

Intro to Law and the Paralegal Profession

PARL 1000

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COLLEGE CORRESPONDENCE
PROGRAM

STUDY GUIDE

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COURSE OVERVIEW

Over the next fifteen weeks, you will be expected to follow the reading assignments listed in the study guide. Each week you will read at least one chapter and answer the Review Questions. These accumulated questions will count toward 25% of your final grade. If you do not have access to a computer or typewriter you may neatly (in print) hand write your answers underneath the heading Review Questions. As you process the information, the questions are designed to help you achieve a working understanding of the material and integrate the data into your vocabulary. A thorough application of these questions is expected. Terms to remember are scattered throughout the text; they are listed as Words to Remember in your study guide. These are key terms that aid in understanding the Introduction to Law and the Paralegal Profession and its application. You will be responsible for incorporating them into your vocabulary and you will likely see them again on Exam day.

At the conclusion of week four, you can expect a week to review and then your first exam. This will count for another 25% of your final grade. You will be expected to turn in all your written assignments (chapters 1-5 Review Questions) along with your exam in order to be graded. Once this is completed, you will resume by following the reading schedule for chapters 6-10. At the conclusion of week 9, you can expect a week to review and then your second exam. This assignment will account for 25% of your grade and will be due along with your Review Questions (chapters 6-10). Once this is completed, you will resume by following the reading schedule for chapters 11-15. At the conclusion of week 14, you can expect a week to review and then your second exam. This assignment will account for 25% of your grade and will be due along with your Review Questions (chapters 11-15).

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WEEK 1

Lesson 1: Character of the Law and Sources of Law

Lesson Topics

- Definition of law.
- The Development of Law.
- The Administration of Justice.
- The Consequence of Law.
- The Sources of Law.

Lesson Objectives

- Analyze the different meanings of the law.
- Recognize the nature of the law.
- To locate the various sources of law

Reading Assignment

Nordyke, Keith. J.D. 2012. Introduction to Law and the Paralegal Profession. Text: Chapter 1 and Chapter 2.

Text



CHAPTER 1 CHARACTER OF THE LAW

The Definition of Law

In examining the framework of the practice of law, students will learn that there are numerous meanings of the word *law*. When a person in the legal field uses the term *law*, he is generally referring to philosophies of conduct. In this sense, the term law in the legal domain is different from references to a *law of nature*. Other categories of law, which refer to behavior, are the laws influencing customs, ethics, and religious conviction. Black's Law Dictionary assigned an entire page to defining this authoritative term. Each designation offers a somewhat different point of view or distinction, but all of them seem to encapsulate the following: Law is a classification of enforceable standards adopted by those in authority to govern the behavior of a civilization.¹

¹ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 5

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From the smallest family to the greatest nation, every society lives by rules. This is necessary because a controlled society cannot survive if each person in the society makes his own set of rules. The standards of law must originate from an authoritative group. The authoritative group could be the parents in a family or a ruler of a nation. Finally, to ensure their enforceability, rules usually impose sanctions upon those who defy them, which may vary from denial of a privilege to capital punishment.

The above definition can be applied to any economic, social, or political unit in the world, including the United States. The characteristic of American law, which distinguishes it from the laws of other nations, is the arrangement of its authoritative body—“a government of the people, by the people, and for the people.”² Just as the structure of our democratic republic was unique in its inception, so was the legal system that was fashioned to meet its needs.

In ancient civilizations, the different meanings of law were indistinguishable. The fear of public rejection; armed retribution of the specific tribe, an individual, or group; or the rage of offended deities, all motivated people to maintain good conduct. Over a period of time, categories of laws became distinct. Although peer pressure, societal influence, self-consciousness, and religion may still influence behavior, these are not the laws referred to in a court of law. In the modern society, the word *law* refers to the rules of conduct set forth by the legislative branch and enforced in the judiciary.

There is a distinct difference between *a law* and *the law*. *A law* is a rule, which forms a part of *the law*. Nonetheless, the law is not solely the sum of these rules. Rather, the law is a system made up of a set of laws and general opinions. These viewpoints result from legal precedent and deliberation. Together with the set of laws, these opinions form an integrated system of direction and order for conduct. These rules and values make up *the law*.³

Laws result from legislative enactment, which may include statutes enacted by Congress or a state legislature. Whether state or federally enacted, these laws are referred to as *statutory laws*. Doctrines, however, result from legal precedents. These doctrines, developed slowly over the years, form the most fundamental components of the legal system. When considered collectively, these canons are known as the *common law*. The common law was created by judges to guide them in deciding cases.

In most cases, when an attorney speaks of *the law*, he is referring to statutory and common law. The law is a system that determines what category of conduct is acceptable among people, within a society, and within a state. The statute law, or *statutory law*, is written down by the state. As such, it is also known as the *written law*. Historically, common law was not written down, it was simply understood. Thus, it was known as the *unwritten law*. Over the years, these unwritten doctrines appeared in more and more cases that were being cited by judges and attorneys. Centuries ago, English judges decided who won a particular case. The judges handed down their opinion in these cases, and the same beliefs were applied to other cases arising with similar circumstances. The existing law of negligence started in a similar manner.⁴

In today’s world, those engaged in the legal profession realize that both written statutes and common law are integral parts of the law by which justice is administered. These rules and opinions play a vital role in assisting judges today in their decisions.

² Source: Preamble to the United States Constitution

³ *American Jurisprudence, Second Edition*

⁴ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 6

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The Development of Law

A person can dedicate his life to learning the many legal rules that have emerged in the American legal system. However, a person who only obtains a practical awareness of the rules is a deprived constituent of the legal community. To understand the framework of the legal system, the need for both practical awareness and historical insight are critical.

To comprehend how and why the American legal system has evolved in the way that it has, one must look beyond the adoption of the U.S. Constitution and the Revolutionary War. One has to look to the colonists who settled in America, to the legal systems from which they came, and to the legal philosophies which they brought with them.

The judge *precedes* the law, which means a judge can exist and administer justice without relying on laws. A court of justice is not necessarily a court of law. In ancient times, judges settled disputes among the people. This was the practice even though civilization had not officially adopted any laws. The Old Testament reflects that Solomon settled disputes among the people. The Old Testament reveals that Solomon was perceptive and had a natural sense of justice. The most remarkable feature is that Solomon settled disputes without relying on law or doctrines; he simply did what he felt was fair and just.⁵ The Judges of Israel, who came from different ethnic groups, functioned as military leaders and civil magistrates. Samuel is generally regarded as the last of the judges and the first of the prophets. The Old Testament reflects vivid stories during the time of judges that illustrate the depth of moral and social corruption resulting from Israel's spiritual apostasy. Thirteen judges existed during that era.⁶

Unfortunately, over the centuries, the administration of justice could not rely on the conventional wisdom and fairness of an individual judge. Under this logic, although a judge may still be able to settle disputes without relying on laws, he could not prevent future disputes or crimes. Hence, people required a formulated set of rules by which they could steer their future conduct. Also, as a society evolves and increases in population, a greater need for justice arises than can be handled by a single individual. Thus, it is better for a civilization if like cases are similarly decided by numerous judges. For this to be practical, judges followed a set of laws or doctrines. Eventually, all civilizations came to realize that law was required in order to maintain a fair and even administration of justice.

The English Roots

A large majority of North American colonists came from England at a time when the king and the Church of England had embraced the controlling mass of English law established through the centuries. England's court system reflected these two controlling forces.⁷

Among the English commoners, there were only specific kinds of legal actions that were authorized for the resolution of disputes. Their claims were heard by the king's court, also referred to as the *king's court of common pleas*, or, stated more generally, the law court. Any action taken was technical and depended entirely on the issuance of writs. Many complainants lost matters because of their failure to adhere to a technical rule. Because of the unfair and, at times, arbitrary and harsh temperament of law court actions, the king ultimately established the *Court of Chancery*.⁸

This court handled cases for which the law court could not provide relief, to-wit, when justice indicated that some type of relief should be granted in a particular case, and the law court could do so,

⁵ Ezra, *The Second Book of Chronicles*

⁶ Anonymous, *The Book of Judges*, and *The First Book of Samuel*

⁷ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 347

⁸ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 347

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these cases were referred to the *Court of Chancery*. Predominantly staffed by distinguished clergy, the Court of Chancery was charged to decide cases dealing with philosophies of fairness as opposed to technical rules.⁹ Initially enacted as an advisory council to the king, Parliament had no power to make laws. Long after the Revolutionary War, power shifted from the king to Parliament.

The ranks of the king's army and navy, maintained by means of a compulsory draft, allowed Great Britain to establish colonies in various parts of the world, including the United States. Contrary to popular belief, America was not a land of milk and honey in its earliest days. Many colonists did not live through the grueling transition. As colonies were initially formed, only the most daring or desperate people came willingly. Others, mostly political extremists and social rebels, arrived at the point of a sword. Whether they came because of banishment or flight, early colonists considered themselves British subjects, and many dreamed of going home one day.¹⁰

The colonies survived even though the king often disregarded them. Consequently, the early colonists did not place their trust in the British military. Instead, colonists relied on voluntary militias for protection. Colonists distrusted lawyers and judges even more than the military. The laws they established were of English common law origin but did not precisely follow English law. The colonists retained those parts of England's common law that served their purpose, modifying or disregarding other parts as indicated. They retained both the law court and the equity court. During this time, a law library consisted mainly of *Blackstone's Commentaries* brought from England. This four-volume collection could fit easily into a lawyer's saddlebags as he traveled from town to town. More often than not, there was no *Blackstone's Commentaries* available, and even when it was available, only a limited few could read it.¹¹

As colonies began to flourish, so did the state of American law. The British-Americans cultivated more land, grew more crops, and prospered. Many of the prosperous colonists sent their children to England for an education where they were exposed to the writings of John Locke and other legal philosophers on natural law. When the king turned to the colonies for commodities and tax revenues,¹² the British-Americans, many of whom regarded themselves as revolutionaries and loners, demanded to be represented in the king's advisory body, but their demands for representation were quickly dismissed. During this time, the British army, loathed by the colonists, began to build-up its troops, forcing the colonists to lodge these soldiers in their homes. Steadily increasing taxes without the benefit of a proper representation of or benefit to the colonists set the stage for the Revolutionary War.

The American government functioned under the *Articles of Confederation* from the end of the Revolutionary War until the Constitutional Convention in 1787.¹³ As such, each state elected a delegate or representative to Congress, which, in turn, elected a president from its own ranks. Over time, this method proved to be ineffective. Times were perilous. There were no means to enforce the decisions of Congress; there was no financial backing for the army or for the government to function. Ultimately, the United States Constitution replaced the Articles of Confederation.

Obviously, the Declaration of Independence and the United States Constitution were heavily influenced by John Locke's theories on natural rights. Americans debated and modified Locke's theories, "to form a more perfect government," as they were accustomed to changing the law to fit the situation.

⁹ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 347

¹⁰ *American Jurisprudence, Second Edition*

¹¹ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 348

¹² Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 348

¹³ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 348

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Today, in America, judges base their decision on legal precedent. As such, they convey uniformity in their decisions. There is also a benefit to judges in that they do not have to retrace the process by which every prior decision was made. The repetition of decisions in the courtroom ensures consistency and fairness in the administration of justice. Since judges generally base their decisions on legal precedent, a fixed set of laws emerge. Over time, the administration of justice becomes the administration of law. In other words, the court of justice becomes the court of law.



However, no system of justice can be completely modified to a canon. The range of issues requiring the attention of judges is endless, and there is not always a precedent upon which to rely. Even so, judges are still required to make decisions about fairness in these cases. Also, over time, it has become apparent that it is not always a good idea to modify justice to a rule in which a judge “goes by the book” and makes a decision based solely on precedents. Judges must have discretion to address the particulars of each individual case.

There is little doubt that every case is different. Some cases are better resolved by a judge’s discretion as opposed to a set of laws. However, even in those cases, a judge’s decision must reflect years of experience in legal reasoning and the application of legal guidelines. A judge’s administration of justice is also influenced by the opinions of the legal profession. In the end, the court and the bar as well as the judge and attorney should base their actions on definitive rules and principles. Their decisions must rely on sound legal reasoning.

The American Experiment

The framers of the Constitution were divided concerning how much power should be given to a federal government, finally agreeing that each state should retain its sovereign status, even if a federal government were established. They also did not want any single part of the federal government to hold too much power, so they divided it into three branches: legislative, executive, and judicial, to provide a system of checks and balances. Congress was then created with two houses to ensure a fair representation of the states.

Even though many doubted the reliability of the new system, under the fabric of the Constitution, a unique system emerged. Once it became known that some states were hesitant to ratify the Constitution’s draft, a collection of ten amendments, also referred to as the Bill of Rights, was supplemented to set forth individual rights and liberties.

One of the most outspoken opponents of these amendments was Thomas Jefferson, who believed it was unnecessary to inscribe individual rights into the Constitution. Jefferson and others believed these rights were so obvious that no one would ever question them. Even so, by adding the Bill of Rights, the Constitution was ratified. Ironically, the Bill of Rights, which was only an afterthought, has become the soul of constitutional law in protecting individual freedoms.¹⁴

The Constitution’s inclusion of the history of law gives it substance. Why did the Boston Tea Party occur? Why did the South believe in the justness of its secession from the Union? Why was civil disobedience accepted as a valid form of protest? Why does each generation grow up believing that each individual has basic rights that no one can take away? These are all things that the history of law helps us to understand. The history of law also helps us understand why lawyers and judges have always been

¹⁴ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 349

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distrusted by society. However, when an individual's rights are threatened or contravened, a lawyer is the first person contacted.

The Administration of Justice

After justice is administered, a decision is made as to whether a particular action was right or wrong. This decision is based on the set of rules and opinions that make up the law. In modern society, justice must be administered by a judge. This is a necessary step in the advancement of civilization. People may have diverse views as to what is right or wrong; therefore, without a judge, justice would not be administered evenly or consistently. In order for a society to develop and cultivate, a judge must administer justice. Historically, a cleric, sovereign, accepted groups, or unions administered justice. Today, the recognized authority is usually a judge, who is also called a *Justice*.¹⁵

Judges must be provided to administer justice over individuals. Without judges, people would seek grievance redress on their own. This is commonly referred to as *vigilantism*. People would also act in their own best interest as opposed to acting in the best interest of society. Over time, *civil justice* was substituted for self-enforcement, and *criminal justice* was substituted for vigilantism.¹⁶

The Consequence of Law

Traditionally, members of early civilizations obeyed laws because they feared scorn from their colleagues. Some people obeyed the laws because these laws were part of their faith. The coercive power that causes people to obey laws is called a *consequence*. In the past, penalties that compelled people to obey laws were fear of public scorn and religion.



Today, most people obey laws for a different reason. The penalty of law compels people to obey laws. The *consequence of law* is the tangible power of the state. The word *tangible* is important here. Most people are not good citizens only because they are adhering to their sense of right and wrong or because they are hesitant to face scorn from their peers. As influential as these consequences may be, they are, in effect, purely psychological. In other words, they mainly affect the mind of the person being influenced by them, not a person's body or personal property.

In contrast, the consequence of law is mostly tangible. Disobeying the law usually results in the state seizing an individual's personal property or putting the individual in prison. In extreme cases, breaking the law may result in the person being put to death. Although the consequence of law is reliant upon the physical enforcement of the law, it is most effective if it has a moral reaction as well.¹⁷

¹⁵ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 6

¹⁶ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 6

¹⁷ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 7

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*Our capacity for justice makes democracy possible;
it is our inclination to injustice that makes
democracy necessary.*

—Reinhold Niebuhr

REVIEW QUESTIONS

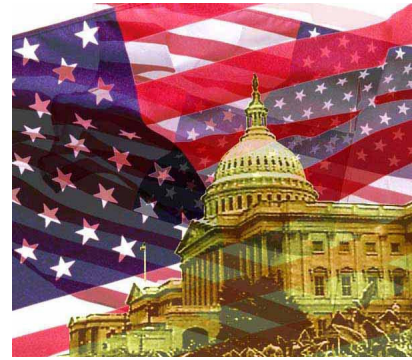
1. According to the text, what motivated people in ancient civilization to maintain good conduct?
2. When a person in the legal field uses the term *law*, he is generally referring to what?
3. True or False.
A judge can exist and administer justice without relying on laws. Explain.
4. True or False.
Written statutes and common law are not as significant today to administer justice. Explain.
5. When justice indicated that some type of relief should be granted, these cases were referred to what court?
6. In your own words, trace the history of law from the Old Testament to modern American law.
7. What is the relationship between justice and law? Give a detailed explanation.

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CHAPTER 2

SOURCES OF LAW



In General

In a democracy, the people are the source of all power, including the power to create law, which is exercised through elected officials. There are at least 51 legal systems operating concurrently within the United States: the federal system and the systems of 50 independent states. Accordingly, the sources of substantive law are constitutions, statutes enacted by legislatures, rules and regulations adopted by administrative agencies, and the common law.

The law is the system of rules and philosophies used to administer justice. Judges acquire *the law* from many different sources, including the state. The state enforces laws, but it does not make them all. There are too many sources of law to name each one, but some of the most important sources of law are *legislation, custom, legal precedent, professional opinion, juristic writings, and public policy*. Arguably, legislation is the most important source of law. By *legislation*, we are referring to laws enacted and enforced by the state. If the state has set forth a rule governing a particular matter, the judge must apply the rule. Judges should only rely on *custom* and *legal precedent* when there is no legislation concerning a particular issue.¹⁸

The Constitution

A constitution is a written document which provides the primary source of law within a particular geographic region. A constitution sets up the basic philosophies and the organization under which a government must operate. The United States Constitution is the written agreement which unites the states as one unified nation. Incorporated within our Constitution is the canon of *separation of powers* by which all governmental powers are divided among three branches: legislative, executive, and judicial. Each branch is designed to serve as a check and balance on the other two.

Each state also has its own constitution, generally, with provisions similar to those of the federal Constitution. Powers which are not specifically given to the federal government are reserved for the states.

Statutes

The second source of substantive law is legislative or statutory law. A statute is a written law enacted either by Congress or by a state legislature. Both federal and state statutes must adhere to the federal constitution. In addition, the statutes of every state must conform to that state's constitution. The courts have the right to review and interpret both state and federal statutes. Since the federal government is one of limited powers, federal statutes may be enacted only in those areas specifically delegated to Congress in the United States Constitution. On the contrary, state statutes may be enacted in nearly any area except those which are prohibited to states by the United States Constitution.

¹⁸ John DeLeo, J.D., *Blackstone Paralegal Studies*, p.9

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Statutes are collected and published in a *code*. Federal statutes are published selectively in the United States Code. Each state has its own code of state statutes.

Customs

Custom is one of the earliest sources of law. *Custom*, in the legal sense, refers to what is practiced in the court. In early years, judges did not rely heavily on ideology in reaching their decisions. Rather, judges based their decisions on what was considered the normal at the time. Actions that were normal were deemed correct, and actions that were abnormal were deemed incorrect. Some judges still consider tradition today; however, it does not have as much influence now as it did in the past.

Nevertheless, current law has evolved to the extent that it is no longer necessary to consider customs. As such, customs are only considered when the law is vague or ambiguous, and only where practice is inconsistent with the written law. Although a custom cannot be exchanged for law, it often affects new legislation.

Administrative Rules and Regulations

In order to assist the legislature in an area that requires exceptional skills and more oversight than the legislature can afford or where it lacks expertise, legislatures establish administrative agencies, boards, and commissions. An agency of this type is created by an *enabling act*, which authorizes the agency to exist and which lists its jurisdiction and areas of responsibility.



Administrative agencies have become so pervasive that they often are referred to as the *fourth branch of government*. Some examples of federal administrative agencies are the Internal Revenue Service (IRS), the Immigration and Naturalization Service (INS), the Social Security Administration (SSA), the Securities and Exchange Commission (SEC), the Federal Communications Commission (FCC), the Equal Employment Opportunity Commission (EEOC), the Food and Drug Administration (FDA), and the Environmental Protection Agency (EPA). There are many others in existence.

Notwithstanding some restrictions, a legislature has free-range to assign some legislative authority to an agency, which allows an agency to enact rules and regulations to clarify or explain statutes within its authorized area of expertise. This rulemaking power is an exercise of an agency's *quasi-legislative* authority. Although not equivalent to a statute, administrative rules and regulations hold much of the same power of law as statutes.

Also, an administrative agency often has authority to investigate, to enforce, and to interpret its own rules and regulations. An administrative law judge or a hearing officer presides over hearings which are similar to trials. However, neither the judge nor the hearing officer is required to be a lawyer by many administrative agencies; this is allowed as part of an agency's *quasi-judicial function*. If a violation is deemed to have occurred, the agency may impose civil sanctions. However, no one can be incarcerated by an administrative agency. On the other hand, when criminal proceedings are necessary, the matter is referred to the Justice Department (federal prosecutor) or to the local district attorney for prosecution.

The rules, regulations, and decisions of an administrative agency are sometimes subject to review and interpretation by courts. Usually, before judicial review can be done, an appellant or petitioner must prove that he has exhausted all available administrative remedies. In other words, an appellant or petitioner must utilize all of the procedures and remedies at the administrative level before he can seek judicial relief.

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When exercising their rule or decision making authority, federal agencies are governed by the Administrative Procedure Act (APA). In general, judicial review of the acts of an administrative agency comes down to two questions: 1) Does the agency have the power to do what it did? (2) If it does have the authority, did the agency abuse its powers?

Uniform State Laws and Model Acts

Since each state has the innate power to create the statutes it deems necessary, the statutes on a particular subject may vary extensively from state to state. If the subject is one of local interest only, the variations make little difference outside a particular state. With escalating interstate activities resulting from growing businesses and populations, state laws that were contradictory became a major impediment by the turn of the 20th century.

In 1915, the National Conference of Commissioners on Uniform State Laws was formed to resolve this problem. Each state, including the District of Columbia and Puerto Rico, appointed at least one commissioner to this organization. The commissioners are charged with identifying areas of law that need to be uniform, thereafter, drafting model legislation in the form of *uniform codes*, *uniform acts*, or *uniform laws*. In addition, the commissioners encouraged states to adopt the same standards.¹⁹

Every state legislature takes into account the uniform code or act in the same way that it considers any other proposed legislation. A state legislature may adopt the code or act, adopt the code or act with modifications, adopt only part of the code or act, or adopt none of it—as the legislature chooses. However, legislatures are urged against enacting substantial changes which would ruin the intent of a uniform law. When a uniform code or act is adopted, it is incorporated into the state’s other statutes and code.²⁰

The National Conference of Commissioners has drafted more than 250 acts, including the Uniform Commercial Code, the Uniform Partnership Act, the Uniform Limited Partnership Act, the Uniform Fraudulent Conveyance Act, the Uniform Probate Code, and the Uniform Reciprocal Support Enforcement Act. Although not to the same extent as the National Conference, several other organizations draft model acts. For instance, the American Law Institute drafted the Model Penal Code. The American Bar Association is responsible for both the Model Business Corporation Act and the Revised Model Business Corporation Act.²¹

Legal Precedents

Judges are obliged to apply the canons and philosophies that were applied in prior decisions of similar matters. Adhering to precedent in judicial decision-making gives stability and certainty to the law. The public can reasonably predict the outcome of specific conduct or events, which, in turn, makes them, better able to plan their lives and provide order to society. In dealing with the relationship between individuals, the largest part of our law is the result of legal precedents. No other system of rule puts more emphasis on legal precedents.

On a larger scale, common law refers to the judicial decision-making process, which is the foundation of the American legal system. Common law is based on the doctrine of *stare decisis* which means, “Standing by the decision.” *Stare decisis* is the process used by judges to analyze past cases to

¹⁹ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.356

²⁰ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.356

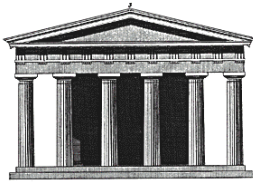
²¹ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.356

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determine if any cases exist which had similar facts and similar legal issues as the present case (the one being decided now). If one or more such cases are found, the holding of the past case is *precedent* in the present case, which means that the present case should be decided in the same way.²²

In most European countries, legal precedents have no more importance than the opinion of a legal expert. In these countries, justice is administered solely on the basis of the facts in each individual case. To the contrary, American law regards legal precedents as extremely significant. A legal precedent is not significant because it is precise, or because a prior decision was accurate; rather, a legal precedent is significant because it is legal precedent. More precisely, judges are cognizant of the certainty of previously resolved cases. Generally, judges abide by the precedent even though they may not agree with that decision.²³



Legal precedents are generally separated into two categories: authoritative and persuasive. *Authoritative precedent* is more commonly called *binding precedent*. A judge has no choice but to abide by it. *Persuasive precedent* is known as *persuasive authority* and, as implied, a judge uses his discretion to accept it or reject it, depending on its persuasiveness. Therefore, only authoritative precedents are recognized as an origin of law. Judges are duty-bound by authoritative precedents even though they may not concur with them. Authoritative precedents cannot be ignored by judges subordinate to the judge making them without risking reversal on review.

Accordingly, a decision of the United States Supreme Court makes a precedent that is absolutely binding on all the federal district courts even if the courts believe the precedent is erroneous and unreasonable. However, judges have discretion to accept or reject persuasive precedents. Courts are not compelled to abide by persuasive precedents. For instance, a decision of the Montana Supreme Court may be considered by a state District Judge in Louisiana, but the Louisiana judge is not required to follow that decision.

While Judges are required to abide by authoritative precedents, if these precedents are obviously and seriously erroneous, they may sometimes be reversed. To reverse a precedent, the court may have to argue injury of law and the benefit of correcting the erroneous decision. When the precedent has been the source of numerous or significant decisions, a reviewing court may conclude it is better to let it stand. Conversely, if the precedent has become archaic and is no longer applied or has been distorted, it may be better to disregard it.

In the event no legal precedent exists on a matter, we must remember that the primary purpose of the court and the judge is to administer justice. As such, a case brought before a judge must be resolved. When practical, the resolution should be based on existing rules and opinions. However, if no rule or doctrine exists, there is no precedent or tradition upon which to base a decision. In such a case, the judge must base his decision on the opinions which lend themselves to general use.

In searching for an opinion, a judge may obtain direction from a variety of sources by taking into account the correlation of previous law. In other words, a judge must look for a law that is different, yet comparable. For instance, if a judge is trying to decide a case of ownership of exotic creatures and no law exists, the judge may take into account existing law regulating pet ownership. On the other hand, lawyers

²² John DeLeo, J.D., *Blackstone Paralegal Studies*, p.10

²³ John DeLeo, J.D., *Blackstone Paralegal Studies*, p.11

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will likely offer different analogies to the judge when the case is argued, and the judge must decide the best comparison. In a perfect world, the judge will choose the analogy that best fits the case at hand and administers the best form of justice. When this occurs, the judge has created a new precedent.

After a ruling is made, various commentaries are written about the decision. These commentaries are compiled into thousands of books of legal commentaries that extend over centuries. Consequently, a judge has numerous sources on which to base a decision even if there is no precedent for the case. As a result, American courts are authoritative; commentaries of so many prior cases enable lawyers to advise their clients with a degree of confidence as to the possible outcome in a given matter.²⁴

Common Law

Another source of substantive law is common law. In its most narrow sense, common law means the rule of law announced as the holding in a judicial opinion. (*Judicial opinions sometimes are called case law*). In a broader sense, common law means the collection of legal rules extracted from judicial opinions in a particular area of law.



For instance, there are common law rules of contract, common law rules of employment relationships, common law rules of negligence, and so forth. To the extent that the common law rules have not been replaced by statutes—which often restate the common law rules in statutory form—the common law rules are still used either alone or to supplement existing statutes. As the term is used in this sense, however, it applies to state law only. Since the *Erie* doctrine was announced, there is no federal common law.²⁵ Federal law comes only from the federal constitution, federal statutes, and rules and regulations of federal administrative agencies.

Common law philosophies do not require judges to rigidly adhere to precedent or to wear blinders when deciding matters. Inherent in the concept of common law is its ability to reflect the mores of society as they exist at any given time. For instance, an extra-marital affair may be commonly accepted in today's society; however, fifty years ago this was not the case. The common law should reflect that fact.²⁶

Because it injects an element of instability into the legal system, judges are reluctant to overturn past decisions. However, as we become technologically advanced and our society evolves, past decisions are occasionally overruled. At the turn of the century, for example, industrial growth was encouraged, and the courts generally took a *nonjudgmental* approach to employment conditions and disposal of industrial waste; this is definitely not the case in today's modern society. Although many changes have come through legislation, a study of legal views reflects a stop-and-start change in judicial attitude, which has caused some past legal precedents to be reversed.²⁷

Legal Interpretation

Once an open question is presented within a jurisdiction, judges are not bound by an existing rule of law. As such, judges may rely upon other sources for assistance to enact a new precedent or to simply resolve the matter at hand.²⁸

²⁴ John DeLeo, J.D., *Blackstone Paralegal Studies*, p.11

²⁵ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.357

²⁶ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.357

²⁷ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 12

²⁸ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 11

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Another basis of direction in legal interpretation for judges is persuasive precedent. For example, let's assume a Louisiana judge is deciding a case which has no legal precedent in his state. The Louisiana judge may take into consideration the decision of a similar case in Mississippi even though Mississippi case precedent is not binding on the Louisiana case. In another example, a judge in the Louisiana Fourth Circuit Court of Appeals may establish a precedent on a particular matter; although that precedent may be binding on the state district courts under its jurisdiction, the precedent is only persuasive to state district courts outside the Fourth Circuit's jurisdiction.

Legal Writing

When deciding a case, a judge may also consider the opinion of a *jurist*, or professional who writes on legal subject matter. A jurist may write legal reviews, assessments, and textbooks. A jurist may be a judge, a lawyer, or a law university lecturer. As such, his writings are published in legal journals and law review articles. Law reviews are usually published by law schools and examine a wide range of legal matters. All of this material may be taken into account by the court.²⁹

The opinion of jurists is very significant in cases where no precedent exists. When considering the large volume of precedents, the work of jurists in examining, organizing, and censuring this material offers a notable advantage. The work of jurists has comparable importance to the legislator where the existing law may need to be corrected, modified, or rescinded.³⁰

In the American legal system, jurists are not bound by precedent. As such, a judge may disagree with court decisions and precedents. In this capacity, a judge also serves as a means for checking the court decisions. Jurists discuss different cases and reach their own opinions concerning what is appropriate or inappropriate. Nevertheless, since judges are obligated by earlier precedents, the opinions of jurists are generally only sought in cases where there is no precedent. In many cases, the writings of jurists, as a result of widespread influence, have been a basis for achieving reform through legislation.³¹

The doctrine of *stare decisis* is a subject of much debate and controversy. Some legal professionals deem it to be a source of weakness in the American legal system. Many opponents argue that each case should be decided on its own merits, regardless of legal precedent. They argue that *stare decisis* compels judges to abide by decisions that may be obsolete. Additionally, opponents assert that the prior decisions may not be comparable to the immediate situation.

Meanwhile, advocates of precedents argue that precedents ensure an organized growth in the law that is vital to the stability and development of civilization. Also, the higher consideration afforded to precedents is by no means arbitrary because a great deal of deliberation and research has gone into these decisions. The philosophies found in these decisions have proven particularly constructive to the creation of the system of justice.³²

Legal judgments are not rendered unconscientiously. Judges are conscientious experts who understand the consequences of their decisions. The public nature of a judge's office, criticism from their colleagues, and scorn from the community are all factors that compel judges to administer justice fairly.

²⁹ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 12

³⁰ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 12

³¹ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 12

³² John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 12

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Interpreting Statutory Law

The courts are often called upon to interpret legislative intent in a particular provision. In doing so, the court has a duty to refer initially to the plain language of the law in question. The *plain language of the law* is the literal meaning of the words and phrases used together. However, if there is an unambiguous meaning, the court must pronounce it as the law. In such a case, the court lacks authority to go beyond the plain language of the law, regardless of whether the court deems the law unfair or not a true intent of the legislature.³³

However, when the plain language of the law is vague or conflicting, the court is duty-bound to interpret the law. In doing so, the court must take into account the intent of the law and any logical explanations of the law. The ultimate goal of interpreting the law is for the court to surmise the intent of the legislature when enacting the law. The court must choose the fairest and wisest of all the explanations of the law when the literal explanation is inadequate.

Courts that abuse their discretion often have their decisions reversed and are cautioned against trying to legislate from the bench under the guise of interpreting of law. In many cases, the law may be applied to a situation that is distinct from the legislative intent. In such cases, a true explanation of the law is not possible. Notwithstanding, the case at hand must be resolved, so the court has to augment the imperfect statute by a rule created for that individual case. Engagement in such practices is more properly referred to as judicial lawmaking rather than interpretation.

Codification

In a move toward scientific legislation, many attempts have been made to reduce the whole legal system to a form of enacted law. This is commonly referred to as *codification*. Although the term is often inaccurately applied to the logical arrangement of the statutes in a given area, the result of codification is a code. Particular sections of the law, such as the law of criminal procedure, have been partially codified in many areas. Many codifications of available to any state, such as the law of sales. Codification has been civil law countries. In America, and California, have nearly complete



specific sections of the law are made of negotiable instruments or the law enacted with great diligence in some several states, including New York codes.³⁴

However, even in a perfect place of precedent as a source of law. It is generally theorized and accepted that no current revelation as to the prospective growth of civilization is sufficient to offer insight into all likely incidents concerning a need for a law, so qualified officials of the code are required to constantly enhance the codes. This is accomplished in the same manner that a judge creates precedent. Both judges and administrators extend the common law. The codes provide judges with a basic and efficient system of universal doctrines from which they can base their decisions.

When codification is planned and executed properly, the benefits are obvious, especially in the United States, where there are 50 separate jurisdictions. Consequently, the large number of jurisdictions has underscored the large volume of the law, its disorder and deficient progress in certain areas, and inconsistency between different jurisdictions. This inconsistency has proven detrimental in a nation that operates under a single financial system.³⁵

³³ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 14

³⁴ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 15

³⁵ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 15

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REVIEW QUESTIONS

1. Who has the responsibility of enforcing legislatively enacted law? Explain.
2. Write a paragraph, based on the text, explaining the written agreement which unites the states as one unified nation?
3. What is the proper word to describe efforts to modify or clarify the legal system?
 - a. codification
 - b. jurisdiction
 - c. supplementation
 - d. downsizing
4. The _____ allows a legislature to create agencies to assist in areas that require expert skills and oversight.
 - a. statute
 - b. constitution
 - c. enabling act
 - d. justification act
5. True or False.
Judges are not required to follow rules and principles applied in prior decisions on similar matters.
6. Write a paragraph about a law that might be reserved for the state in which you live and would not be legislated by the Congress.
7. Write an example of a persuasive precedent that a Louisiana judge followed. Give your own detailed explanation of why you believe the case was followed.
8. During the election in 2000 between George W. Bush and Al Gore, Gore won the popular vote. There was a serious dispute about the tabulation of votes in Florida. After several recounts, the Supreme Court halted the recount and decided, 7-2, that a recount violated the Equal Protections Clause, effectively giving the election to Bush. The stated reason for making a decision without following the normal procedure of allowing lower courts to hear the evidence first was to avoid a potential national crisis. Did the Supreme Court make the correct decision in halting the recount, and did it decide correctly in its reasoning in using the Establishment Clause?

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Written Assignment

At the end of each chapter, several questions are listed under the heading Review Questions. Please answer each one thoroughly and turn them in when you take your exam. The education director will be responsible for forwarding the material to Dr. Wayne Cook at Rayburn Correctional Center.

WORDS TO REMEMBER

The following words should be incorporated into your vocabulary. Your knowledge of the following words will be tested in the Exam.

- | | |
|---------------------------------------|----------------------------------|
| ➤ <i>Consequence</i> | ➤ <i>Authoritative precedent</i> |
| ➤ <i>Blackstone commentaries</i> | ➤ <i>Separation of powers</i> |
| ➤ <i>Statutory law</i> | ➤ <i>Administrative agencies</i> |
| ➤ <i>Solomon</i> | ➤ <i>Erie doctrine</i> |
| ➤ <i>Articles of Confederation</i> | ➤ <i>Law</i> |
| ➤ <i>Vigilantism</i> | ➤ <i>Character of Law</i> |
| ➤ <i>Constitution</i> | ➤ <i>Common law</i> |
| ➤ <i>Statute</i> | ➤ <i>Judges</i> |
| ➤ <i>Jurisprudence constante</i> | ➤ <i>Court of chancery</i> |
| ➤ <i>Codification</i> | ➤ <i>Thomas Jefferson</i> |
| ➤ <i>Bill of Rights</i> | ➤ <i>Custom</i> |
| ➤ <i>Written law</i> | ➤ <i>Persuasive precedent</i> |
| ➤ <i>King's court of common pleas</i> | ➤ <i>Stare decisis</i> |
| ➤ <i>Declaration of Independence</i> | ➤ <i>Plain language of law</i> |

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WEEK 2

Lesson 2: Classifications of Law

Lesson Topics

- Classifications of Law.
- Substantive or Procedural Law.
- Public or Private Law.
- Civil Law.

Lesson objectives.

- Recognize the various classifications of law.

Reading Assignment

Nordyke, Keith. J.D. 2012. Introduction to Law and the Paralegal Profession. Text: Chapter 3.

Text

CHAPTER 3 CLASSIFICATIONS OF LAW



Classifications of Law

Legal rules can be put into many categories according to their classification. A law's classification indicates the circumstances to which it will relate and how it will relate to other rules. For instance, canon law is classified as either criminal or civil. This chapter describes the fundamental classifications of law and examines their connection to each other.

Substantive or Procedural Law

Laws are either substantive or procedural. A *substantive law* is a legal canon which gives rise to or describes rights and responsibilities. For each right, there is a parallel responsibility. For example, if Jeff owns a house, he has a right to its sole control. Jeff's right impresses a responsibility on civilization not to enter his house devoid of his consent.³⁶

³⁶ Virginia K. Newman, *Paralegal Review Manual*, p.351

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A constitutional provision establishing Congress, an administrative regulation compelling the listing of openly exchanged securities, a state statute restricting the speed of vehicles, or a court judgment clarifying the conditions of a contract or fostering common law principles of negligence are all examples of substantive laws. Substantive law may be classified as either public or private, and either criminal or civil.³⁷

Procedural law provides the procedures to implement substantive rights and duties. In the courts and administrative agencies, procedural law normally incorporates the technique for initiating an action, serving a summons, making motions, effecting discovery and trial, and appealing the final decision. In the legislative body, procedural law incorporates the technique required to establish a law or a rule and the means by which those techniques must be performed. Each rule of substantive law can be linked with one or more categories of procedural rules to provide a means for enforcement.

Together with local court rules adopted for use in correlation with them, the *Federal Rules of Civil Procedure*, *Federal Rules of Criminal Procedure*, *Federal Rules of Evidence*, and *Federal Rules of Appellate Procedure* are all examples of procedural law. States may adopt rules of procedure which are comparable to the federal rules in a separate set of rules or included with that state's statutes.³⁸



The rule adopted by the court in which a case is pending is called a local court rule. As such, it complements all relevant procedural rules. It may be best described as a forum court rule. Each federal and state court has its own set of local court rules. As a result, the local court rules of the United States District Court for the Middle District of Louisiana will differ to some extent from the local court rules of the Eastern District of Louisiana.

The goal of local court rules is to supplement or govern conduct missed by the procedural rules. To provide an example, the Federal Rules of Civil Procedure states that every case is initiated by filing a complaint. Although local court rules cannot alter the rule by requiring that cases be initiated by filing an application rather than a complaint, the local rule can require that all complaints be filed with copies, on letter-size paper, and be double-spaced.

Public or Private Law

The law is initially separated as international or municipal law. *Municipal law* is the scheme of rules and philosophies that governs the affairs within an individual state. Also referred to as *national law*, municipal law is again divided into public and private law. All substantive law is either public or private. *Public law* consists of rules which involve the relationship of government to civilization as a whole. It addresses the framework and functions of the state and its relations with individuals. Some examples of public law are constitutional law, administrative law, and criminal law. All substantive law is either criminal or civil.³⁹

Constitutional law deals with the structure and larger purpose of the state. *Administrative law* deals with the questions that arise between the government and persons in the exercise of a variety of

³⁷ Virginia K. Newman, *Paralegal Review Manual*, p.351

³⁸ Virginia K. Newman, *Paralegal Review Manual*, p.351

³⁹ Source: *United States Code Annotated*

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administrative functions. *Criminal law* deals with the definitive responsibilities of persons to the community.⁴⁰

Criminal law consists of rules intended to protect society by providing minimum principles of behavior which must be observed by each of its members. Penal sanctions are imposed on those who fail to observe the minimum standards. Since the protection of community welfare is entrusted almost entirely to the state, criminal law is generally treated as a part of public law. Crimes are usually enumerated within a statute on the federal or state level or by an ordinance on a local level; however, common law crimes are still recognized within the District of Columbia. Crimes are also classified as treason, felonies, or misdemeanors.⁴¹

Treason is depicted as an attempt to conquer the government as defined by Article III, § 3 of the U.S. Constitution. A *felony* is depicted as an offense for which the maximum *possible* penalty is either death or incarceration for a minimum of one year or longer. The classification centers on the maximum punishment possible, not the penalty actually imposed. A *misdemeanor* is depicted as an offense for which the maximum *possible* punishment is either a fine or imprisonment for less than one year. Refer to the chapter on *Criminal Law* for a more thorough review.⁴²

Private law consists of rules which involve the relationship of private individuals and groups to each other. The separation into substantive and adjective law, mentioned earlier in this chapter, is applicable to both public and private law. Each has its substantive rules of fairness and its practical rules for their systematic implementation and enforcement. The bulk of civil law is private law, including tort law, contract law, and most property law. In Louisiana, a private law is separated into the law of persons, the law of things or property, and the law of obligations. This classification is based on the nature of the rights considered in each section.



The *law of persons* deals with those *rights* that protect the personal interests, physical integrity, health, and respect for individual liberty and personal relations. To this end, the law of persons entails the domestic relationships of marriage, parentage, and tutorship, and those other relations that involve status or legal disability of some sort, such as minority, alienage, and incapacitation.

Civil Law

Civil law consists of legal rules which concentrate on the rights and responsibilities of individuals in relation to each other. In contrast to criminal law, which imposes penal sanctions, civil law sanctions are remedial; they grant a remedy to enforce a right.

Many civilizations have developed different schemes for rendering justice. Yet, two great systems separate the field. These are usually designated as the *civil* and the *common law*. American civil law relies on common law philosophies and is usually classified according to (1) the source of the right or duty being enforced, whether in tort or contract; and (2) the sort of relief desired, whether legal or equitable. Only the State of Louisiana and the commonwealth of Puerto Rico have legal systems which originate largely from the civil law.

⁴⁰ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 22

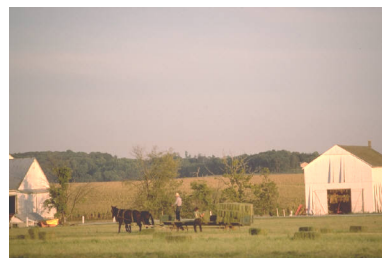
⁴¹ *Federal Criminal Judicial Procedure and Rules*

⁴² *Federal Criminal Judicial Procedure and Rules*

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The word *common law*, with some exceptions, has at least three other more restricted meanings. One exception is that in the Anglo-American legal system, the expression *common law* is used to discern the law argued in courts from the law established by legislatures. In other words, common law is set apart from statutory law.



It is worth restating that there is a distinct difference between common law and equity. Equity laws refer to laws developed and recognized by the English Court of Chancery and its American analogues. To the contrary, common laws refer to all the law, enacted or judicially developed, that is known and implemented in courts other than courts of equity. Besides, local customs, canon law, and the merchant law, common law is also used to designate the general law of the land from special laws. As a general body of rules and philosophies for the administration of justice, common law is not the physically sanctioned law of any particular state.⁴³

A *tort* is an unlawful act for which the law provides a remedy, usually in the form of monetary damages. Torts rely on rules of conduct to which each person is expected to conform. Assault, battery, conversion, false imprisonment, negligence, and trespass are examples of *intentional torts*; while negligence is an example of an *unintentional tort*. Also, a tort can be accomplished based upon *strict liability*, such as a defective product sold to public.

When considering the criminal statutes of a particular location, some conduct that results in civil liability in tort can also result in criminal liability. For instance, if Michael punches Michele in the face, Michele could file a civil action against him for the tort of battery. The burden of proof would be *a preponderance of the evidence*, which means that, more likely than not, Michael is responsible. Simultaneously, on the basis of the same incident, the state could prosecute Michael for the crime of battery. The burden of proof would be *beyond a reasonable doubt*, a higher degree of proof that Michael is guilty. The outcome of the civil case has no effect on the outcome of the criminal case; however a criminal conviction can be used as proof in the civil case. In the end, Michael could be found guilty in the criminal case, as well as the civil case.

A *contract* is an enforceable agreement between two or more parties. A contract is usually comprised of an offer, an acceptance, and considerations which are not subject to any defenses. A contract can be oral or written; it can be expressed or implied in fact or in law from the conduct of the parties. A contract is simply an agreement; it is not the paper on which the agreement is written. When a party fails to perform as agreed, a breach occurs, and the nonbreaching party is entitled to the benefit of the agreement. The remedy can take the form of monetary damages or equitable relief, including specific performance if necessary.

The remedies available in a civil suit are either legal or equitable. A *remedy at law* normally requests damages. If there is not a just compensation for the plaintiff's loss, he may be eligible for equitable relief. A *remedy in equity* normally requests specific performance, such as an injunction or the rescission, improvement, or specific performance of a contract.⁴⁴

⁴³ John DeLeo, J.D., *Blackstone Paralegal Studies*, p. 23

⁴⁴ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.354

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REVIEW QUESTIONS

1. What determines how a law will relate and whether it will correlate to other rules? Explain.
2. Which law balances substantive law by providing the procedures to implement substantive rights and duties? Explain.
3. True or False: The rule adopted by a court in which a case is pending is called a common rule.
4. The scheme of rules and philosophies that governs the affairs within an individual state is called:
 - a. municipal law.
 - b. state law.
 - c. common law.
 - d. public law.
5. Give four examples of procedural law as discussed in the text.



Written Assignment

At the end of each chapter, several questions are listed under the heading Review Questions. Please answer each one thoroughly and turn them in when you take your exam. The education director will be responsible for forwarding the material to Dr. Wayne Cook at Rayburn Correctional Center.



WORDS TO REMEMBER

- | | |
|-----------------------------|-----------------------|
| ↻ <i>Substantive Law</i> | ↻ <i>Tort</i> |
| ↻ <i>Procedural Law</i> | ↻ <i>Public Law</i> |
| ↻ <i>Constitutional Law</i> | ↻ <i>Criminal law</i> |
| ↻ <i>Municipal Law</i> | ↻ <i>FRE</i> |
| ↻ <i>Private Law</i> | ↻ <i>FRCP</i> |
| ↻ <i>Administrative Law</i> | |

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WEEK 3

Lesson 3: Legal Terms

Lesson Topics

- Ethics.
- Unauthorized practice of Law.
- Fees.

Lesson Objectives

- Analyze the rules of conduct for lawyers and paralegals.

Reading Assignment

Nordyke, Keith. J.D. 2012. Introduction to Law and the Paralegal Profession. Text: Chapter 4.

Text

CHAPTER 4 LEGAL TERMS



Legal Terminology

Legal terminology consists of legal expressions, Latin phrases, and general terms. A paralegal needs to have a good understanding of generally recognized legal terms. The legal terms discussed in this chapter are frequently referenced in the legal field. In addition, this chapter offers a look at terminology that one may never use in normal conversation, but will hear in the legal profession. Although Latin, the ancestor of all modern Latin languages, is considered a dead language because it is no longer spoken as a national language, it is used extensively to describe or define many of the terms and phrases used by the American legal system. Therefore, a paralegal must have a practical understanding of these Latin terms and phrases.

Because of the large number of terms and the difficulty in learning them, this chapter focuses on a select few key terms. Black's Law Dictionary, which was the source of much of the information in this chapter, is an excellent resource for someone desiring to learn more about various legal terms and definitions. Several of the most commonly used Latin terms and definitions are provided as well as several English and foreign terms.⁴⁵

⁴⁵ Black's Law Dictionary Abridged 6th Ed. (1993)

WEEK 3

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Abatement	to reduce or terminate
Abstention doctrine	doctrine of “abstention” permits a federal court, in the exercise of its discretion, to relinquish jurisdiction where necessary to avoid needless conflict with the administration by a state of its own affairs.
Acceptance	taking and receiving of anything in good part
Accommodation	arrangement made as a favor to another, not upon a consideration received.
Acknowledgement	to admit, affirm, or avow as genuine.
Acquittal	the legal and formal certification of the innocence of a person who has been charged with crime; a deliverance or setting free a person from a charge of guilt;
Adhesion contract	a standard contract form offered to consumers who have little or no bargaining power and are essentially forced to accept the terms on essentially “take or leave it” basis
Adjudication	the judgment of a court to resolve a dispute.
Administrative law	a system of rules and policies published by an administrative agency that has the force of law
Affiant	a person who swears to the truth of an affidavit.
Affidavit	a sworn written or printed statement of facts, made voluntarily before a person having authority to administer such oath or affirmation.
Agent	a person authorized by a principal to act for or in his place
Amnesty	a sovereign act of forgiveness of past acts
Ancillary	aiding; attendant upon
Antitrust laws	federal and state statutes to protect trade and commerce from unlawful restraints, price discrimination, price fixing, and monopolies.
Arbitration	a process of dispute resolution to which a neutral third party
Assumption of risk	the doctrine of assumption of risk means legally that the plaintiff may not recover for an injury arising from a risk of knowingly and voluntarily accepted
Attachment	the legal process of seizing another’s property or person by writ or judicial order
Attestation	the act of witnessing an instrument in writing,

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Bailment	a delivery of goods or personal property, by one person (bailor) to another (bailee), in trust for the execution of a special object upon or in relation to such goods,
Beneficiary	one who benefits from the act of another.
Bequest	a gift (transfer) by will of personal property.
Brief	a written document; a letter; a writing in the form of a letter. A written statement prepared by the counsel arguing a case in court.
Capacity	legal qualification, competency, power or fitness
Cause of action	the fact or facts which give a person a right to judicial redress or relief against another.
Civil law	that body of law which every nation, commonwealth, or city has established peculiarly for itself
Code Civil	the code which embodies the civil law of France; a great part of the Louisiana Civil Code is derived from the Code Napoleon.
Codicil	an addition to a will;
Community property	property owned in common by husband and wife, each having an undivided one-half interest by reason of their marital status.
Commutation	alteration; change; substitution; the act of substituting one thing for another.
Condemnation	process of taking private property for public use through the power of eminent domain.
Conversion	an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights.
Copyright	the right of literary property as recognized and sanctioned by positive law.
Covenant	an agreement or promise of two or more parties, in writing, by which either of the parties pledges himself to the other that something is either done,
Debenture	a long-term, unsecured debt instrument, issued pursuant to an indenture
Decree	the judgment of a court of equity or chancery, answering for most purposes to the judgment of a court of law.
Defamation	that which holds one up to contempt or ridicule; that which injures one's reputation

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Deponent	one who gives a deposition
Deposition	sworn testimony given by question and answer in a non-courtroom setting, which is recorded and transcribed by a court reporter
Devise	gift of real property by will
Discharge	to release, liberate, annul, disencumber, dismiss
Duress	unlawful constraint exercised upon a person, forcing him to do an act which he would not have done otherwise
Enjoin	to prevent or forbid by injunction
Equity	justice administered by principles of fairness, distinguished from strict rules of law
Escheat	reversion of property to the state when there are no heirs to inherit the property at a person's death
Estoppel	doctrine under which a person's acts or failure to act prevents him from seeking legal relief, although he would have been entitled to relief otherwise
Evidentiary	constituting evidence or proof, having the quality of evidence
Fraud	any artifice used by one person to deceive another
General denial	a pleading in the form of an answer, which denies allegations made by the opposing party but which contains no affirmative defenses
Grantee	one to whom real estate is conveyed; the buyer of real estate
Grantor	one who conveys real estate; the seller of real estate
Guarantor	one who agrees to undertake the (financial) obligation of another
Guardian ad litem	person appointed by a court to look after the interests of a child or other incompetent during the pendency of a litigation
Inchoate	unfinished, incomplete
Indemnify	to secure against loss or damage
Indictment	written accusation issued by a grand jury against a defendant in criminal law
Indorsement	act of a payee, drawee, accommodation indorser, or holder of a bill, note, check, or other negotiable instrument, in writing his name upon the back of the instrument to assign or transfer the negotiable instrument to another

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Injunction	an order issued by a court of equity, requiring a person to do or not to do a specific act
Insolvent	condition of a person or entity that exists when total liabilities exceed total assets
Interlocutory	provisional, interim, not final
Intestate	without a will, one who dies without a will
Jurat	clause of a notary public or authorized officer attesting that a statement or document was sworn to by a specific person on a specific date
Jurisdiction	power conferred on a court to hear a particular case and to render a final decision on the merits
Jurisprudence	science of law; system of law
Laches	a doctrine by which equitable relief is denied to one who has waited too long to seek relief
Legal assistant	a distinguishable group of persons who assist attorneys in delivering legal services (within this occupational category, some individuals are known as paralegals); through formal education, training, and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law that qualifies them to do work of a legal nature under the supervision of an attorney
Lessee	one who possesses or uses the property of another; tenant
Lessor	a title holder of property who contracts for its possession or use by another; landlord
Liable	legally responsible
Libel	written defamation
Lien	a charge, security, or encumbrance on property
Liquidated	property or claim that has been converted to its cash equivalent
Litigation	contest in a court of law for the purpose of enforcing a right or seeking a remedy
Magistrate	court officer with limited judicial authority; a public officer
Malfeasance	evil doing; performance of an act with bad intent
Malpractice	professional negligence or misconduct

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Mediation	arrangement to attempt settlement of a dispute by using a neutral party as the referee; unlike an arbitrator, a mediator does not issue a binding decision
Memorandum of law	brief of law submitted to a court by the attorney for a party
Metes and bounds	a method of describing real estate, using boundary lines with terminal points and angles
Misfeasance	improper performance of an otherwise lawful act
Mitigation	duty of parties to minimize damages after an injury is sustained or a breach occurs
Mortgage	conditional conveyance of an interest in real estate, usually as security for a debt
Mortgagee	one who receives a mortgage, usually a lender
Motion	application (not a pleading) or request made to a court to obtain an interim ruling or order
Motion in limine	application requesting a court to rule in advance that specific, unfairly prejudicial information will not be mentioned during trial
Negligence	failure to use the care which a reasonable and prudent person would use in similar circumstances
Notary public	public officer who administers oaths, attests and certifies documents, and takes acknowledgments
Novation	substitution of a new contract, debt, or obligation for an existing one between the same or different parties
Nuncupative	oral; not written
Option	a right supported by consideration to purchase property at an agreed price within a specified time
Order	mandate, command, or direction authoritatively given; mandate of a court
Ordinance	legislative enactment (law enacted) by a local government such as a county or a city
Parol evidence	oral proof of contract terms which are not contained within the written contract document
Parole	release from imprisonment upon specific conditions related to conduct or good behavior

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Patent	inventor's right to exclude others from making, using, or selling the invention for seventeen years
Paternity	relationship of a father to a child
Payee	one to whom payment is made
Payor	one who makes payment
Pecuniary	monetary; relating to money
Pleading	in federal court, complaints, answer to complaint, and reply to cross-claim (no other pleadings are allowed)
Power of attorney	an instrument authorizing one to act as agent or attorney-in-fact for another as to those matters listed in the instrument
Precedent	holding of a case which guides the decisions in future cases involving similar facts and similar legal issues
Probable cause	justification to believe that a crime was committed and that the accused is the person who committed it
Probation	a sentence which releases a convicted person into the community under the supervision of a probation officer
Promissory estoppel	a doctrine which prevents a party to a contract from denying that consideration was given for the contract
Proximate cause	the last (negligent) act which leads to injury; legal cause
Proxy	an instrument authorizing one to cast the votes of another at a corporate meeting
Punitive damages	damages awarded over and above the amount of losses, which are awarded as punishment of the wrongdoer
Quash	suppress, stop, cease, abate
Quiet title action	action to determine clear title to real estate
Quitclaim deed	deed without warranty, which passes only that title which the grantor has
Recidivist	repeat offender
Release	discharge of one party's obligation to another
Replevin	action to recover possession of personal property

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Rescission	an equitable remedy which invalidates a contract on the basis of mutual mistake, fraud, impossibility, and so forth
Restitution	restoration of a thing to its rightful owner; a measure of damages according to the defendant's gains rather than the plaintiff's losses
Service of process	delivery of a writ, summons, subpoena to the person named therein
Settlor	one who creates a trust, trustor
Specific performance	equitable remedy in contract law which requires the breaching party to perform according to the specific terms of the contract
Statute	legislative enactment (law enacted) by Congress or a state legislature
Statute of limitations	limits the time within which a cause of action must be filed, called prescription in Louisiana
Stipulation	agreement between parties to a lawsuit concerning matters related to the trial
Subpoena	a writ commanding the named person to appear at a specific time and place
Subpoena duces tecum	a writ commanding the named person to appear at a specific time and place and to bring specific records or documents with him
Summons	document served upon a defendant to notify him that suit has been filed against him and directing him to answer or to otherwise appear in the case by a specific date
Temporary restraining order	an emergency injunctive remedy (order) of short duration to require or to forbid an act until a hearing can be held
Testator, testatrix	man who creates and executes a will; woman who creates and executes a will
Testimonium clause	the clause of an instrument which begins "In witness whereof . . ."
Tickler system	reminder system used in law offices to supplement diaries and calendars in the overall docket control system
Tort	a civil wrong such as negligence or trespass, as distinguished from a criminal offense (the same conduct may result in both tort liability and criminal liability)
Trust account	account where client funds are kept separate from attorney funds
Unconscionable	grossly unfair, unscrupulous, terms or conduct which shocks the conscience
Usury	the excess over the lawful interest rate

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Vendee	the purchaser or buyer of property
Venue	the location where an action is tried
Verdict	finding(s) of fact by a jury in a civil or criminal trial
Verification	confirmation of accuracy; sworn oath by an authorized person that certain statements are true to the best of his or her knowledge and belief
Voidable	that which is capable of being declared void but which is valid until such declaration is made
Warranty	a promise to defend the truth of a fact
Warranty deed	a deed conveying land which guarantees that the title is free of defects to marketability
With prejudice	a declaration (usually in connection with an order of dismissal) which ends the right to further relief; it prevents either party from filing future complaints based on the same claim or cause of action
Without prejudice	a declaration (usually in connection with an order of dismissal) which preserves any rights or privileges that a party may have to file a future complaint based upon the same claim or cause of action
Writ of execution	order of a court after judgment commanding a court officer to seize property in satisfaction of the judgment

Latin Terms⁴⁶

<i>a fortiori</i>	with stronger reason
<i>a priori</i>	from what goes before; from the cause to the effect
<i>actiones in personam</i>	personal actions
<i>ad curiam</i>	before the court, to the court
<i>ad hoc</i>	for this purpose, for this occasion
<i>ad litem</i>	for the suit; for the litigation (a guardian <i>ad litem</i> , for example)
<i>ad rem</i>	to the thing at hand
<i>ad valorem</i>	according to the value (an <i>ad valorem</i> tax, for example)

⁴⁶ Virginia K. Newman, J.D., *Paralegal Review Manual* (2011)

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<i>adversus</i>	against (defendant <i>adv.</i> plaintiff)
<i>alibi</i>	in another place, elsewhere
<i>aliunde</i>	from another place, from without (as in evidence outside the document);
<i>amicus curiae</i>	means literally, friend of the court
<i>animo</i>	with intention, disposition, design, will.
<i>ante litem motam</i>	before suit brought, before litigation is filed
<i>bona fide</i>	good faith
<i>capias</i>	take, arrest
<i>causa mortis</i>	by reason of death
<i>caveat emptor</i>	let the buyer beware
<i>certiorari</i>	send the pleadings up (from an inferior court to a superior court; U.S. Supreme Court uses writ of <i>certiorari</i> to review most cases)
<i>cestui</i>	beneficiaries (pronounced “setty”)
<i>cestui que trust</i>	beneficiaries of the trust
<i>compos mentis</i>	of sound mind
<i>consortium</i>	union of lots or chances; conjugal fellowship of husband and wife
<i>contra</i>	against
<i>coram nobis</i>	before us ourselves
<i>corpus delicti</i>	body of the offense; essence of the crime
<i>de facto</i>	in fact, in deed, actually
<i>de jure</i>	of right, lawful
<i>de novo</i>	anew, afresh
<i>duces tecum</i>	bring with you (as in subpoena <i>duces tecum</i> , whereby subpoenaed person must appear and bring records)
<i>en banc</i>	in the bench, all judges present (a three-judge panel sits individually or <i>en banc</i>)

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<i>erratum</i>	(pl., <i>errata</i>) error
<i>et alii</i>	and others (as in Smith <i>et al.</i> v. Jones)
<i>et sequentia</i>	and as follows (<i>et seq.</i>)
<i>et ux</i>	and wife
<i>et vir</i>	and husband
<i>ex delicto</i>	(arising) from a tort
<i>ex gratia</i>	as a matter of favor
<i>ex officio</i>	from office, by virtue of his office
<i>ex parte</i>	one side only, by or for one party only
<i>ex post facto</i>	after the fact
<i>facto</i>	in fact, in or by the law
<i>fiat</i>	let it be done, a short order that a thing be done
<i>fieri</i>	to be made up, to become
<i>fieri facias</i>	cause to be made (a writ [order] directing the sheriff to reduce a judgment debtor's property to money [sell it] for the amount of the judgment, for example)
<i>flagrante delicto</i>	in the very act of committing the crime
<i>forum non conveniens</i>	discretionary power of a court to decline jurisdiction over a case when the court believes it should be tried elsewhere for convenience of parties and witnesses
<i>habeas corpus</i>	you have the body (a writ directed to the custodian of a person, commanding the custodian to produce such person)
<i>habendum clause</i>	that part of a deed which begins “to have and to hold”; defines extent of ownership
<i>in curia</i>	in court
<i>in forma pauperis</i>	permission given to a poor person to sue without liability for court costs
<i>in limine</i>	at the beginning; threshold
<i>in loco parentis</i>	in place of a parent, one charged with a parent's rights and obligations
<i>in pari delicto</i>	in equal fault

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<i>in personam</i>	personally, against the person
<i>in praesenti</i>	at once; now
<i>in re</i>	in the matter
<i>in rem</i>	proceedings against a thing (a bank account or real estate) distinguished from those against a person
<i>inter alia</i>	among other things, between other persons
<i>jura personarum</i>	right of a person, rights of persons
<i>jure divino</i>	by divine right
<i>jus commune</i>	the common law, the common right
<i>jus gentium</i>	the law of nations, international law
<i>just habendi</i>	the right to have a thing
<i>jus tertii</i>	the right of a third party; the rights of another person
<i>levari facias</i>	cause to be levied, a writ of execution
<i>lex</i>	law
<i>lis pendens</i>	litigation pending, as in a <i>lis pendens</i> filed with real estate records to notify the world that the real estate is involved in litigation
<i>locus delicti</i>	the place of the crime or of the tort
<i>locus sigilli</i>	(L.S.) the place for the seal
<i>mala praxis</i>	malpractice
<i>mala prohibita</i>	act declared criminal by statute (failure to file a report, for example), though not wrong in itself (as in murder)
<i>mandamus</i>	we command, a writ used to compel an official to perform an act which she is required to perform
<i>manu forti</i>	with a strong hand, forcible entry
<i>mens rea</i>	guilty mind (most crimes require the element of intent [<i>mens rea</i>])

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<i>nolle prosequi</i>	unwilling to prosecute (a crime); prosecutor's discretion not to file charges in a particular case
<i>nolo contendere</i>	without contest, or opposition
<i>non compos mentis</i>	not of sound mind
<i>nudum pactum</i>	nude pact, a bare agreement which lacks the consideration to form a valid contract
<i>nunc pro tunc</i>	now for then (as in an order <i>nunc pro tunc</i> to correct clerical error in a previous order)
<i>obiter dictum</i>	remark which is not central to the main issue
<i>onus probandi</i>	the burden of proof
<i>peculium</i>	private property
<i>pendente lite</i>	pending the suit, during litigation
<i>per capita</i>	by the head, equally shared
<i>per contra</i>	in opposition
<i>per curiam</i>	by the court
<i>per diem</i>	by the day
<i>per se</i>	by itself, taken alone
<i>post</i>	after, later
<i>post-obit</i>	to take effect after death
<i>prima facie</i>	at first sight, on the face of it
<i>pro bono</i>	free of charge, without cost
<i>pro forma</i>	as a matter of form
<i>pro hac vice</i>	for this occasion
<i>pro se</i>	appearing for oneself; personally
<i>pro tempore</i>	for the time being, temporarily
<i>publici juris</i>	of public right

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<i>pur autre vie</i>	for or during the life of another
<i>quasi</i>	as if, as if it were
<i>quid pro quo</i>	what for what, something for something (as in consideration for a contract)
<i>quo warranto</i>	by what right or authority
<i>res gestae</i>	things done, excited utterance
<i>res judicata</i>	a thing (matter) adjudged
<i>respondeat superior</i>	let the master answer
<i>scire facias</i>	cause to know, give notice (writ used to revive a judgment that has expired [dormant])
<i>se defendendo</i>	in self-defense
<i>semper</i>	always
<i>sic</i>	thus, so, in such manner (used to indicate an error in original, quoted material)
<i>sine die</i>	without a day, without a specific day assigned for a future meeting
<i>sine qua non</i>	that without which a thing cannot occur; indispensable condition or part
<i>stare decisis</i>	to abide by decided cases
<i>status quo</i>	state in which, present state
<i>sua sponte</i>	voluntarily, of his own will and motion
<i>sub nomine</i>	under the name of, in the name of, under the title of
<i>sui juris</i>	of his own right, having legal capacity to act for himself
<i>supersedeas</i>	superseding (as in the bond that accompanies a writ commanding a stay of proceedings pending appeal)
<i>supra</i>	above, cited in full above

REVIEW QUESTIONS

1. What is the portion of a pleading that seeks relief against the defendant or opposing party called?

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2. Who has the authority to act on behalf of another person? Give an example.
3. When a person dies without surviving heirs and without a will, the state may become the owner of the estate property by:
 - a. reversion
 - b. intestacy
 - c. escheat
 - d. none of the above
4. True or False:
Conversion refers to the wrongful taking of personal property with the intent to deprive its owner of it permanently.
5. The code civil, which embodies the civil law of France, was promulgated in 1804. When Napoleon became emperor, the name was changed to “Code Napoleon,” by which it is still often designated though it is now officially styled by its original name of “Code Civil.” Write a paragraph giving some examples of Louisiana law which derive from the Code of Napoleon.



Written Assignment

At the end of each chapter, several questions are listed under the heading Review Questions. Please answer each one thoroughly and turn them in when you take your exam. The education director will be responsible for forwarding the material to Dr. Wayne Cook at Rayburn Correctional Center.



WORDS TO REMEMBER

- | | |
|-------------------------|---------------------------|
| ➤ <i>Acquittal</i> | ➤ <i>Lis pendens</i> |
| ➤ <i>Tickler system</i> | ➤ <i>En Banc</i> |
| ➤ <i>Amicus curiae</i> | ➤ <i>Intestate</i> |
| ➤ <i>Mens rea</i> | ➤ <i>Pendente lite</i> |
| ➤ <i>Commutation</i> | ➤ <i>Proxy</i> |
| ➤ <i>Duress</i> | ➤ <i>Motion in limine</i> |
| ➤ <i>Parole</i> | ➤ <i>Ex parte</i> |
| ➤ <i>Rescission</i> | |

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WEEK 4

Lesson 4: Legal Ethics

Lesson Topics

- Ethics.
- Unauthorized Practice.
- Fees.

Lesson Objectives

- Analyze the rules of conduct for lawyers and paralegals.

Reading Assignment

Nordyke, Keith. J.D. 2012. Introduction to Law and the Paralegal Profession. Text: Chapter 5.

Text



CHAPTER 5 LEGAL ETHICS

Because legal assistants and paralegals are directly and indirectly affected by rules of professional behavior, this chapter will examine the rules governing the conduct of lawyers. As such, this chapter covers the innate authority of the courts in regards to the practice of law, the role of the state bar, the role of state lawmakers and statutes, sanctions for misconduct, and the influence of the American Bar Association.

Legal ethics covers contacts with employers, clients, coworkers, and the general public. Other issues covered include the unauthorized practice of law, ethical standards, conduct rules, and confidentiality. This chapter will assist students in acquiring a practical knowledge of the American Bar Association (ABA) Model Rules of Professional Conduct, the National Association of Legal Assistants and Paralegals, Inc. (NALA) Model Guidelines for Legal Assistants, and the NALA Code of Ethics and Professional Responsibility.

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We will also examine the evolution and rapid development of the paralegal profession. Students will examine efforts made to regulate the profession during its brief history and the ways in which a legal assistant's conduct is regulated or directly guided.

Ethics Defined

The established standard by which conduct is governed is called Ethics. By and large, a professional is held to a higher ethical standard than the average person. Professional ethics are written guidelines that set forth the expected conduct in communication with others. Ethical rules enhance the integrity of a profession by establishing a minimum level of controlled conduct.⁴⁷

Sources of Ethics Rules

Every state has ethical rules to govern the professional conduct and practices of licensed attorneys. As an employee of the lawyer, the paralegal must be familiar with the ethical rules. The ABA's Model Rules of Professional Conduct incorporates ethical standards which have been adopted by a large majority of states. There are only a few states remaining that continue to adhere to the former Model Code of Professional Responsibility.⁴⁸

Competence

Lawyers are duty-bound by the rules of conduct and tort liability law for failure to represent their clients competently. As such, a lawyer's duty to represent his client effectively and competently makes him directly responsible for the work of legal assistants and others who work on the client's case. Although a person may have difficulty clearly defining competence, it is easily identified when it is lacking. A large number of analysts describe competence in legal matters as legal knowledge or skill.

Although knowledge and skill are essential prerequisites, competence, in and of itself, only has comprehensive meaning when it is applied to the task at hand. Being competent means possessing ability, capability, expertise, mastery, proficiency, or skill in a certain field. A person's competence depends on several factors, including their knowledge, training, and experience to do the job. Competence and education are inseparable because both are continuing processes that cannot exist in a dormant condition. When a person no longer pursues knowledge through education, his knowledge becomes limited, and with that limitation, his ability is weakened. Working professionals, who are confident in their ability, readily admit that the more they learn about their area of practice, the more they realize how little they know. A person only achieves a high level of competence through a continuous search for more knowledge.

A competent lawyer must be able to analyze precedent, evaluate evidence, advise clients, and draft legal documents. In some cases, a lawyer must conduct legal research and, when necessary, be willing to consult with more experienced lawyers. It is unethical for a lawyer to handle a case in which he lacks either competence or sufficient preparation. A lawyer is obligated to refer highly complex cases to an attorney with appropriate expertise if he is not competent in that particular area. Similarly, a legal assistant must be specialized in a particular area in order to be considered competent.

Since legal assistants have a professional status and share with the lawyer a moral and ethical responsibility to provide quality assistance, it is imperative that they be fully competent in their work. To maintain a high level of competence, a legal assistant is encouraged to take advantage of educational

⁴⁷ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 171

⁴⁸ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 172

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opportunities. Training can be accomplished through informal means, such as learning by example or by trial and error. Formal means of training can include attending professional meetings, seminars, workshops, and college classrooms. Even when a formal education includes a practical element, legal knowledge and skills incorporate many things not covered in school. As a result, internships and externships have become an integral part of some training programs.

At present, at least thirty-eight states have mandatory continuing legal education requirements. In general, a competent lawyer has, at a minimum, a law school education of three or four years and has passed a bar examination, which mainly tests substantive legal knowledge and judgmental-analytical ability. Although a legal assistant is not held to the same level of education and skill development as a lawyer, he is held to the same level of commitment in his pursuit of competence through education and skill development. The responsibility for competence through education and skills rests solely with the legal assistants and paralegals.⁴⁹

Ethical rules can be encapsulated into a list of traits that add up to competence for lawyers and legal assistants alike. First of all, lawyers and paralegals must have a suitable formal education. Whether legal or general, this education must enable them to communicate well in verbal and printed form. The education must afford them an understanding of substantive law and procedure and should improve their analytical and judgmental abilities. The bodies of knowledge required to be a lawyer differs from that needed by a legal assistant. A lawyer makes substantive legal decisions on how to progress, while legal assistants participate in the practical steps leading to these decisions and their implementation. For instance, a legal assistant may participate in interviewing clients, brainstorming, performing research leading up to a decision, and then drafting the documents.⁵⁰

It is very important that legal professionals stay informed of changes in law or practice. As the law has become more complex, the need for specialized legal knowledge has increased. A growing number of states have specialized certification programs for those in the legal field.⁵¹

Job experience and formal education offers individuals the skills needed to work in the legal profession. Lawyers and legal assistants must be able to apply their skills to resolve legal problems. A legal assistant should be skilled in drafting documents, analyzing documents, summarizing information, handling procedural matters, gathering information, and conducting legal research.⁵²

In applying knowledge and skills to any legal problem, legal assistants, like lawyers, must be thorough and absolute in gathering and considering information. Mistakes, such as ignoring information, failing to complete forms, or failing to exercise due diligence can have harmful consequences for a client. Since legal assistants are valued for their knowledge of specific facts and their carefulness, diligence is one the most critical aspects of paralegal competence.

In addition, a good number of successful lawyers attribute a large part of their success to careful and thorough preparation. Legal assistants have a significant role in this preparation since research tasks are often assigned to them. Generally, paralegals and attorneys work hand in hand in preparation for a

⁴⁹ Therese A. Cannon, *Ethics & Professional Responsibility*, p.271

⁵⁰ Therese A. Cannon, *Ethics & Professional Responsibility*, p.273

⁵¹ Therese A. Cannon, *Ethics & Professional Responsibility*, p.273

⁵² Therese A. Cannon, *Ethics & Professional Responsibility*, p.274

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case. Lawyers rely tremendously on the preparation done by legal assistants as they prepare to represent a client.⁵³

Legal knowledge and skills are insignificant if they are not applied in an efficient and timely manner. Diligence refers to the continuing attention to a legal matter to ensure it is adequately resolved. A lack of due diligence can have destructive consequences to a client's case. Frequently missing court dates or appointments, frequently requesting continuances, being unaware of time limitations, or excessive delaying are all examples of carelessness.⁵⁴

It is imperative for lawyers and legal assistants to communicate clearly with their clients. The best evidence of incompetence is a poorly prepared and misinformed client. For example, it does not matter how well the case is going if the firm never returns the client's phone call. Maintaining an effective level of communication with clients is one of the most important roles of a legal assistant. Many lawyers, especially trial attorneys, are often too busy to return client phone calls. A legal assistant is appropriate for this task and is usually effective at keeping a client satisfied and informed.

The Creation of the Paralegal Profession

The use of legal assistants or paralegals is a fairly new phenomenon in the history of American law, becoming common about forty years ago. The growth of this line of work can be linked to a time of rising legal costs and the unavailability of legal services to poor citizens. This prompted the federal government to establish the Legal Services Corporation which afforded legal services to poverty-stricken citizens. Over time, lawyers and others in the legal profession began to reassess the accessibility and cost of the providing legal services. Eventually, it was resolved that better management and the use of legal assistants would have a huge impact on the efficiency of services provided. As a result, the first committee on legal assistants was established by the American Bar Association in 1967.⁵⁵

Over the years, the role of legal assistants has changed as they took on more and more responsibility. The first recognized paralegal training program was established in the 1970s. In 1976, the National Association for Legal Assistants established the Certified Legal Assistant program. This was a voluntary certification program consisting of two days of testing on selected topics, which generally included communications, ethics, human relations, legal research and analysis, and four significant areas of law.

During the late 70s and early 80s, the opportunity for jobs in this field increased. Although paralegals initially worked in small firms, private and corporate law firms soon took advantage and became major employers of paralegals. The federal government officially recognized the profession of legal assistant and paralegal in 1975.⁵⁶

American Bar Association

A large majority of states have modeled their rules of conduct after the American Bar Association, which is a nationwide professional association of practitioners of law with nearly half a million members; this amounts to about fifty percent of all lawyers. For more than one hundred years, the American Bar Association has been the chief national professional association for lawyers, affecting

⁵³ Therese A. Cannon, *Ethics & Professional Responsibility*, p.275

⁵⁴ Therese A. Cannon, *Ethics & Professional Responsibility*, p.275

⁵⁵ Therese A. Cannon, *Ethics & Professional Responsibility*, p.12

⁵⁶ Therese A. Cannon, *Ethics & Professional Responsibility*, p.13

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legislation, the courts, and the administration of justice. The American Bar Association first published the Canons of Professional Ethics in 1908. The canons were modeled after the first code of ethics for lawyers which had been adopted by Alabama in 1887. Prior to the adoption of codes, the conduct of lawyers was mostly regulated by common law and statutes.⁵⁷

At the behest of then president, Lewis F. Powell, in 1964, the American Bar Association began drafting a new set of guidelines which became known as the Model Code of Professional Responsibility. The new model, which was promulgated in 1969, served as an example for each state to follow in establishing its own codes. The model was readily adopted, in part, by every state. In 1977, the American Bar Association established a new panel, the Commission on Evaluation of Professional Standards, also called the Kutak Commission, to review the model for revisions.⁵⁸

State Regulation

The legal profession is subject to rule by the states. Unlike other professions, the legal profession is governed mainly by the courts, rather than lawmakers. The courts have historically exercised innate authority over lawyers. The highest court in each state, including the District of Columbia, is responsible for established rules governing admission to the practice of law and ethical conduct of those in the practice. These written rules (or codes) are publicized by the high courts and generally include procedures for disciplining lawyers who violate the rules.

A majority of states have enacted statutes that supplement the ethical standards adopted by the state's high court. However, certain states believe that governmental authority over the practice of law coexists with judicial authority; others believe legislative action to be only an aid to judicial action. A small number of state supreme courts have assigned considerable control over the practice of law to the state legislature. In New York, the legislature delegated control over the practice of law, including disciplinary authority, to the intermediate courts, which are referred to as supreme courts in New York although they are not highest state court. When there is a conflict between the judiciary and the legislature over matters affecting the practice of law, the matter is decided by a court. In another example, the state supreme courts in Arizona, Colorado, Idaho, and Washington have stricken down legislation that would have permitted persons not licensed to engage in the practice of law.⁵⁹

Several state supreme courts rely heavily on the state bar associations to perform functions of regulating and disciplining those engaged in the practice of law. In doing so, these courts have attempted to ease the burden of resolving caseloads and conduct matters affecting the practice of law. In some states, the bar association is so integrated with the judiciary and legislative branches that membership to the association is required for licensure to practice law in the state.

The objective of professional ethics for legal assistants is twofold: 1) to maintain elevated levels of competence; and 2) to avoid engaging in the unauthorized practice of law. It is implied by these objectives that legal assistants will have a degree of personal integrity that is above reproach. Like lawyers, legal assistants hold a status of trust which compels them to adhere to the letter of the rules as well as the spirit.⁶⁰

⁵⁷ Therese A. Cannon, *Ethics & Professional Responsibility*, p.3

⁵⁸ Therese A. Cannon, *Ethics & Professional Responsibility*, p.3

⁵⁹ Therese A. Cannon, *Ethics & Professional Responsibility*, p.2

⁶⁰ Source: National Association for Legal Assistants and Paralegals

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Advertising by a Lawyer

Currently, a lawyer is allowed to promote himself using various types of public media. Even though he cannot pay referral fees to private parties, a lawyer can pay the fee ordinarily charged by nonprofit referral services. There are many state level restrictions about what information a lawyer may offer on himself. Although the Model Rules do not impose any such limitations, some states forbid or limit inappropriate advertising.⁶¹

The landmark case of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) reversed decades of ethical rules that prohibited lawyers from advertising. The early rules, which dated back to the first state codes and the 1908 Canons, prohibited practically every form of advertising except business cards. The rules later allowed inclusion of a biography for certain lawyers.⁶²

Legal marketing has now become a small support business to the legal profession. At present, many larger firms have their own internal marketing personnel. The National Association of Law Firm Marketing Administrators was established in the 1980s. Legal advertising has taken on new forms and targets many different classes of potential clientele.⁶³

Solicitation

Changes over the years in ethical rules relating to advertising has not affected rules proscribing the conduct of lawyers in soliciting clients directly, regardless of the communication method employed. Rules in most, if not all, states prohibit a lawyer from having direct contact, in person or via telephone, with a person in need of legal services, but with whom the lawyer has had no previous professional relationship. This is commonly referred to as the rule against “ambulance chasing.” In plain words, a lawyer cannot chase ambulances to the scene of an accident to hand out his business card. A lawyer cannot wait in emergency rooms for ambulances to arrive, nor can a lawyer call or visit the parties whose names are listed on accident reports. The rules echo concerns about the intimidation, undue influence, and unfair negotiation standing that a lawyer has when he deals with a prospective client.

The purpose of the “ambulance chasing” rule is to prohibit lawyers from influencing a person who may be distracted by circumstances for which legal assistance is needed. A person may not be able think clearly soon after an accident. The rule generally does not restrict general mailings or autodial messages to prospective clients although there are strict rules concerning this. If a mailing or autodial message is ignored, the lawyer may be restricted from future contact. Courts have split over the use of the prerecorded telephone message. Some states, such as Alabama and Nebraska, classify these messages with direct telephone solicitation and prohibit them, while others conclude it to be similar to direct-mail advertising and allow them. Louisiana has recently made controversial and stringent changes to its laws on attorney advertisement.

Legal assistants who work in firms that engage in these practices should be conscious of the laws concerning restricted legal advertising and marketing. Some actions may violate professional ethics and subject their firms to disciplinary action. Also, such actions may indicate a loose attitude toward ethics in general.

⁶¹ Virginia Newman, J.D., *Paralegal Review Manual*, p.174

⁶² Therese A. Cannon, *Ethics & Professional Responsibility*, p.182

⁶³ Therese A. Cannon, *Ethics & Professional Responsibility*, p.183

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Integrity

A lawyer is prohibited from knowingly submitting false information or evidence to a court. In addition, a lawyer cannot make false statements of material fact or law to a court, nor is it permissible to knowingly allow a client to testify falsely.

Although a lawyer must be ardent in representing his client, he obviously cannot use dishonesty or make false statements. Also, if a lawyer's research has uncovered cases, statutes, or other authority in the jurisdiction that contradicts his client, he has a duty to inform the court if it is not raised by the other side.

A lawyer cannot hinder the opposing counsel's access to evidence or destroy, alter, or falsify evidence in any way. A lawyer cannot offer any illegal incentive to a witness in exchange for testimony. In accordance with court rules and state statutes, a fact witness may be paid a set statutory fee and expenses. However, it is illegal in most jurisdictions for a contingent fee to be paid to an expert witness for his testimony.⁶⁴

Communication

A lawyer is obliged to keep his client reasonably informed about the status of the case. When possible, lawyers must adhere to their client's requests for information. In addition, a lawyer has a duty to explain issues to his client, so the client can make informed decisions. Failing to communicate with a client about the status of his case is one of the most common complaints filed against lawyers. It is well established that a client has a legal right to be informed about developments in his case. This is one area where legal assistants can be significantly effective because they can draft status letters to clients and help develop a method to ensure prompt replies to all telephone calls and correspondence.⁶⁵

Unless consented to by opposing counsel, a lawyer cannot have direct or indirect contact with an opposing party concerning a pending case. The rule, however, does not prevent an attorney from communicating with the opposing party regarding matters unrelated to the pending case. A paralegal must be thoroughly familiar with this rule since he is the one who generally makes contact with the client for the counsel. Lawyers are encouraged to not offer advice to an unrepresented person beyond the advice to obtain legal counsel even when a person who is not well versed in law chooses self-representation.

Confidentiality

Attorneys are prohibited from disclosing information about their client's case unless consent is given by the client or it is necessary to further the client's case. As one of the oldest principles of legal ethics, confidentiality is extremely important. Even so, confidentiality is frequently breached in today's world.

The principle of confidentiality rests on the concept that an attorney must be well-informed to properly represent his client, but a client is less likely to divulge sensitive information without assurances of attorney-client privilege. The rule of confidentiality is based on agency law. A lawyer has a fiduciary

⁶⁴ Virginia Newman, J.D., *Paralegal Review Manual*, p.175

⁶⁵ Virginia Newman, J.D., *Paralegal Review Manual*, p.175

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connection with his client that requires the utmost confidence, loyalty, and due diligence. This rule is applicable to paralegals as well as lawyers.

The purpose of the confidentiality rule is to persuade clients to reveal all the facts to their lawyer with assurance that the information will remain confidential. Although the rule of confidentiality works in coordination with the attorney-client privilege permitted by evidence rules, they differ in application. If a lawyer is charged in a disciplinary proceeding for breaching a client's confidence, the charge will be based upon this rule and not upon the evidence rule. The client is the owner of the privilege; the attorney has responsibility to inform his client of the privilege. There are exceptions to the rule which permit an attorney to disclose certain information, examples include: preventing future criminal activity, assisting in perfecting a defense, defending himself against a civil action by his client in relation to a malpractice claim against the attorney. An attorney can also breach confidentiality to disclose to the court that his client offered perjured testimony. The attorney-client privilege does not extend to nonlawyers or jailhouse lawyers.

As long as advice sought by a client is legal, confidential communication between a lawyer and his client, whether oral or written, is privileged. On the contrary, advice on personal or business matters is not privileged. Initial consultations, even if an attorney is not hired, are covered by the privilege. The privilege is applicable to legal assistants because confidential communications made directly to or in the presence of an attorney's agent who is working on the case fall within the boundary of attorney-client privilege. Except in extraordinary circumstances, the privilege does not extend to the identity of a client or to a client's whereabouts. In one well-known example, the U.S. Ninth Circuit held in *Baird v. Koener*, 279 F.2d 623 (9th Cir. 1960), determined the identity of a client to be privileged when the attorney sent a payment to the Internal Revenue Service anonymously on the client's behalf for underpayment of federal taxes. The Circuit Court held the client's identity to be confidential because disclosure would have led to conviction of a federal crime. The reasoning in this case was limited and has been narrowly applied since then. The limited cases that adhere to this precedent generally involve withholding a client's identity to protect against criminal prosecution.⁶⁶

The fee agreement between an attorney and his client, however, is not considered as privileged. This avenue has been frequently used by federal prosecutors, grand juries, and the Internal Revenue Service in order to identify and seize legal fees paid to attorneys with money or assets obtained through illegal activity. The only time the fee agreement is considered as privileged information is when the details about a fee agreement may disclose the identity of a client and the identity itself is privileged.

The general scope of confidentiality includes both ethical rules and evidentiary rules in relation to attorney-client privilege. The duty of confidentiality does not end with the case. The rule of confidentiality prohibits a lawyer or paralegal from discussing the client or his case in public. In addition, the rule prohibits such things as discussing the client's case with others who are not involved in the case, disclosing to opposing counsel or others too much information, identifying his client unless that fact is a matter of public record, engaging in communications where the client's name or any identifiable information about the client or the case is referred to in the presence of others, leaving client files or papers in plain view where they can be seen by onlookers, or accidentally mailing information about a client's case to unintended persons.⁶⁷

⁶⁶ Therese A. Cannon, *Ethics & Professional Responsibility*, p.96

⁶⁷ Therese A. Cannon, *Ethics & Professional Responsibility*, p.97

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Although it will not absolve them of misconduct in regards to a breach of client confidentiality, the innocent intentions of the attorney or of the paralegal may mitigate the sanctions imposed. Since a client is the holder of the privilege, it has been argued that unintentional disclosure by the attorney or his agent should not result in waiver of the privilege. Obviously, a client would not consent to the disclosure of harmful confidential information. Although the censoring information may not be admissible at trial, complexities may arise because the opposing counsel has the benefit of knowledge.

Another exemption or waiver of attorney-client privilege occurs when a client challenges his attorney's professional competence by way of criminal charges, a malpractice suit, disciplinary action, or a claim of ineffective counsel in a criminal appeal. Confidential information in a joint matter is no longer protected when two clients represented by the same counsel become adversaries.

Conflict of Interest

Conflict of interest is a difficult area of ethics for law firms. The evolution of law firms, the expansion of branch offices, the merger of firms, and the broad fields of practice have made the protection for conflicts of interest a reality. The ethical rules governing conflicts of interest are based on the principles of loyalty and confidentiality. These principles are endangered when an attorney has an interest that is adverse to a client's. This holds true whether the attorney's adverse interest is personal or business related.⁶⁸

The most obvious case of a conflict of interest is an attorney's concurrent or *simultaneous representations* of two clients whose interests are adverse to one another. For instance, an attorney is prohibited from representing opposing parties in a legal matter except when an attorney reasonably believes his representation will not affect either party adversely, and each party consents. A firm cannot represent both a debtor and creditor in the same bankruptcy proceeding without adversely affecting the position of one or both of the parties. There is a conflict even if two different attorneys from the same firm are involved. As such, law firms usually preserve an adverse party directory that is checked prior to accepting a new client.

Similarly, self-employed paralegals who provide contract services to lawyers must be cognizant of any potential conflict of interest problems. Attorneys are encouraged to avoid dual representation because the interests of two clients, such as a husband and wife seeking divorce, can be hostile. Also, a conflict may arise when an attorney for an organization has a seat on its board of directors.

The conflict of interest rule does not stop when a lawyer or paralegal gains employment with another firm. A conflict of interest may exist if the new firm represents parties adverse to those parties represented by the old firm. Generally, this is resolved by isolating the attorney or paralegal from all contacts with the matter until it is resolved. This process is commonly referred to as a *Chinese wall*. However, there was at least one instance in California when a paralegal was enjoined from being hired at a new firm because of a conflict of interest.⁶⁹

Conflict of interest rules prohibit lawyers from entering into business ownership transactions with a client unless the terms are fair, negotiating or agreeing to obtain from a client media or literary rights to a portrayal based upon his or her representation in a case, providing financial assistance to a client in a pending claim, except expenses in a contingency fee case and except for court costs for an indigent client,

⁶⁸ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.177

⁶⁹ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.177

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accepting payment of fee from anyone other than the client unless the client consents, settling a civil case for some clients or plea bargaining for some criminal defendants unless all clients know all details of other interests in the case, requiring a client to agree prospectively to limit the lawyer's malpractice liability in a case, assuming representation when the opposing party is represented by counsel who is related to the lawyer, and acquiring proprietary interest in litigation being handled for a client except by reasonable contingency fee contract or lawful attorney's lien to secure fees or expenses.

When legal assistants change jobs or work for several firms, a conflict of interest may arise. Legal assistants are required to notify their employer of any potential conflicts, so the firm can take action to gain client consent to screen the legal assistant. Finally, there is a potential for a conflict of interest whenever an attorney acts as a mediator between or among clients if the attorney or his firm represents or has represented a party.

Fraud or Criminal Conduct by the Client

A lawyer cannot knowingly advise or assist a client to engage in unlawful conduct. For instance, it is unethical for a lawyer to advise a client on how to cheat on an income tax return, how to fabricate evidence, or how to destroy evidence that must be preserved.

Fees

There are numerous methods used to charge a client for legal services. The method selected depends in large part on the type of services rendered. The most common methods of billing are fixed fees, contingency fees, and hourly fees. First of all, a lawyer's fee must be reasonable. In determining the reasonableness of a specific fee a court will consider the following: the complexity of the case; the time frame for resolving the case; the outcome; and the skill, character and experience of the lawyer performing the service. The fee rates must be settled out-front.

Regular legal services are generally billed on an hourly fee. If the attorney can predict the length of time needed to complete the work, a flat fee may be appropriate. A flat fee standard is usually charged for standard services, such as filing a default divorce, forming a corporation, or handling a simple wage-earner bankruptcy.

A contingency fee is based on a percentage of the total amount recovered for a client. In some instances, a fixed fee is made contingent on the outcome in a case. Contingent fee arrangements are typically used by plaintiff's attorneys in civil litigation relating to personal injury, property damage, and debt collection cases. In handling a case on a contingency fee basis, the greatest risk is to the attorney. If he loses the case, then he recovers no compensation. An attorney cannot use contingency fees in a criminal case. Also, an attorney cannot recoup contingency fees in a case where a divorce is granted or for support or where a property settlement is awarded. Although now well accepted in the United States,

contingency fees were initially resisted by the American bar. Many surmised that contingency fees stir up litigation and encourage attorneys to engage in unethical conduct to win cases. Eventually, it was acknowledged that contingency fees served as a means to provide legal assistance and services to poor citizens who had valid legal claims.

If the division of fees is proportionate to the services provided, fees can be divided between lawyers in different firms with the full (written) disclosure to the client. Likewise, if the client does not object and each lawyer assumes joint responsibility for the case, fees can be divided. However, fees may never be divided between a lawyer and a paralegal. Bonus payments cannot be made to non-lawyers or

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paralegals for a specific fee earned in a case. In all cases of division of fees, written disclosure is appropriate.

Paralegal services may be charged directly to clients. When legal assistants are used properly, they provide services that allow the attorney to attend to other matters. A lawyer may require a retainer for all or a portion of the services to be performed. However, a lawyer is required to return any unearned portion of the retainer to the client. Although a lawyer may accept property or ownership interests in a business enterprise as payment for legal services, he cannot accept proprietary interest or *champerty* in the outcome of a case. Accepting payment other than a contingency fee is a very risky ethical proposition.

Gifts

A lawyer cannot accept a substantial gift for preparing legal documents, unless the lawyer is related to the client. The prohibition encompasses the lawyer and includes his agent or relatives. For instance, an elderly client whose children are estranged may come to trust and rely on his lawyer. As such, the client may feel that the lawyer is more deserving of his estate than his distant children. The lawyer must avoid this form of conflict of interest.

Most firms have chosen to entirely restrict the acceptance of gifts to avoid potential conflicts. Thus, if a client does send a gift without prior notice, an attorney or paralegal is expected to donate it to charity. It is imperative that a paralegal who receives a gift informs his attorney supervisor immediately, regardless of a rule.⁷⁰

Withdrawal from a Case

If representation will breach the rules of professional conduct, a lawyer has a duty to withdraw from the case. If a lawyer's medical or mental condition impairs his ability to represent a client, he must withdraw from the case. An attorney must continue representation if ordered to do so by a court. If

representation ceases, an attorney must afford the client reasonable notice to permit time for hiring another counsel.

If a client demands that a paralegal engage or assist in conduct that is illegal or unethical, the paralegal should immediately inform the supervising attorney. An attorney who realizes that his client is guilty cannot simply withdraw from the case because he has a duty to protect the rights of his clients regardless of his guilt or innocence.

Unauthorized Practice of Law

Authorization to practice law in the United States dates back to the colonial era. An increase in practice by untrained practitioners caused the local courts to adopt rules requiring attorneys who appeared before them to be licensed by the court. There were other rules that limited the fee range and prescribed that attorneys could not refuse to take a case. The first authorized practice statutes were passed in several states during the 1850s. Under the statutes, anyone not licensed as an attorney was prohibited from appearing before the court. The statute also prohibited bailiffs from practicing law. The era also produced the first unauthorized practice cases. These cases held that it was unlawful for an unlicensed person to represent himself as an attorney or for a nonlawyer to form an association with a lawyer.⁷¹

⁷⁰ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.180

⁷¹ Therese A. Cannon, *Ethics & Professional Responsibility*, p.34

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Defining the unauthorized practice of law is difficult, because no one definitive list of activities constitutes the practice of law. Every state defines the practice of law by distinctively different statutes. However, one commonality is that violation of the unauthorized practice of law is a criminal offense. Each state demands that lawyers be licensed before they can practice in that particular state. However, prior to licensing, the applicant must demonstrate good moral character, graduation from an accredited law school, and minimal competence by passing a state bar examination. The state of California is the sole state which does not mandate law school graduation as a prerequisite to taking the bar. Once issued a license, a lawyer is only permitted to practice law in the state where the license is issued.⁷²

In general terms, the *practice of law* is any act involving the offering of legal advice to others or representing of others in legal matters. As a general rule, legal assistants cannot accept cases, set fees, give direct legal advice to clients, negotiate legal matters on behalf of clients, or represent clients in court settings because these actions constitute the practice of law. Aside from these limitations, legal assistants can perform every other type of legal task possible for clients as long as his work is properly supervised by a licensed attorney, the supervising attorney maintains a direct relationship with the client; and the supervising attorney assumes full professional responsibility for the work product. A legal assistant who engages in the unauthorized practice of law may be subject to criminal prosecution, civil liability for his negligence, and/or termination of employment. In spite of these sanctions, a legal assistant may still gain employment with another willing attorney. However, the same is not true for the supervising attorney, who may incur civil liability or be disbarred as a result of the paralegal's misconduct. Disbarment can prevent an attorney from ever practicing law again.

It is the responsibility of paralegals to distinguish between permissible and impermissible conduct. There are a small number of courts that allow limited motion practice by non-lawyers who are either paralegals or third-year law students.⁷³ Generally, a court rule allows a qualified nonlawyer to appear before the court to argue motions, provided the nonlawyer is sponsored by a licensed attorney. Even so, legal assistants or paralegals cannot sign pleadings or try a case alone. Other courts allow a limited motion practice by supervised third-year law students but not by paralegals. Still other courts allow only licensed attorneys to appear.

An attorney is forbidden from using a firm name, letterhead, or other professional designation that conveys false or misleading information. If a lawyer holding public office is not regularly practicing with a firm, the name of the lawyer cannot be used. There is nothing in this rule, however, to prevent firms from continuing to use the names of deceased members as part of the firm name. On the contrary, it does prohibit lawyers who simply share an office and personnel from suggesting there is a partnership by using a firm name consisting of the related lawyers.

The NALA adopted its Model in 1984. Simultaneously, the following definition was adopted for legal assistant:

A legal assistant, also known as a paralegal, is a distinguishable person who assists an attorney in the delivery of legal services. By means of formal education, training, and experience, a legal assistant possesses knowledge and skill regarding the legal system and substantive and procedural law which qualifies him to do work of a legal nature

⁷² Virginia JK. Newman, J.D., *Paralegal Review Manual*, p.182

⁷³ Virginia K. Newman, *Paralegal Review Manual*

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under the supervision of an attorney.

Traditionally, there have been similar definitions adopted by a variety of legal organizations. However, recognizing the need for one clear definition, the NALA membership approved a resolution in July 2001 to adopt the legal assistant definition of the ABA. The definition remains in use today. A legal assistant or paralegal is a person qualified by education, training, or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity who performs specifically delegated substantive legal work for which a lawyer is responsible.⁷⁴

Application of Ethics Rules

Similar to lawyers, paralegals must be vigilant concerning ethical rules terms and intent. An attorney or paralegal's ignorance to the rules is inexcusable. A paralegal should review ethical rules regularly to ensure his familiarity with specific provisions. Informal opinions of bar associations about specific rules are available to provide insight into their proper interpretation. As well, precedents related to ethical rules provide a structure within which to assess the conduct governed by the rules.⁷⁵

Regardless of the experience or skill of a paralegal, ethical rules demand that an attorney supervise tasks assigned to him. At a minimum, this involves regular evaluations as a project is underway and careful review of the completed work. An attorney jeopardizes his career and that of his paralegal when he fails to provide the proper level of supervision. A paralegal should never be asked to substitute for a lawyer by performing tasks that are legally required to be performed by a lawyer.

*Diplomacy is the art of saying "Nice Doggie"
until you can find a rock.*

—Will Rogers

REVIEW QUESTIONS

1. Give three examples of unethical conduct by a paralegal?
2. Elbert is a paralegal for Carol Greenfield. While Ms. Greenfield is in London, Elbert receives a notice that a succession hearing is scheduled at the end of next week. Ms. Greenfield is not scheduled to return until after that time. Elbert knows that a motion for continuance is needed to postpone the hearing. Which of the following is the worst course of action for Elbert to take in this situation?
 - a. mail the unsigned motion to the court for filing;
 - b. arrange to have the client sign the motion and file it with the court;
 - c. sign his name to the motion and show his paralegal title; or
 - d. sign Ms. Greenfield's name to the motion and place his initials under the signature.

⁷⁴ Adopted by the ABA in 1997, and by NALA in 2001

⁷⁵ Virginia JK. Newman, J.D., *Paralegal Review Manual*, p.187

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3. Give an example of when it is permissible for a paralegal to perform work that otherwise must be performed by an attorney?
4. What are some tasks, which ethically, may not be performed by paralegals under existing rules?
5. Write a paragraph giving an example of when a paralegal's ignorance to the rules is excusable. Also, explain why it is important that a paralegal review ethical rules regularly.



Written Assignment

At the end of each chapter, several questions are listed under the heading Review Questions. Please answer each one thoroughly and turn them in when you take your exam. The education director will be responsible for forwarding the material to Dr. Wayne Cook at Rayburn Correctional Center.



WORDS TO REMEMBER

- | | |
|---------------------------------|-------------------------------|
| ➤ <i>Contingency Fee</i> | ➤ <i>Ethics</i> |
| ➤ <i>Fixed Fee</i> | ➤ <i>Competence</i> |
| ➤ <i>Flat Fee</i> | ➤ <i>Practice of Law</i> |
| ➤ <i>Hourly Fee</i> | ➤ <i>Communication</i> |
| ➤ <i>Diligence</i> | ➤ <i>Simultaneous</i> |
| ➤ <i>Ambulance chasing rule</i> | ➤ <i>Conflict-of-interest</i> |
| ➤ <i>Confidentiality</i> | ➤ <i>Legal Assistant</i> |

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WEEK 5

Lesson 5: REVIEW FOR EXAM

This week is devoted to reviewing for the exam. By now, you should have completed all the written assignments for the first four lessons. The *Review Questions* were designed to draw your attention to major ideas discussed in the text. These questions play a major role in helping you process the information and achieve a working understanding of it.

➤ *As mentioned in your study guide, pay close attention to the Words to Remember.*

Your knowledge of these and the major ideas explored through the text will be tested on exam day.

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WEEK 6

Lesson 6: Subject Matter of the Law and The Legal System

Lesson Topics

- Individual, Public, Social, and Balancing Interest.
- Unauthorized Practice of Law.
- Jurisdictions.
- The Federal Court System.
- The State Court System.
- Judicial Remedies.
- Equitable Remedies.

Lesson Objectives

- Distinguish the subject matters of law, such as individual, public, and private interest.
- Analyze the structure, function, and purpose of the American legal system.

Reading Assignment

Nordyke, Keith. J.D. 2012. Introduction to Law and the Paralegal Profession. Text: Chapter 6 and 7.

Text

CHAPTER 6

SUBJECT MATTER OF THE LAW



Claims

The intent of the law is to modify human behavior so that it adheres to a society's standard of right and wrong. The idea behind this is that a behavior must be modified when it conflicts with the considered norm set by the groups which make up a community. When a person believes he has a right to something, he can make a legal claim to it. A person can make a *personal* or an *economic* claim. Claims which relate to a person's health, physical integrity, reputation, and family relationships are all considered personal claims. A claim concerning a person's property or relationships with others is considered an economic claim. A person can assert multiple claims and then request a desired relief.

The function of the legal system is to determine which claims are reasonable. Once a society identifies a claim which it believes to be legal, the legal system evolves; this progress, in turn, ensures social advancement. Conflicts between claims are resolved by the legal system which also develops the best manner to legalize the claims.

A person setting forth a claim is asserting an *interest*, or *stake*, in a legal matter. If a person asserts ownership of some property, he is stating that he has an interest in the property. The human

WEEK 5

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interests which are recognized under the law are *individual interests*, *public interests*, and *social interests*.⁷⁶

Individual Interests

In the legal system, *group interests* have historically been considered paramount; however, the current legal system is primarily concerned with individual interests. Both personal and economic individual interests are protected under the law. Most demands a person makes and claims to be legal are considered personal interests. Personal interests include a person's bodily integrity, free speech, values, health, and personal relationship with a particular organization.

Various legal problems have arisen because of the realistic difficulty of determining the facts when there is deceit. Similarly, the indefinable nature of individual interests makes certain laws difficult to enforce. As a result, the courts have wide discretion in resolving matters involving individual interests.

There is a real concern that injustice will occur if strict rules are applied to matters which are fundamentally difficult to modify into a standard rule. Additional information about individual or personal interests can be found in the specific state's domestic relations laws. The law also affords protection to an individual's economic interests, which includes an individual's claim to economic growth, property, free enterprise, and profit from transactions with others.

Public Interests

The interest of a society as a political entity in a state is also protected under the law. This is commonly referred to as *public interest*. In the beginning, the laws of the king were, in effect, the laws of the state. Today, a state itself is considered to be an entity. As such, the state has interests and characteristics much like a human being. The state also has interests as the guardian of society. Public interests form national and international law under the pretext of the constitution. In addition, administrative, constitutional, and corporate laws all derive from public interests.⁷⁷

Social Interests

The concerns of society as a whole are called social interests. Some law was specifically created to protect societal interests, such as safety and peace. In order to ensure the advancement of civilization, the protection of social interests serves the ends of justice. Also, society has a vested interest in preserving morality, community institutions, and natural resources. Currently, the majority of the law, which is intended to promote social interests, exists solely as elements that limit individual interests. For example, a nuisance law is addressed by way of tort law or personal injury claim.

Balancing Interests

Frequently, a legal claim will involve more than one area of interest. When multiple interests are involved in a legal claim that does not involve a constitutional issue, social interest is the main criterion used to balance interests in a manner that protects the standards of justice in society; this is the ultimate duty of law. For instance, in divorce law, society has an interest in preserving the institution of marriage. However, divorce is an individual interest for the parties involved. The court has the responsibility of balancing the two interests so that the ends of justice are best served.⁷⁸

⁷⁶ John DeLeo, *Blackstone Paralegal Studies*, p.16

⁷⁷ John DeLeo, *Blackstone Paralegal Studies*, p.17

⁷⁸ John DeLeo, *Blackstone Paralegal Studies*, p.18

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Rights, Responsibilities, and Duties

Legal rights are classified as either primary or curative. Rights conferred and recognized by law for the protection of interests are called *primary rights*. When they are enacted, primary rights, themselves, become interests. Curative rights can be specific or compensatory.

A legal system has the responsibility of identifying, balancing, and protecting legal interests. To this end, the American legal system governs human behavior by setting forth the duties of individuals and by offering individuals the advantage of legal assistance. The duties of individuals are either absolute or relative. Those duties imposed by law to protect the peace, order, and welfare of the community are called *absolute duties*. Unfortunately, those duties do not protect individual interests against violations. Duties recognized by law to protect the interest of a particular individual are called *relative duties*. On occasion, an individual may engage in misconduct that infringes upon both social and individual interests. To-wit, a single episode of wrongdoing can breach absolute and relative duties. While civil law imposes relative duties, criminal law imposes absolute duties.⁷⁹

Advantages

Under the law, individuals are afforded three types of advantages: *rights, powers, and privileges*. Although each is distinctively different, all three advantages are often referred to as *rights*. The legal right of an individual is generally comparable to a legal duty of another person. On the other hand, an advantage may not be comparable to a legal duty. A right is sanctioned by law. As such, it may cause or restrain certain actions. A right of action may not be comparable to a legal duty by anyone; it is a power conferred by law to enable a person to realize his interests.⁸⁰

The *power* to create a will, destroy property, or assign power of attorney is similar to a right. The legal term, *power*, refers to the conferring to an individual the ability to create, change, or destroy civil liberties. The law sets forth harmonious responsibilities to society as a whole.

When an individual is permitted to act without legal limitation or responsibility in a manner that would otherwise be illegal, he is exercising a third kind of legal advantage referred to as a *liberty* or *privilege*. For instance, in almost all cases, use of force against another person is illegal. However, self-defense is an accepted privilege and defense for the use of force. Distinctly different from a right, a privilege does not rely on the legal responsibility of others. The advantage referred to as *rights* is by far the most important of the three legally conferred advantages.

Fundamentals

The rights which are conferred under the law are actually the rights that belong to an individual. These individual rights are effective against another person. Each duty forces an obligation on an individual in favor of another person. *Subject of the right* refers to the possessor of a right, the person to whom the legal advantage is conferred upon.

The person to whom the right is enforced upon is the *subject of the duty*. A duty requires a person to act or refrain from acting. The recipient of this compelled action is the possessor of the right. A responsibility is the *content of the right*. For example, a parent is legally responsible for the care, custody, and control of a minor child; therefore, a child possesses the legal right to be cared for by his parents.⁸¹

⁷⁹ John DeLeo, *Blackstone Paralegal Studies*, p.18

⁸⁰ John DeLeo, *Blackstone Paralegal Studies*, p.19

⁸¹ John DeLeo, *Blackstone Paralegal Studies*, p.19

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In an effort to satisfy primary rights, the law relies on a secondary line of rights called *curative rights*. Depending on whether there has been, or is about to be, a violation of primary rights, this secondary line of rights will be preventive or curative. Curative rights may be particularized or compensatory. *Particularized* relief attempts to produce or restore to the preexisting condition. When a primary right is violated, financial compensation may be substituted for compensatory relief.

The most important determinant of legal rights relies upon the interpretation of the relative and absolute duties. For example, a person cannot infringe on an owner's interest in his home. This right is referred to as *rights in rem*, which means a *right in respect of a thing*. In another example, if a homeowner rents out his house, his interests are legally protected by the general rights against a person. The *rights in personam* require the person renting the house to act in a certain manner. In other words, the law confers upon an individual the right to have his interests protected against all persons.⁸²

Procedural Law

A legal system must define the interests and set forth the framework within which individuals can expect the system to function. First, procedural law normally involves an effective process for the court to resolve a dispute. Secondly, procedural law involves the process by which the exact question at issue between parties may be prepared for a decision; this is referred to as a *pleading*. Third, procedural law involves a process by which the trial of an issue may be accomplished in a manner to serve the ends of justice; this process addresses the specific way to introduce facts, evidence, and legal arguments to assist the court in reaching a disposition (decision). Fourth, procedural law involves the process for preparing a decision. Finally, procedural law regulates the administration of justice. Often referred to as *adjective law*, procedural law is distinctively different from *substantive law*, which deals primarily with the purpose and subject matter of the legal system.

⁸² John DeLeo, *Blackstone Paralegal Studies*, p.20

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The effect of liberty to individuals is that they may do what they please: we ought to see what it will please them to do, before we risk congratulations.

—Edmund Burke

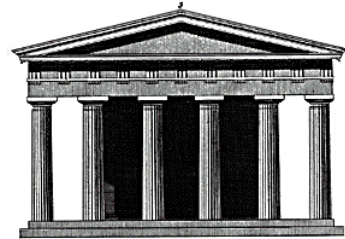
REVIEW QUESTIONS

1. According to the text, what is the purpose of the law? Explain.
2. What kind of claim is presented to the court in relation to a person's reputation? Explain.
3. List the human interests that are recognized under the law? Explain the differences.
4. True or False.
The law was figuratively created to protect society. Explain.
5. Based on the text, write a paragraph explaining how legal rights are classified.

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CHAPTER 7: THE LEGAL SYSTEM



The Legal System

Although the practice of law relates primarily to the judicial branch, a legal assistant must be familiar with all aspects of the American legal system. The duty of the judicial branch is to resolve adversarial disputes by applying the existing law to the facts of a case. Resolution of disputes is generally accomplished by way of a trial and, if necessary, the appellate process. Both the federal and state legal systems have their own judicial branches, which typically function through a system of courts. Courts are classified not only as either federal or state, but also by the types of cases they are authorized to consider.

The Court and Administrative Agencies

A court, a division of the judicial branch of government comprised of one or more persons who are authorized to administer justice, has the inherent power to punish individuals, groups, or agencies for contempt. Courts have a narrow function, generally addressing disputed matters after the fact, and are not subject to suit under the federal civil rights statute because courts are not a “person.” The court is an ongoing institution. Therefore, regardless of personnel changes, the functions of the court are exercised through a judge or judges.⁸³

An administrative agency, a part of the executive branch of government, may conduct hearings to decide issues of fact; however, an agency is not a court. An administrative agency is prospectively orientated, which means that the rules set forth by an agency are usually based upon an act of law by the legislature.

The Judge

Even though a judge may be commonly referred to as “the court,” the concept of the court encompasses a judge. The intent of the legislature is paramount when determining whether a statute using the word “court” is referring to a judge, a court, or to both. The nature of a function, rather than the word referenced in a provision, is used to determine whether a function will be performed by the court or a judge.⁸⁴

Court Personnel

A court may use officials such as clerks, sheriffs, and bailiffs to carry out its administrative functions. Although commissioners, masters, and referees may be assigned administrative duties, these officials cannot perform adjudicative functions. However, a court may adopt the recommendation of an official lacking adjudicative authority. The term “court” is often used in reference to a judge and a jury in a jury trial. Again, when a statute uses the word “court,” legislative intent is paramount in deciding whether the statute refers to the judge alone or to both judge and jury.

⁸³ *American Jurisprudence*, Second Edition

⁸⁴ *American Jurisprudence*, Second Edition

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Jurisdiction

The authority of a court to hear a specific case is called *jurisdiction*. In order to resolve a case on its merits, a court must determine that both subject matter and personal jurisdiction exist.

Subject Matter Jurisdiction

The federal system rests exclusively on the fundamental precepts of the United States Constitution. The Supreme Court of the United States, which was created by Article III of the United States Constitution, is the highest court in the land and the only court mandated by the Constitution of the United States. All other courts were created by an act of Congress. A state's constitution usually incorporates the highest court of a state system; all other state courts are created by legislative statutes. When a law establishes a court, it also defines its subject matter jurisdiction.

The type of case a particular court is authorized to hear is determined by its *subject matter jurisdiction*, which cannot be waived. It is unlawful for a court to decide a matter over which it has no subject matter jurisdiction. Moreover, a claim of jurisdictional defect can be presented at any point in the litigation by either party or by the court *sua sponte*. There are many distinct terms used in the legal system to confer jurisdiction. For instance, a specification may state that a court has *original jurisdiction* over certain types of matters as well as *concurrent* and *appellate jurisdiction* over certain other matters; use of these terms usually conveys whether subject matter jurisdiction attaches.

Every court is either a court of limited jurisdiction or a court of general jurisdiction; no court can be both. A court of *limited jurisdiction* is a court that cannot hear every type of case presented to it; instead, the court may only consider the kinds of cases specified in the constitution or statute. Every federal court, including the United States Supreme Court, is a court of limited jurisdiction. In contrast, a court of *general jurisdiction* is a court that can hear every type of case presented to it, unless exclusive jurisdiction has been granted to some other court for a particular type of case. Each state has a court of general jurisdiction, which is referred to as a district court, a superior court, or a supreme court.

Most of the courts have either original or appellate jurisdiction over a matter; some courts have both. Original jurisdiction determines the type of court where a particular type of case must be heard. Most trial courts are considered courts of original jurisdiction and may hear the types of cases specified by the constitution or statutory law. A court authorized to review decisions of an inferior court in certain types of cases has *appellate jurisdiction*. However, a single court may have both original and appellate jurisdiction in separate cases. In that instance, a court wears two hats: it is a superior court when exercising appellate jurisdiction in one type of case, and it is an inferior court when exercising its original jurisdiction in another type of case. In relation to a particular type of case, a court is granted either exclusive jurisdiction or concurrent jurisdiction.

When no other court has the authority to hear a particular type of case, the court hearing the matter has *exclusive jurisdiction*. For example, federal courts have exclusive jurisdiction of all bankruptcy cases. In most state court systems, one court has exclusive and original jurisdiction of all probate matters. *Concurrent jurisdiction* occurs when more than one court has authority to hear a particular type of case. A plaintiff may choose between courts which have *concurrent jurisdiction* of the subject matter of his case.

Personal Jurisdiction

In order for a court to decide the merits of a case, a court must have both subject matter jurisdiction and personal jurisdiction. *Personal jurisdiction*, also called "*in personam*" jurisdiction, refers to the court's power or authority over the parties in the litigation. Upon the plaintiff's initiation of a complaint or petition, a court assumes personal jurisdiction over the plaintiff. However, personal

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jurisdiction over a defendant can only be acquired by law or the defendant's consent. A defendant may reside in the same state where the action is filed, or out-of-state, in which case, long-arm statutes are applied.

In accordance with a constitutional mandate, an out-of-state defendant must have *minimum contacts* with the forum state before any court of that state can exercise jurisdiction over him. Accordingly, minimum contacts exist when a defendant has engaged in some voluntary act in relation to the forum state. By design, a long-arm statute can affect an out-of-state defendant who has caused injury within the forum state. Under a *long-arm statute*, courts are permitted to go beyond its state boundary lines to contact a defendant and compel defense in the forum state. A defendant subject to enforcement under a state's long-arm statute has performed acts sufficient to satisfy the minimum contacts requirement. Conducting business, soliciting, or visiting a state are some examples of voluntary acts. In one instance, a court determined that flying over a forum state was sufficient to establish minimum contacts.⁸⁵

***In Rem* Jurisdiction**

When the subject matter of the suit relates directly to property located within a court's geographic boundary lines, that court has *in rem jurisdiction*, literally means "in relation to the thing." A court always has jurisdiction of property located within its geographic boundaries. If a claim arises in relation to said property, a court with subject matter jurisdiction in that location has *in rem* jurisdiction, regardless of whether or not the court has personal jurisdiction over the defendant.⁸⁶

***Quasi In Rem* Jurisdiction**

Quasi in rem jurisdiction exists when the subject matter of the suit does not relate to property in the court's jurisdiction; instead, the defendant has property in the court's jurisdiction which may be used to satisfy the judgment. A court may have *quasi in rem* jurisdiction even when it does not have personal jurisdiction.

Venue

Although venue generally refers to the location of the trial, it more specifically relates to the jurisdiction where a trial should take place. In a criminal trial, venue is within the jurisdiction where the crime was committed. Change of venue may be requested by a defendant because of pretrial publicity or public reaction to the case which makes it impossible to obtain a fair and impartial jury. In a civil trial, venue is within the jurisdiction where the claim arose, where a defendant resides, or where a defendant has a place of business or agent. In a federal civil trial, the forum court may have the option of refusing to hear a case if *forum non conveniens* exists, which means the court is inconvenient for witnesses to attend, or it is difficult to obtain evidence.

The Federal Court System

Established by Article III of the United States Constitution, the United States Supreme Court is an integral part of the federal court system, but it is not the only part. The United States Constitution also authorized Congress to establish lower federal courts, which the Congress has done by establishing the United States District Court and United States Court of Appeals. The federal courts of appeals are divided

⁸⁵ Virginia K. Newman, *Paralegal Review Manual*, p. 367

⁸⁶ Virginia K. Newman, *Paralegal Review Manual*, p. 367

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into thirteen circuits. The federal district courts are divided into more than ninety federal district trial courts. There are also a series of specialty courts. Federal courts have limited jurisdiction, in that they only have authority to hear cases specifically authorized by constitutional provisions or federal statutes.

Judges appointed by Article III to federal courts serve a life term subject to good behavior. The salary of a constitutional court judge cannot be decreased. Article I of the United States Constitution established legislative courts with judges who serve fixed terms. Examples of legislative courts include the Tax Court, the Court of Claims, and the Court of International Trade.⁸⁷

The United States Supreme Court

In the American legal system, the United States Supreme Court is the court of last resort – the highest-ranking appellate court in the federal court system. The Supreme Court is comprised of one chief justice and eight associate justices, for a total of nine justices. As the protectors of the Constitution, the justices are the final authority on the Constitution.⁸⁸

Because Article III of the United State Constitution specifically sets forth the jurisdiction of the Supreme Court, the Supreme Court’s authority cannot be modified by Congress. According to the Constitution, the Supreme Court has original jurisdiction in the following areas:

- disputes between two or more states
- actions in which ambassadors, public ministers, or foreign consuls are parties
- disputes between the United States and a state
- actions by a state against citizens of another state or against aliens

Only the Supreme Court has exclusive, original jurisdiction over disputes between states. In all other matters, the Court has concurrent, original jurisdiction. In other words, the lower federal courts share original jurisdiction in certain other matters.

The Supreme Court has appellate jurisdiction of all appeals from the United States Court of Appeals and from the highest appellate court of each state. However, this jurisdiction is only extended when a state appeal raises a question of federal law. Since 1988, appellate cases have reached the Supreme Court exclusively by way of *writ of certiorari*. An appellant seeking a writ must file a petition for *writ of certiorari* with the Supreme Court, asking the Court to hear his appeal. Hence, the granting of the writ is discretionary. The Supreme Court generally does not grant a writ unless the justices believe the case has sufficient national importance to warrant the Court’s attention. When a conflict exists between the federal court of appeals, the *writ of certiorari* is also used to resolve the issue.

United States Court of Appeals

The intermediate appellate court in the federal court system is known as the U.S. Court of Appeals. The Court of Appeals is divided into thirteen circuits which includes the following: the Court of Appeals for the District of Columbia, the Court of Appeals for the Federal Circuit, and eleven circuits

⁸⁷ *United States Code Annotated*

⁸⁸ *Marbury v. Madison*, 5 U.S. 137 (1803)

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numbered according to their respective regions of the country. The Court of Appeals for the Federal Circuit also has exclusive appellate jurisdiction over all cases involving the following:

- copyright, patent, trademark, and plant variety protection
- decisions of the U.S. Claims Court, U.S. Court of International Trade, and the U.S. Court of Veterans Appeals
- final decisions of the United States District Court, with the exception of cases outside the exclusive appellate jurisdiction of the Court of Appeals for the Federal Circuit, lies exclusively with the Court of Appeals for the Federal Circuit
- some final decisions by federal administrative agencies or final decisions of some federal administrative agencies

United States District Court

Each state and territory has at least one United States District Court. District courts have original jurisdiction in a number of areas, particularly in cases involving a federal question or diversity of citizenship. A *federal question* case is an action arising under the Constitution, laws, or treaties of the United States. A *diversity of citizenship* case is a civil action between the citizens of different states when the matter in controversy exceeds \$75,000, exclusive of interest and costs. The United States District Court has *exclusive original jurisdiction* in the following categories:⁸⁹

- admiralty cases
- maritime cases
- prize cases
- suits brought by the United States, its agencies, or officers
- bankruptcy suits
- copyright, patent, and trademark suits
- suits affecting ambassadors and other public ministers and consuls

The district court also has *original jurisdiction* in suits against the United States or its officers, suits to compel officers of the United States to perform their duty, removal of suits against federal officers in state courts, suits involving improper collection of Internal Revenue and customs duties, and suits involving civil rights.

A case may be removed from state court to the federal court in the same district as the state court if the defendant is not a resident of that state, if the case could have been filed in federal court originally, if the state court from which the case is removed has jurisdiction, and if there was complete diversity between plaintiff and defendant both at the time the case was filed in state court and at the time it was removed to federal court. The United States District Court has appellate jurisdiction over some final decisions made by federal administrative agencies. The District Court applies a state's substantive law in diversity of citizenship cases.

⁸⁹ *Federal Civil Judicial Procedures and Rules*

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Federal Specialty Courts

A number of courts have been established by Congress pursuant to Article I of the Constitution. Although courts established by Congress are often referred to as federal specialty courts, they are legislative courts. Federal specialty court judges typically serve fifteen-year terms. Unlike constitutional court judges, the salaries of federal specialty court judges are subject to congressional modification. The United States Court of International Trade, the United States Claims Court, the United States Tax Court, United States Court of Military Appeals, and the United States Court of Veterans Appeals are some of the most well-known specialty courts. Under the authority of Article I of the United States Constitution, the Federal Magistrate Court and Bankruptcy Courts were annexed to the United States District Court.⁹⁰

The State Court Systems

State court systems differ from state to state; however, most states follow an organizational structure comparable to the federal court system. Generally, a state court system consists of a supreme court, intermediary appellate courts, state district or general courts, county courts, small claims courts, and a range of specialty courts. A state legislature can authorize a specialty court such as a probate court, a family court, a juvenile court, or a traffic court.

Except in matters reserved exclusively for the federal courts, state courts may have concurrent jurisdiction with federal courts. A bankruptcy case is one example of a matter subject to concurrent jurisdiction. When a matter heard in state court involves a federal issue, a party may appeal an adverse decision by the state's highest court to the United States Supreme Court. For example, matters such as probation, divorce, or adoption, are purely of state interest and do not qualify for appeal to the United States Supreme Court and cannot be brought into the federal court. However, matters involving a federal question, such as estate tax, due process, or equal protection are of federal interest, can be appealed to the United States Supreme Court. All federal issues must be presented at the trial stage, or else, the issue will be waived.

The authority to establish structure and jurisdiction for courts is vested in large part with their respective states. Each state has exclusive authority to decide how to structure its judicial system. In some states, the state's judicial system was created by constitutional mandate. In others, the legislature created

its judicial system. Although there is a requirement that a state court of competent jurisdiction treat federal law as the law of the land, there is no requirement that a state create a court competent to hear the case in which the federal claim is presented.

A state legislature also has the power to create other courts, subject to constitutional limitation. Although a legislature may delegate its authority to create courts to another lawmaking body, it cannot assign the power to create a court to a municipality. However, the legislature may adopt a format whereby a municipality may elect to establish a municipal court. In deciding whether to create a particular type of court, a legislature may grant discretionary authority to a governmental subdivision.⁹¹

In a municipality, a statute containing permissive language may incidentally allow a subdivision to create certain types of courts to accomplish legislative intent. In that instance, a municipality opting not to create a court cannot be deemed arbitrary and capricious or violative of any individual right. Similarly,

⁹⁰ *United States Code Annotated*

⁹¹ *American Jurisprudence*, Second Edition

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a municipality's decision to combine municipal court functions on the county court docket does not forfeit the municipality's statutory right to establish a city court. A statute authorizing the creation of a county municipal court does not implicitly repeal a statute authorizing the establishment of city courts by incorporated towns. This is especially true if neither statute makes jurisdiction exclusive to a particular court. In such a case, both courts may exercise concurrent jurisdiction.⁹²

As opposed to the date when a judge is appointed to the court, courts are established from the date of legislative enactment. There may be state constitutional restraints on the establishment of new courts. A *de facto* court exists when the court is authorized by law, but the proceedings creating it were irregular or defective. The judgments and proceedings of a *de facto* court are valid and are not open to collateral challenge.⁹³

States are free to create their own system of courts and to reorganize them as necessary. The power to create courts includes the power to establish judgeships in the courts. State courts share the responsibility for the application and enforcement of federal law. A federal court must adhere to the principles that are fundamental to the system of federalism when federal preemption of state law is at issue. This deference is at its apex when a federal court addresses a claim in which a federal law requires a state to undertake a reform of the operation of its courts.

The authority to alter the jurisdiction of a state's court rests solely with its legislature. However, a state's constitution may require a legislature to adhere to any "open court" provision, which requires a

court to actually be open and operating. In establishing their own courts, states have great latitude. A state legislature, subject to constitutional limitations, has the power to organize courts and regulate their jurisdictions. A state legislature's constitutional power to change the jurisdiction of courts includes the power to determine how many and what types of courts are required for the administration of justice.

As a general rule, the power to shut down courts is coexistent with the power to create courts. For example, courts created by constitutional mandate can only be shutdown by the same. Similarly, courts created by legislative act may only be shutdown by legislative act, subject to constitutional limitations. As a final point, courts created by statutory law may be shutdown by the repeal of the statute which enacted it. A statutory court may also be shutdown by a subsequent constitutional amendment, which effectively repeals the statute.⁹⁴

A constitutional court is a court whose existence is specifically set forth within the state constitution. A state legislature has no power to harm the essential nature or jurisdiction of a constitutional court.⁹⁵

Judicial Decision Making

The judge and jury are the decision makers in a trial process; the judge decides the law, and the jury decides the facts of the case. However, in a bench trial, a judge has a responsibility to decide both the facts and the law to be applied to those facts. On appeal, an appellate judge analyzes the accuracy of the trial judge's decisions on the law. In Louisiana, we also have appellate review of fact.

⁹² *American Jurisprudence*, Second Edition

⁹³ *American Jurisprudence*, Second Edition

⁹⁴ *American Jurisprudence*, Second Edition

⁹⁵ *American Jurisprudence*, Second Edition

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Depending on whether it is primary or secondary, the law affords different emphases in the decision-making process. For instance, *primary law* has the greatest weight in the decision-making process. In a state case, *primary law* includes the constitution, statutes, administrative rules, procedural rules, and regulations; it may also include the case law of the state, the federal Constitution, and any federal statutes. To the extent that primary law relates to the facts and issues of the pending case, it is *mandatory law*. In other words, it must be followed in the pending case.

The constitution, statutes, and case law of other states are all considered *secondary law*. Notwithstanding federal jurisdiction, the jurisdictions of other states are of equal level. Legal encyclopedias, annotations, restatements, and treatises are all included as secondary law. Secondary law may assist a court in reaching a decision in the pending case, but since secondary law is considered to be *persuasive law*, the court is not compelled to follow it.

At every stage of a trial, a judge has several substantive and procedural rules to take into account. A great deal of the judicial decision-making process correlates to proper understanding and application of substantive law in the form of constitutional provisions, statutes, and common law. With the exception of Louisiana, common law is applied in state cases and federal diversity cases. Louisiana is the only state that follows the civil law system of French heritage.

Constitutions and Statutes

Any applicable constitutional provision or statute of the jurisdiction takes precedence over all other legal rules in a particular case. In other words, mandatory law must be followed to reach the decision. Unless a statute is unconstitutional, the court is responsible for determining the meaning of a statute and then applying it to the facts of the case in order to reach an outcome. Judges cannot disregard statutes they find objectionable nor can they construe a statute to convey something other than legislatively intended.

Generally, to the benefit of defendants, courts construe statutes in criminal cases more narrowly while still adhering to statutory provisions. For example, if a statute states that a motorist *may* come to a complete stop at any intersection; it is doubtful that a court will allow anyone to be convicted under the statute because, as used therein, the word *may* implies that stopping is optional. The words used in statutes have plain or ordinary meaning. Ambiguous wording in a statute permits a court to consider a statute's legislative history in deciding the intent of the statute.

Common Law

In the absence of a constitutional or statutory provision, state courts, and federal courts hearing diversity cases, apply the appropriate legal rules through common law principles. When an issue is decided by a court, the rule of law applied in that case is followed not only by that court but also the lower courts of the same jurisdiction in all future cases involving similar facts and issues. In other words, the rule of law becomes precedent for all such future cases. As discussed in previous chapters, this process of considering past cases is called *stare decisis*. The holding or ruling of a past case may be *precedent* for the current case if similar facts and issues exist. A precedent is *mandatory law*, which must be adhered to in deciding the current case. A case is precedent only if it is found in a case decided by the present court or by a higher court, the prior case was published, and it is contained in the majority opinion of that court.

A case is not precedent if the facts or issues of the past case are substantially different from the present case. Although a prior case is precedent, a court is free to consider unique circumstances and

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societal influences to determine if the precedent still applies. If a court decides a precedent does not apply, common law principles allow for adjustments necessary in the application of the precedent.

A case lacking applicable statutes and precedents is a *case of first impression*. A court's authority is limited without a statute on the matter. However, in a common law system, a case of first impression is handled by looking to other jurisdictions for a similar case to provide guidance. In the absence thereof, a common law court may draw comparison from existing case law and statutes.

A federal court sitting in diversity must apply the same state substantive law that the state court of that district would apply. When a state's common law applies as the substantive law in a federal diversity case, the federal court applies its own rules of procedure, rather than the rules of procedure of the state court.

Conflicts of Law

The substantive laws of one state can vary extensively from the substantive laws of another state. For instance, a conflict of law can arise when the facts of a case occur in a state other than the forum state. Also, a conflict of law can arise when the facts of a case occur in more than one state. Conflict of law questions are sometimes referred to as *choice of law* questions.

Full Faith and Credit

The requirement that "full faith and credit be given in each state to the public acts, records, and judicial proceedings" is prescribed in Article IV of the United States Constitution. The provision requires that each state enforce the final judgments of all other states, regardless of substantive law and public policy from state to state.

The only justification for disregarding the final judgment of another state is when that judgment is unconstitutional. However, if an individual has the requisite minimum contacts with the issuing state and if that state properly exercised its long-arm statute, procedural due process requirements are presumed met. As a result, the final judgment must be honored. For example, if loan sharking is legal in Texas but not in Louisiana and if Texas obtains a valid final judgment against a defendant, Louisiana must enforce the judgment – even though the source of the underlying debt is repugnant to the public policy of Louisiana. Even though Article IV only applies to states, federal courts are obliged to conform by comparable federal statutes.

Comity

Comity involves the recognition of the public acts of one political entity by another political entity. Comity is a matter of courtesy; there is no law requirement for it. Unless a situation is revolting to public policy or prejudicial to citizens' interests, in general, courts in the United States usually honor the judgments of foreign countries. For example, a Canadian judgment on a defaulted promissory note would be honored by U.S. courts under the doctrine of comity.⁹⁶

Judicial Limitations

The law does not mandate that every case be decided by a court. In fact, even if all jurisdictional requirements are met, other factors may preclude a matter from coming before the court.

⁹⁶ Virginia K. Newman, *Paralegal Review Manual*, p.378

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Case or Controversy

Article III, § 2 of the U.S. Constitution requires that before a party can initiate legal action, there must be a case or controversy. In other words, the federal courts will not issue *advisory opinions*. An advisory opinion is one rendered on the basis of hypothetical facts. Most states do not allow their courts to issue advisory opinions; however, there are some states that do. As a result of the case or controversy requirement, *collusive suits* are not permitted. A collusive suit is one based on a friendly agreement to litigate an issue, just to see how it comes out or, even worse, to influence the result in a certain direction by agreeing that one party will not put up a genuine struggle. To be genuine, a case or controversy requires true adversaries to litigate the issues fully.

A party to a suit must have *standing*. This means that their rights must be personally and immediately affected by the issues in a suit. For example, an individual denied medical treatment because of a state statute, regulation, or policy has legal standing to challenge the statute. Contrariwise, his doctors lack standing.

In order for a judicial decision to be rendered, the issues in a case must be *ripe*. In other words, the case cannot be based upon the assumption of what might happen in the future. There must be an actual dispute. For example, if a student filed a lawsuit because a college official told him his admission application would be denied, the lawsuit would most likely be dismissed because the dispute was not ripe for decision. The student acted prematurely since his application had not been denied. In the end, the application may have very well have been accepted despite the official's comment. A declaratory judgment action has a very narrow distinction from the ripeness doctrine; this kind of action may be an appropriate remedy when a case is on the brink of becoming a full-scale dispute.

If an issue has become irrelevant or academic at any stage of the proceeding, it is *moot*, the opposite of ripe. The courts will not decide moot cases. In referring to the previous example, if the student had applied to college and been refused admission for discriminatory reasons, he could have filed suit and received an injunction ordering his admission for the duration of the case. However, if he graduated before the case had ended, then the case would become moot and subject to dismissal. Since the student would have graduated, the court's decision would not have affected him.

Prohibitions

There are several reasons why litigation may be prohibited. The two most obvious reasons are *statute of limitations* and the doctrine of *res judicata*. A *statute of limitations*, set by the legislature, prescribes that certain types of civil actions be filed within a fixed time after the cause of action first occurs. The *statute of limitations* differs from state to state; it also varies according to the type of case. For example, one state may set a four-year limitation on oral contracts, a five-year limitation on written contracts, and a two-year limitation on malpractice claims. Another state may set a three-year limitation on oral contracts, a two-year limitation on written contracts, and one-year limitation on malpractice claims. When a complaint is not filed within the prescribed time period of that state, the claims are barred, and the plaintiff loses the right to sue.

Although there is no universally applied statute of limitations, generally, each state's statutes of limitation are *tolled* for various legitimate reasons such as infancy, insanity, imprisonment, court order, and fraudulent concealment by a fiduciary. For example, in a case when a statute is tolled due to infancy, the minor, upon reaching adulthood, would have a reasonable amount of time in which to file an action. The circumstances involved in a particular case determine what amount of time is reasonable.

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In the event a final judgment has been rendered in a case, the doctrine of *res judicata* prevents the same facts from being litigated again between the same parties. *Res judicata* literally means “the thing adjudged.” This doctrine is applicable to a final judgment on the merits of a case, to a motion for summary judgment, and to a dismissal with prejudice to future action.

In order for *res judicata* to be applicable, the parties must be identical or be in privity with the original parties, and the facts must be identical to the first suit. For example, a party who loses a case in a small claims court cannot file another claim against the same defendant under a different legal theory, especially if the original facts are identical. Similarly, a party cannot file part of a claim, wait for the decision, and then file another claim if both claims are against the same party and based on the same facts.⁹⁷

Immunity

In some instances, certain individuals are immune from civil actions for tort liability. These individuals for one reason or another are shielded from potential liability. The government is insulated from tort liability on the principle that *the king can do no wrong* or *sovereign immunity*. All federal, state, and local municipalities are subject to sovereign immunity. Nevertheless, a government can waive its sovereign immunity, in whole or in part. For example, by enacting the Federal Tort Claims Act in 1946, the federal government waived part of its sovereign immunity. Consequently, with the exception of discretionary acts of government employees or for acts of the military in time of war, tort actions can now be brought against the federal government. Also, once a government assumes a nongovernmental role, sovereign immunity no longer applies. Some examples would be sponsoring rap concerts for profit, owning a horse racing track, or engaging in other commercial enterprises.

As long as government officials act within the scope of their authority and in the discharge of their official duties, sovereign immunity applies. For judges and other high-ranking government officials who exercise discretionary powers, immunity is absolute. However, immunity is not applicable when officials step outside the authority of their office and violate the constitutional rights of others. For example, if the governor fires a male press secretary because he believes a female press secretary presents a better image to the public, there is no absolute immunity for the governor’s decision. For the most part, nonprofit organizations are shielded from tort action by way of *charitable immunity*. However, several states have limited this type of immunity because many charities have become huge business operations and can afford to purchase insurance protection.

Judicial Remedies

A court must decide the type of relief a winning party is entitled to receive in a civil case. A basic maxim of law is, “*For every right, there is a remedy.*” In part, what the litigant is asking for dictates the remedy. In most cases, when a plaintiff seeks damages, the amount, if any, to be awarded is left for a jury or judge to determine. The judge’s duty is to ensure the remedy applied is permissible under the law. The goal of a court is to restore the injured party to his previous status, *status quo*, as though the injury had not occurred. In the event a statute specifies a certain remedy, the court must adhere to the statute. However, without a statutory scheme, the court relies on common law principles to determine the type and amount of relief deserved. Whether the case is at law or in equity significantly influences that decision.⁹⁸

⁹⁷ Virginia K. Newman, *Paralegal Review Manual*, p.379

⁹⁸ Virginia K. Newman, *Paralegal Review Manual*, p.381

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Law and Equity

The concept of two separate courts, a law court for legal issues and an equity court for equity issues, came to America with the first English Colonists. In fact, until the 1900's when the Louisiana courts were merged, a litigant had to file two separate actions in two separate courts, requiring two separate trials if the case involved both legal and equity issues. Although the merger streamlined many of the procedures involved in dual-law-and-equity cases, the differences between these two distinct forms of action continue to be significant in some jurisdictions. In law actions, parties are identified as plaintiff and

defendant. In equity actions, parties are identified as petitioner and respondent. In law actions, parties are entitled to a jury trial; whereas, there are no jury trials in equity actions. In law actions, the final order is a judgment. The final order in equity actions is a decree. Louisiana does not observe these distinctions.

Generally, if a judgment in a law action declares that John Doe owes money to Jack Smith, and John Doe decides not to pay, there is no special penalty. John cannot be put in jail for nonpayment of that debt. However, if John did not obey a decree, a personal order by the court to do or to refrain from doing some specific act, he would be in contempt of court and may be subject to penalties. In most states, the punishment for civil contempt includes imprisonment. If legal and equitable issues are in dispute in a case, a jury must determine the facts about the legal issue at a different time from equitable issues.⁹⁹ This process is referred to as a *bifurcated trial*.¹⁰⁰

Remedies at Law

Replevin and ejectment are remedies held over from the early common law writ system. *Replevin* requires a defendant to return certain **personal** property in his possession. *Ejectment* requires a defendant to return certain **real** property in his possession. The most common remedy at law is money, also referred to as *damages*. The reason behind the damage award usually determines how much money is awarded. The intent of the awarding of damages is to make the plaintiff whole. However, making a plaintiff whole may have different meanings in different situations.¹⁰¹ For example, if a defendant's negligence led to the death of a child, monetary awards will not make the plaintiff whole again.

In a contract, a reasonable person must be able to predict damages at the time a contract is made or at the time the tort occurs. Consequently, damages that are too far removed from a contract are not predictable and thus cannot be awarded. Also, plaintiffs have a responsibility to mitigate their damages. In other words, a plaintiff must take reasonable steps to minimize his losses. In the event a plaintiff fails to do so, his damage award may be modified by the amount that could have been prevented by means of mitigation.

For instance, a Louisiana court held that when a motorist failed to take physical therapy recommended by a physical therapist, she failed to take reasonable steps to mitigate her damages. Thus, the court reduced her damage award injuries caused when a large tree limb, that city employees were trimming, fell and landed on her vehicle.¹⁰² As a final point, damages must be proven with a "reasonable degree of certainty" at the time of trial. In other words, when seeking compensatory damages, a plaintiff must provide evidence of his losses.

⁹⁹ This is not the case in Louisiana.

¹⁰⁰ Virginia K. Newman, *Paralegal Review Manual*, p.382

¹⁰¹ Virginia K. Newman, *Paralegal Review Manual*, p.382

¹⁰² *Britt v. City of Shreveport*, 55 So.3d 76 (La.App. 2 Cir. 2010)

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Compensatory Damages

As a general rule, compensatory damages focus on a plaintiff's losses. Compensatory damages are classified as either general or special damages. In some jurisdictions, special damages are referred to as consequential damages. The losses that any reasonable person in the plaintiff's situation would incur are called general damages. Losses that are unique to a particular plaintiff are referred to as special damages. Although the basis for the losses is different, the goal of these damages is the same.

Punitive Damages

The intent of punitive damages, or exemplary damages, is to punish a party for contemptible conduct. For example, punitive damages may be awarded when an individual caused injury while driving under the influence of a controlled substance. In addition to compensatory damages, an employer may be required to pay punitive damages if it is determined that he withheld earned wages. Some states do not allow punitive damages. However, in those states where punitive damages are allowed, the purpose is to teach the defendant a lesson while also deterring others from engaging in similar conduct by making an example of the defendant.

Nominal Damages

The intent of nominal damages is to absolve a right which has been violated even where there is no monetary loss. In such a case, the court usually awards a trivial amount of nominal damages in addition to court costs. The court may award nominal damages in either contract or tort cases.

Liquidated Damages

Liquidated damages may only be awarded in contract cases. Generally, parties agree to these damages at the time the contract is made. These damages represent the parties' reasonable estimation of losses in the event of a breach of contract. When it is difficult to determine damages, contracts usually include a liquidated damages provision. Courts are required to enforce the terms of liquidated damages, except when the terms are excessive or grossly disproportionate.

Equitable Remedies

When legal remedies are inadequate, courts fashion equitable remedies to achieve fairness. As such, a plaintiff must demonstrate to the court that he has *no adequate remedy at law*. In other words, he must demonstrate that money cannot compensate for his injury. In cases when the petition seeking equitable relief has any degree of blame in a matter, equity will not intervene. An applicable adage states, "*He who comes into equity must come with clean hands.*"¹⁰³

Restitution

The focus of restitution is on a defendant's gains rather than plaintiff's losses. Restitution is different from compensatory damages in that it is designed to prevent a defendant from profiting from misconduct on his part.

Injunction

The courts may issue a personal order referred to as an injunction, which compels a respondent to do or to refrain from doing a specific act. Injunctions issued by the court are either *mandatory* or *preventive*. Each state has different rules related to the issuance of an injunction. However, the formats used are quite similar. A party seeking injunctive relief usually needs interim intervention to keep matters

¹⁰³ Virginia K. Newman, *Paralegal Review Manual*, p.384

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at a *status quo* pending trial. For example, John Doe claims ownership of a house. Unfortunately, James Public contends he is the rightful owner and wants to sell the house. John wants to prevent James from selling the house because James is moving forward with his plans to sell. By the time a full hearing can be scheduled on this matter, the house may be sold. Therefore, a court can issue an injunction preventing James from selling the house until the dispute over ownership is resolved.

When a lawsuit is initiated or at any time during its pendency, a party may seek a *temporary restraining order* (TRO). The initial TRO hearing is usually held *ex parte*. In other words, only one party is heard on the matter. A party, usually the petitioner, by motion and sworn affidavit, must demonstrate that he has no adequate remedy at law and he will suffer irreparable harm if the TRO is not granted. The petitioner must also show that the TRO will cause little or no harm to the respondent if granted. In the end, a judge must be convinced that the petitioner has a reasonable likelihood of winning his case.¹⁰⁴

Generally, if a TRO has been granted, a hearing is scheduled within seven to ten days. At the hearing, both parties are present and afforded an opportunity to be heard. The proceeding is considerably less formal than a trial. After considering the facts, a judge decides whether to issue a *temporary injunction*. A judge may also dissolve a TRO if he deems it was granted improvidently.

If a petitioner prevails in a trial, a *permanent injunction* is issued by the court. In contrast to other litigation, a trial of an injunction is anti-climatic. As a general rule, a petitioner who successfully obtains a TRO or *preliminary injunction*, a variation of a TRO, will usually win the case. A TRO may only be in place for a few days, while a preliminary injunction can last until the matter is resolved at trial. It is important to note that libel or slander cannot be enjoined or restrained because of First Amendment speech protections. However, after the fact, an injured plaintiff may seek damages.¹⁰⁵

Rescission

Another form of equitable relief available in contract cases is *rescission*. When rescission is granted, the underlying contract is cancelled. Generally, if the exchange of funds has occurred in furtherance of a contract, rescission and restitution are granted at the same time. Fraud, misrepresentation, duress, or calamities of mistakes are each valid reasons for a contract to be rescinded.

Reformation

Similar to rescission, *reformation* is only available in contract cases. Generally, reformation is sought to correct errors in a document evidencing a contract or in a deed of conveyance when the document does not accurately reflect the parties' agreement. In reformation, the parties agree to retract the contract. Although reformation can correct a document evidencing a contract, it cannot change the contract terms themselves. A document labeled "Contract" is merely evidence of that contract.

Specific Performance

Another form of equitable relief that is only available in contract cases is specific performance. This remedy may be available when the subject matter of the contract is unique, such as an original Renoir painting. The only way to make the disappointed buyer whole is to award him the Renoir. As a general principle, money frequently is inadequate when unique property is in dispute.

¹⁰⁴ *Federal Civil Judicial Procedures and Rules*

¹⁰⁵ Virginia K. Newman, *Paralegal Review Manual*, p.386

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Alternative Dispute Resolution

Alternative dispute resolution (ADR) is precisely what the name implies. It provides a way for parties to settle claims without the expense and delay of a full-scale trial by way of a pretrial procedure designed to evaluate the parties' claims and to effect settlement, arbitration, or mediation. The Rules of Professional Conduct of some states require attorneys to advise their clients of ADR options.¹⁰⁶

Arbitration

The business industry has been using arbitration for years as a voluntary method of resolving disputes without litigation. An impartial arbitrator, usually a person with expertise in the area of the parties' dispute, listens to evidence presented by both sides and renders a decision. As part of the agreement to arbitrate, the parties agree that the arbitrator's decision will be binding.

If either party believes errors were made by an arbitrator, they may seek judicial review of the decision. The Better Business Bureau, which operates in most major cities, can supply contact information regarding organizations, such as the American Arbitration Association, the Center for Public Resources, and the Federal Conciliation and Mediation Service, which provide an impartial arbitrator.¹⁰⁷

Mediation

The voluntary method of dispute resolution is referred to as *mediation*. The main difference between arbitration and mediation is that mediation is not binding on the parties. Generally, a mediation proceeding is presided by a third party who presides over the proceeding and attempts to help the parties reach an agreement. The goal is to identify areas of common ground and to present viable options to resolve those areas of genuine dispute. A mediation conference is more relaxed than an arbitration proceeding. Traditionally, labor union negotiators have opted for mediation when there is a failure to reach an agreement. Mediation is very popular in family law matters. A mediator cannot make decisions; he can only offer recommendations. As such, when mediation fails, participants are free to go through the judicial process.

¹⁰⁶ Virginia K. Newman, *Paralegal Review Manual*, p.388

¹⁰⁷ Virginia K. Newman, *Paralegal Review Manual*, p.389

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No civilization . . . would ever have been possible without a framework of stability, to provide the wherein for the flux of change. Foremost among the stabilizing factors, more enduring than customs, manners and traditions, are the legal systems that regulate our life in the world and our daily affairs with each other..

—Hannah Arendt

REVIEW QUESTIONS

1. Explain the various differences between courts and administrative agencies.
2. What kind of jurisdiction determines the type of case a particular court is authorized to hear? Explain.
3. What kind of jurisdiction does a court have when the subject matter of the suit relates directly to property located within a court's geographic boundary lines? Explain.
4. True or False.
Article III of the Constitution of the State of Louisiana sets forth the jurisdiction of the United States Supreme Court. What are some implications of this?
5. Based on the text, write a paragraph explaining the various types of damages available to a plaintiff in federal and state court proceedings.



Written Assignment

At the end of each chapter, several questions are listed under the heading Review Questions. Please answer each one thoroughly and turn them in when you take your exam. The education director will be responsible for forwarding the material to Dr. Wayne Cook at Rayburn Correctional Center.

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WORDS TO REMEMBER

- *Individual Interests*
- *Public Interests*
- *Social Interests*
- *Primary Rights*
- *Absolute Duties*
- *Relative Duties*
- *Subject of the Right*
- *Subject of the Duty*
- *Rights in Rem*
- *Rights in Personam*
- *Sua Sponte*
- *Original Jurisdiction*
- *Subject Matter Jurisdiction*
- *Appellate Jurisdiction*
- *Exclusive Jurisdiction*
- *Concurrent Jurisdiction*
- *Personal Jurisdiction*
- *Long-arm Statute*
- *Minimum Contacts*
- *In Rem*
- *Quasi in Rem Jurisdiction*
- *Venue*
- *Writ of Certiorari*
- *Diversity of Citizenship*
- *Federal Question*
- *Specialty Courts*
- *First Impression*
- *Comity*
- *Collusive Suit*
- *Standing*
- *Ripe*
- *Res Judicata*
- *Statute of Limitations*
- *Maxim of Law*
- *Replevin*
- *Compensatory Damage*
- *Ejectment*
- *Punitive Damage*
- *Nominal damage*
- *Liquidated Damage*
- *Restitution*
- *Rescission*
- *Reformation*
- *Mediation*

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WEEK 7

Lesson 7: Legal Research and Common Law

Lesson Topics

- Role of Paralegal.
- Researching.
- Legal Citations.
- Common Law.

Lesson Objectives

- Identify and use the various resources in a law library.
- Recognize the nature and origin of common law.

Reading Assignment

Nordyke, Keith. J.D. 2012. Introduction to Law and the Paralegal Profession. Text: Chapter 8 and 9.

Text

CHAPTER 8: LEGAL RESEARCH



This chapter will focus on the different types of law libraries and their uses, the sources of law in the United States, and the classification of sources of law.

Role of the Paralegal

Legal research and legal writing are among the many functions a paralegal can perform for a law firm. A paralegal is expected to be able to research cases, statutes, and other legal authorities under the supervision of an attorney. Legal research is arguably, the most important skill in the legal profession, and excellent research techniques enable a paralegal to perform the legal duties expected of him. Legal research may be used to determine if a client has a case, or, after a case is filed, to support the case. When a paralegal can effectively use a law library and the research tools available to him, such as computers, he is able to use the law to draft a simple contract, lease, or complaint as well as prepare for witness interviewing.¹⁰⁸

¹⁰⁸ Steve Barber & Mark A. McCormick, *Legal Research*, p.2

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In theory, a paralegal acts as an arm of the lawyer. The types of assignment and amount of research completed by paralegals vary. In some firms, paralegals perform most of the research necessary to file pleadings or prepare rough drafts of memoranda or briefs. Typically, a paralegal prepares a memorandum summarizing his findings. Prior to beginning a research assignment, a paralegal must be familiar with what legal system is applicable and its functions. America has a multi-tiered system of government which exercises authority over United States citizens. The top two tiers consist of the federal government and the state governments. The lower tiers consist of city and county governments. As a general rule, legal research will involve either federal or state law.

Searching for the Law



Almost all law firms maintain a law library. Some law firm libraries are almost as extensive as those of a law school or courthouse. Some law libraries cost hundreds of thousands of dollars each year to maintain, and others are fairly simple. A paralegal must know how to use a law library since legal research requires “hands-on” competency. The first step is to locate an available law library.

There are hundreds of law libraries in the United States. All accredited law schools have their own law libraries. The majority of these law libraries have tens of thousands of volumes in hardback form and on microfilm. Most paralegal programs have their own law libraries for their students to use, however these libraries are typically much smaller than law school libraries.¹⁰⁹

A parish, county, or city will often have a public law library. The larger law libraries are usually found in the larger parishes or counties, not too far from a courthouse. The Department of Justice and various other governmental agencies maintain their own law libraries. Generally, these law libraries are restricted to agency employees only. The Library of Congress, located in Washington, D.C., was established in 1800 to provide reference and research assistance to members of Congress; this library has an excellent law library that is accessible to the general public.¹¹⁰

There is no uniform standard for organizing a law library. Every law library is organized according to the needs of its clientele or by the decision of the law librarian. The way to learn about a particular law library is to be given a tour by the law librarian or someone familiar with that particular library. In touring a law library, you may notice that there are duplicate volumes of some books or even duplicate sets of books. Generally, when books are widely used, there are duplicates to ensure ease of use and accessibility. Although most law libraries today use the more modern approach of online cataloging, some law libraries still use a card catalog to help individuals locate books, treatises, and periodicals in the library.¹¹¹

Many people are intimidated by the idea of using online catalogs, but most are very easy to use. A law library’s most unusual feature is that it is not a circulating library. In other words, unlike libraries that circulate volumes by allowing people to check out books, law libraries rarely allow customers to check out books. The majority of the larger law libraries are staffed by full-time law librarians, many of whom

¹⁰⁹ Deborah E. Bouchoux, *Legal Research & Writing for Paralegals*, p.4

¹¹⁰ Deborah E. Bouchoux, *Legal Research & Writing for Paralegals*, p.5

¹¹¹ Deborah E. Bouchoux, *Legal Research & Writing for Paralegals*, p.5

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are not only lawyers with a Juris Doctorate degree, but who also possess a Master's Degree in Library Science.

Although the majority of a library staff will be extremely helpful and responsive to questions, it is recommended that an individual try to locate a book or an answer before approaching library staff for help. A person using a law library should assume that everyone in the law library is as busy as they are; therefore, he should observe standard library etiquette by returning each book to its proper location after use. Library patrons should understand how frustrating it is to search for a missing or misplaced volume.

Sources of Law

It is important to “know” the law, but it is even more important to be able to “find” the law; therefore, a paralegal's ability to do legal research is the basis for a flourishing career. Employers will be more concerned about a paralegal's ability to find accurate answers to questions than a final grade in a particular class. A paralegal incapable of performing legal research tasks accurately and efficiently will not be successful regardless of his high grades in coursework. A failure to adequately perform research can result in liability for legal malpractice. For example, in the California case of *Smith v. Lewis*, 530 P.2d 621, the California Supreme Court upheld a lower court decision to award \$100,000 to a former client by an attorney who had failed to conduct adequate legal research. The Court found that the attorney was obligated to conduct reasonable research. The ethical duty imposed on attorneys to provide competent representation to a client is incumbent upon those employed by attorneys as well.

As mentioned in previous chapters, there are numerous definitions to the word “law.” On an educational or theoretical level, the law is a system of rules that govern society so as to prevent chaos. On a practical level, U.S. Supreme Court Chief Justice Charles Evans Hughes suggested that the law “is what judges say it is.” It is the second view that has caused much concern because if a judge says what the law is, then the law may be biased on the basis of race, gender, or religion. Fortunately, safeguards are built into the American legal system to protect litigants from these situations.

In comparison to the expansion of litigation over the last thirty-years, early American history produced a fairly small number of cases. The increase in litigation has resulted from the change in American society from a rural society to an industrial one. The total number of new cases filed in various state courts exceeded one million in 1991.

Statistically, that means one in every 250 Americans has filed a case in court. Taking into account the previously pending cases, the number climbs to one in every two adults in America. Fortunately, an estimated 90 percent of these cases never make it to trial. Of the state cases that proceed to trial, a modest 10 percent are appealed and result in a published opinion. Even with this low percentage, when included with cases decided and published by the federal courts, roughly 50,000 cases are published each year in addition to the thousands of pages of statutes, administrative rules, regulation published annually by Congress and state legislatures.¹¹²

With the extensive amount of primary and secondary sources of laws printed each year, no individual can be expected to know all of the law. However, a law professional must be familiar with how to locate and use these authorities to perform case research. The giants in the legal publishing industry include:

¹¹² Deborah E. Bouchoux, *Legal Research & Writing for Paralegals*, p.14

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- West Publishing Company in St. Paul, Minnesota
- The Lawyers Cooperative Publishing Company in Rochester, New York
- Bancroft-Whitney Company in San Francisco, California (an affiliate of The Lawyers Co-op) ¹¹³

The above cited companies also publish nonbinding authorities such as encyclopedias. Other legal publishing companies include:

- Matthew Bender & Company
- Little, Brown and Company
- Michie Company
- Clark Boardman Callaghan Company

Several companies, such as Commerce Clearing House, Prentice Hall, and the Bureau of National Affairs, publish specialty material on various legal topics in loose-leaf form to be kept in ringed binders. This allows for frequent and fast upgrading of out-of-date material.

One of the general characteristics common among primary sources of law is that published cases are organized chronologically in the order in which the court issued the decisions. For example, a court will not designate a month as landlord-tenant month and only hear cases dealing with landlord-tenant law before moving on to other topics; rather, a court will hear a case involving burglary followed by a contract dispute followed by a probate matter. Accordingly, the cases will appear in volumes of books in the order they were decided.

Similarly, a legislature may enact laws during a given session relating to motor vehicles, regulation of the budget, licensing of real estate agents, and certification of security contractors. The publications of these statutes are in the order in which they were enacted as opposed to the subject matter, which can make research difficult. If an individual is asked to find cases dealing with landlord-tenant law, he will quickly find that these cases are not catalogued in one specific location but, rather, are scattered throughout several hundred volumes of cases. This obviously makes clear the need for a technique to obtain access to these primary authorities. For the most part, secondary sources, such as digests, will assist in locating primary authorities. For example, a secondary source such as a legal encyclopedia will explain landlord-tenant law and direct individuals to cases that are primary or binding authorities.

Constitution

The Constitution of the United States was adopted by representatives of the states to provide the framework under which the federal and state legal systems operate. To this end, the Constitution embodied three branches of government and enumerated their powers. The Constitution established that all remaining powers would revert to the states setting forth the relationship between the federal and state governments. The United States Constitution is the supreme law of the United States; neither Congress nor a state legislature can enact a law that conflicts with the U.S. Constitution. In other words, the U.S. Constitution is the umbrella over all U.S. governing bodies.

The federal government is made up of the legislative, executive, and judicial branches set forth by the U.S. Constitution, which specifies the association between each branch. As a result, the Constitution

¹¹³ Deborah E. Bouchoux, *Legal Research & Writing for Paralegals*, p.14

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formed a system of government in which each branch can monitor the activities of the other branches to prevent abuses. The different branches of government establish rules called laws. For the most part, laws in the United States are made by legislatures, courts, administrative agencies, and cities or counties.

A constitution is a document that establishes the structure of a government. A constitution provides for the organization of government, develops the basic rules of government, and prescribes the relationship between the government and its citizens. A constitution also characterizes the relationship between the institutions of government and is the highest form of law in a democracy. In the United States of America, the Bill of Rights, which is contained in the Amendments to the U.S Constitution, provides for the rights of individuals. A good legal researcher must be able to identify basic constitutional issues. When a legal question involves a constitutional concern, a researcher should begin his research by reviewing the relevant constitutional provisions.

Statutes

The Congress, the legislative branch of our federal government, consists of two chambers referred to as the *Senate* and the *House of Representatives*. Congress enacts laws referred to as statutes, which may result in new rules of law or may supersede or codify court rulings, which are often referred to as case law or common law. Statues, along with the United States Constitution, create a body of law referred to as *enacted law*.¹¹⁴

All *federal statutes* are passed by the United States Congress. Generally, federal statutes relate to federal matters such as bankruptcy, civil rights, commerce, Social Security, and federal taxes. As a general rule, a federal statute cannot conflict with the United States Constitution.

State statutes, which are enacted by the state's legislatures, generally relate to matters such as product liability, commercial law, workers' compensation, divorce, real property, medical malpractice, or other state concerns. A state statute impacts the state's residents and applies only to disputes arising within that state. No state statute can conflict with a federal statute.

Cases

In the United States, which has a *common law* system, a previously decided case is treated as a precedent. When similar circumstances exist in a subsequent case, a precedent is used as a source law. Therefore, it is imperative that a legal researcher know how to find and read court cases.

The United States District Courts are the trial courts in the federal system. The district courts are scattered throughout the fifty states, the District of Columbia, and the territories and possessions of the United States. The decisions of the United States District Courts are published in the Federal Supplement, First or Second Series.

The United States Courts of Appeal, also called circuit courts or appellate courts, are intermediate courts in the federal system. The United States is divided into twelve geographical areas called "circuits," with a court of appeal in each of these circuits. Each circuit is allotted a number and will generally have several states under their jurisdiction. Attorneys and paralegals must know which circuit covers the state in which they are working. Currently, the Fifth Circuit covers Mississippi, Texas, and Louisiana. Originally, the Fifth Circuit, covered Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida; however, in 1981, the Eleventh Circuit was assigned to cover Alabama, Georgia, and Florida in an effort to relieve the pressure of an ever-increasing caseload. The decisions of the federal appellate courts are reported in the Federal Reporter, First, Second, or Third Series.

¹¹⁴ Andrea B. Yelin & Hope R. Samborn, *Legal Research and Writing Handbook*, p.10

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The United States Supreme Court consists of eight Associate Justices and one Chief Justice. Although the Chief Justice is paid more than the Associate Justices and has prestige and certain authority accorded to him by virtue of the office, the Chief Justice's vote counts equally with that of any Associate Justice. The Chief Justice, as the presiding officer of the Supreme Court, is responsible for administration of the Court and leadership of the federal judicial system. Upon the death or resignation of a Chief Justice, the President has authority to appoint one of the eight existing associate justices to the position of Chief Justice or may appoint an "unknown" as Chief Justice. The decisions and orders issued by the United States Supreme Court are reported in West's Supreme Court Reporter, and by the court itself.

Courts are organized in a hierarchical manner. *Trial courts* are the lowest level of courts; an aggrieved party may appeal to a higher court, usually referred to as an *appellate court*. The party taking appeal is referred to as an *appellant*, and the party defending the appeal is an *appellee*. Generally, parties are not allowed to introduce evidence into an appellate court; rather, the appellate court reviews the record from the trial court. A written argument to a court is called a *brief*. A person who loses a case in the appellate court may seek appeal or review by an even higher court, usually referred to as a supreme court. A state *supreme court* may affirm, reverse, or remand a matter.

All cases adhere to a standard citation protocol. Generally, you will receive the case name, the volume number of the set in which the case is published, the name of the set in which the case appears, the page on which it begins, and the year it was decided, for example, in the case of *Brown v. Board of Education*, 347 U.S. 483 (1954).

- The case name is *Brown v. Board of Education*.
- The case is located in volume 347.
- The case is found in a set of books entitled *United States Reports*.
- The case begins on page 483 of volume 347.
- The case was decided in 1954.

The state court structure resembles that of the federal system, and court cases are cited in the same manner. The trial courts are the lowest level of courts and sometimes include juvenile, probate, misdemeanor, and small claims courts. Trial court decisions are usually not published. Typically, each state has a court of appeals with the state Supreme Court serving as the highest appeals court. In some states, the highest state court is referred to by other names. For instance, in New York, a trial court is referred to as the Supreme Court and the highest appellate court is called the Court of Appeals. The decisions of appellate courts are usually published.¹¹⁵

In legal research, sources that contain actual law, such as a statute, case, ordinance, or regulation, are referred to as *primary sources* of law. Law libraries not only maintain these primary sources of law but also have secondary sources of law, which are filled with literature that interprets or explains primary sources of law. Some law libraries also contain books and indexes to assist individuals in finding cases and laws.¹¹⁶

¹¹⁵ Steve Barber, Mark A. McCormick, *Legal Research*, p.14

¹¹⁶ Steve Barber, Mark A. McCormick, *Legal Research*, p.4

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The law varies from state to state. For example, Louisiana laws are distinct from Mississippi laws. Also, federal law is distinctively different than state law. In conducting research, an individual must quickly identify which jurisdiction's law is applicable. A person needs to research Louisiana law if the problem involves a Louisiana situation. If the case involves a federal matter, then research should center on federal statutes. A good researcher will look for laws that are binding on the parties. In court cases, a *binding authority* refers to a case decided by a court of equal or higher ranking in the same jurisdiction.¹¹⁷

There are instances when an individual performing research work will find no relevant authority within the appropriate jurisdiction. Under these circumstances, a person may look to cases from other jurisdictions to find relevant decisions. For example, a court in Mississippi may consider a decision by a court in Alabama. However, legal authority from other jurisdictions is not binding. Authority that is not binding on the resolution of a particular problem is called *persuasive authority*. Another example of persuasive authority is a decision made by an inferior court, which is not binding on a higher court even when the court is in the same jurisdiction. Other forms of persuasive authority include books or articles about the law.¹¹⁸

Primary Authorities (binding)¹¹⁹

<u>Authorities</u>	<u>Source</u>
Cases	Judiciary
Constitutions	Legislature (or vote of the people)
Statutes	Legislature
Administrative Regulations	Administrative Agencies
Executive Orders	Executive Officials
Treaties	Executive Branch

Secondary Authorities (persuasive)

<u>Authorities</u>
Encyclopedias
Law Review Articles
Periodical Publications
Treatises and Texts
Dictionaries
Attorneys General Opinions
Restatements
Annotations
Foreign Sources
Form Books
Practice Guides (<i>such as jury instructions, opinions on ethics</i>)

¹¹⁷ Steve Barber, Mark A. McCormick, *Legal Research*, p.5

¹¹⁸ Steve Barber, Mark A. McCormick, *Legal Research*, p.5

¹¹⁹ Deborah E. Bouchoux, *Legal Research & Writing for Paralegals*, p.13

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In the American legal system, *stare decisis* promotes stability and uniformity in our legal system. However, blind adherence to a precedent in the face of an evolving society can, at times, result in an injustice. For example, the United States Supreme Court held in 1896 that “separate but equal” public facilities for blacks and whites were allowable under the law. This precedent fueled segregation for over fifty years. In 1954, the Supreme Court overruled its earlier decision – *Brown v. Board of Education*, 347 U.S. 483 – and determined that segregation solely on the basis of race in public schools violated the United States Constitution. In other words, strict adherence to *stare decisis* would have prevented reconsideration of the issue and resulted in the continuation of racial segregation.

Similarly, it was once customarily viewed by the law that a husband could not be charged with the rape of his wife. Experts argued that the marital relationship was a situation in which rape could not legally occur. However, over the years, this legal theory has been repeatedly challenged. It is evident that as society evolves, the law must also evolve. There must be a balance between society’s need for stability in its legal system and the need for flexibility, growth, and development when precedents have outlived their usefulness or may have resulted in injustices. Thus, the function of our courts is to achieve two seemingly contradictory objectives: the need for stability and the need for change. In recent years, the United States Supreme Court has increasingly departed from its previous rulings. Between 1789 and 1964, the United States Supreme Court overruled 88 of its precedents. From 1964 to 1990, the Court has overruled 108 of its precedents. These changes in law oblige attorneys and paralegals to do thorough and comprehensive legal research.¹²⁰

The premise of the American legal system lies in its rich and varied body of case law. Under the concept of *stare decisis*, it should be noted that only the actual rule of law pronounced in a case is binding. In other words, only the holding (decision) of the case is authoritative. The holding is referred to as the *ratio decidendi* or “reason of the decision.” The other wording in a case is referred to as *dictum*, an abbreviation of the term *obiter dictum*, Latin meaning for “a remark by the way.” In a case, dictum is persuasive language. For example, a court may reflect on what its decision would be if certain facts were different; this reflection is dictum and is not binding. In most instances, it is easy to distinguish the holding from the dictum. Generally, a court sets the stage for pronouncing its holding by means of explicit language. For instance, a court might say “We hold that the district attorney failed to timely institute prosecution and is therefore barred from retrying the matter.” However, there are some instances when locating the holding is more challenging and requires extensive effort. In some instances, the case may be difficult to read because of archaic and outdated wording.

Court Rules

An individual who presents a claim before a court is subject to that court’s set of practices and procedures or *court rules*, which are general court rules that apply to that court and similar courts. For instance, the Federal Rules of Civil Procedure applies to all federal district courts, while the Federal Rules of Appellate Procedure only applies to the federal Circuit Court of Appeal. The United States Supreme Court also has specially adopted rules specific to that court. Several courts have what are referred to as legal rules which are specific to that court. For instance, the Eastern District of Louisiana has local rules that specifically govern practice and procedures for parties in that court. Therefore, a person with a procedural question should begin his research by referencing the Federal Rules of Civil Procedure and the Local Rules of the Eastern District of Louisiana.

¹²⁰ Deborah E. Bouchoux, *Legal Research & Writing for Paralegals*, p.15

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Each state court system also has its own set of rules governing the practice in its courts. A number of states have patterned their trial court rules after the Federal Rules of Civil Procedure. It is important that legal researchers refer to the rules applicable to the court in which they are practicing, since most local rules are different from the federal rules.

Regulations

The law establishes an administrative agency to administer a statutory program. After the economic collapse of the Great Depression, Congress, to curtail any future economic catastrophe, delegated broad authority to various governmentally-enacted administrative agencies. There was an expectation that these agencies would gain expertise in, and be able to competently regulate, their particular fields. Administrative agencies are divided into two broad categories: independent agencies; and executive agencies.

Agencies created by Congress and given the power to act without political interference are called *independent agencies*. Examples of independent agencies include: the Social Security Administration and the Federal Reserve Board. The heads of these agencies are appointed for set terms and may only be removed from office for cause.

An agency set up as part of the executive branch is called an *executive agency*. The head of an executive agency serves at the discretion of the President. Two examples of executive agencies are the Department of Justice and the Department of Defense.

An administrative agency promulgates regulations that describe and make clear its function. Generally, regulations are found in *registers* in chronological order and in *administrative codes* by subject matter. A regulation is invalid if it conflicts with any statutory provision.

Administrative Decisions

The majority of administrative agencies are authorized to resolve disputes or issue orders through administrative proceedings. Similar to a judge in a court proceeding, an administrative hearing officer can take evidence and render a decision. The decisions from administrative hearings are referred to as administrative decisions and are sometimes published in the *Code of Federal Regulations* (CFR). Similar to court decisions, administrative decisions are sometimes treated as precedent. At other times, an administrative opinion may be issued to individuals relating to the consequences of their actions. For instance, the Internal Revenue Service has issued opinions on whether an individual can claim certain deductions or exemptions. Administrative rulings may be made by agencies on matters of general concern.¹²¹

Charters and Ordinances

Cities, counties and other local units of government have municipal charters to organize the institutions within that unit of government. Charters function much like state and federal constitutions. These local units pass laws called ordinances. Ordinances are specific to the concerns of a particular city or county. For instance, the city of New Orleans has ordinances on zoning, building permits, building restrictions, business markets, and the playing of music or musical instruments.

Researching

There are varied approaches to legal research. In fact, there is no absolute approach. Every research situation is distinctive. Some researchers may be familiar with the law being researched, while

¹²¹ Steve Barber, Mark A. McCormick, *Legal Research*, p.20

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others will have no knowledge in that particular area. As such, their research approaches would obviously not be the same.

The objective of a researcher presented with a question of law is to locate the primary source of information related to that question as proficiently as possible. Techniques for finding and explaining the law vary depending on the legal publisher and other factors. Publishing companies compete on finding the best way to answer legal questions. For example, in attempting to find a specific case, one researcher may begin with the digest, another with an encyclopedia, and a third with a treatise.¹²²

Two threshold questions must be answered by every researcher before starting his research. First, what is the source of authority? In other words, is there a constitutional provision, statute, regulation, court rule, case, or some authority involved? Second, what jurisdictional law applies in the case? It would be unnecessary to search for a Texas statute when doing research on a Louisiana case. Similarly, it makes no sense to search through regulatory authority when the answer to the question is in case law. Once the

threshold questions are resolved, it becomes easy to select the best tools to locate the primary authority. A paralegal must know which of the legal systems is best designed to find or explain primary authority. In many instances, research systems start with an updated index to view the most current laws.¹²³

Legal Indexes

After threshold queries have been resolved, key words can be used to search in the index for the specific information site and the reference. Although the design may vary between publishers, the majority of law books contain a topical index. This is often referred to as the table of contents, and is located in the front of the book. A subject-matter or descriptive word index is located toward the back of the book. Much of the law is composed chronologically, so familiarity with an index system is critical. For example, cases are assembled in a Federal Reporter by the date of the decision, so a case decided March 1, 2012, will precede a case decided on March 12, 2012.

It is important for paralegals to search under the right words in an index. The **TAPP** rule is the best way to penetrate a legal index. TAPP is an acronym, which stands for Things, Actions, Persons, and Places. A good researcher recognizes and categorizes facts into terms or keywords a publisher may have used to index a particular legal problem. For example,

A client's child, age 15, is bitten by a neighbor's dog while crossing the neighbor's backyard in Marrero, Louisiana. The dog has never bitten anyone before, but it has snarled at others. The lawyer for whom you work is concerned because in some states an owner is not liable unless the dog has bitten someone before (the dog gets one free bite). He wants his paralegal to research Louisiana law on this subject: Is Louisiana a one-bite or a two-bite state?

Using the TAPP rules, the researcher must first identify what *thing* is involved. In the example provided, the thing involved is a "dog," an "animal" or a "pet." Secondly, the researcher must determine the *action* involved. For instance, the above scenario would likely be a negligence or tort action. In deciding what kind of action is involved, it may be helpful to consider what relief is being sought or what defense is involved.¹²⁴

¹²² Steve Barber, Mark A. McCormick, *Legal Research*, p.20

¹²³ Steve Barber, Mark A. McCormick, *Legal Research*, p.21

¹²⁴ Steve Barber, Mark A. McCormick, *Legal Research*, p.23

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The TAPP rule helps a researcher to rethink factual problems because it requires him to think in concrete terms as opposed to abstract terms. The rule allows a researcher to access most legal indexes because most are prepared with the TAPP rule in mind. All legal systems use indexing to gain access to the legal information contained in the system.

Secondary Sources

The training a lawyer receives covers areas such as torts, civil procedure, contracts, property, and constitutional law. However, not all paralegals receive such in depth training. As a result, a paralegal must be acquainted with the general legal principles related to his research. To resolve a legal problem, he must begin by identifying the general legal principles. Then, he can narrow the search to more specific principles. In every situation, a researcher always searches for the primary authority.

Many publishers issue *pocket parts* which are pamphlets designed to fit in a pocket holder in the back of a book. Some publishers send a new set of pocket supplements to subscribers, annually, to update the supplements from the previous period. Other publishers prefer to replace the pamphlets or use pamphlets along with supplements. Some publishers prefer to use a *loose-leaf system*. In a *loose-leaf system*, new pages replace outdated pages. In addition, some publishers send new volumes to subscribers, also called *replacement volumes*. When this occurs, subscribers generally discard the old volumes. There are numerous tools used by publishers to update their volumes with recent changes in the law.¹²⁵

Legal research must be continually updated. Although most lawyers supervise research, they often rely upon paralegals to provide this updated research. A failure to provide current research can result in a client receiving erroneous information. In such an instance, a paralegal can be fired, and an attorney can be sued for malpractice by a client who is aggrieved by a decision based on erroneous information.

Legal Citations

There are certain conventional rules that apply to citing a newspaper, a magazine, or a book. A typical citation includes a title, publisher, and date. Similarly, legal researches use citations. A legal citation is a shorthand reference to a legal authority used by legal professionals to reference cases, statutes, regulations, or any other legal authorities. It is imperative that a paralegal be familiar with how to read and write legal citations.

A citation to an alternative source for the same authority is called a *parallel citation*. Some cases are reported in official and unofficial publications. For instance, *Roe v. Wade* is reported in the Supreme Court Report – an official reporter published by West Publishing Company – and in the United States Supreme Court Reports - Lawyer's Edition, an unofficial reporter published by Lawyer's Cooperative Publishing Company.¹²⁶

Today, however, computer technology has become an integral part of the legal research process. A researcher can quickly find information on primary and secondary sources of law through the use of software programs and storage devices, such as compact discs, or be connected to internet online sites, such LEXIS or WESTLAW.

¹²⁵ Steve Barber, Mark A. McCormick, *Legal Research*, p.25

¹²⁶ Steve Barber, Mark A. McCormick, *Legal Research*, p.27

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Additionally, archaic laws can be found on microfilm or ultra-fiche media. Although some lawyers continue to be intimidated by technology, most understand the importance of computer-assisted legal research. A paralegal who is thoroughly familiar with computers can make himself a valuable asset to a law firm. In any event, an effective paralegal is familiar with both traditional and modern approaches to legal research.

After all, the ultimate goal of all research is not objectivity, but truth.

—Helene Deutsch

REVIEW QUESTIONS

1. What is the most important skill to be learned in the legal profession? Why?
2. What types of institutions maintain their own law libraries. Explain.
3. Explain the multi-tiered governmental system of the United States.
4. True or False.
One of the general characteristics common amongst primary sources is that they are organized in chronological order. What does that mean when you are conducting research?
5. Based on the text, write examples of how cases from each of the following courts may be cited: *Louisiana First Circuit Court of Appeal, the Louisiana Supreme Court, the United States Eastern District of Louisiana, the United States Fifth Circuit Court of Appeal, and the United States Supreme Court.*

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CHAPTER 9: COMMON LAW

This chapter focuses on the general aspects of the common law, including its meaning, character, origin, acceptance, functions, variations, and abrogation.

Common Law in General

By definition, common law incorporates rules of law which are not based upon any expressed statute or other written declaration, but relies instead upon principles established by court decisions. The early writers on English Law referred to common law as rules that had come to be recognized as the law of the land, not through their enactment by Parliament, but by common application, societal customs, and prior court decisions. Common law is the law of necessity and is applied in the absence of a controlling statutory law.¹²⁷

Common law is the system of rules and declarations of principles from which our juridical ideals and legal definitions are derived. Although the common law is derived from the court decisions, it is not limited to published judicial precedent; its substance is interwoven with rich traditions, basic philosophies, and common sense. Common law can be considered the embodiment of broad and comprehensive unwritten rules. Common law is inspired by common sense and an innate sense of justice and is adopted by common consent for the regulation and government of human affairs.

The term “common law of England,” which is often found in American statutes and decisions, is not confined to the law as declared by English courts. It refers to the general system of law which prevails in England and, by adoption, in the United States as distinguished from the Roman, or civil law system. Blackstone’s Commentaries have been accepted as a satisfactory exposition of the common law of England.¹²⁸

Evolution

Common law is dynamic and growing, not a stagnant pool, but a moving stream. The best interests of a community are most aptly derived from prior opinions and well-considered judgments. The common law has an inherent capacity for growth and change, which can be attributed to application of reason and common sense to an evolving society and the needs of the community it serves. Common law continuously expands and evolves to meet the needs of a changing civilization, adjusting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country.

¹²⁷ American Jurisprudence, Second Edition

¹²⁸ American Jurisprudence, Second Edition

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The leading cause for the molding and remodeling of common-law principles is to soundly serve the public welfare and the true interests of justice. The common-law system is not paralyzed when there are no legal precedents because it is endowed with the judicial flexibility to meet new situations. The evolution of common law and its adaptation to modern concerns should not impose unreasonable burdens or unachievable duties. However, it must be noted that social and economic shifts resulting in change to common law are not always purely evolutionary.¹²⁹

Origin

The common law, which originated in England as ancient local rules and customs, evolved in the King's courts into the practical principles by which it continues to operate. Common law was brought to this land with the first English colonists, who claimed the system as their birthright. Common law continued in full force in the thirteen original colonies, and after the American Revolution, it was adopted by each of the states as well as the national government of the new nation. As new states were formed, the principles of the common law were made applicable by express provision or force of judicial decisions.

In instances when states were formed from territory in which other systems of law had originally prevailed, a legislative enactment or judicial decision determined which system prevailed. As a result, the common law has generally been adopted by statute or constitutional provision in every state. Although civil law principles influence the course of jurisprudence in some states, the terms by which the common law was adopted do not preclude their application.

English common-law and judicial decisions

The common law of England was the basic component of the common laws as adopted by American courts. However, the judicial decisions of the courts of England are not deemed to be part of the common law, merely expositions of it. The courts of this country may look to the decisions of others states of the Union as well as to those of the English courts to ascertain the principles and rules of the common law. However, the courts of this country are not required to adhere to the decisions of the English common-law courts. For example, in *Carter v. Berry*, 140 S.2d 843 (1962), a Mississippi Court refused to follow the precedent of an 1817 leading English case, stating, "The common law should be, but is not always, a product of rational processes and growth. This question is new in this jurisdiction. It is not good logic or sound law."

English Statutes

As long as English statutes were pertinent to American institutions and conditions, they were included in the American common law system. Although some courts hold that such ancient statutes are not strictly a part of the common law, the statutes remain a part of our judicial heritage and are interpreted and applied in that light. By adopting the English common law, the construction the English courts had placed on these statutes was also adopted. However, after the establishment of the American common law, each state interpreted the common law and its accompanying English statutes as appropriate.

Equity

Equity principles are part of the common law adopted in this country. In its broadest sense, the term "common law" includes doctrines of equity jurisprudence which were not expressed in legislative

¹²⁹ American Jurisprudence, Second Edition

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enactments. For instance, by judicial construction, Florida common law includes the substantive principles of equity as well as of law.¹³⁰

Law merchant

Law merchant, or *lex mercatoria*, which developed over the years as a result of the growth of international trade, is the most international branch of law, providing an organization of the rules of law and business conduct of numerous nations. Although it may not be patently evident upon initial study, the rules of law merchant were based on and established in English common law. Law merchant, referred to as the law regarding the negotiability of commercial paper, developed before the enactment of any statute on the subject and originated under long-established custom and usage. The law merchant is a part of the common law and governs bills of exchange but does not, as common law, apply to promissory notes.

In the Judiciary Act of 1789, the first Congress declared that jurisdiction over admiralty and maritime matters rested exclusively with the federal courts; however, it saved to suitors “the right of a common-law remedy, where the common law is competent to give it.” This can occur when a state court has concurrent jurisdiction with an admiralty court under the “saving to suitors” clause, and the action is brought into the state court. In that case, the substantive law of the admiralty court and the procedural law of the state are both applied.

Christianity

Although Christianity is popularly considered as part of the common law, it is not a controlling factor in law. Christianity is only a part of the common law in the sense that it is interwoven into the fabric of our society as the basis of many of our society’s ethics. Christianity, however, is not a controlling factor in law. When a controversial question arises in law, the general rule of the common law upholding morality, decency, and good order is applied, not the imposition of any narrow view of custom, morality, or decency.¹³¹

Ecclesiastical Law

Since ecclesiastical courts were never established in the United States, the code of law enforced in these courts cannot be considered as part of the common law as it existed in the colonies. However, courts have held that the canon and civil laws administered by the ecclesiastical courts of England must be classed among the unwritten laws of England. Courts have also suggested that such laws should be used in the United States when there is a tribunal having jurisdiction to employ them. This is especially true if the rule of the ecclesiastical courts is better law than the rule announced by a common-law court.

Adoption

Common laws are laws made by a judge on a case based in fact and applied to specific circumstances. Unless there is a question by a higher court, courts are to follow the earlier case rulings, or precedents. The English landmark contract case of *Hadley v. Baxendale* comes to mind as one of the first common laws. The case determined that consequential damages arising from a breach of contract could not be recovered if the damages were not foreseeable. The court addressed the claim of *Hadley*, a mill owner, who had contracted with a courier, *Baxendale*, to deliver a crank to a machinist to repair. The courier was late, and the mill remained closed extra days because of the delay. Consequently, the mill lost more money than anticipated and attempted to obtain extra damages to recover the money lost from the

¹³⁰ *Soud v. Hike*, 56 So.2d 462 (Fla. 1952)

¹³¹ American Jurisprudence, Second Edition

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delay. The court found that the courier did not know the mill had only one crank and would be forced to remain closed. As such, the damages were not foreseeable to the courier, and the mill could not recover the extra damages. Although the case is hundreds of years old, the rule of law is still common today in American courts to resolve contract disputes.

The English common law is the basis of jurisprudence in all the states of the Union except for Louisiana, where the civil law prevails in civil matters. The basic and fundamental law of Louisiana is codal and statutory. Courts have held that common law rules must be followed in Louisiana when there is no express law on the subject. As a general rule, common law prevails throughout the United States except when modified or repealed by statute or constitutional provisions of an individual state under the following conditions:

- It is consistent with the states' constitution, statutes, or institutions.
- It is compatible with the state's views of liberty and sovereignty.
- It is applicable to the wants and needs of the people.

For example, Maryland, a common law state, adopted, as applicable, the English common law in its first constitution in 1776 and in each subsequent constitution. The District of Columbia, which derives its common law from Maryland, also includes principles of private international law with the rule of common law. Common law is not applicable at the federal level.

By statute and constitution

Although the common law prevails in the absence of express adoption, constitutional or statutory provisions in the majority of jurisdictions expressly declare the common law to be in force as long as it is applicable and adaptable to the conditions and needs of the people. It must also be consistent with the constitution and laws of the nation, state, or territory.

Generally, a constitutional or statutory provision incorporating the common law declared that it was adopted as it existed at a specified time, such as the fourth year of the reign of James I, the time of the American Revolution, or other particular times. However, when a statute adopting the common law fails to set forth any time for the ascertainment of that law, it is deemed that the legislature intended to adopt the common law in existence at the time of the statutes enactment.

The courts are not confined to English decisions rendered prior to the Declaration of Independence. In states where the common law prevails, the courts may refer to the decisions of English and American courts rendered prior to and subsequent to the enactment of a statute. For instance, the common law of England adopted by Texas in 1840 was not the law in existence in England at that time; rather, it was the law as had been declared by various state courts. Once a state adopts the common law, it becomes as much a rule of decision as if it had existed at the beginning of that state's political existence.

Limited Adoption

There are certain rules of the common law that are not enforceable in some localities regardless as to whether the unchanged common law has or has not been adopted as the law of the state. Common law rules are generally recognized and adopted when the said common law does not conflict with the federal or state constitutions, statutory laws, or political institutions of the state.

As a general rule, the adoption of the English common law is limited to those laws which are compatible with American views of liberty and sovereignty and are adaptable to the uncharacteristic

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conditions and circumstances of each state, the needs of its people, or are in harmony with the genius, spirit, and objects of its institutions. In effect, only the general nature of the common-law rules is adopted, not rules which are specific to a local or special matter. This practice of selective adoption results from the observation that common law consists not in the actual rules enforced by the decisions of the courts but in the principles from which these rules are derived.

In fact, some states have adopted common-law principles that were rejected or diametrically opposed to in England. Additionally, the different political and geographical conditions of each state may result in variations of the common law from state to state. Although there are disparities among the states, as a general rule, common-law principles cannot be unequal in different areas of the same state.

Modification or Abrogation by the Court

The courts are duty-bound to extend the common law in response to an evolving society; therefore, the common law cannot bar courts from discharging that duty because of statutory or constitutional provisions or the rule of *stare decisis*. The judiciary has competence and authority to abrogate or revise outdated common-law rules. Indeed, the courts are obliged to modernize the law according to present-day standards of wisdom and justice to keep it responsive to the demands of an evolving society. Thus, a court is not bound by early common-law rules unless they are supported by reason and logic.

The nature of common law makes it necessary that a rule of law be carefully scrutinized to ensure that the conditions and needs of the times have not so changed as to make further application of the rule an instrument of injustice. If deemed unsuitable to the circumstance of the people, or if conditions under which it is invoked are not reflective, a court is not bound by common law doctrine. Old rules determined to be outdated must be set aside and new rules established which are harmonious with the needs of society and the demands of justice. Subject to constitutional constraints, a common law rule may be changed by legislative enactment or judicial decision when it is found to be a vestige of the past, no longer suitable to the circumstances.

Limits on the powers of courts

Various decisions have established certain limitations on the power of the court to modify or abrogate the common law; in fact, there are some common law doctrines which cannot be judicially abrogated. Also, when common law is the rule of practice, courts are not free to authorize actions outside the scope of the common law. Additionally, some courts have declined to modify a common law rule on the basis that it is the function of the legislature to amend or repeal laws when it is patent that such change is better effected by legislative action. As a general rule, judicial change to the common law should be used only when necessary and completely avoided when there is no substantial agreement that such change is necessary.

Abrogation by statute or constitution

The power to modify or abolish common law rights or remedies lies with Congress; however, a state may supersede and abrogate the common law through its constitution. Unless prohibited by the state or federal constitution, a state may change or entirely abrogate rules of the common law by way of a legislative act. The grant of legislative power in a constitution confers the right to change the common law. For example, changes can be made with reference to administrative and remedial processes, and a state can change common law to create duties and liabilities which had not existed before.

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When feasible, statutory enactments are construed by courts to be consistent with common law. However, when inconsistency arises, the statute, if it is constitutional, is enforced. Legislation, as an expression of public policy, can shape and add substance to common law.

When a common law right, such as the right of inspection of corporate records by a shareholder, and a statute enact an analogous remedy, the statutory remedy is cumulative to the common-law remedy, unless it is enumerated as exclusive. In contrast, when a statute revises the common law and is clearly set forth as a substitute, the common law is repealed. When a statute revises any and all common law for which the statute was not included, the common law is abrogated. On the other hand, a partial codification of common law rules does not abolish the portion of the rule not encompassed by the statute. Although a statute may declare common law to be the rule of practice, it does not apply when the subject matter is fully covered by statute or rule.

Common sense is judgment without reflection, shared by an entire class, an entire nation, or the entire human race.

—Giambattista Vico

REVIEW QUESTIONS

1. True or False.
Common law can be applied concurrently with controlling statutory law. Explain.
2. Write a paragraph giving a detailed description of what common law is.
3. Write a paragraph explaining why common law continuously expands and evolves.
4. What is the leading cause of the molding and remodeling of common law principles? Explain.

Written Assignment

At the end of each chapter, several questions are listed under the heading Review Questions. Please answer each one thoroughly and turn them in when you take your exam. The education director will be responsible for forwarding the material to Dr. Wayne Cook at Rayburn Correctional Center.

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WORDS TO REMEMBER

- *Paralegal*
- *Legal Research*
- *Library of Congress*
- *Law Libraries*
- *West Publishing*
- *Bancroft-Whitney Company*
- *The Lawyer Coop*
- *Federal Statues*
- *House of Representatives*
- *Senate*
- *State Statutes*
- *U.S. Fifth Sources*
- *U.S. Supreme Court*
- *Trial Court*
- *Appellate Courts*
- *Brief*
- *Primary Sources*
- *Binding Authority*
- *Persuasive Authority*
- *Stare Decisis*
- *Obiter Dictum*
- *Court Rules*
- *Administration Codes*
- *Regulations*
- *Independent Agencies*
- *Executive Agencies*
- *Legal Indexes*
- *TAPP Rule*
- *Pocket Part*
- *Common Law*
- *Law Merchant*
- *Judiciary Act of 1789*
- *Abrogation*

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WEEK 8

Lesson 8: Constitutional Law

Lesson Topics

- The United States Constitution.
- Fundamental American Constitutional Documents.
- State Constitutions.

Lesson Objectives

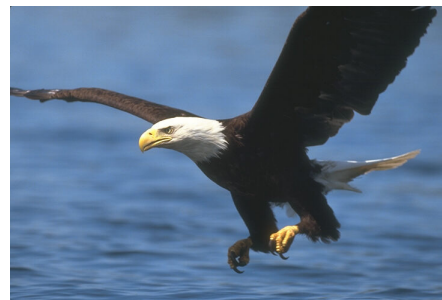
- Recognize the nature and origin of constitutional law.

Reading Assignment

Nordyke, Keith. J.D. 2012. Introduction to Law and the Paralegal Profession. Text: Chapter 10.

Text

CHAPTER 10: CONSTITUTIONAL LAW



This chapter offers an overview of the basic principles of the American constitutional system, including its nature, characteristics, functions, adoption, amendment, construction, operation, and effect. This chapter also briefly discusses the following:

- doctrines applicable to determination of the constitutionality of statutes
- sources, distribution, and separation of government powers and functions
- fundamental constitutional rights and guarantees
- general aspects of constitutional law as applicable to the United States Constitution and each state's constitution

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Definition and nature of “constitution” and “constitutional law”

The word “constitution,” as used herein, refers to a declaration of the basic rules or principles for the government of a nation or state. A constitution is the supreme written will of the people in regards to the framework of their government. When a constitution asserts a certain right or establishes a certain rule of law or procedure, it is the supreme law and paramount authority for all that is done in pursuance to its provisions. A constitution sets forth the exclusive means by which something must be done and embodies the basic values and common aspirations of the people for constitutional authority and the rule of law.

A constitution refers to a written document that is understood to have been enacted by the direct action of the people, providing for the form of their government and defining the powers of the several departments within it. A constitution creates a fundamental law which is absolute and unalterable except through amendment by the people from which it emanated. A state constitution is subject only to the limitations found in the Federal Constitution.

Constitutional law occupies a very important status in the jurisprudence of this country. The constitutional law deals with the understanding and construction of constitutions and their application to statutes and other public acts. Our federal and state constitutions are fashioned differently than those of most other countries because they contain broad principles that are capable of accommodating societal changes. Constitutional provisions gather meaning from the experience of the people. As such, modern society will mold and shape constitutional principles into new and useful forms.

Distinction between constitutions and statutes

A constitution contains the general principles upon which the government must function. A constitution does not exist merely to remedy existing conditions but to govern future contingencies. A constitution is made for the people and by the people, and is, above all, an embodiment of the will of the people, deriving its force directly from the people themselves. A constitution states broad general principles and builds the substantial foundation and general framework of the law and the government.

In contrast, statutes are enactments and rules for the government of conduct, promulgated by the legislative authority of a state. A statute is distinctively different from a constitution in that it provides some details of the subject it treats. Constitutions preempt contrary statutes or rules standing because they are supreme law. When a constitution is explicit on a particular matter, the constitution must be given full force and effect as the paramount law. Therefore, when a statute or other rule and a constitutional provision are in conflict, the constitutional provision must prevail. Some regard a constitution as a higher form of statutory law because when a court is searching for statutory law on a subject, and there is no relevant “statute,” the constitution is used as the point of reference. However, both constitutional and statutory law must be liberally construed to further the goal of allowing the people to express their will.



Characteristics of constitutions

A constitution must be a law for both the rulers and the people in times of war and in times of peace, protecting all classes of people at all times and under all circumstances. Although the permanent nature of a written constitution may at times seem to stand in the way of progress, constitutions contain broad principles capable of accommodating societal changes. In reality, federal and state constitutions protect the power of the people from the impulses of mere majorities.

The framers of our Constitution realized that they could not foresee all the conditions that might arise as the nation progressed nor could they establish all the law that might apply uniformly to the changing conditions of a community. Therefore, our constitution does not go into great detail regarding

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specific laws. Instead, the constitution outlines the general principles and directions to apply to all new facts which may come into existence. This generality permits flexibility in construction to meet the changing conditions of our society.

Purposes of constitutions

The most important function of a constitution is to prescribe the permanent framework for a system of government. The United States Constitution is fixed upon certain vital principles which form the basis of our three branched form of government, assigning to each branch its respective powers and

duties. Thus, the United States Constitution is a primer of basic rules for the conduct of a developing federal system with the intent of taking government “off the backs” of the people; it is not a rigid manual of technical rules. Other important functions of the United States Constitution include:

- safeguarding and promoting the public’s welfare
- establishing justice (including preserving the rights of individual citizens against arbitrary actions of the government)
- protecting the life, liberty, and property of the individual
- ensuring that we operate under a government of laws, not a government of men which might allow for public policy concerns to supersede constitutional mandate

Theoretical Basis of American Constitutional Law

The United States is a constitutional democracy: a form of government centered on the basic notion of the supreme law of the people expressed in written form, and, in accordance with which, all private rights are determined and all public authority administered. A people’s form of constitutional government represents one of the greatest and grandest struggles of humanity, marking the highest political accomplishment of the human race.

Notwithstanding the representative character of our political institutions, restrictions imposed by constitutional law on the action of the government are essential to the preservation of public and private rights. The right of sovereignty is vested in the people and exercised through the joint action of federal and state governments in the United States. The states, upon entering the union, preserved all the power and sovereignty of the original states except in matters surrendered to the federal government.

Effect of British constitutional law theory

Obviously, the United States Constitution is derived in many aspects from the English Declaration of Rights of 1689, the English common law, and the “unwritten” British constitution. The essential difference between the English and American Constitutions is not that the English Constitution is unwritten and the American Constitution is written. The greatest distinction between the two is that the English system is founded on the concept of parliamentary supremacy, and the American constitutional theory is founded on the concept that sovereignty resides with the people.

When the people are sovereign, the concept of their constitution exists apart from, and above, any transient legislative enactments. In drafting the United States Constitution, the framers of the Constitution were not seeking to imitate England’s government; rather, they set forth a written constitution to make clear the ways its government was different from the British one it replaced. One example of this distinction is that the Congress of the United States is not vested with judicial powers, as is the British Parliament although the right of the United States Senate to try federal impeachment cases is somewhat

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reminiscent of the judicial powers of the British Parliament. According to the theory of the English Constitution, absolute despotic power must reside somewhere in all governments. In Britain, this power is entrusted to Parliament. The power of the British Parliament is transcendent and cannot be limited for causes or persons within any bounds. In the United States, the President, all state and federal officials, and all state and federal courts and judges are as bound by the United States Constitution as any other citizen.

Fundamental American Constitutional Documents

Declaration of Independence

Included within the Declaration of Independence are statements of principles, which do not have the force of organic law. As such, these principles are not a basis for any judicial decisions as to the limits of rights and duties. However, it is always prudent to read the letter of the Constitution in the spirit of the Declaration of Independence. In fact, some courts have referred to the Declaration of Independence when determining constitutional questions.

Northwest Ordinance

Congress enacted the Northwest Ordinance on July 13, 1787. Officially entitled, “An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio,” this breakthrough legislation was the basic framework of government for an area covering more than a quarter-million square miles. The territories to which the ordinance applied included all of present-day Michigan, Indiana, Illinois, Wisconsin, Ohio and part of Minnesota.

The federal courts have held that the Northwest Ordinance was superseded by the adoption of the Constitution of the United States on the grounds that the Constitution places all the states of the Union on an equal basis; this would not have been the case had the Ordinance continued in force after the adoption of the organic law. Even after the adoption of the Constitution, however, some of the provisions of the Ordinance continued in force by acts of Congress during the period of the territorial government of the Northwest Territory.

Articles of Confederation

The Articles of Confederation was drafted in 1777, following the Revolutionary War, and submitted by the Continental Congress to the state legislatures for approval. However, the Articles was not approved by all the states until 1781. Many of the newly independent states did not favor a centralized executive authority. As a result, the government created by the Articles of Confederation amounted to little more than a loose confederation of states that derived its authority from acceptance of rules of the confederation by the state legislatures through ratification.

The Articles created a single branch of government, a Congress, with its members appointed by the state legislatures. Congress was given the sole and exclusive power to make war and peace, to enter into treaties and other alliances, to coin money, to establish a postal system, to send and receive ambassadors, and to control commerce with the Indian tribes. However, Congress was not given the authority to levy direct taxes or to exercise any authority over interstate and foreign commerce. Because of the ineffectiveness of the Articles of Confederation to provide a centralized government, in May 1787, a Constitutional Convention met to amend the Articles of Confederation. However, instead of a revised document, the United States Constitution was created.

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Effect of the United States Constitution

Under the Articles of Confederation, prior to adoption of the Constitution of the United States, each state existed as a separate sovereignty. The Constitution created a unified nation instead of a league of separate states. The Constitution was framed upon the theory that the peoples of different states must sink or swim together, and in the long run, the prosperity and salvation of this newly formed nation were in union, not division.

One purpose of the Federal Constitution was to provide for the common defense, protecting the newly united states against dangers from foreign nations; however, a greater purpose was to secure both union and harmony at home and safety against injustice. In other words, the Constitution was intended to protect the people of the United States against arbitrary action by their own government. The constitution was designed for the common and equal benefit of all the people of the United States and created a national economic union.

The standard features of the American system of government established by the United States Constitution include:

- a form of representative government
- a dual government involving both state and federal aspects
- the securing of individual rights and liberties through constitutional restrictions
- a separation of powers among the legislative, executive, and judicial branches

The Constitution of the United States was ordained and established, as declared in the Preamble, “by the people” of the United States and was voluntarily adopted for their protection. The constitution was specifically intended to affect individuals rather than states. As the supreme law of the land, the United States Constitution must be given full force and effect throughout the Union. Consequently, the Federal Constitution is, in reality, a part of the constitution of every state and may be so regarded in determining the validity of legislative acts.

The Federal Constitution applies the same to all fifty states and the District of Columbia. Additionally, Congress, by means of statutes, has extended specific provisions of the United States Constitution to Guam, the Virgin Islands, and Puerto Rico. Although Puerto Rico has attained the status of a commonwealth, it is still considered a “state” or “territory” for the purpose of various federal statutes.

State constitutions

In America, each state is free to establish its own constitution. In doing so, a state constitution may provide such restrictions on the powers of its government as it deems appropriate. The constitution and statutes of a particular state are to be considered as one body of law. Even so, a state’s statutory law is subordinate to its constitution, inasmuch as the state’s constitution is the supreme or basic law of the state and is second in that state only to the United States Constitution in importance and precedence. For example, the Constitution of the State of Louisiana is the supreme law of Louisiana, subject only to the supremacy of the United States Constitution.

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The words of the Constitution ... are so unrestricted by their intrinsic meaning or by their history or by tradition or by prior decisions that they leave the individual Justice free, if indeed they do not compel him, to gather meaning not from reading the Constitution but from reading life.

—Felix Frankfurter

REVIEW QUESTIONS

1. What is the purpose of a constitution? Explain.
2. What does the Federal Constitution embody? How is it similar to or different from a state constitution?
3. True or False.
Similar to other sources of law, the constitutions in the United States contain broad principles capable of accommodating societal changes.
4. According to the text, write a paragraph explaining the distinction between constitutions and statutes.
5. Write a paragraph explaining how the Federal Constitution impacts the constitution of every state.



Written Assignment

At the end of each chapter, several questions are listed under the heading Review Questions. Please answer each one thoroughly and turn them in when you take your exam. The education director will be responsible for forwarding the material to Dr. Wayne Cook at Rayburn Correctional Center.



WORDS TO REMEMBER

- *Constitutions*
- *Federal Constitution*
- *Northwest Ordinance*
- *State Constitutions*
- *Declaration of Independence*
- *Articles of Confederation*

WEEK 8

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WEEK 9

Lesson 9: Litigation

Lesson Topics

- Litigation Process.
- Appellant Process.
- Alternative to Litigation.
- Researching.

Lesson Objectives

- Recognize the difference between civil and criminal procedure.
- Learn to read, interpret, and apply Federal Rules of Civil Procedure.
- Explain what the basic litigation process is for all cases.
- Identify and perform the tasks of litigation paralegals.

Reading Assignment

Nordyke, Keith. J.D. 2012. Introduction to Law and the Paralegal Profession. Text: Chapter 11.

Text



CHAPTER 11: LITIGATION

This chapter will offer an overview of the procedural aspects of litigation with an emphasis on civil litigation. The chapter topics will include:

- reading, interpreting, and applying the *Federal Rules of Civil Procedure*
- differentiating between civil and criminal procedure
- outlining the basic litigation process

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- explaining what the basic litigation process is for all cases
- listing alternatives to litigation
- knowing where to find laws relating to litigation
- listing tasks performed by and identifying skills required of litigation paralegals

Litigation refers to the process of carrying on a lawsuit to seek a remedy or the enforcement of a right in a court of law. Civil Litigation refers to lawsuits that involve only noncriminal matters. Note that another term for a lawsuit is an *action*; these two terms are used interchangeably in this chapter. Unless stated otherwise, when the term *Rule* is used throughout this chapter, it refers to a rule of the Federal Rules of Civil Procedure.

THE LITIGATION PROCESS¹³²

Occurrence of the cause of action
Initial client conference
Preliminary investigation
Complaint and summons: prepare and serve
Responsive pleadings: answer, motions to dismiss, etc.
Discovery
Motions for entry of judgment without trial and other pretrial motions
Sometimes further discovery
Settlement attempts
Pretrial conferences
Trial preparation
Trial
Appeal (if necessary)
Enforcement of judgment

After conducting the initial client interview, the next step for the paralegal is to set up a file. A paralegal should investigate the factual claims made by the client and research the law to make sure that the client has a legally sufficient claim. To begin research, a paralegal should look first to the *statute of limitations*. In Louisiana, the statute of limitations is called a *prescription*. Most states have statutes which require a lawsuit to be filed within a specified time period after the incident. For example, a state statute may require that lawsuits for personal injury be filed within one year of the day the injury occurred. Failure to file a lawsuit within the specified time period will bar a party from ever filing the lawsuit, and the party may forfeit important legal rights. Thus, it is critical for the attorneys and paralegals to know the applicable statute of limitations.

Litigation is the heart of the American legal system. Everything that lawyers do is gauged either to avoid litigation or to prepare for litigation. As such, it is necessary for all paralegals to be familiar with litigation fundamentals, regardless of their practice area. However, a litigation paralegal must know substantially more than the fundamentals to succeed.

¹³² James W.H. McCord, J.D., *The Litigation Paralegal*, 1992

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Selecting the Proper Court

The three distinct issues involved in selecting the proper court are: (1) subject matter jurisdiction, the power or authority of a particular court to decide a specific type of case; (2) personal jurisdiction, the power or authority of a particular court over specific litigants; and (3) venue, the geographical location(s) within a jurisdiction where the case should be tried.

Subject Matter Jurisdiction

The United States District Court is a court of limited jurisdiction, meaning it does not have authority to decide all types of cases. The district court's subject matter jurisdiction is conferred by statute. When considering all the areas over which the U.S. District Court has subject matter jurisdiction, the three most frequently invoked are: (1) cases in which the United States, its agencies, or its officers are parties if named either as a plaintiff or as a defendant in the lawsuit under 28 U.S.C. §§ 1345, 1346; (2) cases involving a federal question when it is a “civil action arising under the Constitution, laws, or treaties of the United States,” under 28 U.S.C. § 1331; and (3) cases involving diversity of citizenship when it is a civil action “where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different states,” under 28 U.S.C. § 1332. Special rules apply in determining whether both parts of diversity jurisdiction requirements are met.

Diversity of Citizenship

The amount in controversy, exclusive of interest and costs, must exceed \$75,000 in diversity cases, which means that it must be at least \$75,000.¹³³ The attorney fees may be included to reach the jurisdictional minimum if a suit involves a statute which awards attorney fees. A solo plaintiff with more than one claim against a defendant may combine his claims to reach the required amount. However, if there are multiple plaintiffs, each plaintiff's claim(s) must exceed \$75,000; the claims of different plaintiffs cannot be combined to reach the required amount. However, if multiple plaintiffs are common owners of a property that is the subject of the dispute, the total value of the property is used to determine whether the minimum amount is met—not the value of each plaintiff's undivided interest in the property.¹³³

Supplemental Jurisdiction

When it was first codified as 28 U.S.C. § 1367, *supplemental jurisdiction* was a new term applied to old concepts. Supplemental jurisdiction allows additional claims and parties to be added to a pending federal case without satisfying the prerequisites of federal subject matter jurisdiction. Prior to the enactment of 28 U.S.C. § 1367, additional claims and parties were supplemented through the doctrines of pendent jurisdiction and ancillary jurisdiction.¹³⁴

The *pendent jurisdiction* doctrine allows for a state-created claim between parties to sometimes be added to a *similar federal question claim* pending in federal court between the same parties, regardless as to whether the federal court would have had jurisdiction if the state-created claim were filed separately.¹³⁵

Prior to the enactment of supplemental jurisdiction, the *ancillary jurisdiction* doctrine was used by judges in cases where diversity existed for at least one claim between one plaintiff and one defendant and where additional claims or additional parties were sought to be added to that core claim. For the most

¹³³ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.830

¹³⁴ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.832

¹³⁵ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.832

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part, ancillary jurisdiction authorized federal jurisdiction over claims made by parties other than the plaintiff when there was no independent federal subject matter jurisdiction for the claim.

Removal Jurisdiction

Removal jurisdiction developed as a result of defendants from other states being viewed with suspicion, resulting in favor of local plaintiffs in state court actions. Allowing an out-of-state defendant to remove the case to federal court was designed to minimize the “home town” advantage enjoyed by the plaintiff. State boundary lines no longer present the barriers they once did. Even so, removal jurisdiction serves as a method for defendants to avoid favoritism toward a plaintiff, whether real or perceived.¹³⁶

As a general rule, if a federal court can exercise original jurisdiction over a case when it is filed, a case filed in a state court may be removed by the defendant to federal court. Plaintiffs cannot seek removal. Removal cannot take place in a diversity case, except when the defendants are not citizens of the state where the state court action is filed. Also, a defendant must show that complete diversity of citizenship exists both at the time the original state action was filed and at the time when removal is sought.¹³⁷

Personal Jurisdiction

Personal jurisdiction, also called *in personam jurisdiction*, is the court’s authority to reach a decision affecting a particular person or entity. Personal jurisdiction incorporates the due process requirement that a party must be given notice and an opportunity to be heard. A notice requires a party to appear before a court; failure to appear before the court may result in sanctions.

Since a plaintiff voluntarily submits himself to the court’s jurisdiction when he files a complaint, the court’s personal jurisdiction over a plaintiff is established. Therefore, the issue of personal jurisdiction usually relates to a court’s authority over a defendant. Historically, personal jurisdiction was limited by state boundary lines; however, enactment of long-arm statutes and the conduct of defendants make it much easier to acquire authority over out-of-state defendants. Typically, a *long-arm statute* allows a court to “reach out with a long arm” and pull a defendant back to the forum state to defend himself when he has been accused of engaging in conduct that caused injury in the forum state. Both state and federal courts can use a long-arm statute to acquire personal jurisdiction over an out-of-state defendant.

Service of Process

As a general rule, service of process in federal cases may only be made within the jurisdiction of the state within which the federal court is located; however, Congress has enacted laws which enlarge the area of service in certain types of cases. For example, Rule 14 and Rule 19 of the Federal Rules of Civil Procedure may be served anywhere outside the state as long as it is within a 100-mile radius of the court where the case is pending. Service of process can be effectuated anywhere in the United States in interpleader cases and cases filed against a federal official or federal agency. In addition, service of process can be made in federal cases in accordance with a forum state’s long-arm statute. A defendant outside the forum state cannot be served with process if he cannot be served subject to one of these provisions.¹³⁸

¹³⁶ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.834

¹³⁷ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.834

¹³⁸ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.836

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Other than a summons, a complaint, or a subpoena, all federal service must be made by the U.S. Marshal, a deputy U.S. Marshal, or a person specially appointed to do so. However, a Marshal may serve a summons, complaint, or subpoena when a party has obtained a court order. Without a properly signed waiver of service by a defendant, a summons, complaint, or subpoena may be served by anyone 18 years of age or older who is not a party to the action. An attorney, as an officer of the court, may also serve a summons, complaint, or subpoena. Service of process can be effectuated upon corporations by service upon an officer or agent of the corporation. Also, service of process can be effectuated in any legal manner, including certified mail.

Venue

The geographic location within a jurisdiction where trial should occur is referred to as a *venue*. Once personal jurisdiction has been established, the venue becomes an issue. Typically, venue in a state court action is where the cause of action arose, where the defendant resides, or where the defendant has either a place of business or an agent. A state statute may provide for other types of venue as well. Pursuant to 28 U.S.C. § 1391 (2003), three basic methods to determine if venue exists in a particular federal judicial district are:

1. A defendant resides in the district and all defendants reside in the state in which the district is located. This applies to both federal question cases and to diversity cases.
2. A substantial part of the events or omissions giving rise to the claim occurred in the district, or a substantial part of the property that is the subject of the action is located in the district. Again, this applies to both federal question cases and to diversity cases.
3. All defendants are subject to personal jurisdiction in the district hearing diversity cases. A defendant “may be found” in the district, and there is no other district in which the action may be brought in federal question cases only.¹³⁹

Parties

In the context of litigation, a *party* is a principal in a lawsuit. In accordance with Rule 17(a), a party must be a real party in interest. One who was damaged or one who caused damage in a specific transaction or occurrence is considered a *real party in interest*. In other words, a manufacturer which produces a defective product may be a real party in interest. On the other hand, the manufacturer’s lender is not a real party in interest despite having a clear interest in the outcome of the suit. An entertainer who loses his vision permanently from using the defective product is a real party in interest. His spouse also may be a real party in interest if she is denied love and affection from the entertainer because of the injury. However, the entertainer’s manager would not be a real party in interest. A real party in interest is one who has *standing* in the suit.¹⁴⁰

Also, Federal Rules prescribe that a party must have the capacity to sue or to be sued. A minor or incompetent person lacks this capacity; as a result, such a person must sue or be sued through a legal representative. A *guardian ad litem* may be appointed by a court for the purpose of litigation if a guardian does not already exist. A corporation has the capacity to sue or to be sued because it is an artificial person created by the state of its incorporation.¹⁴¹

¹³⁹ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.837

¹⁴⁰ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.838

¹⁴¹ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.839

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Joinder of Parties

A single suit may join more than one plaintiff or more than one defendant if their claims arise from the same transaction or occurrence and their claims present a common question of law or of fact that applies to all parties. This condition is termed as a *permissive joinder*. When considering all claims, the common question must be a substantial one. However, other questions which are not shared by all parties do not bar joinder. For example, an airplane crash may result in multiple plaintiffs who qualify for permissive joinder. However, if any plaintiff does not wish to join in the joint action, he may file his own, separate action.¹⁴²

Intervention

A person who was not an original party to a suit may enter into a suit upon his own initiative pursuant to Rule 24. This process is called intervention, and the person who intervenes is the *intervenor*. An intervention may be either *of right* or *permissive*. A stranger to a lawsuit has an automatic right to intervene in the following situations:

- when he has an interest in the property or transaction which is the subject of a lawsuit
- when the resolution of the suit may impair that interest
- when his interest is not adequately represented by the existing parties¹⁴³

Interpleader

In an effort to protect a party from having to pay the same claim twice, *interpleader* is allowed in federal courts, particularly when a party is uncertain who the proper claimant is.

Impleader

When a defendant claims a third person is liable for all or part of the plaintiff's claim, he may *implead* that person by filing a third-party complaint. In a third-party complaint, the original defendant is identified as *defendant and third-party plaintiff*; and the third party accused of liability is identified as the *third-party defendant*.

Class Actions

A class action may be filed when there are large numbers of people with similar claims against the same party which could lead to many lawsuits and potentially inconsistent results. However, in order to do so, Federal Rules require that the following prerequisites must exist:

- The class must be so large that joinder of all of its members is not feasible.
- There must be questions of law or fact which are common to the class.
- The claims or defenses of the representatives of the class must be typical of class members.

¹⁴² Virginia K. Newman, J.D., *Paralegal Review Manual*, p.839

¹⁴³ Federal Rules of Civil Procedure

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- The representatives must represent the interests of the class fairly and adequately.

Consolidation

A court can order that multiple suits be consolidated for trial and judgment if the suits involve the same parties and contain common issues of law or fact even if the claims were set forth in separate complaints. For example, if a bankruptcy trustee for a national trucking company files 1000 separate lawsuits in the same court against 1000 separate freight customers to collect under-charges billed by the bankrupt trucking company over the preceding seven years, the court could order all cases consolidated for trial at the same time in this situation.

Pleading

Historically, pleading in state and federal courts has taken three different forms:

- *Common law pleading* required a different form for each type of action. This is a highly technical situation and is significant for historical reference more than anything else.
- *Code pleading* was designed to disclose the facts upon which the claim is based. Many states still follow the rules of code pleading.
- *Notice pleading* was designed to give sufficient notice of the claim or defense. The federal courts use notice pleading exclusively, with facts to be determined through discovery procedures and with issues to be determined at the mandatory pre-trial conference.¹⁴⁴

Rule 10 of the Federal Rules of Civil Procedure and other local court rules govern the form of pleadings in federal court. Only three pleadings are allowed under the Federal Rules of Civil Procedure: a complaint, an answer, and a reply to a counterclaim. Counterclaims, cross-claims, and third-party complaints are the procedural equivalents of a *complaint*. An *answer* is the proper responsive pleading to a cross-claim or to a third-party complaint. In contrast to state procedures, the plaintiff in a federal case is not compelled to respond to new issues raised by the answer. A *reply* is the proper responsive pleading to a counterclaim. Under federal procedure, it is presumed that the new issues are denied.

Complaint

In federal court, civil actions are commenced by filing a complaint. A federal complaint is comparable to a petition used to initiate civil actions in many state courts. As a general rule, the complaint should include¹⁴⁵:

- the caption of the case, which identifies the court, the parties, and the name of the pleading
- a jurisdictional allegation, a statement of the statute invoking the jurisdiction of the federal court
- a short, concise statement of the claim(s) or defense(s) showing that the pleader is entitled to relief

¹⁴⁴ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.843

¹⁴⁵ Federal Rules of Civil Procedure

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- a statement of the relief or remedy sought by the pleader, such as general and special damages, punitive damages, an injunction, or other relief
- the demand for judgment, also called the *ad damnum* clause, the prayer, or the “wherefore” clause, against the opposing party
- signature of the pleader’s attorney which indicates that he has made reasonable inquiry and believes the allegations are well grounded in fact – if it is determined that the pleading was filed frivolously, the attorney may be subject to personal sanctions by the court
- verification, if required, can be accomplished by an affidavit of the party, swearing that he has read the pleading and that the statements contained in it are true to the best of his knowledge, information, and belief

A defendant seeking to challenge the sufficiency of a complaint or matters associated with it must file a motion within the statutory time period. If such a motion is filed, an answer need not be filed until the matter is resolved. A motion is not a pleading; it is a request to the court for an order granting relief to the moving party. A motion can be made before, during, and after a trial.¹⁴⁶

Discovery

With certain limitations, discovery is a formal, pretrial process designed to give all parties access to the same evidence that will be available to all other parties at the time of trial. The theory behind this rule is that if each party knows what all other parties know about the case, a more accurate assessment of the case is possible, and a pretrial settlement is more probable. Discovery is available in both federal and state courts. Many state discovery rules mirror the federal rules very closely.

The purpose of discovery is to narrow the issues for trial, to avoid unfair surprise during trial, and to encourage settlement before trial. When parties use discovery procedures improperly, such as to harass, to delay, or to increase costs; the attorney may be subject to court sanction. In addition to the Federal Rules, the Model Rules of Professional Conduct provide disciplinary sanctions against attorneys who make frivolous discovery requests. Discovery is also designed to secure evidence that might not be available at the trial because of a witness’s age, poor health, or absence from the jurisdiction.¹⁴⁷

Discovery is *self-executing*, which means, parties implement discovery procedures on their own with little court intervention. Generally, attorneys for parties meet to establish an overall discovery plan. The attorneys also make certain required disclosures before any formal discovery takes place. For example, attorneys may agree to increase the number of depositions or interrogatories or to extend the time to answer discovery requests if it does not conflict with other rules. In cases involving mental or physical examinations, prior approval of the court is required. Otherwise, the court only becomes involved in the discovery process when problems arise that the parties cannot resolve between themselves. The Federal Rules of Civil Procedure allows local courts to decide whether to require filing of all discovery requests or responses with the court in a particular jurisdiction. Most local jurisdictions allow requests and responses to be *served* upon the appropriate party or parties, with copies sent to all other parties.

¹⁴⁶ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.846

¹⁴⁷ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.850

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Scope of Discovery

So long as it is not privileged information, Rule 26 prescribes that a party may discover anything that is relevant to the subject matter of the action or which is reasonably calculated to lead to admissible evidence. Federal Rules require a party to disclose the identity of persons likely to possess knowledge of any discoverable matter, even before formal discovery begins to calculate their damages, to describe or to provide relevant documents, and to disclose the existence and content of any related liability insurance policies. Similarly, the identity of expert witnesses and their opinions must be disclosed before trial. However, once again, privileged information need not be disclosed and cannot be discovered.

Termination without Trial

Every complaint filed does not result in a full trial on the merits of the case. For example, if Rule 12(b) defects in a complaint are not or cannot be cured, the complaint may be dismissed without a trial. A complaint may be dismissed with or without prejudice to future action. When a complaint is subject to *dismissal without prejudice*, the claim may be filed again if a party elects to do so. However, when a complaint is subject to *dismissal with prejudice*, the claim cannot be filed again under the doctrine of *res judicata*, which will be discussed later in this chapter.¹⁴⁸

Voluntary Dismissal

In federal court, a plaintiff may dismiss his own complaint *once* without prejudice if he does so before a defendant serves his answer or moves for summary judgment. However, once an answer or motion for summary judgment is filed, a plaintiff must obtain court permission to dismiss his complaint.¹⁴⁹

Involuntary Dismissal

In federal court, a complaint can be dismissed involuntarily. A complaint can also be dismissed involuntarily either for failure to prosecute the claim or for disobedience of a court order. An involuntary dismissal resulting from lack of jurisdiction, insufficient service of process, improper venue, or failure to join an indispensable party, is usually without prejudice.

Pretrial Conference

A judge is authorized by federal and state rules to conduct a pretrial conference. A pretrial conference is used for the following reasons:

- to identify uncontested issues
- to define and simplify contested issues
- to identify witnesses and exhibits for trial
- to set case progression deadlines for motions, discovery, and related matters

The theory behind a pretrial conference is that when parties are required to clearly define their legal and factual issues, they will be more willing to settle the case. A judge must issue a scheduling order within *120 days* of a complaint being filed, regardless as to whether a pretrial conference is held. Time

¹⁴⁸ Federal Rules of Civil Procedure

¹⁴⁹ Federal Rules of Civil Procedure

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limits concerning joinder of additional parties, amendment of pleadings, filing of motions, and completion of discovery are usually set forth within a *scheduling order*.¹⁵⁰

Trial Procedure

As a trial nears, a litigation team maintains contact with witnesses and organizes evidence collected during discovery for use at trial. Paralegals often prepare a trial notebook; this notebook usually contains final pleadings, outlines for an opening statement and closing argument, witness lists, exhibit lists, and short briefs on evidentiary issues which are expected to be presented at trial. Once a trial date is set, witnesses are again contacted, their testimony reviewed, and subpoenas are issued for all nonparty witnesses.¹⁵¹

The purpose of a trial is to introduce all admissible facts to an impartial fact finder. Thereafter, the fact finder decides which party should win based only on those facts which he believes to be true and the trial judge's instructions on the legal results of those facts. In a conventional trial, a jury decides the facts, and the judge decides the law. *Federal Rules of Civil Procedure* and the *Federal Rules of Evidence* govern substantially in a federal civil trial. State courts are governed by similar rules adopted in their states.

Trial by Jury

The right to a jury trial in all cases “at common law” in which the amount in controversy exceeds \$20.00 is guaranteed under the Seventh Amendment to the United States Constitution. However, this amendment is only applicable to federal trials.

Although tradition has dictated a 12-person jury, the Seventh Amendment does not set forth a specific number of individuals who must serve on a jury. Federal Rules only require a jury of “not fewer than six members. . . .” Unless the parties agree to continue, a mistrial will be declared when a jury shrinks to fewer than six members during the trial. However, to avoid such situations, many federal courts, through their local court rules, require that more than six jurors be seated. The theory behind this rule is that if one or more jurors need to be excused due to illness or for some other reason during the trial, there still are “not fewer than six” to render the verdict.¹⁵²

Although not every case is tried by a jury, a trial by jury is the hallmark of the American judicial system. However, juries are not permitted in equity cases. A party, who prefers to have his case tried by a judge, may waive his right to a trial by jury. In such an instance, a judge serves as the fact finder and the trial judge. As such, his final judgment may include findings of fact and conclusions of law. In federal court, a party desiring a jury trial must make such a request when his complaint is filed; otherwise, jury trial is considered to be waived.

Appellate Review

A party aggrieved by a loss at trial may file an appeal, requesting that a higher court review the trial proceedings for prejudicial error. Similarly, a winning party may request a higher court review if he does not win as much as he thinks he should have won. The party who appeals to a higher court is referred to as the *appellant*; and the party who defends an appeal is referred to as the *appellee*. In some instances, these parties are respectively identified as *petitioner* and *respondent*.

¹⁵⁰ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.864

¹⁵¹ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.865

¹⁵² Federal Rules of Civil Procedure

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Appellate Procedure

The *Federal Rules of Appellate Procedure* governs an appeal of a federal trial court's decision. An appeal of right is initiated by filing a *notice of appeal* with the clerk of the federal trial court within 30 days of entry of the final judgment or order in a case or within 30 days of motions under Rules 50, 52, or 59 if they are denied. When the United States or its officials or agencies is a party, the period is extended to 60 days. The period may be extended for an additional 30 days after the expiration date or for an additional ten days after the order of extension, whichever is later, if a party can show excusable neglect. Often referred to as a *cross-appeal*, once a notice of appeal is filed, another party may file a notice of appeal within 14 days after the first notice of appeal is filed or within any time period set by statute, whichever is later. However, a premature notice of appeal has no effect and must be re-filed at the proper time to perfect the appeal.

Stay Pending Appeal

An appellant, or the losing party, may file a motion for an *order of stay* to prevent enforcement of a judgment while the appeal is pending. If the order of stay is granted, a moving party is usually required to file a *supersedeas bond* in connection with the order. The bond assures a winning party that the judgment will be paid if an appellant ultimately loses the appeal. However, if a motion for order of stay is denied for any reason, the party who prevailed at trial is free to enforce the judgment regardless of a pending appeal.

Disposition by Appellate Court

Although an improperly filed appeal may be dismissed by the appellate court without decision, an appellate court typically disposes of an appeal by a decision through one of the following actions:

1. *Affirm* the lower court decision if, upon review of the record, the appellate court concludes that findings of fact were not clearly erroneous and that no prejudicial errors were made. The majority of appellate cases are disposed of in this way.
2. *Reverse* the lower court decision if, upon review of the record, the appellate court concludes either that findings of fact were clearly erroneous or that prejudicial errors were made, and the facts in the record are sufficient for the appellate court to render a fully informed judgment on the merits.
3. *Reverse and remand* with instructions for further proceedings if, upon review of the record, the appellate court concludes either that findings of fact were clearly erroneous or that prejudicial errors were made but the facts in the record are *insufficient* for the appellate court to render a fully informed judgment on the merits. For example, if the appellate court reverses the trial court's summary judgment, the record will not contain sufficient facts to render a fully informed judgment on the merits. In that situation, the case will be remanded to the trial court for further proceedings in this case, a trial.

Res Judicata

Res judicata literally means *the thing adjudged*. One of the basic principles of the American legal system is that every person is entitled to his day in court; however, he is entitled to only one. In other words, he cannot re-litigate the same case over and over again under the doctrine of *res judicata*. A party's litigation right is limited to one time when the issues or claims are the same. When a final judgment is rendered, the judgment is *res judicata* as to all future suits involving the same parties and the same claims. *Res judicata* can be asserted in a preliminary motion as a defect of a complaint or in an

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answer as an affirmative defense. Remember, a dismissal with prejudice to future claims operates as a judgment on the merits and invokes the *res judicata* doctrine.¹⁵³

Enforcement of Judgments

In a perfect world, a judgment, which is distinct from a decree, is an order or declaration by a court that one party owes money to another party. The party who owes the money is referred to as a *judgment debtor*, while the party to whom money is owed is referred to as a *judgment creditor*.¹⁵⁴

Generally, a judgment does not require that money owed be paid by a certain time or that it must be paid at all. Unless a judgment debtor voluntarily pays a judgment, a judgment creditor must initiate proceedings to enforce, or execute, a judgment. These proceedings are ancillary to the main litigation in which the judgment was entered.

Pursuant to Federal Rules, the procedure for an execution of judgment is the same in the state courts as it is in the federal district court where the state court is located. When a federal statute is involved, the statute governs to the extent that it applies; however, most federal judgment executions follow state rules.

Although the execution devices are similar, procedures for judgment execution vary from state to state. For example, most states provide some type of *writ of execution*, which is used to *levy* against the personal property assets of the judgment debtor, such as a vehicle, boat, or art collection, resulting in the seizure of the property by a local law enforcement official and its subsequent sale. After expenses of the levy and sale are deducted, the proceeds are applied against the judgment. If the proceeds are insufficient to satisfy the entire judgment, additional personal property may be seized and sold. Any other enforcement remedy available can be used either in place of or in addition to execution and levy.¹⁵⁵

*People are getting smarter nowadays; they are letting lawyers,
instead of their conscience, be their guide.*

—Will Rogers

REVIEW QUESTIONS

1. What is litigation? Explain.

¹⁵³ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.878

¹⁵⁴ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.878

¹⁵⁵ Virginia K. Newman, J.D., *Paralegal Review Manual*, p.879

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2. True or False.
Civil Litigation refers to lawsuits that involve only criminal matters. Explain.
3. In investigating a civil matter, where should a paralegal begin his research?
4. True or False.
Everything that lawyers do is gauged either to avoid litigation or to prepare for litigation.
5. Who may perform service of process with regard to a summons, complaint, or subpoena?
6. Traditionally, pleadings in state and federal court had three different forms. What were the forms? Explain the differences between the three.



Written Assignment

At the end of each chapter, several questions are listed under the heading Review Questions. Please answer each one thoroughly and turn them in when you take your exam. The education director will be responsible for forwarding the material to Dr. Wayne Cook at Rayburn Correctional Center.



WORDS TO REMEMBER

- | | |
|--------------------------------------|------------------------------------|
| ➤ <i>FRCP</i> | ➤ <i>Supplemental Jurisdiction</i> |
| ➤ <i>Litigation</i> | ➤ <i>Party</i> |
| ➤ <i>Statute of Limitations</i> | ➤ <i>Real Party Interest</i> |
| ➤ <i>Prescription</i> | ➤ <i>Guardian ad Litem</i> |
| ➤ <i>Venue</i> | ➤ <i>Permissive Joinder</i> |
| ➤ <i>Personal Jurisdiction</i> | ➤ <i>Interpleader</i> |
| ➤ <i>Subject Matter Jurisdiction</i> | ➤ <i>Consolidation</i> |
| ➤ <i>Diversity of Citizenship</i> | ➤ <i>Common law Pleading</i> |
| ➤ <i>Service of Process</i> | ➤ <i>Notice Pleading</i> |
| ➤ <i>Ancillary Jurisdiction</i> | ➤ <i>Code Pleading</i> |

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- *Complaint*
- *Answer*
- *Reply*
- *Discovery*
- *Self-Executing*
- *Petitioner*
- *Respondent*
- *Cross-Appeal*
- *Affirm*
- *Reverse*
- *Reverse and Remand*
- *Res Judicata*
- *Judgment Debtor*
- *Judgment Creditor*
- *Writ of Execution*

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WEEK 10

Lesson 10: Review for Exam

This week is devoted to reviewing for the exam. By now, you should have completed all the written assignments for the first four lessons. The *Review Questions* were designed to draw your attention to major ideas discussed in the text. These questions play a major role in helping you process the information and achieve a working understanding of it. As mentioned in your study guide, pay close attention to the Words to Remember. Your knowledge of these and the major ideas explored through the text will be tested on exam day.

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WEEK 11

Lesson 11: Family Law

Lesson Topics

- Family Law.

Lesson Objectives

- Analyze the law in relation to marriage, divorce, child support, commuity.

Reading Assignment

Nordyke, Keith. J.D. 2012. Introduction to Law and the Paralegal Profession. Text: Chapter 12.

Text



CHAPTER 12

FAMILY LAW

This chapter offers an overview of the Louisiana Civil Code, Louisiana Revised Statute, and case law on various issues of family law, including marriage, divorce, community property, child support, and alimony.

The Louisiana Civil Code is arguably one of the most important books in a law library because it ushers a person into society as a member of his parents' family and regulates his life until he reaches maturity. The Louisiana Civil Code prescribes the rules for the establishment of a family by marriage, the rights of children, and the disposition of an estate when a person dies either by law or by testament subject to law. The Civil Code tells how a person can acquire, own, use, and dispose of property onerously or gratuitously.

Codification

The romance of American history includes the discovery of Louisiana. It has long been held that the mouth of the Mississippi River was discovered by Spanish explorers in the early 1500s either by Alonso Alvarez de Pineda or by an expedition led by Panfilo de Narvaez; however, neither suggestion rests on conclusive evidence. The area remained largely unpopulated by the Europeans until 1712, when Louis XIV granted a Charter to French financier, Antoine Crozat, for the development, administration, and exploitation of Louisiana. The Charter required that the territory be governed by the Edicts, Ordinances and the Custom of Paris, which consisted of a collection of customary rules prevailing in the

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city of Paris. A new Charter issued to Scottish financier John Law’s Company of the West after Crozat surrendered his Charter in 1717 required the continued application of the same French laws. DeBienville, as governor of the Louisiana colony since 1702, laid out the city plan of New Orleans in 1718 and later moved the capital there in 1722. Unfortunately, John Law’s Company met with financial disaster and closed, surrendering its Charter in 1731. Louisiana then reverted back to a crown colony, but its citizens remained governed by the Edicts, Ordinances, and the Custom of Paris established in 1712.¹⁵⁶

The territory was ceded to Spain in 1762 by the Treaty of Fontainebleau, but French laws continued to apply until November 25, 1769, when a newly appointed Spanish Governor, Don Alexander O’Reilly, issued an Ordinance designed to reorganize an efficient government and administration of justice in accordance with the Spanish laws. The Ordinance was accompanied by Instructions as to “the manner of instituting suits, and of pronouncing judgments in general, in conformity to the laws of the *Nueva Recopilacion de Castilla*, and the *Recopilacion de las Indias*, (Spanish for the New Code of Castile, and the Code of the Indies), for the government of the judges and the parties pleading, until a more general knowledge of the Spanish language, and more extensive information upon these laws may be acquired.” The Instructions, often referred to as O’Reilly’s Code, constituted a brief code of practice destined to influence the development of the Louisiana procedural system. O’Reilly’s Code transformed Louisiana into a Spanish ultramarine province, governed by the same laws as the other Spanish possessions in America and subject to the same system of judicial administration. However, the French population demonstrated an unusually strong attachment to their own laws and customs. Rather than resorting to the official Spanish judicial system, the French population frequently settled affairs among themselves extra-judicially on the basis of French laws, customs, and usages.¹⁵⁷

The Louisiana Civil Code

In the 1870s, the Louisiana Civil Code emerged as the primary depository of private law in the state and as a charter for justice, equality, and liberty in the private relations of all persons. The Louisiana Civil Code was greatly influenced by, and was modeled after, the Code Napoleon, resembling it in structure, style, and substance. However, it had its own unique identity as a product of the Louisiana’s legal and cultural history. The Louisiana Civil Code of 1870 contained 1,275 more articles than the Code Napoleon. The provisions that had no equivalent in the Napoleonic Code had been drawn from the Justinian legislation, Spanish sources, French doctrinal works, and Louisiana statutes enacted since 1808.¹⁵⁸

Some of these statutes had introduced into the fabric of the civil law ingenious solutions, such as the usufruct of the surviving spouse in a community. Quite apart from these textual variations, however, the Louisiana Civil Code differed from the Napoleonic Code in its approach to the fundamental matter of sources of law. The extreme legal positivism of the Code Napoleon that has elevated legislation to the status of the single source of law may be contrasted with the genius of the Louisiana Civil Code that has always recognized custom as an authoritative source of law and equity as a source for the resolution of disputes in the absence of a positive law or custom.¹⁵⁹

¹⁵⁶ West’s Louisiana Statutes Annotated

¹⁵⁷ West’s Louisiana Statutes Annotated

¹⁵⁸ West’s Louisiana Statutes Annotated

¹⁵⁹ West’s Louisiana Statutes Annotated

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The Cultural Influence

The Louisiana Civil Code has exerted a profound cultural influence in the United States and abroad. Believed to be the most Romanist civil code ever created, the Louisiana Civil Code was a natural model for the drafting, style, and substance of civil codes in Latin America, including the Argentine Civil Code, which itself became a model for other civil codes. By a twist of fate, the Argentine Civil Code, in turn, deeply influenced the revision of the Louisiana Civil Code in the field of Conventional Obligations. More than one hundred articles of the Louisiana Civil Code of 1870 became a part of the Puerto Rico Civil Code. In the Caribbean Basin, the Civil Code of Santa Lucia was influenced by the Louisiana Code and the influence of the Preliminary Title of the Louisiana Civil Code on the Civil Code of Spain is apparent.¹⁶⁰

The cultural influence of the Louisiana Civil Code on the common law of sister states and on federal law has not been systematically studied, but scattered information suggests that the influence is real and significant.

Family Law

The body of formal, government-created laws that relates to the organization, behavior, rights, and responsibilities within a family is called family law. In most traditional societies, such as India, China, Japan, and in the tribes of the Americas, Australia, Africa, and the islands of the Pacific, the family has also been subject to customary law—the customs, conventions, and practices that are part of the social fabric. Since the late 20th century, particularly in the United States, some quasi-familial or non-familial relationships have been brought within the scope of family law, such as unmarried couples living together, homosexual arrangements, or single parent units. These new aspects of family law are still in the process of being developed; therefore, this article examines only those aspects traditionally considered to be family law.¹⁶¹

The issues dealt with by family law include: the rights and responsibilities of partners in marriage; the ownership and disposition of property; obligations of financial support; child rearing; and divorce. In some countries, legal controversies that arise from these issues are dealt with in family courts or social courts. In other countries, there may be courts that specialize in cases concerning children and young people and other courts that deal primarily in divorce.

Marriage

Marriage has always been strictly regulated by both customary law and religious practice. The ancient concept of marriage was that of a legal transaction between families. Economic dependence of women and ownership of property were key issues. A wedding signified a woman's separation from the control and economic dependence upon her family to domination by her husband. The woman's property also transferred from the father to the husband. This was commonly referred to as a dowry. Regardless as to whether the marriage was arranged or voluntary, the transfer of property was made.

By both customary and formal law, a woman ceased to be a separate legal personality when she married. Her husband acquired extensive rights to the ownership and administration of her property. A woman would regain these rights only if she became a widow. This was true in most of Western society and in the Far East until the 19th century. Exceptions were Imperial Russia, where a woman could deal with her property independently of her husband, and in the Muslim societies of the Middle East, where women have traditionally owned and managed their own property.¹⁶²

¹⁶⁰ West's Louisiana Statutes Annotated

¹⁶¹ The Compton Encyclopedia

¹⁶² The Compton Encyclopedia

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The rights of married people and the disposition of property were significantly affected by the emancipation of women, which began in Western societies in the 19th century and spread to other parts of the world in the late 20th century. In the 1920s, Scandinavian countries reformed their marriage laws to allow spouses to retain independent control of their property. West Germany introduced legal equality of the sexes into its constitution in the 1950s. Over the next few years, other Western nations undertook similar revisions. Similarly, communist countries have made changes.

China proclaimed a marriage code in 1950, which gave spouses equal rights in the control of marital property. The Soviet Union, Czechoslovakia, Poland, East Germany, and Romania enacted similar community regulations. In India, the Hindu Success Act of 1956 greatly enlarged the rights of Indian women with regard to control of marital property. Several countries considered reforming their marital property laws during the 1970s, including the United Kingdom, Canada, and Israel. However, in the United States, marital property laws come within the jurisdiction of the states, not the federal government. As a result, there is much inconsistency from state to state.¹⁶³

By the late 20th century, the common property-separate property issue had yet to be resolved. If a husband and wife maintain separate rights of property, they are much in the same situation as two unmarried adults. Separation of property allows independence to each but fails to provide for reasonable sharing unless specific items are placed in the joint ownership. Common property rights are workable in a successful marriage, but in cases of divorce they may pose difficult problems.

Fair division is often difficult, and third party interests—such as business partners or creditors—may find the property legally tied up for a long time. A fair resolution of the property issue must take into consideration the relative responsibilities of the spouses: Do both spouses work, or is one responsible for income and support while the other takes care of the home and raises the children? The trend in most countries has been to allow separate rights of property while providing rules for its division when there is a divorce.¹⁶⁴

In most countries, the law requires a husband to support his wife and children. Widows and children have certain rights of inheritance. Several nations have enacted legislation to ensure minimal standards of maintenance for children in the absence of the ability or the willingness of the father to support them. This is accomplished through the use of public funds. In modern society, due to an increase in the number of women working outside the home, the responsibility for a wife's own support and for adequate child support has fallen upon her nearly as much as upon her husband.

In Louisiana, marriage is a legal relationship between a man and a woman. Although a marriage contract is regarded in law only as a civil contract, its execution must be attended with certain solemnities prescribed by statute. The relationship and the contract are subject to special rules prescribed by law. The requirements for the contract of marriage are:

- the absence of legal impediment
- a marriage ceremony
- the free consent of the parties to take each other as husband and wife expressed at the ceremony.

¹⁶³ The Compton Encyclopedia

¹⁶⁴ The Compton Encyclopedia

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Impediments

In Louisiana, impediments to marriage include: ascendants and descendants; collaterals within the fourth degree, whether of the whole or of the half blood; and persons of the same sex cannot contract marriage. Also in Louisiana, a married person may not contract another marriage.¹⁶⁵

Required ceremony

The parties must participate in a marriage ceremony performed by a third person who is qualified, or reasonably believed by the parties to be qualified, to perform the ceremony. The parties must be present in person at the ceremony when the ceremony is conducted. Although the state affords full faith and credit to common-law marriages originating in other states, Louisiana does not recognize common-law marriages originating in Louisiana.

Consent

When one party does not freely consent to marriage, it is relatively null. Consent is not free when given under duress or when given by a person incapable of discernment. Upon application of the party who did not freely consent, the marriage may be declared null. However, if that party confirmed the marriage after recovering his liberty or regaining his discernment, the marriage may not be declared null. For example, if a husband lives with his wife as her husband for 73 days following the wedding, he cannot maintain an action for nullity of marriage or for separation on the ground that he mistakenly believed his wife was someone else.

Nullity of Marriage

When a marriage is contracted without a marriage ceremony, by procuration, or in violation of an impediment, it is absolutely null. Although a judicial decree of nullity is not required, any interested party may file an action to recognize the nullity. A defect in the licensing or ceremonial requirements does not absolutely nullify a marriage. However, when no ceremony is performed, a marriage is absolutely null pursuant to codal authority. A bigamous marriage is an absolute nullity and may be impeached by either of the contracting parties, or by any party of interest.¹⁶⁶

Nonetheless, an absolutely null marriage produces civil effects in favor of a party who contracted it in good faith as long as that party remains in good faith. When the cause of the nullity is one party's prior undissolved marriage, the civil effects continue in favor of the other party, regardless as to whether the latter party contracts a valid marriage. A marriage contracted by a party in good faith produces civil effects in favor of a child of the parties. However, a purported marriage between parties of the same sex does not produce any civil effects.¹⁶⁷

Mutual duties

In Louisiana, married persons owe each other fidelity, support, and assistance. As used herein, the term "fidelity" refers not only to the spouses' duty to refrain from adultery, but also to their mutual obligation to submit to each other's reasonable and normal sexual desires. Some Louisiana courts have held that the latter obligation is a necessary concomitant of marriage. Also, spouses mutually assume the moral and material direction of the family, exercise parental authority, and assume the moral and material obligations resulting therefrom. For example, spouses have a mutual obligation to support the children of their marriage.¹⁶⁸

¹⁶⁵ West's Louisiana Statutes Annotated

¹⁶⁶ West's Louisiana Statutes Annotated

¹⁶⁷ West's Louisiana Statutes Annotated

¹⁶⁸ West's Louisiana Statutes Annotated

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Surname

Although some married persons elect to use the surname of their spouse as their surname, in Louisiana, marriage does not change the name of either spouse. Under Louisiana law, the legal name of each spouse remains unchanged by marriage; however, the spouses are entitled to use each other's names as a matter of custom. Accordingly, a spouse's legal name cannot be changed on his birth certificate.

Termination of marriage

In Louisiana, a marriage terminates upon the death of either spouse, divorce, a judicial declaration of its nullity, when the marriage is relatively null, or the issuance of a court order authorizing the spouse of a person presumed dead to remarry, as provided by law.¹⁶⁹

Children

Family law with regard to children focuses upon the issues of legitimacy, adoption, custody, education, and control of the child's welfare.



For centuries, a child's legitimacy, which was based on whether his parents were married, was a matter of great significance because it was related to his maintenance and support as well as to his right of inheritance. Today, legitimacy has become less significant because most societies base the requirement for support on actual parentage as opposed to marriage. For instance, rights of inheritance have been allowed to children born to unmarried women. Legal maneuvers, such as adoption and legitimation, have also narrowed the difference between the legal status of illegitimate and legitimate children. In most nations, an illegitimate child is recognized as a member of society, if not of a family group. As such, these nations have passed laws to provide for support if there is no likelihood of parental maintenance.

Adoption and custody have long been regulated by law and enforced by the courts. In ancient societies, adoption was used for purposes of succession and inheritance. For instance, Julius Caesar, the Roman dictator, died without a legally recognized male heir; however, in his will, he had stipulated as his heir and successor his grandnephew, Gaius Octavius, who then took on Julius Caesar's name as well as his role. Today, adoption is associated with illegitimacy because of the custom of adopting children of unwed mothers. Issues of child custody are generally resolved by the courts on the principle of the "best interests" of the child. Although custody cases mostly arise in divorce proceedings, they have also become common in cases of child abuse and in other situations where the courts decide that it is better for a child not to be raised by the natural parents. In many cases, if the court approves or if the natural parent consents, the person or persons awarded custody are allowed to adopt the child.¹⁷⁰

As a result of an increase in modern compulsory public education, the schooling of children has largely been removed from the province of the parents and put under the jurisdiction of the state. Most countries require education until the late teen years. Currently, various systems of college, university, or career training have extended the educational process into the 20s.

¹⁶⁹ West's Louisiana Statutes Annotated

¹⁷⁰ The Compton Encyclopedia

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Filiation

In Louisiana, the legal relationship between a child and his parent is called *filiation*. Filiation is established by proof of maternity or paternity or by adoption.

Maternity or Paternity

In Louisiana, maternity may be established by a preponderance of the evidence that a child was born of a particular woman. The husband of the mother is presumed to be the father of a child born during the marriage or within three hundred days from the date of the termination of the marriage. If a child is born within three hundred days from the day of the termination of a marriage and his mother has married again before his birth, the first husband is presumed to be the father. If, however, the first husband obtains a judgment of disavowal of paternity of the child, the second husband is then presumed to be the father. The second husband may disavow paternity if he institutes a disavowal action within the one year preemptive period from the day that the judgment of disavowal obtained by the first husband is final.¹⁷¹

A husband who establishes by clear and convincing evidence that he is not the father may disavow paternity of a child, but not in a case where a child is born to his wife as a result of an assisted conception to which he consented. An action for disavowal of paternity is subject to a one year liberative prescription, which commences from the day a husband learns, or should have learned, of the birth of a child. If a husband lived separate and apart from the mother continuously during the three hundred days immediately preceding the birth of the child, the prescription period does not commence until the husband is notified in writing that a party has asserted that the husband is the father of a child.¹⁷²

When a prescription has commenced and the husband dies before the prescription has accrued, his successor whose interest is adversely affected may institute an action for disavowal of paternity. The action of a successor is subject to a one year liberative prescription, which commences from the day of the death of the husband. When a prescription has not yet commenced, the action of a successor is subject to a one year liberative prescription, which commences from the day the successor is notified in writing that a party has asserted that the deceased husband is the father of a child.¹⁷³

The mother of a child may also initiate an action to establish both that her former husband is not the father of the child and that her present husband is the father. The action may be initiated only if the present husband has acknowledged a child by authentic act or by signing the birth certificate. A mother must prove by clear and convincing evidence both that her former husband is not the father and that her present husband is the father.

The action by the mother shall be instituted within a preemptive period of one hundred eighty days from the marriage to her present husband and also within two years from the day of the birth of the child except as may otherwise be provided by law. A judgment shall not be rendered decreeing that the former husband is not the father of the child unless the judgment also decrees that the present husband is the father of the child.

In Louisiana, a man who marries the mother of a child not filiated to another man and who, with the concurrence of the mother, acknowledges a child by authentic act or by signing the birth certificate is presumed to be the father of that child. Also, a man may, by authentic act or by signing the birth certificate, acknowledge a child not filiated to another man. An acknowledgment creates a presumption that the man who acknowledges a child is the father. A presumption may be invoked only on behalf of the

¹⁷¹ West's Louisiana Statutes Annotated

¹⁷² West's Louisiana Statutes Annotated

¹⁷³ West's Louisiana Statutes Annotated

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child. Except as otherwise stipulated in custody, visitation, and child support cases, acknowledgment does not create a presumption in favor of the man who acknowledges the child. A man may disavow paternity of a child. An action for disavowal is subject to a one hundred and eighty day preemptive period, which commences from the day of the marriage or the acknowledgment, whichever occurs later.¹⁷⁴

A child may institute an action to prove paternity even though he is presumed to be the child of another man. When such an action is initiated after the death of the alleged father, a child must prove paternity by clear and convincing evidence. In succession cases, however, such action is subject to a one year preemptive period, which commences from the day of the death of the alleged father.¹⁷⁵

A man may institute an action to establish his paternity of a child at any time subject to statutory limitation. If the child is presumed to be the child of another man, the action must be initiated within one year from the day of the birth of the child. However, if a mother, in bad faith, deceived the father of the child regarding his paternity, an action may be initiated within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs. In all cases, however, an action must be instituted no later than one year from the day of the death of the child.¹⁷⁶

Effect of adoption

In adoption cases, an adopting parent, for all purposes, becomes the parent of the child, and the filiation between the child and his legal parent is terminated except as otherwise provided by law. However, an adopted child and his descendants retain the right to inherit from his former legal parent and the relatives of that parent.¹⁷⁷

In Louisiana, a person who has reached the legal age of majority may be adopted without judicial authorization only when the adoptive parent is the spouse or the surviving spouse of a parent of the person to be adopted. In other cases involving proposed adult adoptions, a court, upon joint petition of the adoptive parent and the person to be adopted, may authorize the adoption of a person who has attained the age of majority if the court finds after a hearing that the adoption is in the best interest of both parties. An adoptive parent and the person being adopted must consent to the adoption in an authentic act of adoption.¹⁷⁸

The spouse of the adoptive parent and the spouse of the person being adopted must also sign the act of adoption for the purpose of concurrence in the adoption. Neither party to an adult adoption and neither concurring spouse may consent by procuration or mandate. Without this concurrence, the act of adoption is absolutely null; however, concurrence does not establish the legal relationship of parent and child. An adoption is effective when an act of adult adoption and any judgment required to authorize the adoption are filed for registry.

¹⁷⁴ West's Louisiana Statutes Annotated

¹⁷⁵ West's Louisiana Statutes Annotated

¹⁷⁶ West's Louisiana Statutes Annotated

¹⁷⁷ West's Louisiana Statutes Annotated

¹⁷⁸ West's Louisiana Statutes Annotated

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Illegitimate children

In a general sense, illegitimate children belong to no family and have no relations. As such, they are not subject to the paternal authority even when they have been legally acknowledged. Nevertheless, nature and humanity compel certain reciprocal responsibilities between fathers and mothers and their illegitimate children. For instance, the following is applicable in Louisiana:

- fathers and mothers owe alimony to their illegitimate children when they are in need
- illegitimate children owe alimony to their father and mother if they are in need and the illegitimate children have the means of providing it.
- illegitimate children have a right to claim alimony not only from their father and mother but even from their heirs after their death.

In order to have a right to sue for this alimony, illegitimate children must have been legally acknowledged by both their father and mother or by either of them from whom they claim alimony, or they must have been declared to be their children by a judgment duly pronounced in cases in which they may be admitted to prove their paternal or maternal descent, and they must prove in a satisfactory manner that they stand absolutely in need of the alimony for their support.¹⁷⁹

In Louisiana, the requirement of paying alimony ceases when an illegitimate child is able to earn his subsistence by labor or whenever his father or mother has caused him to be instructed in an art, trade, or profession fit to procure himself a sufficient livelihood unless some continual sickness or infirmity prevents the child from working for his subsistence. When the father or mother of an illegitimate child has provided during his or her lifetime a sufficient maintenance for his or her illegitimate child or has made to him donations or other advantages which may be sufficient for that purpose, the debt of alimony ceases to be due from the estate.¹⁸⁰

Rules established with respect to alimony for legitimate children are similar to those for illegitimate children. In proceedings where custody of an illegitimate child who has been formally acknowledged by both parents is sought by both parents, custody must be awarded in accordance with the provisions on custody incident to divorce as set forth in statutory law. Likewise, in a proceeding for change of custody after an original award, custody must be awarded in accordance with statutory law.¹⁸¹

Emancipation

In Louisiana, there are three kinds of emancipation: judicial emancipation, emancipation by marriage, and limited emancipation by authentic act. A court, for good cause, may order the full or limited emancipation of a minor sixteen years of age or older. Full judicial emancipation confers all effects of majority on the person emancipated, unless otherwise provided by law. Limited judicial emancipation confers the effects of majority specified in the judgment of limited emancipation unless otherwise provided by law. When a judgment of emancipation is signed, judicial emancipation is effective. A marriage fully emancipates a minor. The termination of that marriage has no effect on the emancipation; it cannot be modified or terminated.¹⁸²

¹⁷⁹ West's Louisiana Statutes Annotated

¹⁸⁰ West's Louisiana Statutes Annotated

¹⁸¹ West's Louisiana Statutes Annotated

¹⁸² West's Louisiana Statutes Annotated

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An authentic act of limited emancipation confers upon a minor age sixteen or older the capacity to make the kinds of juridical acts specified therein. The act must be executed by the minor and by the parents of the minor if parental authority exists; if parental authority does not exist, the tutor of the minor must execute the act. However, all other effects of minority shall continue. Limited emancipation by authentic act is effective when the act is executed.¹⁸³

A court may modify or terminate its judgment of emancipation for good cause. A judgment modifying or terminating a judgment of emancipation is effective toward third persons as to immovable property when the judgment is filed for registry in the conveyance records of the parish in which the property is situated, and as to movables when the judgment is filed for registry in the conveyance records of the parish or parishes in which the minor was domiciled at the time of the judgment. A judgment modifying or terminating a judgment of emancipation does not affect the validity of an act made by the emancipated minor prior to the effective date of modification or termination.

The termination of judicial emancipation places the minor under the same authority to which he was subject prior to emancipation unless expressed otherwise by a court for good cause. The parties to an authentic act of limited emancipation may modify or terminate a limited emancipation by making a subsequent authentic act. In addition, a court may modify or terminate limited emancipation by authentic act for good cause.

Divorce

Divorce, the practice of dissolving a marriage, may be nearly as old as marriage itself and has always been strictly regulated by customary or formal law. Marriages that are found to be invalid for one reason or another may be annulled—a legal process that declares that no marriage ever existed.

In traditional societies governed by customary or religious law, a marriage was dissolved by a process called repudiation. One or both parties could repudiate, or disown, a marriage, and the woman and her property were transferred back to the control of her family. During the early Christian era, the

view arose that marriage was a sacrament, a religious bond that could not be dissolved. This view did away with repudiation in the West, but it is still practiced under Muslim law in the Middle East and Africa.¹⁸⁴ In modern legal systems, a variety of formulas have been established for divorce:

- divorce for fault, such as adultery, alcoholism, or imprisonment
- divorce by mutual agreement
- divorce on the grounds of incompatibility
- divorce on the grounds that the marriage contract has ceased to exist, e.g. one spouse disappears

According to statutory law in Louisiana, a divorce must be granted upon motion of a spouse when either spouse has filed a petition for divorce upon proof that the requisite period of time that the spouses have been living separate and apart continuously has elapsed from the service of petition, or from the execution of written waiver of service. When a spouse has committed adultery, or when a spouse has committed a felony and has been sentenced to death or imprisonment at hard labor, a divorce must also be

¹⁸³ West's Louisiana Statutes Annotated

¹⁸⁴ The Compton Encyclopedia

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granted on the petition of the other spouse upon proof that the spouses have been living separate and apart for the requisite period of time or more. This does not apply in the case of a covenant marriage.¹⁸⁵

The requisite periods of time set forth in accordance with the law are as follows:

- (1) One hundred eighty days when there are no minor children of the marriage; or upon a finding by a court that the other spouse has physically or sexually abused the spouse seeking divorce or a child of one of the spouses; or when a protective order or an injunction has been issued against the other spouse to protect the spouse seeking the divorce or a child of one of the spouses from abuse.
- (2) Three hundred sixty-five days when there are minor children of a marriage at the time a rule to show cause is filed in accordance with law or a petition is filed in accordance with the law.

If the parties reconcile prior to completion of the requisite time period, the cause of action for divorce is extinguished.

In a proceeding for divorce or subsequently, a spouse may request a determination of custody, visitation, or support of a minor child; support for a spouse; injunctive relief; use and occupancy of the family home or use of community movable or immovable items; or use of personal property.¹⁸⁶

Spousal Support

In a divorce proceeding, a court may award interim periodic support to a party or may award final periodic support to a party prior to the filing of a proceeding to terminate the marriage when a spouse has not been at fault and is in need of support. Based on the needs of that party and the ability of the other party to pay, that spouse may be awarded final periodic support in accordance with the law. The court must consider all relevant factors in determining the amount and duration of final support, including:

- (1) the income and means of the parties, including the liquidity of such means
- (2) the financial obligations of the parties
- (3) the earning capacity of the parties
- (4) the effect of custody of children upon a party's earning capacity
- (5) the time necessary for a claimant to acquire appropriate education, training, or employment
- (6) the health and age of the parties
- (7) the duration of the marriage
- (8) the tax consequences to either or both parties

The sum awarded under the law cannot exceed one-third of the obligor's net income. When a claim for final spousal support is pending at the time of the rendition of the judgment of divorce, an

¹⁸⁵ West's Louisiana Statutes Annotated

¹⁸⁶ West's Louisiana Statutes Annotated

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interim spousal support award must terminate upon rendition of a judgment awarding or denying final spousal support or one hundred eighty days from the rendition of judgment of divorce, whichever occurs first. An obligation to pay interim spousal support may be extended beyond one hundred eighty days from the rendition of judgment of divorce for good cause.¹⁸⁷

When the circumstances of either party materially changes, an award of periodic support may be modified or may be terminated if it becomes unnecessary. A subsequent remarriage of the obligor spouse does not constitute a change of circumstance. The obligation of spousal support is extinguished upon the remarriage of the obligee, the death of either party, or a judicial determination that the obligee has cohabited with another person of either sex in the manner of married persons.¹⁸⁸

An obligation of final spousal support may be modified, waived, or extinguished by judgment of a court of competent jurisdiction or by authentic act or act under private signature duly acknowledged by the obligee. The right to claim after divorce the obligation of spousal support is subject to a peremption of three years. Peremption begins to run from the latest of the following events:

- the day the judgment of divorce is signed
- the day a judgment terminating a previous judgment of spousal support is signed if the previous judgment was signed in an action commenced either before the signing of the judgment of divorce or within three years thereafter.
- the day of the last payment made when the spousal support obligation is initially performed by voluntary payment within the periods set forth by law and no more than three years has elapsed between payments.

Claim for contributions to education or training

In a divorce proceeding, a court may award a party a sum for his financial contributions made during the marriage to the education or training of his spouse that increased the spouse's earning power, to the extent that a claimant did not benefit during the marriage from the increased earning power. The sum awarded may be in addition to a sum for support and to property received in the partition of community property. A claim for contributions made to the education or training of a spouse is strictly personal to each party. A sum awarded for contributions made to the education or training of a spouse may be a sum certain payable in installments. This award does not terminate upon the remarriage or death of either party. An action for contributions made to the education or training of a spouse prescribes three years from the date of the signing of the judgment of divorce or declaration of nullity of the marriage.

Child Custody

In a Louisiana divorce proceeding, a court must award custody of a child in accordance with the best interest of the child. When the parents agree on who is to have custody, a court must award custody in accordance with their agreement unless the best interest of the child requires a different award. However, in the absence of agreement or when the agreement is not in the best interest of the child, a court must award custody to the parents jointly. Nonetheless, when custody by one parent serves the best interest of the child, a court must award custody to that parent.¹⁸⁹

When an award of joint custody or of sole custody to either parent will result in substantial harm to a child, a court must award custody to another person with whom the child has been living in a

¹⁸⁷ West's Louisiana Statutes Annotated

¹⁸⁸ West's Louisiana Statutes Annotated

¹⁸⁹ West's Louisiana Statutes Annotated

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wholesome and stable environment, or otherwise to any other person able to provide an adequate and stable environment. In doing so, a court must consider all relevant factors in determining the best interest of the child, including:

- the love, affection, and other emotional ties between each party and the child
- the capacity and disposition of each party to give the child love, affection, and spiritual guidance, and to continue the education and rearing of the child
- the capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs
- the length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment
- the permanence, as a family unit, of the existing or proposed custodial home or homes
- the moral fitness of each party insofar as it affects the welfare of the child
- the mental and physical health of each party
- the home, school, and community history of the child
- the reasonable preference of the child if the court deems the child to be of sufficient age to express a preference
- the willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party
- the distance between the respective residences of the parties
- the responsibility for the care and rearing of the child previously exercised by each party

A custody hearing may be closed to the public. A parent not granted custody or joint custody of a child is entitled to reasonable visitation rights unless a court finds, after a hearing, that visitation would not be in the best interest of the child. Under extraordinary circumstances, a blood or affinity relative, or a former stepparent or step-grandparent, not granted custody of the child may be granted reasonable visitation rights if the court finds that it is in the best interest of the child. In Louisiana, a court must consider the following when determining the best interest of a child: (1) the length and quality of the prior relationship between the child and the relative; (2) whether the child is in need of guidance, enlightenment, or tutelage which can best be provided by the relative; (3) the preference of the child when he is determined to be of sufficient maturity to express a preference; (4) the willingness of the relative to encourage a close relationship between the child and his parent or parents; and (5) the mental and physical health of the child and the relative.

In a proceeding where a natural parent is seeking visitation of a child, visitation and contact with a child may be denied when the child was conceived through the commission of a felony rape. Likewise, when visitation of a child is being sought by a family member, a court may deny visitation and contact with a child if it determines that the intentional criminal conduct of that family member resulted in the death of the parent of the child.

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Child Support

In a divorce proceeding, a court may order either or both of the parents to provide an interim allowance or final support for a child based on the needs of the child and the ability of the parents to provide support. A court may award an interim allowance only when a demand for final support is pending. An award of child support may be modified when the circumstances of the child or of either parent materially change and may be terminated upon proof that it has become unnecessary.

In a proceeding for nullity of a marriage, a court may award a party incidental relief afforded in a proceeding for divorce. After a marriage is nullified, a party entitled to the civil effects of marriage may seek the same relief as may a divorced spouse. Incidental relief granted pending declaration of nullity to a party not entitled to the civil effects of marriage shall terminate upon the declaration of nullity. Nevertheless, a party not entitled to the civil effects of marriage may be awarded custody, child support, or visitation.

A judgment of divorce terminates a community property regime retroactively to the date of filing of the petition in the action in which the judgment of divorce is rendered. A retroactive termination of the community may be without prejudice to rights of third parties validly acquired in the interim between the filing of the petition and recordation of the judgment.

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The family is the basic cell of government; it is where we are trained to believe that we are human beings or that we are chattel; it is where we are trained to see the sex and race divisions and become callous to injustice even if it is done to ourselves, to accept as biological a full system of authoritarian government.

—Gloria Steinem

REVIEW QUESTIONS

1. In American history, the discoverer of Louisiana is considered to be a _____ .
2. Explain why Louis XIV granted a charter to Antoine Crozat.
3. It has long been held been suggested that the mouth of the Mississippi River was discovered by
 - a. Don Alexander O'Reilly
 - b. de Bienville
 - c. Antoine Crozat
 - d. Alonsa Alvarez de Pineda or Panfilo de Narvaez
4. True or False.
Panfilo de Navarez issued an ordinance designed to reorganize an efficient government and administration of justice in accordance with the Spanish laws. Explain.
5. Write a paragraph explaining how the influence of other cultures has resulted in changes in Louisiana Civil Law.
6. According to the text, explain how the Louisiana Civil Code resembled the Code Napoleon.
7. What kinds of emancipations exist in Louisiana? Give a brief description of each.

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Written Assignment

At the end of each chapter, several questions are listed under the heading Review Questions. Please answer each one thoroughly and turn them in when you take your exam. The education director will be responsible for forwarding the material to Dr. Wayne Cook at Rayburn Correctional Center.

WORDS TO REMEMBER

- *Louisiana Civil Code*
- *O'Reily's Code*
- *Code Napoleon*
- *Family Marriage*
- *Louisiana Marriage*
- *Impediments*
- *Fidelity*
- *Filiation*
- *Adoption*
- *Surname*
- *Illegitimate Children*
- *Divorce*
- *Best Interest of Child*
- *Maternity*
- *Paternity*
- *Emancipations*

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WEEK 12

Lesson 12: Criminal Law

Lesson Topics

- Sources of Criminal Law.
- Theories of Punishment.
- Classification of Crimes.
- Essential Elements of a Crime.
- Inchoate Offenses.

Lesson Objectives

- Define a crime.
- Compare civil and criminal law.
- Compare malum in se and malum prohibition crimes.
- Analyze the punishment options for felonies, misdemeanors, felony-misdemeanors, and infractions.
- Ascertain the effects of specific and general deterrence, incapacitation, rehabilitation, retribution, and restitution.
- Recognize the three branches of government.
- Analyze the Senate and the House Representatives.

Reading Assignment

Nordyke, Keith. J.D. 2012. Introduction to Law and the Paralegal Profession. Text: Chapter 13.

Text

CHAPTER 13 CRIMINAL LAW



Source: Image courtesy of Tara Storm.

This chapter covers two central aspects of criminal law: the types of conduct that constitute crimes, *substantive criminal law*; and the rules that must be followed in redressing crimes, *criminal procedure*. A crime is defined as a *wrong committed against society* or against the community in general. A wrong committed against one or more specific individuals or the property of one or more individuals is a civil wrong, or a tort.

WEEK 12

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Jurisdiction

In certain instances, the U.S. Constitution grants jurisdiction to the federal government to regulate while also reserving jurisdiction to the states in others. However, in some instances jurisdiction is shared, or concurrent.

For example, John murders Jack outside a movie theater in San Diego. John immediately surrenders to authorities. In this instance, the state jurisdiction applies. However, if Jack were murdered in a post office (federal property) in San Diego, if Jack were a federal official, or if John had fled across state lines, federal jurisdiction would have been activated. Concurrent jurisdiction would exist if John had committed the murder while robbing a federal bank.

Federal Jurisdiction

The federal government has jurisdiction to define and to enforce crimes in the following places and instances:

- the District of Columbia, U.S. territories, and federal property, such as military bases, national parks, federal buildings
- persons on American ships or in American aircraft in or over international territory
- conduct of American citizens located abroad
- conduct or activities within individual states when the power to regulate the conduct or activity is expressly granted by the Constitution, such as taxation, federal officials, interstate commerce, and activities that cross state lines

State Jurisdiction

Criminal offenses are usually prosecuted at the state level in the United States. Each state has inherent power to police, or regulate, in the protection or promotion of public health, safety, welfare, or morals.

Under common law, where a crime occurred determined which state had jurisdiction. For instance, if a slanderous statement was written in one state but published in another, the second state had jurisdiction because the publication of the slander was the prohibited act. However, under modern principles, a person can be prosecuted under the following conditions by a state for:

- an offense committed within the state, in whole or in part. The occurrence can be either conduct or a result that is an element of the offense. With homicide, for instance, the occurrence is either the physical contact causing death or the death itself.
- conduct outside the state that constitutes an attempt to commit or conspiracy to commit an offense within the state.
- conduct within the state that constitutes an attempt to commit or a conspiracy to commit an offense outside the state.
- omission to perform a duty required by a state law is an offense in that state, regardless as to where the offender is located at the time of the omission.



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Sources of Criminal Law

Although many sources are woven into the overall fabric of the American legal system, the criminal law is one of the most important parts of that system. The common law, the constitution, statutes, administrative rules and regulations as well as the Model Penal Code, where applicable, all contain rules used to define criminal conduct.

Common Law

The common law brought from England by the colonists defined common law crimes. These laws were enforced by courts when specific statutes were unavailable. Although there is no federal common law of crimes, Congress recognizes common law crimes in the District of Columbia. Some states still retain common law crimes either by implication or by specific “retention statutes.” The modern trend is to abolish common law crimes by an express statute of abolition or by adoption of comprehensive criminal codes to replace common law crimes. In these states, common law defenses may be retained; however, most defenses are also statutory.

Constitution

Pursuant to the United States Constitution, Congress has power to legislate in certain areas, such as interstate commerce. As such, only Congress may define criminal conduct in these specific areas. Nonetheless, all powers not given specifically to the federal government are reserved to the states for regulation.

Statute

Although federal criminal law is governed exclusively by statutes adopted by Congress, a majority of state criminal law is governed by statutes adopted by the state legislative body. Today, many states employ a system of comprehensive criminal codes similar to that of the Model Penal Code.

Administrative

An administrative agency may be delegated authority by a federal or state legislature to promulgate rules, the violation of which may be punishable as a crime. However, a legislature cannot delegate the power to decide which regulations will carry criminal punishments, nor may it delegate the power of adjudication, determining guilt or innocence, concerning conduct that may result in criminal punishment. For instance, a person who violates the Securities and Exchange Commission’s, SEC, antifraud rules may be subject to criminal punishment. As such, individuals charged with such a violation are tried in the federal court system, rather than by the SEC. This authority is quite different from the quasi-judicial functions that may be delegated, such as issuance and revocation of certain types of licenses or fines imposed for violation of agency rules and regulations.

Theories of Punishment

Although considerable controversy exists concerning whether they serve their intended purpose, restraint, deterrence, retribution, and rehabilitation are the primary theories advanced to justify criminal punishment.

Restraint

A person restrained or incapacitated by imprisonment has fewer opportunities to engage in conduct that is harmful to society in general.

Deterrence

There are two forms of deterrence: individual deterrence and general deterrence. Individual deterrence occurs when a criminal is punished, and he, as an individual, is deterred from committing

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future crimes. General deterrence occurs when a criminal is punished, and others are deterred from committing similar crimes for fear of incurring the same punishment.

Retribution

In the theory of punishment, retribution serves the purpose of expressing society's outrage at, and its need for revenge for, an offender's criminal conduct. In addition to society's need to get even with a criminal offender and to purge itself by removing the offender from its midst, proponents of retribution maintain that the availability of institutionalized retribution is essential to prevent forms of personal retribution, such as lynch mobs or personal retribution by a victim's family.

Rehabilitation

In theory, punishment of criminal conduct, such as imprisonment, provides the opportunity to reform or to rehabilitate a criminal into a person who will abide by society's rules at the end of the prison term. Although much debate has arisen over whether criminals are rehabilitated under existing prison conditions, the erecting of prisons continues.

Classification of Crimes

Criminal conduct is classified according to its seriousness. As such, the most severe punishments have long been reserved for the most serious crimes. Under common law, all crimes were classified as treason, felonies, or misdemeanors. Specifically, murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem, and burglary were classified as felonies under common law while all other crimes were classified as misdemeanors. In modern times, statutes have expanded the classifications of criminal conduct.

A crime that involves conduct that is inherently bad or wrong is called crime *malum in se*, "an evil in itself." A crime that involves conduct which is wrong because the legislature says it is wrong is referred to as crime *malum prohibitum*, "a prohibited evil."

An attempt to overthrow a government or to betray a government in favor of a foreign power is called *treason*. In accordance to Article III, Section 3, of the U.S. Constitution, a person may only be convicted of treason upon the testimony of two witnesses or by confession in open court. A crime punishable by death is referred to as a *capital crime*. Rather than having a separate classification for capital crimes, many jurisdictions include them in the overall felony classification.

A crime for which the maximum punishment may be death or imprisonment for one year or more is called a *felony*. However, a person may be sentenced to a prison term of less than one year upon conviction of a felony. Remember, the critical point is the *maximum sentence that may be imposed* upon conviction, not the sentence actually imposed. A crime for which the maximum punishment may be imprisonment for less than one year is referred to as a *misdemeanor*. Violations of statutory law, which may only result in a fine, are also classified as misdemeanors.

Constitutional Limitations

Incorporated into the Fifth and Fourteenth Amendments, the Due Process Clause of United States Constitution has been interpreted by the U.S. Supreme Court to require that no criminal penalty be imposed without fair notice that the conduct is prohibited. In addition, Sections 9 and 10 of Article I of

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the Constitution place substantive restrictions on both federal and state legislatures in defining criminal conduct.¹⁹⁰

Void for Vagueness

A criminal law may be made void for vagueness under the Constitution if it fails to give citizens fair warning of the conduct that is prohibited by it. A statute must give a person of ordinary intelligence fair notice of what conduct is forbidden. In addition, a statute cannot encourage arbitrary arrests and convictions. In such an instance, a statute may be attacked on overbreadth grounds as well as on vagueness grounds.

Under these considerations, statutes that are capable of reaching conduct that is otherwise protected by the Constitution, such as freedom of speech, freedom to assemble, freedom to petition the government, or freedom to move from one place to another, must be strictly scrutinized. Statutes directed at vagrancy, restriction of parades, and the like are subject to particular scrutiny under these principles.¹⁹¹

Ex Post Facto Laws

The U.S. Constitution specifically forbids adoption of *ex post facto* laws, which are laws that operate *retroactively* to:

- make an act criminal that was not criminal at the time it was performed
- aggravate a crime or increase the punishment for a crime to make it more serious than when the criminal act was performed
- change the rules of evidence to the detriment of criminal defendants as a class to make the rules more stringent for the defendant than when the criminal act was performed
- change the rules of criminal procedure to deprive criminal defendants of a substantive right that a defendant would have had at the time the criminal act was performed

Bill of Attainder

A legislative enactment that imposes a punishment or denies a privilege without a judicial trial is referred to as a *bill of attainder*. Although a bill of attainder can also be an *ex post facto* law, a distinction can be made in that an *ex post facto* law does not necessarily deprive the accused of a judicial trial. A bill of attainder always does; therefore, the United States Constitution specifically forbids adoption of bills of attainder.¹⁹²

Interpretation of Criminal Laws

Whether created by statute or by adoption, substantive criminal laws are subject to accepted methods of interpretation.

Plain Meaning Rule

A court must give effect even if the court believes a statute is unwise or is undesirable when the language of a statute is plain, and its meaning is clear. The only exception to this rule is when the court

¹⁹⁰ Virginia K. Newman, JD, Paralegal Review Manual, p.642

¹⁹¹ Virginia K. Newman, JD, Paralegal Review Manual, p.642

¹⁹² Virginia K. Newman, JD, Paralegal Review Manual, p.643

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believes that application of the statute’s plain meaning would result in injustice, oppression, or an absurd result.

Strict Construction

A statute must be strictly construed in favor of a defendant when the language of a criminal statute is ambiguous. A statute that is capable of two or more equally reasonable interpretations is considered ambiguous. A vague statute is one that is so unclear that a person of ordinary intelligence cannot tell what conduct is prohibited.¹⁹³

Effect of Repeal

The repeal of a criminal statute operates to bar prosecution for earlier violations, provided the prosecution has not yet commenced at the time of the repeal under common law rules and in the absence of a saving provision. However, the repeal of a criminal statute cannot be used to set free a person who has already been prosecuted and convicted under the repealed statute. Many of the new, comprehensive criminal codes include a specific saving provision so that crimes committed prior to the effective date of the new code are subject to prosecution and punishment under the law as it existed at the time when the offense was committed.¹⁹⁴

Essential Elements of a Crime

Under principles of Anglo-American criminal law, culpability rests upon particular requirements that are observed by legislatures and by courts when defining substantive criminal conduct. As a result, a prosecutor is usually required to prove the following elements of a criminal offense:

- **Actus Reus** “*guilty act*”: a physical act or unlawful omission by the defendant
- **Mens Rea** “*guilty mind*”: the state of mind, or intent, of the defendant at the time of the act
- **Causation**: the defendant’s act must be a proximate cause of the resulting harm
- **Harmful Result**: a harmful result caused both factually and proximately by a defendant’s act

The Physical Act (*Actus Reus*)

For criminal liability to exist, a defendant must have either performed a voluntary, physical act or must have failed to act when he had a legal duty to act. Accordingly, an act is defined as bodily movement. Consequently, a bad thought alone cannot constitute a crime. On the other hand, speech may be an act that can create liability, such as perjury.

The act must be a conscious exercise of voluntary will. In other words, reflexive or convulsive acts, which are not the product of the defendant’s determination, or acts performed while the defendant is unconscious or asleep, are not voluntary.

For example, Adam pushes Jim, who stumbles into Carl’s path, with the result that Carl slips and plunges to his death. With only these circumstances, Jim cannot be held criminally liable for Carl’s death.

In some instances, possession is treated as a wrongful act. A possession offense may be actual or constructive. When a defendant is found with marijuana in his pants pocket, the possession is *actual*.

¹⁹³ Virginia K. Newman, JD, Paralegal Review Manual, p.643

¹⁹⁴ Virginia K. Newman, JD, Paralegal Review Manual, p.643

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However, when the marijuana is found in an automobile owned and driven by the defendant, the possession is *constructive*.¹⁹⁵

Although most crimes are premised on an affirmative act by a defendant, a defendant's failure to act can result in criminal liability if a defendant had a legal duty to act, and it was reasonably possible for the defendant to perform the duty or to obtain the help of others to perform it. A defendant can be subject to a legal duty to act in the following situations:

- when a statute requires the action, such as filing an accident report
- when a defendant contracts for the duty, such as working as a lifeguard
- when the relationship creates a duty, such as a parent's duty to prevent physical harm to his child
- when a defendant voluntarily assumes a duty, such as a Good Samaritan, and does not satisfy reasonable standards of care
- when the hazard was created by a defendant

Intent (*Mens Rea*)

In order to distinguish between inadvertent acts and acts performed with a "guilty mind" under common law rules, intent is usually required; therefore, intent has been incorporated into some statutes, and acts performed with a guilty mind are deemed more blameworthy. Intent may be specific or general. However, in some cases, *mens rea* is not required at all, such as in strict liability crimes.

Specific Intent Some crimes are defined in such a way that a specific intent must accompany the wrongful act. For instance, a statute may define first degree murder as requiring premeditation. In such an instance, a prosecutor must prove not only that the victim was killed by the defendant, but also the defendant planned the killing ahead of time. Specific intent cannot be presumed simply by the performance of the act. Some defenses, such as intoxication, apply only to specific intent crimes. Specific intent crimes may also include assault; attempt; or larceny.¹⁹⁶

General Intent With exception to specific intent and strict liability crimes, all crimes are general intent crimes. General intent merely requires that an accused person is aware that a prohibited act is being committed, and a prohibited result is likely to occur. Since people are generally presumed to know the probable consequences of their acts, general intent can be inferred by the performance of the act.¹⁹⁷

Transferred Intent The concept of transferred intent is borrowed from general tort rules, in which a defendant's intent is *transferred* to fit the result. Cases of transferred intent are sometimes called *bad aim* cases. For example, if A intends to shoot B but misses, shooting C instead, the concept of transferred intent allows A to be found guilty of C's murder even though A's intent was directed at B.¹⁹⁸

¹⁹⁵ Virginia K. Newman, JD, Paralegal Review Manual, p.645

¹⁹⁶ Virginia K. Newman, JD, Paralegal Review Manual, p.645

¹⁹⁷ Virginia K. Newman, JD, Paralegal Review Manual, p.646

¹⁹⁸ Virginia K. Newman, JD, Paralegal Review Manual, p.647

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Strict Liability A strict liability crime is one in which the commission of the prohibited act renders a defendant guilty without regard to his intent. Intent is conclusively presumed by the use of a legal fiction. Strict liability crimes often involve violation of a regulation and customarily result in a minor punishment, such as a fine. For instance, the failure to register firearms sold under federal law is a strict liability crime.

Model Penal Code The Model Penal Code (M.P.C.) rejects the sometimes esoteric distinction between general and specific intent. Instead, the M.P.C. proposes four separate states of mind for which criminal liability may be imposed: *purposeful*, *knowing*, *reckless*, and *negligent*.

- A defendant acts *purposefully* when he consciously desires or seeks his conduct to cause a particular result.
- A defendant acts *knowingly* when he is aware that his conduct is almost certain to cause a particular result.
- A defendant acts *recklessly* when he is aware that there is a risk that his conduct might cause a particular result.
- A defendant acts *negligently* when he should be aware that there is a risk that his conduct might cause a particular result.

The risk involved in the definitions of reckless and negligent under the M.P.C. must be substantial and unjustifiable. In addition, and unlike the common law rules, the M.P.C. assigns a particular state of mind to each element of the crime. For example, the crime of rape requires that the act of sexual intercourse with the victim be purposeful; however, the element of the victim's non-consent may require only negligence.¹⁹⁹

Liability for the Acts of Others

A crime may have many participants. The common law recognized four types of participants to a felony: principals in the first degree; principals in the second degree; accessories before the fact; and accessories after the fact. The distinctions were not used for treason or for misdemeanors, in which all parties were treated as principals. Today, principals in the second degree and accessories before the fact are called accomplices, and the following general classifications are made:

- A *principal or actor* is one who, with the required mental state, engages in the act or omission that causes the criminal result.
- An *aider and abettor* is one who aids, counsels, helps, procures, commands, or encourages another in the commission of the crime.
- A *co-conspirator* is liable for all crimes committed during and in furtherance of the conspiracy.

¹⁹⁹ Virginia K. Newman, JD, Paralegal Review Manual, p.647

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- An *accessory after the fact* is one whose involvement does not begin until after the crime has been completed.

Misprision of felony and compounding a felony are two other types of assistance after the crime that can lead to criminal liability. Failure to report a known felony is referred to as *misprision of felony*. There are not many states which list this as a crime, and there are few reported prosecutions of this crime in the United States. The acceptance of money or other consideration in exchange for not prosecuting a victim or in exchange for not reporting as a witness to a felony is called *compounding a felony*.²⁰⁰

Inchoate Offenses

There are three inchoate offenses: solicitation, attempt, and conspiracy. These offenses are often classified as felonies. An offense committed prior to and in preparation for what may be a more serious offense is called an *inchoate*. It is a complete offense in itself even though the act to be done may not have been completed. Inchoate offenses were misdemeanors under the doctrine of merger in common law but rose to the level of felonies when the principal offense was carried out.

In many jurisdictions, the merger doctrine has been replaced by conspiracy, and an accused can be convicted of both conspiracy and the principal offense. However, an accused cannot be convicted of either solicitation or attempt in addition to the principal offense.

Solicitation

Soliciting another to commit a felony or an act that would breach the peace or would obstruct justice was a common law misdemeanor. Solicitation consisted of inciting, counseling, advising, inducing, urging, or commanding another to commit a felony with the specific intent that the person solicited would commit the crime. The crime of solicitation was complete when the solicitation was made; it was not necessary that the person solicited agreed to commit the crime or do anything else in response to the solicitation. When the solicited person committed the crime, the solicitor would be liable for the crime as a principal or party. When the solicited person proceeded far enough to be liable for attempt, the solicitor would be a party to that attempt. Today, most criminal statutes retain the crime of solicitation; however, these usually restrict it to solicitation of serious felonies only.

Conspiracy

Under common law rules, a conspiracy was a combination or agreement between two or more persons to accomplish a criminal or an unlawful purpose or to accomplish a lawful purpose by unlawful means. Today, however, many states require that the object of the conspiracy be specifically prohibited by statute. The four elements of conspiracy are:

- an agreement between two or more persons
- an intent to enter into an agreement
- an intent to achieve the object of the agreement
- an overt act in furtherance of the conspiracy by at least one party.

²⁰⁰ Virginia K. Newman, JD, Paralegal Review Manual, p.648

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Under the traditional definition, an agreement, itself, is the culpable act, *actus reus*. Distinct from attempt, an “overt act” or other conduct in furtherance of a conspiracy is required. Although a majority of states now require an act in furtherance of a conspiracy, preparation for the act will usually suffice.

Under common law, if the conspirators completed the crime, the crime of conspiracy “merged” into the completed crime; and the accused could be convicted only of the completed crime. Under modern statutes, successful conspirators can be convicted of both criminal conspiracy and of the crime they have successfully completed.

Offenses against a Person

Specific offenses against the person vary widely from state to state. The following are general, common law crimes, which may be and have in some cases been altered substantially by the statutes of a particular state.

The Wharton Rule

When two or more people are necessary for the commission of the crime, for example adultery, gambling, or drag racing on public streets, the Wharton Rule states that there is no crime of conspiracy unless more parties participate in the agreement than are necessary for the crime.²⁰¹

Assault An assault is either an attempt to commit a battery; or the intentional creation of a reasonable fear in the mind of the victim of imminent bodily harm. Simple assault is a misdemeanor. Aggravated assaults, with a dangerous weapon, with a deadly weapon, or with intent to maim, rape, or murder, are treated more severely and are generally classified as felonies. When there has been an actual touching of the victim, the crime is a battery. However, if there has been no touching, the act may or may not be an assault, depending upon the situation.²⁰²

Battery Battery is an unlawful application of force to another person which results in bodily injury or results in an offensive touching. Simple battery is a misdemeanor. Generally, aggravated battery is a felony. A battery does not have to be intentional; it is enough if a defendant causes the application of force with criminal negligence. Moreover, the force does not have to be applied directly. If it is applied by means of another force or by a substance placed into action by the defendant, it is sufficient. For example, causing a dog to attack or causing a victim to ingest poison is sufficient to establish battery.

Mayhem Under common law rules, the felony crime of mayhem required dismemberment, disablement of a bodily part, or disfigurement. Although modern statutes typically retain mayhem in some form, the trend is to abolish mayhem as a separate offense and to treat it as a form of aggravated battery, extending its scope to include permanent disfigurement.

Homicide At common law, criminal homicides were divided into three different offenses: *murder*, *voluntary manslaughter*, and *involuntary manslaughter*.

False Imprisonment The common law misdemeanor of false imprisonment is the unlawful confinement of a person without his consent. To constitute confinement, a victim must either be forced to go where he does not want to go or be compelled to stay where he does not want to stay. Confinement

²⁰¹ Virginia K. Newman, JD, Paralegal Review Manual, p.650

²⁰² Virginia K. Newman, JD, Paralegal Review Manual, p.662

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may be accomplished by force, by a show of force, or by threats. As long as alternative routes are available, blocking a person's path is not confinement. Unless specifically authorized by law or by the consent of the person, confinement is unlawful. Nonetheless, consent must be freely given by one who has the capacity to consent. Coercion, threats, deception, or incapacity resulting from youth, retardation, or mental illness all invalidate consent.

Kidnapping Kidnapping is the confinement of a person involving either some movement of the victim or concealment of the victim in a *secret* place. Today, most define aggravated kidnapping as a separate offense. An aggravated kidnapping has occurred in the following situations: a person is kidnapped for a ransom; a person is kidnapped for the purpose of committing another offense, such as a robbery; a person is kidnapped with the intent of harming the person or with the intent of committing some sexual crime with the person; or when child stealing is involved. Similar to false imprisonment, free consent by one who has the capacity to consent is a defense to a kidnapping charge.

Sex Offenses

The term *sex offenses* encompass a wide array of sexually motivated conduct, including but not limited to: rape; incest and other sex offenses against children; sodomy; obscenity; and prostitution. However, in most jurisdictions, the common law crimes of adultery and fornication have either been abolished or are no longer enforced. Some sex offenses are universally prohibited, and others vary from state to state. For instance, rape is a crime in all states, but prostitution is not. In Nevada, prostitution has been legalized statewide.

Rape Under the common law, the crime of rape required that a man had sexual intercourse with a woman who was not his wife, and he committed the act without the woman's consent by use of force. Most states have changed the common law requirements. For instance, a majority of states have eliminated gender reference, making it possible to convict women and minors of the crime as well. Also, most states have eliminated the spousal exception clause. Further, a victim need not risk her life or serious bodily injury to prove resistance.

The crime involving one who is under the age of consent is referred to as *statutory rape*. Even with the consent of a minor, a defendant is guilty of statutory rape because minors under a certain age are incapable of giving legal consent. Since statutory rape is a strict liability crime, even a reasonable mistake about the victim's age, in most cases, will not absolve the defendant.²⁰³

Incest Generally considered a felony, incest is a statutory offense which consists of either a marriage or a sexual act between persons who are closely related. The states vary widely on what degree of relationship is required. Although most states restrict the crime to blood relatives, a large number of states include some non-blood relatives.

Obscenity Crimes that relate to the sale, display, or publication of material that appeals to a prurient sexual interest; crimes that involve patently offensive sexual conduct and lack serious literary, artistic, political, or scientific value are considered obscene under the law.

Offenses against Property

This section deals with a number of property offenses. Because of the inconsistencies sometimes seen in their use or interpretation, the table below has been provided to help distinguish between the

²⁰³ Virginia K. Newman, JD, Paralegal Review Manual, p.666

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terms, larceny, embezzlement, and false pretenses. The major differences between the terms are related to the type of misappropriation of property.²⁰⁴

	Conduct	Method	Intent
Larceny	Taking and asportation of property from possession of another person	Without consent or with consent obtained by fraud	With intent to steal
Embezzlement	Conversion of property held on behalf of another	Use of property in a way inconsistent with ownership of another	With intent to defraud
False Pretenses	Obtaining title to property	By consent gained through fraudulent misrepresentation	With intent to defraud

Larceny

Larceny is a taking and carrying away, or an *asportation*, of personal property of another by trespass with intent to deprive permanently the person entitled to its possession. When property is severed from real estate and is taken, before it comes into possession of a landowner, it cannot be the subject of larceny. However, if a landowner gains possession of the severed material, the later taking of the material is larceny. Gas and electricity are considered tangible goods and can be the subject of larceny.²⁰⁵

Documents and instruments were considered merged with the item which they represented under common law rules. Unless they had monetary value themselves, these materials could not be the subject of larceny. Today, many state statutes have expanded larceny to include written documents that embody intangible rights. However, real estate and its fixtures cannot be the subject of larceny, nor can services or intangibles be the subject of larceny.

Larceny is a crime against possession. To commit larceny, it is only required that property be taken from someone who has a possessory interest superior to the defendant's. In other words, the property must be taken from one with possession by a defendant who does not have possession. If the defendant has possession of the property when he takes it, the resulting crime is not larceny, but it may be embezzlement. On the other hand, when a defendant has custody but not possession, the crime is larceny.

Embezzlement

There are distinctive differences between embezzlement and larceny. *Embezzlement* is defined differently from state to state, but it generally requires the fraudulent conversion of property of another person by a person who is in lawful possession of the property. A defendant accused of embezzlement had lawful possession of someone else's property when the embezzlement occurred. Larceny requires a taking, or asportation, with the intent to permanently deprive. Embezzlement requires intentional conversion with the intent to defraud. The conversion required for embezzlement generally requires only

²⁰⁴ Virginia K. Newman, JD, Paralegal Review Manual, p.666

²⁰⁵ Virginia K. Newman, JD, Paralegal Review Manual, p.667

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that the defendant deals with the property in a way that is inconsistent with the agreement under which he holds it. It is not necessary that the defendant receive any direct personal gain from the embezzlement.

Pete, a pawn broker, acquires a unique emerald ring from Judy as security for a 15-day loan. After five days, Pete gives the ring to his mother for her birthday. Even though Pete received no direct personal gain from his act, this is embezzlement.

False Pretense

False pretense is part of the common law crimes and is defined as obtaining title to property of another by an intentional false statement of past or present fact with intent to defraud the other person. False pretense is different from larceny. If possession only is obtained by a defendant, the crime is larceny by trick. If title is obtained, the crime is false pretense.

In order to constitute false pretenses, a victim must be deceived by, or act in reliance upon, a misrepresentation. This must be a major factor or the sole cause of the victim's passing title to the defendant. In some instances, simply subjecting a victim to a risk of loss will suffice.

Several states have specific laws to cover conduct that resembles false pretenses; however, the conduct is different and requires separate treatment. For instance, a majority of states have *bad check* laws that prohibit the giving of an insufficient funds check or a no-account check with the intent to defraud. Some states also prohibit the knowing use of a fraudulent credit card, to obtain property.

Another crime related to false pretenses is *mail fraud*. Mail fraud is the use of the United States Mail with the intent to defraud another of money or of property. Mail fraud is a federal offense. An intended victim of mail fraud need not be defrauded; intent to defraud is sufficient for mail fraud. Computer larceny or *computer fraud* also falls into the category of false pretenses.

Forgery

Forgery is the making of a false document or the altering of an existing document to make it false and then passing the document to another with intent to defraud. Forgery was divided into two separate crimes under common law. The purpose of prohibiting forgery is to preserve the commercial system and the documents that are transferred within it.

Robbery

In all jurisdictions, robbery is considered a felony offense. Robbery is defined as the taking of personal property from a person or from his presence by force or intimidation with the intent to permanently deprive the other person of the property. It is an aggravated form of larceny in which the taking is achieved by force or threats of force.

When threats are used, they must be threats of immediate death or serious physical injury against the victim, a member of the victim's family, or a person in the victim's presence at the time the threats are made. A threat to damage property is not enough unless it is a threat to destroy the victim's dwelling. The force or threats must be used to gain possession of the property or to retain possession immediately after the unlawful possession has been achieved. Many statutes define aggravated robbery as robbery accomplished with a deadly weapon.

Ralph grabs Mrs. Evans' handbag as he passes her on the street. Mrs. Evans turns around and grabs Ralph as he tries to run away. Ralph pushes her to the ground and flees. Ralph has just

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committed a robbery since the force used to prevent the victim from regaining her property is sufficiently related to the taking.

Extortion

Under common law, extortion is a misdemeanor consisting of the corrupt collection of an unlawful fee by an officer under *color* of his office. Today, many statutes define extortion, which is also called *blackmail*, as obtaining property from another by means of oral or written threats. In some states, extortion occurs when the threats are made with the intent to obtain money or something of value. In other states, the money or property must be obtained as a result of the threat. In other words, the threat alone is insufficient. Although a threat alone is not sufficient to constitute robbery, it may constitute extortion because the threat does not have to cause physical harm, nor does the threat have to be one of immediate harm. Therefore, the establishment of the threat is critical for the prosecution and of hallmark value to the defense.

Receiving Stolen Property

Under the common law, the crime of receiving stolen property requires the receiving of possession or control of personal property known to have been obtained in an unlawful manner with the intent to deprive the owner of his property permanently. Even though physical possession amounts to *receiving*, receiving can also be established by a thief who puts stolen property in a place designated by the defendant or if the defendant arranges for the thief to sell the stolen property to a third party for profit.

Offenses against a Dwelling

Burglary

Under common law, burglary was defined as the trespassory breaking and entering of the dwelling house of another in the night with the intent to commit a felony therein. As such, the term *breaking* required the removal of anything blocking entry. In Spanish, the word for burglary is *minar*; it implies a process of digging through something. Therefore, the opening of a closed but unlocked door was always sufficient to prove burglary, but the opening of a partially open door was not always sufficient.

In the past, burglaries committed during the day frequently were punished less severely than those committed at night. The protection of the dwelling has since been extended to all occupied buildings and even to automobiles in some states; however, the laws are not consistent. For example, in some states, if a defendant breaks into a vehicle and steals a tape player, it is deemed a more serious offense than if he had stolen the entire vehicle.

Arson

Arson was defined as the malicious burning of the dwelling house of another under common law. Similar to murder, the malice requirement did not mean ill will, but rather, it required an intentional or reckless act. Ironically, under the common law rules, scorching was not arson; however, a slight charring of wood was arson even if no flames ever appeared. In another instance, blowing a house up with explosives was not arson unless the house also caught on fire. However, if the exploded fragments of a house caught on fire, it was not arson because the fragments of a house were not the same as a house intact. Also, torching or burning one's own house was not arson under the common law.

Today, most statutes have changed the common law rules significantly. Current statutes protect buildings other than dwelling houses. Under the M.P.C., a defendant is guilty of arson if he starts a fire or causes an explosion for the purpose of destroying the building or occupied structure of another. In

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addition, anyone who burns his own building or structure is guilty of arson unless he can prove that he did not endanger other people or other property.²⁰⁶

Crimes Involving Judicial Procedure

Perjury

Under common law, perjury was a criminal offense prohibited by specific statutes in each state and by federal statute. The making of a false statement with knowledge that the statement is false while under oath is *perjury*. The most complex element to prove is the defendant's *knowledge that a statement is false*; nonetheless, a finder of fact is permitted to infer a defendant's knowledge from the surrounding facts. A statement made under oath encompasses open court testimony; it also includes affidavits, testimony in a deposition, testimony before a grand jury, a certification, or any other statement that requires it to be given in front of a person authorized to administer oaths.²⁰⁷

In cases where a person's religious beliefs prevent him from giving an oath, the person will be permitted to give an *affirmation*. For purposes of perjury statutes, affirmations are treated the same as oaths. Some states require that the statement be *material* to the outcome of the case. In a state with this materiality requirement, if a statement is not material, a defendant cannot be convicted of perjury even if the statement is false. Truth is a complete defense to a charge of perjury.

Subornation of Perjury

Subornation of perjury refers to the act of convincing someone else to commit perjury. Any person who commits subornation of perjury is treated the same as the perjurer for purposes of sentencing.

Bribery

Bribery is prohibited by statute in every state as well as by federal statute. Originating under common law, *bribery* is defined as the solicitation or acceptance of anything of value with the purpose of violating a duty or trust. The two general classifications of bribery are *bribery of a public official*, and *commercial bribery*.

*Crime seems to change character when it crosses a bridge or a tunnel.
In the city, crime is taken as emblematic of class and race. In the suburbs,
though, it's intimate and psychological—resistant to generalization,
a mystery of the individual soul.*

—Barbara Ehrenreich

²⁰⁶ Virginia K. Newman, JD, Paralegal Review Manual, p.673

²⁰⁷ Virginia K. Newman, JD, Paralegal Review Manual, p.673

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REVIEW QUESTIONS

1. According to the text, how is crime defined?
2. According to your interpretation of the text, explain the theory of how punishment correlates to rehabilitation.
3. True or False.
A federal or state legislature may delegate the power to decide which regulations will carry criminal punishments and determination of guilt or innocence to an administrative agency. Explain.
4. Who had responsibility for enforcement of these common law crimes when no specific statute was available?
5. Write a paragraph, based on the text, explaining what is necessary for a defendant to have criminal liability.
6. List the four types of recognized participants to a felony.
7. What crime replaced the merger doctrine in most jurisdictions?
8. Write a paragraph, according to the text, explaining the Wharton Rule.

Written Assignment

At the end of each chapter, several questions are listed under the heading Review Questions. Please answer each one thoroughly and turn them in when you take your exam. The education director will be responsible for forwarding the material to Dr. Wayne Cook at Rayburn Correctional Center.

WORDS TO REMEMBER

- | | |
|-----------------------------------|-------------------------|
| ↻ <i>Substantive Criminal Law</i> | ↻ <i>Deterrence</i> |
| ↻ <i>Criminal Procedure</i> | ↻ <i>Retribution</i> |
| ↻ <i>Retention Statutes</i> | ↻ <i>Rehabilitation</i> |
| ↻ <i>Restraint</i> | ↻ <i>Malum in Se</i> |

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- *Malum Prohibition*
- *Treason*
- *Felony*
- *Misdemeanor*
- *Due Process Clause*
- *Void for Vagueness*
- *Retroactive*
- *Ex Post Facto*
- *Actus Reus*
- *Mens Rea*
- *Specific Intent*
- *General Intent*
- *Transferred Intent*
- *Model Penal Code*
- *Inchoate*
- *Conspiracy*
- *Kidnapping*
- *False Imprisonment*
- *Embezzlement*
- *Wharton Rule*
- *Assault*
- *Battery*
- *Homicide*
- *Larceny*
- *Incest*
- *Obscenity*
- *Forgery*
- *Fraud*
- *Extortion*
- *Perjury*
- *Subordination of Perjury*
- *Bribery*

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WEEK 13

Lesson 13: Tort Law

Lesson Topics

- Classification of torts.
- Basis of liability.
- Types of torts.
- Justification or defense.
- Remedies or Procedures.

Lesson Objectives

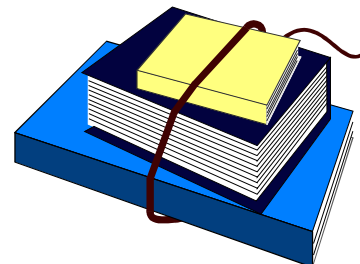
- Recognize the multi-faceted areas of tort law.

Reading Assignment

Nordyke, Keith. J.D. 2012. Introduction to Law and the Paralegal Profession. Text: Chapter 14.

Text

CHAPTER 14 TORT LAW



This chapter introduces students to the field of tort law as applied under the common law. Although the chapter does not rely on the specific law of any particular state, a large majority of the topics are related to the various aspects of tort law as interpreted by courts throughout the United States, including classifications of torts, motives, damages, basis of liability, legal rights and duties, duty to avoid harm to others, acts intended to inflict injury, and the varying types of torts.

A *tort* may be defined as a civil wrong for which a remedy may be obtained, usually in the form of damages. It is a breach of duty that the law imposes to the same degree on everyone involved in a given transaction. A statute may provide a definition of a tort for a particular jurisdiction, and case law may also provide a meaning of tort.

A tortious act has been defined as the commission or omission of an act by one, without right, whereby another receives an injury, directly or indirectly, in his person, property, or reputation. Although a tort may arise out of a contractual relationship, a tort is a wrong independent of contract. Contract law is based on principle of freedom of contract which protects the justifiable expectations of the parties to an agreement, free from governmental interference. Tort law, on the other hand, compensates individuals

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injured by the unreasonable conduct of another. Through the payment of damages, it provides an incentive to prevent future harm.²⁰⁸

The word *tortious* denotes that conduct, whether of an act or its omission, is of such a character as to subject the actor to liability under the principle of the law of torts. The same act may constitute both a crime and a tort. A crime is an offense against the public pursued by the sovereign, while a tort is a private injury pursued by the injured party.

Tort obligations are obligations imposed by the law by policy considerations to avoid some type of loss to others. They are obligations imposed apart from and independent of promises made and, therefore, are apart from any manifested intention of the parties to a contract or other bargaining transaction. The primary purpose of tort law is that wronged persons be compensated for their injuries and that those responsible for the wrong should bear the cost of their tortious conduct.

Existence of "tort law" apart from law of specific torts

There is no necessity for a tort to have a name. New and nameless torts are recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action where none was recognized before. The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.

That no precedent exists to sustain an action in a given case may be evidence that no right based upon the facts stated exists, or that the legal profession does not accept the right asserted. This might create a presumption that no wrong is stated; however, such a presumption is not conclusive. If the plaintiff is shown to have suffered a wrong, a paucity of cases or the absence of precedents does not constitute sufficient reason for refusing relief if a sound principle of the law can be found that governs, or that by analogy ought to govern, the facts presented. That a tort action does not fit into a nicely defined or established "cubbyhole" of the law does not warrant, in itself, the denial of relief to the one who is injured. When Congress creates a federal tort, it adopts the background of general tort law.²⁰⁹

Classifications of torts

Torts are divided into two general classes: property torts, which involve an injury or damage to property, whether realty or personalty; and personal torts, which involve injuries to the person, whether to the body, reputation, or feelings. Although a tortfeasor is under obligation to compensate one injured by his tort, a cause of action for personal injuries usually does not become a debt until it is judicially determined. However, there is authority to the contrary stating that a relationship of debtor and creditor arises in tort cases the moment the cause of action accrues.

A personal injury refers primarily to an injury to the body of a person. A personal injury or an injury to the person, within the meaning of the law, does not necessarily involve physical contact with the person injured or to bodily or physical injuries. It embraces all actionable injuries to the individual himself as distinguished from injuries to his property. Thus, the term *personal injury* may denote an injury affecting the reputation, character, conduct, manner, and habits of a person. It also includes an

²⁰⁸ American Jurisprudence, Second Edition

²⁰⁹ American Jurisprudence, Second Edition

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injury to a person's mind or emotions; however, merely fearing that an injury has occurred is not sufficient to state a cause of action for tort. Under general principles of tort law, a personal injury cause of action accrues when conduct that invades the rights of another has caused injury.²¹⁰

Motive

The terms *motive*, *purpose*, and *intent* are frequently used to denote identical concepts; they are indicators of a particular mental state of the tortfeasor. The cases, however, state that civil liability in tort is determined by the conduct of the actor, not by his mental state. Therefore, the motive of the tortfeasor is generally regarded as immaterial to the question of his liability in tort. Otherwise, the mental attitude of the alleged wrongdoer, and not the act itself, would determine whether the act was wrongful.

An established principle of the law states that an evil motive alone is not actionable; the improper motives of the actor cannot transform lawful actions into actionable torts. Mischievous or malicious motives may harden the jury's perception of the wrong that was done, but they cannot change something that is lawful into a wrong. Conversely, the presence of a good motive, or rather, the absence of an evil motive, does not render lawful an act that is otherwise invasive of another's legal right. Liability in tort is not precluded by the fact that the defendant acted without evil intent.²¹¹

On the one hand, there are acts that are clearly violations of definite legal rights that a good motive cannot make less actionable. There are, on the other hand, acts that a person may perform legally without any qualification that are not actionable even if done with an evil motive. There is also an intermediate class of acts that take into account the motive or the purpose for which an act was done. In these cases, intent is inferred from the likelihood and magnitude of the injury and deemed material to liability. Indeed, there are torts in which a particular motive or purpose constitutes an essential ingredient of the cause of the action itself. When the lawfulness of the act is dependent on the presence of a justifiable cause, motive may be important in ascertaining the existence of justification.

Damage as an element

Legal damage resulting from some injury to the right of another or from the breach of a duty owed to another is a necessary element of a tort cause of action in a person's favor. A wrong without damage does not constitute a good cause of action. Whenever there is a wrongful invasion of a clear legal right, the law infers or presumes damage sufficient to support an action. In such cases, the injury is regarded as the *gist* of the action.

A person injured by the commission of a tort is entitled to pecuniary compensation for the injury he sustained and, except when the circumstances are such as to warrant the allowance of exemplary damages, is limited to that compensation. When a legal right is to be vindicated against an invasion that has produced no actual loss of any kind, the damages recoverable are nominal, but there can be no recovery in tort when the damages are unascertainable.²¹²

Basis of Liability

A legal right and a legal duty corresponding to such right are the essential elements of a cause of action. No right or duty is considered as a basis for an action of tort except a legal right or duty. The word *duty* denotes that the actor is required to conduct himself in a particular manner. If the actor does not do

²¹⁰ American Jurisprudence, Second Edition

²¹¹ American Jurisprudence, Second Edition

²¹² American Jurisprudence, Second Edition

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so, he becomes subject to liability to another to whom the duty is owed for an injury sustained by the other, of which that actor's conduct is a legal cause. A legal right is a well-founded claim enforced by sanctions, and a legal duty is that which the law requires to be done or forborne to a determinate person or to the public.²¹³

The phrase *subject to liability* denotes that an actor's conduct is such as to make him liable for another's injury if his conduct is a legal cause thereof, and the actor has no defense applicable to the particular claim. As general rule, a plaintiff must establish existence of duty; burden is not on the defendant to show that he had no duty. The issue as to whether a legal duty in tort exists is a pure question of law.

Violation of legal right and duty

A cause of action in tort arises for an injury resulting from an invasion of the plaintiff's primary right through some violation of duty imposed upon the defendant in favor of the plaintiff. This rule applies to liability for a tort that arises upon the commission of a legally recognized wrong, the infringement of a legal right, or the breach of a legal duty by the person sought to be held liable. Hence, the general test to determine whether there is a liability for tort is whether the defendant has disregarded his duty.²¹⁴

A cause of action in tort may be predicated upon the failure to discharge some special or absolute duty which, in itself, constitutes an invasion of the rights of, or an infraction of an obligation due to, another. However, to give rise to a cause of action in tort, the injurious act or its omission need not be an invasion of a distinct or absolute legal right of another or a violation of a special or absolute obligation. A cause of action may be predicated upon the violation of some qualified or limited obligation. The duty may be to the person injured as an individual, but this is not essential because it is sufficient that the duty was owed to him as a member of a particular class or group.²¹⁵

Duty to refrain from acts harmful to others

A duty with which the law of torts is concerned is that of avoiding causing harm to others. Whenever, by an act that cannot be justified in law and that could have been avoided, a person inflicts an immediate injury on another by force, he is legally answerable in damages to the party injured by his actions. Under this rule, a person injured by the wrongful act of another, to which he has not contributed, is entitled to monetary compensation from the wrongdoer. Some courts have reasoned that an ideal tort system should impose responsibility on the parties according to their abilities to prevent the harm.

A tort may result from acts of omission as well as of commission in the fulfillment of a non-contractual duty of care. However, the mere refusal of a person to do what he is not legally bound to do is not actionable since those duties dictated merely by good morals or by humane considerations are not within the domain of the law. In this respect, the duty to protect against wrong is, generally speaking and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized nor enforced by law.²¹⁶

²¹³ American Jurisprudence, Second Edition

²¹⁴ American Jurisprudence, Second Edition

²¹⁵ American Jurisprudence, Second Edition

²¹⁶ American Jurisprudence, Second Edition

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Lawful acts; exercise of legal rights

Generally, for a cause of action in tort to arise, there must be an invasion of some right, a breach of duty, or a failure to perform a duty. Even in the absence of an unlawful act, however, there may be liability in tort under the concept of strict liability or under the *prima facie* tort doctrine. Under the general rules stated above, the proper exercise of a legal right cannot constitute a legal wrong for which an action will lie. However, the exercise of a legal right is actionable when it is coupled with misconduct or done at a time or in a manner or under such circumstances that renders the actor chargeable with lack of proper regard for the rights of others. Therefore, a lawful act, when done for an unauthorized purpose, may give rise to an action. Generally, a party may not be held in damages for asserting his rights in court.²¹⁷

Until the 19th century, a person whose actions caused harm to another was, in most situations, held responsible for that harm simply because he had acted. Today, however, the concept of liability without fault is generally limited. It exists in the case of acts which may be lawful but are so fraught with possibility of harm to others that the law treats them as allowable only on the terms of insuring the public against injury.

Strict liability is applicable today in situations in which social policy requires that the defendant make good the harm that results to others from the abnormal risks inherent in his activities that are not considered blameworthy. The doctrine of strict liability applies only in instances where *abnormally* dangerous activities are carried on. The basis of liability in such cases is the intentional behavior in exposing the community to an abnormal risk. For a court to extend the exceptional doctrine of liability without fault into a new field of commercial enterprise involving no recognizable probability of danger, there must be an unusual case, one amenable to no other solution as a matter of public policy.

The violation of a statutory provision containing a mandate to do an act for the benefit of another or for the prohibition of the doing of an act that may be to his injury is generally regarded as giving rise to a liability and creating a private right of action whenever the other elements essential to a recovery are present. The omission of a statutory duty combined with common negligence may together give rise to a single cause of action in tort.

Under the common law, there is no duty to control the conduct of a third party to protect another from harm. An exception is recognized when a defendant stands in some special relationship with either the person whose conduct needs to be controlled or in a relationship with the intended victim of the conduct; this gives to the intended victim a right to protection.²¹⁸

If an alleged tortfeasor negligently or intentionally destroys or discards evidence that is relevant to a tort action, the plaintiff in the tort action does not have an additional independent cognizable claim against the tortfeasor for spoliation of evidence because under already existing law, there are important sanctions that not only provide remedy to persons aggrieved but also deter spoliation of evidence by litigants and their attorneys, including criminal prosecution for perjury or obstruction of justice.

²¹⁷ American Jurisprudence, Second Edition

²¹⁸ American Jurisprudence, Second Edition

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Acts intended to inflict injury

A duty with which the law of torts is concerned is the duty to abstain from causing an intentional injury to others. Therefore, a cause of action arises whenever one person, by an act not in the exercise of a lawful right, causes loss or does damage to another with an intent, either actual or constructive, to produce such harm without just or lawful excuse or justifiable cause or occasion. A person who intentionally deprives another of his legally protected property interest or causes an injury to that interest is subject to liability to the other person if his conduct is generally culpable and not justifiable under the circumstances. *Intentional* torts, as distinguished from negligent or reckless torts, generally require that the actor intended the consequences of the act, not simply the act itself.

For instance, a Longshoreman, who sued a marine terminal's insurer stemming from injuries suffered while loading a container vessel at port, properly stated a claim for intentional infliction of emotional distress when complaint provided an adequate notice of the nature of the claim and the grounds upon which it rested. Intentional torts are punished not because the actor failed to use reasonable care but because the actor intended the act.

A cause of action in tort is not dependent upon a purpose or expectation by the wrongdoer that a particular injury will follow from his act or, indeed, that any injury will result from his act or its omission. A person who is merely negligent has no desire to cause the harm that results from his carelessness and must be distinguished from a person guilty of willful misconduct, such as in an assault and battery where the harm is intended. Willfulness and negligence are contradictory terms. If conduct is negligent, it is not willful, and if it is willful, it is not negligent.²¹⁹

An action may lie for an unintentional injury or an injury committed by mistake. A cause of action may be predicated upon negligence or the failure to observe a standard of care prescribed by the law, without a conscious design to do wrong.

Malicious acts

The terms *malice* and *malicious* are defined not only as relating to the intentional commission of a wrongful act, but also as involving wickedness, depravity, and evil intent. Tort liability may depend upon express malice or similar subjective criteria, like bad faith, when the qualified privileges of action or statement are recognized as defenses. Generally, malicious motives might make a bad case worse, but such motives do not make wrong that which, in its essence, is lawful. As the rule is sometimes stated, a lawful act does not become a wrong because it is done maliciously. However, in some cases, a lawful act done solely out of malice and ill will to injure another may be actionable. Thus, an action may lie for written or oral falsehoods, not actionable, per se, nor even defamatory, when they are maliciously published and are calculated to produce actual damages. If the falsehoods maliciously cause the institution of criminal charges against a party, they may be actionable. Similarly, to establish an intentional interference with a contract, no showing of actual malice is necessary; rather, a showing of legal malice will suffice. In general, however, there is no liability in tort for doing a lawful act even when it is done for the malicious purpose of injuring another party, when there are also legitimate reasons for doing the act.²²⁰

In the matter of *James v. U.S. Airways, Inc.*, 375 F. Supp. 2d 1352 (M.D. Fla. 2005), plaintiffs, who allegedly were injured due to actions of a passenger on the air carrier's aircraft, failed to establish

²¹⁹ American Jurisprudence, Second Edition

²²⁰ American Jurisprudence, Second Edition

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that the carrier owed them a duty to maintain a passenger identification list and, therefore, could not bring a third party negligent spoliation claim against the carrier under Florida law. Plaintiffs neither alleged nor presented evidence showing that the carrier was given formal notice prior to the destruction of the passenger identification list or that the carrier was under an administrative duty to maintain the destroyed evidence based on federal regulations providing for the preservation of certain enumerated air carrier records.

The gross negligence component of the former statutory definition of malice could provide a basis for the award of exemplary damages when underlying actual damages were for an intentional tort such as false imprisonment. In one case, a customer accused of shoplifting sued a department store for false imprisonment after he was escorted in handcuffs up the escalator to an empty office where a guard and another store employee verbally taunted the customer, refused to give him a glass of water he needed to take medication for a migraine headache, and refused to look in the customer's car after he told them that he had the receipts for the three shirts in his vehicle. When the police arrived, the guard placed the customer on the floor with the guard's knee on the customer's back to exchange handcuffs with the police. However, the customer did not provide evidence that established the department store's gross negligence as to false imprisonment nor prove that the customer was exposed to extreme risk of substantial harm.

Acts arising out of a contractual relationship

A defendant may be held liable in tort for misfeasance in the performance of his contractual duties. A tort, while a wrong to another in his rights created by law or existing in consequence of a relation established by contract, cannot be based upon the contract itself. A mere breach of a contract cannot be converted into a tort. Indeed, a tort is sometimes defined as a wrong independent of contract or as a breach of a duty that the law, as distinguished from a mere contract, has imposed. A duty may be imposed by a contract or may be imposed when an act that normally would not have created a duty is combined with a contract. A breach of the contract may only be treated as a tort when the law casts it as a separate obligation. A violation of a legal duty resulting in a tort may spring from extraneous circumstances not constituting elements of the contract when they are connected with and dependent on the contract.

To found an action on tort, there must be a breach of duty apart from the nonperformance of a contract. To determine whether an action is in contract or in tort, it is necessary to ascertain the source of the duty claimed to have been violated. If this duty is one imposed merely by the contract, then an action for the breach thereof is necessarily under the contract.²²¹

When a contractual relationship exists between persons and, at the same time, a duty is imposed by or arises out of the circumstances surrounding or attending the transaction, the breach of the duty is a tort. In such a case, the tortious act, and not the breach of the contract, is the *gravamen* of the action. The contract is the mere inducement creating the condition that furnishes the occasion for the tort.

There may be tort recovery for breach of a duty arising out of a contract between the defendant and a third party, notwithstanding the lack of privity. In such a case, the various factors that must be balanced include:

- the intent of the defendant to harm the plaintiff
- the ability to foresee the harm

²²¹ American Jurisprudence, Second Edition

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- the degree of certainty that the plaintiff would suffer an injury
- the closeness of the connection between the defendant's conduct and the injury suffered
- the moral blame attached to the defendant's conduct
- the policy of preventing future harm

The intersection of tort law and contract law is most clearly encountered in discussing the tort called the *tortious interference with contractual relations* defined as a third party's intentional inducement of a contracting party to break a contract, causing damage to the relationship between the contracting parties. Some courts also require that the defendant acted with malice. A tort cause of action for interference with contractual relations is not established when the interference asserted is not intentional but is only incidental to another legitimate business purpose of the defendant.

Five elements necessary to state a cause of action for intentional interference with contractual relations are:

1. a valid contract between plaintiff and a third party
2. the defendant's knowledge of this contract
3. the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship
4. an actual breach or disruption of the contractual relationship
5. the resulting damage.

A tort may involve acts that also constitute a breach of contract, so that an action in tort will lie, notwithstanding the act complained of would also be a ground for an action in contract.²²²

Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done. The negligent failure to observe any of these conditions is a tort as well as a breach of contract. For example, duress, although it often arises in connection with a breach of contract, is nevertheless a tort, and when a claim is grounded in duress, a person who sustains damage as a result of being subjected to duress may sue as the plaintiff in a tort action, thus obviating the need for privity of contract. Generally, the plaintiff may elect which remedy to pursue, but in some jurisdictions, claims for both tort and breach of contract can be submitted as alternatives to the jury.

There is a split of authority on whether a limitation provision in an insurance contract bars an insured from suing for an insurer's tortious conduct. Courts holding the provision effective to bar such a suit reason that the tortious conduct of the insurer arises out the insurance contract; it would be inequitable not to give effect to the clause. Other courts hold that the standard form limitations provisions are not applicable to tortious conduct because they are not actions on the insurance contract but are separate actions arising from the breach of a positive legal duty imposed by the law.²²³

²²² American Jurisprudence, Second Edition

²²³ American Jurisprudence, Second Edition

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A state may modify the substantive and procedural law in such a way that recovery may be had in tort for the breach of a contract. In most states, the reformed procedure has abolished forms of action in contract and in tort, but the principles of law governing these actions remain unchanged. The substantive distinction between actions on contract and actions in tort still exists, but there are cases in which it is unimportant to classify the action as one strictly in contract or in tort.

Traditionally, to authorize a recovery in tort, privity must exist between the act of the wrongdoer and the injury complained of. More recently, privity is not an element of a tort, provided the rule as to proximate cause is satisfied. In any event, a necessary connection must be traced backward along the line of sequences to establish the occurrence of an effect from a particular cause. It is essential that the wrongful act charged be the proximate or legal cause of the injury complained of.

Liability for tort is based on the view that the tortfeasor should be held liable for the natural, ordinary, and probable consequences that result from his wrongful act. Ordinarily, recovery cannot be had for a suicide or injuries suffered in an attempted suicide following a tortious act when the suicide or attempt is an independent intervening act that the original tortfeasor could not reasonably have been expected to foresee.

Intentional injuries

The rule that renders a person liable for an injury to another as a result of a wrongful act is applied when it is the proximate consequence of such act. This rule is applied strictly when the act or its omission resulting in the injury is merely negligence. However, the rule is relaxed in its application to cover a wider field of resulting injuries when the act is a willful or malicious tort as distinguished from mere negligence. Intentional torts, as distinguished from negligent or reckless torts, generally require that the actor intended the consequences of the act, not simply the act itself.²²⁴

On the one hand, the policy of the law is very strong in not hobbling privileged or morally innocent conduct unless it results in specifically established economic harm. On the other hand, when the conduct is purposively corrupt by conventional standards, intentional as to consequences, or utilizes means thought to be vicious by conventional standards, the law will allow a recovery for foreseeable harm to established protected interests, such as reputation in trade or occupation, reputation for chastity or honesty, and loss of consortium.

Intended results are often regarded as proximate results. A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, except on the occasion when the harm results from an outside force and the risk is not increased by the defendant's act. Thus, when the defendant intends by his conduct to cause serious mental distress and, in fact, does so, and such distress is a substantial factor in bringing about the suicide of the victim of such distress, a cause of action for wrongful death results. When factors other than harm to the plaintiff are the reason for the injurious act, however, the action by the defendant is legal and non-tortious.

An actor who intentionally causes harm is subject to liability for that harm even if it was unlikely to occur. An actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently. In general, the important factors in determining the scope of liability are the moral culpability of the actor, as reflected in the reasons for and intent in committing the tortious acts, the seriousness of harm intended and threatened by those acts, and the degree to which the actor's conduct deviated from appropriate care.

²²⁴ American Jurisprudence, Second Edition

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Notwithstanding the foregoing, an actor who intentionally or recklessly causes harm is not subject to liability for resulting harm when the risk of harm was not increased by the actor's intentional or reckless conduct.

As to willful acts, persons may be held liable for the consequences that flow therefrom as a proximate cause whether or not those consequences could have been foreseen or anticipated. In such cases, intervening causes are especially likely not to preclude liability of the wrongdoer. One who tries to hurt a person but instead accidentally harms another is liable to the person harmed despite the lack of intent to harm that particular person.²²⁵

Unlawful acts

In cases involving unlawful acts, intervening causes are especially likely not to preclude the liability of the wrongdoer even though the defendant did not intend the particular injury that followed. Thus, a person in an unlawful pursuit of another under circumstances that are likely to cause damage to a third person has been held liable for the injury. Some cases even seem to countenance the theory that a person who willfully commits an unlawful act is liable for its remote and unlikely consequences. An unlawful act must be a proximate cause of an injury if liability is to be predicated.

Types of Torts

For the law to furnish redress, the wrongful act of the defendant must affect some legal interest of the complaining party. In assaying the range of interests requiring protection, the law recognizes that in a civilized society, all individuals deserve fair or reasonable political, physical, cultural, social, and economic opportunities.

Damage to reputation

The enjoyment of an unassailed private reputation is a right entitled to protection as much as are the rights of life, liberty, and property. To invade the enjoyment of this right is a breach of legal duty for which an action will lie. The law allows recovery for foreseeable harm to establish protected interests, such as reputation in trade or occupation and reputation for chastity or honesty. Ordinarily, an injury to reputation is affected by slanderous or libelous language, but nonslanderous words, as well as lawful acts, intended solely to injure a person in his business, are also actionable.

Outrage

Outrage is recognized by some courts as an actionable tort. Outrage is defined as a bold or wanton injury to a person or property, wanton mischief, gross injury, or an aggravated wrong. The term implies something more than mere inconvenience or annoyance or injury. It implies excess and violence as well as an intended and designed injury. When applied to the feelings, it implies not merely physical pain, but mental pain as well.

Mere sleeplessness and distress caused by the allegedly improper actions of an insurance company do not constitute a tort of outrage, but egregious sexual harassment may constitute a tort of outrage. For a plaintiff to recover for the tort of outrage, he must demonstrate that the defendant's conduct was intentional or reckless, was extreme and outrageous, or caused emotional distress so severe that no reasonable person could be expected to endure it. For outrage to occur, the conduct complained of must be so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized society.²²⁶

²²⁵ American Jurisprudence, Second Edition

²²⁶ American Jurisprudence, Second Edition

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Cases involving sexual harassment and emotional distress caused by a hospital to a doctor have been held to involve the tort of outrage. However, other cases involving sexual harassment and cases involving instructing an employee/plaintiff to conduct an illegal undercover narcotics investigation, laundering money to fund the investigation, and firing the employee as a scapegoat to cover-up the employer's involvement in criminal activity as well as cases involving dishonest insurance adjustors and insurance agents have not given rise to cognizable claims of outrage.

Interference with personal rights

Everyone has a legal right to enjoy social relations with his friends and neighbors. Furthermore, everyone has a legal right to personal security at home, including the right of enjoyment of life, the enjoyment of the happiness of home, and the love and confidence of a spouse. A person who injures another in the enjoyment of any of these rights commits a tort. Similarly, every member of a family has a right to protect his family's rights against outside interference.

However, there is authority to the contrary, holding that children are not entitled to recover for the disruption of their family ties from one who enticed their mother or father away from them. Nor may the children recover for the loss of consortium when an accident has crippled and immobilized a parent, but the parent is still alive. In one case, a father who sued his children's mother for attempting to take the children away from him was not allowed recovery in tort. In another, a lesbian lover was not able to bring a tort action against her lover's husband when he took nude photographs of her through a window as part of an attempt to prove that his minor daughter lived in an unwholesome environment and that he should be granted custody.

Interference with property rights

The law of torts is concerned with the duty to respect the property of others, and a cause of action in tort may be predicated upon an unlawful interference with the enjoyment by another of his private property. The rules that determine the negligence of conduct threatening harm to another's interest in the physical condition of land and chattels are the same as those determining the negligence of conduct that threatens bodily harm to another.²²⁷

A person is liable in an action for damages for a nontrespassory invasion of another's interest in the private use and enjoyment of his land if the following conditions exist:

- the other person has property rights and privileges with respect to the use or enjoyment interfered with
- the invasion is substantial
- the defendant's conduct is a legal cause of the invasion
- the invasion is either intentional and unreasonable or unintentional and actionable under general negligence rules

²²⁷ American Jurisprudence, Second Edition

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For the purpose of an action in tort, "property" may include: confidential information, evidence required for a court case, living trusts, causes of action in tort, the expectancy of an inheritance, although there is contrary authority.

Interference with right to services

A person unlawfully interfering with another's right to services is liable for actual or compensatory damages in the same manner that he would be in case of the interference with any other property right. If a third person tortiously inflicts a physical injury upon an employee of another, and the employee, as a result, is prevented from performing the duties owing to his employer, the latter may recover from that third person for the damages resulting to him. Other instances of causes of action for the loss of services include cases of interference with the right of a husband to the services of his wife and with the right of a parent to the services of his child.²²⁸

Perversion of or compelling the resort to legal remedies

Civil liability may be predicated upon the malicious prosecution of a criminal action and, in some jurisdictions, a civil action, an abuse of process, or false imprisonment. When the elements constituting such a cause of action are not present, the mere failure of the plaintiff to sustain his action does not give rise to a tort cause of action in favor of the defendant.

When a plaintiff commences a civil action, but dismisses it with prejudice before the trial begins and pays all the legal costs incurred therein, the defendant usually cannot recover damages for his loss of time, expenses, or attorney fees incurred. A private individual, enjoying no special privileges, who, without malice, wrongfully asserts and presses a claim to the property of another, provided he does not physically interfere with the property or its possession, is not, under the common law, guilty of tort. Similarly, no tort cause of action arises out of the act of the defendant in subjecting the plaintiff to unnecessary expense by compelling him to resort to litigation, and by interposing a defense therein, even though the defendant knew that the defense could not be sustained. The malicious instigation of an official action when done to injure another is not actionable in tort.

The expense incurred by the successful party in an action, over and above the taxable costs, does not provide a basis for a subsequent tort action against the unsuccessful party. In such case, the legal costs awarded in the action are regarded as the full measure of liability incurred by the unsuccessful litigant. One reason assigned for this rule is that the recovery of costs in the original action is one of the matters involved therein, and becomes *res judicata*. Another reason for the rule is to not discourage citizens from appealing to the courts for redress, out of fear of the possible consequences if they are unsuccessful.

Particular conduct as constituting

In those jurisdictions in which *prima facie* tort is recognized, the courts have recognized the existence of remedies for a variety of wrongs outside the traditional tort concept. Under some circumstances liability based on the theory of *prima facie* tort has been denied in jurisdictions which generally recognize the cause of action.

Other courts do not recognize the concept of *prima facie* tort, holding that it is unnecessary since the courts can create or recognize new specific torts when confronted with conduct causing injuries which should be compensated. Still others, while recognizing the concept, emphasize that it is not intended to provide a remedy for every intentionally caused harm, but rather, it is a remedy for acts committed with the intent to injure the plaintiff without justification.

²²⁸ American Jurisprudence, Second Edition

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Malice

A cause of action for *prima facie* tort arises only if the defendant can be shown to have acted maliciously, in the sense of possessing an actual intention to harm the plaintiff, aside from any other motive. Phrased differently, for an intentional harm, inflicted without justification, to be *prima facie* actionable, it must have been motivated entirely by disinterested malevolence.²²⁹

To recover under the doctrine of *prima facie* tort, the sole motivation of the defendant must have been a malicious intention to injure the plaintiff. Any other motive, such as profit, self-interest, or business advantage precludes recovery. Therefore, without malice, there is no *prima facie* tort.

Necessity for special damages

An allegation of special damages as distinguished from general damages is an essential element of a cause of action for *prima facie* tort. There can be no recovery for *prima facie* tort unless special damages are alleged with sufficient particularity by the plaintiff. Additionally, there can be no recovery unless there is a showing of actual temporal damage resulting from the acts complained of. Where specific torts account for all the damages sustained, whether provable as general damages or pleadable or provable as special damages, *prima facie* tort does not lie.

Justification or Defense

When the tort is intentional rather than the result of negligence, the law generally recognizes fewer defenses and is more inclined to find that defendant's conduct was the legal cause of the harm complained of. Legal liability in tort is predicated upon acts that cannot be justified in law, acts done without just or lawful excuse, and acts done without justifiable cause or occasion. An act causing damage to another does not create liability when the person doing the act has a legal excuse or justification. However, the justification for an act causing loss or damage to another must be as broad as the act itself, and it must cover the motive, the purpose, and the means used. Moreover, an unlawful act that injures another cannot be justified by showing that the wrongdoer could have done a lawful act that would have caused even greater injury.²³⁰

Contributory and comparative negligence

A cause of action in tort is generally regarded as arising in favor of persons who are without fault proximately contributing to their injury. However, the mere fact that a person is committing a tortious act at the time he is injured does not necessarily preclude his right to maintain an action for such injury. Thus, a person unlawfully assaulted, when without fault, may stand his ground and repel force with force to the extent that to him seems reasonably necessary to protect himself from injury. Similarly, as an incident to the right to acquire and own property, the owner has the right to defend and protect it against aggression, and if he commits an assault in so doing, the law will justify him.



The contributory negligence of the plaintiff is no defense to an action for an intentional tort, nor is it a defense to strict liability. When the defendant's activity is a dangerous one, imposing strict liability, a plaintiff will be barred from recovery not by his mere contributory negligence, but if he has discovered the danger, he will be barred by his own wanton, willful, or reckless misconduct that materially increases

²²⁹ American Jurisprudence, Second Edition

²³⁰ American Jurisprudence, Second Edition

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the probabilities of injury or amounts to an invitation to injury or at least an indifference to the consequences.

Before comparative negligence was widely adopted, contributory negligence principles were not a defense to an intentional tort action. Under comparative negligence, this same defense of nonapplicability to intentional torts carried over and became the general rule, so there was no apportionment of damages when an intentional tort was involved. However, in some jurisdictions, comparative negligence principles are applicable to intentional torts, so the responsibility for the plaintiff's injuries is apportioned according to each party's relative degree of fault, including the degree of fault attributable to multiple intentional tortfeasors. Other courts, however, have not adopted this development.²³¹

Necessity or self-protection

An act that would otherwise be a tort may be justified by necessity. This is true of an act done under the influence of a pressing danger, such as an entry on the land of another to avoid bodily harm, or to save property from destruction. Indeed, the destruction of property, or even life itself, may be justified by necessity.

A necessity sufficient to justify an injury to the property of another may arise out of an act of God or of strangers, such as public enemies. Since there is a great public interest in the prevention of crime and in the speedy apprehension of criminals, the victim of a crime may use ordinary resistance that might otherwise cause actionable damage. He is chargeable with no greater legal duty to use care for the protection of others than he, in the emergency, has seen fit to use to protect himself. The use of force intended or likely to cause death or serious bodily harm is privileged if the actor reasonably believes that the commission or consummation of a felony cannot otherwise be prevented.

A person who knows or has reason to know that a third person is giving or is ready to give to another person aid necessary to prevent a physical harm to the other person, and negligently prevents or disables the third person from giving such aid, is subject to liability for physical harm caused to the other person by the absence of the aid that he prevented the third person from giving.

The exclusive control of private property is subordinate to the exigencies of public safety and private necessity. Legal sanction is also given to the requirements of morality and social duty. Under these principles, a landowner may erect structures on his own land for the purpose of protecting it from the elements even though he produces a condition that injures the adjoining land as a result; but a person does not have the right to relieve his own property of a mischief by causing a similar mischief to the land of his neighbor.²³²

When necessary to insure the public safety, a legislature may, under its police power, authorize municipal authorities summarily to destroy property without legal process or previous notice to the owner. The summary destruction of buildings by public authorities is regarded as a valid exercise of the police power when its purpose is to avert or contain the spread of fire. No compensation need be made to the owners of such buildings.

²³¹ American Jurisprudence, Second Edition

²³² American Jurisprudence, Second Edition

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The right of an individual to take or destroy private property in self-defense or for the protection of life, liberty, or property is a natural right, of which the government cannot deprive the citizen, and is founded on necessity, not expediency. To constitute a justification, it is not essential that the defendant's own property be in imminent danger; a danger to the property of third persons may be sufficient to constitute justification, especially when the act is done by an individual at the instance of those whose property is placed in jeopardy. This applies when the property destroyed would have been destroyed by the fire in any event, so the plaintiff suffers no injury beyond what would have been caused by the fire; however, a different result is reached when the property destroyed would have remained unharmed without the action of the defendant.²³³

To secure the benefit of the justification, the necessity must be immediate and imperative, and in some cases, at least extreme or overwhelming. The necessity must be clearly shown; mere expediency or utility does not suffice, and the parties are liable in those cases when the necessity does not exist.

Practical jokes; horseplay

That there was no intention to inflict an injury on the plaintiff is no justification for an act that does, in fact, cause injury. Therefore, when a practical joke is the cause of an injury to a person, the perpetrator is not excused from liability in damages for the injury sustained.

If an act is done with the intention of bringing about an apprehension of harmful or offensive conduct on the part of another person, it is immaterial that the actor is not inspired by any personal hostility or desire to injure the other person, intending only to perpetrate a practical joke on such person. A person who plays dangerous practical jokes on others, or engages in horseplay, takes the risk that his victims may not appreciate the humor of his conduct, and he will be liable for an injury resulting from the practical joke.

A tort affecting property might be excused as a joke if the parties had been perpetrating a series of practical jokes on each other in such a way that the defendant has a right to believe that the plaintiff would accept the act as a joke.²³⁴

Associations

Not only are persons or entities usually liable for torts they have committed, but they are also liable for the actions of their agents who are acting within the scope of their duties. In some jurisdictions, a member of an unincorporated association may be allowed to sue the association of which he is a member for tort. In other jurisdictions, he may not sue.

Intrafamilial lawsuits

Generally, the jurisdictions are in conflict on the question as to whether parents and their children or whether spouses may sue each other in tort. The reason generally given for denying members of the same family the right to sue each other is that to permit such actions would disrupt family harmony and encourages fraud or collusion. However, a relationship by blood or marriage, other than that of parent and child or husband and wife, between the tortfeasor and the person injured usually does not preclude the maintenance of a tort action for injuries. Therefore, when the plaintiff and defendant are siblings and members of the same household, living together under the same parental authority, these brothers and sisters or other kin are not immune from tort liability to one another by reason of that relationship. When

²³³ American Jurisprudence, Second Edition

²³⁴ American Jurisprudence, Second Edition

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the parties involved in the action do not live in the same household, there is no family relationship that could be considered an obstacle to an action in tort.

Parents have been allowed to maintain an action against their unemancipated 17-year-old son whose negligence caused the death of his 6-year-old brother, but parental immunity barred a suit by a child for damages resulting from her father's intentional tortious acts, when the child alleged damages resulting from sexual assaults, because recovery against a parent by an individual child for an intentional tort, where insurance is not available, decreases the assets available for the support of other family members who may also need assistance. The presence of insurance is often seen as a factor in minimizing the danger of disrupting family harmony.²³⁵

Remedies and Procedure

In the law of torts, remedies attempt primarily to restore an injured person to a position, as nearly as possible, equivalent to his position prior to the tort. Statutes governing the federal court's supplemental jurisdiction over state law claims, which required tolling of the state statute of limitations on a state law claim during the period in which the federal cause of action was pending, was not deemed unconstitutional as applied to tort claims brought against a county. The South Carolina Tort Claims Act conferred upon political subdivisions immunity from tort liability for any claim brought more than two years after the injury was or should have been discovered; municipalities, unlike states, did not enjoy constitutionally protected immunity from suit.

Pleading *res judicata*

The doctrine of *res judicata* applies to judgments in tort actions. A judgment in an action in tort may operate as *res judicata* in a subsequent action in contract. The converse is also true, and a judgment in an action in contract may operate as a bar to a subsequent action in tort.²³⁶

A single wrongful act may cause different injuries, or injuries to different rights, by causing damage to both the person and the property of the same individual. In such a case, only one cause of action arises. Under this rule, when a single wrongful act causes different injuries, or injuries to different rights, a recovery in one action will bar another action involving the same tort even when the damages demanded in each action are for a different injury. For example, the recovery of a judgment for property damage is a bar to a later action for personal injuries sustained in the same mishap. Similarly, because the torts of invasion of privacy, false light, and defamation are so similar, a plaintiff may only recover on one of the theories based on a single publication, but he is free to plead them in the alternative.

Under rare circumstances, when actions may be brought for an injury to a person and to property resulting from the same wrongful act, a judgment in an action for the injury to the person or property is not a bar to the maintenance of a later action for the injury to the other person regardless as to whether the judgment in the earlier case was in favor of the plaintiff or the defendant.

In the absence of a statutory declaration, a judgment in a prior action in which a tort claim might have been, but was not, asserted as a setoff, counterclaim, or cross-petition, generally does not release the defendant from liability. It is no bar to a subsequent independent action based on the claim, or to the right to rely thereon as a defense to, or as a counterclaim in, a subsequent action. This rule is applicable when a claim on a contract is not interposed in a prior action of tort, or the claim is in tort and the prior action was

²³⁵ American Jurisprudence, Second Edition

²³⁶ American Jurisprudence, Second Edition

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on contract, in tort, in equity, or to recover the possession of property. A different result may be reached, however, when the tort claim is necessarily adjudicated in the prior contract action.

Joint Tortfeasors

For a harm resulting to a third person from the tortious conduct of another person, a person is subject to liability under the following conditions:

1. he does a tortious act in concert with the other person or pursuant to a common design with him
2. he knows that the other person's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other person to so conduct himself
3. he gives substantial assistance to the other person in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

A person who joins in committing a tort cannot escape liability by showing that another person is also liable. The fact that a third person co-operated in the wrong is no justification for the misconduct of the defendant.

The general rule is that joint tortfeasors are jointly and severally liable. A tort jointly committed by several persons may be treated as joint or several at the election of the aggrieved party. One injured by joint tortfeasors has a single and indivisible cause of action that he may enforce by proceeding against the wrongdoers either jointly or severally. He may also recover a judgment against all of them, or a judgment against each of them.²³⁷

Joint and several liability applies when there has been a judgment against multiple defendants and can result in one defendant paying more than his apportioned share of the liability when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control, such as another defendant's insolvency. When the limitations on the plaintiff's recovery arise from such outside forces, joint and several liabilities make the other defendants, rather than an innocent plaintiff, responsible for the shortfall. A settlement with one joint tortfeasor does not mean that the other joint tortfeasors must contribute; rather, it preserves the liability of the other joint tortfeasors in later actions.

Joint Tortfeasors

The mere presence at the commission of a tort, without participation therein, does not render a person jointly liable with the wrongdoer; to render persons joint tortfeasors, they must actively participate in the act causing the injury. There is no joint liability when there is no concert of action and no act of one individual operating ordinarily and naturally to produce the act of the other.

Liability in tort may be predicated upon the ratification of a wrongful act after it is done when the act benefited, or was done in the interest of, the person adopting the act and was ratified with full knowledge of the facts. The liability in such a case is joint and several.

²³⁷ American Jurisprudence, Second Edition

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Engagement in common enterprise

Generally, two or more persons engaged in a common enterprise are jointly liable for the wrongful acts committed in connection with the enterprise under the following conditions: the enterprise is an unlawful one even when the damage done was greater than was foreseen; the particular act done was not contemplated or intended by them all; only one of the participants' acts causes the injury.

For example, when two or more persons are guilty of wrongfully or negligently firing a gun, and the plaintiff is wounded by a single bullet or shotgun pellet, each of them may be held liable for the plaintiff's injury even though there is no showing as to which of the tortfeasors fired the shot that produced the plaintiff's injury. There is authority, however, for an alternative rule that when two or more persons are acting lawfully together in the furtherance of a common lawful purpose, one is not liable for the unlawful act of the other when done in furtherance of the common purpose and without his concurrence.²³⁸

Parties

If each of two or more persons is subject to liability for the full amount of damages allowed for a single harm resulting from their tortious conduct, the injured person can properly maintain a single action against one, some, or all of them. Although a plaintiff may proceed jointly and severally against each or all of the wrongdoers until satisfaction of the cause of action has been obtained, he may not split the cause of action with the expectation of having separate recoveries and separate satisfactions for the single wrong. If less than the whole number of wrongdoers is joined as defendants to the plaintiff's suit, those joined may, by a proper cross action, bring in those defendants omitted.

Evidence

In an action against two or more defendants, evidence may be admitted even when it is competent against only one of them. This rule is applicable in a joint action against two or more persons for the commission of a tort, but in such case, the use and application of the evidence must be limited by proper instructions. The burden is on the plaintiff to prove that the defendants were guilty of the wrongful acts charged by concerted action and that the acts charged were the proximate cause of the injury received or the damage sustained by the plaintiff.

Rule against apportionment of damages

In the absence of statutory authorization, no apportionment of compensatory damages may be incorporated in the judgment establishing the liability of joint tortfeasors on the theory that the plaintiff should not be denied the possibility of collecting the full amount of his judgment from any one of the defendants. While a jury can apportion damages for the purposes of contribution among joint tortfeasors, this apportionment does not apply to or change the plaintiff's rights to recover the total amount of the damages against one of several defendants.²³⁹

In actions against two or more persons for a single tort, it is improper to return two verdicts for different sums against different defendants at the same trial. There may be only one verdict for a single sum against all defendants who are found liable of the tort, irrespective of the degree of culpability, even if the defendants plead separately or are charged with distinct and different acts contributing to the injury.

²³⁸ American Jurisprudence, Second Edition

²³⁹ American Jurisprudence, Second Edition

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The general principle that compensatory damages may not be apportioned among tortfeasors jointly and severally liable is applicable to situations in which the defendants' joint and several liability is based upon an employer-employee relationship giving rise to the application of the doctrine of respondeat superior. This general rule against apportionment is not altered in an action against an employer and his employee for injuries resulting from the negligence of the employee by the fact that the joint tortfeasors may be entitled to contribution from another; however, an employee has no right of contribution against his employer. When an employer and employee are sued jointly, a judgment against the employer and absolving the employee of liability for a tort committed by the employee is inconsistent; when the employer is held liable only because he is responsible for the act of another, he cannot be held liable if the other person is exonerated.²⁴⁰

The entry of several verdicts and judgments against each of several joint tortfeasors in a joint action may be permitted by statute, and in such a case, the jury may return a verdict against each joint wrongdoer to the extent of his participation in the wrongful act. A statute may provide that when several trespassers are sued jointly, the plaintiff may recover all his damages from the defendant who caused the greatest injury. The jury may also specify the particular damages to be recovered from each defendant. However, such a statute has been construed to allow the apportionment of damages among joint trespassers against property only, and not to apply to personal torts. In another jurisdiction, however, a statute permitting the apportionment of liability between joint trespassers is applicable to personal injury actions based on negligence. Some statutes allowing for separate verdicts against several defendants are construed so as not to permit separate apportioned verdicts unless the liabilities are different and separable.²⁴¹

Judgments against persons not joint tortfeasors

In some cases, when the defendants are not joint tortfeasors, the acceptance of satisfaction of a judgment against one tortfeasor has been held as a release of a judgment against another when the gist of the action in both cases is the same. Thus, a recovery against one derivatively liable is denied if legal satisfaction is had against the primary tortfeasor. Generally, the rule that all joint tortfeasors are discharged by the satisfaction of a judgment against one of them, does not apply to independent and successive tortfeasors.

Rights that do not flow from duty well performed are not worth having.

—Mohandas K. Gandhi

REVIEW QUESTIONS

1. According to the text, how is a "tort" defined?

²⁴⁰ American Jurisprudence, Second Edition

²⁴¹ American Jurisprudence, Second Edition

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2. _____ are obligations imposed by the law by policy considerations to avoid some kind of loss to others.
3. What two general classes are torts divided into? Explain the difference between the two.
4. Write a paragraph based on the text in this chapter defining the word "duty."
5. According to the text, explain when a cause of action in tort arises.



Written Assignment

At the end of each chapter, several questions are listed under the heading Review Questions. Please answer each one thoroughly and turn them in when you take your exam. The education director will be responsible for forwarding the material to Dr. Wayne Cook at Rayburn Correctional Center.



WORDS TO REMEMBER

- | | |
|-------------------------------|----------------------------------|
| ➤ <i>Tort</i> | ➤ <i>Outrage</i> |
| ➤ <i>Tort Obligations</i> | ➤ <i>Justification</i> |
| ➤ <i>Personal Injury</i> | ➤ <i>Defense</i> |
| ➤ <i>Tortfeasor</i> | ➤ <i>Contributory Negligence</i> |
| ➤ <i>Subject to liability</i> | ➤ <i>Comparative Negligence</i> |
| ➤ <i>Prima Facie</i> | ➤ <i>Joint Tortfeasor</i> |
| ➤ <i>Intentional Tort</i> | ➤ <i>Parties</i> |
| ➤ <i>Malice</i> | ➤ <i>Evidence</i> |

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WEEK 14

Lesson 14: Wills and Estates

Lesson Topics

- Wills.
- Testamentary Capacity.
- Intestacy.
- Probate.
- Estate Planning.
- Tax legislation overview.

Lesson Objectives

- Recognize state law in relation to probate law, intestate successions, preparation and execution of will, and estate planning.

Reading Assignment

Nordyke, Keith. J.D. 2012. Introduction to Law and the Paralegal Profession. Text: Chapter 15.

Text



CHAPTER 15 WILLS AND ESTATES

This chapter introduces the area of wills, estate planning, and administration. Topics discussed in this chapter include probate law, intestate successions, preparation and execution of wills, and estate planning.

Wills

When a person dies with a valid will that disposes of his property, he dies *testate*. The term *testate* derives from the creator of a will. A male who executes a will is referred to as the *testator*; while a female is referred to as the *testatrix*. Each state has its own version of the Statute of Wills. The purposes of the Statute of Wills are to permit individuals to dispose of their assets at death in a clear, orderly manner and to remove fraud and undue influence by others in arranging for that disposition. The Statute of Wills also ensures implementation of the decedent's testamentary intent.

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In the Uniform Probate Code, UPC, a *will* is defined as any testamentary instrument, including a codicil, which appoints a personal representative, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing, by intestate succession.²⁴²

The disposition of real estate by will is a *devise*. However, the conveyance of personal property by will is a *bequest*. Because of the difficulty in distinguishing between real and personal property or because the characteristics of a group of assets may change over time, many estate planners advocate the use of both terms for all testamentary dispositions.²⁴³

In theory, many believe that requiring written terms forces the testator to leave evidence of his desires for the disposing of his estate. The genuineness of a will is determined by the signature of a testator and by the *attestation*. The attestation ceremony is a protective formality, which requires individuals to witness the fact that the testator signed the will voluntarily. When the formalities for the execution of a will are followed, many will contests are eliminated, and probate costs are reduced.

Codicil

In order to amend or modify an existing will, a *codicil* must be executed in the same manner as the original will. Typically, a codicil refers to the date of the original will and ratifies those provisions of the original will which are not specifically revoked, amended, or modified by the codicil. A properly executed codicil becomes a supplement to the original will and is incorporated with the will in the probate process.²⁴⁴

A will is *ambulatory*, or changeable, which means that it disposes of property owned at the date of death without regard to what property was owned when the will was signed. For purposes of interpretation, however, the meaning of the testator's words is determined by the conditions existing when the will was signed. When codicils are executed to update the will, conditions existing when the codicil was signed likewise are taken into account in determining testamentary intent.²⁴⁵

Holographic Wills

A large majority of the states allow for a *holographic will*, a will in the handwriting of and signed by the testator. Although holographic wills must be endorsed, only a handful of states mandate the testator's signature at the end of the document. For the most part, any act performed with the intent of being a signature is sufficient even if it is not legible or not the formal name of the testator. When deemed valid, there is no requirement that holographic wills be witnessed. However, some states do require that a holographic will be dated by the testator.²⁴⁶

Some state statutes require that a will be entirely in the handwriting of the testator. Consequently, some courts have declined to admit documents offered as holographic wills because they were typed or because they contained printed text or printed captions.

²⁴² Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 728

²⁴³ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 728

²⁴⁴ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 729

²⁴⁵ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 729

²⁴⁶ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 729

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Nuncupative Wills

Several states allow a nuncupative will for probate purposes. A nuncupative will is an oral will. A nuncupative will permits a person to dispose of limited amounts of personal property, usually up to \$1,000, and it must be made during the testator's last illness. Witnesses must be present, and at least one must be willing to testify in court if requested to do so. Several states require that a testator's wishes be reduced to writing and that the writing be admitted to probate within a specified time.²⁴⁷

Validity of Wills

The formal requirements for executing a will in all states must be known by an *estate planner*. In modern society, a will may be offered for probate in a different state than the state where it was executed. The general rule is that the validity of a will is determined by the law of the *situs* for immovable assets and by the law of the decedent's domicile at death for movable assets. Courts require substantial compliance with statutory formalities to establish the validity of wills.²⁴⁸

Statutory Formalities

Under federal law, any person who is 18 or more years of age and who is of sound mind may make a will. The procedures necessary to execute a will are relatively simple. Although wills must be in writing, they may be in any language and may be written in any form which has some permanency. Over the centuries, the writing materials used for the purpose of wills have been as varied as the imaginations of the writers. Many wills have been handwritten in pencil; some have been written on brown wrapping paper, and a few even have been carved on hard surfaces.²⁴⁹

Witnesses



Typically, two or more witnesses are required for the execution of formal wills. The qualifications necessary to be a witness to a will are the same as the general qualifications for witnesses. A witness must be able to observe, to understand, and to relate what happened when the will was signed. There is no minimum age required to be a witness to a will.²⁵⁰

In accordance with the UPC, at least two individuals must sign a will, each of whom witnessed at least one of the following: the signing of the will; the testator's acknowledgment of the signature; or the testator's acknowledgment of the will. The signing of a will by an interested witness, such as one who is a beneficiary under the will, does not invalidate the will or any of its provisions. Nevertheless, some jurisdictions do require that at least one witness be a person without interests.²⁵¹

In many states, there are statutes that require a witness to be competent; others require a witness to be credible. Notwithstanding statutory phrasing, standards are generally the same as those used to determine competency of the testator at the time the will is executed. If a witness becomes incompetent or dies after the will is executed, the validity of the will is not affected.

²⁴⁷ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 729

²⁴⁸ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 729

²⁴⁹ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 730

²⁵⁰ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 730

²⁵¹ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 730

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Testamentary Capacity

Only general guidelines are established to determine a person's mental capacity to make a will because individual intellectual capacity and mental power vary. According to the legal standard, some of the elements of mental comprehension necessary for testamentary capacity include: the testator must know the nature and extent of his estate; the testator must be able to identify the persons who are the objects of his bounty and his relationship to them; the testator must understand the nature of his act in disposing of his property. A person making a will must have sufficient mind and memory to understand all of these elements and how each relates to the other.²⁵²

A person must have the capacity to make a will at the time the will is executed. In other words, if a testator had capacity at the time a will was signed but later loses his capacity, the validity of the will is not affected. On the other hand, if a testator does not have capacity when the will is made but subsequently acquires capacity, the will is not legally valid. The best bet would be to re-execute a will after capacity has been acquired. This establishes a valid will. A witness may be called upon to testify as to a testator's capacity to make the will, including the testator's age, sanity, and freedom from undue influence. Keep in mind that these facts are often overlooked by witnesses, who simply believe they are only attesting a legal formality of signing a will.

Objects of Bounty

A testator must be able to identify the claims against his property and the names of those who are the natural objects of his bounty, or property. Generally, relatives are the natural objects of a testator's bounty. An understanding of the condition of his property and the persons related to him are important in establishing testamentary capacity. In addition to knowing who his relatives are, a testator should be able to recollect their treatment of him.²⁵³

A testator must not only be able to identify the recipients of his property but to also identify those relatives to whom no disposition will be made. A testator may choose to give his property to some unrelated person or may choose specifically to omit heirs by stating those desires in his will and by identifying those who otherwise might have a claim against his estate.

Grounds for Invalidity

A court proceeding to contest the will must be initiated by any person who disputes a will. The contestant may assert several grounds for contest. Incapacity, fraud, duress, and undue influence are some of the most common grounds for invalidating a will. All matters associated with the drafting and execution of the will must be analyzed closely. Any actions alleged that may invalidate a will must be scrutinized carefully in relation to the specific statutory language.²⁵⁴

Incapacity Litigation regarding incapacity often centers on mental capacity, which may be mental deficiency or mental derangement. The test applied in *mental deficiency* cases is the same as the test applied for testamentary capacity. *Mental derangement* usually relates to insane hallucinations or delusions. In other words, when a testator imagines facts to exist against all evidence to the contrary, he may be mentally deranged. However, simply having irrational beliefs does not make a will invalid on grounds of mental derangement if said beliefs do not affect the will.

²⁵² Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 731

²⁵³ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 732

²⁵⁴ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 732

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Fraud When false statements are knowingly made by an heir or a beneficiary with the intent to deceive the testator, causing the testator to change his will in reliance upon the statements, this is *fraud*. Generally, there are two types of fraud: fraud in the execution, also called *fraud in the factum*; and fraud in the inducement.

When a will is executed by a testator who believes it to be something other than a will or when the contents of the will are withheld, *fraud in the execution* has occurred. When a testator is deceived about the contents of his will, the fact that he had an opportunity to read the will does not make the will valid if, in fact, he did not read it. Death-bed wills sometimes result from fraud in the execution because the testator may no longer have the physical or mental strength to comprehend the contents of the will. When unusual dispositions are made to persons with influence over the testator at the time of his last illness, fraud in the execution is likely.

When a testator has a genuine intent to create a will, but the intent is induced by false statements of a beneficiary under a will, *fraud in the inducement* has occurred. When inducement or deceit unjustly enriches a beneficiary, a will may be invalidated. Specific knowledge by a beneficiary that a statement is false, together with intent to deceive a testator, is essential to prove fraud. For example, if false statements are made to a testator by one of his daughters that another of his daughters is immoral and if the testator makes a new will disinheriting the allegedly immoral daughter, the will may be invalid if the testator was induced to make the will because he believed the statements and if the person making the statements benefited from the new will.²⁵⁵

Duress The exercise of force over the testator which diminishes his free will and causes him to create a will that he would not have otherwise made falls into the category of duress and invalidates a will. The use of threats or violence toward the testator or toward his family to induce him to create a will is *duress*. Duress often exists in conjunction with undue influence.

Revocation of Wills

One main vital characteristic of a will is its revocability. A will conveys no present interest in the property devised or bequeathed. In other words, the ownership of property remains with the maker of the will until he dies. A will may be revoked in whole or in part by the testator at any time by creating another will that specifically revokes all prior wills, by writing the word “revoked” across the original will and initialing it, or by destroying the original will

A testator may burn, tear, cancel, mutilate, obliterate, or destroy a will with the intent to revoke it, or he may direct another person to do so in his presence. Some statutes enumerate that revocation of a will also revokes codicils related to it. Most litigation arises when the testator’s intent is unclear. If a will has been singed or burnt only along the edges or if only the first page of a will has been cross-marked, the status of the will may be deemed unclear.

A court may declare a will revoked by operation of law under special circumstances. Under the UPC, the provisions of a will are revoked for a spouse when there is a later divorce or annulment. In such as case, the estate is distributed as if the former spouse predeceased the testator.²⁵⁶

²⁵⁵ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 733

²⁵⁶ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 735

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In several states, a will is considered revoked when a will has been executed before marriage and the subsequent birth of children; however, a marriage alone usually does not revoke a will because a spouse has other protections. A will may also be revoked by a subsequent will or codicil.

Intestacy

Intestate refers to an individual who dies without a valid will, and his estate is distributed to his heirs according to the laws of intestate succession. If a decedent owns real estate in more than one state, different intestacy statutes may apply to the same estate. In order to transfer real property located in other states to a decedent's heirs, a separate court proceeding referred to as an *ancillary administration* is required to appoint a personal representative to execute the deeds of distribution. Generally, personal property is distributed according to the laws of the state where the decedent was domiciled. However, a court may, occasionally, assert jurisdiction over personal property which was kept in that state's jurisdiction even though the decedent was domiciled elsewhere.²⁵⁷

Similar to the Canons of Descent under the English common law, intestacy statutes provide for progressive distribution until there is a taker. The terms *descent* and *distribution* comes from the Canons of Descent. The term *descent* originally pertained only to realty; the term *distribution* pertained only to personalty. Over time, the distinction between realty and personalty has become blurred or has been eliminated.²⁵⁸

A *descendant* is an offspring of the decedent, a person who has descended from the body of the ancestor. Sometimes, descendants are classified as *lineal descendants*, those in a direct line of descent from the decedent; and *collateral descendants*, those who are not direct descendants of the decedent, but who share a common ancestor. An *ascendant* is a person to whom the decedent is related as a direct descendant, such as a father, grandfather, great-grandfather, and so on.

Heirs

A person entitled to receive the decedent's property as determined by the statutes of intestate succession is referred to as an *heir*. The intestacy provisions within the UPC require that an heir survive the decedent by 120 hours to be eligible for inheritance. An individual may be named as an heir in an estate without receiving any property at all if the decedent died without a will but provided for transfer of his assets through joint tenancy, gifts, trusts, or insurance designations.²⁵⁹

Adopted Persons

Statutes create the right of an adopted person to inherit as an heir. Many statutes treat the adopted person as if he had been born into the adoptive family, allowing him to inherit through as well as from his adoptive parents. Statutes vary from state to state concerning whether inheritance is permitted *from* as well as *by* an adopted person and concerning the adoptee's status with respect to both his natural relatives and his adoptive relatives.

Persons Born Out of Wedlock

Statutes also differ from state to state concerning the inheritance rights of persons born out of wedlock. A child born out of wedlock clearly inherits as an heir from the mother in all states. However,

²⁵⁷ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 735

²⁵⁸ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 736

²⁵⁹ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 737

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unless there is a subsequent marriage between the mother and the father or unless the father acknowledges paternity, most jurisdictions do not permit the child to inherit from the father.

Escheat

If a person dies both intestate and without surviving heirs, the entire estate will *escheat*, or pass, to the state. Also, if a person dies testate and all of his beneficiaries and heirs are deceased, his estate will escheat to the state. Most statutes provide that the state must hold the assets for a period of time and that a diligent search must be conducted to locate heirs. If no heirs are found within the statutory time, the estate becomes the property of the state.²⁶⁰

Probate

A decedent's estate must go through a liquidation and distribution process to convey legal title to the decedent's heirs or beneficiaries, regardless as to whether he died testate or intestate. The *purposes of probate* proceedings are to determine the validity of the will, to collect and preserve the assets of the decedent, to pay from the estate all expenses and outstanding debts of the decedent, and to distribute the remaining assets to those who are entitled to receive them.²⁶¹

The formal probate proceedings to administer an estate under the continuing supervision of the court are *in rem proceedings*. Actions which may affect administration of an estate, but which are not part of the administration itself are *in personam proceedings*. A typical *in personam* proceeding will include:

- 1.) actions concerning the elective share of the surviving spouse
- 2.) actions by the personal representative against a debtor of the estate
- 3.) actions against the estate by a creditor of the estate.

An existing will must be located as quickly as possible to prevent its loss or destruction. If the will is in the possession of someone who is unwilling to relinquish it, legal proceedings may be initiated to compel production of the will. Once a will is located, it should be filed with a probate court. The probate court will appoint a personal representative and the decedent's estate is administered according to the testator's intent, or probated.²⁶²

Estate Planning

An estate is an interest in property, an asset. A person's estate consists of his total real and personal property interests while living and after death. The process of preserving an individual's assets is called *estate planning*. Estate planning involves meeting the financial lifetime needs of an individual and maximizing the value of assets transferred at death by minimizing estate and death taxes.²⁶³

The value of the gross estate is determined by the total assets an individual owns, regardless as to whether the assets are classified as probate or non-probate property. Ownership is the key factor in determining whether an asset is part of a gross estate. If an individual exercises control over an asset, that

²⁶⁰ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 739

²⁶¹ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 739

²⁶² Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 739

²⁶³ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 707

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asset is part of the gross estate. Estate planners must be familiar with the range of devices used to facilitate an individual's estate planning needs and objectives. The most common of these devices include ownership options for property, gifts of property during life, life insurance, retirement plans, trusts, and wills. Estate and gift tax laws are major factors in any estate plan.

Tax Legislation Overview

In order to understand the present estate and gift tax laws, it may be helpful to know something about their evolution. Over the past decade, Congress has made many changes in estate and gift tax legislation, requiring both ability and patience in estate planners.

The Revenue Act of 1916, which formed the basic framework of our modern federal estate tax, applied a graduated tax rate schedule to a decedent's taxable estate, which was defined as the total property a decedent owned less deduction, including debts, expenses and losses of the estate. Opponents of the tax appealed to the United States Supreme Court, arguing that it was an infringement on the States' right to regulate the process of transferring property at death. However, the constitutionality of the tax was upheld.²⁶⁴

The most comprehensive tax modifications came with the passage of the Tax Reform Act of 1976, TRA-76. The changes included a larger marital deduction, a new unified credit system combining estate and gift tax, an orphan's deduction, special valuation guidelines for farmland and closely held business realty, replacement of the stepped-up income basis at death with a carryover basis, and liberalization of extensions for payment of tax.

The Economic Recovery Tax Act of 1981, ERTA, included among other things: an unlimited marital deduction, the introduction of *qualified terminable interest property*, QTIP; an increase to \$10,000 for the annual gift tax exclusion; an increase in the unified credit; a reduction in the upper rate brackets; the repeal of the orphan's deduction. The estate tax exclusion for qualified plan benefits, such as Keogh plan benefits, IRA plan benefits, and certain annuities, was reduced to \$100,000 under the Tax Equity and Fiscal Responsibility Act of 1982, TEFRA.²⁶⁵

Under the Tax Reform Act of 1984, also known as the Deficit Reduction Act of 1984, DEFRA, the alternate valuation of assets reported on the estate tax return was restricted, the \$100,000 estate tax exclusion for retirement plans was eliminated, installment payments of estate tax were slightly liberalized, and procedures for reforming charitable trusts were established. The Omnibus Budget Reconciliation Act of 1987, OBRA, imposed a five percent surtax on taxable estates in excess of ten million dollars and added I.R.C. § 2036(c) to eliminate estate *freeze* techniques. This surtax was imposed on the decedents' estates coming into existence after 1987.²⁶⁶

The enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 further provided sweeping changes to the unified credit. This act revised the timetable for increasing the estate tax threshold, or *credit*. The filing exemption was increased to one million dollars for decedents dying after December 31, 2001. The act further provided that the exemption would increase periodically after 2001, eventually reaching \$3.5 million in 2009.²⁶⁷

²⁶⁴ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 708

²⁶⁵ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 709

²⁶⁶ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 709

²⁶⁷ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 710

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For those dying on or after January 1, 2010, the act repeals the provision for estate tax and generation-skipping transfer tax. However, to further complicate matters, in 2011 and beyond, the estate tax exclusion reverts back to one million dollars. The 2001 Act also changed the tax treatment of unrealized capital gains in a decedent's portfolio. Under current law, the basis of estate assets is changed to the date of death value, which is received by the beneficiaries. This new law allows each beneficiary to add up to \$1.3 million to the decedent's basis for the purpose of calculating capital gain tax liability on inherited property. In addition, state death taxes paid to any state or to the District of Columbia were reduced gradually beginning 2002 and eventually repealed on December 31, 2004. This is referred to as *decoupling* from the federal estate tax tables. Also, the lifetime gift tax exemption was set at one million dollars for gifts made after December 31, 2001.²⁶⁸

Property Ownership

Property ownership is a method used by estate planners to maximize the value of an individual's estate during life and to maximize assets transferable at death to heirs or beneficiaries. Property is classified either as probate or as nonprobate based upon the legal characteristics attached to its ownership.²⁶⁹

Probate Property

Property owned solely by the decedent is probate property. These assets are subject to the jurisdiction of the probate court and are distributed either according to the laws of intestacy or according to the terms of the decedent's will. Probate proceedings are necessary to transfer ownership of probate assets to the decedent's heirs or beneficiaries.



The key element in determining whether an asset is probate property is the title of ownership. If the decedent owns real estate, stocks, bonds, bank or savings accounts, leases, mortgages, promissory notes, real estate, automobiles, and other property in his name alone, it is probate property. If the decedent owns life insurance and designates his estate as the beneficiary, the policy proceeds are probate property and are distributed under the decedent's will or under intestacy statutes.²⁷⁰

If an individual owns property with one or more other persons or entities, the ownership interest is a *tenancy in common*. As a tenant in common, each owner holds an undivided interest in the property, which can be sold, transferred, or devised separately from the interests of the other owners without destroying the tenancy of the property. Each individual's undivided fractional share is classified as probate property. The value of a deceased owner's fractional share is included in the probate inventory.

Mandated by law in some states, *community property* means that all property acquired during a marriage automatically is marital property and is owned equally by each spouse. Each spouse has an undivided right to one-half the property acquired by the other spouse during the marriage. Each spouse has complete control over his half. From this standpoint, community property is similar to a tenancy in common and is classified as probate property.²⁷¹

²⁶⁸ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 710

²⁶⁹ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 711

²⁷⁰ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 712

²⁷¹ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 712

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Life Insurance

A life insurance policy payable to a beneficiary other than the decedent's estate is a non-probate asset and is included in the decedent's gross estate, provided the decedent was the policy owner at his death. For example, Larry purchased a \$500,000 life insurance policy from Liberty Mutual Life Insurance Company. Larry was the owner and insured under the policy. The primary beneficiary was Ann, Larry's spouse. When Larry died five years later, Ann received \$500,000 from the insurance company. On Larry's federal estate tax return, the policy was reported on Schedule D as an asset owned by Larry. However, the insurance proceeds were not included in Larry's probate estate, because the insurance policy named a beneficiary other than Larry's estate.²⁷²

If the insured is *not* the owner of the life insurance policy, the insurance proceeds are *not* included in the decedent's gross estate. For example, a husband may own life insurance policies insuring his wife, and vice versa. In this event, a husband controls the policy insuring his wife and designates a beneficiary, which will likely be himself or a trust created by him. If the wife dies first, the insurance proceeds are paid directly to the owner/husband or to his trust. Because the wife does not own the policy at her death, the proceeds are not included in her gross estate.

As a part of an estate plan, a married couple may want to consider a *survivor life insurance policy*, sometimes called a second-to-die policy. This is a single policy insuring a married couple simultaneously. It costs less than two separate whole life policies because it pays only upon the second death. With the unlimited marital deduction, often no estate tax is due at the death of the first spouse. As a consequence, when the surviving spouse dies, his estate stands the full burden of the estate tax and related expenses. A survivor life insurance policy provides the funds to meet these expenses.

Retirement Plans

A qualified retirement plan may be a pension plan, a profit-sharing plan, or an annuity plan. Other retirement programs may include: 401(k) plans; a Keogh plan; an employee stock ownership plan, ESOP; and an individual retirement account, IRA. The following material is not an in-depth discussion of retirement plans but, rather, provides definitions of the various plans for review purposes. If there are benefits remaining to be paid at death, the value of the retirement plan is included in the decedent's gross estate for estate tax purposes. Income tax treatment of retirement plans must be scrutinized closely for proper reporting.²⁷³

A qualified *pension plan* must be established and maintained by the employer, the benefits of which are definitely determinable and systematically paid to a retired employee for a specific period of years, usually for life. Benefits are determined by the employee's rate of compensation and by his length of service with the company.

A *profit-sharing plan* is a defined contribution plan to which the employer may make discretionary contributions. Under most plans, employees may make discretionary contributions also. If a profit-sharing plan uses a trust, the trustee requirements must be met. The IRS requires a profit-sharing plan to be a written instrument to be recognized for tax purposes.

A qualified *annuity plan* can use contributions to buy retirement annuity contracts from insurance companies. For the annuity to be effective, a contract must be signed by the annuitant and issued by the

²⁷² Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 714

²⁷³ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 716

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insurance company. Most annuity plans provide a menu of payout options from which the annuitant may select. Again, the key to determine if any annuity benefits are included in an estate is whether any benefits remain to be paid at death.

Under *401(k) plans*, an individual contributes pre-tax dollars up to a specific limit, which are tax free at the time of contribution. When benefits are eventually paid, the recipient pays income tax in the year the benefits are received. Upon death, beneficiary designations determine who is to receive any remaining benefits, all of which remaining benefits are included in the gross estate.

A *Keogh plan* is a self-employment retirement plan, which is a written program created for the benefit of employees. These self-employment plans can be created only by an employer, who typically is an employee as well. Partnerships or proprietorships are eligible for self-employment plans. If a self-employed individual has more than one trade or business that earns income in any tax year, each business is considered separately for purposes of contributing to a plan. The value of the plan at the decedent's death is included in the gross estate for federal estate tax purposes.

An *employee stock ownership plan*, ESOP, is a defined contribution plan which invests primarily in the company's securities. These plans are available only to employees of a company offering such a plan. Purchase of securities usually is done through a stock bonus plan or through a money purchase plan created by the employer. To determine the stock's value for federal estate tax purposes, the corporation's accountant typically will be involved.

Individuals may contribute a specific amount each year until age 70½ to a traditional *individual retirement account*, IRA. Contributions are deductible except by active participants in qualified retirement plans with an adjusted gross income above certain levels. Additional contributions may be made to a spousal IRA for a spouse who does not work outside the home. After an individual reaches age 70½, a minimum distribution must be paid to the participant at least annually. The percentage of the required minimum distribution is determined by the IRS.

Trusts

A trust is an estate planning device which permits one person to hold legal title to assets while the equitable title rests with the beneficiaries of the trust. Equitable title may be granted in different proportions to the trust beneficiaries. Trusts are major tools in family estate planning because of tax considerations and the management benefits. Trusts originally were used to minimize death taxes and probate expenses on assets transferred from generation to generation. Although this is still a consideration, it is not the sole motivation to create a trust.²⁷⁴

An individual may create a trust to ensure that assets are protected for the beneficiaries. For example, if a parent dies with minor children surviving him, a trustee provides not only the management skills necessary to maintain the principal of the trust, but he is also responsible for making distributions for the health, education, maintenance, and support of the beneficiaries. If a parent dies owning a small business, minor beneficiaries will not have the ability, experience, or training necessary to continue the business operation.²⁷⁵

²⁷⁴ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 718

²⁷⁵ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 719

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An individual may also establish a trust for his own benefit. It is common for individuals to establish trusts while they are capable of managing their own affairs so that if they become incompetent, trust administration can continue. Other non-tax reasons to create a trust include:

1. lack of confidence in a beneficiary's ability to manage property
2. preservation of property for a spendthrift beneficiary during life
3. assurance of family income
4. protection of a disabled family member
5. desire to *rule from the grave*
6. avoidance of publicity and probate

Sprinkle Trust

A *sprinkle trust*, also called a *spray trust*, is a discretionary trust. Its purpose is to provide the trustee with uncontrolled discretion to distribute as much income or principal to a beneficiary for care and education as the trustee thinks best. The trustee becomes the parent substitute for children who are beneficiaries. If there is a surviving parent, the trustee typically will rely upon the parent's suggestions for distributing funds among the beneficiaries. However, when there is no surviving parent, the trustee is extremely cautious about making uneven distributions to beneficiaries. Some advantages provided by a sprinkling trusts include:

1. It provides spendthrift protection, since the beneficiaries do not have any right to income until it is allocated to them.
2. Estate tax savings are achieved when the spouse is also a beneficiary and receives only needed income rather than unnecessary increases in the value of the spouse's estate.
3. Savings on family income tax are achieved when income is distributed to a low-bracket beneficiary.
4. Funds are allocated among beneficiaries according to need.

The disadvantage of a sprinkling trust is that it places complete control in the hands of the trustee.²⁷⁶

Spendthrift Trust

A spendthrift provision in a trust allows a grantor to transfer assets for the benefit of a beneficiary and to protect those assets from creditors. The beneficiary cannot transfer his right to any future distributions, and his creditors cannot attach a claim to any future distribution. Protection against creditors depends upon the amount of discretion granted to the trustee. If the beneficiary receives income or principal at the complete discretion of the trustee, the trust is more creditor-proof. Spendthrift provisions are placed in trusts not only to address the problem of minors mismanaging money but also to assist adults who lack the capacity to manage money and assets prudently.²⁷⁷

²⁷⁶ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 724

²⁷⁷ Virginia K. Newman, J.D., *Paralegal Review Manual*, p. 725

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The protection offered by a spendthrift trust is not ironclad. Not all states limit a creditors' reach on the assets to the same extent; there have been cases when the trustee has been forced to make discretionary distributions to a beneficiary. In addition, spendthrift provisions are not effective against a federal tax lien.

REVIEW QUESTIONS

1. According to the text, define a *will*.
2. What does the term *ambulatory* mean when referencing a will?
3. True or False.
Intestate refers to a person who dies with a valid will that disposes of his property. Explain.
4. As a matter of law, how is the validity of a will is determined?
5. Write a paragraph explaining the procedures and steps necessary to amend or modify an existing *will*.
6. Explain the qualifications necessary to be a witness to a will.
7. What guidelines are established to determine a person's mental capacity to make a will?
8. Write a paragraph explaining the most vital characteristic of a will. Explain how or when it is applicable.



Writing Assignments

At the end of each chapter, several questions are listed under the heading Review Questions. Please answer each one thoroughly and turn them in when you take your exam. The education director will be responsible for forwarding the material to Dr. Wayne Cook at Rayburn Correctional Center.



WORDS TO REMEMBER

- | | |
|--------------------|---------------------------|
| ➡ <i>Testatrix</i> | ➡ <i>Codicil</i> |
| ➡ <i>Testate</i> | ➡ <i>Holographic Will</i> |
| ➡ <i>Testator</i> | ➡ <i>Nuncupative Will</i> |
| ➡ <i>Will</i> | ➡ <i>Estate Planner</i> |
| ➡ <i>Devise</i> | ➡ <i>Sound Mind</i> |

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- *Legal Age*
- *Witness*
- *Testamentary Capacity*
- *Object of Bounty*
- *Incapacity*
- *Fraud*
- *Fraud in Factum*
- *Mental Derangement*
- *Fraud in Execution*
- *Fraud in the Inducement*
- *Duress*
- *Intestate*
- *Intestate*
- *Descendant*
- *Collateral Descendant*
- *Lineal Descendant*
- *Heirs*
- *Probate*
- *In Rem Proceedings*
- *QTIP*
- *ERTA*
- *IRA*
- *COBRA*
- *Community Property*
- *Pension Plan*
- *Profit-Sharing Plan*
- *Annuity Plan*
- *401 (k) Plan*
- *Keogh Plan*
- *ESOP*
- *In Personam Proceedings*

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WEEK 15

REVIEW FOR YOUR FINAL EXAM

This week is devoted to reviewing for the Final exam. By now, you have completed all the written assignments for the last four lessons. The *Review Questions* were designed to draw your attention to major ideas discussed in the text. These questions play a major role in helping you process the information and achieve a working understanding of it.

As mentioned in your study guide, pay close attention to the *Words to Remember*. Your knowledge of these and the major ideas explored through the Review Questions will be tested on exam day. This will not be a comprehensive exam. You are only responsible for the information covered in the last four lessons. The test will consist of true or false questions, multiple-choice questions, and fill in the blank questions.

The *Review Questions* are to be submitted with your Final Exam.