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PART

Paralegals and the American Legal System



Chapter 1

Introduction to the Study of Law

The study of the law qualifies a [wo]man to be useful to self, to neighbors, and to the public.
Unknown

INTRODUCTION

Law plays an essential role in everyone's life. It provides guidelines on how people should interact with each other. The criminal codes prohibit theft, assault, battery, rape, murder, and many other offenses. The tax codes require that individuals and businesses give part of their income to the government. The environmental laws prohibit the dumping of raw sewage into lakes and rivers. The civil rights laws protect against discrimination and harassment.

In addition to defining what constitutes appropriate behavior, the law provides a mechanism for resolving the conflicts and disagreements that arise among us without resorting to personal violence. When individuals violate a section of the criminal law, the government takes responsibility for bringing them to trial and for administering an appropriate punishment. If one person's negligence injures others, that person can be required to compensate the injured parties for the damages caused by this negligent act. When persons fail to carry out the terms of a contract, the state can either force them to do so or force them to pay damages that resulted from their failure to live up to their agreement.

Legislators, government administrators, and lobbyists focus on developing the statutes and regulations that govern everything from the way we drive our

cars to the procedures we have to follow to get a divorce. Most lawyers spend their time advising people as to what they should do to live within the requirements of the law. For example, a group of entrepreneurs may seek legal advice regarding the best way to organize their new business, or a young married couple may come to an attorney for help with the purchase of their first home. Alternatively, individuals may enlist the aid of an attorney when they have been injured in an automobile accident or have been charged with a crime.

Paralegals help attorneys solve people’s legal problems by assisting in the gathering of factual information about the client’s situation; by doing legal research to find appropriate statutes, regulations, and case law; by helping to draft various types of legal documents; and by helping to prepare and organize the information attorneys present in trials.

The purpose of this text is to help you understand the American legal system and how attorneys and paralegals work within it. In the chapters that follow, you will learn about the organization and structure of the legal system, the various forms that law takes, the procedures used in litigating civil and criminal cases, and the basic legal principles that form the basis of our law in areas such as torts, contracts, and property.

A. LEGAL ANALYSIS

In addition to helping you acquire this type of basic legal knowledge, this text is designed to develop the critical thinking skills you need to understand statutes, court opinions, and various types of legal documents. These critical thinking skills include analyzing the facts, identifying the appropriate legal rules,

Case 1: The Distressed Grandfather

Approximately one year ago, Donald Drake and his six-year-old grandson, Philip, were walking down a residential road on their way home from visiting one of Philip’s friends. Philip was walking on the sidewalk approximately thirty feet in front of Mr. Drake. Suddenly, a car sped past Mr. Drake, seemingly went out of control, jumped the curb, and hit Philip. Mr. Drake ran to Philip’s side, but it was too late. Philip had been killed instantly. The driver of the car, Mrs. Wilma Small, was unhurt. Based on skid marks and testimony from both Mrs. Small and Mr. Drake, the police investigation following the accident determined that excessive speed was the cause of the accident.

Mr. Drake said that at the time of the accident his only concern was for the welfare of his grandson because he himself was clear of the danger. Naturally, Mr. Drake suffered a great deal of mental pain and shock because of seeing his grandson killed. While being driven home from the accident, he suffered a heart attack that necessitated a lengthy hospital stay.

One year later, he still does not feel completely recovered and often suffers from nightmares reliving the accident and his grandson’s death. Following the advice of trusted friends, he decides to make an appointment at the law office of Darrow and Bryan to see if he can sue Mrs. Small to recover for his hospital bills and for his pain and suffering.

Case 2: The Harassed Student

Wanda Smith, a twenty-two-year-old college student, was walking past a construction site on campus when several of the construction workers began to whistle and make cat calls. Wanda did not appreciate being treated as a sex object and greatly resented the way in which these construction workers were behaving.

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

applying the legal rules to the facts, and reporting the results in a clear and understandable manner.

Throughout the text we will be presenting you with short factual scenarios to illustrate how people and businesses turn to the law for help. Two such scenarios follow. Take a moment to read the facts of the case of “The Distressed Grandfather” and the case of “The Harassed Student.” In addition to studying these cases now, we will refer to them again in later chapters.

Keep these clients’ situations in mind as we give you a quick overview of the four basic steps in analyzing a legal situation:

- analyze the facts;
- identify the appropriate legal rules (and, if necessary, conduct legal research);
- apply the legal rules to the facts; and
- report the results (usually in writing).

Once an attorney completes these steps, the attorney can advise the client as to the appropriate actions to take.

1. Analyzing the Facts

The first step in legal analysis is to review the facts. The answer to any legal question depends on the specific facts of the individual case. Even a minor change in the facts may alter the outcome of the case.

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

Paralegals often assist in the fact-gathering process by conducting interviews, summarizing those interviews, and reading and summarizing relevant

Fact bound

When even a minor change in the facts can change the outcome.

documents. For example, when Donald Drake and Wanda Smith came to the law office of Darrow and Bryan to seek advice, they were each interviewed by Pat Harper, a senior attorney with the firm. Chris Kendall, one of the firm’s paralegals sat in on the interviews to help take notes and to become familiar with the facts of their cases.

PRACTICE TIP

Everything you read in this book is wrong! Or at least it might be. Remember that law keeps changing and that it varies from state to state.

2. Identifying the Appropriate Legal Rules

After meeting with the clients, the first thing that attorney Harper needed to determine was whether either client had a valid cause of action. A **cause of action** can be defined as a claim that based upon the law and the facts is sufficient to support a lawsuit. For example, in Wanda Smith’s case, she was clearly upset and disturbed by what had happened to her. However, that does not mean she has a legal remedy. Her lawyers will have to prove not only that the construction workers harassed and upset her but also that these actions violated some law. It is important to understand that not every problem is a problem for which the courts will supply a remedy.

Thus, the second stage of legal analysis involves the identification of the specific provisions of the law that are applicable to the client’s situation. Because there are so many laws at the federal, state, and local levels, and because the law covers such a wide variety of topics, it is impossible for any lawyer to know everything there is to know about the law. The law is far too complex for any individual to be able to commit it all to memory. Furthermore, because the law is constantly changing, one’s legal knowledge must be continually updated. Therefore, even lawyers who specialize and strive to keep current by reading legal newspapers, journals, and bar publications on a daily basis may still need to do legal research. Law books and on-line computer databases are the tools of the trade for the legal professional.

Because **legal research** is a very time-consuming process, attorneys often rely on paralegals to assist them in locating and summarizing the relevant statutes and cases they need to properly interpret the current status of the law. Because attorney Harper has not recently handled a similar case, Chris Kendall was assigned to research the law on sexual harassment. You can find a detailed discussion of legal research in Chapter 9.

3. Applying the Legal Rules to the Facts

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

There are two basic types of legal reasoning. The first involves the analysis of court opinions and the second the analysis of constitutions, statutes, and administrative regulations. We will discuss these processes in great depth in Chapters 7, 8, and 10. For now, it is important that you understand that the result in a client’s case will depend on how the courts have handled similar situations in the past. This is because our legal system is based on a doctrine known as **stare decisis**, literally, the decision stands. Following *stare decisis* means that if a court has decided one way on a particular issue in the past, in all

Cause of action

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

Legal research

The process of finding the law.

Legal reasoning

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

Stare decisis

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

NETNOTE



One way to stay current with the changes in the law is through the Internet. You can find the latest legal news by going to the home page of Findlaw at www.findlaw.com. Then click on the “For Legal Professionals” tab at the top of the opening screen.

likelihood it and other courts in the same jurisdiction will decide the same way on that issue in future cases given a similar set of facts.

In order to find out how similar situations have been handled in the past, an attorney or a paralegal will examine prior court decisions, known as **precedent**, and then apply them to the client’s situation. If the facts of the client’s situation and a prior court decision are similar, the two situations are **analogous**. If they are analogous, it is likely that the result in the client’s case will be similar to the result reached in the prior case. If the facts are significantly different, the two situations are **distinguishable**. Because they are distinguishable, it is likely that the result in the client’s case will not be the same as the result reached in the prior case. As you progress through this text, you will learn a lot more about the importance of stare decisis to our legal system. But for now, it is enough to understand that the doctrine of stare decisis is what gives our system its stability and predictability. As we will see, however, stare decisis also gives the courts enough flexibility to allow for change as the needs of our society change.

Unfortunately for Ms. Smith, Chris’s research indicated that she did not appear to have a cause of action against the construction workers. If Ms. Smith had been employed as one of the construction workers and her boss had been harassing her in this way, she would have had the basis for a suit against the company. However, as a mere passerby she lacked such protection. Her facts combined with the law do not give her a cause of action.

Twenty-five years ago, Ms. Smith would not even have had a cause of action if she had been harassed by her employer. But as societal values change, the law usually changes as well. In recent years our society has become more sensitive to issues of gender equality, and new laws have been developed to provide new protections. Twenty years from now, someone in Ms. Smith’s position may have a cause of action that does not exist today. Societal values will change, and the law will continue to evolve in order to respond to those changes.

DISCUSSION QUESTIONS

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

Precedent

One or more prior court decisions.

Analogous

Similar.

Distinguishable

Different.

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

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

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

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

Legal Reasoning Exercise

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

4. Reporting the Results

At various points throughout the legal process attorneys and paralegals are required to commit their thoughts to writing. At some points, they will take informal working notes for their own use. At other times they will make more

formal reports that are designed to be read by colleagues, clients, opposing attorneys, or judges. Examples of some of the more specialized forms of **legal writing** include case briefs, legal memoranda, and appellate briefs.

Case briefs summarize specific court decisions. Attorneys and paralegals use case briefs to help them analyze court decisions and prepare legal memoranda and appellate briefs. A **law office memorandum** is an unbiased analysis of a client's case for use within the law firm. It serves as a means of fairly evaluating the likelihood of the client's winning should the case go to court. This type of memorandum is often followed by a letter written to the client advising the client as to what action should be taken. An **appellate brief** is written to persuade an appeals court of the merits of the client's case. These documents will be discussed more thoroughly at various points throughout this text.

Legal writing

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

B. TAKING ACTIONS ON BEHALF OF THE CLIENT

After an attorney has thoroughly analyzed the application of the law to the client's situation and has advised the client as to the options available under the law, the attorney and client may agree to take some action on the client's behalf. These actions might include drafting a demand letter, initiating a lawsuit, defending a client, or helping a client avoid future litigation through careful planning.

In some cases there may be ways to settle the dispute through means other than litigation, such as mediation or arbitration or by sending a **demand letter**. A demand letter is a letter from the attorney demanding that some action be taken, with either an implicit or an explicit threat that the matter will be taken to court if the requested action is not forthcoming.

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

Finally, in many situations the best recourse is to help the client avoid future litigation through careful planning. That planning frequently takes the form of a written agreement. A **contract** is a legally binding agreement that creates an obligation to do or refrain from doing something. Common examples

Pleadings

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

Discovery

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

PRACTICE TIP

The demand letter is usually the first opportunity you have to tell the other side your version of the story. Therefore, before sending the letter, double-check to make sure you have all the relevant facts.

include purchase agreements, leases, and prenuptial agreements. Paralegals often assist in drafting these documents as well.

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

Ethics Alert

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

Legal Reasoning Exercises

2. John and Mary Kulig have been married for ten years. They are both thirty-five years old. For the past eight years they have unsuccessfully been trying to have children. After being told that there would be a ten-year wait before they could adopt an infant, they decided to seek the services of a surrogate mother.

a. What kinds of problems do you think this decision might raise? Personal, medical, moral, religious, legal? If you think this is a problem the legal system should address, should such practices be made illegal? Should they be legal but regulated by the government?

Responding to an advertisement in the classified section of their Sunday newspaper, the Kuligs visited the office of James Matchum, an attorney who acts as a broker in setting up surrogacy arrangements. This attorney introduced John and Mary to Barbara Tufflife, a twenty-five-year-old, divorced woman who has a child from her former marriage. Because she had been having a difficult time finding work and had an easy pregnancy with her own child, Barbara agreed to serve as a surrogate mother for the childless couple. The Kuligs got along well with Barbara and noted that her two-year-old daughter appeared to be energetic and in good health.

Attorney Matchum then drew up a contract in which Barbara agreed to (1) be artificially impregnated with John's sperm, (2) refrain from smoking or consuming alcoholic beverages during the pregnancy, (3) carry the child to term if medical evidence indicated it was healthy, (4) abort the fetus if medical evidence indicated it had major birth defects, and (5) turn over any and all parental rights to the Kuligs when the baby was born. John and Mary, in turn, agreed to pay (1) Barbara's medical costs and (2) a

maintenance allowance of \$8,000 per month during the time of the pregnancy and a three-month recovery period after the pregnancy.

b. What do you think of these contractual arrangements? Are they fair to both parties? Which, if any, of these provisions do you find objectionable? Why?

Both parties signed this agreement, and arrangements were made for Barbara to be artificially inseminated with John's sperm. The process was successful, and Barbara became pregnant with John's baby. The pregnancy went smoothly. Barbara did not smoke or drink alcoholic beverages, and the Kuligs met the financial obligations laid out in the contract. However, when the baby arrived, Barbara refused to release the baby to the couple or sign over her parental rights. When John and Mary turned to attorney Matchum for help, he told them he would have to update his research on the enforceability of surrogacy contracts. Attorney Matchum assigned one of his paralegals to conduct the initial research.

This research revealed that the state legislature still had not passed anything on the subject and that there were no court cases in the state dealing with surrogacy contracts. However, the paralegal found a case in which a man and a woman wrote a contract whereby the woman agreed to live with the man if he would pay her \$500 per month for life. One year later the man stopped the payments, and the woman sued for breach of contract.

c. What do you think the court did in that situation? Do you think the court ordered the man to continue the payments?

One basis for refusing to enforce a contract is because it is against public policy. In the case of the live-in couple, the man argued that the contract was against public policy, as it was based on his giving the woman money in exchange for sex. The court agreed and said that because contracts for prostitution are illegal, the agreement could not be enforced.

d. What are the implications of this case for the Kuligs? Do you see any similarities between their case and that of the live-in couple? Is the surrogacy contract a contract for prostitution? How do you define that term? Even if it is not a contract for prostitution, is a surrogacy contract against public policy?

These are questions that can be answered only through the process of legal reasoning, which we discussed earlier—that is, taking the law and applying it to the facts. Based on how you answered the questions in d above, write one paragraph supporting the conclusion that the surrogacy contract should not be enforced. Then write one paragraph arguing just the opposite. Come to class prepared to defend either position. Remember there is no “right” answer, just better or worse arguments.

SUMMARY

This chapter provided a brief introduction to the role of law in our society and the manner in which lawyers evaluate and respond to their clients' legal problems. Within this context we have noted the contributions paralegals make and the nature of the legal reasoning process.

Throughout the text we will be stressing the development of the critical thinking skills you will need to become a successful paralegal. Among these skills is the ability to analyze the facts, identify the appropriate legal rules, apply the legal rules to the facts, report the results, and take actions on behalf of the client.

Although we have presented each stage in a linear fashion, the reality is that these various stages are intertwined. Legal reasoning often reveals the need to do more research. In the process of reporting your findings, you may discover flaws in your analysis. Thinking, researching, and writing are inseparable.

In the chapters that follow, you will learn more about the organization and structure of the legal system, the various forms that law takes, the procedures used in litigating civil and criminal cases, and basic legal principles that form the basis of our law in areas such as torts, contracts, and property. You will also learn more about the duties and responsibilities of paralegals.

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

REVIEW QUESTIONS

Pages 3 through 7

1. Why does the study of law involve more than simply memorizing rules?
2. What is legal reasoning?
3. What is the doctrine of stare decisis, and why is it important?
4. Why is it important to know whether a client's facts are analogous to or distinguishable from those in prior court decisions?
5. What is a cause of action? What does it mean to say that a person does not have a valid cause of action?
6. Why does law change? Should it?

Pages 8 through 11

7. Why is there no one "right" answer to a legal problem?
8. Should it be the attorney or the paralegal who signs a client letter that analyzes the law? Why?



Chapter 2

Paralegals in the Legal System

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

Justice William Brennan

INTRODUCTION

In hearing about the cases of Donald Drake and Wanda Smith, you met two of the main legal professionals from the law firm of Darrow and Bryan: Pat Harper, a senior attorney, and Chris Kendall, one of the firm’s paralegals. While this book focuses on paralegals, you cannot understand or fully appreciate the role of paralegals without also knowing some basic things about attorneys.

The terms “attorney” and “lawyer” are generally used interchangeably. In its most general sense, “attorney” denotes an agent, one who is authorized to act on behalf of another person or corporation. An “attorney at law” is a person who has been officially licensed to practice law in a state or federal jurisdiction. A “lawyer” is an equivalent term for an “attorney at law.”

In some contexts, people use “lawyer” to refer to a person who is authorized to practice law and use “attorney” to refer to a job title. Thus, an organizational chart may carry titles such as attorney, associate attorney, enforcement attorney, District Attorney, United States Attorney, or Attorney General.

Becoming a licensed attorney involves attaining a bachelor’s degree (not required in all states, but most attorneys have one), a graduate legal education

(normally three years if attending full time or four years part time), passing a state bar exam, and passing a morals/character check. In some states, to be authorized to practice law, attorneys must also join their state bar association and fulfill annual continuing education requirements.

The term “paralegal” refers to a person with special qualifications who assists attorneys in ways that are discussed in this chapter. The paralegal profession emerged in the late 1960s. It established its legitimacy in the early 1970s and underwent tremendous growth in the 1980s and 1990s. According to the U.S. Bureau of Labor Statistics, there were about 238,000 paralegal jobs in 2006. “Employment of paralegals . . . is projected to grow 22 percent between 2006 and 2016, much faster than the average for all occupations. Employers are trying to reduce costs and increase the availability and efficiency of legal services by hiring paralegals to perform tasks once done by lawyers. Paralegals are performing a wider variety of duties, making them more useful to businesses.”¹

In this chapter we discuss the paralegal profession and its role in the American legal system. We explain what paralegals do and how one goes about becoming a paralegal. In the process we will discuss how paralegals differ from lawyers and other law office personnel and whether paralegals should be licensed. Finally, we will look at the types of legal settings in which paralegals are most likely to find themselves employed.

A. THE DEFINITION OF PARALEGAL

A movie produced by the Philadelphia Paralegal Association begins with interviews of passersby on a busy street corner. An anonymous reporter asks each what they think a paralegal is. Their replies range from “A paralegal, ah, isn’t that like half a legal?” to “Paralegal, isn’t that when there is a very difficult case so they need two attorneys? You know, a pair of legals!” Although this movie was made a number of years ago, it still depicts today’s reality. There is a lot of confusion regarding the role of the paralegal. This is partly because the paralegal profession is a relatively new one and partly because it is as yet totally unlicensed and, for the most part, unregulated.

As suggested above, many people are confused as to what a paralegal is or how a paralegal differs from a legal assistant, a law clerk, or a legal technician. This confusion is compounded by the fact that there are also freelance paralegals and independent paralegals, to say nothing of document clerks, legal secretaries, legal scriveners, lay advocates, and even paralegal assistants. What these groups have in common is that they perform various legal tasks without being licensed to practice law. In this section we will examine the most often heard terms:

1. traditional paralegals and legal assistants;
2. freelance paralegals;
3. legal technicians, lay advocates, and document preparers;
4. independent paralegals; and
5. law clerks and document clerks.

¹U.S. Bureau of Labor Statistics, Occupational Outlook Handbook (2008-2009 ed.).

1. Traditional Paralegals and Legal Assistants

Generally speaking, the terms “paralegal” and “legal assistant” are viewed as synonyms. Because the term **paralegal** is the most common and the most generic, it will be the term most often employed in this book.

The prefix *para* carries the meanings of “near” or “beside” and “similar to” or “subordinate to.” The derivation of the word therefore suggests that a paralegal is one who works near or beside a lawyer, one who is similar to a lawyer but in a subordinate position. Thus, paralegals are individuals who do specialized legal work under the supervision of an attorney.

The **American Bar Association (ABA)** is the largest and most prominent national organization of lawyers. Over the past thirty years it has taken a leadership role in recognizing the need for and helping establish the paralegal profession. As the profession has developed, the ABA has periodically modified and refined its definition of paralegal/legal assistant. Most recently in 1997 the ABA amended its officially adopted definition of a legal assistant/paralegal to read:

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.²

Because this is a long definition, we can better understand it by dividing it into its separate components. (This process of dividing a lengthy definition into more manageable subparts is very similar to the process of statutory analysis that you will study in Chapter 7.) A legal assistant or paralegal is

1. “a person, qualified by education, training or work experience” (*focus on the background of the individual*),
2. “who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity” (*focus on the nature of the employer*) and
3. “who performs specifically delegated substantive legal work” (*focus on the nature of the work performed*)
4. for which a lawyer is responsible” (*focus on the supervision provided by the employer*).

The **National Association of Legal Assistants (NALA)** and the **National Federation of Paralegal Associations (NFPA)** are the two major national associations of paralegals/legal assistants. Each association is discussed later in this chapter. For now, it is important to know that each has adopted a slightly different definition of paralegal/legal assistant. NALA declares that

[l]egal assistants are a distinguishable group of non-lawyers who assist attorneys in the delivery of legal services. Through formal education, training *and* experience, legal assistants have knowledge and expertise regarding the legal system and substantive and

Paralegal

A person who assists an attorney and, working under the attorney’s supervision, does tasks that, absent the paralegal, the attorney would do. A paralegal cannot give legal advice or appear in court.

American Bar Association (ABA) www.abanet.org

A national voluntary organization of lawyers.

²Adopted by the ABA House of Delegates, August 1997.

procedural law which qualify them to do work of a legal nature under the supervision of an attorney.³

Contrast the ABA's language about paralegals acquiring their skills through either formal education "or" on-the-job training (part 1) with NALA's use of "and" as the connector for education, training, and experience. This simple change of an "or" to an "and" highlights a major issue in the paralegal profession: whether on-the-job training is sufficient or whether all paralegals must also acquire some type of formal education.

Returning to the ABA definition, it also requires that the paralegal be employed or retained by a lawyer, law office, corporation, governmental agency, or other entity (part 2) and that a lawyer be held responsible for the paralegal's work (part 4). Notice how the next definition, recommended by NFPA, does not limit employment to those situations in which an attorney supervises the work, as it also includes legal work authorized by administrative, statutory, or court authority.

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.*⁴

While there are differences among these definitions, all three suggest that paralegals perform many of the same tasks normally performed by lawyers. They gather and analyze facts relevant to legal disputes, perform legal research, draft legal documents, prepare witnesses and evidence for presentation at legal proceedings, and even represent clients in some types of administrative hearings. Remember, however, that even though paralegals carry out many of the same tasks performed by attorneys, paralegals are not licensed to practice law. Therefore, they can perform many of these tasks only when working under the supervision of an attorney. In addition, even when paralegals are working under the supervision of an attorney, they are not allowed to give direct legal advice to clients or to represent clients in most types of judicial proceedings.

In addition to the ABA, NALA, and NFPA definitions discussed above, over half of the states have developed some form of definition for the term "paralegal." In some cases the definition comes from the state bar association. In others the definition is one created by the state courts or legislature. In 2001, California became the first state not only to define the term paralegal but to limit the use of that term to only those individuals who meet its statutory criteria. Specifically, the statute prohibits people from using the title of "paralegal" unless they meet the following definition.

"Paralegal" means a person who holds himself or herself out to be a paralegal, who is qualified by education, training, or work experience, who either contracts with or is employed by an attorney, law firm, corporation, governmental agency, or other entity,

³This definition was first set out in the 1985 version of NALA's Model Standards and Guidelines for Utilization of Legal Assistants (emphasis added).

⁴NFPA, Information You Should Know about NFPA (pamph. 1990) (emphasis added).

and who performs substantial legal work under the direction and supervision of an active member of the State Bar of California . . . or an attorney practicing law in the federal courts of this state, that has been specifically delegated by the attorney to him or her.⁵

The statute treats the following terms as synonymous: paralegal, legal assistant, attorney assistant, freelance paralegal, independent paralegal, and contract paralegal.⁶

The California statute does not require anyone to register as a paralegal. However, several recent California federal court decisions have suggested that there can be dire financial results for law firms that attempt to bill for substantive legal work performed by “paralegals” who do not meet the registration requirements. In one case, the court reduced the paralegal fees that had been billed from \$1680 to \$225 because several of the “paralegals” working on the case did not meet the qualifications required by the California statute.⁷

DISCUSSION QUESTIONS

1. Which of the definitions of paralegal—the one from the ABA, NALA, or NFPA—do you like best? Why?
2. Until August 1997, the ABA definition of legal assistant read:

A legal assistant is a person, qualified through education, training, or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney, of specifically-delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.

You will see this definition quoted in most of the court opinions decided prior to 1997 that deal with the role of paralegals. It is not certain whether the courts will continue to follow this definition or the most recently adopted one. In what ways do you think the two definitions differ from each other? Which ABA definition do you prefer? Why?

3. What do you think is a good definition of *paralegal*? Try writing a model definition that could be adopted by a court or legislature.

2. Freelance Paralegals

The term **freelance paralegals** refers to a specific subgroup of paralegals who work as **independent contractors** rather than as employees of law firms or corporations. They usually contract to do a specific job and frequently have contracts with several different lawyers at once. The advantages of being a freelance paralegal include having the capacity to choose what kinds of projects you will work on and to set your own hours. Attorneys find that in this type of contractual relationship they can use paralegals on an “as needed” basis without

Freelance paralegal

A paralegal who works as an independent contractor rather than as an employee of a law firm or corporation.

⁵Cal. Bus. & Prof. Code § 6450 (2008).

⁶Cal. Bus. & Prof. Code § 6454 (2008).

⁷Sanford v. GMRI, Inc., 2005 WL 4782697, at 4* (E.D. Cal. Nov. 14, 2005).

having to pay fringe benefits and unemployment compensation insurance and without worrying about what to do with the paralegals during a slack time in the business cycle.

PARALEGAL PROFILE



JENNIFER LERNER FREELANCE PARALEGAL

Although I worked in a personal injury firm while attending school for my paralegal degree, when I graduated I found I could make more money if I contracted my services than if I remained an employee. Freelance work also enables me to decide what types of duties I want to accept and allows me to work from my home. I do personal injury work for area attorneys, with a specialty in writing demands for completed cases to be sent to insurance claims representatives. The demands are based on the medical expenses incurred and the expectation as to future medical and hospital expenses, pain and suffering, and lost wages. I take the file, investigate it, make sure all of the information is there, and then come up with the price. I present the information as persuasively as possible, using spreadsheets and including particulars, such as how many hours the client had to wait in the doctor's office each week. I do all of my work on a disk that I give to the attorney. The attorney then makes any desired changes and sends the demand to the insurance company.

I like the variety that can come at you at any time and the unpredictability. I love working with the law because the whole concept of how conflicts arise and then how people go about getting rid of conflict is fascinating. For some, arbitration or mediation is the best choice. Working as a paralegal teaches you a lot about people. For example, people have very different ways of dealing with their injuries. We are in a people business and what we do changes the lives of people.

Recently, I was also hired on a part-time basis to use my paralegal skills in an unusual way. A maritime company was interested in hiring someone to research regulations, to prepare documents for ships coming into port, to ensure that crew members have all required paperwork, and to communicate with ships at sea. Even though the company did not start out looking for someone with paralegal skills, during the interview process it became evident that those skills were exactly what they needed, and I got the job. Those skills include the abilities to sustain independent thought, understand the need to maintain confidentiality in negotiations, project a professional image, understand the intricacies of dealing with contracts and government regulations, and not make a judgment before having all of the necessary information.

Even if I didn't use any of my paralegal skills as a paralegal, the education and experience I have received have armed me for what the world may throw my way. It has helped me to deal with a lack of predictability and enabled me to reason and see both sides of issues. Rather than jumping to conclusions, I now tend to back up and think of all the reasons before choosing a course of action.

3. Legal Technicians, Lay Advocates, and Document Preparers

Even though freelance paralegals are not in an employer-employee relationship, they still operate under the supervision of a licensed attorney. The terms *legal technician* and *lay advocate*, on the other hand, are used to describe nonlawyers who provide legal services directly to the public without being under the

supervision of an attorney. A **lay advocate** is generally someone operating within the law, representing persons before administrative agencies that permit this practice. **Legal technicians**, however, are nonlawyer service providers who give legal advice to people who are representing themselves. The role of the legal technician is highly controversial; without special legislative or judicial authority, it frequently constitutes the unauthorized practice of law.⁸

There are also services that offer to prepare standardized legal documents for people who are attempting to handle their legal matters **pro se** (i.e., to handle the case on their own without using a lawyer). Individuals who provide this service are also called **legal scriveners**, forms practitioners, form preparers, and legal information specialists. If they provide only typing services, they do not run the same risks of violating the unauthorized practice of law statutes as do legal technicians.

Finally, you should be aware of what California calls “legal document assistants” and what Arizona refers to as “legal document preparers.” These individuals prepare legal documents for members of the public who are representing themselves in a legal matter. Their assistance is limited to ministerial tasks and to providing general published factual information. They are explicitly prohibited from giving legal advice.⁹

Lay advocate

Generally someone operating within the law, representing persons before administrative agencies that permit this practice.

Legal technician

A nonlawyer who provides legal services directly to the public without being under the supervision of an attorney. Absent a statute allowing this activity, it constitutes the unauthorized practice of law.

4. Independent Paralegals

You may also hear the term **independent paralegal**. Usually this term refers to paralegals who work under the supervision of an attorney in a contractual relationship (freelance paralegals). Sometimes, however, you will also hear it used to refer to those who provide legal services directly to the public without being under the supervision of an attorney (legal technicians).

5. Law Clerks and Document Clerks Working under the Supervision of an Attorney

The terms law clerk and document clerk are additional terms that you may come across in the legal community. The **law clerk** title has historically been reserved to describe a law student or a recent law school graduate who has not yet passed the bar and who was hired primarily to do legal research. The term **document clerk** is usually used to describe someone who organizes and files legal documents. While normally a clerical position, it sometimes serves as an entry-level position for recent paralegal graduates.

DISCUSSION QUESTIONS

4. What do you think would be the advantages and disadvantages of working as an independent contractor (freelance paralegal) rather than as a paralegal employee?

⁸To read more on the licensing of these types of paralegals, see the discussion in this chapter beginning on page 28, and see Chapter 11 for a discussion of what constitutes the unauthorized practice of law.

⁹Cal. Bus. & Prof. Code § 6400 (2008); Ariz. Code of Judicial Admin. § 7-208 (2006).

5. Some people have argued that by not being located in the law office, freelance paralegals cannot receive adequate supervision from an attorney. Do you agree or disagree? Why?

6. If nonlawyers are *not* working under the supervision of an attorney, do you think they should be allowed to give legal advice to clients?

7. Should paralegals be allowed to give legal advice if they *are* working under the supervision of an attorney?

B. PARALEGAL EDUCATION

In the previous section we discussed what a paralegal is. In this section we will explore the basic qualifications necessary to become a paralegal.

Figure 2-1 presents the differences in qualifications for becoming a paralegal and becoming an attorney. While, as mentioned above on pages 13 and 20, becoming a licensed **attorney** normally involves attaining a bachelor’s degree, and then a graduate legal education, and passing a state bar exam, including a morals/character check, nothing prevents a person with no college credits and no paralegal training from being hired to work as a paralegal. This is true because currently there are no minimum legal requirements, such as licensing statutes would create, that must be satisfied to be able to work as a paralegal. Nor are there any informal standards universally accepted by all attorneys who hire paralegals. To become a paralegal you simply need to find an attorney who is willing to hire you and assign you that title.

Figure 2-1 Paralegal versus Attorney Qualifications

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

Although it is possible for anyone to be hired as a paralegal, most employers do not wish to start from scratch in training their paralegals. Therefore, they limit their employment searches to individuals who already have experience in the field or who have completed some form of formal paralegal education they trust. For example, perhaps because attorneys in most states are required to graduate from an ABA-accredited law school, many employers limit their employment search to paralegals who have graduated from an ABA-approved paralegal program.

1. Basic Qualifications

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

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

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

Perhaps the most important characteristics for success in the paralegal field are ingenuity and good judgment. The best paralegals are innovative and resourceful. Once they understand the nature of the problem, they develop their own solutions. Because they exercise good judgment, they know when to proceed independently and when to bring matters to the attention of their supervising attorneys.

2. Formal Paralegal Education

Before 1970 there were no formal educational programs for paralegals; the necessary skills were learned exclusively through on-the-job training. Many lawyers simply gave their secretaries a variety of paralegal tasks along with their own instructions as to how they were to be done. Occasionally a law firm brought in someone with a special skill, such as accounting, to help with a specific area of the law, such as assisting with the processing of tax returns.

The late 1960s and early 1970s saw the development of paralegal programs at both community colleges and proprietary schools. Most recently many four-year colleges and universities have also developed formal paralegal programs. The quality of paralegal programs varies widely, and many paralegals and paralegal educators have expressed concern about issues of quality control in paralegal education.

3. The ABA Approval Process

Recognizing the need for some standards for paralegal education, in 1973 the ABA formally adopted a set of standards for granting American Bar Association approval to educational programs. To date the ABA is the only official body to establish a set of standards for paralegal education.

As of 2008, the ABA had approved approximately 260 of the estimated 800 paralegal programs. This does not mean that the remaining programs could not meet the ABA requirements, although some may not be able to do so. It may simply mean that those programs have chosen not to seek ABA approval for either philosophical or economic reasons. Those programs that do meet ABA requirements but have not applied for ABA approval are often spoken of as being in “substantial compliance.”

4. American Association for Paralegal Education

American Association for Paralegal Education (AAfPE) www.aafpe.org

A national organization of paralegal programs that promotes high standards for paralegal education.

In 1981 educators from a variety of paralegal programs formed the **American Association for Paralegal Education (AAfPE)**. This national organization was chartered to promote high standards for paralegal education, provide a forum for professional improvement for paralegal educators, and promote research and dissemination of information regarding the paralegal profession and paralegal education. Its membership includes approximately 350 educational institutions offering programs at the community college, baccalaureate, and postgraduate levels.

In order for an institution to be a voting member of AAfPE, it must be in “substantial compliance” with the ABA standards. The institution need not, however, have formal ABA approval. AAfPE has developed a set of core competencies for paralegals that paralegal programs are encouraged to incorporate into their curriculums. They may eventually supplement the standards developed by the ABA.

C. PARALEGAL PROFESSIONAL ASSOCIATIONS

National Federation of Paralegal Associations (NFPA)

www.paralegals.org

A national association of paralegal associations.

National Association of Legal Assistants (NALA)

www.nala.org

A national paralegal association.

One sign of the growing maturity of a profession is the establishment of professional associations dedicated to meeting the needs of their members as well as educating the public. The two major national paralegal associations are the National Federation of Paralegal Associations and the National Association of Legal Assistants.

The **National Federation of Paralegal Associations (NFPA)** was formed in 1974 as a federation of local paralegal groups. Formed in 1975, the **National Association of Legal Assistants (NALA)** is a direct membership organization.

Both organizations seek to promote the paralegal profession and monitor activities of courts, bar associations, and legislatures that might affect their members’ interests. NFPA and NALA have developed formal sets of ethical guidelines, which their members are pledged to follow. Some of their differences lie in the policy positions taken by each organization on such issues as certification, licensure, the nature of the relationship between paralegals and bar associations, and the extent to which paralegals should be permitted to operate without being under the direct supervision of an attorney.

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

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

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

PRACTICE TIP

Join your local paralegal association.

International Paralegal Management Association (IPMA)
www.paralegalmanagement.org

A national association of legal assistant managers.

PARALEGAL PROFILE

LAURIE ROSELLE DIRECTOR OF LEGAL SERVICES CLIFFORD CHANCE US LLP

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

As Director of Legal Services, I supervise the managers who coordinate the full-time paralegals, the temporary paralegals and attorneys, the clerks (court filers), technology support, conflicts clearance, and records groups. I often handle facilities and space-related issues and generally trouble shoot for the practice groups.

I don’t think I have ever had a typical day. I generally get to the office by 7 A.M. with a “To Do” list of about five items. By 9 P.M. when I’ve only finished one, I declare it a victory and head home, usually by hired car so I can work for another hour before arriving home. (For you country folks, you should know that in the larger cities, such as New York, it is not uncommon to get a hired car ride home . . . which means you can work in the car and bill more time; the operative phrase there being “work and bill”!)

What I really like about my work is that the people are fabulous. They are passionate, resilient, fun, and, most of all, they take very seriously what the client needs, not what suits them. We work as hard as we play. I also like that no two days are ever alike. It’s like a new three-ring circus every day.

Thinking back on my education and what best prepared me for my work, I would have to say that business, math, and statistics were the courses that have helped me the most. When those math teachers tell you that you will use basic algebra all your life, believe them. Business is all a numbers game, and the more you know how to slice and dice them, the better off you’ll be.



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

My advice to students thinking about a career as a paralegal is to act like a sponge: soak up information on both “soft” and “legal” topics. You never know where this field will lead you, so the more information you gather, the better equipped you will be to take the next step up the ladder. Embrace technology (even though we may never really see a paperless courtroom!) and never say “never.” The attitude you bring to the table is what an employer is looking for . . . they can teach you the legal skills, but they cannot teach you attitude. If you don’t have a “can-do” attitude, legal is not the field for you. Lawyers do not want to hear the reasons why you cannot do something. They want to hear that it has been done.

In my free time I do stand-up comedy, spoil my nieces and nephews, and do volunteer work with Delta Gamma Sorority, the Smile Train (a non-profit organization committed to eradicating the problem of cleft lips and palates), and the Princess Project (a non-profit organization that distributes donated new and “gently worn” formal dresses to students who might otherwise not be able to attend their proms).

D. REGISTRATION, CERTIFICATION, AND LICENSURE

Although many employers hire only paralegals who have completed an ABA-approved or other well-established paralegal education program, the lack of formal licensing requirements allows for situations in which people with no formal training or experience can be hired and given the job title of paralegal. This situation often leads to a great deal of variation among paralegals in terms of background and quality, and that, in turn, is seen by many as harming the image of the profession. “Real” paralegals and legal assistants are justifiably upset when they find some law firms giving a paralegal or legal assistant job title to legal secretaries as a reward for loyal service to the firm, even though they will continue to do the same clerical work they have always done.

Many paralegals are therefore looking to various certification and licensing systems to set themselves apart from those who are not doing paralegal work or are not qualified to do so. However, among the various problems they face is that of how these new standards would affect those working paralegals who have attained their jobs through on-the-job training and who cannot, for whatever reason, return to school for more formal education. The possibilities include registration, certification, and licensing.

Registration

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

1. Registration

Registration is a process by which individuals or organizations have their names placed on an official list kept by some private organization or governmental agency. Depending on the purpose of the registration process, placing one’s name on this list is either voluntary or mandatory.

In 2008, Florida became the first state to adopt a registration program for paralegals. This is a voluntary program whereby any person who is qualified by education, training, or work experience and who works under the supervision of a lawyer performing delegated, substantive work for which the lawyer is responsible may register as a tier one paralegal. To qualify as a tier two paralegal, the person must also meet additional experience, education, and continuing education criteria. They can then call themselves “Florida Registered Paralegals.” A spokesperson for the Florida Supreme Court noted that it adopted this plan because it believes it will benefit the public. “While we are cognizant that the adoption of Chapter 20 does not go as far as some would like, we nevertheless believe this is a first, prudent step toward the desired end. It behooves us to tread with caution in implementing a registration program for professionals who have hitherto been largely self-regulated . . . before any mandatory plan is instituted.”¹⁰

2. Certification

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

In 2004, North Carolina became the first state to adopt a method for paralegal certification. According to the rules adopted by the North Carolina Supreme Court, a paralegal may use the title “North Carolina Certified Paralegal (NCCP),” “North Carolina State Bar Certified Paralegal (NCSB/CP),” or “Paralegal Certified by the North Carolina State Bar Board of Paralegal Certification” only if that person has completed a post-secondary paralegal educational program, passed a written exam designed to test the applicant’s knowledge and ability, and annually maintained a minimum of six hours of continuing education.¹¹ The purpose of the plan is to “improve the competency of those individuals [who assist in the delivery of legal services] by establishing mandatory continuing legal education and other requirements of certification.”¹²

Certified

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

Figure 2-2 Increasing Levels of Regulations



¹⁰Mark Killian, *Court OKs Registration Program for Paralegals*, Fl. Bar News, Dec. 1, 2007.

¹¹27 N.C.A.C. 1G.0117(4) (2008).

¹²Id. at 1G.0101.

In 2006, Ohio joined North Carolina by creating the Ohio State Bar Association (OSBA) voluntary paralegal certification program. Individuals who meet the definition of “paralegal,” meet the eligibility requirements, and pass a written examination will be designated as an “OSBA Certified Paralegal.” The written examination covers substantive and procedural law, legal research, ethics, communication, law office management, critical and analytical thinking, communication (both oral and written), and computer skills.

Both of the major paralegal organizations also provide a method by which paralegals can become certified. For example, paralegals can only call themselves “Certified Legal Assistants” or “Certified Paralegals” and use the letters “CLA” or “CP” after their names if they have completed the requirements of NALA’s voluntary certification program. The terms Certified Legal Assistant and Certified Paralegal are registered trademarks of NALA.

To become a certified legal assistant or paralegal, a paralegal must pass NALA’s certification exam and complete five units of continuing legal assistant education every five years. The two-day exam covers communications, ethics, legal research, judgment and analytical ability, and substantive law. A person can qualify to take the exam through either education or work experience.

For many years, NALA also offered an advanced certification in selected specialty practice areas. In 2006, NALA switched to a new curriculum-based certification that is offered online. Assessment measures are built into highly structured educational materials that are accessible via the Internet. Initial offerings were in the areas of Contracts Administration and Management, Discovery, and Business Organizations.

Until recently the two major paralegal organizations, NALA and NFPA, took opposite positions regarding certification. NFPA opposed certification, while NALA established and administers its certified legal assistant program. However, in October 1994, NFPA made a significant change in policy when it announced that it planned to develop a two-tiered proficiency exam for experienced paralegals, known as PACE. The first tier covers general legal issues, while the second tier covers legal specialties. To qualify to take the first-tier exam, a paralegal must hold a bachelor’s degree, have completed a paralegal program, and have worked a minimum of two years as a paralegal. The work requirement increases to four years to take the second-tier exam. Paralegals who successfully complete NFPA’s certification program are authorized to use a “Registered Paralegal (R.P.)” designation.

Both the CLA exam and PACE are designed to be national exams. They test for general legal knowledge that is not state specific. NALA affiliates in California, Florida, and Louisiana have developed their own state-specific tests to complement the CLA exam. Also, the Legal Assistant Division of the State Bar of Texas administers exams on Texas law in the specialty areas of business litigation, family law, and personal injury litigation.

These certification programs are all voluntary in that certification is not a legal requirement for working in the paralegal field. However, in some regions of the country employers are more likely to employ someone who is certified than someone who is not.

Even though no state has as yet licensed paralegals, paralegals must always remember that as part of the legal profession they are required to maintain demanding ethical standards. The following three points are of special importance to paralegals:

1. Paralegals are not attorneys and therefore cannot give legal advice, sign court documents, or appear in court on behalf of a client. To do so is the *unauthorized practice of law*, a crime in most states.
2. Attorneys and their staff must respect the *confidentiality* of the client-attorney relationship. You must treat anything you learn in the law firm as confidential and not discuss it with anyone—even your spouse or other family member—outside the firm.
3. Clients expect their attorneys and staff to be loyal to them. Therefore, if you change employers, you must alert your new employer to any cases with which you were involved while working for your former firm. Not to do so means running the risk of creating a *conflict of interest* for the firm.

As you read through the materials in this book, watch for potential ethical issues posed in the readings or chapter questions.

**Ethics
Alert**

To this point, our discussion has concerned certification. It is important to distinguish between being certified and being certificated. A person is **certificated** when that person receives a document verifying that he or she has successfully completed some educational program, thereby receiving a certificate of some type. In the paralegal field the term *certificated* is usually used to identify someone who has successfully completed a formal paralegal program offered by an accredited educational institution. Thus a person who has graduated from a paralegal certificate program that offers a certificate of completion, whether instead of or in addition to awarding a degree, can appropriately be called a “certificated legal assistant” or “certificated paralegal” but should not be called a “Certified Legal Assistant” or “Certified Paralegal” unless he or she has successfully completed NALA’s certification requirements.

Certificated

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

3. Licensing: Paralegals Who Work under the Supervision of an Attorney

Licensing refers to the process by which governmental agencies establish standards (or adopt those of other groups) and then prohibit those who have not met these standards from working in that occupational field. Thus a person who has not been admitted to the bar is prohibited from practicing law because he or she is not a licensed attorney. Based on the prevailing definitions of what constitutes the unauthorized practice of law, paralegals can perform a variety of legal tasks without a license to practice law as long as they work under the supervision of

a licensed attorney. Some have argued, however, that a separate system of licensing should be established for paralegals in the same way that nurses are licensed separately from doctors.

Although the California statute discussed on pages 16 and 17 regulates who can use the title of paralegal, it does not qualify as a licensing statute. First, there is no requirement that those wishing to use the title paralegal register with the state. Second, although people who do not meet the established criteria cannot call themselves paralegals, it appears that the statute does not prohibit attorneys from employing anyone they choose to perform paralegal type work so long as that person does not claim to be a paralegal. Finally, there is no governing body established to review the credentials of those using the title paralegal or to investigate and punish violators.

When analyzing how the licensing of paralegals might work, one must consider what unit of government should be responsible for administering the licensing process. One possibility is that the state supreme courts could handle it. A second approach would involve the creation of an independent licensing agency especially for this purpose. Finally, the responsibility could be delegated to an existing agency that already handles other types of licensing. Another issue involves the extent to which standards should differ from state to state and whether states might grant reciprocity to paralegals licensed in other states.

Over the past twenty-five years, various proposals for licensing paralegals who work under the supervision of attorneys have been introduced in several state legislatures and presented to some state supreme courts. However, as of the time this book went to press, none has yet been formally adopted.

4. Licensing: Legal Technicians and Paralegals Who Do Not Work under the Supervision of an Attorney

Although some points overlap, the discussion of the licensing of paralegals takes on a new twist when you consider the licensing of nonlawyers who do not work under the supervision of a licensed attorney. The ABA's official definition states that a paralegal is someone who performs work "for which a lawyer is responsible." Even though freelance paralegals are independent contractors rather than employees of law firms or corporations, they are still expected to operate under the supervision of a licensed attorney. On the other hand, legal technicians, lay advocates, legal scriveners, and form preparers establish direct relationships with their clients and operate independently of any supervision by attorneys.

Legislation regarding some type of limited licensure for this group has been proposed in several states. For example, the Washington Supreme Court has adopted a rule that authorizes nonlawyers, known in that state as limited practice officers, to select and prepare certain legal documents incident to closing real and personal property transactions.¹³ In California, as noted above, legislation was introduced to allow for the registration of legal document assistants. However, they are not allowed to provide direct legal services to the public and must basically limit their role to that of the scrivener discussed above. In Arizona, a hearing officer or a superior court judge is authorized to issue a

¹³Rule 12, adopted January 1, 1983.

cease and desist order for anyone engaging in the practice of document preparation without the required certification.¹⁴

Those who support these types of licensing arrangements often argue that they are needed to make legal services more accessible to the lower and middle classes. The National Resource Center for Consumers of Legal Services estimates that over 130 million people are denied legal access because the services of lawyers cost too much.¹⁵

Balanced against this desire to expand access to legal services is the need to protect the public from incompetent assistance. While the types of tasks proposed for legal technicians may not require all the knowledge that we require of licensed attorneys, the tasks still do require some degree of specialized knowledge and training. Because the public cannot judge whether a specific legal technician possesses this knowledge, it is argued that the state has the responsibility to protect the public from legal technicians who may be either incompetent or unethical.

In addition, many reject the very idea of nonlawyers giving direct legal advice to the public. They argue that only licensed attorneys should be allowed to perform such functions and reject any type of limited licensing that would require less than what is currently required of attorneys. Rather than creating a new class of legal service providers, opponents argue that the unmet needs could be better served through expansion of **legal aid services** and more **pro bono work** from private attorneys.

Even those who accept the idea of licensing legal technicians still disagree regarding the nature of the licensing standards. For example, is a formal educational requirement necessary, or would that needlessly screen out members of low-income and minority groups? Should a bachelor's degree be required? How much specialized paralegal education is necessary, and what type of accreditation should be required of the program that provides that education? Should credit for on-the-job training be accepted, and if so, what kind of reasonable standards can be used to assess the quality of that training?

5. Indirect Regulation through Approval of Billing for Paralegal Time

In *Missouri v. Jenkins*,¹⁶ the Supreme Court determined that attorneys could bill clients directly for work done by their paralegals. This is something that they cannot do for work done by secretaries and other clerical personnel. When a law firm bills its client for either paralegal time or attorney time, the firm and client negotiate the rate the client is willing to pay. However, in some cases statutes allow courts to award attorney's fees to the prevailing party. In those situations, the losing party may appeal those charges if he or she thinks the fees are unreasonable. In making that determination, a judge will determine what the

¹⁴Ariz. Code of Judicial Admin. § 7-208 (2006).

¹⁵Warner, *Legal Technicians—Pro and Con: Pro—Affordable Access to Law: Legal Technicians Are Part of the Solution*, 5 Paralegal Educator 1 (Mar. 1991).

¹⁶491 U.S. 274 (1990).

reasonable charges should be, based upon the rate charged as well as whether the work done was of a substantive legal nature (as opposed to clerical work). If the work was done by a paralegal, the court will also inquire as to the paralegal's education and experience to ensure that the paralegal was qualified to handle such work. This is a fairly new area of the law. Therefore, the limitations on what constitutes substantive legal work and what qualifies someone to do that work are still in the formative stages. In the near future, we can expect to see more court decisions that will clarify what constitutes paralegal work and what types of qualifications a person has to have to do that work.

6. Conclusion

As of the year 2008, none of the fifty states had chosen to license paralegals or legal technicians. Before states begin to license nonlawyers, they must decide what types of educational standards and ethical obligations they will require paralegals to meet. In the meantime NALA operates a formal certification program through its examination process. To take NALA's exam, the candidate must have either graduated from a sixty-credit paralegal program or attained significant work experience. NFPA administers PACE, an advanced proficiency exam. To qualify to take the PACE, the candidate must have a bachelor's degree and work experience.

DISCUSSION QUESTIONS

8. What are the strongest arguments for and against developing a certification or licensure system for paralegals? The weakest arguments?
9. Would you like to see either a certification or a licensure system developed for paralegals who work under the supervision of an attorney? Why?

E. WHAT PARALEGALS DO

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

paralegals are capable of carrying out many tasks, under the supervision of an attorney, that might otherwise be performed by a lawyer and billed at a higher rate. Such work might include, for example, factual investigation, including locating and interviewing witnesses; assistance with depositions, interrogatories, and document production; compilation of statistical and financial data; checking legal citations and drafting correspondence. Much of this work lies in a gray area of tasks that might appropriately be performed either by an attorney or a paralegal.¹⁷

¹⁷Id. at 288 n.10 (1989).

When talking with clients, keep in mind that everything that is said must be kept confidential. Also there may be times when you are alone with a client and the client will ask you for legal advice.

Remember that only the attorney can give that advice. For you to do so would be the unauthorized practice of law.

**Ethics
Alert**

The tasks that paralegals perform generally fall within one of the following categories: communications with clients, research, drafting, and case management.

1. Communications with Clients

Just as a nurse often serves as a vital link between the patient and a busy doctor, so, too, a paralegal can serve as a link between the attorney and the client. It is considered unethical for paralegals to be involved in the solicitation of clients, but once the attorney has established the attorney-client relationship, paralegals can and do play a very important role in maintaining effective communications between the attorney and the client.

Whereas many attorneys are notorious for being too busy to return phone calls to their clients, paralegals are usually far more accessible. If they are properly prepared, paralegals can relay important information about the case from the client to the attorney and vice versa. Due to their specialized training, paralegals can help explain legal procedures to the client, and they can communicate effectively with other attorneys and court officials.

2. Research

Almost all legal matters involve some sort of research. This research may involve probing into the facts or finding applicable law.

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

As you study more about the law, you will soon learn just how ambiguous it can be and how rapidly it changes. No lawyer, no matter how bright, can know everything there is to know about the law. That is one reason there is such a tendency for lawyers to specialize in specific areas of the law. But even if you knew everything there was to know about a very esoteric area of the law a month ago, there may have been developments in that area since the last time you studied it. Every year Congress and the state legislatures enact thousands of new laws, federal and state administrative agencies pass regulations, and federal and state judges hand down case decisions.

PRACTICE TIP

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

Therefore, attorneys and paralegals must constantly review and update their knowledge of the law. Although it is ultimately up to the attorney to judge the meaning of the law, a properly trained paralegal can locate new statutes, regulations, and court decisions that are relevant to the case at hand and provide summaries of the important changes. The techniques for finding the law and analyzing it will be presented in Chapters 7 through 10.

3. Drafting

The practice of law involves voluminous exchanges of written documents. Contracts, wills, and other agreements are prepared, signed, and filed. Letters of inquiry and demands for various actions are sent. Lawsuits involve the filing of complaints, answers, motions, interrogatories, and a host of other documents. Probate actions involve the filing of numerous reports to inform the court of the distribution of the deceased's assets and the payment of appropriate taxes. In short, lawyers are responsible for the felling of a lot of trees.

Most paralegals are given responsibility for preparing drafts of legal documents for the lawyer to review. They may also be involved in drafting internal memoranda reporting the results of their legal or factual research.

4. Case Management

Paralegals play an important role in helping with the flow of paperwork involved in the preparation for a trial, a real estate closing, the probating of an estate, and so on. Even though many law offices now use computerized software packages to assist in this process, paralegals are needed to ensure that the correct data and proper instructions are being entered. They also assist in assembling the pleadings, motions, exhibits, and other documents that must be presented in court.

F. WHERE PARALEGALS WORK AND LAW OFFICE PERSONNEL

The practice of law is carried out through a variety of organizational structures and involves a variety of support personnel. Paralegals are employed in small, one-attorney law offices and in multicity mega-firms. You will also find them employed by large industrial and service corporations, governmental agencies, and nonprofit legal services organizations.

Increasingly we are also seeing paralegal graduates move into nontraditional areas of employment, becoming investigators, claims representatives, and office managers. While these positions may not carry the title of paralegal, they

require similar skills and aptitudes: an ability to communicate effectively, both orally and in writing; analytical reasoning skill; top-notch research capabilities; and a sense of professionalism.

1. The Law Office Environment

Approximately 70 percent of all paralegals work in private law firms.¹⁸ In this section we will first explore the various types of private practice arrangements. Then we will look at the people, in addition to attorneys and paralegals, who make up the law office team. Finally, we will examine the purpose of a law office procedures manual and the common practice of legal specialization.

a. Types of Private Practice Arrangements

Attorneys working in a private practice arrangement are self-employed or employed by other attorneys rather than by a financial institution, an insurance company, a manufacturing corporation, a trade association, or a governmental agency. There are five main types of private practice: partnerships, limited liability partnerships, professional corporations, sole proprietorships, and office-sharing arrangements.

(1) Traditional partnership

In a **partnership** arrangement attorneys work cooperatively on cases that are taken by the firm. Traditionally, lawyers who work in a partnership are designated as either associates or partners. **Partners** receive a share of the firm's profits rather than a set salary. The percentage of the profits received and the extent to which partners participate in the decision making for the firm depend on a variety of factors, including the amount of business they bring into the firm, the amount of fees generated by the cases they work on, the contribution they make to the management of the firm, and their longevity with the firm.

In small partnerships most decisions are made by a "committee of the whole" comprised of the partners, who meet and discuss the matter together. As firms grow larger, however, partners are usually assigned to specialized committees in areas like fee setting and finance, recruitment of associates, lay personnel, office equipment and space utilization, and the library. The managing partner takes responsibility for seeing that the policies decided on are properly implemented.

The associate category is used for young attorneys being trained and evaluated. **Associates** are employees of the firm and receive a set salary, along with bonuses, for their efforts. Until very recently the policy was that after approximately five to eight years an associate either was offered a partnership or was expected to leave the firm. Many firms are starting to modify this "up or out" policy because they no longer see that policy as benefiting the attorneys, the firm, or the clients. As an alternative, they are developing a middle-level attorney tier. Such a middle tier may consist of permanent salaried attorney

Partnership

A business run by two or more persons as co-owners.

¹⁸U.S. Bureau of Labor Statistics, Occupational Outlook Handbook (2008-2009 ed.).

positions. In other firms the middle tier may simply be a way to give attorneys more time to prove themselves worthy of partnership status. Firms are using various names for the persons staffing this middle tier, including nonequity partner, of counsel, and senior attorney—titles that in the past had been reserved for older, semi-retired partners. You will still frequently see the term *of counsel* used to designate the status of a semi-retired former partner or an attorney who is affiliated with the firm on only a part-time basis.

A decided disadvantage of the partnership form is that each partner is responsible for the acts of all the other partners. For example, if one partner is sued for malpractice, every partner's personal assets are at risk. Until recently the only way to gain limited personal liability was to form a professional corporation.

(2) Professional corporation (PC)

Professional corporation (PC)

A professional entity in which the stockholders share in the organization's profits but have their liabilities limited to the amount of their investment.

Most professional corporations operate much as partnerships do. The law firm forms a corporation rather than a partnership in order to limit the attorneys' individual financial liability. The corporation pays salaries to all the attorneys who work for it but pays dividends only to the attorneys who are shareholders in the corporation. Attorneys who are designated as directors have a voice in controlling the corporation, and the officers are responsible for managing it. Firms organized as professional corporations usually will have the letters *PC* listed after the firm name.

(3) Limited liability partnership (LLP)

Limited liability partnership (LLP)

A professional entity in which the owners share in the organization's profits but are not liable for the malpractice of their partners.

In the early 1990s legislatures in several states created a new business form: the **limited liability partnership**. The purpose of this form is to give small businesses the best of the partnership and corporate forms without the disadvantages of either. Specifically, a limited liability partnership allows the law firm to function as a partnership but without the partners assuming liability for each other's actions. If a law firm chooses to become a limited liability partnership, the attorneys/partners will not be held individually liable if another attorney/partner makes a mistake. However, attorneys remain liable for their own malpractice and for the actions of anyone under their supervision. Another advantage to the LLP form is that a limited liability partnership is easier to form and maintain than a corporation. Firms organized as limited liability partnerships will usually have the letters *LLP* listed after the firm name.

(4) Sole proprietorship

Several lawyers share in the profits of a partnership or corporation, but in a **sole proprietorship** one lawyer owns all the assets of the business and receives all the profits (or absorbs the losses). This form of practice usually involves a single lawyer assisted by paralegals and clerical staff. However, it also can consist of an arrangement in which the sole practitioner employs other attorneys on a regular salaried basis. Those attorneys are strictly employees, however, and do not have any rights to share in the firm's profits or participate in the management of the firm.

(5) Office-sharing arrangements

Some lawyers develop various office-sharing arrangements that may appear to outsiders to be partnerships or professional corporations but that are technically still sole proprietorships. Typically, two or more attorneys share office space, a telephone system, and a receptionist. Sometimes they share a common secretarial pool and paralegals. Each attorney is responsible for paying his or her share of these common expenses, but the fees earned by each attorney are not pooled or shared.

Another variation of office sharing among sole practitioners occurs when one attorney gives another attorney (usually a young attorney trying to start his or her own practice) office space, library use, and sometimes secretarial help in return for help on some cases. The attorney receiving these office benefits is expected occasionally to perform legal research, answer some court calls, appear at real estate closings, and otherwise cover for the first attorney when he or she has schedule conflicts or takes time off.

b. Law Office Personnel

In a law office setting, in addition to attorneys and paralegals, you are likely to find other support personnel, such as law clerks, investigators, librarians, secretaries, document clerks, file clerks, bookkeepers, and business managers. While we will be discussing these positions in the context of the law office environment, many may also be found in the legal departments of businesses or governmental agencies, to be discussed below.

(1) Law clerks, investigators, and librarians

Law clerks, investigators, and librarians are specialized positions. Although their formal training differs from that of a paralegal, they perform tasks that frequently overlap work done by paralegals.

A **law clerk** usually is a law school student who works for the firm part-time during the school year or full-time during the summer but may be a recent law school graduate who has not yet passed the bar exam. Typically, most of the clerk's time is spent doing legal research. **Investigators** are often former law enforcement officers who locate and interview witnesses, take photographs of accident scenes, and gather documentary evidence. Librarians are responsible for updating and maintaining the firm's law library. In large firms the librarian may have a degree in library science and sometimes joint library and J.D. degrees. In smaller firms the library may be one of several other responsibilities assigned to either a paralegal or a secretary.

(2) Clerical support

No law office can function efficiently without a skilled clerical staff. In addition to typing correspondence and legal documents, the clerical personnel answer the telephone, greet visitors, set up appointments, distribute and post mail, find and file internal office records, file documents in the courthouse, and process billing records.

In smaller offices one or two legal secretaries will perform all of the above functions. In larger offices the clerical staff will be more hierarchical and have specialized jobs, such as receptionist, file clerk, legal stenographer, and bookkeeper, as well as legal secretary.

Some experienced legal secretaries perform some paralegal duties. The key distinction between secretarial and paralegal duties is that the secretarial function involves taking dictation from, or transcribing material produced by, lawyers and paralegals, whereas the paralegal function involves actually composing part of the content of the letters, memoranda, and legal documents being produced.

(3) Managers and administrators

The titles and job descriptions of administrative positions differ widely from one law office to another. In some cases there is a professional legal administrator whose responsibilities may extend to assigning legal work among the firm's attorneys. More commonly, the administrator supervises only the business aspects of the firm. These duties typically include hiring and training the support staff, maintaining personnel records, procuring and maintaining office equipment, overseeing billing operations and bank accounts, and preparing budgets and financial statements.

Administrative positions also exist within departments or units of larger law offices. Thus there may be an office manager in charge of the secretarial pool or word processing unit, a business manager in charge of the bookkeeping department, or a paralegal manager who supervises other paralegals.

c. Office Procedures Manual

The work of these various law office personnel often overlaps, and the organizational structure of the law office can be very confusing to a new employee. One source of assistance may be the office procedures manual. Most large offices maintain a loose-leaf manual containing written copies of their basic policies and procedures. Some more technologically advanced offices may have this policy and procedures manual “on line.” This manual usually explains the personnel structure found within the firm, as well as policies on such things as holidays, sick leave, vacation time, and breaks. It may also describe such diverse activities as how the filing system operates, what kinds of records must be kept, and how supplies are obtained. Some manuals include a glossary of acceptable abbreviations and checklists for handling certain types of matters.

d. Areas of Specialization

In addition to practicing in a variety of different legal settings, attorneys also often differentiate themselves by area of specialization. Although law schools prepare generalists and bar exams test all major areas of the law, most lawyers specialize in a few selected and generally related fields. Some of the most common specialties include criminal law, personal injury work, real estate law, estate planning and probate, corporate law, employment law, and family law. Attorneys doing personal injury work usually segment themselves into the plaintiff's bar and the defense bar. Within an area like family law, attorneys may further specialize in an area like adoptions.

2. Other Forms of Practice

Although most paralegals work in a private practice setting, the fastest growing segment of the paralegal market involves working for corporate legal

departments, insurance companies, banks, and governmental agencies.¹⁹ These types of positions usually provide more predictable hours and compensation, greater security, and relief from the pressure to generate new clients for the firm.

a. Legal Department of a Business

All businesses need legal advice from time to time, legal assistance in filing various forms with governmental agencies, or legal representation when they are involved in litigation. They can obtain this legal assistance by either contracting for the services of a law firm or hiring lawyers as their own employees. Depending on the nature and size of the business, there are advantages and disadvantages to each approach, but because internal legal departments frequently offer greater economy, more responsive service, and greater integration with management, most large corporations hire lawyers as regular salaried employees.

The top legal position in most companies is that of **general counsel**, and the position is usually placed at the vice-presidential level. This office has responsibility for advising corporate officials on how to minimize legal risks and how to respond to legal difficulties. The general counsel's office monitors proposed regulations and legislation that might affect the company's operations and then organizes appropriate lobbying efforts supporting or opposing the proposed changes.

In centralized legal departments all staff attorneys report to the general counsel and usually are located in the corporate headquarters building. In decentralized systems staff lawyers are organized into smaller units and located in operating divisions and regional offices. They may report to the vice-president of finance or the vice-president for research and development rather than the general counsel.

b. Legal Departments in Governmental Agencies

Governmental agencies—from a town manager's office to the Federal Trade Commission—also need legal assistance. If their needs are very limited, they usually retain a private law firm on a limited basis, but if their workload justifies it, they also hire lawyers as full-time employees just as businesses do. These in-house law firms closely parallel those of the private sector. They advise agency officials on the requirements of the law, keep them informed regarding proposed legislation and regulations that might affect the agency, and manage any litigation involving the agency as a party. Agency lawyers and paralegals frequently enjoy civil service protections.

In some cases an entire governmental agency is formed for the specific purpose of providing legal services. The federal Justice Department and a local district attorney's or public defender's office provide examples of agencies designed solely for such a purpose. These types of agencies also employ attorneys on a salaried basis, but they function very much like private law offices.

¹⁹Id.

PARALEGAL PROFILE



MARYANN K. BRUNTON COMPLIANCE OFFICER MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

The MCAD is an administrative agency that investigates and prosecutes complaints of discrimination by people who charge they have been discriminated against based on their race, color, religion, national origin, ancestry, sex, sexual orientation, age, or disability. The commission hears complaints in the areas of employment, housing, places of public accommodation, education, credit, services, and mortgage lending. My job is to investigate these complaints and to enforce the state and federal laws and regulations regarding unlawful discrimination.

Once a complaint is filed with the commission, an investigation is initiated. The investigation entails written submissions filed by the parties regarding their respective positions. As part of the investigative process, I draft interrogatories and requests for production of documents, hold investigative conferences whereby the parties present their legal arguments, conduct witness interviews, conduct on-site visits, and draft affidavits.

The education I received as a paralegal student has equipped me with the knowledge and training I use every day to carry out my responsibilities as a compliance officer. Although the job is at times difficult, it is also rewarding. I have the opportunity to investigate and obtain evidence when individuals have been subjected to egregious harassment and discrimination. The education I received as a paralegal student has enabled me to pursue a career where I can help to correct some of society's injustices.

c. Other Variations

Legal clinic

Usually organized as either a partnership or a professional corporation, law clinics provide low-cost legal services on routine matters by stressing low overhead and high volume.

Legal services offices

Affiliated with the federal government's Legal Services Corporation, these offices serve those who would otherwise be unable to afford legal assistance.

In addition to the forms of practice discussed above, attorneys may be employed in the legal departments of private nonbusiness organizations, such as labor unions, trade associations, consumer groups, and charities. Although the parent organization may have varying goals, the function and operation of the legal department parallel those of a business corporation or a governmental agency.

The terms *legal clinic* and *legal services office* are frequently used incorrectly and interchangeably. **Legal clinics** provide low-cost legal services on routine matters by stressing low overhead and high volume. They frequently operate out of store-front offices and make extensive use of paralegals. The attorneys who operate the clinic, however, are usually organized as either a partnership or a professional corporation. **Legal services offices** usually are legal aid services designed to help poor people and are affiliated with the federal government's **Legal Services Corporation**. The attorneys who work in such offices are salaried employees of a not-for-profit corporation that receives both public funds and private donations to provide free legal services to the poor. They hold positions similar to attorneys working for a public defender's office, except that they handle civil rather than criminal cases. Such offices frequently rely heavily on the assistance of paralegals, as much of the work of a legal services office involves representation before administrative agencies, an area where paralegals are usually allowed to practice without running afoul of the unauthorized practice of law statutes.

DISCUSSION QUESTIONS

10. From an attorney's or a paralegal's perspective, what are the advantages and disadvantages of the various forms of practice? How do you think their perspectives might differ?

11. Job titles and duties are not always well defined in many law offices. Discuss the extent to which the work of various support personnel frequently overlaps that of attorneys, as well as that of those in other positions within the office.

SUMMARY

In this chapter we have discussed the ambiguities inherent in the word *paralegal*. Because formal education for paralegals began only in the 1960s, we have yet to see a well-defined understanding of what the professional role of paralegals should be. In fact, in addition to traditional paralegals, we are now seeing other nonlawyer legal providers, such as freelance paralegals and legal technicians. In an attempt to establish some standards for nonlawyers, attorney and paralegal associations are working to develop educational and testing standards. These efforts include the ABA paralegal program approval process, the NALA certification program, the NFPA advanced proficiency exam, and AAFPE's core competencies. Various state legislatures are also investigating the possibility of registration or licensure requirements.

The most common legal work environments are private practice arrangements, such as partnerships, limited liability partnerships, corporations, sole proprietorships, and office-sharing arrangements. Lawyers and paralegals can also be found in the legal departments of businesses and governmental agencies. In addition to attorneys and paralegals, a number of other personnel, such as law clerks, investigators, librarians, and clerical support, may serve as part of the legal team.

REVIEW QUESTIONS

Pages 13 through 20

1. What are the names of the two major paralegal associations?
2. How do traditional paralegals differ from freelance paralegals?
3. How do freelance paralegals differ from legal technicians?
4. True or false:
 - a. *Paralegal* and *legal assistant* are usually seen as synonymous terms.
 - b. The term *independent paralegal* can sometimes refer to freelance paralegals and sometimes to legal technicians.

Pages 20 through 22

5. What are the requirements for becoming an attorney?
6. What are the requirements for becoming a paralegal?
7. When did formal paralegal education begin?
8. What role does the ABA play in paralegal education?

Pages 22 through 30

9. What is involved in the process of registration?
10. What are the major differences between certification and licensure?

NETNOTE



As you may have noticed by reading the marginal definitions, all of the major associations mentioned in this chapter have web sites. Take a few minutes to visit each.

American Association for Paralegal Education (AAfPE):

www.aafpe.org

American Bar Association (ABA):

www.abanet.org

National Federation of Paralegal Associations (NFPA):

www.paralegals.org

National Association of Legal Assistants (NALA):

www.nala.org

International Paralegal Management Association (IPMA):

www.paralegalmanagement.org

11. Who has the right to use the title Certified Legal Assistant?
12. What are the three ethical issues of which paralegals must be particularly aware?

Pages 30 through 39

13. What are the four basic tasks that most paralegals perform?
14. What are the differences among a partnership, a professional corporation, and a limited liability partnership? Between a sole proprietorship and an office-sharing arrangement? Describe the advantages and disadvantages of each arrangement.
15. For a paralegal or an attorney what are the major alternatives to working in a private law practice?



Chapter 3

Functions and Sources of Law

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

INTRODUCTION

No modern society can exist without a strong legal system, and when a person has a problem or is trying to avoid a problem, that person frequently turns to lawyers and the legal system for help. In this chapter we explore the role of law in American society and the sources of that law. As we begin that discussion, let us first introduce you to a client, Diane Dobbs, who met with attorney Pat Harper of the law firm of Darrow and Bryan. She related the following story.

Case 3: The Pregnant Waitress

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

Six months ago Diane, who is not married, found out that she was pregnant. When she approached her manager, Ben, to discuss arrangements for a maternity leave, instead of the favorable reception she had expected, Ben reached over, patted her stomach, and said, "Well, I guess we can't have you working for us any longer." Ben

then grabbed her by the arm and escorted her out of the restaurant. Diane protested and asked to be allowed to collect her personal belongings from her locker, but the manager just laughed and said she was “history.” When Diane began to cry, he

softened his demeanor a little and said, “Look, we simply can’t have a pregnant lady working here. It just wouldn’t be good for business.”

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

When a client presents a problem to an attorney, the attorney may feel confident that the legal system can provide a remedy, but that will not always be so. As we indicated in Chapter 1, not every problem can be resolved by the legal system. In order to better appreciate why this is so, we need to study the function of law, the history of our American legal system, and the sources of our laws. You also need to understand the sources of law in order to do legal research and analysis.

A. FUNCTIONS AND THEORIES OF LAW

The development and enforcement of the law are essential governmental functions in all developed societies. Although the laws themselves sometimes differ, they serve the same essential functions in all fifty states and at the federal level.

1. Definition of Law

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

To be considered laws, these rules of conduct must be promulgated and enforced by the appropriate governmental bodies. For example, only the U.S. Congress can make federal statutory law, and only a state’s highest court can authoritatively interpret the meaning of that state’s laws.

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

2. Functions of Law

While there may be a great deal of debate over the wisdom and appropriateness of a particular law (as there is, for example, over a mandatory seat belt law),

Laws

Rules of conduct promulgated and enforced by the government.

there is general agreement that laws themselves are necessary. As the Task Force on Law and Law Enforcement reported to the National Commission on the Causes and Prevention of Violence:

Human welfare demands, at a minimum, sufficient order to insure that such basic needs as food production, shelter and child rearing be satisfied, not in a state of constant chaos and conflict, but on a peaceful, orderly basis with a reasonable level of day-to-day security. . . . When a society becomes highly complex, mobile, and pluralistic; the beneficiary, yet also the victim, of extremely rapid technological change; and when at the same time, and partly as a result of these factors, the influence of traditional stabilizing institutions such as family, church, and community wanes, then that society of necessity becomes increasingly dependent on highly structured, formalistic systems of law and government to maintain social order. . . . For better or worse, we are by necessity increasingly committed to our formal legal institutions as the paramount agency of social control.¹

It has thus been increasingly left to the legal system to define and enforce the rules of society. Some of these rules, such as restrictions on abortions, pornography, and gambling, are heavily influenced by the religious and moral beliefs of various groups in the society, while others, such as traffic regulations, have no moral content at all. In either case they help to provide the type of order and predictability that are essential elements of our modern society.

3. Theories of Jurisprudence

To help explain what the purpose of law is and how laws work (or should work in a just society), various theories of legal philosophy have been developed. This area of study, known as **jurisprudence**, has had an important impact on the development of our legal system and on the thinking of many judges.

One part of jurisprudence deals with theorizing about the source of laws. For example, since the time of the ancient Greeks, **natural law** theorists have believed that man-made law should be based on timeless and immutable principles that can be discovered through careful thought and humanity's innate sense of right and wrong. The purpose of having governments and laws is to protect the natural rights that are inherent in these principles. Therefore, the laws that governments enact are to be respected when they reflect these natural laws but should be resisted when they do not conform to these natural laws.

This natural law philosophy has had a great influence on the development of the American legal system and is reflected in our Declaration of Independence, which includes the following:

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.

¹J. Campbell, J. Sahid, & D. Strang, *Law and Order Reconsidered: Report of the Task Force on Law and Law Enforcement to the National Commission on the Causes and Preventions of Violence* 3, 5 (1970).

The Reverend Martin Luther King, Jr. used natural law as a justification for civil disobedience in his fight against racial segregation.

The alternative to the natural law theory is known as **legal positivism**. Supporters of this approach believe that the validity of a law is determined by the process through which it was made rather than by the degree to which it reflects natural law principles. To a legal positivist a law is valid as long as it was passed by the appropriate lawmaking agency.

A second area of jurisprudence is concerned with the extent to which judges simply apply the law versus create the law. **Formalists** believe that the proper role of the judge is to do the former, that is, simply to apply the law. They view the law as a complete and autonomous system of logically consistent principles. Judges can find the “correct result” by simply making logical deductions. Judges serve as impartial technicians who simply identify the proper, preexisting rule and then apply it to the facts of the case. Social policy and the judge’s private views are considered irrelevant.

Legal realists, on the other hand, reject the formalist’s assertion that judges’ decisions are reached by a strict application of the principles of logic. First, judges must frequently decide between contradictory rules. Second, legal realists point to instances in which the law is vague and ambiguous. Because of the elastic nature of the English language, it is always possible for judges to expand or contract the meaning of any given rule. In these situations, the realists assert that judges can interpret the wording of the statutes and prior cases to justify different outcomes. The number of five-to-four split votes in controversial Supreme Court cases is often cited as proof of this assertion that there are always counterarguments.

But if, as the realists assert, logic alone is insufficient to explain judicial decisions, what then does determine how judges decide cases? Some realists suggest that judges simply seek interpretations that will advance the public values and social goals to which they subscribe. Others argue that realism involves going beyond the confines of the law to determine the social consequences of the alternative outcomes. To assist in this process, judges should look to the expertise that can be provided by the social sciences, specifically psychology, sociology, and economics.

An illustration of the realist approach can be found in the 1954 Supreme Court case of *Brown v. Board of Education*.² That case raised the question of whether segregated public schools could provide “separate but equal” education. In 1896 in *Plessy v. Ferguson*³ the Court had found that segregated railway cars did not violate the Fourteenth Amendment so long as they provided “equal” accommodations. However, rather than relying on the legal precedent established by *Plessy*, the Court in *Brown* looked beyond the law and recognized studies done by social scientists that concluded that segregation in the public schools had a detrimental effect upon black children because it generated feelings of inferiority “that may affect their hearts and minds in a way unlikely ever to be undone.”⁴ Based upon this data, the Court concluded that “[s]eparate educational facilities are inherently unequal.”⁵ Today, lawyers routinely present

²347 U.S. 483 (1954).

³163 U.S. 537 (1896).

⁴347 U.S. at 494.

⁵Id. at 495.

policy arguments in support of their client's position in an effort to convince the court that finding for their side is not only "legally" but also "socially" desirable.

While few still argue that judicial decisions are determined solely by the rules of logic, there remains considerable disagreement as to how far judges should be given discretion, especially in the area of constitutional interpretation. Prominent political conservatives such as Supreme Court Justice Antonin Scalia argue for a strict construction that narrowly interprets the text of the Constitution in a manner that is consistent with what most people understood those words meant at the time that they were written.⁶ This view is often referred to as **originalism**. Scalia argues that such an approach will keep judges from substituting their own political views for those of the original drafters.

In contrast to this strict construction approach, others argue that judges should seek to determine the underlying goal or value that the drafters had in mind at the time they wrote the law. Then they should select the modern-day option that best advances that goal or value. This view is sometimes labeled the **evolutionary** or "living law" approach.

In recent years scholars associated with the **Critical Legal Studies (CLS)** movement have been focusing their attention on identifying what they believe to be preferences and biases that are built into our law. The movement is called *Critical Legal Studies* because its members are openly critical of the manner in which our legal system currently operates. Adherents of CLS argue there can be no value-neutral process for enacting society's authoritative rules and any process will inherently favor some values over others. Rather than protecting against the illegitimate use of power, the rule of law protects certain groups and ideas at the expense of others. Some adherents of CLS utilize a Marxist analysis that focuses on economic suppression of the poor by the wealthy. **Critical Race Studies** and **Feminist Jurisprudence** focus on alleged racial and gender biases within the legal system.

Of course, many legal thinkers embrace more than one theory of how law should be viewed. Consider the following remarks of Justice Benjamin Cardozo:

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law.⁷

As you read the cases that are contained in this book and are part of other courses you take, stop and analyze them in terms of these different perspectives of the role of law and how law is made. Did they include references to the natural law? How much discretion did the precedents leave to the judge? What values were aligned with each of the possible outcomes?

⁶Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997).

⁷Benjamin Cardozo, *The Nature of the Judicial Process* 112 (1949).

DISCUSSION QUESTIONS

1. Do you agree with the statement “Laws are necessary”? Many believe we have too many laws today. Do you agree? If you do, which laws should be eliminated? Do we need additional laws in some areas?
2. Can you think of ways, other than those mentioned in the text, that natural law theory has influenced the development of American law?
3. One of the basic principles of the natural law theory is that people should not have to obey an unjust law. Should it be left to the individual or to a judge to determine when a man-made law is unjust? If it is left to the judge, what criteria should the judge use?
4. Which of the theories of jurisprudence discussed in the text do you think best explains how law should work?
5. Would you expect to hear a follower of natural law, legal positivism, legal realism, or Critical Legal Studies making the following statements?
 - a. The killing of another human is wrong.
 - b. The penalty for first degree murder is life imprisonment or death.
 - c. Studies have shown that a disproportionate number of minority men are sentenced to the death penalty.
6. There is an old joke about a lawyer who was asked, “What is two plus two?” The lawyer responded, “What do you *want* it to be?” Which legal theory does this best exemplify? Is it necessarily a bad thing that we live in a world where two plus two does not always have to be four?

B. SOURCES OF LAW

Most people can recall something from their high school civics class about the legislature making the law, the executive branch enforcing the law, and the courts interpreting the law. The truth is that the legislative, executive, and judicial branches are all involved in making the law.

1. Constitutional Law

The United States was the first nation to adopt a written constitution, and it is that Constitution that provides the framework within which all our laws are made. The first major function of the federal Constitution is to establish an organizational structure that allocates governmental powers. On the national level, the Constitution divides governmental powers among the legislative, executive, and judicial branches. This is commonly referred to as the **separation of powers**.

Separation of powers

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

The separate branches of government share power and have the ability to limit the actions of the other branches. In the Federalist Papers, James Madison explained that this system of **checks and balances** is designed to guard against “a gradual concentration of the several powers in the same department.” Under the Constitution, Congress has the power to make laws, but the President has the power to veto them. The executive branch is responsible for administering the law, but it cannot spend money to do so unless Congress provides for the appropriate funding in the budget.

The Constitution also divides governmental power between the national government and the states. This division of power between the national government and the states is referred to as **federalism**. Certain powers are explicitly granted to the federal government, while all others are reserved to the states and the people.

The second major function of the Constitution is to protect individual rights from governmental overreaching. Because our founding fathers perceived a lack of such protection in the Constitution, as soon as it was ratified, the first Congress began work on the first ten amendments, commonly known as the **Bill of Rights**. These ten amendments include protections for freedom of speech and press, freedom of religion, a privilege against self-incrimination, the right to an attorney and a trial by jury, and protections against unreasonable searches and seizures. Along with the Thirteenth, Fourteenth, and Fifteenth Amendments (added during the Civil War), these amendments serve to prevent state or federal government officials from interfering with our civil rights and liberties.

The Constitution and its amendments constitute the “supreme law of the land.” To be enforceable, all other laws must not conflict with the principles laid down in the Constitution. When there is a challenge to the constitutionality of a law, it is the courts that determine whether or not the law is valid. The process by which the courts make these types of judgments is referred to as **judicial review**.

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

In *Marbury v. Madison*⁸ the U.S. Supreme Court claimed this power for itself. The Court held it was inherent in the nature of a court’s work to have to resolve conflicting interpretations of the law before it can carry out its assigned task of applying the law. If a court determines that a statute does not conform to the Constitution, then the statute is invalid and the court cannot enforce it.

Over the years, the U.S. Supreme Court has used this power of judicial review to invalidate a number of federal and state laws that it found to be in conflict with the U.S. Constitution. Some of the most controversial of the more recent applications of judicial review include decisions invalidating state laws involving racial segregation, abortions, and school prayer.

In addition to determining the constitutionality of statutes, the courts are often called upon to determine the meaning of the Constitution itself. The Constitution was written more than two hundred years ago and uses broad sweeping terminology such as “freedom of speech,” “establishment of religion,” “unreasonable searches and seizures,” and “cruel and unusual punishment.” It is often difficult to determine the meaning of such ambiguous phrases, especially when applied to a specific situation. Under the power of judicial review, the U.S. Supreme Court has the final say regarding the interpretation of those ambiguous constitutional provisions.

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

Federalism

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

Bill of Rights

The first ten amendments to the U.S. Constitution

Power of judicial review

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

⁸5 U.S. (1 Cranch) 137 (1803).

NETNOTE



You can read the full text of the Declaration of Independence, the Constitution, and the Bill of Rights at the National Archives web site: www.archives.gov.

The Declaration of Independence:

www.archives.gov/national_archives_experience/declaration.htm

The Constitution:

www.archives.gov/national_archives_experience/constitution.html

The Bill of Rights:

www.archives.gov/national_archives_experience/bill_of_rights.html

You can also view the Constitution and the Bill of Rights at Find law:

<http://caselaw.lp.findlaw.com/data/constitution/articles.html>

(Note: The address does not start with www.)

<http://caselaw.lp.findlaw.com/data/constitution/amendments.html>

PRACTICE TIP

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

the federal Bill of Rights. In the past many attorneys tended to ignore their own state's constitutional provisions. Recently, however, there has been an increase in litigation based on state constitutional law. This is partly because many state constitutions provide for more protection of individual rights than does the federal Constitution. The highest state court is the final arbiter of what its state constitution means.

2. Statutory Law

As explained above, federal and state constitutions delineate the general framework within which the government must operate. Although these documents do list some major substantive and procedural rights, they were not designed to contain the types of detailed laws and regulations we need to operate in today's complex society. Rather, the federal and state constitutions specifically delegate the power to make these laws to the legislative branches of government.

At the federal level, the legislative power rests with the U.S. Congress. At the state level, it is exercised by state legislatures and a variety of local bodies such as city councils and village boards. Congress and state legislatures enact **statutes**, while city councils and village boards enact **ordinances**.

Statute

A law enacted by a state legislature or by Congress.

These statutes and ordinances lay down general rules that govern future conduct. They are general in the sense that they apply to broad categories of people rather than to specific individuals. Furthermore, the requirements they impose generally cannot be applied to actions taken *before* the law went into effect.

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

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

It shall be an unlawful employment practice for an employer (1) to . . . discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin.⁹

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

As with ambiguities in constitutional provisions, when disagreements such as this arise over the meaning of a statute, a court must resolve the ambiguity. Thus in *Gilbert v. General Electric*,¹⁰ the U.S. Supreme Court was called upon to determine if discrimination based on pregnancy was a form of sex discrimination under Title VII. The Supreme Court ruled in *Gilbert* that Title VII allowed employers to discriminate based on pregnancy.

The Supreme Court's interpretation would have left Diane without a remedy under the statute. However, luckily for her, if the legislative branch disagrees with the interpretation a court gives to one of its statutes, Congress can always introduce new legislation that amends the original statute to make clear that a different result or interpretation was intended. If this new legislation passes, the court's interpretation is superseded by the new statute. In this instance, Congress reacted by amending the statute to include pregnancy discrimination with the definition of sex discrimination.¹¹ Thus, under the

⁹42 U.S.C. § 2000e-2(a) (2008).

¹⁰429 U.S. 125 (1976).

¹¹Bennett Amendment, 42 U.S.C. § 2000e(k) (2008).

amended statute it was unlawful for Diane’s employer to fire her based upon her pregnancy.

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

3. Administrative Law

Administrative law

Rules and regulations created by administrative agencies.

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

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

Regulation

A law promulgated by an administrative agency.

Other examples of federal agencies include the Occupational Safety and Health Administration (OSHA), which oversees the federal statute requiring safe working conditions, and the Environmental Protection Agency (EPA), which oversees the federal statute governing the environment.

Just as the courts are drawn into the lawmaking process when they must interpret constitutions and statutes, so, too, are they called on to be the final arbiters of the meaning of administrative regulations. If someone disagrees with the administrative interpretation of a statute, the dissatisfied party can go to court to challenge the agency’s interpretation. The court must support the agency’s interpretation unless the court determines that the regulation is outside the authorization Congress gave to the administrative agency or that the regulation is unconstitutional. To determine whether the agency has stepped out of the bounds created for it by Congress, the court will examine the **enabling act**, the statute that created the agency. The court will also seek to determine the underlying legislative intent of the statute that the agency is attempting to interpret through its regulations.

Enabling act

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

Returning once again to the case of our pregnant waitress, attorney Pat Harper may also wish to consider suing Diane Dobbs’s employer for sexual harassment. A sexual harassment case would be based on the same federal statute, Title VII, that we discussed above. The statute makes no specific reference to sexual harassment. However, the Equal Employment Opportunity Commission (EEOC), acting under authority given to it in the statute, has declared that acts of sexual harassment are a form of sex discrimination. One of its administrative regulations states:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such

PRACTICE TIP

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

conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.¹²

Note how much more specific the wording of the regulation is in comparison to the wording of the statute.

Recall that Diane Dobbs alleged that the manager patted her on the stomach as he was firing her for being pregnant. Do you think that is sufficient to support a claim of sexual harassment? Is there any language in the regulation that could support such a claim?

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

Because administrative agencies combine legislative, executive, and judicial functions, they are sometimes referred to as the **fourth branch of government**.

The following case illustrates the interaction between the courts and administrative agencies when the interpretation of a federal statute is called into question. As you know, Congress has enacted a federal statute, the Internal Revenue Code, to set out the requirements that individuals and businesses must follow regarding the payment of federal taxes. The Code also provides certain exemptions for charitable organizations that operate for educational purposes. In 1970 the Internal Revenue Service (IRS), an administrative agency, interpreted that provision to mean that an organization could not be given tax-exempt status if it engaged in racially discriminatory policies. Based on fundamentalist religious beliefs, Bob Jones University followed a policy that denied admission to applicants who advocated interracial marriage or dating. Based on this racially discriminatory admissions policy, the IRS denied Bob Jones

¹²29 C.F.R. § 1604.11 (2008).

University tax-exempt status. The University sued in federal court seeking a refund of federal unemployment tax payments. The following excerpt is from the decision of the United States Supreme Court in which the Court determined that nonprofit private schools such as Bob Jones University that follow racially discriminatory admission practices, even if based on religious beliefs, do not qualify as tax-exempt organizations under the Internal Revenue Code.

Bob Jones University v. United States 461 U.S. 574 (1983)

Chief Justice BURGER delivered the opinion of the Court.

... Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues. ... [However, the] institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.

[A] declaration that a given institution is not “charitable” should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice. ... Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.

An unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals. ...

Petitioners contend that, regardless of whether the IRS properly concluded that racially discriminatory private schools violate public policy, only Congress can alter the scope of [a federal statute]. Petitioners accordingly argue that the IRS overstepped its lawful bounds in issuing its 1970 and 1971 rulings.

Yet ever since the inception of the Tax Code, Congress has seen fit to vest in those administer-

ing the tax laws very broad authority to interpret those laws. In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems. Indeed as early as 1918, Congress expressly authorized the Commissioner “to make all needful rules and regulations for the enforcement” of the tax laws. The same provision, so essential to efficient and fair administration of the tax laws, has appeared in Tax Codes ever since; and this Court has long recognized the primary authority of the IRS and its predecessors in construing the Internal Revenue Code.

Congress, the source of IRS authority, can modify IRS rulings it considers improper; and courts exercise review over IRS actions. In the first instance, however, the responsibility for construing the Code falls to the IRS. Since Congress cannot be expected to anticipate every conceivable problem that can arise or to carry out day-to-day oversight, it relies on the administrators and on the courts to implement the legislative will. Administrators, like judges, are under oath to do so. ...

The actions of Congress since 1970 leave no doubt that the IRS reached the correct conclusion in exercising its authority. It is, of course, not unknown for independent agencies or the Executive Branch to misconstrue the intent of a statute; Congress can and often does correct such misconceptions, if the courts have not done so. Yet for a dozen years Congress has been made aware—acutely aware—of the IRS rulings of 1970 and 1971. As we noted earlier, few issues have been the subject of more vigorous and widespread debate and discussion in and out of Congress than those related to racial segregation

in education. Sincere adherents advocating contrary views have ventilated the subject for well over three decades. Failure of Congress to modify the IRS rulings of 1970 and 1971, of which Congress was, by its own studies and by public discourse, constantly reminded, and Congress' awareness of the denial of tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings. . . .

Petitioners contend that, even if the Commissioner's policy is valid as to nonreligious private schools, that policy cannot constitutionally

be applied to schools that engage in racial discrimination on the basis of sincerely held religious beliefs. As to such schools, it is argued that the IRS construction of § 170 and § 501(c)(3) violates their free exercise rights under the Religion Clauses of the First Amendment. . . .

The governmental interest at stake here is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.

CASE DISCUSSION QUESTIONS

1. What type of law (constitutional, statutory, or administrative) is being challenged in this case?
2. How is statutory law relevant to this case?
3. Why do you think the Court gives so much deference to the IRS's determination as to the meaning of the Internal Revenue Code?
4. Why is constitutional law relevant to this case?

4. Judicial Interpretation and the Common Law

As we have noted above, courts play a vital role in interpreting constitutions and the laws created by the legislatures and agencies. The courts also apply and interpret the **common law** when there is no statute, administrative regulation, or constitutional provision governing the case they are adjudicating.

The common law consists of various legal principles that have evolved through the years from the analysis of specific court decisions. Ultimately, these principles can be traced back to early medieval England, though they have been modified through the years by various state courts. When a legal dispute involves a subject that is not adequately covered by the other types of law, the judge applies the principles of the common law. In other words, in the absence of pronouncements from the constitution or a legislative or administrative body, the judge looks to the earlier decisions of other judges in similar circumstances.

Indeed, courts existed in England long before there was a democratically elected legislature to enact legislation. The roots of the court's power to create law go back to the eleventh century and the Norman Conquest. Although reading about medieval history may seem irrelevant to your study of the modern American legal system, the principles followed by our American legal system originated in England in 1066. Until 1066 Anglo-Saxon kings ruled England. There was no central legislature or centralized court system. Disputes were decided locally based on local custom. In 1066 the king, Edward the Confessor, died without children. This left the succession to the throne to either

Common law

Law created by the courts.

his brother-in-law, Harold, a powerful English baron, or his French cousin, William, Duke of Normandy. Harold was elected king. Immediately William assembled an army of soldiers, knights, and horses.¹³

In the fall of 1066 William landed on the south coast of England with his soldiers and knights, mounted on horseback. The mounted Norman knights overwhelmed the English foot soldiers, defeating the English army. On Christmas Day, 1066, William, the Duke of Normandy, had himself crowned king of England.

England became a country where everyone who spoke English owned no land and was impoverished. The king and the upper classes spoke French and used French in the courts. As a result, one enduring reminder of the Norman Conquest was the infusion of French words, such as **acquitt** and **voir dire**, into our legal vocabulary. In addition, Norman kings used Latin in their written documents, so many Latin words, such as **certiorari** and **actus reus**, were incorporated into our legal language.

The Norman Conquest left a much greater legacy, however, than the French and Latin words in our legal vocabulary. It created an entirely new method for resolving disputes. Before the Conquest most disputes were decided locally, and the “law” would vary from town to town. As part of unifying England, the English kings wanted to create a common law throughout the land.

How was this uniformity created? Remember that there was no central legislature. The solution was for the king to appoint judges and establish a court system so that disputes could be settled in a uniform manner. Initially, the “courts” were simply individual judges appointed by the king to “ride a circuit” around the countryside, settling disputes in the name of the king. Over time the judges realized that rather than deciding each case as though it were the first of its kind, it would be more efficient to share the results of their prior decisions with each other so that similar cases could be decided similarly. The resulting court-made law became known as the common law.

Stare decisis

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

Unless a good reason dictated otherwise, it became the policy to follow the rules laid down in prior decisions. This was how the doctrine of **stare decisis** developed. Once courts had determined the law in an area, other courts followed that rule unless a court thought there was a good reason to change it.

By about 1200 the main structure of the common law system was in place. A body of centrally appointed judges applied a common law throughout the country, and a tradition of following precedent had been established. The commencement of a series of Year Books, each collecting cases from the most important courts for that year, further solidified this development. In 1535 this system was replaced by reporters, collections of court opinions as “reported” by various authors. Finally, in 1865 this process culminated in the United States with the practice of publishing official law reports.

Meanwhile, the common law had come to America and had formed the basis for our legal system. There are areas of the law that are still totally governed by the common law, such as most matters dealing with torts. However,

¹³This is a good illustration of what occurs when there is no established governmental structure for settling disagreements. The disputants resort to violence.

over the years more and more areas of the common law have been enacted into statutes; that process is known as the **codification of the common law**. When the common law has been changed through legislation, the statute is said to be in **derogation of the common law**.

Before abandoning our history lesson, there was one more development in the English court system that has had a great impact on our system, and that was the development of equity courts. The courts we have discussed up to now had the power to settle disputes by requiring one party to compensate the other with money damages. But there are times when money is not what the litigants want. Rather they would like the court to order the other party to do something, such as living up to contractual obligations, or to cease doing something, such as having loud parties in the wee hours of the morning. In response to this need, the English created the **equity courts**.

Judges in the equity courts used their powers to “do justice.” For example, equity powers allow judges to take preventive action when the law would otherwise limit their decisions to monetary awards after the damage has been done. Equity powers include a judge’s ability to issue an **injunction** or to order **specific performance**. An injunction is a court order requiring someone to act or to refrain from acting. Specific performance requires that a party fulfill his or her contractual obligations. In the 1800s most states merged their law and equity courts. Therefore, today judges have the power to give either monetary awards or equitable relief or both, as they deem appropriate.

DISCUSSION QUESTIONS

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

8. Assume Congress enacted a statute making it a federal crime to have an abortion. Assume further that the U.S. Supreme Court declared the statute to be unconstitutional because it interfered with a woman’s constitutional right to privacy. If it wanted to do so, could the executive branch prosecute women for violating the statute? In other words, does Congress or the Supreme Court have the final word on what is constitutional? Why?

9. For each of the following, which source of law—a constitution, a statute, an administrative regulation, or a court opinion—would be best able to handle the problem and why?

- a. A requirement that all motorcycle riders wear helmets.
- b. A rule making a bar owner liable for any injuries caused by a patron to whom the bar sold drinks.
- c. A rule that all semi-trailers traveling on interstate highways use concave mud flaps.
- d. A requirement that employers not discriminate on the basis of religion or sexual orientation.
- e. A requirement that no more than a certain percentage of a known pollutant be released by factory smokestacks.

Codification of the common law

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

Derogation of the common law

Used to describe legislation that changes the common law.

Equity

Fairness; a court’s power to do justice.

Equity powers allow judges to take action when otherwise the law would limit their decisions to monetary awards. Equity powers include a judge’s ability to issue an injunction and to order specific performance.

Injunction

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

Specific performance

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

- f. A question as to whether a person not wearing a seat belt should be able to recover for injuries that person sustained in an automobile accident that was not his fault.
- g. A law prohibiting government from interfering with an individual's right to freedom of speech.

SUMMARY

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

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

The example with which we began this chapter provides a good illustration of how statutory, regulatory, and court-made law work together. Congress enacted a statute that prohibited "sex discrimination." Because this phrase is so broad, the EEOC, an administrative agency, has issued regulations that more clearly define some types of sex discrimination, such as sexual harassment. Finally, even the most detailed regulation cannot cover every individual case. Therefore, the courts are constantly called on to interpret the meanings of both statutes and regulations.

Where no constitution, statute, or administrative regulation applies, the courts rely on the common law to resolve the problem. But it is in their role as interpreters of constitutional, statutory, and administrative provisions that courts have the greatest power: By interpreting the law, the courts end up creating the law. Figure 3-1, page 57, summarizes the major sources of law.

REVIEW QUESTIONS

Pages 41 through 48

1. What are the two primary functions of the U.S. Constitution?
2. What is the power of judicial review, and why is it so important to our legal system?
3. Read the excerpts from the U.S. Constitution and the Bill of Rights located in Appendix A. Then answer the following questions:
 - a. Which article deals specifically with the legislature? With the executive? With the judiciary? (This may seem like trivia necessary only for Jeopardy contestants, but lawyers often refer to Article I, Article II, or Article III powers.)
 - b. Which amendment states that the powers not specifically delegated to the federal government are reserved to the states?
 - c. Make a list of the rights protected by the first ten amendments.

Federal Government	Type of Law*	State Government
U.S. Constitution	Constitutions	Individual State Constitutions
Congress	Statutes Laws Resolves Codes	Legislatures
Agencies E.g.: OSHA, EPA, EEOC	Regulations Rules	Agencies E.g.: Department of Welfare
Courts E.g.: U.S. Supreme Court Circuit Courts of Appeals	Opinions Decisions Cases	Courts E.g.: State supreme court Intermediate appellate courts

Interpreting
Constitutions
Statutes
Regulations

Creating and modifying
The common law

*While there are some differences among the terms *statutes*, *laws*, *resolves*, and *codes*, for our current purposes you can view them as synonyms. The same is true for the terms *regulations* and *rules*, as well as *opinions*, *decisions*, and *cases*.

Figure 3-1 Sources of Law

Pages 48 through 50

4. Why do constitutions and statutes frequently include ambiguous language?
5. How do courts become involved in the legislative process?
6. Who has the final say as to what a statute means, the legislature or the courts?
7. Who has the final say as to the constitutionality of a statute, the legislature or the courts?

Pages 50 through 53

8. How are statutes and administrative regulations similar? How do they differ?
9. Why are administrative agencies referred to as the fourth branch of government?

Pages 53 through 56

10. What impact did the Norman Conquest have on the American legal system?
11. What is the common law?
12. Why were equity courts created, and what special powers were they given?



Chapter 4

Classification of the Law

*Logically, everything ought to come first.
Jean Jacques Rousseau*

INTRODUCTION

In this chapter we will discuss the most common ways in which lawyers have traditionally categorized law. However, keep in mind that although it is necessary to categorize a client's legal problem in order to help the client, do not fall into the trap of seeing a client as only a set of legal problems that can be neatly sorted into predefined categories. Remember that there is a person behind every legal problem. Nonetheless, before attorneys can take legal action on behalf of that person, they must determine what the real cause of the problem is and what, if any, legal options are available to resolve the problem.

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

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

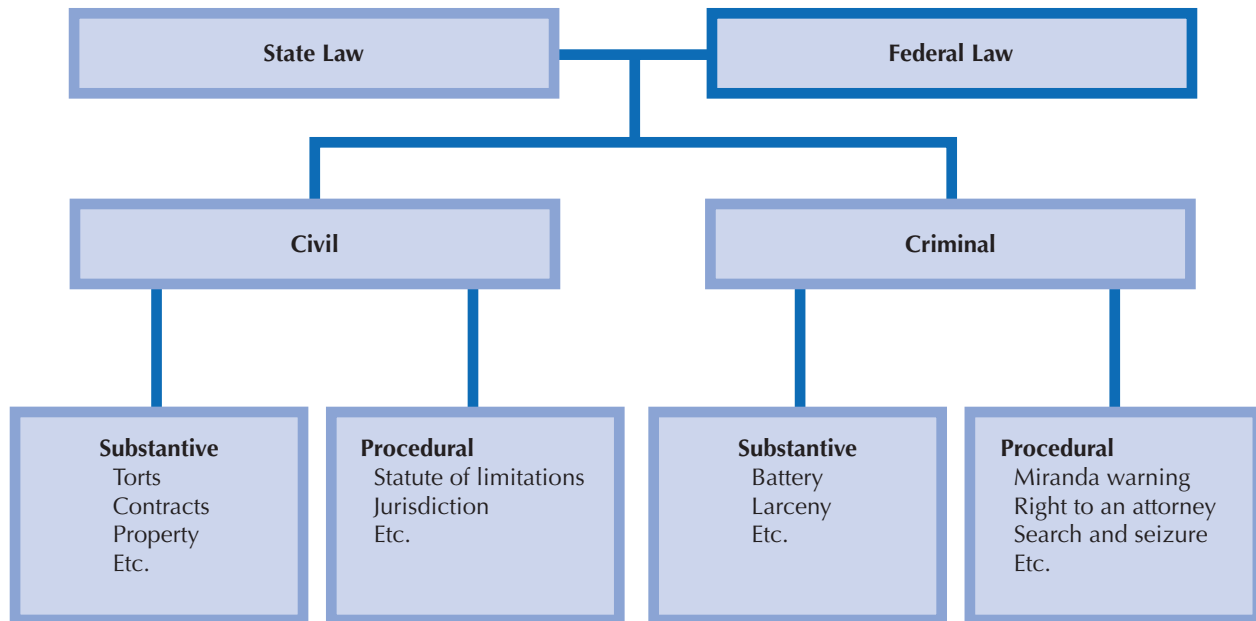


Figure 4-1 How Lawyers Classify the Law

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

Knowledge of these classification schemes is a necessary part of organizing your legal research plan. For example, depending upon how an attorney categorizes a problem, that attorney may decide to start research in state instead of federal law or to look at statutes instead of court opinions. Often these classifications will be obvious to an experienced attorney or paralegal. There will be times, however, when the categorizations are not so obvious.

Recall the case of Diane Dobbs, the pregnant waitress introduced at the beginning of the last chapter. In analyzing Diane’s story, an attorney would think in terms of the three categories we just listed. While it is not necessary to proceed in any particular order in applying the three categories listed above to Diane’s situation, all three must be evaluated. First, do Diane’s problems relate to state or federal law? Are both state and federal laws involved? Second, does her situation involve any criminal laws, or does only civil law apply? Third, in addition to examining the substantive law issues, what procedural issues might be involved? As we proceed through the chapter, we will discuss each of these classifications.

Note that these are not mutually exclusive categories. A client’s situation may involve both federal and state laws, both civil and criminal issues, and procedural as well as substantive questions. Figure 4-1 illustrates how these different categories relate to each other. At this point do not be concerned about understanding all of the terms listed in the figure. As the chapter proceeds, we will discuss each term in more detail.

A. FEDERAL VERSUS STATE LAW

Each of the fifty states, along with the federal government, has its own legal system. Each determines how its court system will be organized and what laws it will enforce. Although the laws of one state are often similar to the laws of another, each state ultimately decides for itself what those laws will be. This is because, as we mentioned in the last chapter, the United States operates under a system of government known as **federalism**. In our federal system the power to make various types of laws is divided between the federal government in Washington, D.C., and the fifty state governments. A client's problem may involve state law or federal law or both state and federal law.

1. Federal Law

You will be in an area covered by federal law if the client's problem deals with any of the following:

1. a U.S. constitutional issue (such as freedom of speech or the rights of a criminal defendant);
2. a federal statute (such as the Internal Revenue Code); or
3. regulations of a federal agency (such as the IRS).

When a client's problem is covered by one of these three areas, you will hear attorneys referring to this as raising a federal issue or a federal question. As we will see later in the chapter on civil litigation, categorizing a legal problem in this way is very important as generally federal courts can only hear cases that either involve parties from different states or that raise a federal question.

When you hear people complaining about what they believe to be the excessive reach of the federal government, they are frequently referring to the second area of federal law, federal statutes. However, despite its growth in recent years, it is not true that eventually all areas of the law will be governed by federal law. The Constitution imposes important limits on the scope of Congress's law-making power. Congress can enact legislation only if the Constitution has given Congress the power to legislate in that particular area. These delegated powers can be found in Article I, Section 8. In addition, several constitutional amendments, such as Section 5 of the Fourteenth Amendment, have provisions enabling Congress to pass legislation necessary to enforce that amendment.

For example, Congress could and does enact legislation regarding taxation because Article I, Section 8, provides that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises." On the other hand, Congress could not enact a national divorce law, as there is nothing in the Constitution to give Congress that power. Further, under the Tenth Amendment any power not specifically given to Congress by the Constitution is reserved to the people or to the states.

It is important to note, however, that after enumerating powers such as those to lay and collect taxes, establish post offices and post roads, raise armies, and declare war, Section 8 states that Congress has the power "to make all Laws which shall be necessary and proper for carrying into Execution" the specifically enumerated powers. The U.S. Supreme Court broadly interpreted this last clause

Federalism

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

Doctrine of implied powers

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

in the 1819 case of *McCulloch v. Maryland*.¹ Even though the Constitution did not explicitly delegate to Congress the power to create banks, the Court ruled that Congress could create and operate a national bank as part of the exercise of its expressly delegated powers to collect taxes and to borrow money. This is known as the “doctrine of implied powers.”

In addition, Congress has sweeping powers under Article I, Section 8. That section provides: “Congress shall have power to regulate commerce . . . among the several states.” This has come to be known as the “interstate commerce clause.” Originally, the courts interpreted “interstate commerce” to mean exactly that: the movement of goods across state lines. However, in *Gibbons v. Ogden*² the Supreme Court interpreted this clause as giving the federal government the authority not only to regulate products that actually travel in interstate commerce, but also to regulate anything that has an “effect upon” interstate commerce.

In the 1930s Congress used this expansive reading of the interstate commerce clause as the basis for much of its “New Deal” economic legislation, including the Unfair Labor Standards Act (controlling the hours and wages of employees who manufactured goods destined for interstate commerce) and the National Labor Relations Act (creating the National Labor Relations Board and authorizing it to enjoin unfair labor practices).

A major challenge to Congress’s use of the commerce clause powers came in the 1960s, following Congress’s passage of the 1964 Civil Rights Act. In Title II of the Civil Rights Act Congress made it unlawful to discriminate in a place of public accommodation on the basis of race, color, religion, sex, or national origin. When this provision was challenged in *Heart of Atlanta Motel, Inc. v. United States*,³ the Court held that the law was within the scope of the commerce clause because the existence of racially discriminatory practices made it more difficult for racial minorities to travel from one state to another and this had a negative impact on the free flow of interstate commerce. In a related case, *Katzenback v. McClung*,⁴ the Court found that even a small, local, family-owned restaurant catering to local customers had enough of an impact on interstate commerce to justify Congress’s actions in prohibiting discrimination.

From the 1960s through the 1990s, this expansive reading of the commerce clause allowed Congress to address a wide range of social problems through federal statutes. It was not until the 1995 case of *United States v. Lopez*⁵ that the U.S. Supreme Court began striking down federal statutes on the basis that they had exceeded congressional power under the interstate commerce clause.

In *Lopez*, the Court reversed a conviction under a federal statute that made it a federal crime to possess a firearm in a school zone. The Court found that the interstate commerce clause did not give the federal government authority to regulate the possession of guns on public school grounds because Congress had failed to show a sufficient connection between the unlawful possession of guns near schools and an economic impact on interstate commerce. Five years later,

¹4 Wheat. 316.

²9 Wheat. 1 (1824).

³379 U.S. 241 (1964).

⁴379 U.S. 294 (1964).

⁵514 U.S. 549 (1995).

in *United States v. Morrison*,⁶ the Supreme Court struck down a federal statute, the Violence Against Women Act of 1994, aimed at protecting women from acts of criminal violence, holding that Congress had exceeded its powers under the commerce clause. The Court held that Congress had overstepped its powers because gender-motivated crimes were not the kind of economic activity that Congress has the power to regulate.⁷

Many commentators thought the *Lopez* and *Morrison* decisions signaled the Court's return to a more conservative judicial philosophy that stressed the limitations of federal powers and the preservation of state's rights. But then in 2005, in *Gonzales v. Raich*,⁸ the Court held that the commerce clause gave the federal government the power to prohibit the cultivation and use of marijuana, even when the marijuana was grown and used within a single state for medical purposes, pursuant to a physician's orders and authorized by state law. The Court reasoned that the marijuana used for local, medicinal purposes could find its way into the interstate market and therefore had an economic effect on interstate commerce.⁹

In addition to validating Congress's use of its commerce-clause power to regulate the intrastate noncommercial use of marijuana, the Court in *Gonzales v. Raich* held that the California laws, providing for the medicinal use of marijuana, could not be used to protect California residents from federal prosecution. The Constitution's Supremacy Clause "unambiguously provides that if there is any conflict between federal and state law, federal law prevails."¹⁰ In other words, there are some areas of law where not only does the federal government have the power to legislate, but it alone can do so. This occurs when uniformity across state lines is necessary. In those areas the federal law is said to "preempt" state law.

This doctrine of preemption allows the federal government to prevent state and local governments from passing laws that conflict with federal laws and sometimes even to prohibit states from passing any laws on a particular subject. For example, it would create chaos if every state could individually regulate railroad safety. Instead, under the Federal Railroad Safety Act,¹¹ the federal government created uniform standards related to railroad safety, such as maximum train speed and train length.

Whereas the preemption doctrine is usually thought of as prohibiting state or local regulation, it can also be applied in a manner that allows state and local governments to pass additional regulations as long as they do not conflict with federal laws. For example, federal statutes prohibit employers from discriminating on the basis of race or sex if that employer employs fifteen or more employees, but these laws do not prevent state or local governments from enacting laws against discrimination on the basis of sexual orientation or from prohibiting race or sex discrimination by employers who have less than fifteen employees.

Preemption

The power of the federal government to prevent the states from passing conflicting laws, and sometimes even to prohibit states from passing any laws on a particular subject.

⁶529 U.S. 598 (2000).

⁷Id. at 618.

⁸545 U.S. 1 (2005).

⁹Noting the "troubling facts" of the case, in which Raich's physician had testified that "forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal," the Court emphasized it was ruling only on the constitutionality of Congress's actions, not on the wisdom of those actions. Id. at 9.

¹⁰Id. at 28.

¹¹49 U.S.C.A. § 20106 (2008).

In some situations the federal statutes contain language that clearly indicates an intention to preempt any form of state or local regulation, but others do not explicitly address preemption. In these cases, it is up to the courts to determine if federal law has preempted the entire field or still allows state and local governments to add other non-conflicting regulations. For example, when Maryland passed a law designed to force Wal-Mart Inc. to increase health insurance benefits to its employees,¹² the Federal Court of Appeals for the 4th Circuit ruled that the Maryland act was preempted by a federal statute regulating employee benefits, the Employee Retirement Income Security Act (ERISA).¹³

In summary, when you are faced with a situation in which you need to decide whether federal law, or state law, or both govern, keep these three possibilities in mind.

- First, there are some areas in which only the states can legislate—areas reserved to the states—such as divorce. In those cases you could limit your research to state law.
- Second, there are some areas in which both the states and Congress can legislate—such as criminal behavior that crosses state lines. In those cases your research should cover both state and federal law.
- Third, there are a few areas in which only Congress can legislate—areas of total preemption—such as certain safety issues involving trains traveling across state lines. In those cases your research can be limited to federal law.

DISCUSSION QUESTIONS

1. Diana Levine, a professional musician, went to the hospital for treatment of a headache. By the time she left the hospital, her headache was gone, but so was one of her arms. The hospital staff had injected her with the drug Phenergan to alleviate her nausea caused by the migraine headache. The drug entered an artery, her arm became gangrenous, and several weeks later, her hand and lower arm were amputated. The drug's manufacturer knew that directly injecting the drug (as opposed to administering it through an IV drip) carried a risk of injury. The drug's label warned of the dangers associated with direct injection, but did not prohibit that method of giving the drug. The label as written was approved by the federal Food and Drug Agency (FDA) in 1974. The FDA is the federal agency created by Congress responsible for approving all drug labeling. A Vermont jury determined that the drug's manufacturer did not adequately warn against that method of administration in its drug labeling and awarded Ms. Levine \$5 million in compensatory damages, and the Vermont Supreme Court affirmed. The drug manufacturer appealed the case to the U.S. Supreme Court arguing that the FDA's authority over drug labeling preempts any state laws regarding product liability. If you were representing Ms. Levine what policy arguments would you advance for arguing that her state products liability case is not preempted? If you were

¹²While the Maryland Fair Share Health Care Fund Act, Md. Code Ann., Lab. & Empl. § 8.5-101 to -107, did not refer to Wal-Mart by name, the legislative history clearly shows that Wal-Mart was its primary target. The law required employers with 10,000 or more Maryland employees to spend at least 8% of their total payrolls on employees' health insurance costs.

¹³Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180 (4th Cir. 2007).

representing the drug manufacturer, what policy arguments would you advance for arguing that her case should be preempted by federal law?

2. Following several well publicized instances in which travelers were kept for hours on airplanes on airport runways without food, water, or adequate bathroom facilities, legislatures in several states considered enacting airline passenger bill of rights laws requiring airlines to provide food, water, clean toilets and fresh air to passengers stuck in a non-airborne plane for more than an hour. The airline industry threatened to file suit to block the legislation on the grounds that the federal government has preempted regulation of the airline industry. What types of arguments would you make if you were representing the states? What do you think the role of the state should be in this type of situation?

2. State Law

Whereas the federal government must trace all of its powers back to a specific constitutional authorization, the states are allowed to make any laws they deem appropriate for the health, welfare, safety, and morals of their citizens as long as those laws are not prohibited by the U.S. Constitution.¹⁴ Typical examples of areas covered by state law are criminal behavior, contracts, torts, property, marriage, and family matters. While much of the law from one state to the next is quite similar, the states are free to create their own unique laws. Where one state may choose to legalize gambling, another may not; where one state may choose to allow no-fault divorces, another may not.

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

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

Finally, both federal and state laws cover some areas, such as employment discrimination. From our discussion above regarding preemption, you will recall that a state cannot pass laws that conflict with federal laws. However, if there is no conflict between state and federal law, a state is free to legislate in that area. For example, a Massachusetts statute states that an employer of six or more employees may not discriminate on the basis of race, color, religion, sex, or national origin. This is perfectly valid as it does not conflict with the federal

¹⁴The Tenth Amendment to the U.S. Constitution declares that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

statute, Title VII, that states an employer of fifteen or more employees may not discriminate on the basis of race, color, religion, sex, or national origin.

DISCUSSION QUESTIONS

3. For each question determine whether you think the law involved is federal, state, or both.
 - a. A person is liable for slander if that person intentionally says that someone is a thief when she knows it is not true.
 - b. To be valid, a contract for the sale of real estate must be in writing.
 - c. Trucks traveling on interstate highways must be equipped with concave mud flaps.
 - d. No employer with ten or more employees may discriminate on the basis of race, color, religion, sex, or national origin.
 - e. A manufacturer of inherently dangerous products will be liable for any defective product that causes injury.
4. Can you think of any areas of the law that are not now regulated on a federal level but should be? What are those areas, and why do you think the federal government should take on a more active role?
5. Can you think of any areas of the law that should be left solely to state and local governments? If so, what are they, and why do you think the federal government should not be involved?
6. In what areas of the law do you think there should be uniformity across all of the states? In what areas should there be diversity? Why?

B. CRIMINAL VERSUS CIVIL LAW

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

1. A Comparison of Criminal and Civil Law

Some of the major differences between criminal and civil law are listed in Figure 4-2.

a. Type of Harm

Civil law

Law that deals with harm to an individual.

Criminal law

Law that deals with harm to society as a whole.

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

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

	Civil	Criminal
Type of harm	Private injury	Harm to society
Names of the parties	Plaintiff/defendant	State*/defendant
“Prosecutor” of the claim	Usually an individual; sometimes the government	Government
Standard of proof	Preponderance of the evidence	Beyond a reasonable doubt
Judgment	Liable/not liable	Guilty/not guilty
Sanctions/remedies	Damages/injunction	Imprisonment/fines/death
Source of law	Common law/statutes	Statutes
*The State may also be referred to as the Commonwealth or the People. Although the state is the named party, it is actually a government employee, the prosecutor (also known as the district attorney , state’s attorney , or attorney general), who brings the lawsuit as the state’s representative.		

Figure 4-2 A Comparison of Civil and Criminal Law

perceives that a particular act, such as drunk driving, has that broader impact, it can criminalize.

b. Names of the Parties and the “Prosecutor” of the Claim

The person who brings the civil suit (also known as a civil action or a civil lawsuit) is known as the **plaintiff**, and the person sued is called the **defendant**. For example, recall the situation involving the pregnant waitress presented at the beginning of Chapter 3. If Diane Dobbs were to sue the restaurant, she would be the plaintiff. Both the corporation that owns the Western Rib Eye Restaurant and the restaurant manager would probably be named as defendants. Although civil suits are usually between individuals, a governmental unit (federal, state, or local) can become a plaintiff in a civil suit. In a criminal case, the case is listed as *People v. Jones* or *State v. Jones*. Governmental attorneys prosecute the accused party (the defendant), and the victim is merely a witness.

c. Standard of Proof

Because of the serious consequences of violating criminal laws, the standard of proof is different from that used in civil cases. On the criminal side, the prosecution is required to prove its case **beyond a reasonable doubt**. In civil actions the plaintiff need only meet the **preponderance of the evidence** standard. Judges usually explain the beyond a reasonable doubt standard to jurors as the degree of doubt that causes a reasonable person to refrain from acting. The proof must be so conclusive and complete that all reasonable doubts regarding the facts are removed from the jurors’ minds. A preponderance of the evidence, on the other

Plaintiff

A person who initiates a lawsuit.

Defendant

In a lawsuit the person who is sued; in a criminal case the person who is being charged with a crime.

Beyond a reasonable doubt

The standard of proof used in criminal trials. The proof must be so conclusive and complete that all reasonable doubts regarding the facts are removed from the jurors’ minds.

Preponderance of the evidence

The standard of proof used in civil trials. The proof must indicate that it is more likely than not the defendant committed the wrong.

hand, is usually understood to mean that the facts asserted are more likely to be true than not true. One study showed that judges equate “beyond a reasonable doubt” with a median probability of approximately 8.8 out of 10. Jurors averaged approximately 8.6 out of 10. The judges interpreted preponderance of the evidence as a median probability of 5.4 out of 10. For jurors the median was 7.1 out of 10.¹⁵ These results indicate that although judges and jurors may disagree as to the precise meaning of the standards, they agree that the criminal law requires a greater degree of proof before its sanctions can be applied.

d. Judgment

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

e. Sanctions/Remedies

Damages

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

The typical remedy in a civil case is either **damages**, where the defendant pays the plaintiff for the harm he or she has done, or an **injunction**, where the court orders the defendant to take some specific action or to cease acting in a specific way. For example, in Diane’s situation she might ask to be paid for the time she has been out of work (damages) and request a court order requiring the restaurant to rehire her (an injunction).

While the focus of civil law is on redressing the losses of the plaintiff, in the criminal law the sanctions are designed to punish the offender and deter future offenders. If a court of law determines that a provision of the criminal law has been violated, it may impose two broad types of sanctions—loss of liberty and financial penalty. The loss of liberty can range from receiving unsupervised probation to spending a few days in the county jail to serving several years in a state penitentiary to receiving the death penalty. The fines assessed as part of the criminal process become the property of the state rather than the victim. Only occasionally will a negotiated settlement with a criminal defendant contain some provisions for restitution for the victim. Usually, if the victim wishes to receive money from the criminal defendant to compensate her for the harm done to her, she must hire a lawyer and initiate a civil suit.

PRACTICE TIP

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

¹⁵Simon & Mahan, Quantifying Burdens of Proofs, 5 Law & Soc’y Rev. 319 (1971).

f. Sources of Law

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

A single event can become the basis for actions in both the criminal and the civil courts. For example, the victim of a battery could sue the attacker for civil damages at the same time the state is prosecuting the attacker on a criminal charge. The driver of an automobile involved in a traffic accident may receive a traffic ticket from the police and at the same time be sued by someone else involved in the accident. In certain types of antitrust cases the government can choose between seeking criminal charges and seeking civil damages. As noted earlier regarding Diane's case, she might bring a civil action to recover money and obtain a court order. In addition, she might want to press criminal charges for the restaurant's refusal to let her collect her personal belongings. Charging a person with a criminal violation and suing that person civilly do not constitute **double jeopardy**. Double jeopardy is defined as being prosecuted twice for the same criminal offense.

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

Double jeopardy

A constitutional protection against being tried twice for the same crime.

2. Criminal Law

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

In this section we will discuss the major types of criminal behavior, what is necessary to prove to a court that a crime has been committed, and what defenses might be raised to try to show the court that the defendant was justified in acting as he or she did.

a. Types of Crimes

Serious crimes, such as murder, rape, armed robbery, and aggravated assault, are classified as **felonies**, and they generally involve a punishment that can include a year or more in a state prison. **Misdemeanors** include such lesser charges as disorderly conduct and criminal damage to property. When incarceration is called for in these cases, it usually is for less than one year and is served in a county jail. Today the criminal law in most jurisdictions is entirely statutory in nature, and the legislature determines whether a given act is to be considered a felony or a misdemeanor.

The criminal codes of most states typically divide crimes into the following categories:

1. crimes against persons (homicide, kidnapping, sex offenses, assault, and battery),
2. crimes against property (theft, robbery, burglary, arson, and trespass),
3. crimes against the public health or decency (drug offenses, bribery, gambling, prostitution, and disorderly conduct), and
4. crimes against the government itself (treason and official misconduct).

The focus of federal criminal law is on interstate activities and unlawful interference with a federal agency or its workers.

b. Establishing a Prima Facie Case

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

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

Mens rea

Bad intent.

Actus reus

Bad act.

Prima facie case

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

DISCUSSION QUESTIONS

7. What do you think of the differences between judges’ and jurors’ definitions of “beyond a reasonable doubt” and a “preponderance of the evidence”? Do you think this causes any problems for our legal system?

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

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

¹⁶Mass. Gen. Laws ch. 266, § 30 (2008).

- a. Assume Alan got into a car, knowing that it was not his, “hot wired” it, and then drove off in it. Is he guilty of violating the statute? Why?
- b. Assume Bill approached a car that he intended to steal but was scared away by a passerby. Is he guilty of violating the statute? Why?
- c. Assume Charles got into a car, thinking he was getting into his friend’s car, and “hot wired” it but only meant to borrow it. Is he guilty of violating the statute? Why?

c. Defenses

If the prosecution does present a prima facie case, the defense then has the opportunity to present evidence that either contradicts that presented by the prosecutor or establishes a legally recognized justification. This evidence could involve witnesses who contradict the testimony of prosecution witnesses or evidence that establishes an alibi, self-defense, or insanity.

There are essentially two types of criminal **defenses**. The first type justifies the act. The second type negates the requisite mens rea. An example of the first type of defense, which justifies the act, is self-defense. The defendant admits killing the victim but argues that he or she had no choice. Examples of the second type of defense, which negates the requisite intent, are insanity, infancy, and intoxication. Each of these defenses has as its premise the fact that the defendant was incapable of forming the requisite intent to commit the crime.

After the defense has presented its evidence, the prosecution has a chance to respond with rebuttal witnesses to attack these defenses and reestablish the credibility of its own witnesses.

3. Civil Law

Civil law involves private actions brought by individuals to address perceived wrongs. In this section we will discuss what is necessary to prove a civil prima facie case, the defenses to a civil suit, the damages that a plaintiff can recover, and the main areas of civil law.

a. Establishing a Prima Facie Case

Just as the prosecution has the burden of establishing a prima facie case in a criminal case, so, too, the plaintiff shares a similar burden in a civil case. The plaintiff has the burden of proving the various elements listed in his or her complaint that show the plaintiff has a valid **cause of action**. A cause of action is a claim that based on the law and the facts is sufficient to demand judicial action. The plaintiff must prove these elements by a preponderance of the evidence, which means it is more likely than not that the defendant committed the wrong.

For example, assume a car and a truck collided at an intersection. The driver of the car is injured and wants to sue the truck driver, alleging the truck driver ran a red light. The car driver will be the plaintiff, and his cause of action will be based on the law of **negligence** (acting unreasonably under the circumstances) and the facts of what happened at the intersection. To succeed in a lawsuit, the plaintiff will have to present evidence that it is more likely than not that the truck driver was negligent. If the plaintiff/driver is able to do so, then he has satisfied his prima facie case. Every area of civil law has its own required

Cause of action

A claim that based on the law and the facts is sufficient to support a lawsuit. If the plaintiff does not state a valid cause of action in the complaint, the court will dismiss it.

elements that constitute the plaintiff's prima facie case. Later in this chapter as you read about torts, contracts, and property law, note the requirements of each for the plaintiff to prove a prima facie case.

b. Defenses

The defendant/truck driver can respond first by trying to negate the plaintiff's case. Perhaps he has a witness who will testify that the light was green for the truck driver and red for the plaintiff. In addition to attempting to negate the plaintiff's case, the defendant can raise defenses of his own, known as **affirmative defenses**. In effect, the defendant is saying this: Even if you are right and I did something wrong, I have a good excuse or a reason why my liability should be reduced.

Affirmative defense

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

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

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

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

In some cases, statutes or constitutions protect certain classes of people or institutions from being sued by granting them either full or partial immunity. One of the oldest and most important forms of immunity is **sovereign immunity**. Historically, the doctrine of sovereign immunity prohibited injured parties from suing the government, unless the government gave its consent. This protection can be traced back to the concept of the divine right of kings and the idea that "the king can do no wrong." In Chapter 12 we discuss how the doctrine of sovereign immunity has been modified over the years. Later in this book we also discuss the related concepts of spousal and parental immunity.

Compensatory damages

Money awarded to a plaintiff in payment for his or her actual losses.

c. Damages

If a court determines that the plaintiff should recover, the issue of damages (monetary compensation) arises. There are three types of damages: compensatory, punitive, and nominal. **Compensatory damages** are intended to compensate the plaintiff for the harm done to her or him. In a tort action involving harm to a person, that might mean the cost of medical bills, lost time from work, and pain and suffering. **Punitive damages** are designed to punish the defendant and typically are awarded only for intentional torts when the court deems that the **torfeasor** (the person who committed the tort) deserves an additional punishment beyond just compensating the plaintiff for the harm done to him or her. Finally, **nominal damages** are awarded when the law has been violated but the plaintiff cannot prove any monetary harm. As mentioned earlier, in addition to or instead of damages, the court might issue an injunction, an order to the defendant telling the defendant to do a specific act or to cease doing a specific act.

Punitive damages

Money awarded to a plaintiff in cases of intentional torts in order to punish the defendant and serve as a warning to others.

Nominal damages

A token sum awarded when liability has been found but monetary damages cannot be shown.

d. Areas of Civil Law

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

(1) Contracts

The formal definition of a **contract** is an agreement supported by consideration. Therefore, contract law deals with two-sided agreements or bargains. I agree to sell you my diamond ring, and you agree to give me \$500 in return. We have struck a bargain, entered into a contract. If something should go wrong—if I refuse to hand over the ring or you refuse to give me the money—we would find our actions governed by contract law. For a contract to be valid there must be an offer, an acceptance of the offer, and **consideration**; that is, something of value must be exchanged. It is the consideration that differentiates a contract from a gift. Common defenses to a contract action include breach by the other side and incapacity to contract, as when one party is underage.

(2) Property

Property law deals with ownership. If two neighbors have a dispute over the correct placement of the boundary separating their land, property law will resolve it. Property law is divided into two main categories: (1) **real property**, land and objects permanently attached to land, and (2) **personal property**, all other property.

The first issue raised in a property law case may be how to classify the property. For example, is a room air conditioner real or personal property? If it is simply sitting in a window opening and can be easily removed without damage to the window, it is personal property. But what if the window has been taken out and the air conditioner screwed into the window frame? Is it now “permanently attached”? How you classify property is important because different rules may apply to real versus personal property.

Another common dispute that arises under property law relates to gift law. Above we noted that the difference between a contract and a gift is that a contract is two-sided (each party gives something to the other), while a gift is one-sided. The necessary elements for a valid gift include an offer, an acceptance of the offer, and delivery. Usually, the first two elements are not at issue, but the last element, delivery, can become a problem, especially when the gift is delivered symbolically, as by handing over the keys to a car. The question is, Has the car been delivered? The deciding factor is usually whether the owner has relinquished all control over the object. In the case of a car, that probably involves more than simply handing over a set of keys. This type of delivery is known as **constructive delivery**. (*Note:* A constructive delivery is one example of a **legal fiction**. Courts create a legal fiction when they need to make an assumption that is not based in fact in order to resolve a dispute. For example,

Contract

An agreement supported by consideration.

Consideration

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

Property law

Law dealing with ownership.

Real property

Land and objects permanently attached to land.

Personal property

All property that is not real property.

Constructive

Not factually true, but accepted by the courts as being legally true.

Legal fiction

An assumption that something that is not real is real—for example, saying that a corporation is a person for purposes of its being able to sue and be sued.

courts frequently speak of corporations as though they were persons.) No actual delivery of the car is made, but the owner takes the necessary actions to allow the new owner to gain control over the gift.

(3) Torts

Tort law

Law that deals with harm to a person or a person's property.

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

Intentional tort

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

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

Negligence

The failure to act reasonably under the circumstances.

The most common category of tort law is that of **negligence**. Negligence is the failure to act as a reasonably prudent and careful person is expected to act under the circumstances. This used to be known as the reasonable man standard but has more recently become known as the reasonable person standard.

Case 4: Mr. Whipple

Your client Mr. Whipple owns a grocery store. A customer breaks a bottle of apple juice and promptly reports it to Mr. Whipple. Nonetheless,

Mr. Whipple fails to have the broken jar and spilled juice cleaned up. Twenty minutes later another customer slips on the wet floor, breaking her leg.

Mr. Whipple would probably be found liable for negligence. Clearly he did not intend for the customer to slip and break her leg. Therefore, there was no intentional tort. But a jury might find that a reasonable store owner would have ordered the spill cleaned up within the twenty minutes after learning of it.

In order for a plaintiff to prove negligence, he or she must show that

1. the defendant owed the plaintiff a duty of care;
2. the defendant breached that duty;
3. the breach caused
4. the plaintiff harm.

These four basic prerequisites (elements) in a negligence case are known as duty, breach, causation, and harm. In the case just mentioned Mr. Whipple had a duty to act as a reasonable store owner would under the circumstances. The circumstances were a broken jar of apple juice about which Mr. Whipple was

You are walking along the beach and see a young child drowning. No one else is in sight. Should the law require you to try to save the child? Should it matter if you are an off-duty lifeguard?

**Ethics
Alert**

informed and a twenty-minute time period in which he did nothing. If the jurors believe Mr. Whipple breached his duty to act as a reasonable store owner, then they will find liability if they also think that breach caused the customer harm.

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

Historically, any showing of contributory negligence or assumption of the risk meant that the plaintiff could recover nothing from the defendant even if the defendant's actions were much more culpable than those of the plaintiff. Legislatures and courts in many states have tried to rectify that situation by replacing contributory negligence with a new defense known as **comparative negligence**. Under comparative negligence, instead of the plaintiff's own negligence relieving the defendant of liability, the jury compares the negligence of the plaintiff to that of the defendant and apportions the responsibility. The plaintiff's recovery is reduced by his or her degree of negligence.

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

Contributory negligence

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

Assumption of the risk

Voluntarily and knowingly subjecting oneself to danger.

Comparative negligence

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

Strict liability

Liability without a showing of fault.

DISCUSSION QUESTIONS

9. For each question decide whether the facts raise an issue of tort, contract, or property law or more than one area of law.
- You buy a new car. Two days later as you are driving, the brakes fail, and you go off the road, hitting a telephone pole. Luckily you are unhurt, but the car is badly damaged.
 - You rent an apartment. One night as you are leaving the building through the central stairway, the railing gives way, and you fall down, breaking your leg.
10. For each of the following situations decide if you think liability should be found based on an intentional tort, negligence, or strict liability or whether no liability should be found.
- Sally was angry with Martha. One night after leaving class, she deliberately drove her car into the side of Martha's car.
 - One night after leaving class, Sally was in a hurry. When she arrived at the stop sign at the student parking lot entrance to Main Street, she did a "rolling stop." Martha was driving by on Main Street. Sally's auto hit the side of Martha's car.
 - One night after leaving class, Sally got into her brand new Dodge van. When she arrived at the stop sign at the student parking lot entrance to Main Street, she pressed on the brakes, but nothing happened. Martha was driving by on Main Street. Sally's auto hit the side of Martha's car.
 - One night after leaving class, Sally got into her car. When she arrived at the stop sign at the student parking entrance to Main Street, she suddenly got a tremendous cramp in her side and momentarily lost control of her car. Martha was driving by on Main Street. Sally's auto hit the side of Martha's car.

C. SUBSTANTIVE VERSUS PROCEDURAL LAW

Substantive law

Law that creates rights and duties.

Procedural law

Law that regulates how the legal system operates.

Statute of limitations

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

In addition to being categorized on the basis of its source, we also classify law as being either substantive or procedural. **Substantive law** refers to the part of the law that defines our rights and duties. It defines what actions will violate the criminal law and what our obligations are to each other. For example, substantive law includes the statutes that govern the legal speed limits, the circumstances under which someone can be convicted of robbery, and when a contract is enforceable. **Procedural law**, on the other hand, deals with how the legal system operates. It defines the steps that someone must go through to file a lawsuit and the procedures the police must follow in conducting a search or interrogating a suspect.

Every case is founded in substantive law, and attorneys must determine what their client's obligations and liabilities are. However, they must be equally aware of the procedural aspects of the case. Even if the substantive law is on the client's side, the case may be lost if a claim is not filed within the time prescribed in the **statute of limitations**. The legal system imposes a limitation on how long a plaintiff has before he or she can no longer bring suit. Those limitations vary given the type of case involved. A plaintiff could also lose if the complaint, the initial document that starts a lawsuit, fails to include all the required information.

We have all heard of the criminal who was set free due to a “technicality.” The rules of criminal procedure have their roots in the Constitution and are intended to protect the innocent from the overreaching of possibly overzealous law enforcement officials. These rules govern everything from the way in which the arresting police officer must inform a suspect of his or her rights to how evidence is introduced at trial.

Civil law is also controlled by very specific rules of procedure. Those rules of civil procedure will be the focus of Chapter 6. Criminal procedure will be discussed in Chapter 17. You will be studying the various areas of substantive law throughout this book and throughout your career.

DISCUSSION QUESTION

11. Review the hypothetical case that began Chapter 3. How would you categorize Diane’s legal problems?

SUMMARY

We have seen how lawyers categorize law as either state or federal, civil or criminal, and substantive or procedural. The first category, state or federal, arises because the United States operates under a system of federalism. Under our federal system governmental authority is split between the national government and the fifty state governments. Some areas of the law, such as divorce, are reserved exclusively to the states; some are reserved to the federal government; and some are shared by the states and the federal government. If you are in doubt as to which law applies, check state law first. Federal law will be involved only if the federal Constitution, a federal statute, or a federal regulation is involved.

Civil law involves harm to an individual, while criminal law deals with harms to society as a whole. In both criminal and civil cases the party with the burden of proof must first establish a prima facie case. Once that is established, the other side is given the opportunity to negate the prima facie case or to raise affirmative defenses. While the law has become increasingly specialized, the main areas of civil law are contracts, property, and torts. Tort law can be further subdivided into those involving intentional acts, those based on negligent behavior, and those that result from an imposition of strict liability. Finally, substantive law defines our rights and duties. Procedural law deals with how the legal system operates.

REVIEW QUESTIONS

Pages 59 through 60

1. What are the three major ways in which attorneys categorize the law?
2. What is the difference between substantive and procedural law?
3. In terms of the type of harm caused, what is the difference between civil and criminal law?

Pages 61 through 66

4. What is federalism?
5. True or false: Every state must have the same laws regarding gambling. Why?

6. What does it mean to say that the federal government is a government of limited powers?
7. Do you think Congress could (not should) enact a national divorce statute? Why?
8. Why are some areas of the law preempted by the federal government?

Pages 66 through 69

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

Pages 69 through 72

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

Pages 73 through 77

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



Chapter 5

Structure of the Court System

*Trial courts search for truth and appellate courts search for error.
Unknown*

INTRODUCTION

The law provides rules about how people should behave in different types of situations and provides remedies for when those rules are broken. However, these rules are not self-enforcing. In order to enforce these rules, people often have to go to court to have a judge or jury settle it for them. A court is a unit of the judicial branch of government that has authority to decide legal disputes. **Jurisdiction** refers to the ability of a specific court to hear a particular type of case.

One major way of classifying courts is in terms of whether they are trial or appellate courts. They can also be classified in terms of whether they are federal or state courts. In this chapter we will examine the structure of the various court systems, the concept of jurisdiction, and the roles played by those who work in the court system.

A. TRIAL VERSUS APPELLATE COURTS

Most court cases begin in a **trial court**.¹ Trial courts are said to be courts of **original jurisdiction** because trial courts are where actions are initiated and heard for the first

Jurisdiction

The power of a court to hear a case.

Trial courts

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

Original jurisdiction

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

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

time. In addition to conducting trials, much of a trial court's time is spent in far less dramatic proceedings, such as receiving plea agreements and ratifying out-of-court settlements. When a trial is held, attorneys present witness testimony and other evidence. After considering the evidence and the attorneys' arguments, trial courts have two functions. First, they must determine whose version of the facts is most credible. Second, they must apply the law to those facts to reach a decision. Therefore, trial courts must determine both questions of fact and questions of law.

Questions of fact

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

Question of law

Questions relating to the interpretation or application of the law.

Bench trial

A trial conducted without a jury.

Questions of fact relate to the determination of what took place: Who, what, when, where, and how? **Questions of law** relate to how the judge interprets and applies the law and include such issues as how a statute is to be interpreted and whether a specific piece of evidence is admissible. In a jury trial questions of fact are determined by the jury, while questions of law are determined by the judge. If it is a **bench trial** rather than a **jury trial**, the judge will decide the factual questions as well as the legal ones.

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

Although the primary focus of most trials is on factual issues, at times legal issues are involved as well. For example, a trial judge may have to decide if certain testimony or evidence is admissible. That is a question of law. If the judge decides that the testimony or evidence is not admissible, then the trial proceeds without it. Also, if the judge rules that a search was illegal or that disputed pictures are too prejudicial, then the objects discovered in that search or the pictures are not admitted as evidence. Based on the evidence that has been allowed, the jury then resolves the questions of fact.

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

It is possible, however, that the defendant might admit to selling the drug but then claim **entrapment**. The entrapment doctrine prohibits law enforcement officers from instigating criminal acts to lure otherwise innocent persons into committing a crime. One question of fact relating to the entrapment defense is whether the defendant ever committed such a criminal act or thought of committing such an act before. However, in addition to the factual questions and depending on the circumstances of a given case, a legal issue of what constitutes entrapment could arise. For example, assume government agents supplied the defendant with a drug and then later arrested him for selling the very same drug to another government agent. Here no one would be disputing what happened, the facts. But an appellate court could be asked to decide whether such actions legally qualify as entrapment. In *Hampton v. United States*² the U.S. Supreme

²425 U.S. 484 (1976).

Court held that as long as the defendant is predisposed to commit the crime, it is not entrapment when government agents supply the defendant with a drug and then later arrest him for selling the very same drug to another government agent.

In sum, legal issues can arise in three ways. First, legal issues can arise regarding the meaning of the underlying cause of action, as in the example given above regarding whether entrapment had occurred. Second, during a trial numerous legal issues may be raised involving the conduct of the trial itself. Such issues might include whether a particular piece of evidence should be excluded because it is the product of an illegal search and seizure, whether the plaintiff’s attorney should be allowed to pursue a certain line of questioning, whether the judge should present a particular set of instructions to the jury, and whether prejudicial publicity has tainted the defendant’s trial—to give but a few examples. Finally, legal issues can involve challenges to the constitutionality of the law that is being applied. For example, a doctor charged with performing an illegal abortion could argue that the law he is charged with violating is itself unconstitutional.

Appellate courts review the actions taken by trial courts (and in some cases the actions of administrative agencies). The person who loses in a trial court may be able to appeal the decision to an appellate court. The party filing the appeal is called the **appellant** or the **petitioner**. The party who won in the trial court is called the **appellee** or the **respondent**. Most states and the federal government provide for one appeal as a matter of right. Additional appeals are usually at the discretion of the higher court.

Unlike trial courts, appellate courts do not hear testimony. They rely on the written record of what occurred in the trial court to determine whether the trial court made an error regarding the law. They do so because when conducting a review, appellate courts limit themselves to “legal” as opposed to “factual” issues that are specifically raised by the party who is bringing the appeal. Therefore, you can appeal a lower court decision only when you raise a valid legal issue. Appellate courts will not reconsider the facts; they will consider only whether the trial court made an error of law. Case 5: Alibi to a Murder illustrates this point.

Appellate courts

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

Appellant or petitioner

The party in a case who has initiated an appeal.

Appellee or respondent

The party in a case against whom an appeal has been filed.

Case 5: Alibi to a Murder

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

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

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

At the end of the trial the jury convicted Mr. Jones.

Do you think there is any basis for launching an appeal in Mr. Jones’s case? It is a question of fact whether on the night of the murder Mr. Jones was present at the scene of the murder (as testified to by one elderly witness) or out

of town attending a wedding (as testified to by ten other witnesses). Therefore, his whereabouts on the night of the murder cannot form the basis for an appeal.

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

There is one exception to the rule that appellate courts review only questions of law. Occasionally they will review a case because they believe that what the jury did was something that no reasonable jury could do. Because appellate courts review only legal issues, normally they do not engage in this type of second-guessing regarding the trial court's findings. For example, in Mr. Jones's situation mentioned above, even though ten eyewitnesses testified that Mr. Jones was out of town on the night of the murder, Mr. Jones's attorney cannot appeal on the grounds that the jury was mistaken about his whereabouts on the night of the murder. Appellate courts will accept a jury's determination as to which witnesses were most credible. Only in rare instances will appellate courts reexamine the evidence.

If the appellate court determines that a legal error occurred but that it was minor and did not affect the result, the court labels it a **harmless error** and allows the decision to stand. If the court finds that a significant legal error was made in the way the trial was conducted, it will usually cancel the original outcome by **reversing** the trial court's decision. It may also direct that the case be retried by **remanding** the case to the trial court for further consideration.

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

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

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

In summary, there are several major differences between trial and appellate courts. At the trial-court level the parties are called the plaintiff and the defendant in a civil case and the state and the defendant in a criminal case. At the appellate-court level the party who lost in the trial court is called either the **appellant** or the **petitioner**, while the party who won is called either the **appellee** or the **respondent**. In the trial court either a single judge or a jury decides

Harmless error

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

Reverse

A decision is reversed when an appellate court overturns or negates the decision of a lower court.

Remand

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

Majority opinion

An opinion in which a majority of the court joins.

Concurring opinion

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

Dissenting opinion

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

the facts, and the judge determines the law. In the appellate court, a panel of three or more judges decides questions of law based on the attorneys' briefs (written arguments) and oral arguments. There are no witnesses who give testimony in the appellate courts and no juries. The judges merely review the trial transcript and the written briefs from the lawyers. Sometimes oral arguments from the opposing attorneys are heard, during which the judges have an opportunity to pose questions. Lower-level appellate judges usually work in rotating panels of three, while in the upper-level appellate courts all the judges jointly decide each case.

Most of these differences are directly related to the most important distinction between trial and appellate courts: Trial courts determine the facts and apply the law to those facts; appellate courts deal only with questions of law. Three basic types of legal questions can arise at the appellate level. First are those that relate to the meaning of the underlying legal cause of action or defense, such as what qualifies as entrapment. Second, one of the parties can argue that the law being applied is unconstitutional, as when the doctor challenged an abortion law. Finally, legal issues can arise that have nothing to do with the underlying legal claim but rather relate to how the trial was conducted. Figure 5-1 summarizes the differences between trial and appellate courts.

DISCUSSION QUESTIONS

1. Do you think it is a good or a bad idea that only questions of law can be appealed?
2. Can you think of a situation when an appellate judge might reverse and remand a case? When a judge might reverse but not remand a case?
3. It is not always easy to know whether something is a question of fact or a question of law. In fact, there have been cases when the issue on appeal was

Figure 5-1 Comparison of Trial and Appellate Courts

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

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

B. FEDERAL AND STATE COURT SYSTEMS

Trial and appellate courts exist in both the federal and the state court systems. At first glance the federal and state judicial systems of this country present a confusing mixture of titles and functions. In large part this is because there are actually fifty-one different court systems (the federal system plus one for each state). To complicate matters, the same types of courts often have different names. For example, the basic trial court is called the court of common pleas in Pennsylvania, the district court in Minnesota, the circuit court in Illinois, the superior court in California, and the supreme court in New York. Although New York uses the “supreme court” designation for its trial courts, most states reserve that title for their highest appellate court. Out of this confusion we will try to create some order by discussing the basic structure of both the federal court system and a typical state court system. Although both systems can seem quite complex, the federal system, as well as most state systems, has three levels: the trial courts, the intermediate appellate courts, and one appellate court of last resort.

1. The Federal System

A simplified organizational chart of the federal court system is shown in Figure 5-2. As you can see, it follows the basic pattern described above: trial courts, intermediate appellate courts, and one highest appellate court. The federal court system also includes a variety of other less well known judicial bodies, such as the U.S. Court of International Trade, which are not listed here. The arrows indicate the avenues for appeals.

The **U.S. Supreme Court** sits at the top of the federal judicial branch, where it hears appeals from both federal and state courts. However, as we will discuss more fully later in this chapter, not all state cases can be appealed to the U.S. Supreme Court. Cases are appealed from state supreme courts only when federal issues are involved.

U.S. Supreme Court

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

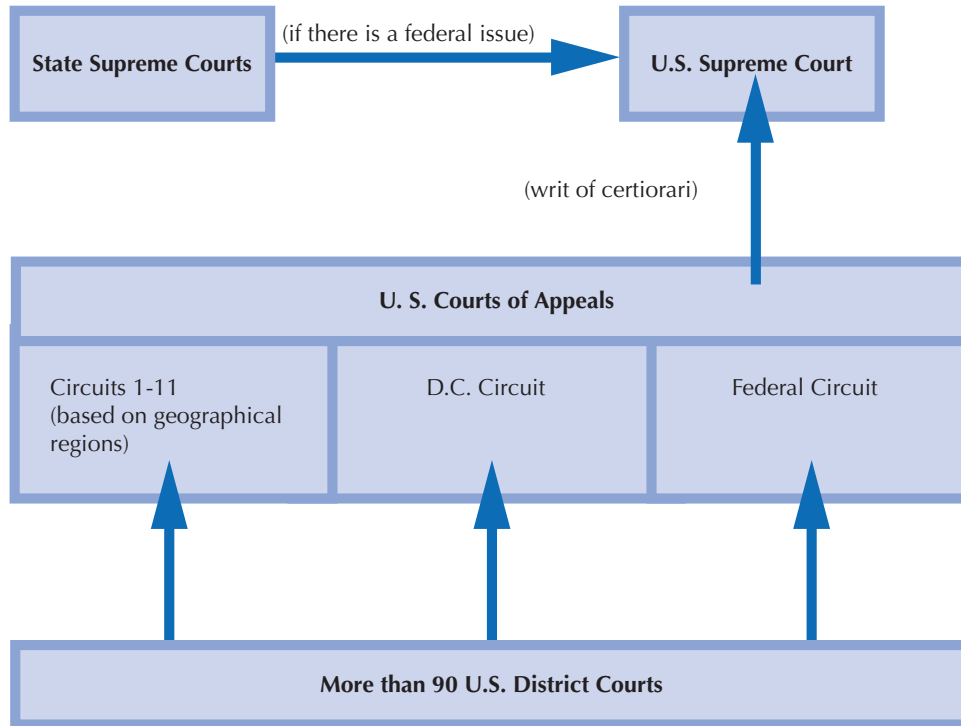


Figure 5-2 The Federal Court System

Immediately below the Supreme Court are the **U.S. courts of appeals**. Both the Supreme Court and the courts of appeals are appellate courts. The Supreme Court is the highest appellate court, while the courts of appeals are intermediate-level appellate courts. The country is divided geographically into twelve circuits, which include eleven numbered circuits and the District of Columbia as a separate circuit. The thirteenth circuit is called the Federal Circuit, where appeals in specialized cases from the entire country are heard. There is a court of appeals for each of the thirteen circuits. Most of the work, however, is done in the federal trial courts, the ninety-three **U.S. district courts** spread among the fifty states. There is at least one district court for each state. Most district court cases are appealed to the U.S. court of appeals in the circuit in which the district court is located. To gain an appreciation for how the circuits are organized, look at the map in Figure 5-3, page 86.

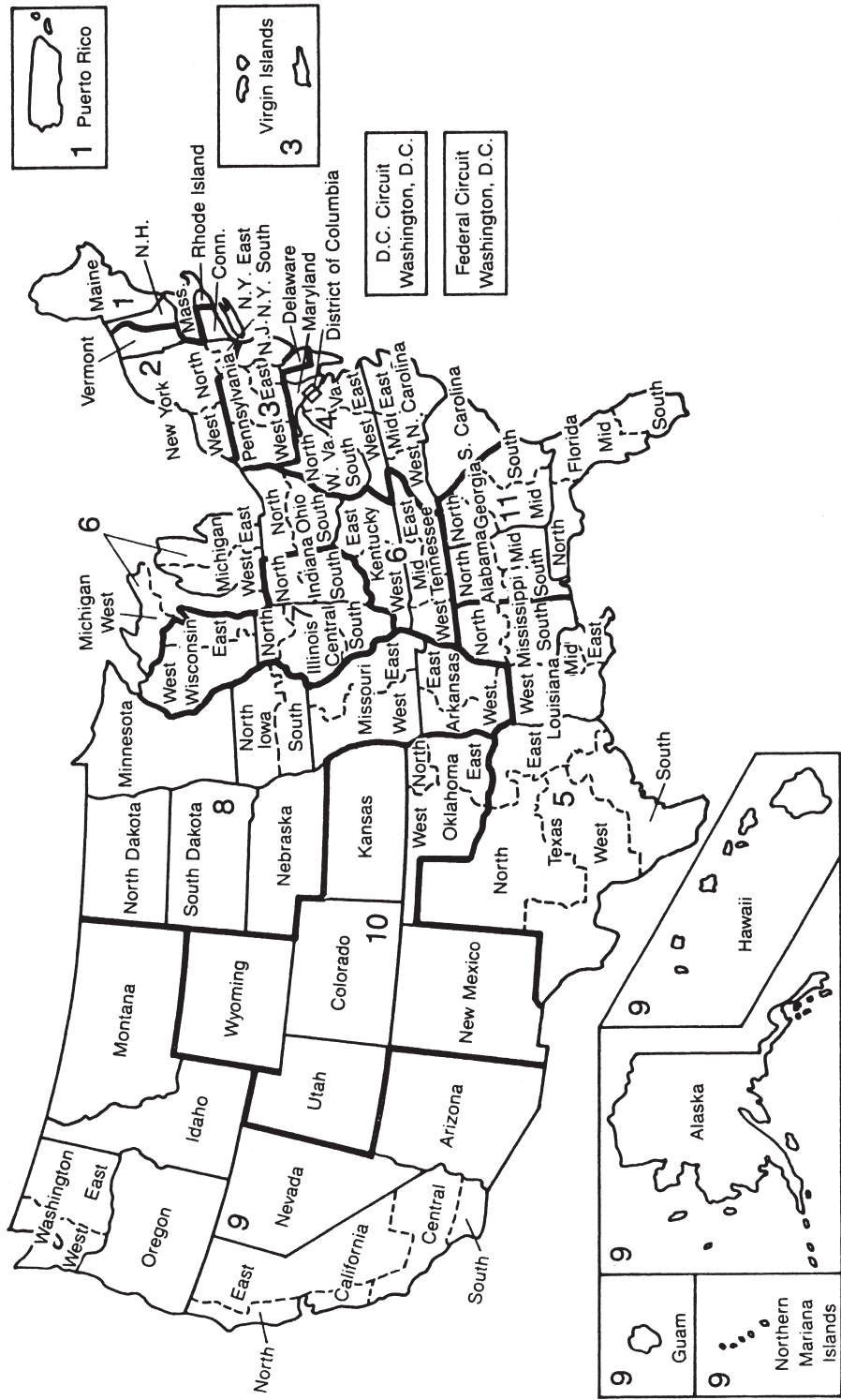
The basic outline for this three-tiered judicial structure is set forth in the federal Constitution. Article III, Section 1, provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Those “**inferior Courts**” are the district courts and courts of appeals. Congress established the first inferior courts through the Judiciary Act of 1789. That act provided for thirteen districts and three circuits. Over the years, through further legislative action, the number of both district and federal circuits has grown to its present-day level.

U.S. courts of appeals

The intermediate appellate courts in the federal system.

U.S. district courts

The general jurisdiction trial courts in the federal system.



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

Figure 5-3 District and Circuit Court Boundaries

a. The Primary Federal Courts

In the federal system, cases normally begin in one of the district courts, which serve as the federal trial courts. These district courts are courts of **general jurisdiction**. That means they are authorized to adjudicate all types of civil and criminal cases. Courts of **limited jurisdiction** hear only a narrow range of cases on a specific subject (such as probate, domestic relations, or traffic).

The number of judges assigned to each district varies from one to twenty-seven depending on the caseload of the district. Usually, cases are heard by a single judge or a judge and a jury. The district court judges are assisted by **magistrate judges** and **bankruptcy judges**.

The magistrate judges supervise court calendars, hear procedural motions, issue **subpoenas**, hear minor criminal offense cases, and conduct civil pretrial hearings. In some district courts the magistrate judges, with the consent of the parties involved, conduct trials and enter judgments in civil cases. Bankruptcy judges handle most bankruptcy cases entirely on their own. In a limited number of cases they conduct the trial but then must submit their proposed findings of fact to the district judge, who enters the final order or judgment.

The losing party takes an appeal from a district court decision to the appropriate court of appeals. For example, cases from California district courts are appealed to the Court of Appeals for the Ninth Circuit. Each of the twelve regular circuits has from four to twenty-three judges. In courts of appeals, a panel, normally comprised of three judges, hears appeals and reaches its decision through a majority vote. Occasionally all the judges sit together and decide a case **en banc**. This happens most frequently when the losing party in a case already decided by a panel of the court requests a rehearing before the full membership of the court.

Sitting at the top of the federal judicial system is the U.S. Supreme Court. The Court is composed of nine justices, who hear all appeals as a group. It is interesting to note that the Judiciary Act of 1789, mentioned above, provided for a Supreme Court with one chief justice and five associate justices. As with the number of courts, the number of Supreme Court justices has also grown over the years as the volume of the Court's work has increased. The Supreme Court justices also reach their decisions by majority vote.

A case seldom goes any further than a court of appeals, as the U.S. Supreme Court rarely is required to hear a case on appeal. Most cases that do reach the U.S. Supreme Court do so because the litigants have requested a **writ of certiorari**. In this writ the losing party asks the Supreme Court to review the case. The decision whether to grant a writ of certiorari is discretionary. The Supreme Court usually hears no more than 200 of the approximately 4,000 requests it receives each year. For the request to be granted, four of the nine justices must agree to hear the case. If the request is denied, this does not mean that the Court agrees with the lower court's decision. It simply means that the Court does not want to hear the case. When discussing the Court's response to a writ of certiorari, you will often hear lawyers refer to the granting or denial of cert.

General jurisdiction

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

Limited jurisdiction

A court's power to hear only specialized cases.

Subpoena

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

Writ of certiorari

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

NETNOTE



The official web site of the federal judiciary is www.uscourts.gov/. It contains links to the U.S. Supreme Court, the U.S. courts of appeals, the U.S. district courts, and the U.S. bankruptcy courts. Emory University's web site at www.law.emory.edu/caselaw/ has a map of the federal circuits that allows you link to a wide variety of information on each of the circuits. The U.S. Supreme Court's site at www.supremecourtus.gov/ contains helpful information on the Court's procedures, its caseload, and biographies and pictures of the justices.

DISCUSSION QUESTIONS

4. Why do you think the framers of the Constitution chose to give federal judges lifetime tenure and to protect them from salary reduction? Do you think that was a wise decision?
5. Do you think it is appropriate that the Supreme Court hears no more than 200 of the approximately 4,000 requests it receives each year? What criteria should the Court use in deciding which cases it will hear?

b. Other Federal Courts

Figure 5-4, page 89, shows where the “core” courts, shown in Figure 5-2, fit into a more complete organizational chart of the federal court system. In addition to the primary courts discussed above, Congress has created more-specialized courts, known as **legislative courts**, under Article I of the federal Constitution. These legislative courts include the U.S. Court of Military Appeals, the U.S. Tax Court, the U.S. Claims Court, and the U.S. Court of International Trade.

The U.S. Court of Military Appeals is the final appellate tribunal for court-martial convictions. The U.S. Tax Court (formerly the Board of Tax Appeals) considers challenges to Internal Revenue Service rulings. The U.S. Claims Court (formerly the Court of Claims) decides the validity of specific types of claims against the U.S. government, and the U.S. Court of International Trade (formerly the U.S. Customs Court) reviews decisions and appraisals of imported merchandise made in collecting customs duties.

2. State Court Systems

Due to the controversial nature of many of its decisions the U.S. Supreme Court gets the lion's share of the media coverage given to the courts on the evening news. While many important cases and significant constitutional issues are decided in the federal courts, it is in state courts where over 98 percent of all legal business occurs.³ While paralegals may have some opportunities to work with federal courts, most will spend their time operating within state court systems.

³Cooke & Goodman, *The State of the Nation's State Courts*, Nat'l. L.J., Mar. 19, 1984, at 23.

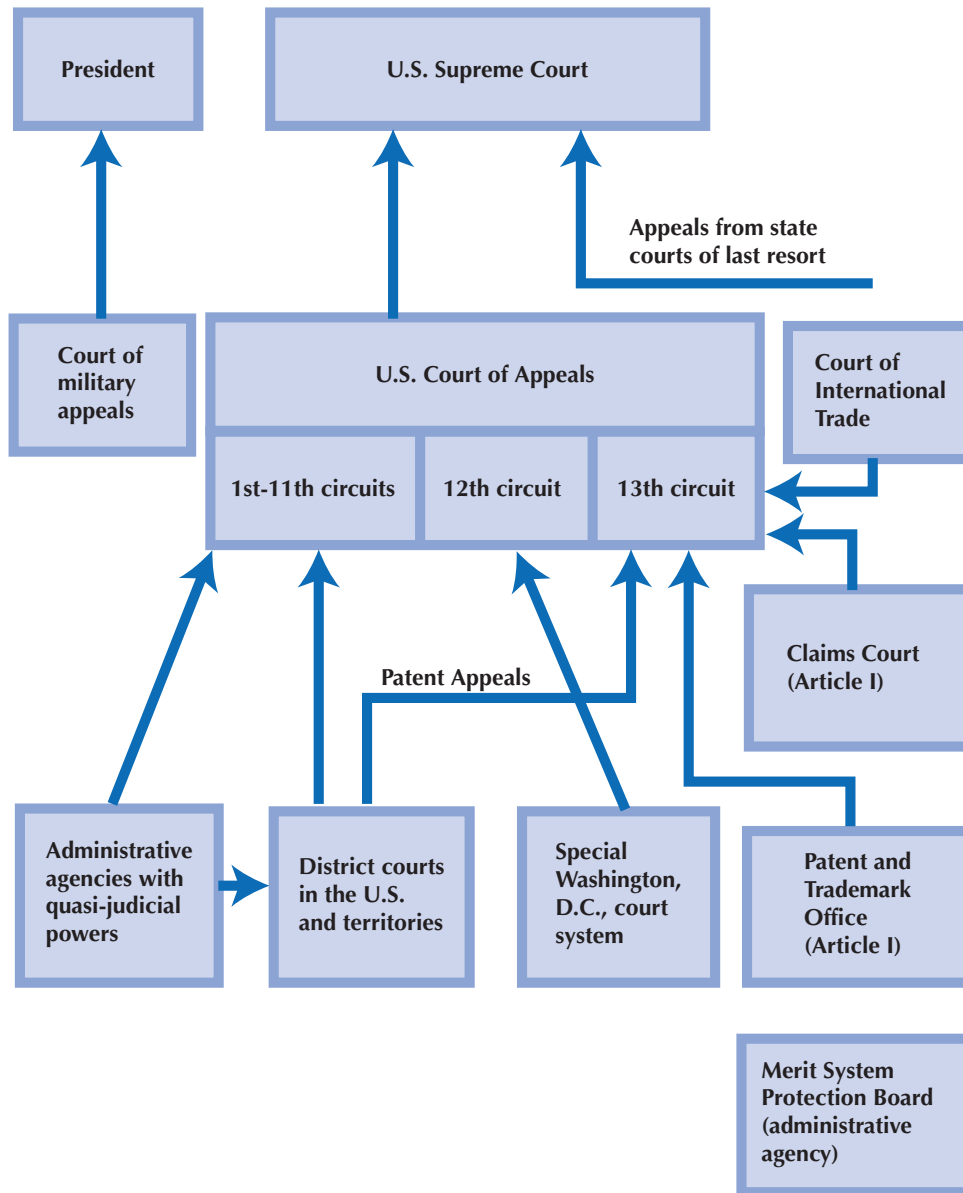


Figure 5-4 Organization of the Federal Courts and Quasi-Judicial Administrative Agencies

Many states have court systems that are very similar to the federal system. Cases begin in a trial court and then proceed through one or two levels of appellate courts. Figure 5-5 shows the organization of a typical state court system. Note how closely it parallels Figure 5-2, showing the core of the federal court system. The path for appeals in most state court systems is from the trial court to an intermediate appellate court (if one exists) and then to the state's highest appellate court (usually called the supreme court).

Rather than attempting to describe each of these fifty-one court systems, we will review some general patterns and leave it to you to search out the details

for your specific state. Relatively simple explanations of most state court systems can be found in books and pamphlets published by the individual states and are usually available in the reference section of local libraries. Other sources for such information are The American Bench and the Martindale-Hubbell Law Directory, Court Calendar section.

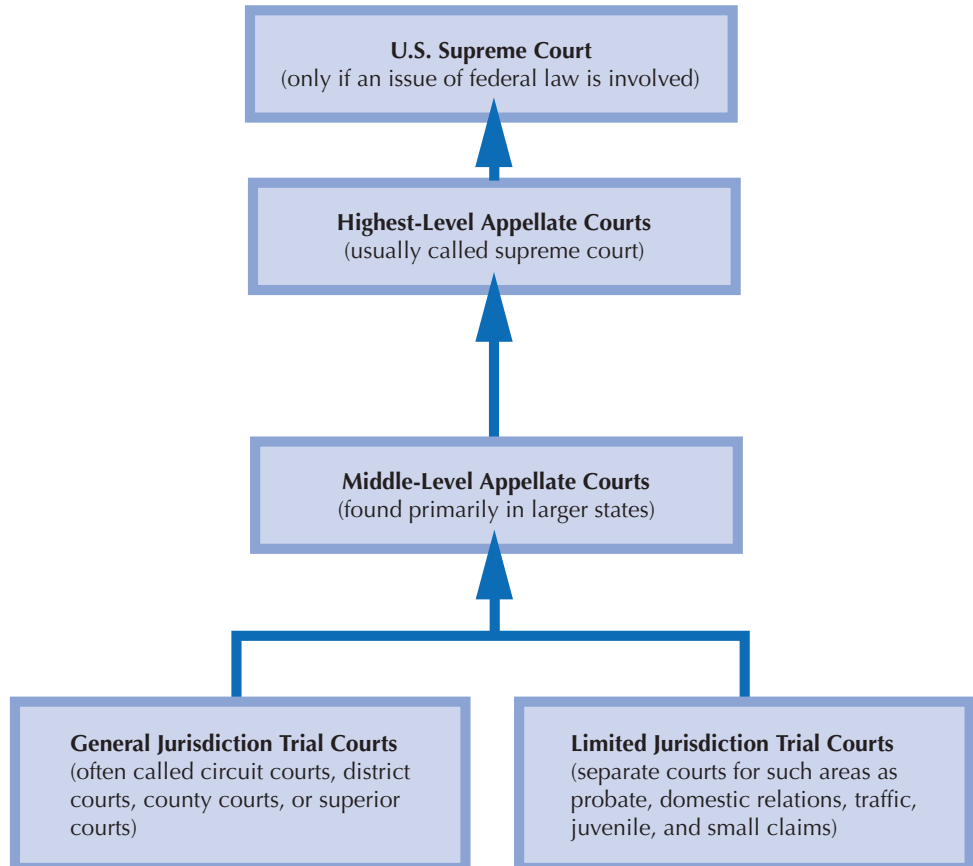
PRACTICE TIP

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

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

Many states have one basic trial court, similar to federal district courts, that can hear any type of case (i.e., it has **general jurisdiction**). This court typically carries a name like circuit court, district court, county court, or superior court. On the other hand, other states have a confusing variety of specialized courts with **limited jurisdiction**. These courts hear a narrow range of cases on a specific subject (such as probate, domestic relations, or traffic) and sometimes even overlap regarding the types of cases they can hear. For example, in Massachusetts both the probate court and the superior court can hear divorce cases.

Figure 5-5 Organization of a Typical State Court System



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

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

3. Exclusive and Concurrent Jurisdiction

If a specific court is the only one authorized to hear a particular type of case, it has **exclusive jurisdiction**. If more than one court is authorized to hear the same type of case, they each have **concurrent jurisdiction**. Where concurrent jurisdiction exists, a case can be heard by more than one court, and the parties can select the one they wish to use.

As we mentioned in Chapter 4, the federal government is a government of limited powers. Just as Congress can legislate only if the Constitution has given it the power to do so, federal courts can hear cases only if the Constitution has given them the power to do so. Article III, Section 2, of the Constitution spells out the jurisdiction of the federal courts in terms of (1) the nature of the subject matter of the case and (2) the parties involved. Figure 5-6 lists the requirements for federal court jurisdiction. Two of the grounds for federal court jurisdiction require particular emphasis, as they account for the bulk of federal cases. The federal courts have jurisdiction when the case involves

1. federal law. This is known as **federal question jurisdiction** and includes cases involving a federal statute, a federal regulation, or the U.S. Constitution.
2. opposing litigants from different states where the amount in controversy exceeds \$75,000. This is known as **diversity jurisdiction**.

If a lawsuit does not fall within one of the categories listed in Figure 5-6, the parties have no choice but to bring the matter in a state court. Unlike the

En banc

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

Exclusive jurisdiction

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

Concurrent jurisdiction

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

Federal question jurisdiction

The power of the federal courts to hear matters of federal law.

Diversity jurisdiction

The power of the federal courts to hear matters of state law if the opposing parties are from different states and the amount in controversy exceeds \$75,000.

Based on the subject matter (federal question):

Any case involving the interpretation or application of

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

Based on the parties involved:

Any case or controversy in law and equity in which

1. the case affects ambassadors or other public ministers and counsels,
2. the United States is a party to the suit,
3. the controversy is between two or more states,
4. the controversy is between a state and citizens of another state,*
5. **the parties are citizens of different states (known as diversity jurisdiction),**
6. the controversy is between citizens of the same state claiming lands under grants of different states, or
7. the controversy is between (a) a state or the citizens thereof and (b) foreign states, citizens, or subjects.*

Based on the amount of money involved:

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

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

Figure 5-6 Jurisdiction of Federal Courts

federal courts, state courts generally have the power to hear any type of case. The only time state courts are prohibited from hearing cases involving federal law is when Congress has expressly included that limitation in a federal statute.

In situations where both the state and the federal courts have concurrent jurisdiction, the plaintiff makes the initial decision as to which court to use. However, when the plaintiff selects a state court and the federal courts also have jurisdiction, the defendant may be able to **remove** the case to federal court.

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

Removal

The transfer of a case from state court to federal court.

DISCUSSION QUESTION

6. For each of these situations determine whether you think the matter should be heard in state or federal *court*. Also decide whether you think a court would apply state or federal *law*.
- A wife wants to divorce her husband.
 - Martha, a Massachusetts resident, wants to sue Susan, a Massachusetts resident, for \$80,000 based on breach of contract.
 - Sam, a Massachusetts resident, wants to sue Jill, a Vermont resident, for \$80,000 based on breach of contract.
 - A teacher in a public school wants to challenge a state law requiring all teachers to start each day of class with a minute of silent prayer.

C. COURT PERSONNEL

It takes many different participants to make the judicial system work effectively. Court personnel include not only the judges and attorneys appearing before them but also court clerks, court reporters, and bailiffs. Some states also use **justices of the peace**, **court commissioners**, and **magistrates** in their court systems. Individuals holding these titles are lower-level court personnel who perform limited judicial duties but are not considered full-fledged judges. In some states they do not have to be lawyers to perform these duties.

1. Judges

It is the responsibility of the trial court judge to decide whether to dismiss a case before it reaches trial, to determine the extent of pretrial discovery, and to set the amount of time the lawyers will have to prepare their cases. Once the trial is under way, the judge acts as the presiding officer, rules on objections, and determines when recesses will occur. If a jury is involved, the judge supervises its selection, removes jury members from the courtroom at key times to protect them from improper influences, and instructs them on the meaning of the law they are to apply. When a jury is not involved, the judge also acts as the fact finder and decides whether the defendant is guilty (in criminal cases) or liable (in civil cases). In criminal cases the judge is also responsible for sentencing the convicted defendant. If the litigants want to contest a trial judge's findings, they must present their arguments to appellate judges.

Appellate court judges review lower court decisions and decide whether they should be affirmed or reversed. As discussed at the beginning of this chapter, they focus on questions of law rather than second guessing the trial court's findings of fact.

In the federal system, the President, with the approval of the U.S. Senate,⁴ appoints District Court, Court of Appeals, and Supreme Court judges. The U.S. Constitution, Article III, Section 1, provides that “[t]he Judges, both of the

⁴Federal judicial appointments, particularly at the District Court level, have frequently been used as a form of political patronage to reward attorneys who have been loyal supporters of the party. The “Senatorial Courtesy” tradition gives Senators from the President’s party a veto power over District Court appointments from their state.



supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” This means that “constitutional” judges are guaranteed lifetime tenure unless they resign or are impeached and are protected from any salary reductions.

Unlike these “constitutional” judges, other federal judges do not hold lifetime appointments. For example, the court of appeals in each circuit appoints bankruptcy judges for fourteen-year terms. District courts appoint magistrate judges for eight-year terms.

Dating back to the 1968 Nixon/Humphrey presidential campaign, there has been increased attention paid to the legal philosophy of judicial appointees—especially those being considered for the U.S. Supreme Court. (See discussion of Theories of Jurisprudence in Chapter 3.) The potential nominee’s views on controversial issues, such as abortion rights, same-sex marriage, and affirmative action have become critical.

In 2005 Associate Justice Sandra Day O’Connor announced her retirement from the court to spend time with a husband battling Alzheimer’s and Chief Justice William Rehnquist died of thyroid cancer. This gave President George W. Bush the opportunity to significantly change the ideological balance on the Supreme Court. Based on the decisions handed down since his appointments of John Roberts and Samuel Alito, Bush clearly moved the Supreme Court in a more conservative direction. So far new Chief Justice Roberts’ voting pattern has been similar to that of Rehnquist, but Alito has voted much more conservatively than had Justice O’Connor—especially on cases involving affirmative action and abortion. Figure 5-7 shows a picture of the U.S. Supreme Court taken in the spring of 2006. The caption includes biographical information about the justices.

Figure 5-7 The U.S. Supreme Court, 2006. **Standing, from left to right:** *Stephen Breyer*—appointed by President Clinton (D) in 1994; a former law clerk for Justice Goldberg, a law professor, and a federal appellate court judge. *Clarence Thomas*—appointed by President George H. Bush (R) in 1991; the second African American to reach the Supreme Court and a federal appellate court judge when appointed; his confirmation hearings included the examination of charges that he had sexually harassed a female employee while he was Chairman of the U.S. Equal Employment Opportunity Commission. *Ruth Bader Ginsburg*—appointed by President Clinton (D) in 1993; the second woman to reach the Supreme Court; had been the General Counsel for the ACLU, a law professor, and a federal appellate judge. *Samuel Alito*—the most recent member to join the court, appointed by President George W. Bush (R) in 2006; was Deputy Assistant U.S. Attorney General and a federal appellate court judge. **Sitting, from left to right:** *Anthony Kennedy*—appointed by President Reagan (R) in 1988; a law professor and federal appellate judge. *John Paul Stevens*—appointed by President Ford (R) in 1975; served as a law clerk for Justice Rutledge, was an anti-trust lawyer, and served as a federal appellate court judge. *John Roberts*, Chief Justice—appointed by President George W. Bush (R) in 2005; a former law clerk to Justice Rehnquist, worked for the Justice Department during the Reagan administration, and was a federal appellate court judge. *Antonin Scalia*—appointed by President Reagan (R) in 1986; a law school professor and a federal appellate court judge. *David H. Souter*—appointed by George H. Bush (R) in 1990; a New Hampshire Supreme Court justice and a federal appellate court judge.

States vary widely with respect to how they select their judges. Only a few states follow the federal model of executive appointments. Most states have voters choose their judges in either partisan or non-partisan elections or use a variant of the “Missouri Plan” in which the governor selects from candidates recommended by a non-partisan commission.

2. Jurors

For most civil and criminal trials, the parties have the option of having their case heard solely by the judge or by a judge and a jury. This is in stark contrast to most European courts where the jury trial is reserved almost exclusively for criminal cases. We will discuss the role of jurors and how they are selected in Chapters 6 and 17.

3. Attorneys

In our “adversarial” legal system, attorneys are responsible for effectively presenting all of the relevant facts and arguments that favor their clients. But, in addition to being advocates for their clients, attorneys are considered officers of the court. As such, they are responsible for maintaining proper decorum in the courtroom and acting within the ethical restraints imposed on them by the courts and their profession.

4. Support Personnel

Court clerks are responsible for keeping the court files in proper condition and ensuring that the various motions filed by lawyers and the actions taken by judges are properly recorded. A head clerk of the courts is usually responsible for running the central records section of the courthouse; his or her assistants are assigned to sit in on the actual courtroom proceedings.

The **court reporter** prepares verbatim transcripts of courtroom proceedings. Most reporters use a stenotype machine rather than shorthand. Because it is expensive, they prepare a written transcript only if the case is being appealed.

Bailiffs are responsible for maintaining order in the courtrooms. They are also responsible for watching over the juries when they are in recess or when they have been sequestered. When a jury is sequestered, the members sleep at a hotel and are kept isolated from the public and their families to prevent them from being exposed to prejudicial publicity, threats, bribes, or any other improper influences.

Finally, sheriffs and marshals also serve as officers of the court. They serve summonses and other court documents, collect money as required by court judgments, and otherwise help in carrying out the court’s orders.

PRACTICE TIP

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

SUMMARY

In this chapter we have seen that although the American legal system may seem to involve a confusing mix of names and functions, all courts can be classified in two ways:

1. They are either trial or appellate courts. Some trial courts have only limited jurisdiction; for example, they only hear cases worth less than a certain amount of money.
2. They are part of either the federal or a state system.

The federal court system and most state court systems are based on a three-tier model. At the bottom are the trial courts, which decide both factual and legal issues. Above the trial courts you will generally find an intermediate appellate court. At the top of every system is the highest appellate court. Appellate courts decide questions of law only. In the federal system the trial courts are called district courts, the intermediate appellate courts are called courts of appeals, and the highest court is the U.S. Supreme Court.

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

REVIEW QUESTIONS

Pages 79 through 84

1. What are the two basic functions of trial courts?
2. What is the difference between questions of law and questions of fact? Why is it important to know the difference?
3. Give an example of a question of fact that might arise during a murder trial. Give an example of a question of law that might arise in that same trial.
4. What is the difference between a bench and a jury trial?
5. What will an appellate court usually do if it finds that the trial court made a harmless error?
6. What is the difference between reversing and remanding a case?
7. How do majority, dissenting, and concurring opinions differ from each other?
8. List the major differences between trial and appellate courts.

Pages 84 through 88

9. In the federal court system what are the names given to
 - a. the highest appellate court,
 - b. the intermediate appellate courts, and
 - c. the trial courts?
10. Look at the map in Figure 5-3. How many district courts are there in your state? In which circuit is your state located?
11. If you hear that “cert.” has been denied in a case, what does that mean?
12. In the federal system, what are the “inferior Courts”?

Pages 88 through 97

13. Describe a typical state court system. How is your state court system similar to or different from the “typical” state system?
14. True or false: In every state the highest appellate court is called the supreme court.
15. Jurisdiction refers to the power a court has to hear a case. Define each of the following types of jurisdiction:
 - a. general jurisdiction,
 - b. limited jurisdiction,
 - c. original jurisdiction,
 - d. appellate jurisdiction,
 - e. exclusive jurisdiction, and
 - f. concurrent jurisdiction.
16. What are the two major grounds for gaining federal court jurisdiction?

