liability
Landowner's duty
Licensee
Limiting physical conditions
Mitigate damages
Negligence
Negligence per se
Nominal damages
Ordinary person standard
Prima facie
Professional duty
Proximate cause
Punitive damages
Res ipsa loquitur
Social guest licensee
Standard of care
Substantial-cause test
Tort reform law
Trespassers

Review Questions

TRUE AND FALSE

Read each of the following and mark true or false. For those marked false, provide a sentence that makes the statement true.

1. Under negligence per se theory, a complete defense may be presented.
2. Comparative negligence is the theory under which the defendant's verdict is reduced by the amount of negligence apportioned to the plaintiff.
3. Attractive nuisances on a landowner's property need not impose any particular duty on the landowner.
4. Assumption of the risk is an available defense in negligence actions.
5. Under some circumstances, the plaintiff need not prove duty to prevail in a negligence action.
6. Tort reform movements are a minor issue in negligence practice.
7. A professional defendant is held to the reasonable standard of care for the reasonable man when assessing liability.
8. Certain classes of land users may impose a higher duty on a landowner.
9. Nominal damage awards are made when the injury is clear but the extent of the impact illusory.
10. Statutory authority often establishes negligence per se.

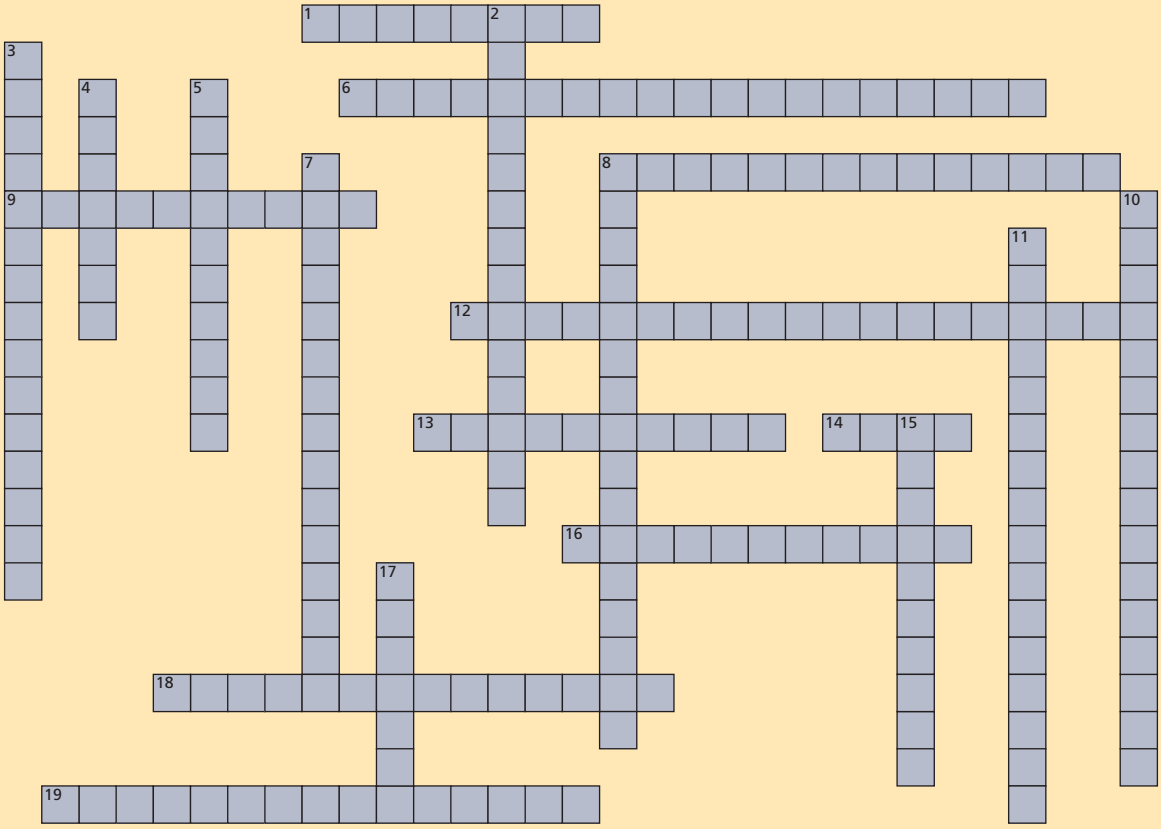
Discussion Questions

1. Locate a case from your home jurisdiction in which *res ipsa loquitur* was invoked and the plaintiff prevailed. Read the case opinion and briefly prepare a summary of the case facts and court holding. Pay particular attention to the rationale of the court opinion, noting particularly how the court applied the doctrine to the specific case facts. Can you think of any situations in which a different finding could be made with similar facts? If yes, explain why. If not, also explain why you concur unconditionally with the finding of the court.
2. Select a partner and, between you, locate a case in which professional negligence (malpractice) was at issue. One partner should represent the plaintiff, while the other takes the position of the defending professional. One member of the pair should formulate an explanation of why the court opinion was correct as to the plaintiff and the other present argument showing the incorrectness of the finding of liability. Remember that you need not agree with the points raised in the opinion. Rather, you need to formulate a persuasive argument based on your understanding of the law of negligence.
3. Locate your state law regarding punitive damages in negligence actions. Prepare an office memorandum in which you briefly describe the law, provide citations to your sources, and provide reference citations to cases on point with the various kinds of cases from your home state. Describe briefly the statutes, including specific reference citations. Make copies of the statutory provisions and retain in your PRM along with your memorandum for future ease of reference.
4. Formulate a list of reasonable circumstances or conditions that would form the basis for negligence per se claims, such as a zoning law requiring pool fences. Consider dangerous dogs as one possibility or maintaining an archery range in a residential neighborhood even if for personal use. After formulating a list, check your home state statute to see the status of negligence per se law related to those particular special issues. Create a list of the cases by name, case citation, and brief description of the condition and statutory reference. Retain this list and related materials in your PRM for easy future reference. Compare your list and discussion of the general state of the law on such unique situations with your classmates.
5. Research one recent case of gratuitous undertaking in your home state. Prepare a case brief including discussion of social policy served, if any, in the opinion.
6. Pair project. Working with a partner, prepare a chart or PowerPoint presentation suitable for a meeting of paralegals in which you outline negligence law. The key components should be brief fact patterns illustrating a claim. Use the various examples from the lesson wherever possible to illustrate the type of negligence. State the claim, the defense if any available, and the available damages in such issues. Be sure to include special duty cases and any other exceptional issues. Prepare a written discussion piece to supplement the presentation to ensure the reader of the chart understands the chart design, as well as the content. You should be prepared to present the materials to your classmates. Retain your completed project in your PRM for easy future reference and use.

Portfolio Assignment

Prepare a reference chart for use in your paralegal office as a tool for the newer paralegals assigned to the negligence litigation section. The chart should present an overview of negligent tort elements, a brief explanation of each, and exceptions such as negligence per se. Additionally, the defenses should be presented, including a brief explanation of when they are available and the elements of each. Finally, include various damages classifications and the situations in which each may be awarded either independently or with others. When complete, your presentation should outline all aspects of negligent torts paralegals will need to know about to formulate an individualized system for investigation and documentation in case trial preparation. Retain a copy of your completed document in your PRM for easy future reference and use.

Vocabulary Builders



Across

1. Landowner allows this to use the premises for limited purposes.
6. Artificial condition appealing to children.
8. Nearest most closely related cause.
9. In and of itself breaches duty.
12. Repay or replace money spent as a result of injury.
13. Motivation other than duty.
14. Obligation to perform.
16. Zone of foreseeability.
18. Predictability.
19. Statute establishes the wrong and the law permits no defense.

Down

2. Criteria for measuring appropriateness of behavior.
3. The thing stands for itself.
4. The landowner knows and wants on premises.
5. If the event had not occurred, there would be no injury.
7. Offset or decrease the amount through self-help measures.
8. Reasonable level of skill, knowledge, and training for similar professionals.
10. Which of several causes is legal and the primary cause.
11. An ordinary person in a similar situation requiring neither special training nor understanding.
15. Unwanted user of landowner's premises.
17. Legally adequate reason for nonperformance.

Chapter 14

Family Law

CHAPTER OBJECTIVES

Upon completion of this chapter, the student will be able to:

- Describe various types of marriage.
- Explain the dissolution of marriage processes.
- Demonstrate an understanding of the child support process and law.
- Explain the child custody process.
- Discuss and compare federal child protection statutes.
- Demonstrate an understanding of equitable distribution processes.
- Identify ethical challenges and strategies to avoid compromising obligations.

In this chapter, we look into an area of legal specialization in which the paralegal typically plays an active role with the clients. The paralegal becomes involved in a wide variety of functions from client interviews, to drafting pleadings, to custody, visitation, or partial custody and child support obligations and issues related to each of these and more. We also look into the typically most contentious part of a dissolution action, which is equitable distribution or dividing the marital estate. The clients frequently expect the paralegal to fill the role of advisor as well as legal assistant. In this respect, the paralegal must have a clear idea of the scope of the permitted role, as well as when the requests of the client present an ethical compromise, if not handled properly, without alienating the client. In this chapter, we will broadly cover each aspect of the family law practice, including marriage, dissolution of marriage, equitable distribution, child custody, adoption, and support, both spousal and child. Upon completion of this chapter, you will have a more specific idea of what is involved in family law practice as well as the role the paralegal can fill when working with clients in this area of legal representation.

BRIEF HISTORICAL BACKGROUND

Historically, women were chattel of their husbands, both legally and religiously; thus, divorce was rare. When it did arise, because marriage assumed husband superiority in all circumstances, the male was entitled to more legal protection. Prior to the 1900s, common law marriage was relatively commonplace throughout the country. However, as scientific knowledge and interest in citizen health increased, common law marriage and state regulation of who could marry, at what age, and under what specific circumstances became the norm. In 1909, the state of Washington passed the first laws prohibiting individuals known to be impaired mentally or physically from marrying. Shortly thereafter, Wisconsin passed legislation requiring males to pass state-mandated physical examinations prior to granting a license to wed.

Along with the regulation of marriage came regulation of divorce. The first divorce laws were intended to reward a wronged spouse based on evidence that the spouse sued had committed certain offenses that spoiled the marriage. Among the most common grounds or reasons for divorce were adultery, desertion, and cruelty. Some states held that only adultery qualified as adequate grounds, but this gradually eroded as women's rights expanded and gained legal recognition. Many states permitted the somewhat illusory concept of cruelty as grounds for a petition and grant of dissolution.

collusion
Illegally created agreement of the parties.

There was never a question that the law cannot facilitate divorce resulting from **collusion**, or an illegally created agreement of the parties. In a divorce resulting from collusion, the parties agree between themselves that the marriage was a mistake, for whatever reason. Having jointly reached the decision, the parties create documents that meet the applicable legal standards for divorce serving legitimate social needs. This kind of mere change of mind is insufficient basis at law to grant a divorce.

marriage
A union between a man and a woman.

As the divorce rate increased, many states implemented waiting periods that discouraged all but the most seriously broken marriages from seeking court assistance to resolve issues. In some cases, the waiting period was two years. Many of the states have either rescinded or decreased the waiting period, or have calculated the wait for final decree as running from the date of filing with the court.

MARRIAGE

certificate of marriage
Completed when the official completes the ceremony confirming the ceremony took place and is recognized by the state.

consular marriage
Conducted by a diplomat of the U.S. government.

proxy marriage
An agent for the parties arranges the marriage for the couple.

putative marriage
The couple completes the requirements in good faith, but an unknown impediment prevents the marriage from being valid.

covenant marriage
The couples make an affirmative undertaking to get counseling prior to the marriage and to seek counseling if contemplating divorce.

Marriage is a union between a man and a woman, often accompanied by a celebration. It is also a contract recognized at law. As might be expected for legal agreements, a license is needed to signify that permission by the civil authority has been granted for the marriage. While state ratification may be a requirement, the state is not a party to the contractual aspects of the marriage. State involvement ensures legal integrity and fairness of the process. License requirements have changed over time. A blood test or other health screening is no longer mandated. Many states have also reduced, if not eliminated, lengthy waiting periods between issuance of the license and the date of the ceremony itself.

Whether a civil or a religious official presides at the ceremony, when the official completes the ceremony, he or she completes a **certificate of marriage**. The certificate confirms that the ceremony took place and the state officially recognizes the union. The ceremonial unification ritual is not the only type of marriage recognized at law. The state recognizes other processes or protocols as forming a binding and legal marital union. Figure 14.1 lists the different types of marriages: **consular**, **proxy**, **putative**, and **covenant**.

The most recent effort to augment the legal definition of marriage is same-sex marriages or unions. The topic has been controversial and thought provoking. The issue is far from resolution. The prevailing attitude is that marriage is between a husband and wife, thus implying marriage is valid only for opposite-sex partners. In 1993, however, Hawaii ruled that same-sex unions are permissible under the law. Since that decision, various states, notably Massachusetts, California, and Vermont, have enacted statutory provisions for same-sex unions to have the same status and effect as the traditional opposite-sex unions.

The federal government has not been so accepting and enacted the Defense of Marriage Act (1996), which provides that states need not recognize same-sex unions. The act also reiterated the legal definition of marriage for purposes of federal law as only recognizing opposite-sex unions. The debate over the issue is far from ending. As of the date of this writing, several states have agreed to hear appeals and others have set aside their legislation, thus creating a state of legal limbo for those joined under such unions, or contemplating such unions.

FIGURE 14.1
Types of Marriage

Consular:	Conducted by a diplomat of the United States government but this type is not universally recognized
Proxy:	An agent for the parties arranges the marriage for the couple
Putative:	The couple completes the requirements in good faith but an unknown impediment prevents the marriage from being valid
Covenant:	The couples make an affirmative undertaking to get counseling prior to the marriage, and to seek counseling if contemplating divorce

CYBER TRIP

Explore the Web site provided to gain some insight into the various perspectives and legal positions on same-sex unions and the legality of permitting it: http://law-library.rutgers.edu/SSM.html. Locate other sources, including both case law and secondary sources. Note elements and features of particular interest. Check recent publications, both legal and other, for updates on the current status of the issue both nationally and locally.

RESEARCH THIS!

Research your home state law to find one case opinion related to each of the four marriage forms legally permissible under the law. Briefly outline the facts of each type and also summarize the case opinion, paying particular attention to exceptions or special provisions required. If there are no cases on point in your home state, search neighboring states for examples. Retain the completed brief in your PRM for future easy reference and use.

CYBER TRIP

Check out this Web site to access the federal Defense of Marriage Act (1996): http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR:. Research case law and other resources to determine the position your home state takes on the issue.

Given that marriage is a contractual arrangement, the law requires that the elements of contractual competence and validity of agreement be present. Just as with other contracts, there are certain circumstances under which the contract may be *void* or *voidable*.

A void contract is one that, for purposes of legal adequacy, never took place, notwithstanding any ceremonies or other social signs of marriage. A **void marriage** fails to meet the legal requirements. In cases involving incestuous relations within the degrees of relationship set forth by statute, the marriage is void regardless of the intent of the parties. In cases of **bigamy**, that is, where one spouse knowingly enters a second marriage while the first remains valid, or **polygamy**, in which multiple marital relationships are entered while others remain intact, no valid marriage exists despite external evidence that such may have occurred.

A **voidable marriage** is valid in all legal respects until the union is dissolved by order of the court. This differs from a void marriage in that a void marriage is not valid when entered while a voidable marriage is valid until specific legal means are engaged to dissolve the union. If the dissolution process is not finalized by order of the court, the marriage remains valid despite evidence of intent to dissolve that may be filed of record. The law assumes that an incomplete process indicates that the parties want the marriage to remain intact. Without affirmative evidence from the parties, the courts do not assume dissolution should be the resolution. This

void marriage
The marriage fails to meet the legal requirements.

bigamy
One spouse knowingly enters a second marriage while the first remains valid.

polygamy
Multiple marital relationships are entered while others remain intact.

voidable marriage
Valid in all legal respects until the union is dissolved by order of the court.

RESEARCH THIS!

Billy and Marcia, two love-struck teens, decide their love will last forever and they want to marry immediately. Marcia, however, is only 15 and, as such, she may not marry without parental consent. Of course, her parents refuse and counsel her to wait until she is old enough, at which time she would be free to do whatever she wishes. The young lovers are not deterred and figure out the perfect plan to marry while omitting the consent element. They marry and tell no one until both are over the age of consent. Is the marriage automatically legalized when both are past the age of consent?

Research your home state law and secondary law sources and then formulate your answer. Bear in mind contract principles discussed in previous chapters. If your home state has no case law on point, search neighboring state law. Prepare a summary of the key elements in the opinion analysis. Comment on your position regarding the issue. If you agree, indicate why, including legal citations to support your opinion. If not, then recommend an alternative, including in your recommendation citation to legal sources on which you base your analysis.

RESEARCH THIS!

Research your home state law to confirm at what age parental consent is no longer required to marry and the degree of relationship creating an incestuous relationship. Research the law regarding the procedure for obtaining and determining parental consent. Briefly summarize the provisions and specify the documents needed to complete consent and marriage. Comment on your position regarding the statutory age including whether you agree and, if so, on what basis. If you disagree, state why and the alternative you recommend. Retain the statutes and the essay in your PRM for future reference.

approach is consistent with the legal presumption that preservation of the family unit is the desired social and legal goal.

DISSOLUTION OF MARRIAGE

dissolution of marriage
Process resulting in termination of the marital union.

spousal payment
See *alimony* and *support.*

alimony
Court-ordered money paid to support a former spouse after termination of a marriage.

support
Periodic payments extending over time.

equitable distribution
Divides the assets acquired during the marriage between the parties.

bifurcated
Separated from other issues.

Dissolution of marriage has been a fact of life almost as long as there have been marriages. The acrimony of many divorce actions led to the passage of no-fault divorce statutes. Under this scheme, the legislators hoped to reduce the acrimony and damage to the parties and families by eliminating the need to present evidence of cruelty or other grounds for the requested order of dissolution. Even in states with no-fault divorce provisions, issues of child support and equitable distribution must be resolved. The parties can agree to a resolution of any related issues and file agreements with the court to have enforceable agreements. If the parties are unable to reach agreement as to the collateral issues, the courts will entertain litigation just as with cases of contested divorce. No-fault provisions merely address the narrow aspect of grounds for the divorce, one of many elements of the total action.

Despite the different facts, each dissolution action has similar components. **Dissolution of marriage** is the process resulting in termination of the marital union. Typically, each dissolution petition proceeds concurrently with petitions to distribute marital assets. Child custody matters relate to custodial rights and privileges of the divorcing spouses and the minor children involved in the marriage. *Child support* and **spousal payments**, whether **alimony** or **support**, are financial considerations often decided according to a state-mandated formula; nonetheless, they are subject to process and often to litigation. **Equitable distribution** divides the assets of the marriage between the parties. Each stage or component requires separate court proceedings and may proceed through the courts at different pacing, based on the parties' ability to resolve the outstanding issues and agree on all facets simultaneously. It is not at all unusual in a family law practice to see the various aspects separated, or **bifurcated**, from the rest of the issues.

Procedurally, the actions for support, custody, dissolution, and equitable distribution often are filed concurrently but subsequently separated from the initial action. The final order then is entered of record as each segment resolves. As with other law that varies from state to state, the procedure and other requirements are set by statute and, in some respects, dictated by the wishes of the parties and the custom of the jurisdiction. The local and state rules of procedure guide each aspect as with any other civil litigation issue. Underlying constitutional concerns and guarantees form the underpinnings of the substantive and procedural law.

RESEARCH THIS!

Determine if your state is a no-fault divorce jurisdiction. Read over the law to see if exceptions or other unique conditions are imposed on petitions for dissolution. Note the exceptions and retain a brief summary along with the citation to relevant state law in your PRM for easy future reference and use.

RESEARCH THIS!

Research your home state law regarding bifurcation of the dissolution, equitable distribution, custody, and support issues. Find the forms and related procedural rules. Prepare a checklist of all the relevant documents, a brief description of the purpose of each, exceptions to the requirement for filing, and timelines for filing. Retain your completed checklist and source citations to the relevant rules of procedure in your PRM for easy future reference.

DISSOLUTION OF MARRIAGE PROCESSES

petition for dissolution of marriage
Request for an order dissolving the marriage of the petitioner and spouse.

The **petition for dissolution of marriage** asks the court to enter an order dissolving the marriage of the petitioner and the spouse. Often the petition will ask for additional relief in the form of alimony, or spousal support; child support; and, lastly, property distribution. Child custody issues are often included in the first filing but subsequently separated and subject to parallel litigation and process in the family court. In some cases, the court may resolve one aspect of the matter, for example, child support, before the remaining issues are completely resolved and reduced to the final order. Although it is uncommon, dissolution may be final before the equitable distribution issues are resolved and reduced to the final order. The best approach if you are working as a family law paralegal is to become quickly acquainted with the local rules, practices, and customs.

For purposes of our discussion, we will assume that all jurisdictional and venue issues have been resolved. State statute clearly sets forth the permissible grounds and the form of the petition for dissolution of marriage used in the jurisdiction. Some states are **no fault**, in which assertions that the marriage is irretrievably broken are sufficient grounds. On the other hand, if the jurisdiction requires specific grounds, then the local rules may provide the form and sample language to insert for each of the recognized grounds the party asserts.

no fault divorce
A divorce in which one spouse does not need to allege wrongdoing by the other spouse as grounds for the divorce.

domicile
The place where a person maintains a physical residence with the intent to permanently remain in that place; citizenship; the permanent home of the party.

residence
The permanent home of the party.

Assertions of **domicile**, indicating continuous residence within the jurisdiction of the court, are mandated regardless of jurisdiction. Domicile establishes evidence the parties are properly within the jurisdiction, and thus the authority of the court. Domicile and residence are different terms in a legal context despite the common interchangeability of the terms. *Domicile* legally requires identification of (1) a specific place where the party has physically been and (2) clear, present, and absolute intention to make that place his or her permanent home. **Residence**, on the other hand, narrowly means the house or place where the person stays.

separation
Legally requires continuously living separate and apart for the statutorily set period.

When the party petitioner makes claims of separation, the statutes in each jurisdiction clearly define the applicable period for purposes of the legal definition. **Separation** legally requires continuously living separate and apart for the statutorily set period. Separations for several weeks, followed by a week or a few days of cohabitation, and a repeated similar pattern do not qualify as separation in a legal sense. Separation must be complete and continuous for the statutory period to be legally recognized. Serial reconciliation and returns to the marital residence followed by a period of absence is inadequate under the law. Statements from the parties related to the issue of domicile and separation are given under oath, thus legally foreclosing the possibility of misrepresentation to the degree possible.

The petition also requires specific details as to date and place of marriage. In some jurisdictions, a copy of the certificate of marriage must accompany the petition. Again, your local rules set forth this requirement. Following are the other mandated assertions and statements: whether or not there are children or issue of the union and the date and the place of birth of those minor children including the social security numbers and the names of the offspring.

respondent
Name designation of the party responding to an appeal.

default judgment
A judgment entered by the court against the defendant for failure to respond to the plaintiff 's complaint.

Having filed the petition and summons, the **respondent** has the opportunity to file both an answer and a counterclaim. While the answer is required to avoid a default, a counterclaim is elective by the party. The **default judgment** results when an answer is not filed of record: the court legally may assume the assertions of the complaint are true as stated, the silence of the respondent is taken as agreement, and, thus, the court may legally enter its order granting the relief sought in the complaint. In a petition for dissolution of marriage, the relief sought is dissolution of the marital relationship and all collateral issues that may be subject to independent litigation and order. Dissolution may be granted prior to resolution of equitable distribution as well as child

CYBER TRIP

Locate your home jurisdiction statutory provisions regarding separation including statutory time period. Note the rule and the statute number, as well as the specific requirements. Prepare a checklist of time lines and other considerations to cover in the initial client interview.

PRACTICE TIP

Locate the form complaint in dissolution of marriage and copy those provisions related to separation into your PRM for future easy reference. Create a checklist of demographic data about your client and spouse to ensure you have the information and documents needed to file.

custody and support issues. While this is not the typical sequence, it is certainly no less legal that simultaneous filing of final orders related to all outstanding issues.

When an answer is filed by the responding party, the process proceeds similarly to other civil actions in terms of legal requirements for filing documents, verification of pleadings, motions, and discovery practice. Of course, requests for production of documents and admissions, if appropriate, are used. As with other civil matters, the frequency and the length of such requests may be determined in the rules of procedure. As a practicing paralegal, you need to develop familiarity with the required process as well as exceptions and proper requests for deviation from mandated requirements.

The parties exchange **interrogatories** to provide information related to evidence associated with the legal issues and elements of action. Your home state may require specific forms of interrogatories in dissolution and other civil actions. When using form interrogatories, you should read them carefully to ensure that evidence related to any unusual issues will be reached and requested under the form questions. If such is not the case, determine if your jurisdiction provides for service of special interrogatories. If there is such a provision, become familiar with the applicable rules governing preparation, filing, and service.

interrogatories
A discovery tool in the form of a series of written questions that are answered by the party in writing, to be answered under oath.

In cases of simple **uncontested dissolution** actions, discovery is limited. There is typically a waiting period prescribed by statute, following which the parties jointly file the required documents to dissolve the marriage, based on assertions of voluntary agreement on all outstanding issues. Once the court signs and files the order, courts look unfavorably upon one or the other spouse going back to request opening up any issues that otherwise would reasonably be resolved. With a showing of extraordinary circumstances or fact, the court may grant such a petition. An alternative to uncontested divorces filed after the customary waiting period is the **decree nisi**. Still used in some jurisdictions, the decree says that all related issues are finalized and the dissolution should be finalized pending passage of the statutorily prescribed waiting period.

uncontested dissolution
Following the waiting period prescribed by statute, parties jointly file the documents required by law to dissolve the marriage, based on voluntary agreement.

Given the legal finality of such an agreed dissolution, attorneys for both parties have the responsibility to explore the sincerity of the parties and the reasonableness under the circumstances. The paralegal may conduct limited discovery and document review to ensure that assertions of agreement, distribution of assets, and child custody issues have indeed been resolved.

decree nisi
The divorce and all related issues are finalized pending passage of the statutorily prescribed period.

In states without uncontested actions or in the case of contest in a no-fault state, the family law practitioner often files *motions requesting temporary relief*. These can relate to spousal support, child support, alimony, custody, and visitation. In family law practice, temporary orders more routinely issue than with other civil litigation. One of the most common preliminary or temporary

RESEARCH THIS!

Locate your home jurisdiction form interrogatories for dissolution of marriage. Find the rule regarding service of interrogatories in dissolution actions. Also determine the provisions for service of special interrogatories in those cases where routine discovery fails to meet special needs, for example, with trust income or internationally based business interests where income is generated offshore, to name a few. Retain copies of any forms and rules related to special interrogatories in your PRM for easy future reference and use.

FIGURE 14.2
Grounds for Annulment

1. One spouse was underage at the time of the marriage
2. One or both parties were not legally competent to understand the nature of the agreement formed and the legal obligations imposed
3. Marriage resulted from fraud
4. One or both spouses are unable to consummate the marriage

alimony pendente lite
Temporary order for payments of a set amount monthly while the litigation continues.

orders entered is the **alimony pendente lite**, or temporary support payments to the spouse while the litigation continues. The court does not automatically make such an award nor does alimony pendente lite replace or otherwise include child support. The separate issues should neither be confused nor merged. The attorney for the spouse requesting the relief must file a petition, including the reasons why the court should grant this form of temporary relief. Some jurisdictions use the pendente lite reference for all matters preceding the entry of the final decree, including child custody, visitation, and occupancy of the marital residence. As with other issues related to dissolution, you need to check your local rules and procedures to make this determination.

Under any procedure, these requests for temporary relief must contain specific details of the relief sought; including the reasons the petitioner believes the relief is appropriate under the law and facts of the case. The judge frequently will entertain a hearing on the matter but, in some cases, may rule on the pleadings, saving the time and expense of court appearances.

ANNULMENT

annulment
Court procedure dissolving a marriage, treating it as if it never happened.

Another form of dissolution of marriage is annulment, which is available under certain narrowly defined circumstances. (See Figure 14.2.) Under any case, an **annulment** is a legal declaration that the marriage never took place. This petition, and subsequent court order, is much less common than a formal petition for dissolution of marriage through action in divorce. Nonetheless, the state law establishes circumstances under which such a petition may be granted. An annulment relies on evidence of legal impediment preventing formation of a valid marriage.

PALIMONY

People living together as unmarried partners also separate and exit cohabitation arrangements. The courts began to see cases filed by live-ins, or partners without marriage, requesting judicial intervention and orders normally applied in marital dissolution and equitable distribution matters despite failing to meet the threshold legal issue of dissolving a marriage or legally sanctioned union.

palimony
A division of property between two unmarried parties after they separate or the paying of support by one party to the other.

When Michelle Triola Marvin filed her landmark **palimony** case against actor Lee Marvin, her longtime live-in companion, she opened groundbreaking litigation options. When *Marvin v. Marvin*, 557 P.2d 106 (1976), was finally resolved, the opinion redefined legal relationships and remedies for unmarried cohabitants. Up to that time, the law consistently failed to grant relief to individuals seeking an award of assets accrued during the period of cohabitation when the relationship dissolved; the theory of recovery was contract rather than equitable distribution. In granting Michelle Marvin relief, the court upheld the legitimacy of the contract between the parties and further recognized that the companionship provided extended well beyond a mere sexual relationship. The court found that, while viewed as a girlfriend and little more by many people, in reality, Michelle Triola worked to maintain the relationship and the requirements of her relationship with the movie actor. Thus, she contributed to asset accumulation and was entitled to compensation upon termination of the relationship. This is a similar theory to that applied in marital dissolution matters where the equitable distribution petition of the economically disadvantaged spouse seeks recompense for help and support to the breadwinner spouse in attaining and maintaining his business position, lifestyle, and child rearing.

The legal significance of *Marvin v. Marvin* was twofold. First, the status of unmarried cohabitants was legally recognized. Second, the distribution of assets demonstrated that for purposes of law contributions of the minor-earning spouse or companion has financial value. The social policy message was that women are equal partners and valuable participants in the relationship whether sanctioned by marriage or otherwise meeting the legal standard.

CYBER TRIP

Research your home state law regarding Marvin agreements. Identify the key elements of proof or evidence required to support valid claims. Pay particular attention to requirements of residence as well as agreement conditions. Prepare a summary of the provisions and conditions, including citation to the seminal state case related to the concept of Marvin agreements. Retain your research in your PRM for easy future reference.

PRACTICE TIP

Working as a paralegal in a family law practice calls for applying certain skills that may not be engaged as often in any other practice specialty. Compassion, patience, flexibility, and professional demeanor and approach are essential. When viewed objectively, the pleadings in the litigation process are not that much different from those in other litigation specialties. The analytical skills applied in a contract dispute are equally valuable in an equitable distribution matter.

child custody
Arrangement between the parties for residential and custodial care of the minor children.

legal custody
The right and obligation to make major decisions regarding the child, including, but not limited to, educational and religious issues.

Following this landmark case, similar agreements are known as Marvin agreements. Not unlike dissolution of marriage, many issues arise when termination of a Marvin agreement relationship is at issue. In *Kurokawa v. Blum*, 199 Cal. App. 3d 976 (1988), the court affirmed a two-year statute of limitations for such actions. In *Whorton v. Dillingham*, 202 Cal. App. 3d 447 (1988), the court held that if any parts of the underlying agreement are found to be illegal, the remaining clauses remain in full force and effect, as would be the case under severability provisions in contract law. *Bergen v. Wood*, 14 Cal. App. 4th 854 (1993), established that, without cohabitation and sexual relations, a Marvin agreement is not formed; thus, protections afforded under such agreements were unavailable.

CHILD CUSTODY AND VISITATION

physical custody
Child living with one parent or visiting with the noncustodial parent.

visitation
The right to legally see a child, where physical custody is not awarded.

sole custody
Only one of the divorcing spouses has both legal and physical custody, but the noncustodial parent may have visitation rights.

joint custodial arrangements
Detail the scope of the shared parental responsibility, whether legal, physical, or both.

Most often, the most contentious issues related to dissolution of marriage focus on *child custody* and *visitation* issues. **Child custody** relates to the arrangement between the parties for residential and custodial care of the minor children, including specific periods of time, conditions of change, and exceptions to the agreed-upon plan. **Legal custody**, more particularly, is the right and obligation to make major decisions regarding the child, including, but not limited to, educational and religious issues. There is a trend to have this decision-making right and attendant obligations shared by the divorcing spouses. When the spouses share the right, the legal name of the relationship is *joint custody*.

Physical custody, on the other hand, is limited to the circumstance where the child lives with the parent. In this situation, the parent with whom the child lives is the custodial parent. The other spouse typically, but not always, has visitation rights to the child. **Visitation** is a limited period during which the child stays with the noncustodial parent. At the conclusion of the visitation period, the child returns to the custodial parent. Some jurisdictions refer to visitation as *partial custody*, but this term is gradually being phased out in favor of visitation.

Sole custody occurs when only one of the divorcing spouses has both legal and physical custody. The noncustodial parent may have visitation rights with sole custody agreements but does not participate in any legal issues related to the minor child. **Joint custodial arrangements** expressly detail the scope of the shared responsibility, whether legal, physical, or both. The parties, with the assistance of their attorneys and paralegals, determine the ideal agreement. The final terms are reduced to writing and filed with the court to ensure enforceability and preservation of the terms of the agreement. However, this is not always the case. When the parties cannot resolve the matter, then court intervention and trial are the option. The sheer volume of family disputes

has severely overburdened most jurisdictions. This, in turn, created a number of alternative resolution mechanisms, some or all of which may or may not be available in your home state.

Many courts use mandatory mediation to resolve issues related to both visitation and custody prior to the final order. Any changes or modifications sought following entry of the final order of dissolution are handled in one of two ways in most jurisdictions. The family court will hear the issue if the parties cannot resolve the issue and properly petition for hearing before the court. An alternative method is a **joint stipulation** that states the change and the agreement of the parties to implement the change on a date certain.

joint stipulation
States agreement of the parties to implement the change or other mutual agreement.

Establishing the terms of the custodial and visitation arrangements can be extremely complicated, given the variety of activities in which children may participate, demands on the time of the parents, studying, and many other considerations. However, the agreements are extremely important and should not be left to chance, nor should they be put together quickly without consideration of all possible eventualities. A good agreement at the start is preferable to going back to the court to request changes after the fact.

Courts presume the parents are most legally competent to make decisions relating to the best interests of the child. While courts are loathe to second-guess the elections of the parental choices related to their children, in cases where the plan or request is so patently harmful, unreasonable, or otherwise fails to meet the needs and best interests of the child, the court may indeed reject the agreement and order further negotiation to arrive at a decision more consistent with the needs of all, including those of the minor children. The legislatures and judicial systems both recognize this standard. In 2005, the state of Florida modified the rules of criminal procedure to accommodate certain issues related to parents with children in the criminal law system. This change is gradually becoming part of criminal and family law in many jurisdictions. Likewise, changes to the juvenile court rules and procedures continually clarify and redefine the scope and the limitations of this doctrine as related to the wide variety of issues that arise in relationship to children.

The paralegal can be an invaluable asset to the practice when he or she actively guides the negotiation stage with compassionate but professional recommendations, and concern for the premier issue in every family law matter, which is the **best interest of the child**. This standard governs all issues related to children as the measure of whether a recommendation or request is acceptable and within the legal competence of the judge to grant.

best interest of the child
Premier concern in every family law matter.

CYBER TRIP

Research your home state law and secondary sources related to the best-interest-of-the-child standard, in both case law and secondary sources, to gain insight into the analysis applied by the court, but also the complexity of the issues presented for decision. After reviewing the material, formulate an outline of factual issues to which the standard is applied along with the legal position on the facts in light of applying the best interest of the child standard.

RESEARCH THIS!

Research to find the following cases: (1) Colonna v. Colonna, No. 36 WAP 2002, 581 Pa. 1, 855 A.2d 648, 2004 Pa. LEXIS 1251 (March 3, 2003, argued, April 29, 2004, decided), and (2) Mascaro v. Mascaro, No. 73 MAP 2001, 569 Pa. 255, 803 A.2d 1186, 2002 Pa. LEXIS 1703 (November 14, 2001, argued, August 20, 2002, decided, as amended September 26, 2002).

After locating each case, review the opinions and prepare a brief on either one in which you present the facts, the holding, and the key points in the legal analysis. Be sure to include comment on your position on the legal issue. If you have recommendations to modify the decision of the court, explain how you would do so and why. If you agree with the holding and the analysis, explain what aspects of the relevant law you believe support the holding.

CYBER TRIP

Go to the following Web site to explore resources, including a listing of states recognizing grandparental rights and related information: www.grandparenting.org/Grandparent%20Visitation.htm.

Research your home state statute and briefly summarize the status and procedure required to perfect grandparental rights.

The fundamental assumption of the best-interest-of-the-child standard is that preserving the integrity of the child-and-parent relationship is the goal. The standard likewise champions the position of the parents as most competent to determine the specific details of that best interest as related to their children in the specific situation resulting in the legal controversy or dispute. The courts invoke the standard in most issues related to the child or the interests of minor children.

In our present environment, with so many marriages ending in divorce, the courts are more frequently inclined to permit grandparental visitation rights including custody or partial custody under certain circumstances. The law in this area is evolving, but more frequently includes grandparental interests and wishes essential when assessing the best interest the child.

The courts assume that both parents seek the best interest of the child in any custody dispute. In some situations, however, the intensity of the controversy coupled with the vehemence of the positions both parties take may cause the court to appoint a **guardian ad litem**, who represents only the interests of the minor child. Once appointed, the guardian spends time getting to know the child and understand the various issues related to the dispute. The guardian also may become involved in attempts to resolve the dispute by entering into settlement negotiations actively on behalf of the unique and separate interest of the minor child. If the court appoints a guardian, the parents do not surrender any of their rights to the child or to exercise behavior consistent with the best interest of the minor child, nor are they forced to sever relationships with the child. The guardian is an objective third party who hears the facts and analyzes the impact and relationship of the child, the interests of that child in those circumstances, and the parents. The guardian ad litem makes recommendations to the court as to what serves the best interest of the child primarily and all other involved parties secondarily. As with other aspects of custody and visitation, preservation of the family unit is the ultimate goal even in cases with a guardian representing the interests of the minor child. In cases where the court may appoint a guardian ad litem for the minor child or children, the parents do not sacrifice any responsibilities or rights normally conferred with parental status. The guardian acts to facilitate an unbiased assessment and recommendation of the best interests in light of the controversy and other relevant factors with each unique dispute.

guardian ad litem
Court-appointed representative of the interests of the minor child or other incompetent party.

The continually increasing volume of cases in the family court division has created an increased demand for individuals to fill the role of guardian ad litem. The appointments are typically made from a list of trained and certified individuals. More and more jurisdictions seek paralegals aware of the legal system and the unique demands of a guardian representing the interests of the legally incompetent in an unbiased manner. The guardian balances the special interests of the incompetent while recognizing the conflicting interests of the parents and other parties such as grandparents also asserting interests and demands for visitation rights in the dissolution action. Many jurisdictions have formalized certification programs and require regular recertification to remain active.

Cross-Jurisdictional Issues

There may be cases where one spouse removes the child from the jurisdiction, perhaps to either another state or maybe even a different country. In such circumstances, the jurisdiction of the court issuing the documents can be obstructed. Litigating the jurisdictional issue wastes time more productively spent resolving the underlying substantive issue. These are difficult situations, which fortunately have some legal provisions to facilitate return of the child.

The Uniform Child Custody Jurisdiction Act (UCCJA), passed in 1968 and revised in 1997, has been immensely helpful in resolving these difficult situations. This federal act primarily looks at two concerns:

1. When a court has original jurisdiction pertaining to a child custody issue.
2. When a court may modify an existing order for custody.

The act created an interactive relationship among the signing states whereby other states or foreign jurisdictions enforce the agreements of record from other states as if originally entered in the substitute jurisdiction. See Figure 14.3 for a partial list of the states and the UCCJA acts they have enacted.

FIGURE 14.3
Partial Listing of State UCCJA Acts

Alabama	Code 1975, §§ 30-3-20 to 30-3-44
Alaska	Ch. 25.30.300 to 25.30.910
Arizona	A.R.S. §§ 25-431 to 25-454
Arkansas	Title 9, Ch. 19
California	Division 8, Part 3
Colorado	C.R.S.A. Title 14, Art. 13
District of Columbia	D.C. Code Division II, Title 16, Ch. 46
Georgia	O.C.G.A. §§ 19-9-40 to 19-9-64
Idaho	I.C. §§ 32-1101 to 32-1126
Kansas	K.S.A. §§ 38-1336 to 38-1377
New Mexico	NMSA Ch. 40, Art. 10A
New York	NYSCL, Domestic Relations, Art 5-A)
North Carolina	G.S. §§ 50A-1 to 50A-25
North Dakota (PDF)	NDCC 14-14-01 to 14-14-26
Oklahoma	Okl.St.Ann. §§ 551-101 to 551-402.
Oregon	ORS §§ 109.700 to 109.930
Tennessee	Tenn. Code Title 36, Ch. 6, Part 2
Washington	RCWA 26.27.010 to 26.27.910

To obtain jurisdiction, under UCCJA § 3, the court must be in the home state in which the child resides at the time of the initial filing. In addition, evidence must demonstrate a substantial interest or relationship to that state, and not merely a stay in a motel. The child must be present in the state and there must be evidence, through affidavit or other forms, demonstrating clear proof that no other state has jurisdiction over the matter, or the child.

When modification of an order from a foreign jurisdiction is requested, under UCCJA § 14, the court must first confirm the original state no longer has jurisdiction and then evaluate whether the new state could have jurisdiction under the conditions set forth in section 3. The clean hands provisions of the act guarantee a minimal amount of abuse of the act and the jurisdictional requirements.

Parental Kidnapping Prevention Act (PKPA)
An act related to jurisdictional issues in applying and enforcing child custody decrees in other states.

In cases involving parental kidnapping of the child from the custodial parent, the **Parental Kidnapping Prevention Act (PKPA)** imposes consistency and uniformity in prompt, vigorous enforcement of the antisnatching provisions in some state laws. The UCCJA facilitates enforcement of state orders by transcending state lines to enforce violations of the custody agreement expeditiously and effectively.

CYBER TRIP

Go to the following Web site to view the entire Uniform Child Custody Jurisdiction Act (UCCJA) as revised in 1997: www.law.upenn.edu/bll/ulc/fnact99/1990s/uccjea97.pdf. After reviewing the federal law, research your state legislation and your home state case law for case opinions related to the UCCJA. Prepare a brief interoffice memorandum outlining the process and the filing requirements for both the initial and subsequent filings. Retain copies of the relevant rules of procedure and the statutory provisions in your PRM for easy future reference and use.

RESEARCH THIS!

Research the Parental Kidnapping Prevention Act (PKPA). Check for related state provisions in your home and neighboring states. Prepare a brief outline of the provisions, the reporting and recording requirements, and other special considerations. Formulate a checklist for use in your practice of all key points and timelines. Retain your final document in your PRM for easy future reference and use.

RESEARCH THIS!

Research your home state law and secondary sources to determine the process and the legal provisions of enforcement. Remember to look at sections related to multiple jurisdictional considerations. Prepare a brief interoffice legal memorandum to your fellow family law paralegals reminding them of the provisions for the process. Also, provide a checklist or other reminder for the strategies to avoid enforcement issues that might arise after an initial agreement is filed with the court. Retain your final documents in your PRM, including reference citations to the appropriate legal sources, for easy future reference and use.

Enacted to provide immediate cross boundary cooperation to find and return children taken out of the jurisdiction by the noncustodial parents in violation of the terms of the custody agreement.

While it may be comforting to know there is legal recourse in cases of custody agreement breach, at the same time, the trauma for the child and the spouse deprived of custody so hard won in the courts remains despite relatively quick return of the child. Cases of dramatic actions are increasing in frequency, thus imposing on the paralegal a burden to ensure an understanding of the applicable laws and the enforcement provisions available.

CHILD SUPPORT

child support payments
The right of a child to financial support and the obligation of a parent to provide it.

The most important thing about **child support payments** is that they are for the expenses and use of the child. The payment, therefore, is not an appropriate spousal bargaining chip in negotiating a property settlement or equitable distribution plan. The money belongs to the child. Therefore, the custodial parent to whom the payments are made on behalf of the child should request and press for payments according to statutory provisions. Many states have enacted enforcement mechanisms by requiring payments through the court, which in turn remits the monies to the custodial parent, or other designated child guardian, on behalf of the payor. Regardless of the agreement between the parents to make support payments, the final agreements should be filed of record in the court of competent jurisdiction to ensure future payments or changes are readily enforceable without undue delay.

The payment obligation is not determined by the amount of visitation time, nor does it depend on whether time is spent or available during holiday seasons and on gifts from the parent. The payment is an obligation of the parent for the benefit of the child. To effect payment through the courts, the person making the payments must be within the jurisdiction of the court. The custodial parent must have a properly filed order in the originating jurisdiction to effect seamless transfer of enforcement and other proceedings.

Example:

Billie and Barbie are married and living in Texas. They have one child, Beeble. Barbie is offered a contract to act in the runaway television hit *Life as a Barbie Doll*, but Billie refuses to move to California. The marriage has been troubled for some time. Billie believes life in California is good for neither him nor Barbie. They decide this is a perfect opportunity to divorce. Barbie must get to the film studio within the week, so she takes the baby, Beeble, and moves, telling Billie she will get the divorce in California.

When she is settled, Barbie obtains a California divorce. She also receives child support and a custody decree. Billie fails to make any payments under the support decree, and Barbie seeks enforcement through the California court. *Question:* Does the court in California have jurisdiction over Billie, who is still living in Texas?

Answer: No.

in personam jurisdiction
A court's authority over a party personally.

To confer jurisdiction to enforce a support order, the court must have **in personam jurisdiction** over the payor. Without a mechanism in place to confer jurisdiction on a court other than the originally entering court, once the payor leaves the original jurisdiction, payments are subject to

CYBER TRIP

Go to the following Web site from the state of Florida for a sample worksheet for calculating child support payments: www.myflorida.com/dor/childsupport/pdf/poz8.pdf. Note that it includes provisions for insurance and child care expenses.

PRACTICE TIP

Investigate whether your state has guaranteed tuition payment plans, and, if so, include discussion as to if and how much each spouse will contribute to ensure adequate funding. Also, explore whether private schools or special instructions or practices are part of the routine child lifestyle, and be sure such items are included in support payment negotiations.

interruption and a long process prior to recommencement. National recognition of the potential harm caused by institutionalizing such lawbreaking led to passage of national cooperation agreements to ensure seamless collection of support payments despite the increasingly mobile characteristics of the American public.

Various factors contribute to the calculation of amounts due, including ability to pay, salary of the custodial parent, income of the payor parent, the number of children, and the state-established minimum calculated monies needed for customary support and upkeep. In most states, statutes contain a computation table to ensure consistency and accuracy in the calculations. In addition to child support payments, the primary earner also may be responsible to carry health insurance coverage for the minors and to contribute to any special expenses required in the customary maintenance of the child.

A frequently contentious payment obligation is college tuition or payments of child support through secondary education. Some states see this as a parental obligation, while others ignore consideration of expenses beyond secondary schooling. The position of the individual state is set forth by statute or common law case decision. See Finder v. Finder, 2072 Pittsburgh 1994 J-A25046-95, 1995 Pa. Super. LEXIS 2899 (July 24, 1995), for insight into the position under Pennsylvania law. Even in states that do not routinely include post secondary education as part of the parental responsibility, the parties can agree to allocate this obligation. As such, the topic should be one of the categories discussed with the client when assessing how to best approach not only payments of child support, but also long-term obligations as well. When including this obligation as part of a property settlement agreement, a formula or payment arrangement should be included in the agreement.

From time to time, the payor parent requests modifications up or down. The courts typically apply the standard of *material change in circumstance* when analyzing the request for modification. The change must be substantial rather than incidental. The change also must render a severe impact on the paying parent. If remarriage creates a change of circumstances, the courts are disinclined to see this as either substantial or material. Remarriage is voluntary, while the obligation for child support payments is mandatory. Thus, courts tend to see remarriage as an inappropriate basis for depriving the child of a sum sufficient to meet his or her minimal support needs, regardless of changes in the financial circumstances of the custodial parent. The payment obligation rests with the legal parent of the minor child and is not dependent on the subsequent marriage of the custodial spouse. Only in cases where the payor relinquishes parental rights through the courts is the obligation of payment possibly excused, but that is neither a simple nor a short process. The courts would continue to look at the best interest of the child. The courts also explore if the petition to surrender parental rights is entered for valid reasons beyond merely avoiding payment of the child support obligation.

RESEARCH THIS!

Research the law in your home state regarding payment of college tuition and support obligations. Note the key case citations and retain in your PRM for easy future reference.

EQUITABLE DISTRIBUTION OF PROPERTY

marital estates (marital property)
The property accumulated by a couple during marriage, called community property in some states.

real property
Land and all property permanently attached to it, such as buildings.

personal property
Movable or intangible thing not attached to real property.

community property
All property acquired during marriage in a community property state, owned in equal shares.

separate property
One spouse is the exclusive owner.

It sounds relatively simple to determine which spouse gets the personal and the real property. After all, the property is most often evident, listed, and then divided. When the parties separate, often they retain what they consider their personal things, which have value or use to them exclusively, to start the process. Necessarily, the wealthier **marital estates** that include substantial real and personal property, complex trust and will issues, goods, and other legally recognized interests are not the only circumstances in which the parties become embroiled in complex, lengthy, and acrimonious litigation. The emotional issues are no less traumatic and difficult for those with small estates; thus, these dissolution actions are often as protracted as other more complicated cases. For purposes of this lesson, we will discuss general issues and aspects of distribution that arise in virtually every such matter.

We should establish that the *marital estate* includes all property owned at the date of separation that had been acquired during the marriage. The types of property are (a) **real property**, which includes land as well as other fixtures on the land such as a house, and (b) **personal property**, which is movable. Within these categories, of course, the parties must determine which is either **community**, owned by both, or **separate property**, which is legally owned by only one partner. For those states who have adopted community property principles, *community property* includes all property acquired during the marriage in which each spouse has a one-half interest, regardless of who acquired the property or holds title. On the other hand, one spouse is the exclusive owner of *separate property*. The other has no interest, and, therefore, no legal entitlement.

Example:

Matt and Theodora have been married for 10 years. During that time, Matt worked as a landscape artist and leaf blower, while Theodora stayed at home and cared for the children. Matt purchased several rental properties during the marriage, all of which were titled and deeded only in his name. *Question:* Are the rental properties community property? *Answer:* Yes. Even though only Matt's name appears on the title, the real property was acquired during the marriage; thus, Theodora has a one-half interest.

Example:

Theodora has a priceless family heirloom, an original sculpture by her grandfather, Theodore Be-Bop, the world-renowned paper clip sculptor. Theodora must pass the sculpture on to her children or her brother when she decides it no longer matches her décor. *Question*: Is this sculpture community property? *Answer*: No. Theodora owns the sculpture. Theodora has an obligation to dispose of it in a particular way; thus, Matt cannot assert right to title or interest and cannot add the sculpture to the marital estate.

There are as many things subject to dispute in equitable distribution as one can imagine. The more contentious categories include whether the professional degrees of either spouse have value, as well as the retirement funds either one or both have accumulated. These both have value to the estate and thus are distributable marital assets. Other assets such as 401(k) savings plans, college degrees and post-graduate study, businesses, insurances policies, and legacies under a will must be considered. These assets are representative and not intended to be an exhaustive list.

PRACTICE TIP

The paralegal in a family law practice is often responsible for collecting information, cataloguing, and getting evaluation data on items included in the marital estate. It is critical to have a definite organizational pattern, including followup and summaries. The best format for you is the one that works best for your working style. Regardless of what format you select, you need to formulate a system that works well. Remember to include some type of tickler file element to ensure that responses to requests are followed up if not received, as well as readily available documentation for requesting information and release-of-information forms and other forms required to secure information and make final distribution.

FIGURE 14.4
Distribution of Assets in Different Property Allocation Jurisdictions

Property Type	Common Law States	Community Property States
Premarital acquisition	Separate property; only owner spouse retains and has interest	Separate property retained by the owning spouse
Acquired by one spouse by gift or inheritance during the marriage	Separate property retained by the acquiring spouse without agreement to do otherwise prior to date of separation	Separate property retained by the acquiring spouse without agreement to do otherwise prior to date of separation
Acquired during marriage neither by gift nor inheritance	If parties do not allocate, equitable share goes to each	50/50 division between parties without agreement of the parties
Value increase (appreciation) during marriage	If parties do not agree, court will give each an equitable share	50/50 division of increased value only between parties without agreement of the parties

Other items such as crystal, china, or collections of stamps or trinkets, artwork, tapes, and CDs, to name but a few, also have value and may be subject to distribution as part of the marital estate. Collecting data regarding property, as well as obtaining valuation data, is an aspect of the practice in which the paralegal typically is heavily relied upon by both the client and the supervising attorney.

Each state law differs somewhat as to how discrete marital assets are treated. General, broad categories of assets are typically distributed as shown in Figure 14.4. This figure sets out a general distribution plan; however, it may not be exactly similar to that in your home state. You need to check not only the statutes, but also the common law in your home jurisdiction to determine exactly how the specific asset is customarily distributed. Some of the factors taken into consideration when making the determination as to share include the contributions of the spouses to the marriage, the length of the marriage, personal career changes or interruptions by one spouse directly related to the other such as staying home to allow the second spouse to finish a college degree program, and earning capacity.

earning capacity
The ability to earn based on objective evidence.

Note that **earning capacity**, or the ability to earn based on objective evidence rather than actual earnings, may be considered for financial calculation purposes. This prevents one of the divorcing spouses from refusing to work as a way of forcing the other to pay more in spousal support, and thus receiving a greater portion of the marital estate. As you might expect, documents evidence not only the existence, but also the distribution of the various assets between the spouses. For example, a new deed is drafted and filed when the name on the deed changes.

qualified domestic relations order (QDRO)
Retirement account distributions' legal documentation requirement for ultimate distribution.

Retirement account distributions require that a **qualified domestic relations order (QDRO)** must be completed and filed with the courts following ratification by the payor company. (See Figure 14.5.) Any orders related to the various components of the distribution and the dissolution are filed with the court. Stock certificates and insurance beneficiary forms also are required by the underwriting companies and the courts. The paralegal often has the responsibility for ensuring completion of all related documents. Failure to complete the documentation may result in delay if not deprivation of the asset when distribution is otherwise appropriate. Health insurance plans may require documents of ratification and change confirmation. Completing all of the documentation is part of the client representation. Once again, the more organized the paralegal is, the easier each of these processes and requirements becomes.

dissipating
Wasting the marital estate.

No matter how long the process takes, the custodial spouse must protect the asset throughout the process. The law is clear that certain assets such as college degrees or 401(k) plans may not be devalued by one to deprive the other spouse of a benefit rightly due under the plan. The law requires the parties to preserve the value of marital assets and refrain from **dissipating**, or wasting, the marital estate. When such improper use is suspected, the court may make adjustments in the distribution of the estate if it suspected that the change in valuation was deliberately done and not a function of market economic forces.

FIGURE 14.5
Sample Qualified Domestic Relations Order

IN THE CIRCUIT COURT OF THE > JUDICIAL CIRCUIT
IN AND FOR > COUNTY, FLORIDA

IN RE: The Marriage of

>,
Petitioner/ **>**

And CASE NO.:

>,
Respondent/ **>**.

_____

QUALIFIED DOMESTIC RELATIONS ORDER

THIS CAUSE came before the Court for entry of a Qualified Domestic Relations Order (hereinafter referred to as QDRO). The parties were married on **> (date of marriage)**. A Final Judgment of Dissolution of Marriage was entered in this case on **> (date of dissolution)** which reserved jurisdiction for entry of a QDRO.

Pursuant to the Final Judgment of Dissolution of Marriage, the Court finds that the Former **> (Wife or Husband)** is entitled to a marital portion of the Former **>**'s **(Wife or Husband)** retirement benefits under the Florida Retirement System Pension Plan as of **> (date of valuation)**, as part of the equitable distribution of marital assets. Pursuant to Section 414(p) of the Internal Revenue Code of 1986, as amended, Section 222.21 of the Florida Statutes, and Chapter 61 of the Florida Statutes, it is therefore,
ORDERED and ADJUDGED:

1. The term "Participant" means the Former **> (Wife or Husband), > (name of Participant),** Social Security Number **>**, whose current address is **>**, and who is a Participant under the Florida Retirement System through **> (his or her)** employer, **> (name of employer)**.
2. The term "Alternate Payee" means **> (name of Alternate Payee)**, the former spouse of the Participant, Social Security Number **>**, whose current address is **>**.
3. The term "Plan" shall refer to the Florida Retirement System Pension Plan.
4. This Order is drawn pursuant to the laws of the State of Florida regarding the equitable distribution of marital property (as that term is defined therein) between spouses in an action for dissolution of marriage.
5. The Former **> (Wife or Husband)**, as Alternate Payee, is hereby awarded a portion of Participant's entitlement under the Florida Retirement System, as a reduction from each monthly benefit payment payable to Participant from the Plan. The amount of the reduction shall be **>** percent (**>** %) of all benefits that have accrued to the Participant through **> (valuation date)**, which the Participant would be entitled to if **> (he or she)** was to retire at age **> (55 or 62) >** in **(month and year Participant attains age 55 or 62)** utilizing retirement option 1 under section 121.091(6) of the Florida Statutes without taking into account an early retirement penalty for **> (his or her)** total creditable service through **> (valuation date)**.
6. Participant may select any retirement option of **> (his or her)** choosing at retirement, but the payment to the Alternate Payee shall be measured as though **> (he or she)** had made the option 1 selection.
7. Beginning with the first monthly retirement benefit payment actually made to the Participant, the sum of $ **>** shall be paid to the Alternate Payee. This monthly payment shall continue in like amount each month thereafter in which the Participant is entitled to receive a monthly benefit payment from the Plan, which exceeds the amount of the reduction.
8. If at any time the Participant participates in the Deferred Retirement Option Plan (DROP), the Alternate Payee's share of the Participant's benefit will be deposited in a separate DROP account where it shall earn interest at the same rate as the Participant's share. The accrued benefits and interest will be released to the Alternate Payee when the Participant's participation in the DROP terminates, regardless of whether the Participant elects to have all or a portion of **> (his or her)** share rolled over into another eligible investment vehicle (401-K, IRA, etc.) or takes a lump sum payment.

FIGURE 14.5 (Concluded)

9. The payments being ordered herein are being paid as a property right and not as support.
10. The parties agree that the Plan Administrator shall increase the amount payable each month to the Alternate Payee based upon the Alternate Payee's share of any cost of living adjustment (COLA) received by the Participant. COLAs are made at the start of each fiscal year, which is currently the month of July. After the time the Participant receives any COLA and until the Plan Administrator commences payment to the Alternate Payee of **> (his or her)** proportionate share, the Participant shall pay directly to the Alternate Payee the Alternate Payee's proportionate share of the COLA.
11. The Alternate Payee's monthly payments shall be payable to **> (him or her)** commencing on the date monthly retirement benefits actually commence being paid to the Participant under the Florida Retirement System. The Participant's retirement pension benefits under the Florida Retirement System shall be subject to this Order and to the Alternate Payee's right to receive a distribution of the marital assets of the parties. Copies of this Order shall be served by U.S. Mail by **> (name of attorney for Alternate Payee)**, as attorney for the Alternate Payee, to the Plan Administrator and Legal Office at Post Office Box 9000, Tallahassee, Florida 32315-9000, and with a certificate of service to **> (name of attorney for Participant)**, attorney for Participant.
12. The Plan Administrator, the Director of the Division of Retirement of the State of Florida, is directed and ordered to pay the Alternate Payee in accordance with this QDRO and make the payments provided for herein until either the Participant or Alternate Payee dies, which ever occurs first. **Upon the death of the Participant or the Alternate Payee, this QDRO becomes Null & Void**.
13. This Order does not require the Plan to provide any type or form of benefit, or any option, not otherwise provided under the Plan; does not require the Plan to provide increased benefits; and does not require the payment of benefits to an Alternate Payee which are required to be paid to another Alternate Payee under another Order previously determined to be a QDRO.
14. All payments to the Alternate Payee shall be made payable to the Alternate Payee at **> (address of Alternate Payee)**. It is the duty of the Alternate Payee to advise the Plan Administrator (Retired Payroll Section), in writing, of any change of address. The Division of Retirement would not be responsible for any loss incurred by the Alternate Payee due to a change of address of which the Division was not advised.
15. This Order shall supersede any previous Order in this cause seeking deduction payments from the Plan Administrator, or from the Florida Retirement System, or from the Division of Retirement of the State of Florida, and each is hereby absolved and released from any liability or responsibility under such prior Order in this cause.
16. Except as modified by this Order, all provisions set forth in the Final Judgment of Dissolution of Marriage **>** on **(date of dissolution)** shall remain in full force and effect.

DONE AND ORDERED in Chambers in **> (city)**, **> (county)** County, Florida, this ____ day of _____, 20**>**.

_____
Circuit Judge

Copies furnished to:

> (name of Attorney for Former Wife)
> (address of above)

> (name of Attorney for Former Husband)
> (address of above)

> (Clerk of the Circuit Court)
> (address of above)

Plan Administrator
Division of Retirement
Post Office Box 9000
Tallahassee, Florida 32315-9000

Team Activity Exercise

Form teams to locate and review the following cases to get a better idea of how the court interprets and treats dissipation of marital assets:

1. Gastineau v. Gastineau, 573 N.Y.S.2d 819 (1991).
2. Stone v. Godbehere, 894 F.2d 1131 (9th Cir. 1990).
3. Bush v. Bush, 824 So. 2d 293 (Fla. 4th Dist. Ct. App. 2002).

Review the case opinions and compare and contrast the analysis regarding dissipation of assets. Be aware of any unique circumstances in one that could prevent universal application of the analytical model.

The opinions in the Team Activity Exercise, or in any other cases you may research, make clear the obligation of both parties is to preserve the marital asset for distribution. The cases also give some insight into the kinds of distribution issues that may arise in the course of an equitable distribution dispute.

ADOPTION

Adoption law is a relatively recent legal specialty and one that, unlike much of our law, was not based on the British system. In fact, the English considered adoption a rite of paganism, thus inconsistent with the Enlightenment's legal and religious theory and practice. Another important factor in the British viewpoint of adoption was the emphasis on the blood lines and importance of the consanguinity for inheritance and other succession issues. Children who are otherwise candidates for adoption today were used as servants or apprentices when family-of-origin economics required reducing family size. A similar position was available for children left homeless because the parents were deceased. The person who took the child in for apprenticeship filled the role **in loco parentis**, or in the place of the parent, in responsibility as well as benefit from having the minor child in the home. Thus, the need for formalized adoption was obviated.

in loco parentis
In the place of the parent.

The first adoption law formalizing the process was passed in Massachusetts in 1851. The law was created to ensure some legal status for those children filling the role of apprentices or servants who became estranged from their family of origin but, at the same time, were not welcomed entirely into the substitute family. On the other hand, the family enjoyed all of the benefits of the added member without legal provisions for the best interest of the minor, who had no benefit from family of origin or apprenticeship.

adoption
The taking of a child into the family, creating a parent-child relationship where the biological relationship did not exist.

Adoption can occur either with an agency facilitating the process, **agency adoption**, or the parents acting on their own behalf or with the assistance of a third-party intermediary, **private adoption**. Many recent high-profile adoption cases involving celebrities have created a more open view on the topic, in addition to revealing the difficulties of finding suitable parent–child matches.

agency adoption
Using an agency, either government or private, but government-regulated, to facilitate the process.

Legal procedure through which non-birth parents seek legal recognition of the minor child as their child, thus severing all legal rights in the birth parents and conferring on the child legal rights equal to those of a natural born child.

private adoption
Parents acting on their own behalf or with the assistance of a third-party intermediary.

Adoption law is normally a state issue. Nonetheless, as with other issues related to minor children, there are federal laws as well as treaties and international compacts ensuring consistency of enforcement and interpretation of adoption law and theory. Adoption creates the same rights and obligations in parents and minor children as any other custody and family law matter. The child is incompetent to make decisions, so, in the initial proceedings, the agency, private or state, handling the adoption represents the present and future best interests of the minor child. The unique interests and complexity of the investigation mandate strict observance of principles of confidentiality and privacy for all parties.

The relatively recent expansion of wrongful adoption cases spotlights the unique challenges of the process as well as the expectations in terms of disclosure, investigation, and post-adoption

RESEARCH THIS!

Research your home state and secondary law sources regarding adoption. Contact a local agency to gain insight into the process, the time involved, and information about the nature and the complexity of the process both prior to placement and thereafter. Explore similarities and differences when the child is foreign born. Make notes on key elements discussed and then prepare a summary of the discussion and a brief outline of the statutory provisions, both federal and state, regulating the process. Retain your notes and copies of the relevant statutory provisions in your PRM for easy future reference and use.

Eye on Ethics

As a practical matter, a paralegal working in this environment must be organized and thorough from the client intake phase of client representation through the entire process. Many issues arise, as there are many small details to consider in the cataloguing, evaluation, and distribution phases of the marital estate. There are also issues related more closely to the emotional aspects of the divorce experienced by both spouses, as well as the minor children. The professional paralegal must remain a disinterested third party to avoid getting caught up in any potentially ethical challenges.

The paralegal facilitates decision making and, in that role, must avoid placing him- or herself in a position where the client relies on specific advice as legal counsel rather than information. Maintaining a professional distance does not mean the client and paralegal cannot enjoy a good relationship. It does mean that the paralegal understands the limitations of the relationships and, as the less emotionally involved party, has a responsibility to keep things on a professional level. As with many other aspects of professional paralegal practice, balancing the various interests entails understanding the role of emotion, professionalism, and ethical boundaries, and managing each to create an appropriate environment.

> Jane works for attorney McCauley in a family law practice. The client, Mr. Jackson, is a master carpenter who has come to the firm to represent him in his divorce action. Business has not been good recently, so Mr. Jackson has a cash flow problem and will continue to have that problem for some time. During the client interview, Jane discovers that Mr. Jackson has actually been subcontracting with one of his friends, who gives him cash for the work. The arrangement was made to avoid reporting income that would increase his financial obligations to both his spouse and children. Mr. Jackson asks that the information about these side payments not be disclosed.
>
> When Jane goes home that evening, her husband tells her that they finally have enough money for the house addition they have been talking about, but they do not have enough for the customized kitchen cabinets to make their dream home complete. On her way to work the following morning, Jane realizes she can solve Mr. Jackson's problems and her own. She calls the client to have him come into the office to talk about the interview.
>
> When Mr. Jackson arrives, Jane proposes that she will not reveal the cash income if he agrees to complete the customizing for her kitchen cabinets. Jane believes there is nothing wrong with this since the attorney had promised her a raise in salary for the last two years but has never actually paid the additional amounts. She also sees this as a way to compromise with the client for getting the information about the cash payments and paying a reduced price to get the cabinets installed without paying full price to a contractor.

Prepare an office memorandum in correct format in which you discuss the above and the various ethical challenges posed, including ethical code sections involved, and strategies for avoiding such problems. Also, include in your memorandum discussion the implication professionally and ethically for the supervising attorney.

assistance for child and parents. The best interest of the adoptive child remains the premier concern and prevailing legal theory. Many cases center on the issue of failure to disclose information regarding either the child or the adoptive parents that subsequently comes to light and is considered a serious threat to the integrity of the adoption contract.

The investigation phase is an extremely lengthy process exploring every facet of the adoptive parents background, lifestyle, and suitability for parenting. Both private agencies and government offices facilitating the process are regulated to ensure full disclosure and investigation of all relevant information. The investigation detail minimizes the possibility that the placement will fail to serve the best interest of the child. The process for adopting children from other countries is equally complex and maintains the best-interest-of-the-child standard regardless of the noncitizen status of the child at the time of adoption.

The parent–child relationship established by adoption may have direct consequences in areas of federal law such as Social Security. A number of government-underwritten adoption assistance programs are available for parents and children who qualify. The programs are designed to enhance the stability of the adoptive relationship and ensure access to services that enhance the relationship and benefit both parents and child.

Your future courses in family law will investigate the topic of adoption in detail. However, the overview provided in this chapter is not indicative of a lack of interest in the subject, nor does it indicate that adoption plays a minor role in family law.

Summary

In this chapter, we have explored the field of family law practice. An overview including documentation was presented. The professional paralegal position and value in this practice area should be clear. While many of the cases become complicated and drawn out, the same process applies whether the case is relatively simple, with a small marital estate and no children, or a very wealthy marital estate. We looked first at marriage, the foundation of the practice area, and then moved into dissolution, custody, and support issues. You began to explore the difficult challenges presented with kidnapping and cross-jurisdictional issues that frequently arise with the globalization of our economy and cultural diversity. The objective in matters related to children is to serve and protect the best interest of the child and retain family cohesiveness notwithstanding dissolution of the marriage. In this connection, you have looked into the newly expanding focus on grandparental rights in custody and visitation as a reflection on the broader analysis of what the best interest of the child actually means legally and conceptually. Having completed the chapter material, you should feel competent to perform the variety of tasks involved in this practice area.

Key Terms

Adoption
Agency adoption
Alimony
Alimony pendente lite
Annulment
Best interest of the child
Bifurcated
Bigamy
Certificate of marriage
Child custody
Child support payments
Collusion
Community property
Consular marriage
Covenant marriage
Decree nisi
Default judgment
Dissipating
Dissolution of marriage
Domicile
Earning capacity
Equitable distribution
Guardian ad litem
In loco parentis
In personam jurisdiction
Interrogatories
Joint custodial arrangements
Joint stipulation
Legal custody
Marriage
Marital estates (marital property)
No fault divorce
Palimony
Parental Kidnapping Prevention Act (PKPA)

Personal property
Petition for dissolution of marriage
Physical custody
Polygamy
Private adoption
Proxy marriage
Putative marriage
Qualified domestic relations order (QDRO)
Real property
Residence
Respondent
Separate property
Separation
Sole custody
Spousal payment
Support
Uncontested dissolution
Visitation
Void marriage
Voidable marriage

Review Questions

TRUE AND FALSE

Read each of the following and mark true or false. For those marked false, provide a sentence that makes the statement true.

1. Bifurcation is impermissible in family law matters.
2. No state courts have recognized grandparental rights.
3. Voidable marriages are defective on their face but, nonetheless, in full force and effect.
4. In community property states, the marital estate is split 50/50 absent an agreement in advance of allocating the assets differently.
5. Courts may entertain changed circumstances including remarriage as a basis for modifying child support payments.
6. The UCCJA ensures consistent and cooperative enforcement of a child custody agreement across and between states.
7. Under the provisions of the PCKA, the spouse accused of taking the child will not be prosecuted if the child is returned to the custodial parent without resistance once located.
8. Marvin agreements are executed between married partners no longer cohabitating.
9. The best-interest-of-the-child standard is applied in calculations of distribution of marital assets and visitation arrangements.
10. Agreed visitation between parents is called shared legal custody.

Discussion Questions

1. Locate your state law related to the dissolution of marriage. After reviewing the statute, draft a checklist of the procedure for filing, including all the documents required, the timelines, and the differences, if any, when it is a noncontested action and when it is contested. Include a list of all documents required in each stage of the process. Make copies of any forms for the relevant documents and retain along with your checklist in your PRM for easy future reference.
2. After reading the fact pattern, respond to the questions posed:

   Sam Lamb and Sarah Lamb have divorced. The dissolution process was volatile and contentious. Both parents wanted full legal and physical custody of their minor children, Ham, Jam, and Cam. After protracted litigation, the court awarded physical custody to Sarah, with visitation and partial custody to Sam. Additionally, the court entered its order stating that the children must remain within Grungie County, whether with their father or their mother. Both parents share legal custody. Sam is unhappy with the arrangement and grows more disturbed as time goes on. Sam has always wanted to leave the area, and, as things dissolved with his former wife, he thought about it more and more. After a particularly ugly argument following Sarah's chronically late drop-off at his residence, Sam Lamb and the three little Lambs got in the car, drove across state lines, and ultimately across the border to Mexico. When the children failed to arrive at

school on Monday morning, pursuant to the agreement, Sarah went to Sam's residence and realized the children and Sam were gone.

a. Is there any legal remedy available to Sarah? If so, what precisely is available to her? If not, why not.
b. If any legal remedy other than the divorce and custody decree is available, state specifically what it might be and why it may be available.
c. For any remedy discussed in (b), outline the complete process, including time requirements.
d. If the facts indicate that the agreement for custody and visitation could have been prepared in such a way as to avoid this kind of event, how would that be accomplished.
e. If the children are returned, based on each and all of the available remedies, what, if any, punitive or enforcement action is available to ensure no repetition.
f. If your answer to any of the above would change if Sarah took the children, explain why. If nothing would differ, explain briefly why.

3. Locate and read the child support guidelines used in your home state for purposes of calculating the child support obligations. For each of the scenarios presented, calculate the support obligation owed by the payor:

a. Mother has primary physical custody. Father has liberal visitation of the three minor children, ages 8, 10, and 12. Mother works part time as a cashier earning an average of $500.00 per week (gross). Father is an accountant who paid taxes each of the last three years on $75,000.00.
b. Father has consistently earned less than $40,000 per year for the entire 10-year marriage. There are four minor children, ages 5, 7, 9, and 11. Mother is an heir, so she does not work, but annually is paid $100,000 from the trust fund her deceased parents left to her and her brother.
c. Mother has worked as a legal secretary for the entire marriage and currently earns approximately $60,000 annually. Father works at the local health center as an administrator and annually earns $65,000. There are two minor children, ages 15 and 17. The older child, a son, plans to enter the university next school year but does not expect that he will earn any scholarships or other tuition assistance. As such, tuition estimated at approximately $15,000 per annum is expected.

4. Read the following and respond to the questions following:

After years of fighting, making up, and fighting again, Beulah and Bobbie Buffalobreath decide that divorce is the only available option for them. Neither is happy, and the children are suffering miserably. Notwithstanding their history, they decide to divide the marital estate themselves without incurring needless extra expense. Both prepare lists of assets and have come to you to decide which may be subject to distribution and how the law in your state applies. The asset list contains the following items:

1. Beulah's family heirloom ivory cane collection, which was left by her parents and must be handed down to her daughter.
2. Bobbie's pension from the Buffalobreath Snake Farm and Alligator Wrestling Attraction, valued about 10 years ago at $100,000.
3. The marital residence, valued currently at $350,000, with a mortgage of $100,000 and an IRS tax lien for $50,000, that was purchased for $90,000 by Bobbie prior to his marriage to Beulah.
4. Beulah's 401(k) from The Beulah Family Enterprises Snake Oil Manufacturing Company, valued about three years ago at $200,000.
5. Miscellaneous household items valued at approximately $75,000.
6. Beulah's Hummer, which has no loan outstanding.
7. Bobbie's Mercedes, which has a remaining loan balance of $7,000 and is valued at $45,000.
8. Beulah's canary-yellow diamond engagement ring, valued at $20,000 when she received it.

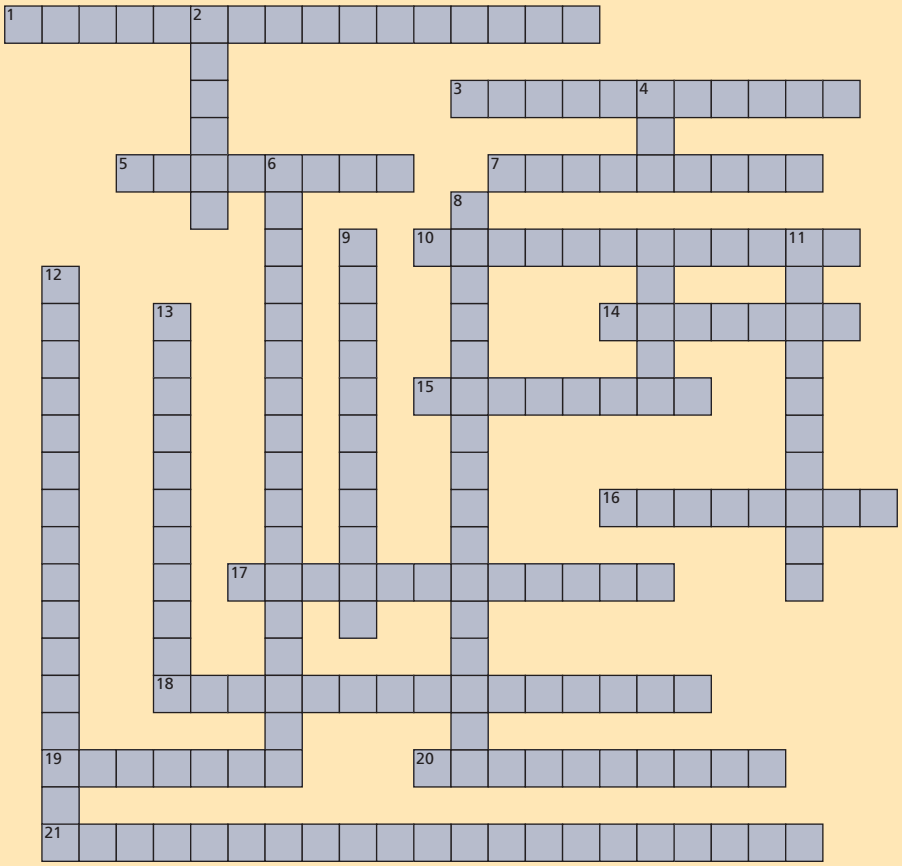
For each item in the above list, indicate if it is subject to distribution and, if so, how it is to be distributed; be specific. If not, explain exactly why. Prepare a list of documents that may be required to perfect the distribution.

5. Briefly describe the purpose and process for putting a qualified domestic relations order (QDRO) in place. Be sure to include the type of assets to which it applies and a specific list of the documentary requirements in your home state.
6. Discuss the purpose of a guardian ad litem in dissolution of marriage and custody action with minor children. Be specific as to the impact on parental rights. Also, discuss the role a guardian might play in the divorce aspect of the matter as well as the custody and visitation.
7. Your supervising attorney has asked that you draft sample interrogatories for the opposing party in relation to the distribution of marital assets. You are most interested in the marital residence, which is deeded only to the husband, but the wife has signed on the mortgage note; retirement, pension, and 401(k) accounts; and the stock accounts the husband has maintained throughout the marriage but did not have prior to that time.
8. Outline the process, including the specific documents filed, in relation to a child support action in your home state. Discuss the process and the requirements for modification, including specific circumstances under which such a request is permitted.

Portfolio Assignment

Identify the key aspects of family law practice. Itemize the specific functions the paralegal routinely performs in the practice. Next, formulate a list of identifiable ethical challenges in each aspect of the practice and specific strategies to avoid compromising ethics while professionally performing the duties and fulfilling the role. Finally, discuss recommendations when the client gives the impression that he or she relies on the paralegal discussion as advice. Your standpoint for this aspect of the assignment should be that you are concerned the client is rejecting your reminders that you are giving information rather than legal counsel. You have the impression that the client acts upon your advice and may even be using you rather than speaking with the attorney in part to avoid accruing legal bills. Assume you have regularly cautioned the client to discuss legal issues and strategies with the attorney, but you do not believe the client is doing so. Your recommendations can certainly include steps you might ask the supervising attorney to take to assist in client management with this kind of challenge. Following class discussion of the recommendations, add strategies from others that complement your list and retain in your PRM for future reference use your completed document as well as additional comments and recommendations from class members that you found particularly helpful.

Vocabulary Builders



Across

1. May be terminated by legal process.
3. Separation from the remaining sections in the complaint.
5. Permanent legal residence.
7. Legal declaration the marriage never took place.
10. Shared responsibility and physical presence.
14. Legal dissolution of the marital relationship.
15. Live-in relationship recognized for purposes of equitable distribution of mutually acquired property.
16. Creates a family line and a unit based on legal, not biological, lines.
17. Invalid at the time formed.
18. Represents the legal interests of an incompetent individual or a minor child.
19. Temporary spousal support payments.
20. Termination of cohabiting as a marital unit.
21. The allocation of all property acquired during marriage between the parties.

Down

2. One partner to a marriage has an intact marriage to another at the time of the marriage.
4. Mutual agreement created to eliminate an otherwise valid marriage.
6. Acquired during marriage and owned by both spouses.
8. Formed by agreement of the parties subject to specific terms and conditions.
9. Legal and physical responsibility and presence.
11. Marriage dissolution completed except for the statutory period.
12. Alternative form performed by a government official.
13. Wasting.

Appendix

Resources

CHAPTER 1: WHAT IS LAW?

Electronic Resources

- Declaration of Independence:
  www.archives.gov/national_archives_experience/charters/declaration_transcript.html
- The Bill of Rights:
  www.billofrights.org/
  www.archives.gov/national_archives_experience/charters/bill_of_rights.html
- Information about the U.S. Constitution:
  www.nara.gov/exhall/charters/constitution/constitution.html
- List of federal agencies: www.lib.lsu.edu/gov/fedgov.html
- Supreme Court:
  http://supct.law.cornell.edu/supct/html/historics/USSC_CR_0037_0524_ZS.html
  http://supct.law.cornell.edu/supct/cases/topic.htm
- www.cec.org/pubs_info_resources/law_treat_agree/summary_enviro_law/publication/us01.cfm?varlan=english
- http://usinfo.state.gov/usa/infousa/laws/majorlaw/warpower.htm
- www.findlaw.com/casecode/constitution/
- www.nara.gov/fedreg/eo.html
- www.faso-afrs.ca/docs/ethics-e.html
- www.chra.eur.army.mil/staffing/inprocessing/ipguide/empl_guide/SecA-AllEmpl/ethics.htm

CHAPTER 2: WHAT IS A PARALEGAL?

Electronic Resources

Paralegal codes of ethics:

- NALA Code of Ethics: www.nala.org/98model.htm
- NALS Code of Ethics: www.nals.org/aboutnals/code/index.html
- NFPA Model Code of Ethics:
  www.paralegals.org/displaycommon.cfm?an=1&subarticlenbr=359

Professional organizations:

- American Association of Law Libraries (AALL): www.aallnet.org
- American Bar Association (ABA): www.abanet.org
- Association of Legal Administrators (ALA): www.alanet.org
- American Association for Paralegal Education (AAFPE): www.aafpe.org
- National Association for Legal Professionals (NALA): www.nala.org

- NALS: www.nals.org
- National Federation of Paralegal Associations (NFPA): www.paralegals.org

CHAPTER 3: COURTS AND LAW

Electronic Resources

- U.S. Supreme Court: www.supremecourthistory.org/ www.supremecourtus.gov/
- Federal Rulemaking: www.uscourts.gov/rules/index.html
- Drafting complaint: www.celdf.org/glsp/glsp4c.asp
- Court structure references: www.law.syr.edu/Pdfs/0Intro%20Court%20System.pdf#search='federal%20court%20system%20chart'
- Mediation and arbitration: www.adr.org/ http://adrr.com/adr1/essayh.htm http://adrr.com/index.htm www.mediationnetwork.net/practitioners/membership.cfm

CHAPTER 4: INTRODUCTION TO LEGAL RESEARCH

Electronic Resources

- Reference format for *Federal Register* entries: www.archives.gov/federal_register/publications/document_drafting_resources.html
- Records from congressional proceedings and materials: www.archives.gov/records_of_congress/information_for_researchers/citing_the_records_of_congress.html
- Landmark U.S. Supreme Court cases: www.landmarkcases.org/
- P. W. Martin, Introduction to Basic Legal Citation (LII 2003 ed.), at www.law.cornell.edu/citation/ (May 11, 2005).
- *Shepard's Citations*: http://www.lexisnexis.com/shepards/printsupport/shepardize_print.pdf

General Internet Resource Site Links

- Evidence law materials (Cornell Legal Information Institute) http://www.law.cornell.edu/wex/index.php/Evidence
- Federal Rules of Civil Procedure (Cornell Legal Information Institute) http://www.law.cornell.edu/rules/frcp/index.html
- Federal Rules of Criminal Procedure http://judiciary.house.gov/media/pdfs/printers/109th/crim2005.pdf
- Federal Rules of Evidence (Cornell Legal Information Institute) http://www.law.cornell.edu/rules/fre/index.html http://judiciary.house.gov/media/pdfs/printers/109th/evid2005.pdf
- Jurisdiction law materials (Cornell Legal Information Institute) http://www.law.cornell.edu/wex/index.php/Jurisdiction
- Original jurisdiction (Cornell Legal Information Institute) http://www.law.cornell.edu/wex/index.php/Original_jurisdiction
- NFPA research site: www.paralegals.org/displaycommon.cfm?an=1

CHAPTER 5: LEGAL WRITING AND ANALYSIS

Electronic Resources

- Writing in general:
  www.apastyle.org/elecmedia.html
  www.apastyle.org/elecgeneral.html
- Legal research and writing format and recommendations:
  www.outreach.utk.edu/ljp/publications/cites.html
- Federal government writing site:
  www.archives.gov/federal-register/write/handbook/chapters.html
- Legal analysis and format:
  www.law.depaul.edu/programs/pdf/legal_analysis_manual.pdf
  www.law.berkeley.edu/students/asp/ASP_Materials/IRAC/IRAC_handout.doc
  www.law.cuny.edu/wc/students/usage/index.html

CHAPTER 6: CONTRACTS AND SALE OF GOODS

Electronic Resources

- Tips for contracts:
  http://profs.lp.findlaw.com/contracts/contract_7.html
- Contracting on the Internet:
  http://library.findlaw.com/1999/Aug/1/128190.html#IssuesRegardingFormation

CHAPTER 7: CONTRACT PERFORMANCE, TERMINATION, AND BREACH

Electronic Resources

- Uniform Commercial Code (UCC), Article 2, Sale of Goods, and Restatement (Second) of Contracts § 265: www.law.cornell.edu/ucc/2/overview.html
- Overview of contracts formation and negotiating:
  www.prairielaw.com/articles/article.asp?channelId=21&subId=110&articleId=1289
- *Restatement (Second) of Contracts* §§ 151–154, mutual mistake:
  www.scu.edu/law/FacWebPage/Neustadter/e-books/abridgedcontracts/main/Restatement/index.html#Section 151–54

CHAPTER 8: REAL PROPERTY LAW

Electronic Resources

- www.law.cornell.edu/wex/index.php/Real_estate_transactions#Judicial_Decisions
- www.law.cornell.edu/wex/index.php/Real_estate_transactions#State_Material
- www.law.cornell.edu/topics/real_estate.htm

CHAPTER 9: CIVIL PROCEDURE AND LITIGATION

Electronic Resources

- Federal Rules of Civil Procedure:
  http://judiciary.house.gov/media/pdfs/printers/108th/civil2004.pdf#search='Federal%20Rules%20of%20Civil%20Procedure

Publications

- Federal Rules of Civil Procedure (Fed. R. Civ. P.)
- Rules of Civil Procedure (your home state)
- *Federal Rules Decisions* (F.R.D.)

CHAPTER 10: TRIAL, ALTERNATIVE DISPUTE RESOLUTION (ADR), AND REMEDIES

Electronic Resources

- Alternative dispute resolution:
  www.nadrac.gov.au/adr/HTML/introduction.html
  www.ag.gov.au/agd/www/agdHome.NSF
  www.adr.com
- Nebraska Mediation Programs:
  www.nemediation.org/TrainingInstitute.htm
- Jury instructions:
  www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/civ00105.htm
  www.juryinstruction.ca8.uscourts.gov/civilman05.pdp
- Jury instructions in O.J. Simpson case:
  www.llrx.com/columns/reference19.htm
- Alaska Criminal Pattern Jury Instructions:
  www.state.ak.us.courts/crimins.htm
- U.S. District Court, District of New Mexico:
  www.nmcourt.fed.us.web/DCDOCS/dcindex.html
- Opening statements:
  www.courttv.com
  www.lectlaw.com/boys.html
  www.washingtonpost.com/wp-srv/politics/special/pjones/docs/complaint.htm

CHAPTER 11: CRIMINAL LAW AND PROCEDURE

Electronic Resources

- Sample indictment: www.usdoj.gov/ag/moussaouiindictment.htm
- U.S. Supreme Court slip opinions:
  www.supremecourtus.gov/opinions/opinions.html
- National Association for Legal Professionals (NALA):
  www.nala.org
- Jury instructions in O.J. Simpson case:
  www.lectlaw.com/files/cas62.htm

Publication

- American Law Institute, Model Penal Code and Commentaries 216–17 (Official Draft and Revised Comments, 1985) (Adopted by A.L.I. May 24, 1962).

CHAPTER 12: INTRODUCTION TO INTENTIONAL TORTS

Electronic Resources

- U.S. Consumer Product Safety Commission: www.cpsc.gov

Publications

- *Restatement of the Law of Torts*
- *American Jurisprudence* (Am. Jur. 2d)
- *Corpus Juris Secundum* (Cor. Jur. 2d)
- *Physician's Desk Reference* (PDR)
- Case bibliography

CHAPTER 13: NEGLIGENCE LAW AND DAMAGES

Electronic Resources

Tort reform:

- www.atra.org/display/13
- www.atra.org/reforms/

Publications

- M. J. White, *An Empirical Test of the Comparative and Contributory Negligence Rules in Accident Law*, Rand J. Econ. 20 (1989).
- L. M. Solan & John M. Darley, (2001). *Causation, Contribution, and Legal Liability: An Empirical Study*, Law and Contemporary Problems 64 (2001).

CHAPTER 14: FAMILY LAW

Electronic Resources

- Grandparents' rights: www.grandparenting.org/Grandparent%20Visitation.htm
- Child support calculations: www.courts.michigan.gov/scao/resources/publications/manuals/focb/2004MCSFmanual.pdf
- Uniform Child Custody Jurisdiction Act (UCCJA), passed in 1968 and revised in 1997: www.law.upenn.edu/bll/ulc/fnact99/1990s/uccjea97.pdf
- American Center for Law and Justice, Protecting Marriage: www.aclj.org/Issues/InDepth.aspx?ID=59
- American Civil Liberties Union, Lesbian & Gay Rights; Same-Sex Relationships: www.aclu.org/LesbianGayRights/LesbianGayRightslist.cfm?c=101 (includes current news and legal documents)

Publications

Grandparents' visitation rights:

- Robyn L. Ginsberg, Comment, *Grandparents' Visitation Rights: The Constitutionality of New York's Domestic Relations Law Section 72 after* Troxel v. Granville, 65 Alb. L. Rev. 205 (2001).
- Anne Marie Jackson, Comment, *The Coming of Age of Grandparent Visitation Rights*, 43 Am. U.L. Rev. 563 (1994).

Same sex unions:

- Robin Cheryl Miller, Annotation, *Marriage between Persons of Same Sex*, 81 ALR 5th 1–40 (2000). This annotation, updated by an annual pocket supplement, provides citations and lengthy summaries of case law from the United States concerning the validity of same-sex marriages.
- Robin Cheryl Miller & Jason Binimow, Annotation, *Marriage between Persons of Same Sex—United States and Canadian Cases*, 2003 A.L.R. Fed. 2, 2003 WL 21467103.

Glossary

A

abandonment Quitting the use by the adverse user, which terminates the tolling of time.

absolute sale The title transfers upon delivery and payment.

acceptance The offeree's clear manifestation of agreement to the exact terms of the offer in the manner specified in the offer.

accord Agreement, but it must be agreement to substitute.

actus reus The guilty act.

adequacy of consideration Sufficient under the circumstances to support the contract.

adequacy of performance An obligation meets the minimum or completeness test.

administrative agency regulations and rules Processes and guidelines established under the particular administrative section that describe acceptable conduct for persons and situations under the control of the respective agency.

administrative law The body of law governing administrative agencies, that is, those agencies created by Congress or state legislatures, such as the Social Security Administration.

admission Acknowledge the facts as true.

adoption The taking of a child into the family, creating a parent-child relationship where the biological relationship did not exist.

adverse possession The legal taking of another's property by meeting the requirements of the state statute, typically open and continuous use for a period of five years.

advisory opinion Statement of potential interpretation of law in a future opinion made without real case facts at issue.

affidavit A sworn statement.

affirmative defense An "excuse" by the opposing party that does not just simply negate the allegation, but puts forth a legal reason to avoid enforcement. These defenses are waived if not pleaded.

agency adoption Using an agency, either government or private, but government-regulated, to facilitate the process.

aggravating Enhancing.

agreement Understanding mutually reached between two parties in which rights and obligations of both parties are clearly defined.

alimony Court-ordered money paid to support a former spouse after termination of a marriage.

alimony pendente lite Temporary order for payments of a set amount monthly while the litigation continues.

alternative dispute resolution (ADR) Method of settling a dispute before trial in order to conserve the court's time.

ALWD Citation Manual A legal citation resource, published by the Association of Legal Writing Directors, that contains local and state sources that may not be found in *The Bluebook*.

American Bar Association (ABA) A national organization of lawyers, providing support and continuing legal education to the profession.

American Jurisprudence **(Am. Jur. and Am. Jur. 2d)** Legal encyclopedia organized by topics and subheadings presenting law and scholarly discussionfrom multiple jurisdictions.

analysis Applied after finding the law and interpreting the application to the facts to formulate a persuasive argument supporting your position.

annotated version Presents the law as enacted or case opinion as stated along with discussion and commentary.

annulment Court procedure dissolving a marriage, treating it as if it never happened.

answer The defendant's response to the plaintiff's complaint.

anticipatory breach Party provides notice, or otherwise it becomes known, that the anticipated performance will not be completed.

appeal Tests the sufficiency of the verdict under the legal parameters or rules.

appellant The party filing the appeal; that is, bringing the case to the appeals court.

appellate court The court of appeals that reviews a trial court's record for errors.

appellee The prevailing party in the lower court, who will respond to the appellant's argument.

arbitration Alternative dispute resolution method mediated or supervised by a neutral third party who imposes a recommendation for resolution, after hearing evidence from both parties and the parties participated in reaching, that is fully enforceable and treated in the courts the same as a judicial order.

arbitrator Individual who imposes a solution on the parties based on the evidence from both parties.

argument Section of the brief where the issues are analyzed through citation of legal authorities.

arraignment A court hearing where the information contained in an indictment is read to the defendant.

arrest The formal taking of a person, usually by a police offcer, to answer criminal charges.

Articles of the Constitution Establish government form and function.

assault Intentional voluntary movement that creates fear or apprehension of an immediate unwanted touching; the threat or attempt to cause a touching, whether successful or not, provided the victim is aware of the danger.

assumption of the risk The doctrine that releases another person from liability for the person who chooses to assume a known risk of harm.

attractive nuisance doctrine The doctrine that holds a landowner to a higher duty of care even when the children are trespassers, because the potentially harmful condition is so inviting to a child.

avoid The power of a minor to stop performance under a contract.

avoid the contract Legally sufficient excuse for failure to complete performance under the contract.

B

bail Court-mandated surety or guarantee that the defendant will appear at a future date if released from custody prior to trial.

battery An intentional and unwanted harmful or offensive contact with the person of another; the actual intentional touching of someone with intent to cause harm, no matter how slight the harm.

bench trial A case heard and decided by a judge.

benefit Gain acquired by a party or parties to a contract.

best interest of the child Premier concern in every family law matter.

beyond a reasonable doubt The requirement for the level of proof in a criminal matter in order to convict or find the defendant guilty. It is a substantially higher and more-difficult-to-prove criminal matter standard.

bifurcated Separated from other issues.

bigamy One spouse knowingly enters a second marriage while the first remains valid.

bilateral contract A contract in which the parties exchange a promise for a promise.

Bill of Rights Set forth the fundamental individual rights government and law function to preserve and protect.

billing Record keeping of time and tasks performed by a paralegal for each client and the legal task performed on behalf of the client.

binding authority (mandatory authority) A source of law that a court must follow in deciding a case, such as a statute or federal regulations.

Black's Law Dictionary Dictionary of legal terminology and word usage.

***The Bluebook: A Uniform System of Citation,* 17th ed.** Widely used legal citation resource, published by the Harvard Law Review Association, that is regularly revised and updated.

breach of contract A party's performance that deviates from the required performance obligations under the contract; a violation of an obligation under a contract for which a party may seek recourse to the court.

breach of duty The failure to maintain a reasonable degree of care toward another person to whom a duty is owed.

briefing schedule Timetable for various required filings by both parties throughout the appeal process.

bulk sale Agreement to transfer all or substantially all the goods to the buyer.

burden of proof Standard for assessing the weight of the evidence.

"but for" test If the complained-of act had not occurred, no injury would have resulted.

C

calendaring System of tracking dates, appointments, filing deadlines for documents, and events throughout the case file for both the attorney and the paralegal.

cap on damages Limit established by statutes.

Cardozo test Zone of foreseeability and proximate cause analysis as a test of the scope of damages.

case holding The statement of law the case opinion supports.

case (common) law Published court opinions of federal and state appellate courts; judge-created law in deciding cases, set forth in court opinions.

case management Keeping track of the progress or status of the file and proactively organizing the work of both the attorney and the paralegal.

case opinions Explanations of how and why the court interpreted the law as it did under the specific facts and applicable law of the individual case.

case reporters Publish opinions of the appellate courts that serve to interpret the law. They contain opinions from every case heard and published within the relevant jurisdiction.

causation Intentional act resulted in harm or injury to the complaining plaintiff.

certificate of marriage Completed when the official completes the ceremony confirming the ceremony took place and is recognized by the state.

Certified Legal Assistant (CLA) Standardized test based primarily on general concepts and federal law administered in connection with paralegal certification.

chattel Tangible personal property or goods.

checks and balances Mechanism designed into the Constitution that prevents one branch from overreaching and abusing its power.

child custody Arrangement between the parties for residential and custodial care of the minor children.

child support payments The right of a child to financial support and the obligation of a parent to provide it.

citation Information about a legal source directing you to the volume and page in which the legal source appears.

civil liability Finding that the defendant acted or failed to act, resulting in damages or harm. It cannot be punished by incarceration.

civil verdict Finds liability.

clean hands doctrine A plaintiff at fault is barred from seeking redress from the courts.

client intake Basic demographic and case-specific information developed in the first meeting with the client following the formal engagement.

closing statements (closing arguments) A statement by a party's attorney that summarizes that party's case and reviews what that party promised to prove during trial.

Code of Federal Regulations (C.F.R.) Federal statutory law collection.

Code of Hammurabi First formalized legal system (1792–1750 B.C.).

collusion Illegally created agreement of the parties.

comity Federal government respect for state government power and authority results in federal refusal to intervene in matters clearly within the sole jurisdiction of the state government.

commencement of action The formal document filed in the court describing the plaintiff, the party bringing the action, and the wrongdoing alleged by the plaintiff against the defendant, or the party against whom the claim is made.

Commerce Clause Statement in the Constitution that the federal government has absolute authority in matters affecting citizens of all states.

commercial impracticability Impossibility of performance in a commercial context and contracts governed by UCC Article 2.

common law Judge-made law, the ruling in a judicial opinion.

community property All property acquired during marriage in a community property state, owned in equal shares.

comparative negligence Applies when the evidence shows that both the plaintiff and the defendant acted negligently.

compensatory damages A payment to make up for a wrong committed and return the nonbreaching party to a position where the effect or the breach has been neutralized.

competent jurisdiction The power of a court to determine the outcome of the dispute presented.

competent parties Ability or legally adequate qualification of an individual to do something.

complaint Document that states the allegations and the legal basis of the plaintiff 's claims.

complete defense The individual entered the relationship knowingly with legal capacity.

compulsory counterclaim A counterclaim that is required to be pleaded because the facts relate to the same transaction as that set forth in the original complaint.

computer-assisted legal research (CALR) Research method using electronically retrieved source materials.

concurrence Another view or analysis written by a member of the same reviewing panel.

concurrent ownership More than one individual shares the rights of ownership.

concurring opinion An opinion in which a judge who agrees with the ultimate result wishes to apply different reasoning from that in the majority opinion.

condemnation proceedings The process by which state or federal government obtains property.

conditional acceptance A refusal to accept the stated terms of an offer by adding restrictions or requirements to the terms of the offer by the offeree.

conditional sale Terms other than delivery and payment must be met to transfer title of the goods.

conditional transfer Conditions stated at the time of the conveyance; the original owner, despite the conveyance, retains an interest.

conflict of interest Clash between private and professional interests or competing professional interests that makes impartiality difficult and creates an unfair advantage.

Confrontation Clause Sixth Amendment guarantee that the accused has the absolute right to confront his or her accusers and all evidence.

consent All parties to a novation must knowingly assent to the substitution of either the obligations or parties to the agreement.

consequential damages Damages resulting from the breach that are natural and foreseeable results of the breaching party's actions.

consideration The basis of the bargained-for exchange between the parties to a contract that is of legal value.

constitutional law Based on the federal Constitution and arising from interpretations of the intent and scope of constitutional provisions.

consular marriage Conducted by a diplomat of the U.S. government.

continuing consideration Extends over time.

continuing legal education (CLE) Continued legal competence and skills training required of practicing professionals.

contraband Commodity that cannot be legally possessed.

contract A legally binding agreement between two or more parties.

contractual capacity Legal capability to enter a contract.

contractual good faith See *good faith*.

contributory negligence The plaintiff played a large part in causing the injury thus, fundamental fairness precludes assigning liability to the defendant.

conversion An overt act to deprive the owner of possession of personal property with no intention of returning the property, thereby causing injury or harm.

conveyance A transfer.

conviction Results from a guilty finding by the jury in a criminal trial.

***Corpus Juris Secundum* (Cor. Jur. 2d)** Legal encyclopedia organized by topics and subheadings presenting law and scholarly discussion from multiple jurisdictions.

counterclaim A claim made by the defendant against the plaintiff—not a defense, but a new claim for damages, as if the defendant were the plaintiff in a separate suit; a countersuit brought by the defendant against the plaintiff.

counteroffer A refusal to accept the stated terms of an offer by proposing alternate terms.

Court of International Trade Part of the federal lower-court level authorized to hear matters related to international trade agreements and disputes.

covenant marriage The couples make an affirmative undertaking to get counseling prior to the marriage and to seek counseling if contemplating divorce.

criminal law The legal rules regarding wrongs committed against society.

criminal verdict Finds the defendant guilty or not guilty of the criminal offense charged and tried.

criticism An opinion.

critique A position that is presented with supporting evidence.

cross examination Occurs when the opposing attorney asks the witness questions.

custodial parent Parent with whom the child(ren) resides primarily following dissolution of the marriage.

D

damage Detriment, harm, or injury.

damages Money paid to compensate for loss or injury.

deadly force Defense available in cases involving the defense of persons, oneself, or another.

Declaration of Independence Statement, preceding the U.S. Constitution, giving the intention to form a new government in the colonies and including general principles guiding the form of that new government.

decree nisi The divorce and all related issues are finalized pending passage of the statutorily prescribed period.

deed The written document transferring title, or an ownership interest in real property, to another person.

defamation An act of communication involving a false and unprivileged statement about another person, causing harm.

default judgment A judgment entered by the court against the defendant for failure to respond to the plaintiff 's complaint.

defendant The party against whom a lawsuit is brought.

defense Legally sufficient reason to excuse the complained-of behavior.

defense of arrest In situations involving police officers or, rarely, private citizens with evidence that the arrest was in furtherance of the reasonable duties of the officer.

defense of consent The plaintiff consented fully, knowingly, and willingly to the act or acts.

defense of discipline Requires the discipline be reasonable under the circumstances.

defense of necessity Available with invasion of property when such occurs in an emergency.

democracy Government form characterized by rule of and by the people or, if more practical, by elected representatives of the people.

denial Defendant may deny the facts in the complaint.

deposition A discovery tool in a question-and-answer format in which the attorney verbally questions a party or a witness under oath.

detriment A loss or burden incurred because of contract formation.

dictum (plural: dicta) A statement made by the court in a case that is beyond what is necessary to reach the final decision.

digest A collection of all the headnotes from an associated series of volumes, arranged alphabetically by topic and by key number or summary of testimony with indexed references of a deposition.

direct examination Occurs when the attorney questions his or her own witness.

disaffirm Renounce, as in a contract.

discharge of duties Recognition by both parties that contract obligations are completed whether by performance or by agreement of the parties.

discharged Contract completion as to every requirement; that is, completed and terminated.

discovery The pretrial investigation process authorized and governed by the rules of civil procedure; the process of investigation and collection of evidence by litigants; the process in which the opposing parties obtain information about the case from each other; the process of investigation and collection of evidence by litigants.

discovery requests Requests from one party to another for responses to questions or production of documents or other evidence related to issues in dispute.

dissenting opinions Opinion in which a judge disagrees with the result reached by the majority; an opinion outlining the reasons for the dissent, which often critiques the majority and any concurring opinions.

dissipating Wasting the marital estate.

dissolution of marriage Process resulting in termination of the marital union.

distinguishing Explaining why the factual differences call for a decision differing from established law.

distinguishing facts Facts that establish the different analysis and application of settled law.

diversity of citizenship Federal jurisdiction conferred when the case involves citizens of different states.

documentary evidence Any evidence represented on paper that contributes to supporting the legal position and/or verbal testimony of witnesses, for example, medical billing records, physician treatment notes, bank statements, and canceled checks.

do-gooder arguments Appeals to the save-the-world attitude.

domicile The place where a person maintains a physical residence with the intent to permanently remain in that place; citizenship; the permanent home of the party.

double jeopardy Being tried twice for the same act or acts.

due process Ensures the appropriateness and adequacy of government action in circumstances infringing on fundamental individual rights.

duress Unreasonable and unscrupulous manipulation of a person to force him to agree to terms of an agreement that he would otherwise not agree to.

duty A legal obligation that is required to be performed.

E

earning capacity The ability to earn based on objective evidence.

easement A right to use another's property for a specific purpose, such as a right of way across the land.

eggshell skull theory A plaintiff with a preexisting condition does not change or diminish the defendant's liability.

eminent domain The government can take land through the process of condemnation when the taking is for public use.

empty promise A promise that has neither a legal nor a practical value.

en banc Appellate review by the entire circuit appeals judiciary after review by the intermediate panel.

enumerated powers Powers listed in the Constitution or the jobs of the particular office, for example, the president, or the branch, for example, the judicial.

equal bargaining power Both parties have the same position in terms of strengths and weaknesses.

equitable distribution Divides the assets acquired during the marriage between the parties.

equitable relief A remedy that is other than money damages, such as refraining from or performing a certain act; nonmonetary remedies fashioned by the court using standards of fairness and justice. Injunction and specific performance are types of equitable relief.

evidence Must be reasonably calculated to lead to the discovery of admissible evidence.

exceptions to contract enforceability Legally adequate reasons for nonperformance of contract obligations.

exclusionary rule Circumstances surrounding the seizure do not meet warrant requirements or exceptions; items seized deemed *fruit of the poisonous tree* are excluded from trial evidence.

exculpatory evidence Supports the possibility of the defendant's innocence.

executed contract The parties' performance obligations under the contract are complete.

executive order Order issued by the U.S. president having the force of law but without going through the typical process for enacting legislation.

executory consideration An exchange of value completed over time.

executory interest Following the termination of the life tenant's possession, other conditions or circumstances become complete at some designated future date or occurrence.

exhaustion of administrative remedies Provision that a nonlitigation process to informally resolve disputes must be attempted prior to filing a complaint.

exigent circumstances Compelling reason to believe the evidence may be destroyed or otherwise removed.

express acceptance Stated or, if applicable, written statement from the offeree that mirrors the offer; that is, it is precisely the same as the offer.

express consideration Stated clearly and unambiguously.

express (written) contracts An agreement whose terms have been communicated in words, either in writing or orally.

F

false imprisonment Any deprivation of a person's freedom of movement without that person's consent and against his or her will, whether done by actual violence or threats.

federal question The jurisdiction given to federal courts in cases involving the interpretation and application of the U.S. Constitution or acts of Congress.

Federal Register Pamphlet service that records the daily activity of the Congress.

Federal Rules Decisions (F.R.D.) Contains decisions of the federal district courts relating to the rules of civil and criminal procedure.

Federal Rules Digest Digest of opinions related to rules of procedure in the federal court system.

Federal Rules of Civil Procedure (Fed. R. Civ. P.) The specific set of rules followed in the federal courts.

Federal Rules of Criminal Procedure (Fed. R. Crim. P.) Rules governing the procedural issues in criminal prosecutions.

federalism Balanced system of national and state government in the U.S. Constitution: the federal government has jurisdiction over all matters related equally to all citizens of all states and the state governments have specific authority in matters affecting only the citizens of the respective state entity.

fee simple absolute A property interest in which the owner has full and exclusive use and enjoyment of the entire property.

fee simple defeasible An interest in land in which the owner has all the benefits of a fee simple estate, except that property is taken away if a certain event or condition occurs.

Field Code The forerunner to our present code of procedure; developed in New York in 1848.

final judgment The last possible order or judgment entered in the lower court; the required threshold for filing a notice of appeal.

first pleading Complaint.

fixtures Personal property that has become permanently attached or associated with the real property.

force majeure An event that is neither foreseeable nor preventable by either party that has a devastating effect on the performance obligations of the parties.

foreseeability The capacity for a party to reasonably anticipate a future event.

formal contract An agreement made that follows a certain prescribed form like negotiable instruments.

forum The proper legal site or location.

forum non conveniens Venue is inconvenient despite the otherwise appropriateness of a jurisdiction choice.

forum shopping Plaintiff attempts to choose a state with favorable rules in which to file suit.

Fourth Amendment Prohibits unreasonable searches, seizures and warrants issued without reasonable probable cause.

fragile class Group considered particularly susceptible to harm such as the very old or the very young.

fraud A knowing and intentional misstatement of the truth in order to induce a desired action from another person.

freelancer Paralegal in business for him- or herself who contracts with an attorney or law firm to perform specific tasks for a designated fee.

fruit of the poisonous tree Evidence tainted based on illegal seizure may not be used in a trial.

full performance Completed exactly as set forth in the contract.

fundamental individual rights Contained in the first Ten Amendments to the Constitution, spelling out the individual rights the government functions to preserve and protect; those rights essential to ensuring liberty and justice.

G

general damages Those that normally would be anticipated in a similar action.

general jurisdiction The court is empowered to hear any civil or criminal case.

good faith The ability, competence, and intent to perform under the contract; the legal obligations to enter and perform a contract with honest and real intentions to complete performance and other conditions; fair dealing, integrity, and commitment to perform under the contract in an appropriate, timely, and responsible manner.

good faith dealing Doing the best possible to complete the contractual obligations.

goods Movable items under the UCC definition.

grantee The person receiving the property.

grantor The person transferring the property.

gratuitous promise A promise in exchange for nothing.

gratuitous undertaking An act undertaken for reasons other than duty and measured with the same legal standard reasonably attributable to those with appropriate training.

guardian ad litem Court-appointed representative of the interests of the minor child or other incompetent party.

H

holding That aspect of a court opinion which directly affects the outcome of the case; it is composed of the reasoning necessary and sufficient to reach the disposition.

I

illusory promise A statement that appears to be a promise but actually enforces no obligation upon the promisor because he retains the subjective option whether or not to perform on it.

implied acceptance Acceptance of the offeror's terms and conditions by actions or words indicating clearly the intention to accept.

implied contract An agreement whose terms have not been communicated in words, but rather by conduct or actions of the parties.

impossibility of performance An excuse for performance based upon an absolute inability to perform the act required under the contract.

in loco parentis In the place of the parent.

in personam jurisdiction A court's authority over a party personally.

in rem jurisdiction A court's authority over claims affecting property.

incidental or nominal damages Damages resulting from the breach that are related to the breach but not necessarily directly foreseeable by the breaching party.

indictment A written list of charges issued by a grand jury against a defendant in a criminal case.

informal contract Can be oral or written and executed in any style acceptable to the parties.

information States that the magistrate determines there is sufficient cause to make an arrest and also sets forth the formal charges sought by the prosecution.

injunction A court order that requires a party to refrain from acting in a certain way to prevent harm to the requesting party.

injunctive relief Court order to cease or commence an action following a petition to enter such an order upon showing of irreparable harm resulting from the failure to enforce the relief requested.

injury In legal context, violation of right protected by and enforceable under the law, that can be physical or other harm such as loss of business income.

INS Immigration and Naturalization Service, which has been reorganized into part of the Department of Homeland Security.

instrumentality of crime Used in committing a crime.

insufficient consideration Inadequate value exchanged to form a enforceable contract.

intent Having the knowledge and desire that a specific consequence will result from an action.

intentional Voluntarily and knowingly undertaken.

intentional infliction of emotional distress Intentional act involving extreme and outrageous conduct resulting in severe mental anguish.

intentional torts An intentional civil wrong that injures another person or property.

interference with business relations Overt act causing disruption or interruption to a business done with the intent to harm the business.

interlocutory appeal Appeal entered prior to entry of a final order by the trial court judge.

interrogatory A discovery tool in the form of a series of written questions that are answered by the party in writing, to be answered under oath.

invitees People wanted on the premises for a specific purpose known by the landowner.

IRAC Issue, rule, application, and conclusion.

J

joint and several liability Shared responsibility, apportioned between all of the defendants, but in no case can the plaintiff recover more than 100 percent of the damages awarded.

joint custodial arrangements Detail the scope of the shared parental responsibility, whether legal, physical, or both.

joint stipulation States agreement of the parties to implement the change or other mutual agreement.

joint tenancy The shared ownership of property, giving the other owner the right of survivorship if one owner dies.

judge Trier of law.

judgment notwithstanding the verdict (judgment N.O.V.) Asks the judge to reverse the jury verdict based on the inadequacy of the evidence presented to support the law and the verdict.

judicial opinions Analysis of a decision issued by an appellate court panel.

jurisdiction The power or authority of the court to hear a particular classification of case.

jurisdictional clause Establishes that the court in which the action is filed is empowered to hear the case and has jurisdiction over the parties.

jury Trier of fact.

jury deliberations Confidential discussions and review by jury members of the evidence, law, and instructions from the judge resulting in verdict or decision in the case heard.

jury instructions Directions for the jury regarding what law applies and how it applies to the facts; also known as *points of charge*.

justiciable content Genuine issue of law and fact within the power of the court to decide.

K

Katz expectation-of-privacy test Two prongs: (1) reasonableness of the expectation of privacy—the subjective prong; (2) efficacy of the expectation asserted based on community standards—the objective prong.

key search terms Words or phrases used in legal research to help focus the research.

key words Terms used in legal research to identify the law related to your case facts and legal issues.

L

landmark cases A decision of the Supreme Court that significantly changes existing law.

landowner's duty To warn of known unsafe artificial conditions on the property.

law Identifiable governance form characterized by structure, power, and systemic operation.

leading Attorney objection based on the question creating the desired answer.

legal argument A well-reasoned presentation of your position.

legal assistant Individual qualified to assist an attorney in the delivery of legal services.

legal custody The right and obligation to make major decisions regarding the child, including, but not limited to, educational and religious issues.

legal memorandum Summary of the case facts, the legal question asked, the research findings, the analysis, and the legal conclusion drawn from the law applied to the case facts.

legal purpose Ultimate goal or objective must be within the law under all circumstances.

Lexis Commercial electronic law database service.

libel Oral defamatory statements.

license The original owner and the grantor retain the right to revoke or withdraw the rights conferred.

licensee One known to be on the premises but whose presence gives no benefit to the property owner.

life estate An ownership interest in property for a designated period of time, based on the life of another person.

limited jurisdiction The court is empowered to hear only specified types of cases.

limiting physical conditions Class considered for purposes of the standard of care to be reasonable for an ordinary person with those limiting physical conditions, for example, blindness or deafness.

liquidated damages Set forth in the contract so the parties have a clear idea of the risk of breach.

litigation process Adversarial process in which parties use the courts for formal dispute resolution.

loose-leaf, binder, or pamphlet service A service that publishes recently decided court decisions in loose-leaf binders, such as U.S. Law Week.

M

Magna Carta British document (originally issued in 1215) describing the system and form of government and law upon which the U.S. Constitution was modeled.

majority opinion An opinion where more than half of the justices agree with the decision. This opinion is precedent.

mandatory authority Authority that is binding upon the court considering the issue—a statute or regulation from the relevant jurisdiction that applies directly; a case from a higher court in the same jurisdiction that is directly on point; or a constitutional provision that is applicable and controlling.

marital estates (marital property) The property accumulated by a couple during marriage, called community property in some states.

marriage A union between a man and a woman.

material breach Substantial and essential nonperformance.

mediation A dispute resolution method in which a neutral third party meets with the opposing parties to help them achieve a mutually satisfactory solution without court intervention.

mediator Individual who facilitates a resolution by the parties using methods designed to facilitate the parties' reaching a negotiated resolution.

meeting of the minds A legal concept requiring that both parties understand and ascribe the same meaning to the terms of the contract; a theory holding that both parties must both objectively and subjectively intend to enter into the agreement on the same terms.

memorandum of law Analysis and application of existing law setting forth the basis for filing the motion.

mens rea "A guilty mind"; criminal intent in committing the act.

Miranda warnings Mandatory notice given detainees specifically advising that anything said while in custody can be used subsequently as trial evidence.

mirror image rule A requirement that the acceptance of an offer must exactly match the terms of the original offer.

misrepresentation A reckless disregard for the truth in making a statement to another in order to induce a desired action.

mitigate To lessen in intensity or amount.

mitigate damages The obligation to offset or otherwise engage in curative measures to stop accrual of unreasonable economic damages; that is, to minimize the damage incurred through affirmative actions.

Model Penal Code (MPC) A comprehensive body of criminal law, adopted in whole or in part by most states.

motion for a new trial Post-trial relief that requests a new trial on the same issues for specific reasons that must be clearly explained and argued in the motion.

motion in limine A request that certain evidence not be raised at trial, as it is arguably prejudicial, irrelevant, or legally inadmissible evidence.

motion to compel Request for the production of information or testimony for use at trial

motion to suppress Asks the court to eliminate allegedly tainted evidence.

mutual assent Concurrence by both parties to all terms.

mutual mistake An error made by both parties to the transaction; therefore, neither party had the same idea of the terms of the agreement. The contract is avoidable by either party.

mutual release (mutual recission) An agreement by mutual assent of both parties to terminate the contractual relationship and return to the pre-contract status quo.

N

Napoleonic Code French code of law and government influencing certain aspects of our system. It serves as the model for the government and law in the State of Louisiana.

National Association of Legal Assistants (NALA) A legal professional group that lends support and continuing education for legal assistants.

National Federation of Paralegal Associations (NFPA) National paralegal professional association providing professional career information, support, and information on unauthorized practice of law.

negligence per se Results from statutes establishing that certain actions or omissions are impermissible under any and all circumstances; The failure to use reasonable care to avoid harm to another person or to do that which a reasonable person might do in similar circumstances

negligent Careless or unintentional act or omission.

negotiation Voluntary discussions in which parties to dispute evaluate various issues and optional solutions to reach agreement that satisfies both parties and avoids litigating matter in formal trial court setting.

new law A novel interpretation of established law.

no fault divorce A divorce in which one spouse does not need to allege wrongdoing by the other spouse as grounds for the divorce.

nominal damages A small amount of money given to the nonbreaching party as a token award to acknowledge the fact of the breach.

noncustodial parent Parent with whom the child(ren) stays or visits some of the time but not as primary residence.

nonpossessory interests The holder does not have per se possession of the property but may have use interests such as easements, profits, and licenses.

nonprivileged information Discoverable information not protected by confidentiality provisions even when exchanged between parties who may enjoy privileged communications in certain circumstances.

notice of appeal Puts the trial court, the appeals court, and the opposing party on notice that the judgment entered is challenged.

notice pleading A short and plain statement of the allegations in a lawsuit.

novation An agreement that replaces previous contractual obligations with new obligations and/or different parties.

novel interpretation New interpretation of law as applied to specific facts.

O

objection for cause The attorney making the objection states the reason, which must be such as to impair the juror's ability to rule impartially on the evidence.

offer A promise made by the offeror to do (or not to do) something provided that the offeree, by accepting, promises or does something in exchange.

offeree The person to whom the offer is made.

offeror The person making the offer to another party.

Office of Safety and Health Administration (OSHA) Government agency established to set standards and enforce regulations aimed at protection of citizen safety and health.

open-fields doctrine The personal residence per se is protected from unreasonable search; the open fields surrounding the property are not equally protected.

opening statements An initial statement by a party's attorney explaining what the case is about and what that party's side expects to prove during the trial.

opinion Analysis supported by emotion.

opinion letter A letter that renders legal advice.

oral argument Oral presentation by attorney of key issues and points of law presented in the appeals documents and written legal argument.

ordinary person standard The reasonable behavior for an ordinary individual in a similar situation.

original jurisdiction The power of a court to be the first to review and try case issues.

outrageous conduct Exceeding all bounds of decency and propriety.

overt act Identifiable commission or omission, an intentional tort requirement.

P

PACE Two-tiered paralegal certification program requiring a bachelor's degree, completion of a paralegal program, and practical experience to qualify for the proficiency examination leading to certification.

palimony A division of property between two unmarried parties after they separate or the paying of support by one party to the other.

paralegal A person qualified to assist an attorney, under direct supervision, in all substantive legal matters with the exception of appearing in court and rendering legal advice.

Parental Kidnapping Prevention Act (PKPA) An act related to jurisdictional issues in applying and enforcing child custody decrees in other states.

parol evidence rule A court evidentiary doctrine that excludes certain types of outside oral testimony offered as proof of the terms of the contract.

partial performance doctrine The court's determination that a party's actions taken in reliance on the oral agreement "substitutes" for the writing and takes the transaction out of the scope of the Statute of Frauds and, thus, can be enforced.

paternalism One person looked out for another; companies took care of their employees.

pen register Records telephone numbers for outgoing calls.

peremptory challenge An attorney's elimination of a prospective juror without giving a reason; limited to a specific number of strikes.

permissive counterclaim A counterclaim that is not required to be filed with a complaint because the facts do not arise out of the same set of circumstances as the complaint.

personal property Movable or intangible thing not attached to real property.

persuasive Influential presentation or interpretation of law that may guide decision but the law does not mandate the interpretation when applied to facts at issue.

persuasive authority A source of law or legal authority that is not binding on the court in deciding a case but may be used by the court for guidance, such as law review articles; all nonmandatory primary authority.

petition for dissolution of marriage Request for an order dissolving the marriage of the petitioner and spouse.

physical custody Child living with one parent or visiting with the noncustodial parent.

plagiarism Taking the thoughts of another and presenting them as one's own without properly crediting or citing the source.

plaintiff The party initiating the legal action.

pleadings Formal documents filed with the court that establish the claims and defenses of the parties to the lawsuit; the complaint, answer to complaint, and reply.

pocket parts Annual supplements to digests.

points of charge See *jury instructions*.

political asylum Immigration status available under some circumstances when the party seeking asylum claims political persecution. Not commonly and broadly available without a clear showing of oppression.

polygamy Multiple marital relationships are entered while others remain intact.

position Analysis supported by fact.

precedent The holding of past court decisions that are followed in future judicial cases where similar facts and legal issues are present.

preemption Right of the federal government to exclusive governance in matters concerning all citizens equally.

preliminary hearing An appearance by both parties before the court to assess the circumstances and validity of the restraining application.

preliminary matters Determining the legal issues, parties, venue, and jurisdiction.

preponderance of the evidence The weight or level of persuasion of evidence needed to find the defendant liable as alleged by the plaintiff in a civil matter.

pretrial conference The meeting between the parties and the judge to identify legal issues, stipulate to uncontested matters, and encourage settlement.

pretrial memo Outlining the legal and factual issues, as well as the recommended jury instructions, and other matters related to trial conduct.

pretrial motions Used to challenge the sufficiency of evidence or the suppression of allegedly tainted evidence or other matters that could impact the focus, the length, and even the need for trial.

pretrial phase (pretrial stage) The steps in the litigation process before trial, to accomplish discovery and encourage settlement.

prima facie A case with the required proof of elements in a tort cause of action; the elements of the plaintiff 's (or prosecutor's) cause of action; what the plaintiff must prove.

primary sources of law State the law in the state or federal system and can be found in statutes, constitutions, rules of procedure, codes, and case law; that is, the most fundamental place in which law was established.

private adoption Parents acting on their own behalf or with the assistance of a third-party intermediary.

private necessity Invasion into property of another was for purposes of protecting the property.

private sale A sale between the buyer and the seller without notice or advertisement.

privilege Reasonable expectation of privacy and confidentiality for communications in furtherance of the relationship such as attorney–client, doctor–patient, husband–wife, psychotherapist–patient, and priest–penitent.

probable cause The totality of circumstances leads one to believe certain facts or circumstances exist; applies to arrests, searches, and seizures.

probable cause for a search Thing(s) sought and assertions as to location, date, and time are correctly represented and researched prior to a search.

procedural due process These requirements mandate scrupulous adherence to the method or mechanism applied. Notice and fair hearing are the cornerstones of due process, though certainly not the only consideration.

procedural law The set of rules that are used to enforce the substantive law.

product liability theory The manufacturer and the seller are held strictly liable for product defects unknown to consumers that make the product unreasonably dangerous for its intended purpose.

professional duty Exercising a reasonable level of skill, knowledge, training, and understanding related to the specific profession.

profit interest The grantee has the right to enter the property of another and remove a specified thing or things from the premises.

promise Indication of intention to act or not conveyed in a manner such to make clear to another the intention.

promisee The party to whom the promise of performance is made.

promisor The party who makes a promise to perform under the contract.

property Rights a person may own or be entitled to own, including personal and real property.

prosecutor Attorney representing the people or plaintiff in criminal matters.

Prosser on Torts Legal treatise or discussion on the law of torts.

protection defense Includes self-defense, defending another, and defending one's own property.

proximate cause defendant's actions are the nearest cause of the plaintiff 's injuries.

proxy marriage An agent for the parties arranges the marriage for the couple.

public necessity defense The invasion is necessary to protect the community and therefore is a complete bar to recovery.

public sale A sale advertised to the public and subject to UCC provisions.

punitive damages An amount of money awarded to a nonbreaching party that is not based on the actual losses incurred by that party, but as a punishment to the breaching party for the commission of an intentional wrong.

putative marriage The couple completes the requirements in good faith, but an unknown impediment prevents the marriage from being valid.

Q

qualified domestic relations order (QDRO) Retirement account distributions' legal documentation requirement for ultimate distribution.

quasi contract Where no technical contract exists, the court can create an obligation in the name of justice to promote fairness and afford a remedy to an innocent party and prevent unearned benefits to be conferred on the other party. Also known as quasi-contract/pseudo-contract/implied-in-law contract.

quasi in rem jurisdiction The court takes authority over property to gain authority over the person.

quitclaim deed A deed transferring only the interest in property of the grantor, without guarantees

R

real property Land and all property permanently attached to it, such as buildings.

real property ownership Legally recognized interest in land, fixtures attached thereto, and right to possession, transfer, or sale.

reasonable person standard When objectively assessed, a reasonable person would consider the complained-of activity both unwanted and the cause of harm.

reasonable Comporting with normally accepted modes of behavior in a particular instance.

reasonableness Requires that under the surrounding circumstances action taken is fair, appropriate, and within scope of expected action or inactivity as understood by any person in similar situation.

rebuttal witness Refutes or contradicts evidence presented by the opposing side.

reckless (recklessness) Lack of concern for the results or applicable standards of decency and reasonableness.

recuse or recusal Voluntary disqualification by a judge due to a conflict of interest or the appearance of one.

redirect examination The attorney who originally called the witness asks more questions.

reformation An order of the court that "rewrites" the agreement to reflect the actual performances of the parties where there has been some deviation from the contractual obligaton.

reformed (reformation) Changed or modified by agreement; that is, the contracting parties mutually agree to restructure a material element of the original agreement.

regulatory law Laws passed by administrative agencies and court interpretations.

relevance Reasonably related or associated with the ultimate facts and legal theories.

reliability Confidence of soundness.

remainder interest The original owner transfers the remaining portion of the interest and property upon termination of the life estate.

remand Disposition in which the appellate court sends the case back to the lower court for further action.

removal Moving a case from the state court to the federal court system.

request for production of documents Must specify the document sought.

requests for admission A document that provides the drafter with the opportunity to conclusively establish selected facts prior to trial.

res ipsa loquitur Doctrine in which it is assumed that a person's injuries were caused by the negligent act of another person as the harmful act ordinarily would not occur but for negligence.

rescission Mutual agreement to early discharge or termination of remaining duties.

research Process of locating law.

research memorandum Reviews case facts, presents the research question, summarizes the research findings, and answers the research question with a legal analysis of the applicable law.

residence The permanent home of the party.

respondent Name designation of the party responding to an appeal.

Restatement (Second) of Contracts Treatise on contracts considered authoritative but not mandatory guidance in contract law.

restitution Returns the injured party to the same position enjoyed prior to the breach.

reversionary future interest Upon completion of the life estate, the property, in its entirety, passes back again to the original owner.

reversionary interest Upon completion of the terms under the conditional estate, the remainder of the real property reverts to the original owner, or his or her estate, as appropriate and consistent with the type of ownership originally vested in the owner.

revert (reversion) Right to receive back property in the event of the happening of a certain condition.

risk management Prospectively evaluating potential problems or legal challenges in a particular situation and implementing avoidance strategies in advance to limit potential liability.

S

sales contract The transfer of title to goods for a set price governed by the UCC rules.

sanctions Penalty against a party in the form of an order to compel, a monetary fine, a contempt-of-court citation, or a court order with specific description of the individualized remedy.

satisfaction Changed agreement resulting from agreed discharge of obligations.

secondary sources of law (secondary authority) Authority that analyzes the law such as a treatise, encyclopedia, or law review article.

seizure Personal exercise of the possessory right to particular property is interrupted or denied by virtue of government action.

seminal Most important, fundamental.

separate property One spouse is the exclusive owner.

separation Legally requires continuously living separate and apart for the statutorily set period.

separation of powers A form of checks and balances to ensure that one branch does not become dominant.

service of process The procedure by which a defendant is notified by a process server of a lawsuit.

settled law Established law.

Shepard's Citations Reference system that reports the legal authority referring to the legal position of the case and making reference to the case opinion.

Shepardizing cases Using *Shepard's* verification and updating system for cases, statutes, and other legal resources.

Sixth Amendment Protections include a speedy trial, the right to confront the accuser, a jury trial, and the assistance of counsel.

slander Written defamatory statements.

social guest licensee Property owner derives no benefit or economic gain from the individual's presence and legal use of the property.

Socratic method Analysis and teaching tool based on questioning and discussion.

sole custody Only one of the divorcing spouses has both legal and physical custody, but the noncustodial parent may have visitation rights.

special damages Those damages incurred beyond and in addition to the general damages suffered and expected in similar cases.

specific performance A court order that requires a party to perform a certain act in order to prevent harm to the requesting party.

speculative damages Harm incurred by the nonbreaching party that is not susceptible to valuation or determination with any reasonable certainty.

speedy trial Begins within a reasonably prompt time which time is related to adequacy of time to permit appropriate preparation; rules of civil and criminal procedure as well as Speedy Trial Act (18 USCA §§3161-3174) set forth precise timing provisions.

spousal payment See *alimony* and *support*.

standard of care Criteria for measuring appropriateness of behavior.

standing Legally sufficient reason and right to object.

stare decisis Decisions from a court with substantially the same set of facts should be followed by that court and all lower courts under it; the judicial process of adhering to prior case decisions; the doctrine of precedent whereby once a court has decided a specific issue one way in the past, it and other courts in the same jurisdiction are obligated to follow that earlier decision in deciding cases with similar issues in the future.

state or federal rules of civil procedure Rules related to all aspects of the legal process, from the proper court for a particular dispute through each aspect, including appeals.

state, local, or federal rules of the court Contain rules related to the conduct of proceedings before the respective court and judicial system at all levels, including agency proceedings.

state rights Constitutionally defined rights of individual state governments to preserve and protect individual rights of citizens of the state, providing there is no conflict with the federal Constitution.

state supremacy Constitutional principle that the individual states have sole governmental authority over matters related to only state citizens without influencing or negatively impacting federal rights and privileges.

Statute of Frauds Rule that specifies which contracts must be in writing to be enforceable.

statute of limitations Establishes the applicable time limits for filing and responding to certain claims or legal actions.

statutory law Derived from the Constitution in statutes enacted by the legislative branch of state or federal government.

stay(ed) Extraordinary relief suspending the process in one court while the appellate court reviews the legal issue, which may result in dismissal of the case from the lower court.

strict liability The defendant is liable without the plaintiff having to prove fault.

strict scrutiny standard Most exacting and precise legal analysis because fundamental constitutional rights may have been unconstitutionally restricted or revoked.

structure Fundamental principle of law and social order in any government system.

sua sponte On his or her own motion; rarely exercised right of the judge to make a motion and ruling without an underlying request from either party.

subject matter jurisdiction A court's authority over the res, the subject of the case.

substantial-cause test Analysis of which of the possible factors was the real cause.

substantial performance Most of the contracted performance is complete.

substantive due process Requires that legislation be reasonable in scope and limitations, and further that the statute serve a legitimate purpose, including equal impact on all citizens.

substantive law Legal rules that are the content or substance of the law, defining rights and duties of citizens.

sufficiency Adequacy.

sufficient consideration The exchanges have recognizable legal value and are capable of supporting an enforceable contract. The actual values are irrelevan.

summons The notice to appear in court, notifying the defendant of the plaintiff's complaint.

support Periodic payments extending over time.

Supremacy Clause Sets forth the principle and unambiguously reinforces that the Constitution is the supreme law of the land.

T

tenancy by the entirety A form of ownership for married couples, similar to joint tenancy, where the spouse has right of survivorship.

tenancy in common A form of ownership between two or more people where each owner's interest upon death goes to his or her heirs.

tenant A person, or corporation, who rents real property from an owner; also called a lessee.

tender of performance Acts in furtherance of performance.

terminated Performance is complete and the contract is discharged.

tickler file System of tracking dates and reminding what is due on any given day or in any given week, month, or year.

time is of the essence A term in a contract that indicates that no extensions for the required performance will be permitted. The performance must occur on or before the specified date.

timekeeping Records of the time spent and the nature of the work done for each client; a legal task for both paralegals and attorneys.

tone Language and style used to present an argument; the way a writer communicates a point of view.

tort A civil wrongful act, committed against a person or property, either intentional or negligent.

tort reform law Limiting or capping the monetary awards juries can make for specific classes of tort actions such as personal injury or automobile liability.

tortfeasor Actor committing the wrong, whether intentional, negligent, or strict liability.

torts against the person Assault and battery; false imprisonment; defamation, either libel or slander; and intentional infliction of emotional distress.

torts against property Trespass to land and chattel, interference with business relations, and conversion.

totality of circumstances test Evidence offered must be sufficient in terms of quantity or comprehensiveness.

traditional (manual) legal research Uses libraries, books, and other materials in paper format.

transferred intent The doctrine that holds a person liable for the unintended result to another person not contemplated by the defendant's actions.

trespass to chattel Interfering with the right to freedom of possession of chattel, or personal property, rightly owned and possessed.

trespass to land Intentional and unlawful entry onto or interference with the land of another person without consent.

trespassers Uninvited guests on the property of the landowner.

trial The forum for the presenting of evidence and testimony and the deliberation of guilt.

trial notebook Started and organized prior to the pretrial conference, it contains all documentary and other tangible evidence or materials used by the attorney in trial.

trial order Also called a trial schedule order; issued by the judge assigned to the case.

trier of fact Jury.

trier of law Judge.

U

unauthorized practice of law (UPL) Practicing law without proper authorization to do so.

uncontested dissolution Following the waiting period prescribed by statute, parties jointly file the documents required by law to dissolve the marriage, based on voluntary agreement.

undue enrichment Gain experienced without related duty or obligation of performance.

undue influence Persons who do not have the capacity to understand a transaction due to overconsumption of alcohol or the use of drugs, either legal or illegal, and, therefore, who do not have the requisite mental intent to enter into a contract.

unfair detriment A burden incurred for which there is no compensation.

Uniform Commercial Code (UCC) Unified code used to govern all commercial transactions including sale of goods, negotiable instruments, and secured or collateralized transactions.

uniform resource locator (URL) Precise location of a specific document retrieved from an electronic source or the Web address for the referenced source.

unilateral contract A contract in which the parties exchange a promise for an act.

U.S. Bankruptcy Code Defines the rules related to bankruptcy filing, process, and adjudication.

United States Code (U.S.C.) The published collection of all federal law created by statute from all legislators, agencies, and other sources within the government.

U.S. Constitution The fundamental law of the United States of America, which became the law of the land in March of 1789.

U.S. Court of Federal Claims Part of the lower or trial court level of the federal court system in which disputes with the U.S. government are heard.

U.S. courts of appeals Intermediate review level of the federal court system that reviews the decisions of the district or trial court level.

U.S. district courts Trial or lower court level in the federal system.

V

venue County in which the facts are alleged to have occurred and in which the trial will take place.

veracity test Meets truth or strict correctness in process and content.

verdict Decision of the jury following presentation of facts and application of relevant law as they relate to the law presented in the jury instructions.

vicarious liability (respondeat superior) One person, or a third party, may be found liable for the act of another or shares liability with the actor.

visitation The right to legally see a child, where physical custody is not awarded.

void contract Agreement that does not meet the required elements and therefore is unenforceable under contract law.

void marriage The marriage fails to meet the legal requirements.

voidable contract Apparently fully enforceable contract with a defect unknown by one party.

voidable marriage Valid in all legal respects until the union is dissolved by order of the court.

voir dire The process of selecting a jury for trial.

W

warrant Issued after presentation of an affidavit stating clearly the probable cause on which the request is based.

warrantless search Compelling reasons support search without a written warrant.

warranty deed A deed guaranteeing clear title to real property

waste Deterioration of the property.

Westlaw Commercial electronic law database service.

writ of certiorari Granting of petition, by the U.S. Supreme Court, to review a case; request for appeal where the Court has the discretion to grant or deny it.

writ of habeas corpus Literally “bring the body”; application for extraordinary relief or a petition for rehearing of the issue on the basis of unusual facts unknown at the time of the trial.

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