This is “Litigation”, chapter 3 from the book Business and the Legal and Ethical Environment (index.html) (v. 1.0).

Chapter 3

Litigation

LEARNING OBJECTIVES

In this chapter, you will explore our litigation system in detail. Litigation provides an opportunity for each side in a dispute, whether criminal or civil, to lay their side of the story to an impartial jury or judge and ask that jury or judge to decide who wins and loses, and how much the loser should pay or how much time the defendant should spend in jail. After reading this chapter, you should have a deeper understanding of how litigation is conducted in the United States. Specifically, you should be able to answer the following questions:

1. Who are the parties involved in litigation?
2. What is standing and how does it impact litigation?
3. How does a court obtain personal jurisdiction over a defendant?
4. How does a trial progress from beginning to end?
5. How does a losing side appeal a case?

Even if you've never stepped foot in a courtroom before, you can probably describe what a courtroom looks like. It's a large, imposing room with tall ceilings, flags on stands, and wood paneling on the walls. The majority of the floor space is taken up with seating for the public. The front of the courtroom is dominated by the bench, behind which the judge sits, above everyone else in the room. Next to the bench is a solitary chair with a microphone in front of it, where a witness sits. Along one side of the wall is a separated area with two rows of seats, where the jury sits. Facing the bench, and always closest to the jury, is one table for the party that is carrying the burden of proof in the case: the **prosecution**[1] in a criminal trial and the **plaintiff**[2] in a civil trial. Across the aisle, there is another impressive table for the opposite side, the **defense**[3]. When court is in session, a hush settles into the room so that everyone can hear the judge, commanding in presence, or the witness, captivating in detail.

Figure 3.1 *A Typical Courtroom*

© Thinkstock

1. The government's side in a criminal case.
2. The party that starts a lawsuit.
3. The party that responds to a civil or criminal complaint.

Many of us have such clear imagery of a courtroom because our experiences are drawn from popular culture. Whether in movies (*A Civil Action*, *To Kill a Mockingbird*, *Erin Brockovich*), on television shows (*Law & Order*, *L.A. Law*, *Boston Legal*), or in fictional books (*The Firm*, *Twelve Angry Men*), courtroom scenes capture our imagination and fire our sense of righteousness and justice as good always prevails over evil. In our collective courtrooms the truth always comes out, our ideals are always upheld, and the bad guys always lose. Who could forget, for example, the psychological breakdown on the witness stand in the movie *A Few Good Men*, as Jack Nicholson plays it out?

Video Clip: You Can't Handle the Truth

(click to see video)

Scenes like these, while providing wonderful imagery, are pure fiction. In a real courtroom, there is no back-and-forth argument between counsel and witness as examinations proceed through questioning alone. In a real courtroom, the truth doesn't always emerge. In a real courtroom, there are many shades of gray between good and evil. And finally, in a real courtroom, the bad guys don't always lose, and the good guys don't always win.

As future business professionals, your responsibility to your company, to your company's stakeholders, and to yourself is to avoid ever seeing the inside of a courtroom. Acting ethically and legally, and identifying the legal pitfalls that you may encounter by mastering the elements of this course, will help you achieve this goal. Agreeing to arbitration for parties that you have a preexisting relationship with, such as your customers, suppliers, or employees, will also help you stay away from a courtroom. In spite of this planning, however, many companies still find that **litigation**[4] is sometimes unavoidable. Whether litigation is initiated against parties you don't have a contract with (such as another company that steals your intellectual property rights) or by parties you don't have a contract with (such as a customer who is injured by your product or an employee harassed by another employee), litigation may be the only dispute-resolution mechanism available.

In this chapter we'll explore the process of litigation from the beginning to the end. You'll learn about the parties involved and about preliminary matters such as standing and personal jurisdiction and then explore the trial and appeal. We'll also discuss the role of lawyers and juries in our litigation system. By the end of the chapter, you'll have an appreciation that while our litigation system is cherished for its ability to resolve disputes peacefully and establishes a hallmark for public accessibility, for businesses it is often a far from satisfactory forum for dispute resolution.

4. A lawsuit filed in court to determine liability and remedies.

Key Takeaways

Litigation is an inevitable part of a business's activities. Lawsuits, trials, and appeals can be ruinously expensive for some companies, especially small- and medium-sized enterprises. Learning about our litigation system will give you the skills and comfort you need should your company find itself in litigation.

3.1 The Parties Involved

LEARNING OBJECTIVES

1. Identify the parties involved in litigation.
2. Explore the role of lawyers in our adversarial system.
3. Understand the roles and obligations of jurors.

The litigation system relies on parties bringing forth and defending their respective claims. As in the game of chess, each move can take place only if a player makes a decision to move in a particular direction; the game does not play itself. Courts, jurors, and witnesses are similarly moribund: it is up to the players, in this case called **litigants**[5], to act decisively. Occasionally, a court may act **sua sponte**[6], without a direct request from a party. A judge may decide, for example, to fine a party for bad or unethical behavior. These actions are fairly rare. More commonly, judges act on a **motion**[7] filed by either party asking the judge to make a particular decision.

The party that begins the lawsuit is called the plaintiff in a civil case. The plaintiff is a victim that has presumably suffered some sort of legal wrong that the law recognizes. The plaintiff brings suit against the defendant—the alleged wrongdoer or perpetrator. Note that in a criminal trial, the party that initiates litigation is the prosecution, representing the people of a state or, in federal cases, representing the people of the United States. In a criminal trial the alleged wrongdoer is also called the defendant.

Many cases involve multiple plaintiffs and multiple defendants. Civil procedure encourages, and makes it easy for, parties to air all their grievances against each other at once. All parties, and every possible **claim**[8] (each claim is a separate violation of law) arising out of a single incident or series of related incidents, should be identified and named in a lawsuit. For example, if you go to an off-campus party one night and witness a friend being harassed, you might feel the need to step in to defend your friend. The harasser may then turn his attention toward you, perhaps taking a swing at you. Let's assume that the harasser is drunk and misses, but in return you take a swing and hit him, knocking him to the ground. The harasser may file a lawsuit against you, alleging assault and battery. The harasser is the plaintiff, and you are the defendant. The lawsuit filed in court would be captioned *Harasser v. You*. You might decide in return to file a claim against the harasser, alleging that the harasser started the fight and that you acted in self-defense. This is called a

5. Parties in litigation.
6. Latin for "of its own accord," an action by a court without motion by the parties.
7. Any request to a court for the court to take a specific action.
8. Any legal right to seek a remedy for a wrong.

counterclaim[9], and you are now the **counterplaintiff**[10], making the harasser the **counterdefendant**[11]. In return, the harasser may allege that he wasn't really harassing your friend but trying to defend himself from your friend's unwanted advances. The harasser may sue your friend as a third-party defendant through a process called **joinder**[12].

Except in some small-claims courts, parties hire attorneys to litigate most cases. Sometimes individuals feel like they have a sufficient grasp on the law to proceed in litigation without a lawyer or that they have sufficient legal training (or even a law degree) that hiring a lawyer would be a waste of money. Individuals who represent themselves are called **pro se**[13] litigants and can only proceed pro se if the judge overseeing the case allows it. Abraham Lincoln once famously said, "He who represents himself has a fool for a client." The complexities of litigation require a cool and detached mind to thread a route to success, and if you are representing yourself it is all too easy to allow passion to cloud your judgment.

Attorneys are sometimes called members of the **bar**[14]. The U.S. legal profession is unique in several respects. In most countries, legal education is an undergraduate program followed by a period of apprenticeship before an individual is allowed to practice law. Many countries also make a distinction between attorneys who litigate in court and those who do not. In the United Kingdom, for example, solicitors are lawyers who deal with ordinary legal matters outside of court, while Queen's Counsel (QC) are specially trained lawyers who are permitted to argue in court. In the United States, lawyers undertake three years of graduate study resulting in the award of the **Juris Doctorate**[15] degree, or JD. Every year, more than thirty thousand students graduate from U.S. law schools with their JD. They then sit for the bar exam in the state where they wish to practice. Since the practice of law in the United States varies widely by different jurisdictions, lawyers are only permitted to practice in jurisdictions where they are licensed. Some states permit lawyers from out of state, after a few years of being in practice, to apply for bar admission without taking the exam through a process called reciprocity. Other states, notably California and Florida, require attorneys to take the bar exam no matter how long they have been in practice. If a lawyer is dealing with an issue or matter that takes him or her out of state to litigate a case, he or she can ask to be admitted temporarily by a court in that foreign state through a motion called **pro hac vice**[16]. Once the lawyer passes the state's bar exam or is otherwise admitted, he or she is permitted to practice all aspects of law in that state, from drafting wills and contracts to arguing a case before the U.S. Supreme Court.

Attorneys in the United States are broadly divided into civil and criminal attorneys; few lawyers excel in both areas. Civil attorneys generally work in two different categories: in law firms, where they may represent multiple clients, and as **in-house counsel**[17], where they represent only one client, their employer. Most large

9. A claim by a defendant against the plaintiff.
10. The original defendant in a lawsuit, when asserting a claim against the plaintiff.
11. The original plaintiff in a lawsuit, when sued in return by the defendant.
12. Joining of parties or claims in litigation.
13. Latin for "on one's own behalf," a litigant representing herself without an attorney.
14. A body of attorneys and judges.
15. A professional degree and doctorate in law, required for practicing law in the United States.
16. Latin for "for this occasion," a motion allowing out-of-state attorneys to practice in-state for a specific case or matter.
17. The attorney employed by and representing only one enterprise.

corporations have an in-house legal department to control legal costs but may still hire **outside counsel**[18] for representation and advice in complex matters.

With the possible exception of politicians, no other profession is subject to more morbid jokes than lawyering. William Shakespeare famously wrote in *Henry VI*, through a character speaking of a utopian world, "The first thing we do, let's kill all the lawyers." In spite of this public animosity toward lawyers, however, if there comes a time when someone needs a lawyer, it's not uncommon to hear them wish they had the most aggressive lawyer money can buy.

Perhaps part of the reason the public has a low opinion of lawyers can be traced to the ethical and legal obligations of attorneys. Lawyers may be the most regulated of all the professional industries, and they are required to comply with complex and sometimes rigid **rules of professional conduct**[19]. Unlike rules for other professions, the rules of professional conduct for lawyers are largely drafted and enforced by the bar itself (other lawyers and judges) and almost never involve external enforcement mechanisms. These rules govern virtually every aspect of the practice of law, and a violation of these rules can result in disciplinary action from the state bar or supreme court of the state in which the lawyer practices, up to lifetime disbarment. When President Bill Clinton, for example, lied under oath about certain aspects of his extramarital affairs, he was suspended from practicing law for five years in Arkansas and ordered to pay a $25,000 fine. These rules of professional responsibility require attorneys to represent their clients with zealous advocacy. Ordinarily, we associate the word "zealot" with extremists, but that is the standard by which lawyers must represent their clients. This might clarify why some lawyers act the way they do.

One of the most sacrosanct rules of professional responsibility is the obligation to keep a client's secrets. The communications between a client and his or her attorney are absolutely confidential under the **attorney-client privilege**[20] doctrine. There are many privileges under the law, such as the **spousal privilege**[21], **doctor-patient privilege**[22], and **priest-penitent privilege**[23]. The attorney-client privilege, however, is arguably the strongest of these privileges. The privilege belongs to the client, and the attorney is not permitted to reveal any of these communications without the client's consent. A narrow exception exists for clients who tell their lawyers they intend to harm others or themselves, but attorneys must tread very carefully to avoid violating the privilege. Many members of the public feel that the privilege may be open to abuse and can't understand, for example, why an attorney can't reveal a client's confession to a heinous crime. Ultimately, the privilege exists for the client's benefit. Someone who cannot communicate with his or her attorney freely is unable to help the attorney prepare the best possible case for litigation. You should note that in-house attorneys represent the corporations they work for and not individual employees. If you

18. Law firm attorneys representing a company or other enterprise.

19. Rules for attorney conduct issued by a licensing entity such as a state bar or supreme court. The American Bar Association issues a set of Model Rules of Professional Conduct for attorneys nationwide, which can be found at http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

20. A doctrine that requires all communications between client and attorney be kept secret by the attorney from any disclosure to any person.

21. A doctrine protecting communications between spouses from disclosure in court.

22. A doctrine that prevents medical personnel from testifying in court about their patients' communications with them.

23. A doctrine protecting communications between clergy and penitent from disclosure.

communicate with an in-house attorney for the company where you work, for example, that communication may not be automatically protected by the attorney-client privilege.

Hyperlink: The Lynne Stewart Case

http://www.lynnestewart.org

Lynne Stewart, a human rights attorney, was assigned to represent Sheik Omar Abdel-Rahman, the blind Egyptian cleric convicted of conspiracy in the 1993 World Trade Center bombing in New York City. As part of her representation, she agreed to abide by certain conditions when communicating with her client, including not speaking to the media. Ms. Stewart broke those promises and inadvertently passed on a communication from her client to his followers around the world. She was indicted and convicted of conspiracy and providing material support to terrorists. She was sentenced to a twenty-eight-month prison term. Click the link to read more about her case, including the legal documents involved. A very controversial aspect of the case involved the use of secret cameras and recorders to listen in on her conversations with her client while he was in prison.

Figure 3.2
Lynne Stewart

Source: Photo courtesy of Robert B. Livingston, http://en.wikipedia.org/wiki/File:Lynne_Stewart.JPG.

In spite of an attorney's professional obligations to his or her client, it's important to remember that ultimately a lawyer's first duty is to the **administration of justice**[24]. The rules of professional conduct are written with this goal in mind. The

24. The highest duty of any attorney.

requirements for lawyers on civility, honesty, and fairness are all written to ensure that lawyers represent the very best aspects of our judicial system. Let's say, for example, a client admits to his lawyer that he is guilty or liable in a case. The client then wants to testify under oath that he is innocent. Although a lawyer cannot tell anyone what her client has told her, the lawyer is also prohibited from knowingly suborning **perjury**[25]. The attorney must either convince the client to not testify, or withdraw from the case.

In the case in Note 3.31 "Hyperlink: A Question of Ethics", an attorney goes a little too far in her representation and draws a heavy fine from a judge as a result.

25. Lying under oath.

Hyperlink: A Question of Ethics

The Case of the Birther Attorney

Order Hon. Clay D. Land, U.S. District Judge, District Court for the Middle District of Georgia, Case No. 4:09-CV-106, *Rhodes v. MacDonald*, at http://www.scribd.com/doc/20996403/Gov-uscourts-gamd-77605-28-0.

Throughout the presidential election campaign in 2008, persistent rumors swirled around whether Barack Obama was born in the United States, a requirement under the Constitution to serve as president. After the election, California attorney Orly Taitz launched a campaign to prove that the president was not, in fact, born in Hawaii. Her bizarre tirades against the media and the courts earned her this unusual reprimand from a federal judge. Click the link to read the entire order. Do you believe that in their "zealous" representation of their clients, attorneys have the ethical duty to pursue claims such as these?

Order

Introduction

Commenting on the special privilege granted to lawyers and the corresponding duty imposed on them, Justice Cardozo once observed, "Membership in the bar is a privilege burdened with conditions. [A lawyer is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." Competent and ethical lawyers "are essential to the primary governmental function of administering justice." For justice to be administered efficiently and justly, lawyers must understand the conditions that govern their privilege to practice law. Lawyers who do not understand those conditions are at best woefully unprepared to practice the profession and at worst a menace to it.

When a lawyer files complaints and motions without a reasonable basis for believing that they are supported by existing law or a modification or extension of existing law, that lawyer abuses her privilege to practice law. When a lawyer uses the courts as a platform for a political agenda disconnected from any legitimate legal cause of action, that lawyer abuses her privilege to practice

law. When a lawyer personally attacks opposing parties and disrespects the integrity of the judiciary, that lawyer abuses her privilege to practice law. When a lawyer recklessly accuses a judge of violating the Judicial Code of Conduct with no supporting evidence beyond her dissatisfaction with the judge's rulings, that lawyer abuses her privilege to practice law. When a lawyer abuses her privilege to practice law, that lawyer ceases to advance her cause or the ends of justice.

It is irrefutable that a lawyer owes her client zealous advocacy, but her zeal must be constrained within the bounds placed on her as an officer of the Court and under the Court's rules. Specifically, Rule 11 of the Federal Rules of Civil Procedure expressly sets forth the outer boundaries of acceptable attorney conduct. That rule prohibits a lawyer from asserting claims or legal positions that are not well-founded under existing law or through the modification, extension, or expansion of existing law. Rule 11 also prohibits an attorney from using the courts for a purpose unrelated to the resolution of a legitimate legal cause of action.

Regrettably, the conduct of counsel Orly Taitz has crossed these lines, and Ms. Taitz must be sanctioned for her misconduct. After a full review of the sanctionable conduct, counsel's conduct leading up to that conduct, and counsel's response to the Court's show cause order, the Court finds that a monetary penalty of $20,000.00 shall be imposed upon counsel Orly Taitz as punishment for her misconduct, as a deterrent to prevent future misconduct, and to protect the integrity of the Court. Payment shall be made to the United States, through the Middle District of Georgia Clerk's Office, within thirty days of today's Order. If counsel fails to pay the sanction due, the U.S. Attorney will be authorized to commence collection proceedings. The Court does not take this action lightly, and in fact, cannot recall having previously imposed monetary sanctions upon an attorney sua sponte.

As the Orly Taitz case demonstrates, attorneys must take care to respect a court's authority at all times and conduct themselves in a civil manner. Most attorneys have no problem discharging this obligation to the judge, but it is to the jury that they focus their attention the most. In our legal system, the jury has a very special role to play in ensuring citizen participation in the administration of justice. As the trier of fact, the jury has the duty of determining the truth in any given situation: who said and did what, why, and when?

Do you know when someone is lying to you? Have you ever been lied to so well that you didn't find out about the lie until much later? Have your roommates or friends who were involved in a dispute ever asked you to decide who should win? In essence, being a juror relies on those same human skills. In every legal proceeding, each of two adversarial sides, absolutely opposed to each other, claims that it is right and the other side is wrong. Our litigation system is a process by which each side gets to present its case to a group of stranger citizens, and then ask them to decide who is lying and who is telling the truth.

There are two types of juries. A **grand jury**[26] is a group of citizens convened by the prosecution in serious criminal cases to simply determine whether there is probable cause to believe that a crime has occurred and whether it's more likely than not that the defendant in question committed the crime. The grand jury serves as a procedural step to prevent prosecutors from abusing their powers of arrest and indictment, a sort of "sanity check" on the awesome power of government to accuse citizens of crime. The grand jury requirement exists at the federal level and in some, but not all, states. A grand jury typically meets for an extended period of time and can hear several different cases in one day.

The grand jury does not determine guilt or innocence. A **petit jury**[27] does that. This jury is impaneled for a specific trial. During the trial, members of the jury listen to the evidence presented and then deliberate as a group on what they believe the facts of the case are. They then apply the law, as instructed by the judge, to the facts. There are typically twelve members in a petit jury in criminal trials and from six to twelve members in civil trials, and generally speaking they must arrive at a unanimous verdict.

The jury system is a jewel in our litigation system for it involves ordinary citizens in adjudicating all sorts of disputes, from domestic family issues to complex business and insurance litigation to heart-wrenching criminal cases. There are problems with administering this system, however.

Both grand and petit juries are drawn from citizen voter and driver license rolls. In high-profile cases, it may be difficult to find citizens who have not heard about the case or who can be impartial about the case, in spite of their promises to be open minded. When Enron collapsed in 2001, for example, defense attorneys for former CEO Jeff Skilling argued strenuously that the trial should not be held in Houston, where almost every citizen was affected in some way by the energy giant's collapse or knew someone affected. The question of juror bias was so serious that the U.S. Supreme Court agreed to hear Skilling's appeal based partially on this argument. Although the Court eventually found that Skilling's jury was adequately impartial, Justice Sotomayor noted in a dissenting opinion that the "deep seated animosity

26. A body of citizens examining whether someone accused of a crime should be formally charged.

27. A body of citizens determining guilt or innocence in a criminal trial or liability in a civil trial.

that pervaded the community at large" caused her great concern.*Skilling v. United States*, 561 U.S. ___ (2010), http://www.supremecourt.gov/opinions/09pdf/08-1394.pdf (accessed October 2, 2010).

Another problem arises from the burdens placed on jurors' personal lives through their service. While most states have laws that prevent an employer from firing a worker or taking any negative work action, such as demotion, against the worker for being on jury duty, there is no legal requirement that an employer continue to pay a worker on jury duty. The court system does not pay juries for their services either (although some court systems pay a small amount, typically less than twenty dollars per day, to cover food and transportation costs). Some citizens, such as those who are self-employed, are therefore at great risk for losing personal income by serving on juries. Imagine being on the O. J. Simpson criminal trial jury, for example—that trial lasted ten months. The effects of jury service on a juror's personal life can be staggering.

Another potential problem arises in the makeup of the jury itself. To provide a fair jury, courts attempt to draw from a cross-section of society to reflect the diversity of the surrounding community. Local court rules typically allow judges to excuse potential jurors for hardship or extreme inconvenience. If these rules are too generous, then the only citizens left may be those without full-time employment, such as students or retirees. Such a narrow cross-section of society would tend to skew the reliability and trust of the jury system, and judges across the country are becoming increasingly intolerant of attempts to evade jury service. The only professions that automatically exempt citizens from jury duty are active-duty soldiers, police officers and firefighters, and public officers.

In spite of these administrative problems, our jury system remains a cornerstone of litigation and is often openly admired. In South Korea, for example, attempts to create a more open and responsive democracy resulted in a novel and wholesale revision to the country's court system: the adoption of citizen juries.

Hyperlink: Korea Adopts Jury System

http://www.nytimes.com/2008/07/07/world/asia/07iht-jury.2.14299454.html

In 2007, with little public debate or preparation, South Korea adopted a jury system in certain criminal and civil trials. For now, the jury's decision is only advisory, and the court is free to reject it. The result has been some confusion about the role of citizens in the legal system, some concern about the methodology employed to implement the jury system, and an increase in transparency and greater citizen participation in government affairs.

KEY TAKEAWAYS

The federal rules of civil procedure make it easy for parties in a lawsuit to identify and join other relevant parties and to make legal claims against each other. The goal of civil litigation is to find the truth. Litigants typically rely on lawyers to assist them in litigation. An attorney's highest duty is to the administration of justice. Lawyers are ethically bound to represent their clients with zealous advocacy. A grand jury acts as a body of citizens to prevent abuse of discretion by prosecutors. A petit jury sits in trials as the trier of fact to ascertain the truth through their observations of the presented evidence.

EXERCISES

1. Can you think of a situation where an in-house attorney may advise you to retain your own counsel?
2. Most rules of legal professional conduct are drafted and enforced by the bar itself, but the Sarbanes-Oxley Act (passed in reaction to the Enron accounting scandal) imposed a legal duty on lawyers to report acts of misconduct in publicly traded corporations. Do you believe that the bar does an effective job of policing itself, or do you think external government agencies should be more involved?
3. Read the legal documents available for the Lynne Stewart case at Note 3.28 "Hyperlink: The Lynne Stewart Case". Do you think that the U.S. government should be able to curb the attorney-client privilege when the client is a convicted terrorist? Or a suspected terrorist?
4. How aggressive should a lawyer be in representing his or her client "zealously"? Read the rest of Judge Land's order in Note 3.31 "Hyperlink: A Question of Ethics". Do you think Orly Taitz's conduct warranted a twenty-thousand-dollar fine?
5. Do you think that juries can be trusted to always arrive at the truth? Why or why not?
6. Do you think the U.S. jury system should be adopted by other countries? What factors do you think should affect a country's decision to adopt a jury system?

3.2 Standing and Personal Jurisdiction

LEARNING OBJECTIVES

1. Explore the standing requirement.
2. Understand how a court obtains personal jurisdiction over the parties.

Before a case can be litigated, parties have to demonstrate that they meet two pretrial requirements: standing and personal jurisdiction.

Standing[28] is a constitutional requirement. Article III of the Constitution grants the judiciary the power to hear "cases" and "controversies." This means actual cases and controversies, not merely hypothetical ones. Unlike some other jurisdictions, the standing requirement means that courts are unable to give advisory opinions. Let's say, for example, Congress is considering whether or not to pass a law and would like to know whether the law is constitutional. Standing prevents this question from being litigated, because it's not yet an actual case or controversy. Standing, therefore, is a doctrine that limits judicial overreach by circumscribing the types of cases that are litigated in our courts.

To demonstrate standing, a party has to prove first that it has an actual case to proceed. This is a procedural matter, and it requires the case to be brought at the right time. If a case is brought too early, it's not yet **ripe**[29]. If it's brought too late, then the case is **moot**[30]. For example, assume that a state is debating whether or not to pass a law that would require thirty hours of financial management classes before anyone is allowed to form his or her own company. If an entrepreneur who wishes to form her own company but doesn't want to take the thirty hours of classes sues the state for an unconstitutional law, that lawsuit would be dismissed for being brought too early—it is not ripe since the law hasn't been passed yet. Now let's assume that the law has been passed, and the entrepreneur, who has abandoned her plans and is now working for someone else, sues the state anyway. That lawsuit would also be dismissed since it is now moot. Even if the entrepreneur won the case and the law was overturned, the remedy would be meaningless to her since she does not plan to take the class anyway.

In addition to being brought at the right time, the case has to be brought by the right person. To show standing, a plaintiff has to demonstrate that he has an actual stake in the litigation, or something of value that would be lost if he loses the case. Of course, if a plaintiff has lost money in a contract dispute or has been injured in a

28. The Constitutional requirement for the right plaintiff to bring a claim at the right time in litigation.

29. A claim ready for litigation.

30. Abstract and theoretical. In standing cases, a case is moot if granting the remedy asked would not help the plaintiff.

tort case, that is sufficient legal injury. Let's say, for example, that your roommate is the victim of Internet fraud when she does not receive the goods that she paid for online. She would rather move on and forget the whole episode, but you are outraged and decide to sue the perpetrator in court. Even if the perpetrator admitted that it committed fraud, you would still lose the case because you're not the right plaintiff here; your roommate is.

Cases that don't involve monetary damages are sometimes more difficult to call. For example, what if a constitutional right is at stake? What standing does a citizen have to prove to file a lawsuit? Courts have generally held that merely being a taxpayer does not give standing to challenge government expenditures. So, for example, a citizen cannot sue the government to stop the war in Afghanistan just because he pays his taxes. If taxpayers don't have standing to challenge government action, then who does?

In 2007 Massachusetts, along with eleven other states, sued the Environmental Protection Agency (EPA) to force the agency to regulate carbon dioxide as a pollutant. For years, the EPA had argued that carbon dioxide is not a pollutant and therefore could not be regulated. In response to the suit, the EPA argued that the states lacked standing since they couldn't prove they had been harmed by excess carbon dioxide in the air. In a major decision,*Massachusetts v. EPA*, 549 U.S. 497 (2007). the Supreme Court ruled that the states had standing because they had suffered environmental degradation as a result of global warming brought about by excess carbon dioxide and that therefore the EPA has jurisdiction over carbon dioxide as a pollutant. This decision, along with the election of President Obama, led to a major policy reversal at the EPA, which is now aggressively pursuing the regulation of carbon pollution to combat global warming.

Another high-profile case on standing involves the Pledge of Allegiance. In 2000 a California attorney and physician sued the government because his daughter attended a school where the Pledge of Allegiance was recited every morning. The plaintiff, Michael Newdow, claimed that the pledge is unconstitutional under the First Amendment because it contains the words "under God." In 2002 the Ninth Circuit Court of Appeals agreed with Newdow, ruling that the pledge is indeed unconstitutional. On appeal to the Supreme Court, the Court ducked the question of whether the pledge is unconstitutional.*Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004). Instead, the Court held that Newdow lacked standing to bring the lawsuit in the first place since he is a noncustodial parent. Only his wife, who had custody of the daughter, could bring the lawsuit.

It's important to note that standing doesn't have anything to do with the merits of the case. Being able to prove standing doesn't mean that you can win the case at

hand. It only means that you've been able to clear a procedural bar toward proceeding with litigation.

Another procedural bar before a plaintiff can proceed is **personal jurisdiction**[31]. Personal jurisdiction is different from subject matter jurisdiction, which is the power of a court to hear a case. Personal jurisdiction is the power of a court over specific litigants, and it requires litigants to have some form of **minimum contacts**[32] with the state where the case is filed. Personal jurisdiction seeks to avoid inconvenient litigation, even if the case has actual merit. If you've never been to Nebraska, for example, and don't have any connections to Nebraska, then you might be very surprised to find that you're being sued in a Nebraska state court. In addition to that, you'd have to go to Nebraska to answer the lawsuit, hire local lawyers to assist you, and spend a lot of time and money in a state you have nothing to do with.

A court obtains personal jurisdiction over the plaintiff when the plaintiff files its lawsuit. Obtaining personal jurisdiction over the defendant can be a little trickier. Typically, there has to be some sort of connection between the defendant and the state where the court is located. For example, living in the state would create personal jurisdiction. Residency for purposes of personal jurisdiction is different from residency for other legal requirements such as voting and driving. Even temporary residency, such as a college student studying out of state, creates residency for personal jurisdiction purposes. Moreover, merely being in the state temporarily creates personal jurisdiction. If you're driving through Nebraska, for example, and you're speeding on a local highway, Nebraska courts have jurisdiction to hear a speeding ticket issued against you. Owning property in a state also creates jurisdiction. For corporations, courts generally hold that personal jurisdiction is proper in the state of incorporation as well as in any state the corporation does business.

Personal jurisdiction, like standing, is a constitutional requirement. The due process clause of the Fourteenth Amendment requires government processes to be carried out fairly. In 1980, the Supreme Court heard an important case on personal jurisdiction involving a car crash in Oklahoma.*World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980). The plaintiff purchased the car in New York and filed a lawsuit against the manufacturer (Volkswagen) and the distributor and retailer (car dealer). The distributor and the retailer moved to dismiss the case for lack of personal jurisdiction, arguing that they had no business in Oklahoma, had no employees or property there, and did not target citizens of Oklahoma to purchase vehicles from them in New York. The Supreme Court held in favor of the distributor and car dealer, finding that neither had "purposefully availed" themselves of the privileges that come from doing business in Oklahoma. The Court noted that for

31. A court's jurisdiction over parties in litigation.

32. The Constitutional requirement for some form of contact with a forum state before the proper exercise of personal jurisdiction.

personal jurisdiction to attach, "substantial notions of fair play and justice" cannot be offended.

Today, most states have written these concepts into laws known as **long-arm statutes**[33]. These statutes set forth the procedure by which out-of-state defendants can be required to appear before a local court. The statutes provide for how service of process can occur. **Service of process**[34] is the process by which any defendant (both local and out-of-state) is notified that it is being sued. Service of process typically requires a copy of the **summons**[35] (notice to appear before a court) to be personally delivered to the defendant or the defendant's agent. In the case of companies and other nonhuman entities, service of process is usually easy since they are required to have a registered agent as part of the process of forming an organization. Service can be more challenging with an individual, since some defendants know that litigation can be held up while service is attempted and therefore choose to avoid being served at all costs. While the best service is personal delivery of the summons, some states prescribe alternative methods such as leaving a copy with a family member while also mailing a copy.

The Internet era has raised some interesting personal jurisdiction issues. Does creating a Web site, for example, subject you to personal jurisdiction in all states where the Web site is accessible? Courts have ruled that the answer depends on what kind of Web site you have created. If it is a general informational Web site that describes a product, then there are insufficient minimum contacts to create personal jurisdiction. If, on the other hand, the Web site reaches out to specific customers and urges them to make a purchase, either through a shopping cart function or by calling the seller, then there are minimum contacts to justify jurisdiction.

33. State laws allowing service of process on an out-of-state defendant with some form of minimum contact with the state.

34. The procedure to give legal notice to a litigant that a court is exercising personal jurisdiction over that person.

35. A judicial order to appear before a court.

KEY TAKEAWAYS

Standing is a constitutional requirement that requires a plaintiff prove that he or she is the right person to bring a lawsuit and that he or she is bringing the lawsuit at the right time. Taxpayers lack standing to sue the government just by being taxpayers. Legal injury does not have to be monetary based; environmental harm, for example, may be sufficient to demonstrate standing. Standing has nothing to do with the merits of the underlying case. Courts must have personal jurisdiction over a defendant before litigation can proceed. Personal jurisdiction, a constitutional requirement, requires minimum contacts with the state such that substantial notions of fair play and justice are not offended. Once personal jurisdiction is established, service of process can occur, where a copy of the summons is delivered to the defendant. If the defendant lives out of state, a long-arm statute prescribes the method for service to occur. A Web site creates personal jurisdiction in any state where it reaches out for customers through a shopping cart function.

EXERCISES

1. When President Obama nominated Hillary Clinton as secretary of state in 2008, several constitutional scholars observed that it may be unconstitutional for her to assume the post due to an often-ignored section of the Constitution. What procedural bar stopped citizens from challenging the nomination?
2. Do you believe the Supreme Court acted properly by finding that states with environmental damage from global warming had standing to challenge the federal government?
3. In the Volkswagen car crash case, the manufacturer (Volkswagen, a German company) and the importer did not contest personal jurisdiction of Oklahoma state courts. Why do you think they submitted to jurisdiction so readily?
4. If a car dealer in a neighboring state runs advertisements in your state claiming that its deals are better than those of in-state dealers, does that out-of-state car dealer create personal jurisdiction in your state?
5. If you sell something on eBay, do you create personal jurisdiction in the buyer's state? Why or why not?
6. If you commit a tort on the Internet, do you create personal jurisdiction in the victim's state? For example, if you defamed someone who lives out of state on Facebook, have you created jurisdiction in that foreign state?

3.3 Pretrial Procedures

LEARNING OBJECTIVES

1. Explore pretrial procedures such as pleadings, discovery, and motions.
2. Find out how class-action lawsuits are organized and prosecuted.
3. Learn about issues and challenges facing parties during discovery.

After issues related to subject matter jurisdiction, standing, and personal jurisdiction are sorted out and parties have hired counsel to represent them, then a dispute can proceed to the pretrial stage. In civil cases, litigation begins with the filing of a **complaint**[36] by the plaintiff. The complaint is a simple document setting forth who the parties are, the facts of the case, and what specific laws the defendant has violated. (Each of these is a claim.) The complaint ends with a **prayer for relief**[37]. The plaintiff may be seeking **damages**[38] (money), **specific performance**[39] in certain kinds of contract cases, or a temporary or permanent **injunction**[40]. It is much easier to get a temporary injunction in the early stages of litigation, because courts don't want to see the defendant take some action that may result in **irreparable harm**[41]. For example, if a real estate development company wants to tear down an old shopping mall to build a new skyscraper, and one of the tenants in the old mall claims it still has a right to be there, the tenant may be able to obtain a temporary injunction stopping the demolition until the lease issues are sorted out. If the demolition is allowed to continue and the tenant later turns out to be the winner, it will be too late to grant the tenant any meaningful remedy.

Citizen advocacy groups with an antilitigation public policy agenda often complain about **frivolous**[42] lawsuits being filed in court. Most court systems have rules to prevent the filing of frivolous suits. In the federal system, the rules state that all claims must be signed by a lawyer certifying that to the "best of the person's knowledge," formed after "an inquiry reasonable under the circumstances," the claim is not being presented for an unlawful purpose such as harassment and that the claims are either "warranted by existing law" or a nonfrivolous argument for modifying existing law. In practice, this standard is quite easy to meet, and it's hard to think of a factual scenario—other than the most absurd—that would rise to the level of being legally frivolous.

The complaint is filed with the clerk of the court where the suit is to be heard. Every court has a clerk's office to handle administrative matters relating to

36. The initial document that starts the lawsuit by setting forth the plaintiff's claims.

37. A claim by the plaintiff for damages sought from the defendant.

38. Loss suffered by plaintiff, typically expressed in terms of money.

39. A nonmonetary remedy available in certain cases whereby the defendant is ordered to perform the specific act agreed to in a contract.

40. An order by a court to a party to do something or to stop doing something.

41. A type of injury that cannot be corrected by money or by putting things back to where they were.

42. Lacking in legal merit.

litigation. Even though the court system is a public service, there is usually a fee associated with filing a complaint to cover some of the court's costs.

The clerk will next issue a summons to the defendant, along with a copy of the complaint. The summons is sent to a process server to effect service on the defendant. When the defendant is served, it is very important for the defendant to respond to the complaint in a timely manner. Ignoring the complaint, even if the defendant believes the complaint is devoid of any merit, is a fatal error. If the defendant does not reply to the complaint, the plaintiff can ask the court to issue a **default judgment**[43] against the defendant, including granting all the relief the plaintiff is asking for.

In certain types of cases, there may be a large number of plaintiffs injured by a defendant's actions. This may happen in a product liability lawsuit where a product is purchased by many thousands of consumers, all of whom experience the same product failure. The batteries for Apple's popular iPod, for example, had a high failure rate, leading to a large number of consumer claims. There also may be a large number of plaintiffs in financial services cases, where a financial institution or investment firm defrauds a large number of investors. In these cases, several **lead plaintiffs**[44] may attempt to form a class in a **class-action**[45] lawsuit against the defendants. Under federal civil procedure rules, class actions may be granted when there are so many plaintiffs that it is impractical for them to file separate lawsuits, there are questions of law or fact that are common to members of the class, and the lead plaintiffs will fairly and adequately protect the interests of the class.

The defendant must file an **answer**[46] to the complaint within a specified period of time, typically thirty days. The answer is a paragraph-by-paragraph response to the complaint, admitting certain paragraphs and denying others. The answer may also contain an **affirmative defense**[47] (self-defense in an assault charge, for example) the defendant wishes to pursue. Taken together, the complaint and answer are known as the **pleadings**[48]. The answer may admit, for example, noncontroversial claims by the plaintiff such as the defendant's name, address, and the nature of the defendant's relationship with the plaintiff. Each time the defendant denies a plaintiff's claim in the complaint, that sets up a controversy or argument that must be litigated. Reducing the number of claims to be resolved before an actual trial begins makes the trial shorter. For example, in many civil cases, the plaintiff will make claims about liability and damages. A defendant may be willing to admit that it is liable but may argue about the plaintiff's claims for damages. This can sometimes lead to bifurcated trials, where the issues of liability and damages are litigated separately.

43. A judgment entered against a party for misconduct or failure to answer.

44. In a class-action suit, the representative plaintiffs of the class.

45. Describes a lawsuit in which a representative plaintiff represents an entire class of similarly situated plaintiffs against the defendant.

46. The defendant's written response in civil suit to the plaintiff's complaint.

47. A defense that does not deny the defendant's actions but provides a reason or justification, such as self-defense.

48. The complaint, answer, and any supporting documentation.

At any point in litigation, either party may file motions with the court. The motions are designed to short-circuit the litigation and lead to an early end to the lawsuit. Litigation is so time consuming and expensive that either party would be gratified if the judge would simply cut the lawsuit short and declare a winner. One such motion is the motion to dismiss for failure to state a cause of action. In this motion, the defendant argues that even if it admits everything in the complaint is factually true, that doesn't lead to any legal liability. In other words, the defendant's conduct has not broken any laws. A similar motion is the motion for judgment on the pleadings. In this motion, one party asks the judge to decide the case based simply on the answer and complaint.

If a long period of time has passed since the incident in question and the filing of the lawsuit, a defendant may file a motion to dismiss based on the statute of limitations. Every civil and criminal action has a **statute of limitations**[49], which states that any claim or prosecution under the statute must be brought within a specified period of time or it will be dismissed. Only a few crimes are exempt from the statute of limitations and can be prosecuted at any time: murder (in most states) and rape (in many states). The statute of limitations exists to encourage aggrieved parties to file their lawsuits quickly, while evidence is still fresh and relevant people have memories of what occurred. As time passes, evidence may become stale, witnesses may die or move away, and those that can be located can't remember what they saw or heard. In other words, the quicker a suit is filed, the more likely that the real truth will be discovered by litigation. For businesses, a statute of limitations also allows it to "close the books" on past liabilities, such as accounts payable or tax payments, knowing that too much time has passed for anyone to come collecting on those monies. It is possible, though, in many cases to **toll**[50] the statute of limitations. If an accountant commits fraud, for example, and a criminal complaint is filed but the accountant flees overseas for many years, the statute of limitations does not run while the suspect is hiding.

In support of any motion, a party may submit an **affidavit**[51]. Affidavits play an important role in pretrial procedure because they are an effective way for parties to tell their side of the story to the judge. They are limited, however, because even though they are given under oath, they may raise more questions and are not subject to examination by the other side.

After pleadings are filed, the litigation moves into the **discovery**[52] phase. Discovery is a process in which each side finds out information about the other's case. Let's assume, for example, that you buy a new car and within a few weeks, a tire falls off suddenly while you're driving. You would rightly conclude that there's something wrong with the car, so you sue the manufacturer. At this point, you have no idea what's wrong with the vehicle. Was the design flawed? Was there something wrong with the manufacturing of your specific vehicle? All you know is that new cars

49. A defined time limit under which a legal action must commence or be forever barred.

50. A temporary halting of the clock in calculating whether the statute of limitations has run out.

51. A sworn statement in writing made under oath.

52. The method used in civil and criminal cases to obtain information about each party's case.

should not experience this sort of failure. After you file a lawsuit against the manufacturer, discovery allows you to find out more information about the vehicle so that you can effectively proceed with the lawsuit. You could find out what engineers did when they designed the vehicle and review records of similar accidents or factory records from the day your vehicle was produced.

Discovery is designed to prevent trial by surprise, where either side may suddenly produce a damning piece of evidence that allows it to win the trial. Since trials are based on the discovery of truth, they should be tried on the merits of the case rather than a party's deceit. In that spirit, the rules of discovery are written broadly to cover scope and obligation. In scope, any piece of evidence that may be relevant to the trial is discoverable. Even if evidence may be ruled later to be inadmissible for a legal reason, it is discoverable during discovery. In obligation, both parties are obligated to turn over material that supports their own case, without demand from the other side. If the material harms their own case, they have to turn it over if the other side asks for it.

There are four types of discovery. The simplest (and least expensive) is an **interrogatory**[53]. These are written questions addressed to the other party. The questions tend to be simple and straightforward, dealing with uncontroversial matters such as a company's structure or the names and addresses of relevant witnesses.

A second type is a request for production. Using this form of deposition, a party can request the other party to produce written communications such as internal company reports, e-mails, product manuals, and engineering specifications. In some cases physical evidence may also be produced. If you sued a vehicle manufacturer because your tire fell off while driving, for example, the manufacturer may ask you to produce your vehicle so that its engineers can inspect it. Failure to preserve and produce key evidence in litigation can lead to charges of **spoliation**[54], which may result in severe sanctions against the offending party.

A third form of discovery is a **request for admission**[55]. Remember that a complaint contains a series of claims the plaintiff is making against the defendant, and the answer is mainly a series of denials of those claims. As each party finds more information about the other's case in discovery, one party may ask the other to admit that one of the contested claims is true. Doing so narrows the issues for trial because it is one less thing that the jury has to decide. Asking a party to give up a contested claim can be done at any time during litigation. If not done as a formal method of discovery, it may be done as a **stipulation**[56] instead. For example, in your trial against the vehicle manufacturer, you may ask the manufacturer to admit that your specific vehicle was manufactured on a specific date at a specific factory.

53. Written questions posed by a party to another party during discovery.

54. Destruction of key evidence in a trial.

55. A set of statements posed by one party to another for purposes of having the other party admit or deny the statements, to narrow the scope of facts to be tried.

56. An agreement made between opposing parties in litigation.

Finally, discovery can take the form of a **deposition**[57]. A deposition is a sworn oral statement, in response to questions, given by a potential witness in a trial to the attorneys in the case. A deposition hearing is attended by the witness being deposed and lawyers from both side, as well as a court reporter who keeps a written transcript of the entire deposition. In your product liability suit against your vehicle's manufacturer, for example, you might want to depose the safety engineer who designed the car's tire and braking systems. There is no judge present, so there is great latitude for parties to ask questions, even if those questions may result in testimony that is later inadmissible in court. Depositions serve to allow attorneys to prepare for trial by knowing everything a witness may say in court. They also serve to pin down a witness's testimony, since a witness who changes testimony between a deposition and trial can be easily **impeached**[58]. Depositions are easily the most expensive form of discovery, sometimes requiring weeks or months of advance planning, travel, extra costs, and lost work time from witnesses being deposed. In some cases they can degenerate without the presence of a judge, as Note 3.72 "Video Clip: A Deposition Goes Awry" shows.

Video Clip: A Deposition Goes Awry

(click to see video)

Although the policy behind liberal rules of discovery is to permit both sides to prepare adequately for trial, in effect discovery is an expensive phase of litigation. With most lawyers charging by the hour, responding to discovery requests can quickly rack up daunting legal bills. Discovery can also drag out litigation to many months or years. Most large corporations find they must dedicate entire in-house staffs of attorneys, paralegals, and support staff to respond exclusively to discovery requests. The judge assigned to the case is supposed to supervise discovery and ensure that the parties respond in a timely manner, as well as make rulings on specific discovery requests and objections. Theoretically, a judge has the power to sanction parties for abusive discovery, up to and including ordering a default judgment against the offending party. There are, however, few meaningful sanctions that can be levied against parties that abuse discovery, and plaintiffs in particular have a vested interest in making discovery last longer than the price of a sought-after settlement. These issues are magnified in **e-discovery**[59], when mountains of electronic data have to be sifted through to find relevant discoverable material. Objections to turning over material that may be proprietary, privileged, or the result of the **work product doctrine**[60] also become more time consuming when parties are engaged in e-discovery.

During or after discovery, parties typically make a motion for **summary judgment**[61]. This motion is designed to cut the trial short by asking the judge to decide based on the information discovered so far in the case. In essence, the party

57. A statement by a party or witness made under oath.

58. To challenge the credibility of a witness to tell the truth.

59. Discovery involving electronically stored information.

60. Materials prepared in anticipation of litigation protected from disclosure during discovery.

61. A judicial order declaring a winner on the merits of a case.

making the motion is saying, "Why have a trial?" since the evidence would lead any reasonable jury to the same and inevitable conclusion.

KEY TAKEAWAYS

Litigation commences with the filing of a complaint by the plaintiff. If the plaintiff wishes to represent many others with the same claim against the same defendants, the plaintiff may try to certify the lawsuit as a class-action suit. Frivolous cases are prohibited in litigation, but it is relatively easy to argue that a case is not frivolous. The defendant files an answer to the complaint or risks a default judgment. Most civil and criminal cases must be brought within the prescribed statute of limitations. During the discovery phase of litigation, parties share and exchange information about each other's cases so that neither side is surprised during the trial. There are four methods for conducting discovery: interrogatories, requests for production, requests for admissions, and depositions.

EXERCISES

1. During the Catholic priest sex scandal, many potential plaintiffs who were abused as children found that their lawsuits against the church and individual priests were barred by the statute of limitations because the abuse happened so many years ago. Do you believe that these lawsuits were rightfully barred? Why or why not? Should the statute be changed in sexual misconduct cases?
2. Do you think there are too many frivolous cases filed? If you answered yes, how would you revise the federal rules of civil procedure to raise the standard on what constitutes a frivolous case?
3. Look at a sample interrogatory at http://www.justice.gov/atr/foia/frito-lay/8-16-96.htm. This interrogatory was issued by the U.S. Department of Justice in an antitrust investigation against Frito-Lay for possible violations of the Sherman Antitrust Act. What do you notice about the questions? How long do you think it would take to compile a response to these questions? If you were the defendant, would you object to any of them? If so, on what grounds?

3.4 The Trial and Appeal

LEARNING OBJECTIVES

1. Learn about jury selection.
2. Follow a trial from opening statement to closing arguments.
3. Explore the public policy rationale for the trial system.

After discovery is finally completed, and assuming that neither side has been successful in short-circuiting litigation through motions, the case is finally scheduled for a trial. In civil litigation, this is a most unusual development, for well over 90 percent of cases filed are resolved or settled before a trial. If a case actually goes to trial, it means there are genuine issues of fact that the parties cannot resolve, and both sides are determined to see their side win. Remember that a trial is a fact-finding process, through which the trier of fact (the jury in most cases or the judge in a bench trial) attempts to determine what happened. The trier of fact applies the facts to applicable law as instructed by the judge and determines guilt or innocence in a criminal case, or liability or no liability in a civil case. The first step in this process is to seat a jury.

At any given day in a courthouse, several citizens may be called by a judge as potential jurors in a case. If a jury needs twelve members, it's not unusual for a judge to begin with a pool of more than fifty or sixty potential jurors to narrow down to a dozen. The process of selecting a petit jury is called **voir dire**[62].

Voir dire typically begins with the jurors filling out a written questionnaire. The questionnaire asks the jurors to identify their occupation, any work or occupational conflicts, and any potential conflicts of interest with the case. The process then continues with attorneys quizzing each potential juror in turn. During this questioning, attorneys ask each juror if he or she has any biases against upholding the law and whether he or she can keep an open mind during the trial.

If an attorney does not like a juror's response, that juror may be excused. There are two types of challenges to a potential juror: peremptory or for cause. A party can make a **for cause**[63] challenge if it can demonstrate to the judge that there is a good reason to excuse the juror, such as the juror's personal relationship with one of the parties, or the juror's stated unwillingness to be unbiased. Since these excuses are for a good reason, each side is allowed an unlimited number of for cause challenges. A party can also make a **peremptory**[64] challenge against a juror, without giving any

62. The questioning of prospective jurors.

63. A challenge to a prospective juror for a good reason such as bias.

64. A challenge to a juror without giving a reason.

reason for the challenge. Since these challenges are unsupported by rationale or reason, each side is given a limited number of peremptory challenges. A party may make a peremptory challenge based on a juror's perceived bias because of that juror's occupation or life background but may not make a peremptory challenge because of the juror's race*Batson v. Kentucky*, 476 U.S. 79 (1986). or gender.

After a jury has been selected and sworn in, the trial begins. The plaintiff or prosecution begins by delivering an **opening statement**[65]. The opening statement is a preview of the trial. In it, the attorneys explain the facts of the case to the jury and indicate what witnesses they will be calling and what the witnesses will say. Attorneys do not make any arguments during the opening statement; they simply lay out what jurors can expect from the trial ahead. In a trial against your vehicle's manufacturer, your attorney may begin by telling the jury to expect testimony from you about your car accident, from your doctor about the injuries you suffered, and perhaps from an expert witness who has examined your vehicle and believes it was manufactured defectively. Once the plaintiff has delivered an opening statement, the defendant will deliver the defense opening statement. In a criminal case, the defense has the right to reserve delivering the opening statement until after the prosecution has rested its case (concluded presenting all the witnesses).

After opening statements, the trial moves into the examination phase. Jurors are presented with witnesses, called by each side, to give evidence. The plaintiff begins by calling its witnesses. The attorney will guide the witness in delivering testimony by a series of short open-ended questions during the **direct examination**[66]. Leading questions (questions that call for a yes or no answer) are not permitted during direct examination. As the questioning proceeds, a court reporter maintains a record of all the words spoken in case there is an appeal. The opposing side may raise objections during the examination, which the judge will rule on. These rulings can also form the basis for a later appeal.

All the evidence in a trial must be introduced in this manner (questioning a live witness). If one side wants to introduce videotape into evidence, for example, it has to call the person who took the footage or was in charge of running the camera to testify about his or her personal knowledge of where the camera footage came from before the jury can watch the video. In a criminal case, if the prosecution wants to introduce the murder weapon into evidence, it must first call the detective or police officer who found the weapon to testify about where he or she found it and where it has been since then.

65. The statement by attorneys to the jury at the beginning of the trial, laying out the essential facts of the case.

66. Examination through questioning of a witness by the side that called the witness.

Hyperlink: O. J. Simpson Tries on Gloves

http://video.google.com/videoplay?docid=-7472594685651342793#

O. J. Simpson's criminal murder trial was probably the most-watched courtroom proceeding in history. During the trial, the prosecution sought to introduce a pair of gloves into evidence. The prosecution claimed the gloves contained blood from the victims. In this scene, the defendant, O. J. Simpson, is asked to try on the gloves so that the jury can see for themselves whether or not the gloves might belong to him. The fact that the gloves appear too small for his hands later becomes fertile ground for the defense attorneys to argue that reasonable doubt exists as to his guilt.

After direct examination, the other side has the right to conduct a **cross-examination**[67]. During the cross-examination, the attorney will try to discredit the witness to convince the jury that the witness is not credible. The attorney may probe into any potential biases the witness may have or try to prove that the witness's recollection of events may not be as clear or certain as the witness believes. During cross-examination, attorneys frequently engage in asking leading questions, which is permitted.

Once the prosecution or plaintiff has called all its witnesses, and the witnesses have undergone direct and cross-examination, then the prosecution or plaintiff will rest its case. The defendant may make a motion for a **directed verdict**[68], arguing that no reasonable juror could possibly find in favor of the prosecution or plaintiff after hearing the evidence presented so far. This motion can be made anytime during the trial before the jury returns a verdict. The motion is typically denied, and the trial moves on to the defense phase. The defense will then present its witnesses, who are led through direct and cross-examination.

After the defense has rested its case, the attorneys once again address the jury in **closing arguments**[69]. Here, the attorneys summarize the case for the jury. They address what witnesses were called and what the witnesses said. During closing arguments, the attorneys are permitted to be much more persuasive and argumentative than during the opening statement. They appeal to the jury's emotions and argue how the jury should interpret the evidence before them.

67. Examination through questioning of a witness called by the opposing side.

68. An action by the court to direct a verdict when a party has failed to meet its burden of proof.

69. Summation of the case presented by attorneys at the conclusion of presentment of evidence.

Video Clip: Johnnie Cochran Delivers Closing Arguments

(click to see video)

After closing arguments are made, the judge in the case charges the jury by giving the jury its instructions. The instructions acquaint the jury with the relevant law. The jury then retires to deliberate. During deliberations, the jury will decide first what facts it believes to be true. Then it will apply those facts to the law as outlined in the jury instructions. In a trial against your vehicle's manufacturer, for example, the judge may explain to the jury what is legally required for a product to be considered defective so that the jury can make a determination, based on the evidence presented, whether or not there is any liability.

Central to the jury's deliberations is the **burden of proof**[70] applicable to the case. In criminal trials, the prosecution always carries the burden of proof. That burden is to prove the defendant committed all the elements required in the crime **beyond a reasonable doubt**[71]. If any member of the jury has any reasonable doubts about the defendant's guilt or innocence, then the only appropriate verdict is not guilty. Many people confuse the burden with "without a doubt." Jurors may have doubts, but the only question for the jurors is whether they have any reasonable doubts. This standard is deliberately set high because of the severe sanctions and penalties that follow a criminal conviction. In a criminal trial, the defense only has to prove reasonable doubt exists and has no burden of proof at all. That is why in criminal trials, the defense may strategically decide to not call any witnesses and to rest its case strictly on creating doubt by cross-examining the prosecution's witnesses.

In civil cases the burden of proof is **preponderance of the evidence**[72]. This standard requires the scales of justice to tilt ever so slightly toward one party to declare that party the winner. If the jury believes one side is 51 percent correct and the other is 49 percent correct, that is enough to declare a winner. It is a much easier standard to win, because it only requires a party to prove that its side is more likely than not telling the truth. In a civil liability suit against your vehicle's manufacturer, your burden is to convince the jury that more likely than not, your vehicle was somehow defective. Sometimes it's possible for a jury in a criminal trial to find the defendant not guilty, while a separate jury in a civil case applying a lower burden of proof finds the defendant liable for the same act. This is what happened to O. J. Simpson when he was tried for the murder of his wife.

During jury deliberations, the jurors are permitted to ask the judge for clarification about the law and to request to see the evidence again. If the jury is unable to come to a verdict, the jury is said to be deadlocked, and a mistrial results. Since trials are expensive and time consuming, the judge will usually instruct the jury to try its best before giving up. If the jury does arrive at a decision, it is called a **verdict**[73].

70. The responsibility of a party to produce sufficient evidence to convince the trier of fact of a particular fact or issue.

71. The standard of proof in a criminal trial. It means that the evidence must be so compelling that there is no reasonable doubt as to the defendant's guilt.

72. The standard of proof in a civil trial. It means that the evidence that supports the claim is more likely than not.

73. A jury's decision.

Once the jury delivers its verdict, the losing side typically makes a motion for **judgment notwithstanding the verdict**[74]. In this motion, the party is arguing that the jury arrived at the wrong verdict and that no reasonable jury could have arrived at that verdict. The judge typically will not grant this verdict. Even if the judge believes that the jury arrived at the wrong factual conclusion, the judge is not permitted to substitute his or her judgment for that of the jury. If, however, the jury clearly ignored the law in arriving at its verdict in a criminal case, the judge may overrule the jury. This phenomenon is known as **jury nullification**[75].

If the judge denies the motion for judgment notwithstanding the verdict, then the judge enters the jury's verdict as a **judgment**[76]. After that, the losing party has the right to file an appeal. Remember that on appeal, the appellate court is only reviewing the record for legal error and cannot call new witnesses or substitute its judgment on the facts for the jury's. In the following excerpt, Supreme Court Justice Ruth Bader Ginsburg uses the trial record to make a point in her dissenting opinion in an important employment discrimination case involving gender discrimination. Although hers was a dissenting opinion and the plaintiff lost her case, Congress reacted to the decision by passing the Lily Ledbetter Fair Pay Act, the first law signed by President Obama after he assumed office.

74. A judgment setting aside the jury's verdict.

75. An act by a jury to willingly ignore the law to achieve an equitable result or outcome.

76. A formal determination of a matter by a court.

Hyperlink: Justice Ginsburg Reviews an Employment Discrimination Case

http://www.law.cornell.edu/supct/html/05-1074.ZD.html

From 1979 to 1998, Lilly Ledbetter worked as a supervisor at Goodyear's plant in Gadsden, Alabama. Over the course of her career, her pay slipped when compared to the pay of men of equal experience and seniority. She sued the company, alleging pay discrimination on the basis of her gender under Title VII of the 1964 Civil Rights Act. The law states that any lawsuit must be initiated within 180 days of the unlawful discriminatory act occurring. Ledbetter argued that each paycheck she received was an unlawful discriminatory act, so the fact that she filed her lawsuit within 180 days of her last paycheck means her lawsuit is within the time limit. Goodyear argued that the discriminatory act was the decision to pay her less, which took place many years ago and that therefore her lawsuit is too late. In a 5–4 decision, the Supreme Court ruled in Goodyear's favor. In her dissent, Justice Ginsburg returns to the trial record to make her point that Ledbetter is the victim of unlawful discrimination. The following is from the dissenting opinion:

Specifically, Ledbetter's evidence demonstrated that her current pay was discriminatorily low due to a long series of decisions reflecting Goodyear's pervasive discrimination against women managers in general and Ledbetter in particular. Ledbetter's former supervisor, for example, admitted to the jury that Ledbetter's pay, during a particular one-year period, fell below Goodyear's minimum threshold for her position. Although Goodyear claimed the pay disparity was due to poor performance, the supervisor acknowledged that Ledbetter received a "Top Performance Award" in 1996. The jury also heard testimony that another supervisor—who evaluated Ledbetter in 1997 and whose evaluation led to her most recent raise denial—was openly biased against women. And two women who had previously worked as managers at the plant told the jury they had been subject to pervasive discrimination and were paid less than their male counterparts. One was paid less than the men she supervised. Ledbetter herself testified about the discriminatory animus conveyed to her by plant officials. Toward the end of her career, for instance, the plant manager told Ledbetter that the "plant did not need women, that [women] didn't help it, [and] caused problems." After weighing all the evidence, the jury found for Ledbetter, concluding that the pay disparity was due to intentional discrimination.

Once all appeals are exhausted, the winner in litigation can finally collect whatever damages it is entitled to. This process is called **execution**[77]. If the loser is unable or unwilling to pay the judgment, the winner can petition the court to use its full legal resources, including asking the sheriff to seize the loser's assets for sale, to satisfy the judgment. The winner can also ask that the loser's wages be **garnished**[78] until the judgment is satisfied. The loser in litigation cannot refile a civil lawsuit once it has been decided under the doctrine of **res judicata**[79]. Just like criminal cases cannot be retried after acquittal under the double jeopardy clause of the Constitution, res judicata operates as a bar to relitigation.

KEY TAKEAWAYS

The process of selecting a jury is called voir dire. Each side is permitted to question a potential juror and excuse that juror for any reason through a peremptory challenge or for a good reason through a for cause challenge. A trial begins with opening statements where the parties lay out the essential facts of their case. Next, witnesses are called to provide testimonial evidence. The side calling the witness conducts a direct examination, while the opposing side conducts a cross-examination. After all witnesses are called, the parties make closing arguments to the jury, which then deliberates and applies the law as outlined in the jury instructions. The burden of proof in a criminal case is "beyond a reasonable doubt," while the burden of proof in a civil case is "preponderance of evidence." A jury's verdict must be converted into a legal judgment by the trial judge. Once all appeals are settled, res judicata prevents the case from being tried again.

EXERCISES

1. Why would a jury engage in jury nullification? If a jury cannot engage in nullification, what are its alternatives to express a similar view?
2. One of President Obama's first acts as president was to sign into law a statute aimed at overturning the Ledbetter decision. How can Congress overturn the Supreme Court in this instance?
3. Although litigation is rightfully criticized as slow and expensive, res judicata means the parties have only one chance to "get it right." Do you think relaxing the rules of res judicata would help with the expense and time involved in litigating cases?

77. The collection or enforcement of a judgment.

78. Attachment of a debtor's wages to pay a judgment.

79. The doctrine barring relitigation of issues and claims already finally determined.

3.5 Concluding Thoughts

The litigation system, publicly financed, is an important dispute-resolution mechanism that processes millions of cases in both state and federal courts every year. The system permits parties to air their grievances against each other in an open and transparent manner and is typically very effective at finding the truth. The jury system, in particular, is largely admired for its ability to involve ordinary citizens in an important form of civil service. For many businesses, however, litigation can be a vexing and distracting problem. The extraordinarily high costs associated with complex litigation, along with pressure from stakeholders to settle cases rather than litigate them fully, means that most businesses would prefer to avoid litigation whenever possible. These problems have led many courts to experiment with various levels of reform, from mandatory pretrial settlement attempts to mandatory mediation to jury selection and management reforms. These reforms are aimed at maintaining the vitality and usefulness of the litigation system, which can be a trusted and valuable resource for all citizens and corporations.