One of the important functions of law in any society is to provide stability, predictability, and continuity so that people can know how to order their affairs. If any society is to survive, its citizens must be able to determine what is legally right and legally wrong. They must know what sanctions will be imposed on them if they commit wrongful acts. If they suffer harm as a result of others’ wrongful acts, they must know how they can seek redress. By setting forth the rights, obligations, and privileges of citizens, the law enables individuals to go about their business with confidence and a certain degree of predictability. The stability and predictability created by the law provide an essential framework for all civilized activities, including business activities.

What do we mean when we speak of “the law”? Although the law has various definitions, they are all based on the general observation that law consists of enforceable rules governing relationships among individuals and between individuals and their society. These “enforceable rules” may consist of unwritten principles of behavior established by a nomadic tribe. They may be set forth in a law code, such as the Code of Hammurabi in ancient Babylon (c. 1780 B.C.E.) or the law code of one of today’s European nations. They may consist of written laws and court decisions created by modern legislative and judicial bodies, as in the United States. Regardless of how such rules are created, they all have one thing in common: they establish rights, duties, and privileges that are consistent with the values and beliefs of their society or its ruling group.

In this introductory chapter, we first look at an important question for any student reading this text: How does the legal environment affect business decision making? We next describe the major sources of American law, the common law tradition, and some basic schools of legal thought. We conclude the chapter with sections offering practical guidance on several topics, including how to find the sources of law discussed in this chapter (and referred to throughout the text) and how to read and understand court opinions.

SECTION 1
BUSINESS ACTIVITIES AND THE LEGAL ENVIRONMENT

As those entering the world of business will learn, laws and government regulations affect virtually all business activities—from hiring and firing decisions to workplace safety, the manufacturing and marketing of products, business financing, and more. To make good business decisions, a basic knowledge of the laws and regulations governing these activities is beneficial—if not essential. Realize also that in today’s world, a knowledge of “black-letter” law is not enough. Businesspersons are also pressured to make ethical decisions. Thus, the study of business law necessarily involves an ethical dimension.

Many Different Laws May Affect a Single Business Transaction

As you will note, each chapter in this text covers a specific area of the law and shows how the legal rules in that area affect business activities. Though compartmentalizing the law in this fashion promotes conceptual clarity, it does not indicate the extent to which a number of different laws may apply to just one transaction.

Consider an example. Suppose that you are the president of NetSys, Inc., a company that creates
and maintains computer network systems for business firms, and also markets related software. One day, Hernandez, an operations officer for Southwest Distribution Corporation (SDC), contacts you by e-mail about a possible contract concerning SDC’s computer network. In deciding whether to enter into a contract with SDC, you should consider, among other things, the legal requirements for an enforceable contract. Are there different requirements for a contract for services and a contract for products? What are your options if SDC breaches (breaks, or fails to perform) the contract? The answers to these questions are part of contract law and sales law.

Other questions might concern payment under the contract. How can you ensure that NetSys will be paid? For example, if payment is made with a check that is returned for insufficient funds, what are your options? Answers to these questions can be found in the laws that relate to negotiable instruments (such as checks) and creditors’ rights. Also, a dispute may occur over the rights to NetSys’s software, or there may be a question of liability if the software is defective. Questions may even be raised as to whether you and Hernandez had the authority to make the deal in the first place. A disagreement may arise from other circumstances, such as an accountant’s evaluation of the contract. Resolutions of these questions may be found in areas of the law that relate to intellectual property, e-commerce, torts, product liability, agency, business organizations, or professional liability.

Finally, if any dispute cannot be resolved amicably, then the laws and the rules concerning courts and court procedures spell out the steps of a lawsuit. Exhibit 1–1 illustrates the various areas of law that may influence business decision making.

**Ethics and Business Decision Making**

Merely knowing the areas of law that may affect a business decision is not sufficient in today’s business world. Businesspersons must also take ethics into account. As you will learn in Chapter 5, ethics generally is defined as the study of what constitutes right or wrong behavior. Today, business decision makers need to consider not just whether a decision is legal, but also whether it is ethical.

Throughout this text, you will learn about the relationship between the law and ethics, as well as about some of the types of ethical questions that
often arise in the business context. For example, the unit-ending Focus on Ethics features are devoted solely to the exploration of ethical questions pertaining to topics treated within the unit. We have also included Ethical Dimension questions for selected cases that stress the importance of ethical considerations in today’s business climate and Insight into Ethics features that appear in selected chapters. A Question of Ethics case problem is included at the conclusion of every chapter to introduce you to the ethical aspects of specific cases involving real-life situations. Additionally, Chapter 5 offers a detailed look at the importance of ethical considerations in business decision making.

**Statutory Law**

Laws enacted by legislative bodies at any level of government, such as the statutes passed by Congress or by state legislatures, make up the body of law generally referred to as statutory law. When a legislature passes a statute, that statute ultimately is included in the federal code of laws or the relevant state code of laws (these codes are discussed later in this chapter).

Statutory law also includes local ordinances—statutes (laws, rules, or orders) passed by municipal or county governing units to govern matters not covered by federal or state law. Ordinances commonly have to do with city or county land use (zoning ordinances), building and safety codes, and other matters affecting the local community.

A federal statute, of course, applies to all states. A state statute, in contrast, applies only within the state’s borders. State laws thus may vary from state to state. No federal statute may violate the U.S. Constitution, and no state statute or local ordinance may violate the U.S. Constitution or the relevant state constitution.

**Uniform Laws**

The differences among state laws were particularly notable in the 1800s, when conflicting state statutes frequently made trade and commerce among the states difficult. To counter these problems, in 1892 a group of legal scholars and lawyers formed the National Conference of Commissioners on Uniform State Laws (NCCUSL) to draft uniform laws, or model laws, for the states to consider adopting. The NCCUSL still exists today and continues to issue uniform laws.

Each state has the option of adopting or rejecting a uniform law. Only if a state legislature adopts a uniform law does that law become part of the statutory law of that state. Note that a state legislature may adopt all or part of a uniform law as it is written, or the legislature may rewrite the law however the legislature
wishes. Hence, even though many states may have adopted a uniform law, those states’ laws may not be entirely “uniform.”

The earliest uniform law, the Uniform Negotiable Instruments Law, was completed by 1896 and adopted in every state by the early 1920s (although not all states used exactly the same wording). Over the following decades, other acts were drawn up in a similar manner. In all, more than two hundred uniform acts have been issued by the NCCUSL since its inception. The most ambitious uniform act of all, however, was the Uniform Commercial Code.

THE UNIFORM COMMERCIAL CODE The Uniform Commercial Code (UCC), which was created through the joint efforts of the NCCUSL and the American Law Institute, was first issued in 1952. All fifty states, the District of Columbia, and the Virgin Islands have adopted the UCC. It facilitates commerce among the states by providing a uniform, yet flexible, set of rules governing commercial transactions. The UCC assures businesspersons that their contracts, if validly entered into, normally will be enforced.

As you will read in later chapters, from time to time the NCCUSL revises the articles contained in the UCC and submits the revised versions to the states for adoption. During the 1990s, for example, four articles (Articles 3, 4, 5, and 9) were revised, and two new articles (Articles 2A and 4A) were added. Amendments to Article 1 were approved in 2001 and have now been adopted by a majority of the states. Because of its importance in the area of commercial law, we cite the UCC frequently in this text. We also present the UCC in Appendix C.

Administrative Law

Another important source of American law is administrative law, which consists of the rules, orders, and decisions of administrative agencies. An administrative agency is a federal, state, or local government agency established to perform a specific function. Administrative law and procedures, which will be examined in detail in Chapter 44, constitute a dominant element in the regulatory environment of business.

Rules issued by various administrative agencies now affect almost every aspect of a business’s operations, including its capital structure and financing, its hiring and firing procedures, its relations with employees and unions, and the way it manufactures and markets its products. Regulations enacted to protect the environment often play a significant role in business operations. See this chapter’s Shifting Legal Priorities for Business feature on the following page for a discussion of the concept of sustainability and how some environmental regulations encourage it.

FEDERAL AGENCIES At the national level, the cabinet departments of the executive branch include numerous executive agencies. The U.S. Food and Drug Administration, for example, is an agency within the U.S. Department of Health and Human Services. Executive agencies are subject to the authority of the president, who has the power to appoint and remove their officers. There are also major independent regulatory agencies at the federal level, such as the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Communications Commission. The president’s power is less pronounced in regard to independent agencies, whose officers serve for fixed terms and cannot be removed without just cause.

STATE AND LOCAL AGENCIES There are administrative agencies at the state and local levels as well. Commonly, a state agency (such as a state pollution-control agency) is created as a parallel to a federal agency (such as the Environmental Protection Agency). Just as federal statutes take precedence over conflicting state statutes, so federal agency regulations take precedence over conflicting state regulations.

Case Law and Common Law Doctrines

The rules of law announced in court decisions constitute another basic source of American law. These rules include interpretations of constitutional provisions, of statutes enacted by legislatures, and of regulations created by administrative agencies. Today, this body of judge-made law is referred to as case law. Case law—the doctrines and principles announced in cases—governs all areas not covered by statutory law or administrative law and is part of our common law tradition. We look at the origins and characteristics of the common law tradition in some detail in the pages that follow.

See Concept Summary 1.1 on page 7 for a review of the sources of American law.

1. This institute was formed in the 1920s and consists of practicing attorneys, legal scholars, and judges.
2. Louisiana has not adopted Articles 2 and 2A (covering contracts for the sale and lease of goods), however.
By now, almost everyone is aware that at the federal, state, and local levels there are numerous statutes that deal with the environment (environmental law will be discussed in Chapter 46). In the last few years, federal, state, and local statutes and administrative regulations have started to embrace the concept of sustainability.

What Does Sustainability Mean?
Although there is no one official definition, sustainability generally has been defined as economic development that meets the needs of the present while not compromising the ability of future generations to meet their own needs. By any definition, sustainability is a process rather than a tangible outcome. For business managers, it means that they should engage in long-range planning rather than focusing only on short-run profitability.

Federal Law and Sustainability
Certain provisions of federal environmental laws directly address the topic of sustainability. For example, the Resource Conservation and Recovery Act \(^{a}\) requires waste minimization as the preferred means of hazardous waste management. Facilities that generate or manage hazardous waste must certify that they have a waste minimization program that reduces the toxicity and quantity of the hazardous waste.

The Pollution Prevention Act (PPA) \(^{b}\) requires that facilities minimize or eliminate the release of pollutants into the environment whenever feasible. The PPA established a national policy to recycle any pollutants that cannot be prevented.

Finally, the federal Environmental Protection Agency (EPA) \(^{c}\) has undertaken a major effort to encourage sustainability. The agency’s Web site (www.epa.gov) devotes numerous pages to sustainability, sustainable development, and sustainable agriculture. The EPA also has a “sector strategies program” that seeks industry-wide environmental gains through innovative actions.

Other nations have enacted legislation that requires sustainability to be taken into account when protecting the environment. An example is the Environmental Protection and Bio-Diversity Conservation Act in Australia. \(^{d}\)

State Law and Sustainability
At least one state has legislatively committed itself to the concept of sustainable policies. More than a decade ago, the Oregon Sustainability Act was passed. This act officially defines sustainability as:


c. This act became effective in 1999 and has been amended many times since.

6

Using, developing, and protecting resources in a manner that enables people to meet current needs and provides that future generations can also meet future needs, from the joint perspective of environmental, economic, and community objectives.

Oregon’s seven-member sustainability board recommends and proposes sustainability legislation and also develops policies and programs related to sustainability.

Where Does the United States Rank in the World Sustainability Index?
Environmental experts from Yale and Columbia universities have created an Environmental Sustainability Index (ESI) that ranks countries according to how well they manage their environments, protect the global commons, and have the capacity to improve their environmental performance. Finland and Norway are at the top of the ESI. The United States ranks forty-fifth. This low ranking is due mainly to excessive waste generation and greenhouse gas emissions in this country.

Some Corporations Take the Lead by Creating the Position of a Chief Sustainability Officer
The giant chemical company DuPont has an official chief sustainability officer (CSO)—a position that did not exist a few years ago. This corporate officer is responsible not only for ensuring that the company complies with all federal, state, local, and international environmental regulations, but also for discovering so-called megatrends that can affect different markets.

DuPont, though best known as a chemical company, also sells agricultural seeds and crop-protection products. One megatrend that its CSO has identified is a growing world population that is going to require more production of corn, soybeans, and other crops from limited acreage. That is where sustainability comes in—producing more with less.

Managerial Implications
Managers cannot wait until the government tells them what sustainable business practices they must follow. A company that adopts sustainable business practices today not only will promote desirable economic, social, and environmental results, but at the same time will enhance productivity, reduce costs, and thereby increase profitability. A company that has a clear understanding of sustainability will be more competitive as increasing consumer demand for “green” products and global concerns about the environment put pressure on all producers.
CHAPTER 1 Introduction to Law and Legal Reasoning

CONCEPT SUMMARY 1.1 Sources of American Law

<table>
<thead>
<tr>
<th>Source</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitutional Law</td>
<td>The law as expressed in the U.S. Constitution and the state constitutions. The U.S. Constitution is the supreme law of the land. State constitutions are supreme within state borders to the extent that they do not violate a clause of the U.S. Constitution or a federal law.</td>
</tr>
<tr>
<td>Statutory Law</td>
<td>Laws (statutes and ordinances) enacted by federal, state, and local legislatures and governing bodies. None of these laws may violate the U.S. Constitution or the relevant state constitution. Uniform laws, when adopted by a state, become statutory law in that state.</td>
</tr>
<tr>
<td>Administrative Law</td>
<td>The rules, orders, and decisions of federal, state, or local government administrative agencies.</td>
</tr>
<tr>
<td>Case Law and Common Law Doctrines</td>
<td>Judge-made law, including interpretations of constitutional provisions, of statutes enacted by legislatures, and of regulations created by administrative agencies.</td>
</tr>
</tbody>
</table>

SECTION 3 THE COMMON LAW TRADITION

Because of our colonial heritage, much of American law is based on the English legal system, which originated in medieval England and continued to evolve in the following centuries. Knowledge of this system is necessary to understanding the American legal system today.

Early English Courts

The origins of the English legal system—and thus the U.S. legal system as well—date back to 1066, when the Normans conquered England. William the Conqueror and his successors began the process of unifying the country under their rule. One of the means they used to do this was the establishment of the king’s courts, or curiae regis. Before the Norman Conquest, disputes had been settled according to the local legal customs and traditions in various regions of the country. The king’s courts sought to establish a uniform set of customs for the country as a whole. What evolved in these courts was the beginning of the common law—a body of general rules that applied throughout the entire English realm. Eventually, the common law tradition became part of the heritage of all nations that were once British colonies, including the United States.

COURTS OF LAW AND REMEDIES AT LAW The early English king’s courts could grant only very limited kinds of remedies (the legal means to enforce a right or redress a wrong). If one person wronged another in some way, the king’s courts could award as compensation one or more of the following: (1) land, (2) items of value, or (3) money. The courts that awarded this compensation became known as courts of law, and the three remedies were called remedies at law. (Today, the remedy at law normally takes the form of monetary damages—an amount given to a party whose legal interests have been injured.) Even though the system introduced uniformity in the settling of disputes, when a complaining party wanted a remedy other than economic compensation, the courts of law could do nothing, so “no remedy, no right.”

COURTS OF EQUITY AND REMEDIES IN EQUITY

Equity is a branch of law—founded on what might be described as notions of justice and fair dealing—that seeks to supply a remedy when no adequate remedy at law is available. When individuals could not obtain an adequate remedy in a court of law, they petitioned the king for relief. Most of these petitions were decided by an adviser to the king, called a chancellor, who had the power to grant new and unique remedies. Eventually, formal chancery courts, or courts of equity, were established.

The remedies granted by the equity courts became known as remedies in equity, or equitable remedies. These remedies include specific performance (ordering a party to perform an agreement as promised), an injunction (ordering a party to cease engaging in a specific activity or to undo some wrong or
injury), and rescission (the cancellation of a contractual obligation). We will discuss these and other equitable remedies in more detail at appropriate points in the chapters that follow, particularly in Chapter 18.

As a general rule, today's courts, like the early English courts, will not grant equitable remedies unless the remedy at law—monetary damages—is inadequate. Suppose that Ted forms a contract (a legally binding agreement—see Chapter 10) to purchase a parcel of land that he thinks will be just perfect for his future home. Further suppose that the seller breaches this agreement. Ted could sue the seller for the return of any deposits or down payment he might have made on the land, but this is not the remedy he really seeks. What Ted wants is to have the court order the seller to perform the contract. In other words, Ted wants the court to grant the equitable remedy of specific performance because monetary damages are inadequate in this situation.

EQUITABLE MAXIMS In fashioning appropriate remedies, judges often were (and continue to be) guided by so-called equitable maxims—propositions or general statements of equitable rules. Exhibit 1–2 lists some important equitable maxims. The last maxim listed in that exhibit—"Equity aids the vigilant, not those who rest on their rights"—merits special attention. It has become known as the equitable doctrine of laches (a term derived from the Latin laxus, meaning "lax" or "negligent"), and it can be used as a defense. A defense is an argument raised by the defendant (the party being sued) indicating why the plaintiff (the suing party) should not obtain the remedy sought. (Note that in equity proceedings, the party bringing a lawsuit is called the petitioner, and the party being sued is referred to as the respondent.)

The doctrine of laches arose to encourage people to bring lawsuits while the evidence was fresh. What constitutes a reasonable time, of course, varies according to the circumstances of the case. Time periods for different types of cases are now usually fixed by statutes of limitations. After the time allowed under a statute of limitations has expired, no action (lawsuit) can be brought, no matter how strong the case was originally.

Legal and Equitable Remedies Today

The establishment of courts of equity in medieval England resulted in two distinct court systems: courts of law and courts of equity. The courts had different sets of judges and granted different types of remedies. During the nineteenth century, however, most states in the United States adopted rules of procedure that resulted in the combining of courts of law and equity. A party now may request both legal and equitable remedies in the same action, and the trial court judge may grant either or both forms of relief.

The distinction between legal and equitable remedies remains relevant to students of business law, however, because these remedies differ. To seek the proper remedy for a wrong, one must know what remedies are available. Additionally, certain vestiges of the procedures used when there were separate courts of law and equity still exist. For example, a party has the right to demand a jury trial in an action at law, but not in an action in equity. Exhibit 1–3 summarizes the procedural differences (applicable in most states) between an action at law and an action in equity.

The Doctrine of Stare Decisis

One of the unique features of the common law is that it is judge-made law. The body of principles and doctrines that form the common law emerged over time as judges decided legal controversies.

EXHIBIT 1–2 • Equitable Maxims

1. Whoever seeks equity must do equity. (Anyone who wishes to be treated fairly must treat others fairly.)

2. Where there is equal equity, the law must prevail. (The law will determine the outcome of a controversy in which the merits of both sides are equal.)

3. One seeking the aid of an equity court must come to the court with clean hands. (The plaintiff must have acted fairly and honestly.)

4. Equity will not suffer a wrong to be without a remedy. (Equitable relief will be awarded when there is a right to relief and there is no adequate remedy at law.)

5. Equity regards substance rather than form. (Equity is more concerned with fairness and justice than with legal technicalities.)

6. Equity aids the vigilant, not those who rest on their rights. (Equity will not help those who neglect their rights for an unreasonable period of time.)
CHAPTER 1  Introduction to Law and Legal Reasoning

CHAPTER 1  Introduction to Law and Legal Reasoning

EXHIBIT 1–3 • Procedural Differences between an Action at Law and an Action in Equity

<table>
<thead>
<tr>
<th>PROCEDURE</th>
<th>ACTION AT LAW</th>
<th>ACTION IN EQUITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initiation of lawsuit</td>
<td>By filing a complaint</td>
<td>By filing a petition</td>
</tr>
<tr>
<td>Parties</td>
<td>Plaintiff and defendant</td>
<td>Petitioner and respondent</td>
</tr>
<tr>
<td>Decision</td>
<td>By jury or judge</td>
<td>By judge (no jury)</td>
</tr>
<tr>
<td>Result</td>
<td>Judgment</td>
<td>Decree</td>
</tr>
<tr>
<td>Remedy</td>
<td>Monetary damages</td>
<td>Injunction, specific performance, or rescission</td>
</tr>
</tbody>
</table>

CASE PRECEDENTS AND CASE REPORTERS  When possible, judges attempted to be consistent and to base their decisions on the principles suggested by earlier cases. They sought to decide similar cases in a similar way and considered new cases with care because they knew that their decisions would make new law. Each interpretation became part of the law on the subject and served as a legal precedent—that is, a decision that furnished an example or authority for deciding subsequent cases involving identical or similar legal principles or facts.

In the early years of the common law, there was no single place or publication where court opinions, or written decisions, could be found. By the early fourteenth century, portions of the most important decisions from each year were being gathered together and recorded in Year Books, which became useful references for lawyers and judges. In the sixteenth century, the Year Books were discontinued, and other forms of case publication became available. Today, cases are published, or “reported,” in volumes called reporters, or reports. We describe today’s case reporting system in detail later in this chapter.

STARE DECISIS AND THE COMMON LAW TRADITION  The practice of deciding new cases with reference to former decisions, or precedents, became a cornerstone of the English and American judicial systems. The practice formed a doctrine known as stare decisis (a Latin phrase meaning “to stand on decided cases”).

Under this doctrine, judges are obligated to follow the precedents established within their jurisdictions. The term jurisdiction refers to a geographic area in which a court or courts have the power to apply the law—see Chapter 2. Once a court has set forth a principle of law as being applicable to a certain set of facts, that court and courts of lower rank (within the same jurisdiction) must adhere to that principle and apply it in future cases involving similar fact patterns. Thus, stare decisis has two aspects: first, that decisions made by a higher court are binding on lower courts; and second, that a court should not overturn its own precedents unless there is a compelling reason to do so.

Controlling precedents in a jurisdiction are referred to as binding authorities. A binding authority is any source of law that a court must follow when deciding a case. Binding authorities include constitutions, statutes, and regulations that govern the issue being decided, as well as court decisions that are controlling precedents within the jurisdiction. United States Supreme Court case decisions, no matter how old, remain controlling until they are overruled by a subsequent decision of the Supreme Court, by a constitutional amendment, or by congressional legislation (that has not been held unconstitutional).

STARE DECISIS AND LEGAL STABILITY  The doctrine of stare decisis helps the courts to be more efficient because if other courts have carefully analyzed a similar case, their legal reasoning and opinions can serve as guides. Stare decisis also makes the law more stable and predictable. If the law on a given subject is well settled, someone bringing a case to court can usually rely on the court to make a decision based on what the law has been in the past.

DEPARTURES FROM PRECEDENT  Although courts are obligated to follow precedents, sometimes a court will depart from the rule of precedent if it decides that the precedent should no longer be followed. If a court decides that a ruling precedent is simply incorrect or that technological or social changes have rendered the precedent inapplicable, the court might rule contrary to the precedent. Cases that overturn precedent often receive a great deal of publicity.

EXHIBIT 1–3 • Procedural Differences between an Action at Law and an Action in Equity

CASE PRECEDENTS AND CASE REPORTERS  When possible, judges attempted to be consistent and to base their decisions on the principles suggested by earlier cases. They sought to decide similar cases in a similar way and considered new cases with care because they knew that their decisions would make new law. Each interpretation became part of the law on the subject and served as a legal precedent—that is, a decision that furnished an example or authority for deciding subsequent cases involving identical or similar legal principles or facts.

In the early years of the common law, there was no single place or publication where court opinions, or written decisions, could be found. By the early fourteenth century, portions of the most important decisions from each year were being gathered together and recorded in Year Books, which became useful references for lawyers and judges. In the sixteenth century, the Year Books were discontinued, and other forms of case publication became available. Today, cases are published, or “reported,” in volumes called reporters, or reports. We describe today’s case reporting system in detail later in this chapter.

STARE DECISIS AND THE COMMON LAW TRADITION  The practice of deciding new cases with reference to former decisions, or precedents, became a cornerstone of the English and American judicial systems. The practice formed a doctrine known as stare decisis (a Latin phrase meaning “to stand on decided cases”).

Under this doctrine, judges are obligated to follow the precedents established within their jurisdictions. The term jurisdiction refers to a geographic area in which a court or courts have the power to apply the law—see Chapter 2. Once a court has set forth a principle of law as being applicable to a certain set of facts, that court and courts of lower rank (within the same jurisdiction) must adhere to that principle and apply it in future cases involving similar fact patterns. Thus, stare decisis has two aspects: first, that decisions made by a higher court are binding on lower courts; and second, that a court should not overturn its own precedents unless there is a compelling reason to do so.

Controlling precedents in a jurisdiction are referred to as binding authorities. A binding authority is any source of law that a court must follow when deciding a case. Binding authorities include constitutions, statutes, and regulations that govern the issue being decided, as well as court decisions that are controlling precedents within the jurisdiction. United States Supreme Court case decisions, no matter how old, remain controlling until they are overruled by a subsequent decision of the Supreme Court, by a constitutional amendment, or by congressional legislation (that has not been held unconstitutional).

STARE DECISIS AND LEGAL STABILITY  The doctrine of stare decisis helps the courts to be more efficient because if other courts have carefully analyzed a similar case, their legal reasoning and opinions can serve as guides. Stare decisis also makes the law more stable and predictable. If the law on a given subject is well settled, someone bringing a case to court can usually rely on the court to make a decision based on what the law has been in the past.

DEPARTURES FROM PRECEDENT  Although courts are obligated to follow precedents, sometimes a court will depart from the rule of precedent if it decides that the precedent should no longer be followed. If a court decides that a ruling precedent is simply incorrect or that technological or social changes have rendered the precedent inapplicable, the court might rule contrary to the precedent. Cases that overturn precedent often receive a great deal of publicity.
**CASE IN POINT.** The United States Supreme Court expressly overturned precedent when it concluded that separate educational facilities for whites and blacks, which it had previously upheld as constitutional, were inherently unequal. The Court’s departure from precedent in this case received a tremendous amount of publicity as people began to realize the ramifications of this change in the law.

Note that judges do have some flexibility in applying precedents. For example, a lower court may avoid applying a precedent set by a higher court in its jurisdiction by distinguishing the two cases based on their facts. When this happens, the lower court’s ruling stands unless it is appealed to a higher court and that court overrules the decision.

**WHEN THERE IS NO PRECEDENT** Occasionally, the courts must decide cases for which no precedents exist, called cases of first impression. For example, as you will read throughout this text, the extensive use of the Internet has presented many new and challenging issues for the courts to decide. In deciding cases of first impression, courts often look at persuasive authorities (precedents from other jurisdictions) for guidance. A court may also consider a number of factors, including legal principles and policies underlying previous court decisions or existing statutes, fairness, social values and customs, public policy (governmental policy based on widely held societal values), and data and concepts drawn from the social sciences. Which of these sources is chosen or receives the greatest emphasis depends on the nature of the case being considered and the particular judge or judges hearing the case.

**Stare Decisis and Legal Reasoning**

Legal reasoning is the reasoning process used by judges in deciding what law applies to a given dispute and then applying that law to the specific facts or circumstances of the case. Through the use of legal reasoning, judges harmonize their decisions with those that have been made before, as the doctrine of stare decisis requires.

Students of business law and the legal environment also engage in legal reasoning. For example, you may be asked to provide answers for some of the case problems that appear at the end of every chapter in this text. Each problem describes the facts of a particular dispute and the legal question at issue. If you are assigned a case problem, you will be asked to determine how a court would answer that question, and why. In other words, you will need to give legal reasons for whatever conclusion you reach. We look here at the basic steps involved in legal reasoning and then describe some forms of reasoning commonly used by the courts in making their decisions.

**BASIC STEPS IN LEGAL REASONING** At times, the legal arguments set forth in court opinions are relatively simple and brief. At other times, the arguments are complex and lengthy. Regardless of the length of a legal argument, however, the basic steps of the legal reasoning process remain the same. These steps, which you can also follow when analyzing cases and case problems, form what is commonly referred to as the IRAC method of legal reasoning. IRAC is an acronym formed from the first letters of the following words: Issue, Rule, Application, and Conclusion. To apply the IRAC method, you would ask the following questions:

1. **What are the key facts and issues?** Suppose that a plaintiff comes before the court claiming assault (the act of wrongfully and intentionally making another person fearful of immediate physical harm—part of a class of actions called torts). The plaintiff claims that the defendant threatened her while she was sleeping. Although the plaintiff was unaware that she was being threatened, her roommate heard the defendant make the threat. The legal issue, or question, raised by these facts is whether the defendant’s action constitutes the tort of assault, given that the plaintiff was not aware of that action at the time it occurred.

2. **What rules of law apply to the case?** A rule of law may be a rule stated by the courts in previous decisions, a state or federal statute, or a state or federal administrative agency regulation. In our hypothetical case, the plaintiff alleges (claims) that the defendant committed a tort. Therefore, the applicable law is the common law of torts—specifically, tort law governing assault (see Chapter 6 for more detail on intentional torts). Case precedents involving similar facts and issues thus would be relevant. Often, more than one rule of law will be applicable to a case.

---

4. See Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). A later section in this chapter explains how to read legal citations.


6. See Appendix A for further instructions on how to analyze case problems.
CHAPTER 1  Introduction to Law and Legal Reasoning

3. How do the rules of law apply to the particular facts and circumstances of this case? This step is often the most difficult because each case presents a unique set of facts, circumstances, and parties. Although cases may be similar, no two cases are ever identical in all respects. Normally, judges (and lawyers and law students) try to find cases on point—previously decided cases that are similar as possible to the one under consideration. (Because of the difficulty—and importance—of this step in the legal reasoning process, we discuss it in more detail in the next subsection.)

4. What conclusion should be drawn? This step normally presents few problems. Usually, the conclusion is evident if the previous three steps have been followed carefully.

FORMS OF LEGAL REASONING Judges use many types of reasoning when following the third step of the legal reasoning process—applying the law to the facts of a particular case. Three common forms of reasoning are deductive reasoning, linear reasoning, and reasoning by analogy.

Deductive Reasoning. Deductive reasoning is sometimes called syllogistic reasoning because it employs a syllogism—a logical relationship involving a major premise, a minor premise, and a conclusion. For example, consider the hypothetical case presented earlier. In deciding whether the defendant committed assault by threatening the plaintiff while she was sleeping, the judge might point out that “under the common law of torts, an individual must be aware of a threat of danger for the threat to constitute assault” (major premise); “the plaintiff in this case was unaware of the threat at the time it occurred” (minor premise); and “therefore, the circumstances do not amount to an assault” (conclusion).

Linear Reasoning. A second form of legal reasoning that is commonly employed might be thought of as “linear” reasoning because it proceeds from one point to another, with the final point being the conclusion. To understand this form of reasoning, imagine a knotted rope, with each knot tying together separate pieces of rope to form a tightly knotted length. As a whole, the rope represents a linear progression of thought logically connecting various points, with the last point, or knot, representing the conclusion. For example, a tenant in an apartment building sues the landlord for damages for an injury resulting from an allegedly inadequately lit stairway. The court may engage in a reasoning process involving the following “pieces of rope”:

1. The landlord, who was on the premises the evening the injury occurred, testifies that none of the other nine tenants who used the stairway that night complained about the lights.

2. The fact that none of the tenants complained is the same as if they had said the lighting was sufficient.

3. That there were no complaints does not prove that the lighting was sufficient but does prove that the landlord had no reason to believe that it was not.

4. The landlord’s belief was reasonable because no one complained.

5. Therefore, the landlord acted reasonably and was not negligent with respect to the lighting in the stairway.

From this reasoning, the court concludes that the tenant is not entitled to compensation on the basis of the stairway’s allegedly insufficient lighting.

Reasoning by Analogy. Another important type of reasoning that judges use in deciding cases is reasoning by analogy. To reason by analogy is to compare the facts in the case at hand to the facts in previous cases and, to the extent that the patterns are similar, to apply the same rule of law to the present case. To the extent that the facts are unique, or “distinguishable,” different rules may apply. For example, in Case A, the court held that a driver who crossed a highway’s center line was negligent. Case B involves a driver who crossed the line to avoid hitting a child. In determining whether Case A’s rule applies in Case B, a judge would consider what the reasons were for the decision in A and whether B is sufficiently similar for those reasons to apply. If the judge holds that B’s driver is not liable, that judge must indicate why Case A’s rule is not relevant to the facts presented in Case B.

There Is No One “Right” Answer

Many people believe that there is one “right” answer to every legal question. In most legal controversies, however, there is no single correct result. Good arguments can often be made to support either side of a legal controversy. Quite often, a case does not involve a “good” person suing a “bad” person. In many cases, both parties have acted in good faith in some measure or in bad faith to some degree.

Additionally, each judge has her or his own personal beliefs and philosophy (see the discussion of
schools of jurisprudential thought later in this chapter), which shape the process of legal reasoning, at least to some extent. This means that the outcome of a particular lawsuit before a court cannot be predicted with absolute certainty. In fact, in some cases, even though the weight of the law would seem to favor one party’s position, judges, through creative legal reasoning, have found ways to rule in favor of the other party in the interests of preventing injustice.

Legal reasoning and other aspects of the common law tradition are reviewed in Concept Summary 1.2.

**The Common Law Today**

Today, the common law derived from judicial decisions continues to be applied throughout the United States. Common law doctrines and principles, however, govern only areas not covered by statutory or administrative law. In a dispute concerning a particular employment practice, for example, if a statute regulates that practice, the statute will apply rather than the common law doctrine that applied prior to the enactment of the statute.

**COURTS INTERPRET STATUTES** Even in areas governed by statutory law, though, judge-made law continues to be important because there is a significant interplay between statutory law and the common law. For example, many statutes essentially codify existing common law rules, and regulations issued by various administrative agencies usually are based, at least in part, on common law principles. Additionally, the courts, in interpreting statutory law, often rely on the common law as a guide to what the legislators intended.

Furthermore, how the courts interpret a particular statute determines how that statute will be applied. If you wanted to learn about the coverage and applicability of a particular statute, for example, you would necessarily have to locate the statute and study it. You would also need to see how the courts in your jurisdiction have interpreted and applied the statute. In other words, you would have to learn what precedents have been established in your jurisdiction with respect to that statute. Often, the applicability of a newly enacted statute does not become clear until a body of case law develops to clarify how, when, and to whom the statute applies.

**RESTATEMENTS OF THE LAW CLARIFY AND ILLUSTRATE THE COMMON LAW** The American Law Institute (ALI) has drafted and published compilations of the common law called Restatements of the Law, which generally summarize the common law rules followed by most states. There are Restatements of the Law in the areas of contracts, torts, agency,

---

**Concept Summary 1.2**

<table>
<thead>
<tr>
<th>Aspect</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Origins of the Common Law</td>
<td>The American legal system is based on the common law tradition, which originated in medieval England. Following the conquest of England in 1066 by William the Conqueror, king’s courts were established throughout England, and the common law was developed in these courts.</td>
</tr>
<tr>
<td>Legal and Equitable Remedies</td>
<td>The distinction between remedies at law (money or items of value, such as land) and remedies in equity (including specific performance, injunction, and rescission of a contractual obligation) originated in the early English courts of law and courts of equity, respectively.</td>
</tr>
<tr>
<td>Case Precedents and the Doctrine of Stare Decisis</td>
<td>In the king’s courts, judges attempted to make their decisions consistent with previous decisions, called precedents. This practice gave rise to the doctrine of stare decisis. This doctrine, which became a cornerstone of the common law tradition, obligates judges to abide by precedents established in their jurisdictions.</td>
</tr>
<tr>
<td>Stare Decisis and Legal Reasoning</td>
<td>Legal reasoning is the reasoning process used by judges in applying the law to the facts and issues of specific cases. Legal reasoning involves becoming familiar with the key facts of a case, identifying the relevant legal rules, applying those rules to the facts, and drawing a conclusion. In applying the legal rules to the facts of a case, judges may use deductive reasoning, linear reasoning, or reasoning by analogy.</td>
</tr>
</tbody>
</table>
trusts, property, restitution, security, judgments, and conflict of laws. The Restatements, like other secondary sources of law, do not in themselves have the force of law, but they are an important source of legal analysis and opinion on which judges often rely in making their decisions.

Many of the Restatements are now in their second, third, or fourth editions. We refer to the Restatements frequently in subsequent chapters of this text, indicating in parentheses the edition to which we are referring. For example, we refer to the third edition of the Restatement of the Law of Contracts as simply the Restatement (Third) of Contracts.

SECTION 4
SCHOOLS OF JURISPRUDENTIAL THOUGHT

How judges apply the law to specific cases, including disputes relating to the business world, depends in part on their philosophical approaches to law. Part of the study of law, often referred to as jurisprudence, involves learning about different schools of jurisprudential thought and discovering how the approaches to law characteristic of each school can affect judicial decision making.

Clearly, a judge’s function is not to make the laws—that is the function of the legislative branch of government—but to interpret and apply them. From a practical point of view, however, the courts play a significant role in defining the laws enacted by legislative bodies, which tend to be expressed in general terms. Judges thus have some flexibility in interpreting and applying the law. It is because of this flexibility that different courts can, and often do, arrive at different conclusions in cases that involve nearly identical issues, facts, and applicable laws.

The Natural Law School

An age-old question about the nature of law has to do with the finality of a nation’s laws, such as the laws of the United States at the present time. For example, what if a particular law is deemed to be a “bad” law by a substantial number of that nation’s citizens? Those who adhere to the natural law theory believe that a higher or universal law exists that applies to all human beings and that written laws should imitate these inherent principles. If a written law is unjust, then it is not a true (natural) law and need not be obeyed.

The natural law tradition is one of the oldest and most significant schools of jurisprudence. It dates back to the days of the Greek philosopher Aristotle (384–322 B.C.E.), who distinguished between natural law and the laws governing a particular nation. According to Aristotle, natural law applies universally to all humankind.

The notion that people have “natural rights” stems from the natural law tradition. Those who claim that a specific foreign government is depriving certain citizens of their human rights are implicitly appealing to a higher law that has universal applicability. The question of the universality of basic human rights also comes into play in the context of international business operations. For example, U.S. companies that have operations abroad often hire foreign workers as employees. Should the same laws that protect U.S. employees apply to these foreign employees? This question is rooted implicitly in a concept of universal rights that has its origins in the natural law tradition.

The Positivist School

In contrast, positive, or national, law (the written law of a given society at a particular point in time) applies only to the citizens of that nation or society. Those who adhere to legal positivism believe that there can be no higher law than a nation’s positive law. According to the positivist school, there is no such thing as “natural rights.” Rather, human rights exist solely because of laws. If the laws are not enforced, anarchy will result. Thus, whether a law is “bad” or “good” is irrelevant. The law is the law and must be obeyed until it is changed—in an orderly manner through a legitimate lawmaking process. A judge with positivist leanings probably would be more inclined to defer to an existing law than would a judge who adheres to the natural law tradition.

The Historical School

The historical school of legal thought emphasizes the evolutionary process of law by concentrating on the origin and history of the legal system. This school looks to the past to discover what the principles of contemporary law should be. The legal doctrines that have withstood the passage of time—those that have worked in the past—are deemed best suited for shaping present laws. Hence, law derives its legitimacy and authority from adhering to the standards that historical development has shown to be workable. Adherents of the historical school are more likely than those of other schools to strictly follow decisions made in past cases.
Legal Realism

In the 1920s and 1930s, a number of jurists and scholars, known as legal realists, rebelled against the historical approach to law. Legal realism is based on the idea that law is just one of many institutions in society and that it is shaped by social forces and needs. The law is a human enterprise, and judges should take social and economic realities into account when deciding cases. Legal realists also believe that the law can never be applied with total uniformity. Given that judges are human beings with unique personalities, value systems, and intellects, different judges will obviously bring different reasoning processes to the same case.

Legal realism strongly influenced the growth of what is sometimes called the sociological school of jurisprudence. This school views law as a tool for promoting justice in society. In the 1960s, for example, the justices of the United States Supreme Court played a leading role in the civil rights movement by upholding long-neglected laws calling for equal treatment for all Americans, including African Americans and other minorities. Generally, jurists who adhere to this philosophy of law are more likely to depart from past decisions than are those jurists who adhere to the other schools of legal thought.

Concept Summary 1.3 reviews the schools of jurisprudential thought.

### Concept Summary 1.3

<table>
<thead>
<tr>
<th>School of Thought</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Natural Law School</td>
<td>One of the oldest and most significant schools of legal thought. Those who believe in natural law hold that there is a universal law applicable to all human beings. This law is discoverable through reason and is of a higher order than positive (national) law.</td>
</tr>
<tr>
<td>Positivist School</td>
<td>A school of legal thought centered on the assumption that there is no law higher than the laws created by the government. Laws must be obeyed, even if they are unjust, to prevent anarchy.</td>
</tr>
<tr>
<td>Historical School</td>
<td>A school of legal thought that stresses the evolutionary nature of law and looks to doctrines that have withstood the passage of time for guidance in shaping present laws.</td>
</tr>
<tr>
<td>Legal Realism</td>
<td>A school of legal thought that advocates a less abstract and more realistic and pragmatic approach to the law and takes into account customary practices and the circumstances surrounding the particular transaction. Legal realism strongly influenced the growth of the sociological school of jurisprudence, which views law as a tool for promoting social justice.</td>
</tr>
</tbody>
</table>

**CLASSIFICATIONS OF LAW**

The law may be broken down according to several classification systems. For example, one classification system divides law into substantive law and procedural law. **Substantive law** consists of all laws that define, describe, regulate, and create legal rights and obligations. **Procedural law** consists of all laws that delineate the methods of enforcing the rights established by substantive law. Other classification systems divide law into federal law and state law, private law (dealing with relationships between private entities) and public law (addressing the relationship between persons and their governments), and national law and international law. Here we look at still another classification system, which divides law into civil law and criminal law, as well as what is meant by the term **cyberlaw**.

**Civil Law and Criminal Law**

Civil law spells out the rights and duties that exist between persons and between persons and their governments, as well as the relief available when a person’s rights are violated. Typically, in a civil case, a private party sues another private party (although
the government can also sue a party for a civil law violation) to make that other party comply with a duty or pay for the damage caused by failure to comply with a duty. Much of the law that we discuss in this text is civil law. Contract law, for example, covered in Chapters 10 through 18, is civil law. The whole body of tort law (see Chapters 6 and 7) is also civil law.

Criminal law, in contrast, is concerned with wrongs committed against the public as a whole. Criminal acts are defined and prohibited by local, state, or federal government statutes. Criminal defendants are thus prosecuted by public officials, such as a district attorney (D.A.), on behalf of the state, not by their victims or other private parties. (See Chapter 9 for a further discussion of the distinction between civil law and criminal law.)

**Cyberlaw**

As mentioned, the use of the Internet to conduct business transactions has led to new types of legal issues. In response, courts have had to adapt traditional laws to situations that are unique to our age. Additionally, legislatures at both the federal and the state levels have created laws to deal specifically with such issues. Frequently, people use the term cyberlaw to refer to the emerging body of law that governs transactions conducted via the Internet. Cyberlaw is not really a classification of law, nor is it a new type of law. Rather, it is an informal term used to describe both new laws and modifications of traditional laws that relate to the online environment. Throughout this book, you will read how the law in a given area is evolving to govern specific legal issues that arise in the online context.

### Finding Statutory and Administrative Law

When Congress passes laws, they are collected in a publication titled *United States Statutes at Large*. When state legislatures pass laws, they are collected in similar state publications. Most frequently, however, laws are referred to in their codified form—that is, the form in which they appear in the federal and state codes. In these codes, laws are compiled by subject.

**UNITED STATES CODE** The *United States Code (U.S.C.)* arranges all existing federal laws by broad subject. Each of the fifty subjects is given a title and a title number. For example, laws relating to commerce and trade are collected in Title 15, “Commerce and Trade.” Titles are subdivided by sections. A citation to the U.S.C. includes both title and section numbers. Thus, a reference to “15 U.S.C. Section 1” means that the statute can be found in Section 1 of Title 15. (“Section” may be designated by the symbol §, and “Sections,” by §§.) In addition to the print publication of the U.S.C., the federal government provides a searchable online database of the *United States Code* at [www.gpoaccess.gov/uscode](http://www.gpoaccess.gov/uscode).

Commercial publications of federal laws and regulations are also available. For example, West Group publishes the *United States Code Annotated (U.S.C.A.)*. The U.S.C.A. contains the official text of the U.S.C., plus notes (annotations) on court decisions that interpret and apply specific sections of the statutes. The U.S.C.A. also includes additional research aids, such as cross-references to related statutes, historical notes, and library references. A citation to the U.S.C.A. is similar to a citation to the U.S.C.: “15 U.S.C.A. Section 1.”

**STATE CODES** State codes follow the U.S.C. pattern of arranging law by subject. They may be called codes, revisions, compilations, consolidations, general statutes, or statutes, depending on the preferences of the states. In some codes, subjects are designated by number. In others, they are designated by name. For example, “13 Pennsylvania Consolidated Statutes Section 1101” means that the statute can be found in Title 13, Section 1101, of the Pennsylvania code. “California Commercial Code Section 1101” means that the statute can be found under the subject heading “Commercial Code” of the California code in Section 1101. Abbreviations are often used. For example, “13 Pennsylvania Consolidated Statutes Section 1101” is abbreviated “13 Pa. C.S. § 1101,” and “California Commercial Code Section 1101” is abbreviated “Cal. Com. Code § 1101.”

### Section 6

**HOW TO FIND PRIMARY SOURCES OF LAW**

This text includes numerous references, or citations, to primary sources of law—federal and state statutes, the U.S. Constitution and state constitutions, regulations issued by administrative agencies, and court cases. A citation identifies the publication in which a legal authority—such as a statute or a court decision or other source—can be found. In this section, we explain how you can use citations to find primary sources of law. Note that in addition to being published in sets of books, as described next, most federal and state laws and case decisions are available online.
Administrative Rules

Rules and regulations adopted by federal administrative agencies are initially published in the Federal Register, a daily publication of the U.S. government. Later, they are incorporated into the Code of Federal Regulations (C.F.R.). Like the U.S.C., the C.F.R. is divided into fifty titles. Rules within each title are assigned section numbers. A full citation to the C.F.R. includes title and section numbers. For example, a reference to “17 C.F.R. Section 230.504” means that the rule can be found in Section 230.504 of Title 17.

Finding Case Law

Before discussing the case reporting system, we need to look briefly at the court system (which will be discussed in detail in Chapter 2). There are two types of courts in the United States, federal courts and state courts. Both the federal and the state court systems consist of several levels, or tiers, of courts. Trial courts, in which evidence is presented and testimony given, are on the bottom tier (which also includes lower courts that handle specialized issues). Decisions from a trial court can be appealed to a higher court, which commonly is an intermediate court of appeals, or an appellate court. Decisions from these intermediate courts of appeals may be appealed to an even higher court, such as a state supreme court or the United States Supreme Court.

State Court Decisions

Most state trial court decisions are not published in books (except in New York and a few other states, which publish selected trial court opinions). Decisions from state trial courts are typically filed in the office of the clerk of the court, where the decisions are available for public inspection. Written decisions of the appellate, or reviewing, courts, however, are published and distributed (both in print and via the Internet). As you will note, most of the state court cases presented in this book are from state appellate courts. The reported appellate decisions are published in volumes called reports or reporters, which are numbered consecutively. State appellate court decisions are found in the state reporters of that particular state. Official reports are published by the state, whereas unofficial reports are privately published.

Regional Reporters. State court opinions appear in regional units of the National Reporter System, published by West Group. Most lawyers and libraries have the West reporters because they report cases more quickly and are distributed more widely than the state-published reporters. In fact, many states have eliminated their own reporters in favor of West’s National Reporter System. The National Reporter System divides the states into the following geographic areas: Atlantic (A. or A.2d), North Eastern (N.E. or N.E.2d), North Western (N.W. or N.W.2d), Pacific (P., P.2d, or P.3d), South Eastern (S.E. or S.E.2d), South Western (S.W., S.W.2d, or S.W.3d), and Southern (So., So.2d, or So.3d). (The 2d and 3d in the preceding abbreviations refer to Second Series and Third Series, respectively.) The states included in each of these regional divisions are indicated in Exhibit 1–4, which illustrates West’s National Reporter System.

Case Citations. After appellate decisions have been published, they are normally referred to (cited) by the name of the case; the volume, name, and page number of the state’s official reporter (if different from West’s National Reporter System); the volume, name, and page number of the National Reporter; and the volume, name, and page number of any other selected reporter. (Citing a reporter by volume number, name, and page number, in that order, is common to all citations; often, as in this book, the year the decision was issued will be included in parentheses, just after the citations to reporters.) When more than one reporter is cited for the same case, each reference is called a parallel citation.

Note that some states have adopted a “public domain citation system” that uses a somewhat different format for the citation. For example, in Wisconsin, a Wisconsin Supreme Court decision might be designated “2010 WI 40,” meaning that the case was decided in the year 2010 by the Wisconsin Supreme Court and was the fortieth decision issued by that court during that year. Parallel citations to the Wisconsin Reports and West’s North Western Reporter are still included after the public domain citation.

Consider the following case citation: State v. Favoccia, 119 Conn.App. 1, 986 A.2d 1081 (2010). We see that the opinion in this case can be found in Volume 119 of the official Connecticut Appellate Reports, on page 1. The parallel citation is to Volume 986 of the Atlantic Reporter, Second Series, page 1,081. In presenting appellate opinions in this text (starting in Chapter 2), in addition to the reporter, we give the name of the court hearing the case and the year of the court’s decision. Sample citations to state court decisions are explained in Exhibit 1–5 on pages 18–20.

Federal Court Decisions

Federal district (trial) court decisions are published unofficially in West’s
### EXHIBIT 1-4 • West’s National Reporter System—Regional/Federal

<table>
<thead>
<tr>
<th>Regional Reporters</th>
<th>Coverage Beginning</th>
<th>Coverage</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Eastern Reporter (N.E. or N.E.2d)</td>
<td>1885</td>
<td>Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin.</td>
</tr>
<tr>
<td>North Western Reporter (N.W. or N.W.2d)</td>
<td>1879</td>
<td>Nevada, New Mexico, Oklahoma, Utah, Washington, and Wyoming.</td>
</tr>
<tr>
<td>South Eastern Reporter (S.E. or S.E.2d)</td>
<td>1887</td>
<td>Georgia, North Carolina, South Carolina, Virginia, and West Virginia.</td>
</tr>
<tr>
<td>South Western Reporter (S.W., S.W.2d, or S.W.3d)</td>
<td>1886</td>
<td>Arkansas, Kentucky, Missouri, Tennessee, and Texas.</td>
</tr>
<tr>
<td>Southern Reporter (So., So.2d, or So.3d)</td>
<td>1887</td>
<td>Alabama, Florida, Louisiana, and Mississippi.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Federal Reporters</th>
<th>Coverage Beginning</th>
<th>Coverage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Reporter (F, F.2d, or F.3d)</td>
<td>1880</td>
<td>U.S. Circuit Courts from 1880 to 1912; U.S. Commerce Court from 1911 to 1913; U.S. District Courts from 1880 to 1932; U.S. Court of Claims (now called U.S. Court of Federal Claims) from 1929 to 1932 and since 1960; U.S. Courts of Appeals since 1891; U.S. Court of Customs and Patent Appeals since 1892; U.S. Court of Customs Court of Appeals from 1893; U.S. Court of Customs Court of Appeals from 1932; U.S. Customs Court since 1956.</td>
</tr>
<tr>
<td>Federal Supplement (F.Supp. or F.Supp.2d)</td>
<td>1932</td>
<td>U.S. Court of Claims from 1932 to 1960; U.S. District Courts since 1932; U.S. Customs Court since 1956.</td>
</tr>
<tr>
<td>Supreme Court Reporter (S.Ct.)</td>
<td>1882</td>
<td>United States Supreme Court since the October term of 1882.</td>
</tr>
</tbody>
</table>

Federal Supplement (F.Supp. or F.Supp.2d), and opinions from the circuit courts of appeals (reviewing courts) are reported unofficially in West’s Federal Reporter (F, F.2d, or F.3d). Cases concerning federal bankruptcy law are published unofficially in West’s Bankruptcy Reporter (Bankr. or B.R.).
EXHIBIT 1–5 • How to Read Citations

STATE COURTS

279 Neb. 443, 778 N.W.2d 115 (2010)

N.W. is the abbreviation for West’s publication of state court decisions rendered in the North Western Reporter of the National Reporter System. 2d indicates that this case was included in the Second Series of that reporter. The number 778 refers to the volume number of the reporter; the number 115 refers to the page in that volume on which this case begins.

181 Cal.App.4th 161, 104 Cal.Rptr.3d 319 (2010)

Cal.Rptr. is the abbreviation for West’s unofficial reports—titled California Reporter—of the decisions of California courts.

14 N.Y.3d 100, 896 N.Y.S.2d 741 (2010)

N.Y. is the abbreviation for New York Reports, New York’s official reports of the decisions of its court of appeals. The New York Court of Appeals is the state’s highest court, analogous to other states’ supreme courts. (In New York, a supreme court is a trial court.)


Ga.App. is the abbreviation for Georgia Appeals Reports, Georgia’s official reports of the decisions of its court of appeals.

FEDERAL COURTS

U.S. 130 S.Ct. 693, ___ L.Ed.2d ___ (2010)

L.Ed. is an abbreviation for Lawyers’ Edition of the Supreme Court Reports, an unofficial edition of decisions of the United States Supreme Court.

S.Ct. is the abbreviation for West’s unofficial reports—titled Supreme Court Reporter—of decisions of the United States Supreme Court.

U.S. is the abbreviation for United States Reports, the official edition of the decisions of the United States Supreme Court. The blank lines in this citation (or any other citation) indicate that the appropriate volume of the case reporter has not yet been published and no page number is available.

The case names have been deleted from these citations to emphasize the publications. It should be kept in mind, however, that the name of a case is as important as the specific page numbers in the volumes in which it is found. If a citation is incorrect, the correct citation may be found in a publication’s index of case names. In addition to providing a check on errors in citations, the date of a case is important because the value of a recent case as an authority is likely to be greater than that of older cases from the same court.

The official edition of the United States Supreme Court decisions is the United States Reports (U.S.), which is published by the federal government. Unofficial editions of Supreme Court cases include West’s Supreme Court Reporter (S.Ct.) and the Lawyers’ Edition of the Supreme Court Reports (L.Ed. or L.Ed.2d). Sample citations for federal court decisions are also listed and explained in Exhibit 1–5.
### EXHIBIT 1-5 • How to Read Citations, Continued

**FEDERAL COURTS (Continued)**

<table>
<thead>
<tr>
<th>Citation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>590 F.3d 259 (4th Cir. 2010)</td>
<td><em>4th Cir.</em> is an abbreviation denoting that this case was decided in the U.S. Court of Appeals for the Fourth Circuit.</td>
</tr>
<tr>
<td>683 F.Supp.2d 918 (W.D.Wis. 2010)</td>
<td><em>W.D.Wis.</em> is an abbreviation indicating that the U.S. District Court for the Western District of Wisconsin decided this case.</td>
</tr>
</tbody>
</table>

**ENGLISH COURTS**

<table>
<thead>
<tr>
<th>Citation</th>
<th>Description</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Citation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 U.S.C. Section 1961(1)(A)</td>
<td><em>U.S.C.</em> denotes <em>United States Code,</em> the codification of United States Statutes at Large. The number 18 refers to the statute’s U.S.C. title number and 1961 to its section number within that title. The number 1 in parentheses refers to a subsection within the section, and the letter A in parentheses to a subsection within the subsection.</td>
</tr>
<tr>
<td>UCC 2–206(1)(b)</td>
<td><em>UCC</em> is an abbreviation for <em>Uniform Commercial Code.</em> The first number 2 is a reference to an article of the UCC, and 206 to a section within that article. The number 1 in parentheses refers to a subsection within the section, and the letter b in parentheses to a subsection within the subsection.</td>
</tr>
<tr>
<td>Restatement (Third) of Torts, Section 6</td>
<td><em>Restatement (Third) of Torts</em> refers to the third edition of the American Law Institute’s <em>Restatement of the Law of Torts.</em> The number 6 refers to a specific section.</td>
</tr>
<tr>
<td>17 C.F.R. Section 230.505</td>
<td><em>C.F.R.</em> is an abbreviation for <em>Code of Federal Regulations,</em> a compilation of federal administrative regulations. The number 17 designates the regulation’s title number, and 230.505 designates a specific section within that title.</td>
</tr>
</tbody>
</table>

**STATUTORY AND OTHER CitATIONS**

**UNPUBLISHED OPINIONS** Many court opinions that are not yet published or that are not intended for publication can be accessed through Westlaw® (abbreviated in citations as “WL”), an online legal database maintained by West Group. When no citation to a published reporter is available for cases cited in this text, we give the WL citation (see Exhibit 1-5 on the next page for an example).
## EXHIBIT 1–5 • How to Read Citations, Continued

<table>
<thead>
<tr>
<th>WESTLAW® CITATIONS&lt;sup&gt;b&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010 WL 348005</td>
</tr>
</tbody>
</table>

WL is an abbreviation for Westlaw. The number 2010 is the year of the document that can be found with this citation in the Westlaw database. The number 348005 is a number assigned to a specific document. A higher number indicates that a document was added to the Westlaw database later in the year.

### UNIFORM RESOURCE LOCATORS (URLs)

#### http://www.westlaw.com<sup>c</sup>

The suffix .com is the top level domain (TLD) for this Web site. The TLD .com is an abbreviation for “commercial,” which usually means that a for-profit entity hosts (maintains or supports) this Web site.

Westlaw is the host name—the part of the domain name selected by the organization that registered the name. In this case, West registered the name. This Internet site is the Westlaw database on the Web.

www is an abbreviation for “World Wide Web.” The Web is a system of Internet servers that support documents formatted in HTML (hypertext markup language) and other formats as well.

#### http://www.uscourts.gov

This is “The Federal Judiciary Home Page.” The host is the Administrative Office of the U.S. Courts. The TLD .gov is an abbreviation for “government.” This Web site includes information and links from, and about, the federal courts.

#### http://www.law.cornell.edu/index.html

This is the host name for a Web site that contains the Internet publications of the Legal Information Institute (LII), which is a part of Cornell Law School. The LII site includes a variety of legal materials and links to other legal resources on the Internet. The TLD .edu is an abbreviation for “educational institution” (a school or a university).

#### http://www.ipl2.org/div/news

This part of a URL points to a static news page at this Web site, which provides links to online newspapers from around the world.

div is an abbreviation for “division,” which is the way that ipl2 tags the content on its Web site as relating to a specific topic.

The site ipl2 was formed from the merger of the Internet Public Library and the Librarians’ Internet Index. It is an online service that provides reference resources and links to other information services on the Web. The site is supported chiefly by the iSchool at Drexel College of Information Science and Technology. The TLD .org is an abbreviation for “organization” (normally nonprofit).

---

<sup>b</sup> Many court decisions that are not yet published or that are not intended for publication can be accessed through Westlaw, an online legal database.

<sup>c</sup> The basic form for a URL is “service://hostname/path.” The Internet service for all of the URLs in this text is http (hypertext transfer protocol). Because most Web browsers add this prefix automatically when a user enters a host name or a hostname/path, we have generally omitted the http:// from the URLs listed in this text.

---

**OLD CASE LAW** On a few occasions, this text cites opinions from old, classic cases dating to the nineteenth century or earlier; some of these are from the English courts. The citations to these cases may not conform to the descriptions given above because the reporters in which they were originally published were often known by the names of the persons who compiled the reporters.
HOW TO READ AND UNDERSTAND CASE LAW

The decisions made by the courts establish the boundaries of the law as it applies to almost all business relationships. It thus is essential that businesspersons know how to read and understand case law. The cases that we present in this text have been condensed from the full text of the courts’ opinions and are presented in a special format. In approximately two-thirds of the cases, we have summarized the background and facts, as well as the court’s decision and remedy, in our own words and have included only selected portions of the court’s opinion (“in the language of the court”). In the remaining one-third of the cases, we have provided a longer excerpt from the court’s opinion without summarizing the background and facts or decision and remedy. The following sections will provide useful insights into how to read and understand case law.

Case Titles and Terminology

The title of a case, such as Adams v. Jones, indicates the names of the parties to the lawsuit. The v. in the case title stands for versus, which means “against.” In the trial court, Adams was the plaintiff—the person who filed the suit. Jones was the defendant. If the case is appealed, however, the appellate court will sometimes place the name of the party appealing the decision first, so the case may be called Jones v. Adams if Jones is appealing. Because some appellate courts retain the trial court order of names, it is often impossible to distinguish the plaintiff from the defendant in the title of a reported appellate court decision. You must carefully read the facts of each case to identify the parties. Otherwise, the discussion by the appellate court may be difficult to understand.

The following terms, phrases, and abbreviations are frequently encountered in court opinions and legal publications. Because it is important to understand what is meant by these terms, phrases, and abbreviations, we define and discuss them here.

PARTIES TO LAWSUITS As mentioned previously, the party initiating a lawsuit is referred to as the plaintiff or petitioner, depending on the nature of the action, and the party against whom a lawsuit is brought is the defendant or respondent. Lawsuits frequently involve more than one plaintiff and/or defendant.

When a case is appealed from the original court or jurisdiction to another court or jurisdiction, the party appealing the case is called the appellant. The appellee is the party against whom the appeal is taken. (In some appellate courts, the party appealing a case is referred to as the petitioner, and the party against whom the suit is brought or appealed is called the respondent.)

JUDGES AND JUSTICES The terms judge and justice are usually synonymous and represent two designations given to judges in various courts. All members of the United States Supreme Court, for example, are referred to as justices, and justice is the formal title often given to judges of appellate courts, although this is not always the case. In New York, a justice is a judge of the trial court (which is called the Supreme Court), and a member of the Court of Appeals (the state’s highest court) is called a judge. The term justice is commonly abbreviated to J., and justices, to JJ. A Supreme Court case might refer to Justice Sotomayor as Sotomayor, J., or to Chief Justice Roberts as Roberts, C.J.

DECISIONS AND OPINIONS Most decisions reached by reviewing, or appellate, courts are explained in written opinions. The opinion contains the court’s reasons for its decision, the rules of law that apply, and the judgment. When all judges or justices unanimously agree on an opinion, the opinion is written for the entire court and can be deemed a unanimous opinion. When there is not a unanimous agreement, a majority opinion is written; the majority opinion outlines the view supported by the majority of the judges or justices deciding the case.

Often, a judge or justice who wishes to make or emphasize a point that was not made or emphasized in the unanimous or majority opinion will write a concurring opinion. This means that the judge or justice agrees, or concurs, with the majority’s decision, but for different reasons. When there is not a unanimous opinion, a dissenting opinion presents the views of one or more judges who disagree with the majority’s decision. The dissenting opinion is important because it may form the basis of the arguments used years later in overruling the precedential majority opinion. Occasionally, a court issues a per curiam (Latin for “by the court”) opinion, which does not indicate the judge or justice who authored the opinion.

A Sample Court Case

To illustrate the various elements contained in a court opinion, we present an annotated court
opinion in Exhibit 1–6 on pages 23–25. The opinion is from an actual case decided by the U.S. Court of Appeals for the Seventh Circuit in 2010.

**BACKGROUND OF THE CASE** Kevin T. Singer, an inmate at a Wisconsin correctional facility, was a devoted player of Dungeons and Dragons (D&D), a popular fantasy role-playing game. While incarcerated, Singer was able to order and possess D&D materials for two years. In November 2004, however, the prison’s gang expert received an anonymous letter stating that Singer and three other inmates were trying to recruit others to join a “gang” dedicated to playing D&D. Prison officials immediately searched Singer’s cell, confiscated all of his D&D materials and prohibited him and other inmates from playing D&D. Singer filed a lawsuit in federal district court against the Wisconsin prison alleging that these actions violated his free speech and due process rights. The district court found in favor of the prison when it concluded that the D&D ban was rationally related to a legitimate government interest. Singer appealed to the U.S. Court of Appeals for the Seventh Circuit.

**EDITORIAL PRACTICE** You will note that triple asterisks (*) and quadruple asterisks (**) frequently appear in the opinion. The triple asterisks indicate that we have deleted a few words or sentences from the opinion for the sake of readability or brevity. Quadruple asterisks mean that an entire paragraph (or more) has been omitted. Additionally, when the opinion cites another case or legal source, the citation to the case or other source has been omitted to save space and to improve the flow of the text. These editorial practices are continued in the other court opinions presented in this book. In addition, whenever we present a court opinion that includes a term or phrase that may not be readily understandable, a bracketed definition or paraphrase has been added.

**BRIEFING CASES** Knowing how to read and understand court opinions and the legal reasoning used by the courts is an essential step in undertaking accurate legal research. A further step is “briefing,” or summarizing, the case. Legal researchers routinely brief cases by reducing the texts of the opinions to their essential elements. Generally, when you brief a case, you first summarize the background and facts of the case, as we have done for the cases presented within this text. You then indicate the issue (or issues) before the court. An important element in the case brief is, of course, the court’s decision on the issue and the legal reasoning used by the court in reaching that decision. Detailed instructions on how to brief a case are given in Appendix A, which also includes a briefed version of the sample court case presented in Exhibit 1–6.
CHAPTER 1  Introduction to Law and Legal Reasoning

EXHIBIT 1–6 • A Sample Court Case

SINGER v. RAEMISCH
United States Court of Appeals,
Seventh Circuit,
593 F.3d 529 (2010).

TINDER, Circuit Judge.

* * * *

I. Background

Kevin T. Singer is an inmate at Wisconsin’s Waupun Correctional Institution. He is also a devoted player of D&D [Dungeons and Dragons], a fantasy role-playing game in which players collectively develop a story around characters whose personae they adopt.

* * * Singer was able to order and possess his D&D materials without incident from June 2002 until November 2004. This all changed on or about November 14, 2004, when Waupun’s long-serving Disruptive Group Coordinator, Captain Bruce Muraski, received an anonymous letter from an inmate. The letter expressed concern that Singer and three other inmates were forming a D&D gang and were trying to recruit others to join by passing around their D&D publications and touting the “rush” they got from playing the game. Muraski, Waupun’s expert on gang activity, decided to heed the letter’s advice and “check into this gang before it gets out of hand.”

On November 15, 2004, Muraski ordered Waupun staff to search the cells of the inmates named in the letter. The search of Singer’s cell turned up twenty-one books, fourteen magazines, and Singer’s handwritten D&D manuscript, all of which were confiscated. * * * In a December 6, 2004, letter to Singer, Muraski informed Singer that “inmates are not allowed to engage in or possess written material that details rules, codes, dogma of games/activities such as ‘Dungeons and Dragons’ because it promotes fantasy role playing, competitive hostility, violence, addictive escape behaviors, and possible gambling.”

Continued
To lodge a complaint is to file the appropriate legal documents with the clerk of a court to initiate a lawsuit.

The First Amendment to the U.S. Constitution guarantees the right of free speech—to express one’s views without governmental restrictions. The Fifth and Fourteenth Amendments guarantee the right to due process—to enjoy life, liberty, and property without unfair government interference.

An affidavit is a written or printed voluntary statement of fact, confirmed by the oath or affirmation of the party making it and made before a person having the authority to administer the oath or affirmation.

A summary judgment is a judgment that a court enters without continuing a trial. This judgment can be entered only if no facts are in dispute and the only question is how the law applies to the facts.

The second major section of the opinion responds to the plaintiff’s appeal.

The court applies the principle established by the Turner case—which the United States Supreme Court decided—to the facts of the Singer case. The rulings in cases decided by higher courts are binding on the decisions of lower courts, according to the doctrine of stare decisis (see page 9).

Penological interests relate to the branch of criminology dealing with prison management and the treatment of offenders.

**EXHIBIT 1–6 • A Sample Court Case, Continued**

**Singer lodged a complaint in federal court.** He alleged that his free speech and due process rights were violated when Waupun officials confiscated his D&D materials and enacted a categorical ban against D&D.

Singer collected fifteen affidavits—from other inmates, his brother, and three role-playing game experts. He contends that the affidavits demonstrate that there is no connection between D&D and gang activity. The prison officials countered Singer’s affidavit evidence by submitting an affidavit from Captain Bruce Muraski. Muraski testified that fantasy role-playing games like D&D have “been found to promote competitive hostility, violence, and addictive escape behavior, which can compromise not only the inmate’s rehabilitation and effects of positive programming, but endanger the public and jeopardize the safety and security of the institution.”

The prison officials moved for summary judgment on all of Singer’s claims. The district court granted the motion in full, but Singer limits his appeal to the foreclosure of his First Amendment claims.

II. Discussion

In [Turner v. Safley], the [United States] Supreme Court determined that prison regulations that restrict inmates’ constitutional rights are nevertheless valid if they are reasonably related to legitimate penological interests.

[Singer] attacks the district court’s conclusion that the D&D ban bears a rational relationship to a legitimate governmental interest.

The sole evidence the prison officials have submitted on this point is the affidavit of Captain Muraski, the gang specialist. Muraski testified that Waupun’s prohibition on role-playing and fantasy games was intended to promote prison security because co-operative games can mimic
something that is organized by a rigid, ranked order—here, by a ranked order of inmates depending on who is winning the most.

A trove is a collection or treasure.

An affiant is a person who swears to an affidavit.

In the third major section of the opinion, the court states its decision and gives its order.

A large quantum is a sizeable quantity.

To affirm a judgment is to declare that it is valid.

---

thereof. * * * At bottom, his testimony about this policy aim highlighted Waupun’s worries about cooperative activity among inmates, particularly that carried out in an organized, hierarchical fashion * * *. He [also] testified that D&D can “foster an inmate’s obsession with escaping from the real life, correctional environment, fostering hostility, violence and escape behavior,” which in turn “can compromise not only the inmate’s rehabilitation and effects of positive programming but also endanger the public and jeopardize the safety and security of the institution.”

* * * *

It is true that Singer procured an impressive trove of affidavit testimony, including some from role-playing game experts, but none of his affiants’ testimony addressed the inquiry at issue here. The question is not whether D&D has led to gang behavior in the past; the prison officials concede that it has not. The question is whether the prison officials are rational in their belief that, if left unchecked, D&D could lead to gang behavior among inmates and undermine prison security in the future. Singer’s affiants * * * lack the qualifications necessary to determine whether the relationship between the D&D ban and the maintenance of prison security is so remote as to render the policy arbitrary or irrational. In other words, none of them is sufficiently versed in prison security concerns to raise a genuine issue of material fact about their relationship to D&D.

* * * *

III. Conclusion

Despite Singer’s large quantum of affidavit testimony * * *, he has failed to demonstrate a genuine issue of material fact concerning the reasonableness of the relationship between Waupun’s D&D ban and the prison’s clearly legitimate penological interests. The district court’s grant of summary judgment is therefore AFFIRMED.
Suppose that the California legislature passes a law that severely restricts carbon dioxide emissions from automobiles in that state. A group of automobile manufacturers files suit against the state of California to prevent the enforcement of the law. The automakers claim that a federal law already sets fuel economy standards nationwide and that fuel economy standards are essentially the same as carbon dioxide emission standards. According to the automobile manufacturers, it is unfair to allow California to impose more stringent regulations than those set by the federal law. Using the information presented in the chapter, answer the following questions.

1. Who are the parties (the plaintiffs and the defendant) in this lawsuit?
2. Are the plaintiffs seeking a legal remedy or an equitable remedy?
3. What is the primary source of the law that is at issue here?
4. Where would you look to find the relevant California and federal laws?

**DEBATE THIS:** Under the doctrine of stare decisis, courts are obligated to follow the precedents established in their jurisdiction unless there is a compelling reason not to. Should U.S. courts continue to adhere to this common law principle, given that our government now regulates so many areas by statute?

**1–1. Sources of Law** How does statutory law come into existence? How does it differ from the common law?

**1–2. QUESTION WITH SAMPLE ANSWER: Schools of Jurisprudential Thought.**

After World War II, an international tribunal of judges convened at Nuremberg, Germany and convicted several Nazis of “crimes against humanity.” Assuming that these convicted war criminals had not disobeyed any law of their country and had merely been following their government’s orders, what law had they violated? Explain.

* For a sample answer to Question 1–2, go to Appendix I at the end of this text.

**1–3. Reading Citations** Assume that you want to read the entire court opinion in the case of *Pinard v. Dandy Lions,*
CHAPTER 1 Introduction to Law and Legal Reasoning

(a) Suppose that Rabe wants Sanchez to perform the contract as promised. What remedy would Rabe seek from the court?

(b) Now suppose that Rabe wants to cancel the contract because Sanchez fraudulently misrepresented the painting as an original Van Gogh when in fact it is a copy. What remedy would Rabe seek?

(c) Will the remedy Rabe seeks in either situation be a remedy at law or a remedy in equity? What is the difference between legal and equitable remedies?

(d) Suppose that the trial court finds in Rabe's favor and grants one of these remedies. Sanchez then appeals the decision to a higher court. On appeal, which party will be the appellant (or petitioner), and which party will be the appellee (or respondent)?

(a) In this lawsuit, who is the plaintiff and who is the defendant?

(b) Should judges ever have the power to look beyond the written "letter of the law" in making their decisions? Why or why not?

1–5. Stare Decisis In this chapter, we stated that the doctrine of stare decisis “became a cornerstone of the English and American judicial systems.” What does stare decisis mean, and why has this doctrine been so fundamental to the development of our legal tradition?

1–6. Court Opinions What is the difference between a concurring opinion and a majority opinion? Between a concurring opinion and a dissenting opinion? Why do judges and justices write concurring and dissenting opinions, given that these opinions will not affect the outcome of the case at hand, which has already been decided by majority vote?

1–7. The Common Law Tradition Courts can overturn precedents and thus change the common law. Should judges have the same authority to overrule statutory law? Explain.

1–8. Schools of Judicial Thought “The judge’s role is not to make the law but to uphold and apply the law.” Do you agree or disagree with this statement? Discuss fully the reasons for your answer.

1–9. Remedies Assume that Arthur Rabe is suing Xavier Sanchez for breaching a contract in which Sanchez promised to sell Rabe a painting by Vincent van Gogh for $3 million.

(a) In this lawsuit, who is the plaintiff and who is the defendant?

(b) Suppose that Rabe wants Sanchez to perform the contract as promised. What remedy would Rabe seek from the court?

(c) Now suppose that Rabe wants to cancel the contract because Sanchez fraudulently misrepresented the painting as an original Van Gogh when in fact it is a copy. What remedy would Rabe seek?

(d) Will the remedy Rabe seeks in either situation be a remedy at law or a remedy in equity? What is the difference between legal and equitable remedies?

(e) Suppose that the trial court finds in Rabe’s favor and grants one of these remedies. Sanchez then appeals the decision to a higher court. On appeal, which party will be the appellant (or petitioner), and which party will be the appellee (or respondent)?


On July 5, 1884, Dudley, Stephens, and Brooks—all able-bodied English seamen—and a teenage English boy were cast adrift in a lifeboat following a storm at sea. They had no water with them in the boat, and all they had for sustenance were two one-pound tins of turnips. On July 24, Dudley proposed that one of the four in the lifeboat be sacrificed to save the others. Stephens agreed with Dudley, but Brooks refused to consent—and the boy was never asked for his opinion. On July 25, Dudley killed the boy, and the three men then fed on the boy’s body and blood. Four days later, a passing vessel rescued the men. They were taken to England and tried for the murder of the boy. If the men had not fed on the boy’s body, they would probably have died of starvation within the four-day period. The boy, who was in a much weaker condition, would likely have died before the rest. [Regina v. Dudley and Stephens, 14 Q.B.D. (Queen’s Bench Division, England) 273 (1884)]

(a) The basic question in this case is whether the survivors should be subject to penalties under English criminal law, given the men’s unusual circumstances. Were the defendants’ actions necessary but unethical? Explain your reasoning. What ethical issues might be involved here?

(b) Should judges ever have the power to look beyond the written “letter of the law” in making their decisions? Why or why not?
Today, in the United States there are fifty-two court systems—
one for each of the fifty states,
one for the District of Columbia, and a federal system. Keep in mind that the
federal courts are not superior to the state courts; they are simply an independent system of courts, which derives its authority from Article III, Section 2,
of the U.S. Constitution. By the power given to it under Article I of the U.S.
Constitution, Congress has extended the federal court system beyond the
boundaries of the United States to U.S. territories such as Guam, Puerto Rico,
and the Virgin Islands.1 As we shall see, the United States Supreme Court is the
final controlling voice over all of these fifty-two systems, at least when ques-
tions of federal law are involved.

Every businessperson will likely face a lawsuit at some time in his or her career. Thus, anyone involved in
business needs to have an understanding of the American court systems,
as well as the various methods of dispute resolution that can be pursued outside the courts. In this chapter, after
examining the judiciary’s role in the American governmental system, we
discuss some basic requirements that must be met before a party may bring
a lawsuit before a particular court. We then look at the court systems of
the United States in some detail. We conclude the chapter with an overview
of some alternative methods of settling disputes, including online dispute
resolution.

SECTION 1
THE JUDICIARY’S ROLE
IN AMERICAN GOVERNMENT

As you learned in Chapter 1, the body of American law includes the federal and state constitutions, statutes passed by legislative bodies, administrative law, and the case decisions and legal principles that form the common law. These laws would be meaningless, however, without the courts to interpret and apply them. This is the essential role of the judiciary—the courts—in the American governmental system: to interpret the laws and apply them to specific situations. (See this chapter’s Insight into Ethics feature for a discussion of how the availability of “unpublished opinions” over the Internet is changing what some judges consider to be persuasive precedent.)

As the branch of government entrusted with interpreting the laws, the judiciary can decide, among other things, whether the laws or actions of the other two branches are constitutional. The process for making such a determination is known as judicial review. The power of judicial review enables the judicial branch to act as a check on the other two branches of government, in line with the system of checks and balances established by the U.S. Constitution.2

The power of judicial review is not mentioned in the U.S. Constitution (although many constitutional scholars conclude that the founders intended the judiciary to have this power). Rather, this power was explicitly established by the United States Supreme Court in 1803 by its decision in Marbury v. Madison.3

In that decision, the Court stated, “It is emphatically

1. In Guam and the Virgin Islands, territorial courts serve as both federal courts and state courts; in Puerto Rico, they serve only as federal courts.

2. In a broad sense, judicial review occurs whenever a court “reviews” a case or legal proceeding—as when an appellate court reviews a lower court’s decision. When discussing the judiciary’s role in American government, however, the term judicial review refers to the power of the judiciary to decide whether the actions of the other two branches of government violate the U.S. Constitution.

3. 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).
CHAPTER 2 Courts and Alternative Dispute Resolution

the province and duty of the Judicial Department to say what the law is. . . . If two laws conflict with each other, the Courts must decide on the operation of each. . . . [I]f both [a] law and the Constitution apply to a particular case, . . . the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.” Since the Marbury v. Madison decision, the power of judicial review has remained unchallenged. Today, this power is exercised by both federal and state courts.

SECTION 2 BASIC JUDICIAL REQUIREMENTS

Before a lawsuit can be brought before a court, certain requirements must be met. These requirements relate to jurisdiction, venue, and standing to sue. We examine each of these important concepts here.

INSIGHT INTO ETHICS
How the Internet Is Expanding Precedent

The notion that courts should rely on precedents to decide the outcome of similar cases has long been a cornerstone of U.S. law. Nevertheless, the availability of “unpublished opinions” over the Internet is changing what the law considers to be precedent. An unpublished opinion is a decision made by an appellate court that is not intended for publication in a reporter (the bound books that contain court opinions). Courts traditionally have not considered unpublished opinions to be “precedent,” binding or persuasive, and attorneys often have not been allowed to refer to these decisions in their arguments.

Increased Online Availability
The number of court decisions not published in printed books has risen dramatically in recent years. Nearly 80 percent of the decisions of the federal appellate courts are unpublished, and the number is equally high in some state court systems. Even though certain decisions are not intended for publication, they are posted (“published”) almost immediately on online legal databases, such as Westlaw and Lexis. With the proliferation of free legal databases and court Web sites, the general public also has almost instant access to the unpublished decisions of most courts. This situation has caused many to question why these opinions have no precedential effect.

Should Unpublished Decisions Establish Precedent?
Before the advent of the Internet, not considering unpublished decisions as precedent might have been justified on the ground of fairness. How could lawyers know about unpublished decisions if they were not printed in the case reporters? Now that opinions are so readily available on the Web, however, this justification is no longer valid. Moreover, it now seems unfair not to consider these decisions as precedent, given that they are so publicly accessible. Some claim that unpublished decisions could make bad precedents because these decisions frequently are written by staff attorneys and law clerks rather than by judges, so the reasoning may be inferior. If an unpublished decision is considered merely as persuasive precedent, however, then judges who disagree with the reasoning are free to reject the conclusion.

The United States Supreme Court Changed the Federal Rules on Unpublished Opinions
The United States Supreme Court made history in 2006 when it announced that it would allow lawyers to refer to (cite) unpublished decisions in all federal courts. Rule 32.1 of the Federal Rules of Appellate Procedure states that federal courts may not prohibit or restrict the citation of federal judicial opinions that have been designated as “not for publication,” “non-precedential,” or “not precedent.” The rule applies only to federal courts and only to unpublished opinions issued after January 1, 2007. It does not specify the effect that a court must give to one of its unpublished opinions or to an unpublished opinion from another court. Basically, Rule 32.1 simply establishes a uniform rule for all of the federal courts that allows attorneys to cite—and judges to consider as persuasive precedent—unpublished decisions. The rule is a clear example of how technology—the availability of unpublished opinions over the Internet—has affected the law.

CRITICAL THINKING
INSIGHT INTO THE LEGAL ENVIRONMENT
Now that the United States Supreme Court is allowing unpublished decisions to form persuasive precedent in federal courts, should state courts follow? Why or why not?

a. Recently decided cases that are not yet published are also sometimes called unpublished opinions, but because these decisions will eventually be printed in reporters, we do not include them here.
Jurisdiction

In Latin, *juris* means “law,” and *dictio* means “to speak.” Thus, “the power to speak the law” is the literal meaning of the term *jurisdiction*. Before any court can hear a case, it must have jurisdiction over the person (or company) against whom the suit is brought (the defendant) or over the property involved in the suit. The court must also have jurisdiction over the subject matter of the dispute.

**JURISDICTION OVER PERSONS OR PROPERTY**

Generally, a particular court can exercise *in personam jurisdiction* (personal jurisdiction) over any person or business that resides in a certain geographic area. A state trial court, for example, normally has jurisdictional authority over residents (including businesses) of a particular area of the state, such as a county or district. A state’s highest court (often called the state supreme court) has jurisdictional authority over all residents within the state.

A court can also exercise jurisdiction over property that is located within its boundaries. This kind of jurisdiction is known as *in rem jurisdiction*, or “jurisdiction over the thing.” For example, suppose that a dispute arises over the ownership of a boat in dry dock in Fort Lauderdale, Florida. The boat is owned by an Ohio resident, over whom a Florida court normally cannot exercise personal jurisdiction. The other party to the dispute is a resident of Nebraska. In this situation, a lawsuit concerning the boat could be brought in a Florida state court on the basis of the court’s *in rem* jurisdiction.

**Long Arm Statutes.** Under the authority of a state long arm statute, a court can exercise personal jurisdiction over certain out-of-state defendants based on activities that took place within the state. Before a court can exercise jurisdiction over an out-of-state defendant under a long arm statute, though, it must be demonstrated that the defendant had sufficient contacts, or *minimum contacts*, with the state to justify the jurisdiction. Generally, this means that the defendant must have enough of a connection to the state for the judge to conclude that it is fair for the state to exercise power over the defendant. For example, if an out-of-state defendant caused an automobile accident or sold defective goods within the state, a court usually will find that minimum contacts exist to exercise jurisdiction over that defendant. Similarly, a state may exercise personal jurisdiction over a nonresident defendant who is sued for breaching a contract that was formed within the state.

**CASE IN POINT.** An Xbox game system caught fire in Bonnie Broquet’s home in Texas and caused substantial personal injuries. Broquet filed a lawsuit in a Texas court against Ji-Haw Industrial Company, a nonresident company that made the Xbox components. Broquet alleged that Ji-Haw’s components were defective and had caused the fire. Ji-Haw argued that the Texas court lacked jurisdiction over it, but a state appellate court held that the Texas long arm statute authorized the exercise of jurisdiction over the out-of-state defendant.

**Corporate Contacts.** Because corporations are considered legal persons, courts use the same principles to determine whether it is fair to exercise jurisdiction over a corporation. A corporation normally is subject to personal jurisdiction in the state in which it is incorporated, has its principal office, and/or is doing business. Courts apply the minimum-contacts test to determine if they can exercise jurisdiction over out-of-state corporations.

The minimum-contacts requirement is usually met if the corporation advertises or sells its products within the state, or places its goods into the “stream of commerce” with the intent that the goods be sold in the state. Suppose that a business is incorporated under the laws of Maine but has a branch office and manufacturing plant in Georgia. The corporation also advertises and sells its products in Georgia. These activities would likely constitute sufficient contacts with the state of Georgia to allow a Georgia court to exercise jurisdiction over the corporation.

Some corporations, however, do not sell or advertise products or place any goods in the stream of commerce. Determining what constitutes minimum contacts in these situations can be more difficult. In the following case, the defendant was a New Jersey corporation that performed machining services on component parts that it received from a North Carolina firm. The North Carolina firm claimed that the services were defective and wanted to sue for breach of contract in a North Carolina court. Did the New Jersey firm have minimum contacts with North Carolina?

---

4. As will be discussed shortly, a state’s highest court is often referred to as the state supreme court, but there are exceptions. For example, in New York the supreme court is a trial court.

5. The minimum-contacts standard was first established in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).


7. In the eyes of the law, corporations are “legal persons”—entities that can sue and be sued. See Chapter 39.
Defendant’s only argument on appeal is that the trial court erred in denying its motion to dismiss for lack of personal jurisdiction. Specifically, defendant argues there are insufficient contacts to satisfy the due process of law requirements that are necessary to subject defendant to the personal jurisdiction of North Carolina’s courts. We disagree.

Neither party contests the findings of fact contained in the trial court’s order. Therefore, the only issue to be determined is “whether the trial court’s findings of fact support its conclusion of law that the court has personal jurisdiction over defendant. We conduct our review of this issue de novo [anew].”

North Carolina courts utilize a two-prong analysis in determining whether personal jurisdiction against a nonresident is properly asserted. Under the first prong of the analysis, we determine if statutory authority for jurisdiction exists under our long-arm statute. If statutory authority exists, we consider under the second prong whether exercise of our jurisdiction comports [is in accordance] with standards of due process.

Defendant has conceded that the facts are sufficient to confer jurisdiction under the North Carolina long arm statute. Therefore, “the inquiry becomes whether plaintiffs’ assertion of jurisdiction over defendants complies with due process.” In order to satisfy due process requirements, there must be “certain minimum contacts [between the nonresident defendant and the forum state—that is, the state in which the court is located] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” In order to establish minimum contacts with North Carolina,

the defendant must have purposefully availed itself of the privilege of conducting activities within the forum state and invoked the benefits and protections of the laws of North Carolina. The relationship between the defendant and the forum state must be such that the defendant should reasonably anticipate being haled into a North Carolina court.

Our courts look at the following factors in determining whether minimum contacts exist: (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience to the parties. [Emphasis added.]

In the instant case, the trial court found that the parties “had an ongoing business relationship characterized by frequent transactions between July 27, 2007, and April 25, 2008, as reflected by thirty-two purchase orders.” Plaintiff would ship machined parts to defendant, who would then anodize the parts and return them to plaintiff in North Carolina. Defendant sent invoices totaling $21,018.70 to plaintiff in North Carolina, and these invoices were paid from plaintiff’s corporate account at a North Carolina bank. Plaintiff filed a breach of contract action against defendant because the machined parts that were shipped to defendant from North Carolina and then anodized

---

**EXTENDED CASE CONTINUES**
EXTENDED CASE 2.1 CONTINUED

by defendant and shipped back to North Carolina were defective.

“It is generally conceded that a state has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. Thus, North Carolina has a ‘manifest interest’ in providing the plaintiff ‘a convenient forum for redressing injuries inflicted by defendant, an out-of-state merchant.’” As for the remaining factor, there is no evidence in the record that would indicate that it is more convenient for the parties to litigate this matter in a different forum. “Litigation on interstate business transactions inevitably involves inconvenience to one of the parties. When [the] inconvenience to defendant of litigating in North Carolina is no greater than would be the inconvenience of plaintiff of litigating in [the defendant’s state] . . . no convenience factors . . . are determinative[.]” [Emphasis added.]

Therefore, after examining the ongoing relationship between the parties, the nature of their contacts, the interest of the forum state, the convenience of the parties, and the cause of action, we conclude defendant has “purposely availed” itself of the benefits of doing business in North Carolina and “should reasonably anticipate being haled” into a North Carolina court. We hold that defendant has sufficient minimum contacts with North Carolina to justify the exercise of personal jurisdiction over defendant without violating the due process clause. Affirmed.

1. What are the factors that the court looked at in determining whether minimum contacts existed between the defendant and the state of North Carolina?
2. Why did the court state that the convenience of the parties was not “determinative” in this case?

JURISDICTION OVER SUBJECT MATTER

Subject-matter jurisdiction refers to the limitations on the types of cases a court can hear. Certain courts are empowered to hear certain kinds of disputes.

General and Limited Jurisdiction. In both the federal and the state court systems, there are courts of general (unlimited) jurisdiction and courts of limited jurisdiction. A court of general jurisdiction can decide cases involving a broad array of issues. An example of a court of general jurisdiction is a state trial court or a federal district court. An example of a state court of limited jurisdiction is a probate court.

Probate courts are state courts that handle only matters relating to the transfer of a person’s assets and obligations after that person’s death, including issues relating to the custody and guardianship of children. An example of a federal court of limited subject-matter jurisdiction is a bankruptcy court.

Bankruptcy courts handle only bankruptcy proceedings, which are governed by federal bankruptcy law (see Chapter 30).

A court’s jurisdiction over subject matter is usually defined in the statute or constitution creating the court. In both the federal and the state court systems, a court’s subject-matter jurisdiction can be limited not only by the subject of the lawsuit but also by the sum in controversy, whether the case is a felony (a more serious type of crime) or a misdemeanor (a less serious type of crime), or whether the proceeding is a trial or an appeal.

Original and Appellate Jurisdiction. A court’s subject-matter jurisdiction is also frequently limited to hearing cases at a particular stage of the dispute. Courts in which lawsuits begin, trials take place, and evidence is presented are referred to as courts of original jurisdiction. Courts having original jurisdiction are courts of the first instance, or trial courts. In the federal court system, the district courts are trial courts. In the various state court systems, the trial courts are known by different names, as will be discussed shortly.

Courts having appellate jurisdiction act as reviewing courts, or appellate courts. In general, cases can be brought before appellate courts only on appeal from an order or a judgment of a trial court or other lower court. In other words, the distinction between courts of original jurisdiction and courts of appellate jurisdiction normally lies in whether the case is being heard for the first time.

JURISDICTION OF THE FEDERAL COURTS

Because the federal government is a government of limited powers, the jurisdiction of the federal courts is limited. Federal courts have subject-matter jurisdiction in two situations.

Federal Questions. Article III of the U.S. Constitution establishes the boundaries of federal judicial power. Section 2 of Article III states that “the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall
be made, under their Authority." In effect, this clause means that whenever a plaintiff’s cause of action is based, at least in part, on the U.S. Constitution, a treaty, or a federal law, a \textit{federal question} arises. Any lawsuit involving a federal question comes under the judicial authority of the federal courts and can originate in a federal court. People who claim that their constitutional rights have been violated, for example, can begin their suits in a federal court. Note that in a case based on a federal question, a federal court will apply federal law.

\textbf{Diversity of Citizenship.} Federal district courts can also exercise original jurisdiction over cases involving \textit{diversity of citizenship}. This term applies whenever a federal court has jurisdiction over a case that does not involve a question of federal law. The most common type of diversity jurisdiction has two requirements: (1) the plaintiff and defendant must be residents of different states, and (2) the dollar amount in controversy must exceed $75,000. For purposes of diversity jurisdiction, a corporation is a citizen of both the state in which it is incorporated and the state in which its principal place of business is located. A case involving diversity of citizenship can be filed in the appropriate federal district court. If the case starts in a state court, it can sometimes be transferred, or “removed,” to a federal court. A large percentage of the cases filed in federal courts each year are based on diversity of citizenship.

As noted, a federal court will apply federal law in cases involving federal questions. In a case based on diversity of citizenship, in contrast, a federal court will apply the relevant state law (which is often the law of the state in which the court sits).

8. Diversity jurisdiction also exists in cases between (1) a foreign country and citizens of a state or of different states and (2) citizens of a state and citizens or subjects of a foreign country. These bases for diversity jurisdiction are less commonly used.

\textbf{EXHIBIT 2–1 • Exclusive and Concurrent Jurisdiction}

\textbf{Exclusive Federal Jurisdiction} (cases involving federal crimes, federal antitrust law, bankruptcy, patents, copyrights, trademarks, suits against the United States, some areas of admiralty law, and certain other matters specified in federal statutes)

\textbf{Concurrent Jurisdiction} (most cases involving federal questions and diversity-of-citizenship cases)

\textbf{Exclusive State Jurisdiction} (cases involving all matters not subject to federal jurisdiction—for example, divorce and adoption cases)

\textbf{Jurisdiction in Cyberspace}

The Internet’s capacity to bypass political and geographic boundaries undercuts the traditional basis on which courts assert personal jurisdiction. This basis includes a party’s contacts with a court’s
geographic jurisdiction. As already discussed, for a court to compel a defendant to come before it, there must be at least minimum contacts—the presence of a salesperson within the state, for example. Are there sufficient minimum contacts if the only connection to a jurisdiction is an ad on a Web site originating from a remote location?

**THE “SLIDING-SCALE” STANDARD** Gradually, the courts are developing a standard—called a “sliding-scale” standard—for determining when the exercise of personal jurisdiction over an out-of-state Internet-based defendant is proper. In developing this standard, the courts have identified three types of Internet business contacts: (1) substantial business conducted over the Internet (with contracts and sales, for example); (2) some interactivity through a Web site; and (3) passive advertising. Jurisdiction is proper for the first category, is improper for the third, and may or may not be appropriate for the second. An Internet communication is typically considered passive if people have to voluntarily access it to read the message and active if it is sent to specific individuals. In certain situations, even a single contact can satisfy the minimum-contacts requirement.

**CASE IN POINT** A Louisiana resident, Daniel Crummey, purchased a used recreational vehicle (RV) from sellers in Texas after viewing photos of it on eBay. The sellers’ statements on eBay claimed that “Everything works great on this RV and will provide comfort and dependability for years to come. This RV will go to Alaska and back without problems!” Crummey picked up the RV in Texas, but on the drive back to Louisiana, the RV quit working. He filed a suit in Louisiana against the sellers alleging that the vehicle was defective, but the sellers claimed that the Louisiana court lacked jurisdiction. Because the sellers had used eBay to market and sell the RV to a Louisiana buyer—and had regularly used eBay to sell vehicles to remote parties in the past—the court found that jurisdiction was proper.

**INTERNATIONAL JURISDICTIONAL ISSUES** Because the Internet is international in scope, international jurisdictional issues have understandably come to the fore. The world’s courts seem to be developing a standard that echoes the requirement of minimum contacts applied by the U.S. courts. Most courts are indicating that minimum contacts—doing business within the jurisdiction, for example—are enough to compel a defendant to appear and that a physical presence is not necessary. The effect of this standard is that a business firm has to comply with the laws in any jurisdiction in which it targets customers for its products. This situation is complicated by the fact that many countries’ laws on particular issues—free speech, for example—are very different from U.S. laws.

**CASE IN POINT** Yahoo operated an online auction site on which Nazi memorabilia, among other things, were offered for sale. In France, the display of any objects depicting symbols of Nazi ideology is illegal and leads to both criminal and civil liability. The International League against Racism and Anti-Semitism filed a suit in Paris against Yahoo for displaying Nazi memorabilia and offering them for sale via its Web site. The French court asserted jurisdiction over Yahoo on the ground that the materials on the company’s U.S.-based servers could be viewed on a Web site accessible in France. The French court ordered Yahoo to eliminate all Internet access in France to the Nazi memorabilia offered for sale through its online auctions. Yahoo then took the case to a federal district court in the United States, claiming that the French court’s order violated the First Amendment to the U.S. Constitution. Although the federal district court ruled in favor of Yahoo, the U.S. Court of Appeals for the Ninth Circuit reversed. According to the appellate court, U.S. courts lacked personal jurisdiction over the French groups involved. The ruling leaves open the possibility that Yahoo, and anyone else who posts anything on the Internet, could be held answerable to the laws of any country in which the message might be received.

**Concept Summary 2.1** reviews the various types of jurisdiction, including jurisdiction in cyberspace.

**Venue**

Jurisdiction has to do with whether a court has authority to hear a case involving specific persons, property, or subject matter. Venue is concerned with the most appropriate location for a trial. For

---

10. Crummey v. Morgan, 965 So.2d 497 (La.App. 1 Cir. 2007). But note that a single sale on eBay does not necessarily confer jurisdiction. Jurisdiction depends on whether the seller regularly uses eBay as a means for doing business with remote buyers. See Boschetto v. Hansing, 539 F.3d 1011 (9th Cir. 2008).
Courts and Alternative Dispute Resolution

35

CHAPTER 2

CONCEPT SUMMARY 2.1

Jurisdiction

<table>
<thead>
<tr>
<th>Type of Jurisdiction</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal</td>
<td>Exists when a defendant is located within the territorial boundaries within which a court has the right and power to decide cases. Jurisdiction may be exercised over out-of-state defendants under state long arm statutes. Courts have jurisdiction over corporate defendants that do business within the state, as well as corporations that advertise, sell, or place goods into the stream of commerce in the state.</td>
</tr>
<tr>
<td>Property</td>
<td>Exists when the property that is subject to a lawsuit is located within the territorial boundaries within which a court has the right and power to decide cases.</td>
</tr>
<tr>
<td>Subject Matter</td>
<td>Limits the court’s jurisdictional authority to particular types of cases. 1. <strong>Limited jurisdiction</strong>—Exists when a court is limited to a specific subject matter, such as probate or divorce. 2. <strong>General jurisdiction</strong>—Exists when a court can hear cases involving a broad array of issues.</td>
</tr>
<tr>
<td>Original</td>
<td>Exists with courts that have the authority to hear a case for the first time (trial courts).</td>
</tr>
<tr>
<td>Appellate</td>
<td>Exists with courts of appeal and review. Generally, appellate courts do not have original jurisdiction.</td>
</tr>
<tr>
<td>Federal</td>
<td>1. <strong>Federal questions</strong>—A federal court can exercise jurisdiction when the plaintiff’s cause of action is based at least in part on the U.S. Constitution, a treaty, or a federal law. 2. <strong>Diversity of citizenship</strong>—A federal court can exercise jurisdiction in cases between citizens of different states when the amount in controversy exceeds $75,000 (or in cases between a foreign country and citizens of a state or of different states and in cases between citizens of a state and citizens or subjects of a foreign country).</td>
</tr>
<tr>
<td>Concurrent</td>
<td>Exists when both federal and state courts have authority to hear the same case.</td>
</tr>
<tr>
<td>Exclusive</td>
<td>Exists when only state courts or only federal courts have authority to hear a case.</td>
</tr>
<tr>
<td>Jurisdiction in Cyberspace</td>
<td>Because the Internet does not have physical boundaries, traditional jurisdictional concepts have been difficult to apply in cases involving activities conducted via the Web. Gradually, the courts are developing standards to use in determining when jurisdiction over a Web site owner or operator in another state is proper. Jurisdictional disputes involving international cyberspace transactions present a significant legal challenge.</td>
</tr>
</tbody>
</table>

example, two state courts (or two federal courts) may have the authority to exercise jurisdiction over a case, but it may be more appropriate or convenient to hear the case in one court than in the other.

Basically, the concept of venue reflects the policy that a court trying a case should be in the geographic neighborhood (usually the county) where the incident leading to the lawsuit occurred or where the parties involved in the lawsuit reside. Venue in a civil case typically is where the defendant resides, whereas venue in a criminal case normally is where the crime occurred. Pretrial publicity or other factors, though, may require a change of venue to another community, especially in criminal cases in which the defendant’s right to a fair and impartial jury has been impaired.

Standing to Sue

In order to bring a lawsuit before a court, a party must have **standing to sue**, or a sufficient stake in a matter to justify seeking relief through the court system. In other words, to have standing, a party must have a legally protected and tangible interest at stake in the litigation. The party bringing the lawsuit must have suffered a harm or been threatened
with a harm by the action about which she or he has complained. At times, a person can have standing to sue on behalf of another person. Suppose that a child suffers serious injuries as a result of a defectively manufactured toy. Because the child is a minor, another person, such as a parent or a legal guardian, can bring a lawsuit on the child's behalf.

Standing to sue also requires that the controversy at issue be a justiciable controversy—a controversy that is real and substantial, as opposed to hypothetical or academic.

**CASE IN POINT:** James Bush went to the Federal Bureau of Investigation's (FBI’s) office in San Jose, California, and filled out complaint forms indicating that he was seeking records under the Freedom of Information Act (FOIA—see Chapter 45). When the FBI failed to provide the requested records, Bush filed a lawsuit against the U.S. Department of Justice. The court dismissed the suit, however, finding that no actual controversy existed for the court to decide. Bush had failed to comply with the requirements of the FOIA when he filled out the forms, so the FBI was not obligated to provide any records.

In the following case—involving a suit between a state and an agency of the federal government—the court was asked to determine whether the state’s allegations rose to the level of a “concrete, particularized, actual or imminent” injury against the state independent of any harm to private parties.

---


---

**BACKGROUND AND FACTS**. The federal government established the Legal Services Corporation (LSC) to provide federal funds to local legal assistance programs for individuals who cannot afford legal services. LSC restricts the use of the funds for some purposes, including participating in class-action lawsuits. The recipients must maintain legal, physical, and financial separation from organizations that engage in these activities. In 2005, in the interest of cutting costs, the state of Oregon directed legal assistance programs in the state to consolidate in situations in which separate organizations provided services in the same geographic area. LSC did not approve of the integration of programs that received its funds with programs that engaged in restricted activities. Oregon filed a suit in a federal district court against LSC, alleging that the state’s ability to provide legal services to its citizens was frustrated. The court dismissed the suit “on the merits.” Oregon appealed to the U.S. Court of Appeals for the Ninth Circuit.

**IN THE LANGUAGE OF THE COURT**

Milan D. Smith, Jr., Circuit Judge:

* * * *  
* * * In this case there is no burden or injury placed on Oregon. * * * Oregon has not accepted federal funds, nor is it bound by the accompanying restrictions. Oregon is not injured by the federal government’s decision to subsidize certain private activities, even if the government attaches impermissible conditions, as is alleged, to the recipients of those funds. Oregon is only affected by virtue of its interest in the effect of the grant and the conditions on its citizens; it has no independent claim of injury. [Emphasis added.]

Oregon cannot claim injury simply on the basis that federal subsidies to private parties do not [complement] Oregon’s policies. The state has no standing to sue the federal government to provide voluntary federal subsidies to private parties, and certainly has no standing to sue the federal government to change its conditions for those federal subsidies. [Emphasis added.]

---

a. In the left-hand column, in the “Decisions” pull-down menu, click on “Opinions.” On that page, click on “Advanced Search”; in the “by Case No.:” box, type “06-36012” and click on “Search.” In the result, click on the appropriate link to access the opinion. The U.S. Court of Appeals for the Ninth Circuit maintains this Web site.
CHAPTER 2 Courts and Alternative Dispute Resolution

CASE 2.2 CONTINUED

Oregon argues that it has been injured by LSC’s regulations, which thwart Oregon’s efforts at policy making with regards to Oregon’s Legal Service Program. Oregon attempts to analogize its situation to cases recognizing a state’s standing to defend its statutes when they are alleged to be unconstitutional or pre-empted by federal regulation. However, those cases are distinguishable, because in this case there is no dispute over Oregon’s ability to regulate its legal services program, and no claim that Oregon’s laws have been invalidated as a result of the LSC restrictions.

The core of the dispute is whether Oregon should have the ability to control the conditions surrounding a voluntary grant of federal funds to specifically delineated private institutions. Because Oregon has no right, express or reserved, to do so, there is no judicially cognizable injury. Oregon may continue to regulate its legal service programs as it desires, but it cannot depend on voluntary financial support from LSC to any legal services provider within the state if it makes choices that conflict with the LSC regulations.

Oregon has failed to allege generalized facts sufficient to show an actual injury for the purposes of establishing its standing in this case. Oregon is not directly affected by the LSC regulations, and is free to avoid any or all indirect effects of those regulations by simply increasing its own taxes to fund its desired policies. Oregon is, therefore, without standing to pursue its claim in this action.

DECISION AND REMEDY • The U.S. Court of Appeals for the Ninth Circuit agreed that Oregon’s complaint should be dismissed, but vacated the judgment and remanded the case for an entry of dismissal based on the plaintiff’s lack of standing.

THE LEGAL ENVIRONMENT DIMENSION • Under what circumstances might a state suffer an injury that would give it standing to sue to block the enforcement of restrictions on the use of federal funds?

THE ETHICAL DIMENSION • Would it be ethical for a state to alter its policies to align with LSC’s restrictions in order to continue the funding of local legal services programs? Explain.

SECTION 3

THE STATE AND FEDERAL COURT SYSTEMS

As mentioned earlier in this chapter, each state has its own court system. Additionally, there is a system of federal courts. Although no two state court systems are exactly the same, the right-hand side of Exhibit 2–2 on the following page illustrates the basic organizational framework characteristic of the court systems in many states. The exhibit also shows how the federal court system is structured. We turn now to an examination of these court systems, beginning with the state courts.

The State Court Systems

Typically, a state court system includes several levels, or tiers, of courts. As indicated in Exhibit 2–2 on the next page, state courts may include (1) local trial courts of limited jurisdiction, (2) state trial courts of general jurisdiction, (3) state courts of appeals (intermediate appellate courts), and (4) the state’s highest court (often called the state supreme court). Generally, any person who is a party to a lawsuit has the opportunity to plead the case before a trial court and then, if he or she loses, before at least one level of appellate court. Finally, if the case involves a federal statute or federal constitutional issue, the decision of a state supreme court on that issue may be further appealed to the United States Supreme Court.

The states use various methods to select judges for their courts. Usually, voters elect judges, but in some states judges are appointed. For example, in Iowa, the governor appoints judges, and then the general population decides whether to confirm their appointment in the next general election. The states usually specify the number of years that judges will serve. In contrast, as you will read shortly, judges in the federal court system are appointed by the president of the United States and, if they are confirmed by the Senate, hold office for life—unless they engage in blatantly illegal conduct.
TRIAL COURTS Trial courts are exactly what their name implies—courts in which trials are held and testimony is taken. State trial courts have either general or limited jurisdiction. Trial courts that have general jurisdiction as to subject matter may be called county, district, superior, or circuit courts. State trial courts of general jurisdiction have jurisdiction over a wide variety of subjects, including both civil disputes and criminal prosecutions. In some states, trial courts of general jurisdiction may hear appeals from courts of limited jurisdiction.

Courts of limited jurisdiction as to subject matter are often called special inferior trial courts or minor judiciary courts. Small claims courts are inferior trial courts that hear only civil cases involving claims of less than a certain amount, such as $5,000 (the amount varies from state to state). Suits brought in small claims courts are generally conducted informally, and lawyers are not required (in a few states, lawyers are not even allowed). Decisions of small claims courts and municipal courts may sometimes be appealed to a state trial court of general jurisdiction.

Other courts of limited jurisdiction include domestic relations courts, which handle primarily divorce actions and child-custody disputes; local municipal courts, which mainly deal with traffic cases; and probate courts, as mentioned earlier. A few states have also established Islamic law courts, which are courts of limited jurisdiction that serve the American Muslim community.16

APPELLATE, OR REVIEWING, COURTS Every state has at least one court of appeals (appellate court, or reviewing court), which may be an intermediate appellate court or the state’s highest court. About three-fourths of the states have intermediate appellate courts. Generally, courts of appeals do not conduct new trials, in which evidence is submitted to the court and witnesses are examined. Rather, an appellate court panel of three or more judges reviews the record of the case on appeal, which includes a transcript of the trial proceedings, and then determines whether the trial court committed an error.

Usually, appellate courts focus on questions of law, not questions of fact. A question of fact deals with what really happened in regard to the dispute being tried—such as whether a party actually burned a flag. A question of law concerns the application or interpretation of the law—such as whether flag-burning is a form of speech protected by the First Amendment to the U.S. Constitution. Only a judge, not a jury, can rule on questions of law. Appellate courts normally defer (or give weight) to the trial court’s findings on questions of fact because the

16. See, for example, Jabri v. Qadduna, 108 S.W.3d 404 (Tex.App.—Fort Worth 2003); Abd Alla v. Moussi, 680 N.W.2d 569 (Minn. App. 2004).
trial court judge and jury were in a better position to evaluate testimony—by directly observing witnesses’ gestures, demeanor, and other nonverbal behavior during the trial. At the appellate level, the judges review the written transcript of the trial, which does not include these nonverbal elements. Thus, an appellate court will not tamper with a trial court’s finding of fact unless it is clearly erroneous (contrary to the evidence presented at trial) or when there is no evidence to support the finding.

**HIGHEST STATE COURTS** The highest appellate court in a state is usually called the supreme court but may be designated by some other name. For example, in both New York and Maryland, the highest state court is called the Court of Appeals. The highest state court in Maine and Massachusetts is the Supreme Judicial Court, and in West Virginia, it is the Supreme Court of Appeals.

The decisions of each state’s highest court on all questions of state law are final. Only when issues of federal law are involved can the United States Supreme Court overrule a decision made by a state’s highest court. For example, suppose that a city ordinance prohibits citizens from engaging in door-to-door advocacy without first registering with the mayor’s office and receiving a permit. Further suppose that a religious group sues the city, arguing that the law violates the freedoms of speech and religion guaranteed by the First Amendment. If the state supreme court upholds the law, the group could appeal the decision to the United States Supreme Court—because a constitutional (federal) issue is involved.

**The Federal Court System**

The federal court system is basically a three-tiered model consisting of (1) U.S. district courts (trial courts of general jurisdiction) and various courts of limited jurisdiction, (2) U.S. courts of appeals (intermediate courts of appeals), and (3) the United States Supreme Court.

Unlike state court judges, who are usually elected, federal court judges—including the justices of the Supreme Court—are appointed by the president of the United States, subject to confirmation by the U.S. Senate. All federal judges receive lifetime appointments under Article III of the U.S. Constitution, which states that federal judges “hold their offices during good Behaviour.” In the entire history of the United States, only seven federal judges have been removed from office through impeachment proceedings.

**U.S. DISTRICT COURTS** At the federal level, the equivalent of a state trial court of general jurisdiction is the district court. U.S. district courts have original jurisdiction in matters involving a federal question and concurrent jurisdiction with state courts when diversity jurisdiction exists. Federal cases typically originate in district courts. There are other federal courts with original, but special (or limited), jurisdiction, such as the federal bankruptcy courts and others shown in Exhibit 2–2.

There is at least one federal district court in every state. The number of judicial districts can vary over time, primarily owing to population changes and corresponding changes in caseloads. Today, there are ninety-four federal judicial districts. Exhibit 2–3 on the following page shows the boundaries of both the U.S. district courts and the U.S. courts of appeals (discussed next).

**U.S. COURTS OF APPEALS** In the federal court system, there are thirteen U.S. courts of appeals—referred to as U.S. circuit courts of appeals. Twelve of the federal courts of appeals (including the Court of Appeals for the Thirteenth Circuit, called the Federal Circuit, has national appellate jurisdiction over certain types of cases, such as those involving patent law and those in which the U.S. government is a defendant. The decisions of a circuit court of appeals are binding on all courts within the circuit court’s jurisdiction and are final in most cases, but appeal to the United States Supreme Court is possible.

**UNITED STATES SUPREME COURT** At the highest level in the three-tiered federal court system is the United States Supreme Court. According to the language of Article III of the U.S. Constitution, there is only one national Supreme Court. All other courts in the federal system are considered “inferior.” Congress is empowered to create other inferior courts as it deems necessary. The inferior courts that Congress has created include the second tier in our model—the U.S. circuit courts of appeals—as well as the district courts and the various federal courts of limited, or specialized, jurisdiction.

17. Historically, judges were required to “ride the circuit” and hear appeals in different courts around the country, which is how the name “circuit court” came about.
EXHIBIT 2–3 • Geographic Boundaries of the U.S. Courts of Appeals and U.S. District Courts

The United States Supreme Court consists of nine justices. Although the Supreme Court has original, or trial, jurisdiction in rare instances (set forth in Article III, Sections 1 and 2), most of its work is as an appeals court. The Supreme Court can review any case decided by any of the federal courts of appeals, and it also has appellate authority over cases involving federal questions that have been decided in the state courts. The Supreme Court is the final arbiter of the Constitution and federal law.

Appeals to the Supreme Court. To bring a case before the Supreme Court, a party requests the Court to issue a writ of certiorari.18 A writ of certiorari is an order issued by the Supreme Court to a lower court requiring the latter to send it the record of the case for review. The Court will not issue a writ unless at least four of the nine justices approve of it. This is called the rule of four. Whether the Court will issue a writ of certiorari is entirely within its discretion, and most petitions for writs are denied. (Thousands of cases are filed with the Supreme Court each year, yet it hears, on average, fewer than one hundred of these cases.)19 A denial of the request to issue a writ of certiorari is not a decision on the merits of a case, nor does it indicate agreement with the lower court’s opinion. Also, denial of the writ has no value as a precedent. Denial simply means that the lower court’s decision remains the law in that jurisdiction.

Petitions Granted by the Court. Typically, the Court grants petitions in cases that raise important constitutional questions or when the lower courts have issued conflicting decisions on a significant issue. The justices, however, never explain their reasons for hearing certain cases and not others, so it is difficult to predict which type of case the Court might select.

See Concept Summary 2.2 to review the various types of courts in the federal and state court systems.

---

19. From the mid-1950s through the early 1990s, the Supreme Court reviewed more cases per year than it has since then. In the Court’s 1982–1983 term, for example, the Court issued written opinions in 151 cases. In contrast, during the Court’s 2009–2010 term, the Court issued written opinions in only 92 cases.
CHAPTER 2 Courts and Alternative Dispute Resolution

Most states either require or encourage parties to undertake ADR prior to trial. Many federal courts have instituted ADR programs as well. In the following pages, we examine the basic forms of ADR. Keep in mind, though, that new methods of ADR—and new combinations of existing methods—are constantly being devised and employed.

Negotiation

In negotiation, a process in which the parties attempt to settle their dispute informally, with or without attorneys to represent them. Attorneys frequently advise their clients to negotiate a settlement voluntarily before they proceed to trial. Parties may even try to negotiate a settlement during a trial or after the trial but before an appeal. Negotiation traditionally involves just the clients themselves and (typically) their attorneys. The attorneys, though, are advocates—they are obligated to put their clients’ interests first.

Mediation

In mediation, a neutral third party acts as a mediator and works with both sides in the dispute to facilitate a resolution. The mediator normally talks with the parties separately as well as jointly, emphasizes points of agreement, and helps the parties to evaluate their options. Although the mediator may propose a

---

**SECTION 4**

ALTERNATIVE DISPUTE RESOLUTION

Litigation—the process of resolving a dispute through the court system—is expensive and time consuming. Litigating even the simplest complaint is costly, and because of the backlog of cases pending in many courts, several years may pass before a case is actually tried. For these and other reasons, more and more businesspersons are turning to alternative dispute resolution (ADR) as a means of settling their disputes.

The great advantage of ADR is its flexibility. Methods of ADR range from the parties sitting down together and attempting to work out their differences to multinational corporations agreeing to resolve a dispute through a formal hearing before a panel of experts. Normally, the parties themselves can control how they will attempt to settle their dispute, what procedures will be used, whether a neutral third party will be present or make a decision, and whether that decision will be legally binding or nonbinding. ADR also offers more privacy than court proceedings and allows disputes to be resolved relatively quickly.

Today, more than 90 percent of civil lawsuits are settled before trial using some form of ADR. Indeed, most states either require or encourage parties to undertake ADR prior to trial. Many federal courts have instituted ADR programs as well. In the following pages, we examine the basic forms of ADR. Keep in mind, though, that new methods of ADR—and new combinations of existing methods—are constantly being devised and employed.

**NEGOTIATION**

In negotiation, a process in which the parties attempt to settle their dispute informally, with or without attorneys to represent them. Attorneys frequently advise their clients to negotiate a settlement voluntarily before they proceed to trial. Parties may even try to negotiate a settlement during a trial or after the trial but before an appeal. Negotiation traditionally involves just the clients themselves and (typically) their attorneys. The attorneys, though, are advocates—they are obligated to put their clients’ interests first.

**MEDIATION**

In mediation, a neutral third party acts as a mediator and works with both sides in the dispute to facilitate a resolution. The mediator normally talks with the parties separately as well as jointly, emphasizes points of agreement, and helps the parties to evaluate their options. Although the mediator may propose a

---

**CONCEPT SUMMARY 2.2**

**Types of Courts**

<table>
<thead>
<tr>
<th>Type of Court</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trial Courts</td>
<td>Trial courts are courts of original jurisdiction in which actions are initiated. 1. State courts—Courts of general jurisdiction can hear any case that has not been specifically designated for another court; courts of limited jurisdiction include, among others, domestic relations courts, probate courts, municipal courts, and small claims courts. 2. Federal courts—The federal district court is the equivalent of the state trial court. Federal courts of limited jurisdiction include the bankruptcy courts and others shown in Exhibit 2-2 on page 38.</td>
</tr>
<tr>
<td>Intermediate Appellate Courts</td>
<td>Courts of appeals are reviewing courts; generally, appellate courts do not have original jurisdiction. About three-fourths of the states have intermediate appellate courts; in the federal court system, the U.S. circuit courts of appeals are the intermediate appellate courts.</td>
</tr>
<tr>
<td>Supreme Courts</td>
<td>The highest state court is that state’s supreme court, although it may be called by some other name. Appeal from state supreme courts to the United States Supreme Court is possible only if a federal question is involved. The United States Supreme Court is the highest court in the federal court system and the final arbiter of the Constitution and federal law.</td>
</tr>
</tbody>
</table>
solution (called a mediator’s proposal), he or she does not make a decision resolving the matter. The mediator, who need not be a lawyer, usually charges a fee for his or her services (which can be split between the parties). States that require parties to undergo ADR before trial often offer mediation as one of the ADR options or (as in Florida) the only option.

One of the biggest advantages of mediation is that it is less adversarial in nature than litigation. In mediation, the mediator takes an active role and attempts to bring the parties together so that they can come to a mutually satisfactory resolution. The mediation process tends to reduce the antagonism between the disputants, allowing them to resume their former relationship while minimizing hostility. For this reason, mediation is often the preferred form of ADR for disputes between business partners, employers and employees, or other parties involved in long-term relationships.

Arbitration

A more formal method of ADR is arbitration, in which an arbitrator (a neutral third party or a panel of experts) hears a dispute and imposes a resolution on the parties. Arbitration differs from other forms of ADR in that the third party hearing the dispute makes a decision for the parties. Exhibit 2–4 outlines the basic differences among the three traditional forms of ADR. Usually, the parties in arbitration agree that the third party’s decision will be legally binding, although the parties can also agree to non-binding arbitration. (Arbitration that is mandated by the courts often is not binding on the parties.) In nonbinding arbitration, the parties can go forward with a lawsuit if they do not agree with the arbitrator’s decision.

THE ARBITRATION PROCESS In some respects, formal arbitration resembles a trial, although usually the procedural rules are much less restrictive than those governing litigation. In a typical arbitration, the parties present opening arguments and ask for specific remedies. Evidence is then presented, and witnesses may be called and examined by both sides. The arbitrator then renders a decision, called an award. An arbitrator’s award is usually the final word on the matter. Although the parties may appeal an arbitrator’s decision, a court’s review of the decision will be much more restricted in scope than an appellate court’s review of a trial court’s decision. The general view is that because the parties were free to frame the issues and set the powers of the arbitrator at the outset, they cannot complain about the results. The award will be set aside only if the arbitrator’s conduct or “bad faith” substantially prejudiced the rights of

**EXHIBIT 2–4 • Basic Differences in the Traditional Forms of ADR**

<table>
<thead>
<tr>
<th>TYPE OF ADR</th>
<th>DESCRIPTION</th>
<th>NEUTRAL THIRD PARTY PRESENT</th>
<th>WHO DECIDES THE RESOLUTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negotiation</td>
<td>Parties meet informally with or without their attorneys and attempt to agree on a resolution. This is the simplest and least expensive method of ADR.</td>
<td>No</td>
<td>The parties themselves reach a resolution.</td>
</tr>
<tr>
<td>Mediation</td>
<td>A neutral third party meets with the parties and emphasizes points of agreement to bring them toward resolution of their dispute. 1. This method of ADR reduces hostility between parties. 2. Mediation is preferred for resolving disputes between business partners, employers and employees, or others involved in long-term relationships.</td>
<td>Yes</td>
<td>The parties, but the mediator may suggest or propose a resolution.</td>
</tr>
<tr>
<td>Arbitration</td>
<td>The parties present their arguments and evidence before an arbitrator at a hearing, and the arbitrator renders a decision resolving the parties’ dispute. 1. This ADR method is the most formal and resembles a court proceeding because some rules of evidence apply. 2. The parties are free to frame the issues and set the powers of the arbitrator. 3. If the parties agree that the arbitration is binding, then the parties’ right to appeal the decision is limited.</td>
<td>Yes</td>
<td>The arbitrator imposes a resolution on the parties that may be either binding or nonbinding.</td>
</tr>
</tbody>
</table>
one of the parties, if the award violates an established public policy, or if the arbitrator exceeded her or his powers (by arbitrating issues that the parties did not agree to submit to arbitration).

**ARBITRATION CLAUSES AND STATUTES**

Almost any commercial matter can be submitted to arbitration. Frequently, parties include an arbitration clause in a contract (a written agreement—see Chapter 10) specifying that any dispute arising under the contract will be resolved through arbitration rather than through the court system. Parties can also agree to arbitrate a dispute after it arises.

Most states have statutes (often based, in part, on the Uniform Arbitration Act of 1955) under which arbitration clauses will be enforced, and some state statutes compel arbitration of certain types of disputes, such as those involving public employees. At the federal level, the Federal Arbitration Act (FAA), enacted in 1925, enforces arbitration clauses in contracts involving maritime activity and interstate commerce. Because of the breadth of the commerce clause (see Chapter 4), arbitration agreements involving transactions only slightly connected to the flow of interstate commerce may fall under the FAA. The FAA established a national policy favoring arbitration.

**CASE IN POINT** Buckeye Check Cashing, Inc., cashes personal checks for consumers in Florida. Buckeye would agree to delay submitting a consumer’s check for payment if the consumer paid a “finance charge.” For each transaction, the consumer signed an agreement that included an arbitration clause. A group of consumers filed a lawsuit claiming that Buckeye was charging an illegally high rate of interest in violation of state law. Buckeye filed a motion to compel arbitration, which the trial court denied, and the case was appealed. The plaintiffs argued that the entire contract—including the arbitration clause—was illegal and therefore arbitration was not required. The United States Supreme Court found that the arbitration provision was severable, or capable of being separated, from the rest of the contract. The Court held that when the challenge is to the validity of a contract as a whole, and not specifically to an arbitration clause within the contract, an arbitrator must resolve the dispute. This is true even if the contract later proves to be unenforceable, because the FAA established a national policy favoring arbitration and that policy extends to both federal and state courts.

**THE ISSUE OF ARBITRABILITY**

When a dispute arises as to whether the parties to a contract with an arbitration clause have agreed to submit a particular matter to arbitration, one party may file a lawsuit to compel arbitration. The court before which the suit is brought will decide not the basic controversy but rather the issue of arbitrability—that is, whether the matter is one that must be resolved through arbitration. If the court finds that the subject matter in controversy is covered by the agreement to arbitrate, then a party may be compelled to arbitrate the dispute. Usually, a court will allow the claim to be arbitrated if the court, in interpreting the relevant statute (the state arbitration statute or the FAA), can find no legislative intent to the contrary.

No party, however, will be ordered to submit a particular dispute to arbitration unless the court is convinced that the party has consented to do so. Additionally, the courts will not compel arbitration if it is clear that the prescribed arbitration rules and procedures are inherently unfair to one of the parties.

The terms of an arbitration agreement can limit the types of disputes that the parties agree to arbitrate. When the parties do not specify limits, however, disputes can arise as to whether the particular matter is covered by the arbitration agreement, and it is up to the court to resolve the issue of arbitrability.

In the following case, the parties had previously agreed to arbitrate disputes involving their contract to develop software, but the dispute involved claims of copyright infringement (see Chapter 8). The question was whether the copyright infringement claims were beyond the scope of the arbitration clause.

by an electric motor. By 1914, the company had developed one of the first automated credit systems. By the 1950s, NCR had branched out into transistorized business computers, and later it expanded into liquid crystal displays and data warehousing. Today, NCR is a worldwide provider of automated teller machines (ATMs), integrated hardware and software systems, and related maintenance and support services. More than 300,000 NCR ATMs are installed throughout the world.

**BACKGROUND AND FACTS**

To upgrade the security of its ATMs, NCR developed a software solution to install in all of its machines. At the same time, Korala Associates, Ltd. (KAL), claimed to have developed a similar security upgrade for NCR's ATMs. Indeed, KAL had entered into a contract with NCR in 1998 (the "1998 Agreement") to develop such software. To facilitate that process, NCR had loaned to KAL a proprietary ATM that contained copyrighted software called APTRA XFS. NCR alleged that KAL had "obtained access to, made unauthorized use of, and engaged in unauthorized copying of the APTRA XFS software." NCR further claimed that KAL had developed its version of the security upgrade only by engaging in this unauthorized activity. When NCR brought a suit claiming copyright infringement, KAL moved to compel arbitration under the terms of the 1998 Agreement. At trial, KAL prevailed. NCR appealed the order compelling arbitration.

**IN THE LANGUAGE OF THE COURT**

Chief Justice BATCHELDER delivered the opinion of the court.

* * * *

The arbitration clause contained within the 1998 Agreement provides that:

> Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitrator shall be appointed upon the mutual agreement of both parties failing which both parties will agree to be subject to any arbitrator that shall be chosen by the President of the Law Society.

The parties do not dispute that a valid agreement to arbitrate exists; rather the issue of contention is whether NCR's claims fall within the substantive scope of the agreement.

As a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Despite this strong presumption in favor of arbitration, "arbitration is a matter of contract between the parties, and one cannot be required to submit to arbitration a dispute which it has not agreed to submit to arbitration." When faced with a broad arbitration clause, such as one covering any dispute arising out of an agreement, a court should follow the presumption of arbitration and resolve doubts in favor of arbitration. Indeed, in such a case, only an express provision excluding a specific dispute, or the most forceful evidence of a purpose to exclude the claim from arbitration, will remove the dispute from consideration by the arbitrators. [Emphasis added.]

* * * It is sufficient that a court would have to reference the 1998 Agreement for part of NCR's direct [copyright] infringement claim. Under these circumstances, we find that the copyright infringement claim as to APTRA XFS falls within the scope of the arbitration agreement.

**DECISION AND REMEDY**

The U.S. Court of Appeals for the Sixth Circuit affirmed the part of the district court's decision compelling arbitration of NCR's claims of direct copyright infringement relating to the APTRA XFS software.

**THE LEGAL ENVIRONMENT DIMENSION**

Why did NCR not want its claims decided by arbitration?

**THE ETHICAL DIMENSION**

Could NCR have a claim that KAL engaged in unfair competition because KAL engaged in unethical business practices? (Hint: Unfair competition may occur when one party deceives the public into believing that its goods are the goods of another.) Why or why not?

**MANDATORY ARBITRATION IN THE EMPLOYMENT CONTEXT**

A significant question in the last several years has concerned mandatory arbitration clauses in employment contracts. Many claim that employees' rights are not sufficiently protected when they are forced, as a condition of being hired, to agree to arbitrate all disputes and thus waive their rights under statutes specifically designed to protect employees.
The United States Supreme Court, however, has held that mandatory arbitration clauses in employment contracts are generally enforceable.\(^21\)

Compulsory arbitration agreements often spell out the rules for a mandatory proceeding. For example, an agreement may address in detail the amount and payment of filing fees and other expenses. Some courts have overturned provisions in employment-related agreements that require the parties to split the costs when an individual worker lacks the ability to pay.\(^22\)

Other Types of ADR

The three forms of ADR just discussed are the oldest and traditionally the most commonly used forms. As mentioned earlier, a variety of new types of ADR have emerged in recent years, including those described here.

1. In **early neutral case evaluation**, the parties select a neutral third party (generally an expert in the subject matter of the dispute) to evaluate their respective positions. The parties explain their positions to the case evaluator, and the case evaluator assesses the strengths and weaknesses of each party’s claims.

2. In a **mini-trial**, each party’s attorney briefly argues the party’s case before the other and a panel of representatives from each side who have the authority to settle the dispute. Typically, a neutral third party (usually an expert in the area being disputed) acts as an adviser. If the parties fail to reach an agreement, the adviser renders an opinion as to how a court would likely decide the issue.

3. Numerous federal courts now hold **summary jury trials**, in which the parties present their arguments and evidence and the jury renders a verdict. The jury’s verdict is not binding, but it does act as a guide to both sides in reaching an agreement during the mandatory negotiations that immediately follow the trial.

4. Other alternatives being employed by the courts include summary procedures for commercial litigation and the appointment of special masters to assist judges in deciding complex issues.

---

\(^{21}\) For a landmark decision on this issue, see *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

\(^{22}\) See, for example, *Davis v. O’Mehony & Myers, LLC*, 485 F.3d 1066 (9th Cir. 2007); and *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006).

---

**Providers of ADR Services**

Both government agencies and private organizations provide ADR services. A major provider of ADR services is the **American Arbitration Association (AAA)**, which was founded in 1926 and now handles more than 200,000 claims a year in its numerous offices around the country. Cases brought before the AAA are heard by an expert or a panel of experts in the area relating to the dispute and are usually settled quickly. Generally, about half of the panel members are lawyers. To cover its costs, the AAA charges a fee, paid by the party filing the claim. In addition, each party to the dispute pays a specified amount for each hearing day, as well as a special additional fee in cases involving personal injuries or property loss.

Hundreds of for-profit firms around the country also provide dispute-resolution services. Typically, these firms hire retired judges to conduct arbitration hearings or otherwise assist parties in settling their disputes. The judges follow procedures similar to those of the federal courts and use similar rules. Usually, each party to the dispute pays a filing fee and a designated fee for a hearing session or conference.

**Online Dispute Resolution**

An increasing number of companies and organizations are offering dispute-resolution services using the Internet. The settlement of disputes in these online forums is known as **online dispute resolution (ODR)**. The disputes resolved in these forums have most commonly involved rights to domain names (Web site addresses—see Chapter 8) or the quality of goods sold via the Internet, including goods sold through Internet auction sites.

ODR may be best for resolving small- to medium-sized business liability claims, which may not be worth the expense of litigation or traditional ADR methods. Rules being developed in online forums, however, may ultimately become a code of conduct for everyone who does business in cyberspace. Most online forums do not automatically apply the law of any specific jurisdiction. Instead, results are often based on general, more universal legal principles. As with offline methods of dispute resolution, any party may appeal to a court at any time if the ODR is nonbinding arbitration.

Some cities use ODR as a means of resolving claims against them. For example, New York City hires an ODR provider called Cybersettle to resolve auto accident, sidewalk, and other personal-injury claims made against the city.
UNIT ONE THE LEGAL ENVIRONMENT OF BUSINESS

SECTION 5 INTERNATIONAL DISPUTE RESOLUTION

Businesspersons who engage in international business transactions normally take special precautions to protect themselves in the event that a party with whom they are dealing in another country breaches an agreement. Often, parties to international contracts include special clauses in their contracts providing for how disputes arising under the contracts will be resolved.

Forum-Selection and Choice-of-Law Clauses

As you will read in Chapter 19, parties to international transactions often include forum-selection and choice-of-law clauses in their contracts. These clauses designate the jurisdiction (court or country) where any dispute arising under the contract will be litigated and which nation’s law will be applied. When an international contract does not include such clauses, any legal proceedings arising under the contract will be more complex and attended by much more uncertainty. For example, litigation may take place in two or more countries, with each country applying its own national law to the particular transactions.

Furthermore, even if a plaintiff wins a favorable judgment in a lawsuit litigated in the plaintiff’s country, the defendant’s country could refuse to enforce the court’s judgment. As will be discussed in Chapter 23, for reasons of courtesy, the judgment may be enforced in the defendant’s country, particularly if the defendant’s country is the United States and the foreign court’s decision is consistent with U.S. national law and policy. Other nations, however, may not be as accommodating as the United States, and the plaintiff may be left empty handed.

Arbitration Clauses

International contracts also often include arbitration clauses that require a neutral third party to decide any contract disputes. In international arbitration proceedings, the third party may be a neutral entity (such as the International Chamber of Commerce), a panel of individuals representing both parties’ interests, or some other group or organization. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards—23—which has been implemented in more than 144 countries, including the United States—assists in the enforcement of arbitration clauses, as do provisions in specific treaties among nations. The American Arbitration Association provides arbitration services for international as well as domestic disputes.

Stan Garner resides in Illinois and promotes boxing matches for SuperSports, Inc., an Illinois corporation. Garner created the concept of “Ages” promotion—a three-fight series of boxing matches pitting an older fighter (George Foreman) against a younger fighter. The concept had titles for each of the three fights, including “Battle of the Ages.” Garner contacted Foreman and his manager, who both reside in Texas, to sell the idea, and they arranged a meeting in Las Vegas, Nevada. During the negotiations, Foreman’s manager signed a nondisclosure agreement prohibiting him from disclosing Garner’s promotional concepts unless the parties signed a contract. Nevertheless, after negotiations fell through, Foreman used Garner’s “Battle of the Ages” concept to promote a subsequent fight. Garner filed a suit against Foreman and his manager in a federal district court located in Illinois, alleging breach of contract. Using the information presented in the chapter, answer the following questions.

1. On what basis might the federal district court in Illinois exercise jurisdiction in this case?
2. Does the federal district court have original or appellate jurisdiction?
3. Suppose that Garner had filed his action in an Illinois state court. Could an Illinois state court exercise personal jurisdiction over Foreman or his manager? Why or why not?
4. Assume that Garner had filed his action in a Nevada state court. Would that court have had personal jurisdiction over Foreman or his manager? Explain.

DEBATE THIS: In this age of the Internet, when people communicate via e-mail, instant text messaging, tweeting, Facebook, and MySpace, is the concept of jurisdiction losing its meaning? Explain your answer.

2–1. **Standing** Jack and Maggie Turton bought a house in Jefferson County, Idaho, located directly across the street from a gravel pit. A few years later, the county converted the pit to a landfill. The landfill accepted many kinds of trash that cause harm to the environment, including major appliances, animal carcasses, containers with hazardous content warnings, leaking car batteries, and waste oil. The Turtons complained to the county, but the county did nothing. The Turtons then filed a lawsuit against the county alleging violations of federal environmental laws pertaining to groundwater contamination and other pollution. Do the Turtons have standing to sue? Why or why not?

2–2. **QUESTION WITH SAMPLE ANSWER: Appellate Review.**

The defendant in a lawsuit is appealing the trial court’s decision in favor of the plaintiff. On appeal, the defendant claims that the evidence presented at trial to support the plaintiff’s claim was so scanty that no reasonable jury could have found for the plaintiff. Therefore, argues the defendant, the appellate court should reverse the trial court’s decision. Will an appellate court ever reverse a trial court’s findings with respect to questions of fact? Discuss fully.

* For a sample answer to Question 2–2, go to Appendix I at the end of this text.

2–3. **Jurisdiction** Marya Callais, a citizen of Florida, was walking along a busy street in Tallahassee, Florida, when a large crate flew off a passing truck and hit her, causing numerous injuries. She experienced a great deal of pain and suffering, incurred significant medical expenses, and could not work for six months. She wants to sue the trucking firm for $300,000 in damages. The firm’s headquarters are in Georgia, although the company does business in Florida. In what court might Callais bring suit—a Florida state court, a Georgia state court, or a federal court? What factors might influence her decision?

2–4. **Jurisdiction** Xcentric Ventures, LLC, is an Arizona firm that operates the Web sites RipOffReport.com and BadBusinessBureau.com. Visitors to the sites can buy a copy of a book titled *Do-It-Yourself Guide: How to Get Rip-Off Revenge*. The price ($21.95) includes shipping to anywhere in the United States, including Illinois, to which thirteen copies have been shipped. The sites accept donations and feature postings by individuals who claim to have been “ripped off.” Some visitors posted comments about George S. May International Co., a management consulting firm. The postings alleged fraud, larceny, possession of child pornography, and possession of controlled substances (illegal drugs). May filed a suit in a federal district court in Illinois against Xcentric and others, charging, among other things, “false descriptions and representations.” The defendants filed a motion to dismiss for lack of jurisdiction. What is the standard for exercising jurisdiction over a party whose only connection to a jurisdiction is over the Web? How would that standard apply in this case? Explain. [George S. May International Co. v. Xcentric Ventures, LLC, 409 F.Supp.2d 1052 (N.D.Ill. 2006)]

2–5. **Jurisdiction** In 2001, Raul Leal, the owner and operator of Texas Labor Contractors in East Texas, contacted Poverty Point Produce, Inc., which operates a sweet potato farm in West Carroll Parish, Louisiana, and offered to provide field workers. Poverty Point accepted the offer. Jeffrey Brown, an owner of and field manager for the farm, told Leal the number of workers needed and gave him forms for them to fill out and sign. Leal placed an ad in a newspaper in Brownsville, Texas. Job applicants were directed to Leal’s car dealership in Weslaco, Texas, where they were told the details of the work. Leal recruited, among others, Elias Moreno, who lives in the
Rio Grande Valley in Texas, and transported Moreno and the others to Poverty Point’s farm. At the farm, Leal’s brother Jesse oversaw the work with instructions from Brown, lived with the workers in the on-site housing, and gave them their paychecks. When the job was done, the workers were returned to Texas. Moreno and others filed a suit in a federal district court against Poverty Point and others, alleging, in part, violations of Texas state law related to the work. Poverty Point filed a motion to dismiss the suit on the ground that the court did not have personal jurisdiction. All of the meetings between Poverty Point and the Leals occurred in Louisiana. All of the farmwork was done in Louisiana. Poverty Point has no offices, bank accounts, or phone listings in Texas. It does not advertise or solicit business in Texas. Despite these facts, can the court exercise personal jurisdiction? Explain. [Moreno v. Poverty Point Produce, Inc., 243 F.R.D. 275 (S.D.Tex. 2007)]

2–6. CASE PROBLEM WITH SAMPLE ANSWER: Arbitration Clause.
Kathleen Lowden sued cellular phone company T-Mobile USA, Inc., contending that its service agreements were not enforceable under Washington state law. Lowden requested that the court allow a class-action suit, in which her claims would extend to similarly affected customers. She contended that T-Mobile had improperly charged her fees beyond the advertised price of service and charged her for roaming calls that should not have been classified as roaming. T-Mobile moved to force arbitration in accordance with the provisions that were clearly set forth in the service agreement. The agreement also specified that no class-action suit could be brought, so T-Mobile also asked the court to dismiss the request for a class-action suit. Was T-Mobile correct that Lowden’s only course of action was to file arbitration personally? Why or why not? [Lowden v. T-Mobile USA, Inc., 512 F.3d 1213 (9th Cir. 2008)]

• To view a sample answer for Problem 2–6, go to this book’s Web site at www.cengage.com/blaw/clarkson, select “Chapter 2,” and click on “Case Problem with Sample Answer.”

2–7. Arbitration
Thomas Baker and others who bought new homes from Osborne Development Corp. sued for multiple defects in the houses they purchased. When Osborne sold the homes, it paid for them to be in a new home warranty program administered by Home Buyers Warranty (HBW). When the company enrolled a home with HBW, it paid a fee and filled out a form that stated the following: “By signing below, you acknowledge that you . . . CONSENT TO THE TERMS OF THESE DOCUMENTS INCLUDING THE BINDING ARBITRATION PROVISION contained therein.” HBW then issued warranty booklets to the new homeowners that stated: “Any and all claims, disputes and controversies by or between the Homeowner, the Builder, the Warranty Insurer and/or HBW . . . shall be submitted to arbitration.” Were the new homeowners bound by the arbitration agreement, or could they sue the builder, Osborne, in court? Explain. [Baker v. Osborne Development Corp., 159 Cal.App.4th 884, 71 Cal.Rptr.3d 854 (Cal.App. 2008)]

2–8. Arbitration
PRM Energy Systems, Inc. (PRM), owned technology patents that it licensed to Primenergy to use and to sublicense in the United States. The agreement stated that all disputes would be settled by arbitration. Kobe Steel of Japan was interested in using the technology at its U.S. subsidiary. PRM directed Kobe to talk to Primenergy about that. Kobe talked to PRM directly about using the technology in Japan, but no agreement was reached. Primenergy then agreed to let Kobe use the technology in Japan without telling PRM. The dispute between PRM and Primenergy about Kobe went to arbitration, as required by the license agreement. In addition, PRM sued Primenergy for fraud and theft of trade secrets. PRM also sued Kobe for using the technology in Japan without its permission. The district court ruled that PRM had to take all complaints about Primenergy to arbitration. PRM also had to take its complaint about Kobe to arbitration because the complaint involved a sublicense Kobe was granted by Primenergy. PRM appealed, contending that the fraud and theft of trade secrets went beyond the license agreement with Primenergy and that Kobe had no right to demand arbitration because it never had a right to use the technology under a license from PRM. Is PRM correct, or must all matters go to arbitration? Why or why not? [PRM Energy Systems, Inc. v. Primenergy, 592 F.3d 830 (8th Cir. 2010)]

Nellie Lumpkin, who suffered from various illnesses, including dementia, was admitted to the Picayune Convalescent Center, a nursing home. Because of her mental condition, her daughter, Beverly McDaniel, filled out the admissions paperwork and signed the admissions agreement. It included a clause requiring parties to submit to arbitration any disputes that arose. After Lumpkin left the center two years later, she sued, through her husband, for negligent treatment and malpractice during her stay. The center moved to force the matter to arbitration. The trial court held that the arbitration agreement was not enforceable. The center appealed. [Covenant Health & Rehabilitation of Picayune, LP v. Lumpkin, 23 So.3d 1092 (Miss.App. 2009)]

(a) Should a dispute involving medical malpractice be forced into arbitration? This is a claim of negligence, not a breach of a commercial contract. Is it ethical for medical facilities to impose such a requirement? Is there really any bargaining over such terms?

(b) Should a person with limited mental capacity be held to the arbitration clause agreed to by the next-of-kin who signed on behalf of that person?

2–10. VIDEO QUESTION: Jurisdiction in Cyberspace.
Go to this text’s Web site at www.cengage.com/blaw/clarkson and select “Chapter 2.” Click on “Video Questions” and view the video titled Jurisdiction in Cyberspace. Then answer the following questions.
(a) What standard would a court apply to determine whether it has jurisdiction over the out-of-state computer firm in the video?

(b) What factors is a court likely to consider in assessing whether sufficient contacts existed when the only connection to the jurisdiction is through a Web site?

(c) How do you think the court would resolve the issue in this case?

Go to this text’s Web site at www.cengage.com/blaw/clarkson, select “Chapter 2,” and click on “Practical Internet Exercises.” There you will find the following Internet research exercises that you can perform to learn more about the topics covered in this chapter.

**Practical Internet Exercise 2–1:** Legal Perspective
   Alternative Dispute Resolution

**Practical Internet Exercise 2–2:** Management Perspective
   Resolve a Dispute Online

**Practical Internet Exercise 2–3:** Historical Perspective
   The Judiciary’s Role in American Government
American and English courts follow the adversarial system of justice. Although parties are allowed to represent themselves in court (called pro se representation), most parties to lawsuits hire attorneys to represent them. Each lawyer acts as his or her client’s advocate, presenting the client’s version of the facts in such a way as to convince the judge (or the judge and jury, in a jury trial) that this version is correct.

Most of the judicial procedures that you will read about in the following pages are rooted in the adversarial framework of the American legal system. In this chapter, after a brief overview of judicial procedures, we illustrate the steps involved in a lawsuit with a hypothetical civil case (criminal procedures will be discussed in Chapter 9).

SECTION 1
PROCEDURAL RULES

The parties to a lawsuit must comply with the procedural rules of the court in which the lawsuit is filed. Although most people, when considering the outcome of a case, think of matters of substantive law, procedural law can have a significant impact on one’s ability to assert a legal claim. Procedural rules provide a framework for every dispute and specify what must be done at each stage of the litigation process. Procedural rules are complex, and they vary from court to court and from state to state. There is a set of federal rules of procedure as well as various sets of rules for state courts. Additionally, the applicable procedures will depend on whether the case is a civil or criminal proceeding. All civil trials held in federal district courts are governed by the Federal Rules of Civil Procedure (FRCP).²

Stages of Litigation

Broadly speaking, the litigation process has three phases: pretrial, trial, and posttrial. Each phase involves specific procedures, as discussed throughout this chapter. Although civil lawsuits may vary greatly in terms of complexity, cost, and detail, they typically progress through the specific stages charted in Exhibit 3–1.

To illustrate the procedures involved in a civil lawsuit, we will use a simple hypothetical case. The case arose from an automobile accident, which occurred when a car driven by Antonio Carvello, a resident of New Jersey, collided with a car driven by Jill Kirby, a resident of New York. The accident took place at an intersection in New York City. Kirby suffered personal injuries, which caused her to incur medical and hospital expenses as well as lost wages for four months. In all, she calculated that the cost to her of the accident was $100,000.³ Carvello and Kirby have been unable to agree on a settlement, and Kirby now must decide whether to sue Carvello for the $100,000 compensation she feels she deserves.

1. This right was definitively established in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

2. The United States Supreme Court has authority to establish these rules, as spelled out in 28 U.S.C. Sections 2071–2077. Generally, though, the federal judiciary appoints committees that make recommendations to the Supreme Court. The Court then publishes any proposed changes in the rules and allows for public comment before finalizing the rules.

3. In this example, we are ignoring damages for pain and suffering and for permanent disabilities. Often, plaintiffs in personal-injury cases seek such damages.
CHAPTER 3 Court Procedures

EXHIBIT 3-1 • Stages in a Typical Lawsuit

The First Step: Consulting with an Attorney

As mentioned, rules of procedure often affect the outcome of a dispute—a fact that highlights the importance of obtaining the advice of counsel. The first step taken by almost anyone contemplating a lawsuit is to seek the guidance of a qualified attorney. In the hypothetical Kirby-Carvello case, assume that Kirby consults with a lawyer. The attorney will advise her regarding what she can expect in a lawsuit, her probability of success at trial, and the procedures that will be involved. If more than one court would have jurisdiction over the matter, the attorney will also discuss the advantages and disadvantages of filing in a particular court. Depending on the court hearing the case, the attorney will give Kirby an idea of how much time it will take to resolve the dispute through litigation and provide an estimate of the costs involved.

The attorney will also inform Kirby of the legal fees that she will have to pay in an attempt to collect damages from the defendant, Carvello. Attorneys base their fees on such factors as the difficulty of a matter, the amount of time involved, the experience and skill of the attorney in the particular area of the law, and the cost of doing business. In the United States, legal fees range from $175 to $700 per hour or even higher (the average fee per hour is between $200 and $425). In addition, the client is also responsible for paying various expenses related to the case (called “out-of-pocket” costs), including court filing fees, travel expenses, depositions, and the cost of expert witnesses and investigators, for example.

---

4. See Chapter 43 on pages 837 and 838 for a discussion of the importance of obtaining legal counsel and for guidelines on how to locate attorneys and retain their services.
TYPES OF ATTORNEYS’ FEES

For a particular legal matter, an attorney may charge one type of fee or a combination of several types. **Fixed fees** may be charged for the performance of such services as drafting a simple will. **Hourly fees** may be computed for matters that will involve an indeterminate period of time. Any case brought to trial, for example, may involve an expenditure of time that cannot be precisely estimated in advance. **Contingency fees** are fixed as a percentage (usually between 25 and 40 percent) of a client’s recovery in certain types of lawsuits, such as a personal-injury lawsuit.\(^5\) If the lawsuit is unsuccessful, the attorney receives no fee, but the client will have to reimburse the attorney for any out-of-pocket costs incurred. Because Kirby’s claim involves a personal injury, her lawyer will likely take the case on a contingency-fee basis, but she may have to pay an amount up front to cover the court costs. In some cases, the winning party may be able to recover at least some portion of her or his attorneys’ fees from the losing party.

**SETTLEMENT CONSIDERATIONS**

Once an attorney has been retained, the attorney is required to pursue a resolution of the matter on the client’s behalf. Nevertheless, the amount of energy an attorney will spend on a given case is also determined by the time and funds the client wishes to devote to the process. If the client is willing to pay for a lengthy trial and one or more appeals, the attorney may pursue those actions. Often, however, after learning of the substantial costs that litigation entails, a client may decide to pursue a settlement of the claim. Attempts to settle the case may be ongoing throughout the litigation process.

Another important factor in deciding whether to pursue litigation is the defendant’s ability to pay the damages sought. Even if Kirby is awarded damages, it may be difficult to enforce the court’s judgment if, for example, the amount exceeds the limits of Carvello’s automobile insurance policy. (We will discuss the problems involved in enforcing a judgment later in this chapter.)

The pretrial litigation process involves the filing of the **pleadings**, the gathering of evidence (called discovery), and possibly other procedures, such as a pretrial conference and jury selection.

**The Pleadings**

The **complaint** and **answer** (and other legal documents discussed below), taken together, are known as the **pleadings**. The pleadings inform each party of the other’s claims and specify the issues (disputed questions) involved in the case. Because the rules of procedure vary depending on the jurisdiction of the court, the style and form of the pleadings may be different from those shown in this chapter.

**THE PLAINTIFF’S COMPLAINT**

Kirby’s action against Carvello commences when her lawyer files a **complaint**\(^6\) with the clerk of the appropriate court. The complaint contains a statement alleging (1) the facts showing that the court has subject-matter and personal jurisdiction, (2) the facts establishing the plaintiff’s basis for relief, and (3) the remedy the plaintiff is seeking. Complaints can be lengthy or brief, depending on the complexity of the case and the rules of the jurisdiction.

Exhibit 3–2 illustrates how a complaint in the Kirby-Carvello case might appear. The complaint asserts facts indicating that the federal district court has subject-matter jurisdiction because of diversity of citizenship. It then gives a brief statement of the facts of the accident and alleges that Carvello negligently drove his vehicle through a red light, striking Kirby’s car and causing serious personal injury and property damage. The complaint goes on to state that Kirby is seeking $100,000 in damages, although in some state civil actions the plaintiff need not specify the amount of damages sought.

**Service of Process.** Before the court can exercise personal jurisdiction over the defendant (Carvello)—in effect, before the lawsuit can begin—the court must have proof that the defendant was notified of the lawsuit. Formally notifying the defendant of a lawsuit is called **service of process**. The plaintiff must deliver, or serve, a copy of the complaint and a **summons** (a notice requiring the defendant to appear in court and answer the complaint) to the defendant. The summons notifies Carvello that he must file an answer to the complaint within a specified time period (twenty days in the federal courts) or suffer a default judgment against him. A **default judgment** in Kirby’s favor

---

\(^5\) Note that attorneys may charge a contingency fee in only certain types of cases and are typically prohibited from entering into this type of fee arrangement in criminal cases, divorce cases, and cases involving the distribution of assets after death.

\(^6\) Sometimes, the document filed with the court is called a **petition** or a declaration instead of a complaint.
CHAPTER 3  Court Procedures

EXHIBIT 3–2 • A Typical Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JILL KIRBY

v.

ANTONIO CARVELLO

Plaintiff,

Defendant.

COMPLAINT

The plaintiff brings this cause of action against the defendant, alleging as follows:

1. This action is between the plaintiff, who is a resident of the State of New York, and the defendant, who is a resident of the State of New Jersey. There is diversity of citizenship between the parties.
2. The amount in controversy, exclusive of interest and costs, exceeds the sum of $75,000.
3. On September 10th, 2011, the plaintiff, Jill Kirby, was exercising good driving habits and reasonable care in driving her car through the intersection of Boardwalk and Pennsylvania Avenue, New York City, New York, when the defendant, Antonio Carvello, negligently drove his vehicle through a red light at the intersection and collided with the plaintiff’s vehicle.
4. As a result of the collision, the plaintiff suffered severe physical injury, which prevented her from working, and property damage to her car.

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of $100,000 plus interest at the maximum legal rate and the costs of this action.

By

Joseph Roe
Attorney for Plaintiff
100 Main Street
New York, New York

1/3/12

Method of Service. How service of process occurs depends on the rules of the court or jurisdiction in which the lawsuit is brought. Under the Federal Rules of Civil Procedure, anyone who is at least eighteen years of age and is not a party to the lawsuit can serve process in federal court cases. In state courts, the process server is often a county sheriff or an employee of an independent company that provides process service in the local area. Usually, the server hands the summons and complaint to the defendant personally or leaves it at the defendant’s residence or place of business. In some states, process can be served by mail if the defendant consents (accepts service). When the defendant cannot be reached, special rules provide for alternative means of service, such as publishing a notice in the local newspaper. In some situations, such as when the defendant is in a foreign country, courts have even allowed service of process via e-mail, as long as it...
is reasonably calculated to provide notice and an opportunity to respond.7

In cases involving corporate defendants, the summons and complaint may be served on an officer or on a registered agent (representative) of the corporation. The name of a corporation’s registered agent can usually be obtained from the secretary of state’s office in the state where the company incorporated its business (and, frequently, from the secretary of state’s office in any state where the corporation does business).

Did the plaintiff in the following case effect proper service of the summons and the complaint on an out-of-state corporation?

---

**EXHIBIT 3–3 • A Typical Summons**

---

**IN THE LANGUAGE OF THE COURT**

**AARON, J. [Judge]**

* * * *

[Alan] Cruz’s parents purchased a pressure cooker from a vendor at the San Diego County Fair [in California] in the summer of 2001. On September 10, 2001, Cruz, who was 16 years old at the time, suffered burns on the left side of his torso and thigh when he attempted to take the lid off of the pressure cooker. Fagor [America, Inc.] is the American distributor of the pressure cooker.

On the date of the incident involving the pressure cooker, Cruz’s parents sent an e-mail to Fagor to
alert the company about what had occurred.

On June 2, 2003, [Fagor] notified Cruz that it was denying liability.

** * * * **

Cruz filed a complaint [in a California state court] against Fagor on December 1, 2004, alleging causes of action for negligence and product liability. On December 14, 2004, Cruz, through his attorney, mailed the summons and complaint to Fagor by certified mail, return receipt requested. The envelope was addressed to “Patricio Barriga, Chairman of the Board, FAGOR AMERICA, INC., A Delaware Corporation, 1099 Wall Street, Lyndhurst, NJ 07071-3678.” The return receipt indicates that it was signed by an individual named Tina Hayes on December 22. Fagor did not file an answer.

** * * * **
A default judgment [a judgment entered against a defendant who fails to answer or respond to the plaintiff’s complaint] in the amount of $259,114.50 was entered against Fagor on May 31, 2005.

Fagor did not make an appearance in the matter until November 29, 2005, when Fagor’s attorneys [filed] a motion to set aside the entry of default and default judgment.

** * * * **

On February 1, the trial court granted the motion. Cruz [appealed to a state intermediate appellate court] on February 16.

** * * * **
The trial court found that service was not effected because there was no proof that the summons and complaint (1) were served on Fagor’s designated agent for service; (2) were delivered to the president or other officer, manager, or person authorized to receive service in accordance with [California Civil Procedure Code Section] 416.10; or (3) were served in accordance with [California] Corporations Code Section 2110, which provides for service on a foreign corporation by hand delivery to an officer or designated agent for service of process.

** * * * ** [But] the proofs of service demonstrate that Cruz served Fagor, an out-of-state corporation, in accordance with [California Civil Procedure Code Section] 416.40. Section 416.40 provides in pertinent part:

A summons may be served on a person outside this state in any manner provided by this article or by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt.

Because Fagor is a corporate entity, Cruz was also required to comply with the mandates of Section 416.10. That section details how a plaintiff is to serve a summons on a corporate defendant and provides in relevant part:

A summons may be served on a corporation by delivering a copy of the summons and of the complaint; * * * To the president or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the corporation to receive service of process.

** * * * **

A number of documents in the record establish that Cruz properly served Fagor with process pursuant to California’s statutory requirements. The first is a Judicial Counsel of California proof of service form, completed and signed by Cruz’s attorney, Harold Thompson. In that form, Thompson states that the summons and complaint were addressed and mailed to Patricio Barriga, the president of Fagor, at 1099 Wall Street, Lyndhurst, New Jersey 07071-3678, which is the address Fagor listed in 2003 with the New York State Department of State—Division of Corporations as its “service of process address.”

** * * * ** Thompson’s declaration was properly executed because it shows that Cruz addressed the summons and complaint to a person to be served, as listed under Section 416.10. [Emphasis added.]

Cruz also submitted a signed return receipt to establish the fact of actual delivery. A return receipt attached to the proof of service form shows that the envelope was accepted at the Lyndhurst address. The receipt was signed by Hayes.

** * * * **

* * Cruz submitted the declaration of his attorney, Harold Thompson, in which Thompson states that he confirmed with a representative of the United States Postal Service in Lyndhurst, New Jersey, that Hayes regularly receives mail on behalf of Fagor at its Lyndhurst office. This is * * sufficient to establish that an agent authorized to receive mail on the defendant’s behalf received the summons and complaint.

** * * * **

* * By virtue of her authority to accept mail on Fagor’s behalf, Hayes’s notice of the action is imputed to Fagor and its officers. Barriga’s statement that he did not receive the summons and complaint does not establish that service of process was invalid. Barriga had constructive knowledge of the existence of the action, and of the summons and complaint, once an individual authorized to receive corporate mail acknowledged service. To hold otherwise would be to ignore the realities of corporate life, in which the duty to sign for mail received often resides with a designated mailroom employee, a receptionist, a secretary, or an assistant. A plaintiff who has provided evidence that a person authorized to receive mail on behalf of a corporation in fact received an item that was mailed to an officer of the corporation should not be held responsible for any failure on the part of the corporate defendant to effectively distribute that mail. [Emphasis added.]

** * * * **

Cruz has * * * * satisfied all of the elements necessary to establish effective service.

** * * * ** The order of the trial court is reversed.

EXTENDED CASE CONTINUES
OPERATES AS A COMPLETE DEFENSE. IN MOST STATES, HOWEVER, THE PLAINTIFF’S OWN NEGLIGENCE CONSTITUTES ONLY A PARTIAL DEFENSE (SEE CHAPTER 7).

COUNTERCLAIMS. CARVELLO COULD ALSO DENY KIRBY’S ALLEGATIONS AND SET FORTH HIS OWN CLAIM THAT THE ACCIDENT OCCURRED AS A RESULT OF KIRBY’S NEGLIGENCE AND THAT THEREFORE SHE OWS CARVELLO FOR DAMAGE TO HIS CAR. THIS IS APPROPRIATELY CALLED A COUNTERCLAIM. IF CARVELLO FILES A COUNTERCLAIM, KIRBY WILL HAVE TO SUBMIT AN ANSWER TO THE COUNTERCLAIM.

DISMISSALS AND JUDGMENTS BEFORE TRIAL

MANY ACTIONS FOR WHICH PLEADINGS HAVE BEEN FILED NEVER COME TO TRIAL. THE PARTIES MAY, FOR EXAMPLE, NEGOTIATE A SETTLEMENT OF THE DISPUTE AT ANY STAGE OF THE LITIGATION PROCESS. THERE ARE ALSO NUMEROUS PROCEDURAL AVENUES FOR DISPOSING OF A CASE WITHOUT A TRIAL. MANY OF THEM INVOLVE ONE OR THE OTHER PARTY’S ATTEMPTS TO GET THE CASE DISMISSED THROUGH THE USE OF VARIOUS MOTIONS.

A MOTION IS A PROCEDURAL REQUEST SUBMITTED TO THE COURT BY AN ATTORNEY ON BEHALF OF HER OR HIS CLIENT. WHEN ONE PARTY FILES A MOTION WITH THE COURT, THAT PARTY MUST ALSO SEND TO, OR SERVE ON, THE OPPOSING PARTY A NOTICE OF MOTION. THE NOTICE OF MOTION INFORMS THE OPPOSING PARTY THAT THE MOTION HAS BEEN FILED. PRETRIAL MOTIONS INCLUDE THE MOTION TO DISMISS, THE MOTION FOR JUDGMENT ON THE PLEADINGS, AND THE MOTION FOR SUMMARY JUDGMENT, AS WELL AS THE OTHER MOTIONS LISTED IN EXHIBIT 3–4.

EXTENDED CASE 3.1 CONTINUED

1. Suppose that Cruz had misaddressed the envelope but the summons had still reached Hayes, and Cruz could prove it. Would this have been sufficient to establish valid service? Explain.
2. Should a plaintiff be required to serve a defendant with a summons and a copy of a complaint more than once? Why or why not?
CHAPTER 3  Court Procedures

EXHIBIT 3-4 • Pretrial Motions

MOTION TO DISMISS
A motion normally filed by the defendant in which the defendant asks the court to dismiss the case for a specified reason, such as improper service, lack of personal jurisdiction, or the plaintiff’s failure to state a claim for which relief can be granted.

MOTION TO STRIKE
A motion filed by the defendant in which the defendant asks the court to strike (delete) certain paragraphs from the complaint. Motions to strike help to clarify the underlying issues that form the basis for the complaint by removing paragraphs that are redundant or irrelevant to the action.

MOTION TO MAKE MORE DEFINITE AND CERTAIN
A motion filed by the defendant to compel the plaintiff to clarify the basis of the plaintiff’s cause of action. The motion is filed when the defendant believes that the complaint is too vague or ambiguous for the defendant to respond to it in a meaningful way.

MOTION FOR JUDGMENT ON THE PLEADINGS
A motion that may be filed by either party in which the party asks the court to enter a judgment in his or her favor based on information contained in the pleadings. A judgment on the pleadings will be made only if there are no facts in dispute and the only question is how the law applies to a set of undisputed facts.

MOTION TO COMPEL DISCOVERY
A motion that may be filed by either party in which the party asks the court to compel the other party to comply with a discovery request. If a party refuses to allow the opponent to inspect and copy certain documents, for example, the party requesting the documents may make a motion to compel production of those documents.

MOTION FOR SUMMARY JUDGMENT
A motion that may be filed by either party in which the party asks the court to enter judgment in his or her favor without a trial. Unlike a motion for judgment on the pleadings, a motion for summary judgment can be supported by evidence outside the pleadings, such as witnesses’ affidavits, answers to interrogatories, and other evidence obtained prior to or during discovery.

MOTION TO DISMISS
A motion normally filed by the defendant in which the defendant asks the court to dismiss the case for a specified reason, such as improper service, lack of personal jurisdiction, or the plaintiff’s failure to state a claim for which relief can be granted.

In deciding a motion for judgment on the pleadings, the judge may consider only the evidence contained in the pleadings. A judgment on the pleadings will be made only if there are no facts in dispute and the only question is how the law applies to a set of undisputed facts.

MOTION TO DISMISS
A motion normally filed by the defendant in which the defendant asks the court to dismiss the case for a specified reason, such as improper service, lack of personal jurisdiction, or the plaintiff’s failure to state a claim for which relief can be granted.

MOTION TO STRIKE
A motion filed by the defendant in which the defendant asks the court to strike (delete) certain paragraphs from the complaint. Motions to strike help to clarify the underlying issues that form the basis for the complaint by removing paragraphs that are redundant or irrelevant to the action.

MOTION TO MAKE MORE DEFINITE AND CERTAIN
A motion filed by the defendant to compel the plaintiff to clarify the basis of the plaintiff’s cause of action. The motion is filed when the defendant believes that the complaint is too vague or ambiguous for the defendant to respond to it in a meaningful way.

MOTION FOR JUDGMENT ON THE PLEADINGS
A motion that may be filed by either party in which the party asks the court to enter a judgment in his or her favor based on information contained in the pleadings. A judgment on the pleadings will be made only if there are no facts in dispute and the only question is how the law applies to a set of undisputed facts.

MOTION TO COMPEL DISCOVERY
A motion that may be filed by either party in which the party asks the court to compel the other party to comply with a discovery request. If a party refuses to allow the opponent to inspect and copy certain documents, for example, the party requesting the documents may make a motion to compel production of those documents.

MOTION FOR SUMMARY JUDGMENT
A motion that may be filed by either party in which the party asks the court to enter judgment in his or her favor without a trial. Unlike a motion for judgment on the pleadings, a motion for summary judgment can be supported by evidence outside the pleadings, such as witnesses’ affidavits, answers to interrogatories, and other evidence obtained prior to or during discovery.

In deciding a motion for judgment on the pleadings, the judge may consider only the evidence contained in the pleadings. In contrast, in a motion for summary judgment, discussed next, the court may consider evidence outside the pleadings, such as sworn statements and other materials that would be admissible as evidence at trial.

MOTION FOR SUMMARY JUDGMENT
Either party can file a motion for summary judgment, which asks the court to grant a judgment in that party’s favor without a trial. As with a motion for judgment on the pleadings, a court will grant a motion for summary judgment only if it determines that no facts are in dispute and the only question is how the law applies to the facts. A motion for summary judgment can be made before or during a trial, but it will be granted only if, when the evidence is viewed.
in the light most favorable to the other party, there clearly are no facts in contention.

To support a motion for summary judgment, a party can submit evidence obtained at any point before the trial that refutes the other party’s factual claim. The evidence may consist of affidavits (sworn statements by parties or witnesses) or copies of documents, such as contracts, e-mails, and letters obtained through the course of discovery (discussed next). Of course, the evidence must be admissible—that is, evidence that the court would allow to be presented during the trial. As mentioned, the use of additional evidence is one feature that distinguishes the motion for summary judgment from the motion to dismiss and the motion for judgment on the pleadings.

**Discovery**

Before a trial begins, the parties can use a number of procedural devices to obtain information and gather evidence about the case. Kirby, for example, will want to know how fast Carvello was driving, whether he had been drinking or was under the influence of any medication, and whether he was wearing corrective lenses if he was required by law to do so while driving. The process of obtaining information from the opposing party or from witnesses prior to trial is known as discovery. Discovery includes gaining access to witnesses, documents, records, and other types of evidence. In federal courts, the parties are required to make initial disclosures of relevant evidence to the opposing party.

Discovery prevents surprises at trial by giving both parties access to evidence that might otherwise be hidden. This allows the litigants to learn as much as they can about what to expect at a trial before they reach the courtroom. Discovery also serves to narrow the issues so that trial time is spent on the main questions in the case.

The main question in the following case was what a court could do when a plaintiff failed to identify and disclose the names of expert witnesses, even though the court deemed that such witnesses were necessary to establish the plaintiff’s claim against the defendants.

**CASE 3.2**

**Blankenship v. Collier**

Supreme Court of Kentucky, 302 S.W.3d 665 (2010).

[www.courts.ky.gov/supremecourt/minutes.htm](http://www.courts.ky.gov/supremecourt/minutes.htm)

**BACKGROUND AND FACTS**

In February 2004, Horace Collier was admitted to Caritas Medical Center with abdominal pain. The following day, after undergoing tests and being diagnosed by Dr. Robert Blankenship as having appendicitis, Collier had an appendectomy. One year later, Collier sued Blankenship and Caritas Health Services in a Kentucky state court, contending that they had been negligent because they had failed to evaluate and treat him in a timely manner. Specifically, Collier claimed that he had been ignored for several hours while awaiting treatment and had suffered severe abdominal pain, and that the X-ray of his abdomen had not been stored properly, causing further delay in his diagnosis and treatment. Collier alleged that as a result of the defendants’ medical negligence, he had sustained permanent physical and mental injuries, prolonged pain and mental anguish, impairment of his power to earn income, and significant medical expenses. More than nine months later, Collier had not yet disclosed the identities of any expert witnesses who would testify on his behalf, and the court ordered him to do so by January 30, 2006. At Collier’s request, this deadline was extended to February 28. Finally, on March 14, 2006, after Collier still had not disclosed any names, the defendants filed motions for summary judgment, arguing that there could be no issue of material fact in this medical malpractice case without expert testimony. The trial court granted the motions. Collier appealed, arguing that summary judgment was inappropriate in this instance because it was being used only as a sanctioning tool to punish him for failing to timely disclose his experts and that there was a “serious question” as to whether he would even need experts to prove his medical malpractice claim.

---

**a.** On the page that opens, select “January 21” under the “2010” heading. Scroll down the list to the case title to access the court’s opinion. The Supreme Court of Kentucky maintains this Web site.

**b.** Medical malpractice is the term used for the tort of negligence when committed by medical professionals—see Chapter 7.
intermediate appellate court agreed and reversed the trial court's decision. The defendants appealed the decision to the Supreme Court of Kentucky.

IN THE LANGUAGE OF THE COURT

Opinion of the court by Justice ABRAMSON.

* * * Although a defendant is permitted to move for a summary judgment at any time, this Court has cautioned trial courts not to take up these motions prematurely and to consider summary judgment motions “only after the opposing party has been given ample opportunity to complete discovery.” Thus, even though an appellate court always reviews the substance of a trial court's summary judgment ruling de novo to determine whether the record reflects a genuine issue of material fact, a reviewing court must also consider whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling. In a medical malpractice action, where a sufficient amount of time has expired and the plaintiff has still “failed to introduce evidence sufficient to establish the respective applicable standard of care,” then the defendants are entitled to summary judgment as a matter of law. The trial court’s determination that a sufficient amount of time has passed and that it can properly take up the summary judgment motion for a ruling is reviewed for an abuse of discretion. [Emphasis added.]

In this case, the issue before this Court is not simply whether Collier had failed to establish a genuine issue of material fact at the time Dr. Blankenship and Caritas filed their summary judgment motions—without a doubt, there is no genuine issue of material fact in the record because Collier has no expert to support his claim of medical negligence. Rather, the more specific issue is whether the trial court was correct to take up the defendants’ summary judgment motions and enter a ruling when it did and, secondarily, whether the court was required first either to enter a separate order requiring Collier to obtain expert testimony or to enter an order sanctioning Collier for failing to meet the court’s expert disclosure deadline.

Having carefully reviewed the record, we conclude that the defendants’ summary judgment motions were properly before the trial court and it did not abuse its discretion in taking them up and deciding to rule on the motions approximately four months after they were filed and seventeen months after the lawsuit was initiated. Collier had completely failed to identify any expert witnesses and could not sustain his burden of proof without expert testimony and, thus, no material issue of fact existed in the record and the defendants were entitled to summary judgment as a matter of law. Because Collier never disputed that a medical expert was necessary to prove his claim of medical negligence and continually represented to the trial court that he would obtain an expert witness, no separate ruling stating the obvious—the need for an expert witness—was required before the court ruled on the defendants’ summary judgment motions. Further, * * * the trial court was not required to enter a sanctions order prior to granting the defendants’ summary judgment motions.

DECISION AND REMEDY • The Supreme Court of Kentucky reversed the decision of the lower appellate court and reinstated the trial court’s decision. The trial court had not abused its discretion by granting summary judgment for the defendants.

THE ETHICAL DIMENSION • Collier contended that there was a “serious question” as to whether he would even need experts to prove his medical malpractice claim. Is it fair to Collier to prevent the trial from proceeding, even though the lack of expert testimony might have made it difficult—if not impossible—for him to win the case? Explain.

MANAGERIAL IMPLICATIONS • Business owners and managers should be aware that initiating discovery procedures and responding to discovery requests in a timely fashion are important in any litigation. Although the court in this case claimed that summary judgment was not a sanction imposed on the plaintiff for delays during discovery, one could argue (as a dissenting judge did) that it was indeed a sanction—and a very harsh one. Courts have also dismissed cases when the plaintiffs have caused undue delay by not meeting procedural deadlines.
DISCOVERY RULES The FRCP and similar state rules set forth the guidelines for discovery activity. Generally, discovery is allowed regarding any matter that is relevant to the claim or defense of any party. Discovery rules also attempt to protect witnesses and parties from undue harassment, and to safeguard privileged or confidential material from being disclosed. Only information that is relevant to the case at hand—or likely to lead to the discovery of relevant information—is discoverable. If a discovery request involves privileged or confidential business information, a court can deny the request and can limit the scope of discovery in a number of ways. For example, a court can require the party to submit the materials to the judge in a sealed envelope so that the judge can decide if they should be disclosed to the opposing party.

DEPOSITIONS Discovery can involve the use of depositions. A deposition is sworn testimony by a party to the lawsuit or by any witness, recorded by an authorized court official. The person deposed gives testimony and answers questions asked by the attorneys from both sides. The questions and answers are recorded, sworn to, and signed. These answers, of course, will help the attorneys prepare their cases. Depositions also give attorneys the opportunity to ask immediate follow-up questions and to evaluate how their witnesses will conduct themselves at trial. In addition, depositions can be employed in court to impeach (challenge the credibility of) a party or a witness who changes testimony at the trial. A deposition can also be used as testimony if the witness is not available at trial.

INTERROGATORIES Discovery can also involve interrogatories, which are written questions for which written answers are prepared and then signed under oath. The main difference between interrogatories and written depositions is that interrogatories are directed to a party to the lawsuit (the plaintiff or the defendant), not to a witness, and the party usually has thirty days to prepare answers. The party’s attorney often drafts the answers to interrogatories in a manner calculated to give away as little information as possible. Whereas depositions are useful for eliciting candid responses and answers not prepared in advance, interrogatories are designed to obtain accurate information about specific topics, such as how many contracts were signed and when. The scope of interrogatories is also broader because parties are obligated to answer questions, even if that means disclosing information from their records and files. Note that a court can impose sanctions on a party who fails to answer interrogatories (or who refuses to respond to other discovery requests).

CASE IN POINT Computer Task Group, Inc. (CTG), hired William Brotby as an information technology consultant. As a condition of his employment, Brotby signed an agreement that restricted his ability to work for CTG’s customers if he left CTG. Less than two years later, Brotby left CTG and began working for Alyeska Pipeline Service Company, a CTG client, in breach of the agreement. CTG sued Brotby. During discovery, Brotby refused to respond fully to CTG’s interrogatories. He gave contradictory answers, made frivolous objections, filed baseless motions, and never disclosed all the information that CTG sought. The court ordered Brotby to comply with discovery requests five times, but Brotby continued to make excuses and changed his story repeatedly, making it impossible for CTG to establish basic facts with any certainty. Eventually, CTG requested and the court granted a default judgment against Brotby based on his failure to cooperate.8

REQUESTS FOR ADMISSIONS One party can serve the other party with a written request for an admission of the truth of matters relating to the trial. Any fact admitted under such a request is conclusively established as true for the trial. For example, Kirby can ask Carvello to admit that his driver’s license was suspended at the time of the accident. A request for admission shortens the trial because the parties will not have to spend time proving facts on which they already agree.

REQUESTS FOR DOCUMENTS, OBJECTS, AND ENTRY UPON LAND A party can gain access to documents and other items not in her or his possession in order to inspect and examine them. Carvello, for example, can gain permission to inspect and copy Kirby’s car repair bills. Likewise, a party can gain “entry upon land” to inspect the premises.

REQUESTS FOR EXAMINATIONS When the physical or mental condition of one party is in question, the opposing party can ask the court to order a physical or mental examination by an independent examiner. If the court agrees to make the order, the opposing party can obtain the results of the examination. Note that the court will make such an order only when the need for the information outweighs the right to privacy of the person to be examined.

Electronic Discovery

Any relevant material, including information stored electronically, can be the object of a discovery request. The federal rules and most state rules (as well as court decisions) specifically allow individuals to obtain discovery of electronic “data compilations.” Electronic evidence, or e-evidence, consists of all computer-generated or electronically recorded information, such as e-mail, voice mail, spreadsheets, word-processing documents, and other data. E-evidence can reveal significant facts that are not discoverable by other means. For example, computers automatically record certain information about files—such as who created the file and when, and who accessed, modified, or transmitted it—on their hard drives. This information can only be obtained from the file in its electronic format—not from printed-out versions.

The Federal Rules of Civil Procedures deals specifically with the preservation, retrieval, and production of electronic data. Although traditional means, such as interrogatories and depositions, are still used to find out whether e-evidence exists, a party usually must hire an expert to retrieve the evidence in its electronic format. The expert uses software to reconstruct e-mail exchanges to establish who knew what and when they knew it. The expert can even recover computer files that the user thought had been deleted. Reviewing back-up copies of documents and e-mail can provide useful—and often quite damaging—information about how a particular matter progressed over several weeks or months.

Electronic discovery, or e-discovery, has significant advantages over paper discovery, but it is also time consuming and expensive. These costs are amplified when the parties involved in the lawsuit are large corporations with many offices and employees. Who should pay the costs associated with e-discovery? For a discussion of how the courts are handling this issue, see this chapter’s Shifting Legal Priorities for Business feature on the next page.

Pretrial Conference

After discovery has taken place and before the trial begins, the attorneys may meet with the trial judge in a pretrial conference, or hearing. Usually, the conference consists of an informal discussion between the judge and the opposing attorneys after discovery has taken place. The purpose of the conference is to explore the possibility of a settlement without trial and, if this is not possible, to identify the matters that are in dispute and to plan the course of the trial. In particular, the parties may attempt to establish ground rules to restrict the number of expert witnesses or discuss the admissibility or costs of certain types of evidence.

The Right to a Jury Trial

The Seventh Amendment to the U.S. Constitution guarantees the right to a jury trial for cases at law in federal courts when the amount in controversy exceeds $20. Most states have similar guarantees in their own constitutions (although the threshold dollar amount is higher than $20). The right to a trial by jury need not be exercised, and many cases are tried without a jury. In most states and in federal courts, one of the parties must request a jury, or the judge presumes the parties waive this right. If there is no jury, the judge determines the truth of the facts alleged in the case.

Jury Selection

Before a jury trial commences, a panel of jurors must be selected. Although some types of trials require twelve-person juries, most civil matters can be heard by six-person juries. The jury selection process is known as voir dire. During voir dire in most jurisdictions, attorneys for the plaintiff and the defendant ask prospective jurors oral questions to determine whether a potential jury member is biased or has any connection with a party to the action or with a prospective witness. In some jurisdictions, the judge may do all or part of the questioning based on written questions submitted by counsel for the parties.

During voir dire, a party may challenge a certain number of prospective jurors peremptorily—that is, ask that an individual not be sworn in as a juror without providing any reason. Alternatively, a party may challenge a prospective juror for cause—that is, provide a reason why an individual should not be sworn in as a juror. If the judge grants the challenge, the individual is asked to step down. A prospective juror, however, may not be excluded by the use of discriminatory challenges, such as those based on racial criteria or gender.

See Concept Summary 3.1 on page 63 for a review of pretrial procedures.

9. Pronounced vwahr deehr. These verbs based on Old French mean “to speak the truth.” In legal language, the phrase refers to the process of questioning jurors to learn about their backgrounds, attitudes, and similar attributes.
Today, less than 0.5 percent of new information is created on paper. Instead of sending letters and memos, people send e-mails and text messages, creating a massive amount of electronically stored information (ESI). The law requires parties to preserve ESI whenever there is a "reasonable anticipation of litigation."

### Why Companies Fail to Preserve Electronic Evidence

Preserving electronic evidence, or e-evidence, can be a challenge, particularly for large corporations that have electronic data scattered across multiple networks, servers, desktops, laptops, handheld devices, and even home computers. Although many companies have policies regarding back-up of office e-mail and computer systems, these may cover only a fraction of the e-discovery requested in a lawsuit.

Technological advances further complicate the situation. Users of BlackBerry devices, for example, can configure them so that messages are transmitted with limited or no archiving rather than going through a company’s servers and being recorded. How can a company preserve e-evidence that is never on its servers? In one case, the court held that a company had a duty to preserve transitory “server log data,” which exist only temporarily on a computer’s memory.

### Potential Sanctions and Malpractice Claims

A court may impose sanctions (such as fines) on a party that fails to preserve e-evidence or to comply with e-discovery requests. A firm may be sanctioned if it provides e-mails without the attachments, does not produce all of the e-evidence requested, or fails to suspend its automatic e-mail deletion procedures. Nearly 25 percent of the reported opinions on e-discovery from 2008 involved sanctions for failure to preserve e-evidence. Attorneys who fail to properly advise their clients concerning the duty to preserve e-evidence also often face sanctions and malpractice claims.

### Lessons from Intel Corporation

A party that fails to preserve e-evidence may even find itself at such a disadvantage that it will settle a dispute rather than continue litigation. For example, Advanced Micro Devices, Inc. (AMD), sued Intel Corporation, one of the world’s largest microprocessor suppliers, for violating antitrust laws. Immediately after the lawsuit was filed, Intel began collecting and preserving the ESI on its servers. Although the company instructed its employees to retain documents and e-mails related to competition with AMD, many employees saved only copies of the e-mails that they had received and not e-mails that they had sent.

In addition, Intel did not stop its automatic e-mail deletion system, causing other information to be lost. In the end, although Intel produced data that, on paper, would have been equivalent to “somewhere in the neighborhood of a pile 137 miles high,” its failure to preserve e-evidence led it to settle the dispute in 2008.

### Managerial Implications

Clearly, companies can be accused of intentionally failing to preserve electronic data. As a manager, you have to weigh the cost of retaining data, such as e-mails, against the benefits of having those data available if your company is ever sued.

---

b. See, for example, John B. v. Goetz, 531 F.3d 448 (6th Cir. 2008); and Wingnut Films, Ltd. v. Katija Motion Pictures, 2007 WL 2758571 (C.D.Cal. 2007).
d. See, for example, Qualcomm, Inc. v. Broadcom Corp., 539 F.3d 1214 (S.D.Cal. 2007).
Evidence Must Be Relevant to the Issues

Evidence will not be admitted in court unless it is relevant to the matter in question. Relevant evidence is evidence that tends to prove or disprove a fact in question or to establish the degree of probability of a fact or action. For example, evidence that the defendant’s gun was in the home of another person when the victim was shot would be relevant—because it would tend to prove that the defendant did not shoot the victim.

Hearsay Evidence Not Admissible

Generally, hearsay is not admissible as evidence. Hearsay is testimony someone gives in court about a statement made by someone else who was not under oath at the time of the statement. Literally, it is what someone heard someone else say. For example, if a witness
in the Kirby-Carvello case testified in court concerning what he or she heard another observer say about the accident, that testimony would be hearsay, or secondhand knowledge. Admitting hearsay into evidence carries many risks because, even though it may be relevant, there is no way to test its reliability.

In the following case, some of the plaintiff’s evidence consisted of printouts of Web pages purporting to indicate how the pages appeared at a prior point in time. The defendant challenged this evidence as hearsay.

**BACKGROUND AND FACTS** • In 1997, Robert Novak registered the domain name petswarehouse.com and began selling pet supplies and pets online. Within two years, the site had become one of the most popular sites for pet supplies in the United States. Novak obtained a trademark for the petswarehouse.com name and transferred its registration to Nitin Networks, Inc., which was owned by Tucows, Inc., a Canadian firm that is a domain registrar. In an unrelated matter, John Benn obtained a judgment against Novak in an Alabama state court. On May 1, 2003, on that court’s order, Tucows transferred the domain name to the court to satisfy the judgment. After an Alabama intermediate appellate court reversed the judgment, the name was returned to Novak on October 1, 2004. Novak filed a suit in a federal district court against Tucows and Nitin, claiming that the transfer of the name out of his control for seventeen months destroyed his pet-supply business. Novak alleged that the defendants had committed several violations of federal and state law, including trademark infringement. Tucows responded with, among other things, a motion to strike some of Novak’s exhibits.

**IN THE LANGUAGE OF THE COURT**

Joseph F. BIANCO, District Judge.

* * *

Defendants contend that plaintiff’s Exhibits B, J, K, O–R, U and V, which are printouts of Internet pages, constitute inadmissible hearsay and do not fall within any acknowledged exception to the hearsay rule. * * * Defendants [also] objected to Plaintiff’s Exhibit 1, as well as to Plaintiff’s Exhibits N–R. Plaintiff’s Exhibit 1 is a printout from “RegisterSite.com,” Nitin’s Web site, as it purportedly appeared in 2003. According to plaintiff, he obtained the printout through a Web site called the Internet Archive, which provides access to a digital library of Internet sites. The Internet Archive operates a service called the “Wayback Machine,” which purports to allow a user to obtain an archived Web page as it appeared at a particular moment in time. The other contested exhibits include: Exhibit B, an online summary of plaintiff’s past and pending lawsuits, obtained via the Wayback Machine; Exhibit J, printouts of comments on a Web message board by [Evgeniy] Pirogov [a Tucows employee]; Exhibit K, a news article from the Poughkeepsie Journal Web site featuring [Nitin] Agarwal [the chief executive officer and founder of Nitin]; Exhibit N, Novak’s declaration regarding the authenticity of pages printed from the Wayback Machine; Exhibit O, pages printed from the Internet Archive Web site; Exhibit P, pages printed from the Wayback Machine Web site; Exhibits Q, R and U, all of which constitute pages printed from RegisterSite.com via the Wayback Machine; and Exhibit V, a news article from “The Register,” a British Web site, regarding Tucows. Where postings from Internet Web sites are not statements made by declarants testifying at trial and are offered to prove the truth of the matter asserted, such postings generally constitute hearsay under [the Federal Rules of Evidence]. [Emphasis added.]

Furthermore, in this case, such documents have not been properly authenticated pursuant to [the Federal Rules of Evidence]. While plaintiff’s declaration purports to cure his inability to authenticate the documents printed from the Internet, he in fact lacks the personal knowledge required to set forth with any certainty that the documents obtained via third-party Web sites

---

*In this context, authentication refers to the requirement that sufficient evidence be introduced to show that these Web pages are what Novak claims.*
Expert Witnesses

are, in fact, what he proclaims them to be. This problem is even more acute in the case of documents procured through the Wayback Machine. Plaintiff states that the Web pages archived within the Wayback Machine are based upon “data from third parties who compile the data by using software programs known as crawlers,” who then “donate” such data to the Internet Archive, which “preserves and provides access to it.” Based upon Novak’s assertions, it is clear that the information posted on the Wayback Machine is only as valid as the third-party donating the page decides to make it—the authorized owners and managers of the archived Web sites play no role in ensuring that the material posted in the Wayback Machine accurately represents what was posted on their official Web sites at the relevant time. As Novak proffers neither testimony nor sworn statements attesting to the authenticity of the contested Web page exhibits by any employee of the companies hosting the sites from which plaintiff printed the pages, such exhibits cannot be authenticated as required under the [Federal] Rules of Evidence. Therefore, in the absence of any authentication of plaintiff’s Internet printouts, combined with the lack of any assertion that such printouts fall under a viable exception to the hearsay rule, defendants’ motion to strike Exhibits B, J, K, N–R, U and V is granted.

Decision and Remedy • The court granted Tucows’s motion to strike Novak’s exhibits. Tucows also filed a motion to dismiss Novak’s suit altogether based on a clause in the parties’ domain name transfer agreement. The clause mandated that all related disputes be litigated in Ontario, Canada, according to Canadian law. The court determined that the clause was valid and reasonable, and granted Tucows’s motion to dismiss the suit.

The Ethical Dimension • Hearsay is literally what a witness says he or she heard another person say. What makes the admissibility of such evidence potentially unethical?

The E-Commerce Dimension • In this case, the plaintiff offered as evidence printouts of Web pages that he claimed once appeared on others’ Web sites. What makes such evidence questionable until proved accurate?

Examination of Witnesses

Because Kirby is the plaintiff, she has the burden of proving that her allegations are true. Her attorney begins the presentation of Kirby’s case by calling the first witness for the plaintiff and examining, or questioning, the witness. (For both attorneys, the types of questions and the manner of asking them are governed by the rules of evidence.) This questioning is called direct examination. After Kirby’s attorney is finished, the witness is subject to cross-examination by Carvello’s attorney. Then Kirby’s attorney has another opportunity to question the witness in redirect examination, and Carvello’s attorney may follow the redirect examination with a recross-examination. When both attorneys have finished with the first witness, Kirby’s attorney calls the succeeding witnesses in the plaintiff’s case, each of whom is subject to examination by the attorneys in the manner just described.

Expert Witnesses Both the plaintiff and the defendant may present testimony from one or more expert witnesses—such as forensic scientists, physicians, and psychologists—as part of their cases. An expert witness is a person who, by virtue of education, training, skill, or experience, has scientific, technical, or other specialized knowledge in a particular area beyond that of an average person. In Kirby’s case, her attorney might hire an accident reconstruction specialist to establish Carvello’s negligence or a physician to confirm the extent of Kirby’s injuries.

Normally, witnesses can testify only about the facts of a case—that is, what they personally observed. When witnesses are qualified as experts in a particular field, however, they can offer their opinions and conclusions about the evidence in that field. Expert testimony is an important component of litigation today.

Because numerous experts are available for hire and expert testimony is powerful and effective with juries, there is tremendous potential for abuse. Therefore, in federal courts and most state courts, judges act as gatekeepers to ensure that the experts are qualified and that their opinions are based on scientific knowledge.10 If a party believes that the opponent’s witness

10. The requirement that judges act as gatekeepers is known as the Daubert standard, named after the case, Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995). A minority of jurisdictions still follow the Frye standard, which allows both sides to present all relevant evidence to the jury and then requires the jury to weigh the testimony of experts. See Paul C. Giannelli and Edward J. Imwinkelried. Scientific Evidence, 4th ed. (Newark, NJ: LexisNexis, 2007), Sections 1.06 and 1.16.
is not qualified as an expert in the relevant field, that party can make a motion asking the judge to exclude this evidence and prevent the expert witness from testifying in front of the jury.

**POTENTIAL MOTION AND JUDGMENT** At the conclusion of the plaintiff's case, the defendant's attorney has the opportunity to ask the judge to direct a verdict for the defendant on the ground that the plaintiff has presented no evidence to support her or his claim. This is called a **motion for a judgment as a matter of law** (or a **motion for a directed verdict** in state courts). In considering the motion, the judge looks at the evidence in the light most favorable to the plaintiff and grants the motion only if there is insufficient evidence to raise an issue of fact. (Motions for directed verdicts at this stage of a trial are seldom granted.)

**DEFENDANT'S EVIDENCE** The defendant's attorney then presents the evidence and witnesses for the defendant's case. Witnesses are called and examined by the defendant's attorney. The plaintiff's attorney has the right to cross-examine them, and there may be a redirect examination and possibly a recross-examination. At the end of the defendant's case, either attorney can move for a directed verdict, and the test again is whether the jury can, through any reasonable interpretation of the evidence, find for the party against whom the motion has been made. After the defendant's attorney has finished introducing evidence, the plaintiff's attorney can present a **rebuttal** by offering additional evidence that refutes the defendant's case. The defendant's attorney can, in turn, refute that evidence in a **rejoinder**.

**Closing Arguments, Jury Instructions, and Verdict**

After both sides have rested their cases, each attorney presents a closing argument. In the **closing argument**, each attorney summarizes the facts and evidence presented during the trial and indicates why the facts and evidence support his or her client's claim. In addition to generally urging a verdict in favor of the client, the closing argument typically reveals the shortcomings of the points made by the opposing party during the trial.

Attorneys generally present closing arguments whether or not the trial was heard by a jury. If it was a jury trial, the attorneys will have met with the judge prior to closing arguments to determine how the jury will be instructed on the law. The attorneys can refer to these instructions in their closing arguments. After closing arguments are completed, the judge instructs the jury in the law that applies to the case (these instructions are often called **charges**), and the jury retires to the jury room to deliberate a verdict. In most civil cases, the standard of proof is a **preponderance of the evidence**. In other words, the plaintiff (Kirby in our hypothetical case) need only show that her factual claim is more likely to be true than the defendant's. (As you will read in Chapter 9, in a criminal trial the prosecution has a higher standard of proof to meet—it must prove its case **beyond a reasonable doubt**.)

Once the jury has reached a decision, it issues a **verdict** in favor of one party; the verdict specifies the jury's factual findings. In some cases, the jury also decides on the amount of the **award** (the compensation to be paid to the prevailing party). After the announcement of the verdict, which marks the end of the trial itself, the jurors are dismissed.

For a review of trial procedures, see Concept Summary 3.2.

**POSTTRIAL MOTIONS**

After the jury has rendered its verdict, either party may make a posttrial motion. The prevailing party usually requests that the court enter a judgment in accordance with the verdict. The nonprevailing party frequently files one of the motions discussed next.

**Motion for a New Trial**

At the end of the trial, the losing party may make a motion to set aside the adverse verdict and any judgment and to hold a new trial. After looking at all the evidence, the judge will grant the **motion for a new trial** only if she or he believes that the jury was in error and that it is not appropriate to grant judgment for the other side. Usually, this occurs when the jury verdict is obviously the result of a misapplication of the law or a misunderstanding of the evidence presented at trial. A new trial can also be granted on the grounds of newly discovered evidence, misconduct by the participants during the trial (such as when a juror has made prejudicial and inflammatory remarks), or an error by the judge.

---

11. Note that some civil claims must be proved by "clear and convincing evidence," meaning that the evidence must show that the truth of the party's claim is highly probable. This standard is often applied in situations that present a particular danger of deception, such as allegations of fraud.
CHAPTER 3 Court Procedures

CONCEPT SUMMARY 3.2
Trial Procedures

<table>
<thead>
<tr>
<th>Procedure</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Opening Statements</td>
<td>Each party’s attorney is allowed to present an opening statement indicating what the attorney will attempt to prove during the course of the trial.</td>
</tr>
</tbody>
</table>
| Examination of Witnesses   | 1. Plaintiff’s introduction and direct examination of witnesses, cross-examination by defendant’s attorney, possible redirect examination by plaintiff’s attorney, and possible recross-examination by defendant’s attorney.  
2. Both the plaintiff and the defendant may present testimony from one or more expert witnesses.  
3. At the close of the plaintiff’s case, the defendant may make a motion for a directed verdict (or judgment as a matter of law), which, if granted by the court, will end the trial before the defendant presents witnesses.  
4. Defendant’s introduction and direct examination of witnesses, cross-examination by plaintiff’s attorney, possible redirect examination by defendant’s attorney, and possible recross-examination by plaintiff’s attorney.  
5. Possible rebuttal of defendant’s argument by plaintiff’s attorney, who presents more evidence.  
6. Possible rejoinder by defendant’s attorney to meet that evidence. |
| Closing Arguments, Jury Instructions, and Verdict | Each party’s attorney argues in favor of a verdict for his or her client. The judge instructs (or charges) the jury as to how the law applies to the issue, and the jury retires to deliberate. When the jury renders its verdict, this brings the trial to an end. |

Motion for Judgment N.O.V.
If Kirby wins, and if Carvello’s attorney has previously moved for a directed verdict, then Carvello’s attorney can now make a motion for judgment n.o.v.—from the Latin non obstante veredicto, meaning “notwithstanding the verdict.” (Federal courts use the term judgment as a matter of law instead of judgment n.o.v.) Such a motion will be granted only if the jury’s verdict was unreasonable and erroneous. If the judge grants the motion, then the jury’s verdict will be set aside, and a judgment will be entered in favor of the opposing party (Carvello). If the motion is denied, Carvello may then appeal the case. (Kirby may also appeal the case, even though she won at trial. She might appeal, for example, if she received a smaller monetary award than she had sought.)

Filing the Appeal
If Carvello decides to appeal the verdict in Kirby’s favor, then his attorney must file a notice of appeal with the clerk of the trial court within a prescribed period of time. Carvello then becomes the appellant or petitioner. The clerk of the trial court sends to the reviewing court (usually an intermediate court of appeals) the record on appeal. The record contains all the pleadings, motions, and other documents filed with the court and a complete written transcript of the proceedings, including testimony, arguments, jury instructions, and judicial rulings.

Carvello’s attorney will file an appellate brief with the reviewing court. The brief is a formal brief document outlining the facts and issues of the case, the judge’s rulings or jury’s findings that should be reversed or modified, the applicable law, and arguments on Carvello’s behalf (citing applicable statutes

12. See, for example, Phansalkar v. Andersen Weinroth & Co., 356 F.3d 188 (2d Cir. 2004).
and relevant cases as precedents). The attorney for the *appellee* (Kirby, in our hypothetical case) usually files an answering brief. Carvello’s attorney can file a reply, although it is not required. The reviewing court then considers the case.

**Appellate Review**

As mentioned in Chapter 2, a court of appeals does not hear any evidence. Rather, it reviews the record for errors of law. Its decision concerning a case is based on the record on appeal and the briefs and arguments. The attorneys present oral arguments, after which the case is taken under advisement. The court then issues a written opinion. In general, appellate courts do not reverse findings of fact unless the findings are unsupported or contradicted by the evidence.

An appellate court has the following options after reviewing a case:

1. The court can *affirm* the trial court’s decision. (Most decisions are affirmed.)
2. The court can *reverse* the trial court’s judgment if it concludes that the trial court erred or that the jury did not receive proper instructions.
3. The appellate court can *remand* (send back) the case to the trial court for further proceedings consistent with its opinion on the matter.
4. The court might also *affirm or reverse a decision in part*. For example, the court might affirm the jury’s finding that Carvello was negligent but remand the case for further proceedings on another issue (such as the extent of Kirby’s damages).
5. An appellate court can also *modify* a lower court’s decision. If the appellate court decides that the jury awarded an excessive amount in damages, for example, the court might reduce the award to a more appropriate, or fairer, amount.

Appellate courts apply different standards of review depending on the type of issue and the ruling involved. Generally, these standards require the reviewing court to give a certain amount of deference, or weight, to the findings of lower courts on specific issues. The following case illustrates how courts use standards of review.

**CASE 3.4  
Evans v. Eaton Corp. Long Term Disability Plan  
United States Court of Appeals, Fourth Circuit, 514 F.3d 315 (2008).**

**BACKGROUND AND FACTS** Eaton Corporation is a multinational manufacturing company that funds and administers a long-term disability benefits plan for its employees. Brenda Evans was an employee at Eaton. In 1998, due to severe rheumatoid arthritis, Evans quit her job at Eaton and filed for disability benefits. Eaton paid disability benefits to Evans without controversy prior to 2003, but that year, Evans’s disability status became questionable. Her physician had prescribed a new medication that had dramatically improved Evans’s arthritis. In addition, Evans had injured her spine in a car accident in 2002 and was claiming to be disabled by continuing back problems as well as arthritis. But diagnostic exams indicated that the injuries to Evans’s back were not severe, and she could cook, shop, do laundry, wash dishes, and drive about seven miles a day. By 2004, medical opinion on Evans’s condition was mixed. Some physicians who had examined Evans concluded that she was still disabled, but several other physicians had determined that Evans was no longer totally disabled and could work. On that basis, Eaton terminated her disability benefits. Evans filed a complaint in a federal district court alleging violations of the Employee Retirement Income Security Act of 1974 (ERISA, a federal law regulating pension plans that will be discussed in Chapter 34). The district court examined the evidence in great detail and concluded that Eaton had abused its discretion in failing to find Evans’s examining physicians’ opinions more credible. Eaton appealed.

**IN THE LANGUAGE OF THE COURT**

*WILKINSON, Circuit Judge.*

* * *

This case turns on a faithful application of the abuse of discretion standard of review, and so we begin with what is most crucial: a clear understanding of what that standard is, and what such standards are for. The purpose of standards of review
CASE 3.4 CONTINUED is to focus reviewing courts upon their proper role when passing on the conduct of other decision-makers. Standards of review are thus an elemental expression of judicial restraint, which, in their deferential varieties, safeguard the superior vantage points of those entrusted with primary decisional responsibility. * * * The clear error standard, for example, protects district courts’ primacy as triers of fact. * * * Rational basis review protects the political choices of our government’s elected branches. And trust law, to which ERISA is so intimately linked, uses the abuse of discretion standard to protect a fiduciary’s [one whose relationship is based on trust] decisions concerning the trust funds in his care. [Emphasis added.]

The precise definitions of these various standards, the nuances separating them from one another, “cannot be imprisoned within any forms of words” * * *. But what these and other such standards share is the designation of a primary decision-maker other than the reviewing court, and the instrument, deference, with which that primacy is to be maintained. * * * In [this] case, the Plan’s language giving Eaton “discretionary authority to determine eligibility for benefits” and “the power and discretion to determine all questions of fact * * * arising in connection with the administration, interpretation and application of the Plan” is unambiguous, and Evans does not dispute the standard it requires. Thus the district court functions in this context as a * * * reviewing court with respect to the ERISA fiduciary’s decision. * * * *

At its immovable core, the abuse of discretion standard requires a reviewing court to show enough deference to a primary decision-maker’s judgment that the court does not reverse merely because it would have come to a different result * * *. The trial judge has discretion in those cases where his ruling will not be reversed simply because an appellate court disagrees. [Emphasis added.]

* * * * Under no formulation, however, may a court, faced with discretionary language like that in the plan instrument in this case, forget its duty of deference and its secondary rather than primary role in determining a claimant’s right to benefits. The abuse of discretion standard in ERISA cases protects important values: the plan administrator’s greater experience and familiarity with plan terms and provisions; the enhanced prospects of achieving consistent application of those terms and provisions that results; the desire of those who establish ERISA plans to preserve at least some role in their administration; and the importance of ensuring that funds which are not unlimited go to those who, according to the terms of the plan, are truly deserving.

* * * * Where an ERISA administrator rejects a claim to benefits on the strength of substantial evidence, careful and coherent reasoning, faithful adherence to the letter of ERISA and the language in the plan, and a fair and searching process, there can be no abuse of discretion—even if another, and arguably a better, decision-maker might have come to a different, and arguably a better, result.

* * * * So standards of review do matter, for in every context they keep judges within the limits of their role and preserve other decision-makers’ functions against judicial intrusion.

DECISION AND REMEDY • The U.S. Court of Appeals for the Fourth Circuit reversed the district court’s award of benefits to Evans and remanded the case with instructions that the district court enter a judgment in favor of Eaton. The district court had incorrectly applied the abuse of discretion standard when reviewing Eaton’s termination of Evans’s benefits.

THE ETHICAL DIMENSION • The appellate court noted in this case that the district court’s decision—which granted benefits to Evans—might arguably have been a better decision under the facts. If the court believed that the district court’s conclusion was arguably better, then why did it reverse the decision? What does this tell you about the standards for review that appellate judges use?

WHAT IF THE FACTS WERE DIFFERENT? • Suppose that it was clear from the evidence on record that the ERISA administrator had not been careful and consistent and had rejected Evans’s claim merely because of a personal dislike for Evans. How might this fact have changed the result in this case?
Higher Appellate Courts

If the reviewing court is an intermediate appellate court, the losing party may decide to appeal the decision to the state’s highest court, usually called its supreme court. Although the losing party has a right to ask (petition) a higher court to review the case, the party does not have a right to have the case heard by the higher appellate court. Appellate courts normally have discretionary power and can accept or reject an appeal. Like the United States Supreme Court, state supreme courts generally deny most petitions for appeal.

If the petition is granted, new briefs must be filed before the state supreme court, and the attorneys may be allowed or requested to present oral arguments. Like the intermediate appellate courts, the supreme court can reverse or affirm the lower appellate court’s decision or remand the case. At this point, the case typically has reached its end (unless a federal question is at issue and one of the parties has legitimate grounds to seek review by a federal appellate court).

Concept Summary 3.3 reviews the options that the parties may pursue after the trial.

ENFORCING THE JUDGMENT

The uncertainties of the litigation process are compounded by the lack of guarantees that any judgment will be enforceable. Even if the jury awards Kirby the full amount of damages requested ($100,000), for example, Carvello’s auto insurance coverage might have lapsed, in which event the company would not pay any of the damages. Alternatively, Carvello’s insurance policy might be limited to $50,000, meaning that Carvello personally would have to pay the remaining $50,000.

Requesting Court Assistance in Collecting the Judgment

If the defendant does not have the funds available to pay the judgment, the plaintiff can go back to the court and request that the court issue a writ of execution. A writ of execution is an order directing the sheriff to seize and sell the defendant’s nonexempt assets, or property (certain assets are exempted by law from creditors’ actions). The proceeds of the sale are

<table>
<thead>
<tr>
<th>Procedure</th>
<th>Description</th>
</tr>
</thead>
</table>
| Posttrial Motions          | 1. *Motion for a new trial*—If the judge believes that the jury was in error but is not convinced that the losing party should have won, the motion normally is granted. It can also be granted on the basis of newly discovered evidence, misconduct by the participants during the trial, or error by the judge.  
2. *Motion for judgment n.o.v.* ("notwithstanding the verdict")—The party making the motion must have filed a motion for a directed verdict at the close of the presentation of evidence during the trial; the motion will be granted if the judge is convinced that the jury was in error. |
| Appeal                     | Either party can appeal the trial court’s judgment to an appropriate court of appeals.  
1. *Filing the appeal*—The appealing party must file a notice of appeal with the clerk of the trial court, who forwards the record on appeal to the appellate court. Attorneys file appellate briefs.  
2. *Appellate review*—The appellate court does not hear evidence but bases its opinion, which it issues in writing, on the record on appeal and the attorneys’ briefs and oral arguments. The court may affirm or reverse all (or part) of the trial court’s judgment and/or remand the case for further proceedings consistent with its opinion. Most decisions are affirmed on appeal.  
3. *Further review*—In some cases, further review may be sought from a higher appellate court, such as a state supreme court. If a federal question is involved, the case may ultimately be appealed to the United States Supreme Court. |
then used to pay the damages owed, and any excess proceeds are returned to the defendant. Alternatively, the nonexempt property itself could be transferred to the plaintiff in lieu of an outright payment. (Creditors’ remedies, including those of judgment creditors, as well as exempt and nonexempt property, will be discussed in more detail in Chapter 28.)

**Availability of Assets**
The problem of collecting a judgment is less pronounced, of course, when a party is seeking to satisfy a judgment against a defendant with substantial assets that can be easily located, such as a major corporation. Usually, one of the factors considered by the plaintiff and his or her attorney before a lawsuit is initiated is whether the defendant has sufficient assets to cover the amount of damages sought. In addition, during the discovery process, attorneys routinely seek information about the location of the defendant’s assets that might potentially be used to satisfy a judgment.

Ronald Metzgar placed his fifteen-month-old son, Matthew, awake and healthy, in his playpen. Ronald left the room for five minutes and on his return found Matthew lifeless. A toy block had lodged in the boy’s throat, causing him to choke to death. Ronald called 911, but efforts to revive Matthew were to no avail. There was no warning of a choking hazard on the box containing the block. Matthew’s parents hired an attorney and sued Playskool, Inc., the manufacturer of the block, alleging that the manufacturer had been negligent in failing to warn of the block’s hazard. Playskool filed a motion for summary judgment, arguing that the danger of a young child choking on a small block was obvious. Using the information presented in the chapter, answer the following questions.

1. Suppose that the attorney the Metzgars hired agreed to represent them on a contingency-fee basis. What does that mean?
2. How would the Metzgars’ attorney likely have served process (the summons and complaint) on Playskool, Inc.?
3. Should Playskool’s request for summary judgment be granted? Why or why not?
4. Suppose that the judge denied Playskool’s motion and the case proceeded to trial. After hearing all the evidence, the jury found in favor of the defendant. What options do the plaintiffs have at this point if they are not satisfied with the verdict?

**DEBATE THIS:** Some consumer advocates argue that attorneys’ high contingency fees—sometimes reaching 40 percent—unfairly deprive winning plaintiffs of too much of their awards. Should the government put a cap on contingency fees at, say, 20 percent of the award? Why or why not?
3–1. Discovery Rules In the past, the rules of discovery were very restrictive, and trials often turned on elements of surprise. For example, a plaintiff would not necessarily know until the trial what the defendant’s defense was going to be. In the last several decades, however, new rules of discovery have substantially changed this situation. Now each attorney can access practically all of the evidence that the other side intends to present at trial, with the exception of certain information—namely, the opposing attorney’s work product. Work product is not a precise concept. Basically, it includes all of the attorney’s thoughts on the case. Can you see any reason why such information should not be made available to the opposing attorney? Discuss fully.

3–2. QUESTION WITH SAMPLE ANSWER: Motions.

When and for what purpose is each of the following motions made? Which of them would be appropriate if a defendant claimed that the only issue between the parties was a question of law and that the law was favorable to the defendant’s position?

(a) A motion for judgment on the pleadings.
(b) A motion for a directed verdict.
(c) A motion for summary judgment.
(d) A motion for judgment n.o.v.

For a sample answer to Question 3–2, go to Appendix I at the end of this text.

3–3. Motion for a New Trial Washoe Medical Center, Inc., admitted Shirley Swisher for the treatment of a fractured pelvis. During her stay, Swisher suffered a fatal fall from her hospital bed. Gerald Parodi, the administrator of her estate, and others filed an action against Washoe seeking damages for the alleged lack of care in treating Swisher. During voir dire, when the plaintiffs’ attorney returned a few minutes late from a break, the trial judge led the prospective jurors in a standing ovation. The judge joked with one of the prospective jurors, whom he had known in college, about his fitness to serve as a judge and personally endorsed another prospective juror’s business. After the trial, the jury returned a verdict in favor of Washoe. The plaintiffs moved for a new trial, but the judge denied the motion. The plaintiffs then appealed, arguing that the motion prejudiced their right to a fair trial. Should the appellate court agree? Why or why not?

3–4. Discovery Advance Technology Consultants, Inc. (ATC), contracted with RoadTrac, LLC, to provide software and client software systems for the products of global positioning satellite (GPS) technology being developed by RoadTrac. RoadTrac agreed to provide ATC with hardware with which ATC’s software would interface. Problems soon arose, however. ATC claimed that RoadTrac’s hardware was defective, making it difficult to develop the software. RoadTrac contended that its hardware was fully functional and that ATC had simply failed to provide supporting software. ATC told RoadTrac that it considered their contract terminated. RoadTrac filed a suit in a Georgia state court against ATC alleging breach of contract. During discovery, RoadTrac requested ATC’s customer lists and marketing procedures. ATC objected to providing this information because RoadTrac and ATC had become competitors in the GPS industry. Should a party to a lawsuit have to hand over its confidential business secrets as part of a discovery request? Why or why not? What limitations might a court consider imposing before requiring ATC to produce this material?

3–5. Service of Process To establish a Web site, a person must have an Internet service provider or hosting company, register a domain name, and acquire domain name servicing. Pfizer, Inc., Pfizer Ireland Pharmaceuticals, and Warner-Lambert Co. (collectively, Pfizer) filed a suit in a federal district court against Domains By Proxy, Inc., and other persons alleged to be behind two Web sites—www.genericlipitors.com and www.econopetcare.com. Among the defendants were an individual and a company that, according to Pfizer, were located in a foreign country. Without investigating other means of serving these two defendants, Pfizer asked the court for permission to accomplish service of process via e-mail. Under what circumstances is service via e-mail proper? Would it be appropriate in this case? Explain. [Pfizer, Inc. v. Domains By Proxy, ___ F.Supp.2d __ (D.Conn. 2004)]

3–6. CASE PROBLEM WITH SAMPLE ANSWER: Appellate Review. BSH Home Appliances Corp. makes appliances under the Bosch, Siemens, Thermador, and Gaggenau brands. To make and market the “Pro 27 Stainless Steel Range,” a restaurant-quality range for home use, BSH gave specifications for its burner to Detroit Radiant Products Co. and requested a price for 30,000 units. Detroit quoted $28.25 per unit, offering to absorb all tooling and research and development costs. In 2001 and 2003, BSH sent Detroit two purchase orders, for 15,000 and 16,000 units, respectively. In 2004, after Detroit had shipped 12,886 units, BSH stopped scheduling deliveries. Detroit filed a suit against BSH, alleging breach of contract. BSH argued, in part, that the second purchase order had not added to the first but had replaced it. After a trial, a federal district court issued its “Findings of Fact and Conclusions of Law.” The court found that the two purchase orders “required BSH to purchase 31,000 units of the burner at $28.25 per unit.” The court ruled that Detroit was entitled to $418,261 for 18,114 unsold burners. BSH appealed to the U.S. Court of Appeals for the Sixth Circuit. Can an appellate court set aside a trial court’s findings of fact? Can an appellate court come to its own conclusions of law? What should the court rule in this case? Explain. [Detroit Radiant Products Co. v. BSH Home Appliances Corp., 473 F.3d 623 (6th Cir. 2007)]

To view a sample answer for Problem 3–7, go to this book’s Web site at www.cengage.com/blaw/clarkson, select “Chapter 3,” and click on “Case Problem with Sample Answer.”

Practical Internet Exercises

**Practical Internet Exercise 3–1:**
Go to the text’s Website at www.cengage.com/blaw/clarkson, select “Chapter 3,” and click on “Practical Internet Exercises.” You will find the following Internet research exercises that you can perform to learn more about the topics covered in this chapter.

**Practical Internet Exercise 3–2:**
Go to www.cengage.com/blaw/clarkson, select “Chapter 3,” and click on “Virtual Courtrooms.”

**Practical Internet Exercise 3–3:**
Go to www.cengage.com/blaw/clarkson, select “Chapter 3,” and click on “Small Claims Court.”

**Practical Internet Exercise 3–4:**
Go to www.cengage.com/blaw/clarkson, select “Chapter 3,” and click on “Civil Procedure.”

**Practical Internet Exercise 3–5:**
Go to www.cengage.com/blaw/clarkson, select “Chapter 3,” and click on “Management Perspective.”

**Practical Internet Exercise 3–6:**
Go to www.cengage.com/blaw/clarkson, select “Chapter 3,” and click on “Technological Perspective.”

**Practical Internet Exercise 3–7:**
Go to www.cengage.com/blaw/clarkson, select “Chapter 3,” and click on “Legal Perspective.”

---

**3–8. Jury Misconduct**
Michelle Fleshner worked for Pepose Vision Institute, a surgical practice. She was fired three years after she provided information to the Department of Labor about PVI’s overtime pay policy. She sued for wrongful termination, and the jury awarded her $125,000. After the hearing in January 2006, the plaintiff asked for, and the court granted, five months more to conduct discovery. The plaintiff asked the court to lift the order. Should the court do so? Why or why not?

**3–9. A QUESTION OF ETHICS: Service of Process.**
Harvestons, Securities, Inc., a securities dealer, filed a suit in a Texas state court against several defendants, including Narnia Investments, Ltd., a securities dealer, and Harvestons, Securities, Inc. v. Narnia Investments, Ltd., filed a suit in a Texas state court against several defendants, including Narnia Investments, Ltd., a securities dealer. The court issued an order to a Texas securities commissioner. In this case, the return of service indicated that process was delivered to “JoAnn Kocerek” by a Texas securities commissioner. Should such a detail, if invalid, in part, because the return of service in this case? If not, why not?

**3–10. SPECIAL CASE ANALYSIS: Proper Service.**
Go to Extended Case 3.1, Cruz v. Fagor America, Inc., 146 Cal.App.4th 488, 2 Cal.Rptr.3d 862 (2007), on pages 54 and 55. Read the excerpt and answer the following questions.

(a) **Conclusion:** Did the court conclude that the plaintiff had met all the requirements for a favorable judgment in this case? If not, why not?

(b) **Rule of Law:** What are the chief requirements for fulling the pretrial procedure at the center of the dispute? Whose responsibility is it to see this service accomplished properly? Was it accomplished properly in this case? Why or why not?

(c) **Issue:** On what preliminary step to litigation does this issue fall? In applying the rule of law in this case, what do the court say about the authority to accept process on behalf of Harvestons or the Texas Securities Commissioner? Should such a detail, if invalid, in part, because the return of service in this case? If not, why not?

---

**54 and 55. Read the excerpt and answer the following questions.**

(a) **Conclusion:** Did the court conclude that the plaintiff had met all the requirements for a favorable judgment in this case? If not, why not?

(b) **Rule of Law:** What are the chief requirements for fulling the pretrial procedure at the center of the dispute? Whose responsibility is it to see this service accomplished properly? Was it accomplished properly in this case? Why or why not?

(c) **Issue:** On what preliminary step to litigation does this issue fall? In applying the rule of law in this case, what do the court say about the authority to accept process on behalf of Harvestons or the Texas Securities Commissioner? Should such a detail, if invalid, in part, because the return of service in this case? If not, why not?