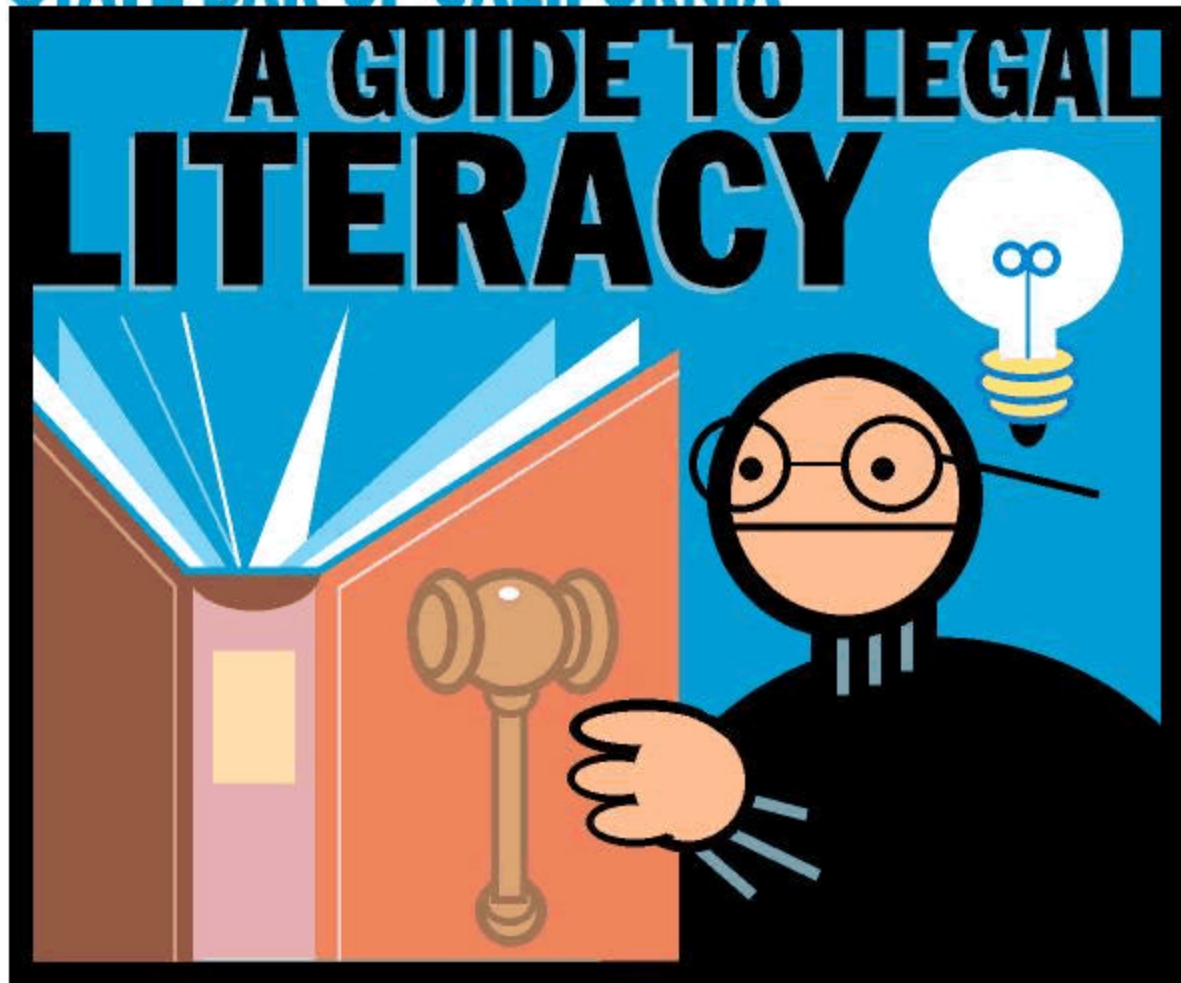


**STATE BAR OF CALIFORNIA**



***Understanding the U.S. Legal System***

***2001***

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## Introduction

Most people come into contact with the legal system only when they are experiencing a serious problem. Perhaps a person or a loved one has been arrested. Maybe there is a divorce or a fight over child custody. Sometimes it is a death and the need to have a will approved by a court. A serious injury, maybe on the job or in a car accident, often prompts a lawsuit. A person can be sued for money, such as when there are unpaid debts.

Thus, people often deal with the legal system when they are experiencing great stress and are least able to deal with a complex bureaucracy with a language of its own and procedures that seem totally foreign.

The purpose of this publication is to provide a description of the legal system in clear language for non-lawyers. The focus is on answering basic questions: where do laws come from; how is the legal system structured; how do cases come to court and what happens there; who are the participants in the legal system and what is their role; how are legal proceedings conducted?

## WHERE LAWS COME FROM

### The Constitution

The United States Constitution is the ultimate source of authority for all laws. The Constitution, which was adopted in 1789, creates the government and divides power among three separate and equal branches: Congress (legislative), the President (executive), and the federal courts (judicial).

Through this separation of powers, the framers of the Constitution sought to prevent any one branch from becoming too strong and abusing its power.

The Constitution also established several levels of government -- a national federal government, independent governments in each state, and governments for each city.

This arrangement of dividing power among levels of government is termed federalism.

The Constitution enumerates the broad areas where the federal government can legislate, with the remaining matters left to state and local control. Therefore, although the federal government has the authority to act in myriad areas, most laws are adopted by state and local governments.

State and local laws range from prohibiting crimes such as murder and rape to regulating land use through local zoning ordinances.

The U.S. Constitution and the federal laws are the "supreme law of the land," meaning that no state or local laws may violate or be inconsistent with them.

## **Legislatures**

For a federal law to exist, a bill must pass both houses of Congress (the Senate and the House of Representatives) and must be presented to the President -- the head of the executive branch -- for signature or veto.

If a bill is vetoed, Congress can override the President by a 2/3 vote of both houses of Congress. Laws adopted through this process are called statutes, and federal statutes cover an almost infinite variety of subjects, ranging from requiring payment of income taxes, to establishing the Social Security system, to protecting the environment by limiting air and water pollution.

Each state has its own legislative and executive branch which make and implement laws within that state. Also, in California and many other states, voters can adopt laws by an initiative process where proposed statutes are placed on the ballot and voted on in elections.

In recent years, initiatives in California have imposed term limits for members of the California legislature, reformed automobile insurance, restricted affirmative action programs, prevented the state from recognizing same sex marriages, and mandated drug diversion programs for first time offenders.

## **Regulatory Agencies**

There are federal agencies, such as the Food and Drug Administration and the Environmental Protection Agency, that are a part of the executive branch and make rules that have the effect of laws.

Federal statutes give power to these agencies to make rules because of the difficulty of having detailed and technical matters handled by a non-expert, overburdened Congress.

Although established by the legislature, the regulatory agencies are part of the executive branch. They make regulations to enforce laws passed by the legislature. These regulations have the force of law and have the same authority as laws created by the legislature.

The Food and Drug Administration, for instance, regulates prescription drugs and medical devices to protect the public's safety and health.

State legislatures also have created state agencies which can make rules regulating areas such as health and the environment. Agencies also administer government programs, such as determining who qualifies for welfare benefits and the amount they are to receive. California's Department of Motor Vehicles, for example, licenses drivers and administers the automobile registration system.

### **Courts and the Power of Judicial Review**

Long ago, the United States Supreme Court held that federal courts may declare unconstitutional and invalidate federal laws that are inconsistent with the Constitution. The power of judicial review is one of the most important powers of the judicial branch of government.

For example, if Congress adopted a law prohibiting religious worship, the federal judiciary could declare this unconstitutional as violating the First Amendment's assurance of free exercise of religion.

Laws adopted by state and local governments also must not violate the United States Constitution, nor can they be inconsistent with federal law. Article VI of the Constitution says that the Constitution and all laws and treaties made pursuant to it are the supreme law of the land. If there is a conflict between federal and state law, federal law controls.

Some law is entirely created by courts. For example, much of the law concerning contracts, legal agreements among people, and torts -- the ability of people to recover from others for injuries -- is judge-made.

This judge-made law is sometimes called "common law" and evolves on a case-by-case basis through the growth of precedent. Legislatures by statute can change the common law when they deem reform appropriate.



## HOW CASES COME TO COURT

### Function of Courts

Courts are an independent branch of government that exist to enforce the laws, to resolve disputes, and to protect the rights people have as Americans. All levels of government -- federal, state, and local -- make laws that prohibit certain behavior and order punishment such as imprisonment for violations.

If a person violates such a law, for example by committing a murder, the person is prosecuted in court. An important function of the court is to determine if the person is guilty and, if so, to impose the appropriate punishment.

Another crucial responsibility of courts is to settle disputes between people. Disagreements are inevitable in any society. A peaceful forum for resolving disputes is essential to prevent violence and insure fairness.

There are countless types of disagreements which might develop; some are financial, while others are a result of injuries inflicted accidentally or intentionally. Society relies on the courts to serve as a neutral decisionmaker to resolve conflicts.

Courts also play a very important role in preventing the government from abusing its power. The United States Constitution guarantees every person basic rights, such as freedom of speech and religion.

Each state also has its own constitution which can provide additional rights.

History shows that governments frequently act out of their own self-interest and violate individual rights. Indeed, the Declaration of Independence and the founding of this nation were reactions to abuses of power by the King of England.

Courts exist to check government power by halting infringements of liberty and compensating those who have been injured by government wrong-doing.

### **Difference Between Criminal and Civil Cases**

Lawsuits brought by the federal or state government to prosecute a person for violating a law are termed criminal cases. Although people can file complaints with the police, only the government can initiate a criminal case in court.

Government officials, called prosecutors, decide to file criminal charges in court against a person or corporation. Prosecutors at the federal level generally work in the United States Attorney's office, which is a part of the United States Department of justice.

At the state level, prosecutors are usually part of the district attorney's office. In California, each county elects a district attorney.

The term *civil suits* refers to cases brought by people against other people, or businesses, or even against the government to recover compensation for injuries or to halt injurious practices.

If a person sues a doctor for making a mistake (called a malpractice suit), a civil suit is filed. A legal action to obtain a divorce is a civil suit, too. Whenever people sue

each other for money or for an injunction (a court order commanding certain behavior to stop) a civil suit is used.

Any person can file a civil suit in court. Even the government can file a civil suit against individuals or businesses such as when it wants to collect money it believes it is owed.

### **Asserting Constitutional Rights**

People can assert their constitutional rights in both criminal and civil cases. For example, a person being prosecuted for a crime can argue in defense that the government acted in violation of the Constitution, for instance, by conducting a search without a search warrant in disregard of the Fourth Amendment.

The United States Supreme Court has held that evidence obtained as the result of an illegal police search usually cannot be used as evidence. A defendant in a criminal case can raise his or her Fourth Amendment rights by asking the court to exclude evidence that was obtained unconstitutionally.

Alternatively, people can sue the government for violating their rights and stop the government's action or receive compensation for their injuries.

For instance, if the government adopts a law preventing political demonstrations in a park, people might go to court challenging the government's action as violating the First Amendment's guarantee of freedom of speech.

## TYPES OF COURTS

### Federal and State Courts

There are two types of courts in the United States: federal and state. Detailed rules exist for what types of cases can be filed in each type of court. Only very limited types of matters can be brought in federal court.

Generally, federal courts can hear civil cases only if there is an issue involving the meaning of a federal law (such as the Constitution or a law passed by Congress), or if the parties are from different states and more than \$75,000 is at stake, or if the United States is a party to the lawsuit.

For example, if a company violates a federal environmental law, a suit can be brought against it in federal court. If two people, one from Arizona and one from California, are in a car accident and one of them suffers losses greater than \$75,000, the injured person also can sue in federal court.

Some types of civil cases, most notably domestic relations cases (such as divorce and child custody) and probate matters (administration of wills) cannot be heard in federal court.

In criminal matters, federal courts hear cases against individuals who are prosecuted by the federal government for violating federal laws. Most federal criminal laws exist in areas where the federal government has a special interest.

For example, bank robbery is a federal crime because of the federal government's role in insuring and regulating banks. In the past two decades, many new federal laws have been adopted creating federal penalties for illegal drug transactions.

In federal court, cases usually are initially heard in a federal district court. For example, in San Francisco, cases are heard by what is called the "United States District Court for the Northern District of California." In Los Angeles it is the "United States District Court for the Central District of California." In the federal district court, one judge is assigned to each case and usually will hear all issues and arguments that arise.

There are some specialized federal courts. For example, the United States Bankruptcy Courts exist to hear petitions for bankruptcy where individuals ask to be excused of their debts.

State courts can hear most types of cases. In fact, the vast majority of cases of all types are heard in state courts. In California, cases are usually filed in the Superior Court.

Small claims courts are places where people can file claims for disputes involving relatively small sums of money on their own without an attorney. In most instances, lawyers are not allowed in small claims courts and the procedures are simplified.

Usually, to file a lawsuit a filing fee must be paid. Those too poor to afford the fee can ask for a waiver. In some types of cases, such as divorce, a fee waiver must be given to the indigent. In most instances, it is up to the judge whether to grant the fee waiver.

### **Administrative Proceedings**

Many disputes are resolved not by courts, but rather by government administrative agencies that have the responsibility for administering particular laws.

For example, a person who is injured on the job likely will have his or her claim for compensation heard by a workers' compensation board -- a government agency that exists to compensate individuals who are hurt in the course of their employment.

Similarly, denials of welfare or social security benefits are usually challenged in proceedings conducted by the agencies that administer these programs

Such government agencies are not part of the judicial branch of government, but instead are viewed as executive agencies even though the decision-makers are often called "administrative law judges." Administrative agencies exist at all levels of government -- federal, state, and local.

Generally, individuals who lose in administrative proceedings can seek review of the decision in a court, but judges will generally defer to the administrative ruling unless it was arbitrary, capricious, or a violation of law.

## Alternative Dispute Resolution

At times, people attempt to resolve their disputes, without going to a court, through various methods called "alternative dispute resolution (ADR)." In one of the most widely used forms of ADR -- arbitration -- people submit their disputes to a third party, who is not a judge in a court, to make a decision.

An increasing number of contracts -- ranging from employment contracts to contracts with doctors and hospitals for medical services -- contain provisions requiring that disputes arising under them must be submitted to arbitration.

Also, some laws require arbitration of particular kinds of disputes. California law provides for arbitration of fee disputes with lawyers.

Arbitration has the advantage of simpler procedures and quicker resolution of disputes as compared to trying a lawsuit in court.

On the other hand, many procedural protections that are present in courts -- such as the right to a jury and the right to appeal - are not present in arbitration and other forms of ADR.

In mediation, a third-party works to help the parties agree to a settlement of their dispute. An arbitrator usually has the power to decide the matter; a mediator lacks this authority and acts to facilitate a compromise among the parties.

Mediation is frequently used in domestic relations cases to work out differences over issues such as child visitation and support.

In California, many counties have low-fee and/or free mediation services for the public. To locate a program in your community, contact your local county

bar association or write to: The State Bar of California, 180 Howard St., San Francisco, California, 94105.

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### ***Steps in a typical Mediation Session***

#### **Step 1 *Introduction***

The mediator sets the parties at ease and explains the ground rules. The mediator's role is not to make a decision but to help the parties reach a mutual agreement. The mediator explains that he or she will not take sides.

#### **Step 2 *Telling the Story***

Each party tells what happened, the person bringing the complaint tells his or her side of the story first. NO interruptions are allowed. Then the other party explains his or her version of the facts.

#### **Step 3 *Identifying Facts and Issues***

The mediator attempts to identify agreed upon facts and issues. This is done by listening to each side, summarizing each party's view, and asking if these are the facts and issues as each party understands them.

#### **Step 4 *Identifying Alternative Solutions***

Everyone thinks of possible solutions to the problem. The mediator makes a list and asks each party to explain his or her feelings about each possible solution.

#### **Step 5 *Revising and Discussing Solutions***



Based on the expressed feelings of the parties, the mediator revises possible solutions and attempts to identify a solution that both parties can agree to.

**Step 6 *Reaching Agreement***

The mediator helps the parties reach an agreement that both can live with. The agreement should be written down. The parties should also discuss what will happen if either of them breaks the agreement.

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## **THE STAGES OF A CRIMINAL CASE BEFORE TRIAL**

### **Grand Jury**

In both federal and California state courts, a person must be indicted by a grand jury or brought before a magistrate (judge) to determine whether there is sufficient evidence to be tried for a crime.

The Fifth Amendment to the United States Constitution requires a grand jury indictment of criminal cases in federal courts. A grand jury is a group of citizens who decide whether there is a sufficient basis to try a person for a criminal offense.

Grand jury proceedings are secret, and individuals subpoenaed to appear before a grand jury are not allowed to bring a lawyer into the hearing room, although they may go outside to consult with the attorney any time they wish.

If the grand jury believes that there is enough evidence to justify a trial, it returns an indictment. A grand jury does not determine whether the defendant is guilty or innocent, rather, it decides whether there is enough evidence to justify accusing and trying the person for a crime.

### **Arrest**

An arrest occurs when the police take custody of a person upon suspicion of having committed a crime. A person can be arrested before or after a grand jury indictment. At the time of arrest, a person has to be informed of certain basic rights.

As is always shown on television and in the movies, the police must tell the suspect that he or she has the right to remain silent, that anything said can be used against the person in a court of law, and that the person has a right to an attorney and that one will be provided if the person cannot afford one.

The United States Supreme Court held that to protect the privilege against self-incrimination -- the right to not testify against one's self -- found in the Fifth Amendment to the Constitution, these warnings must be given to every person after arrest and before any questioning begins.

Usually within 48 hours after an arrest a person must be brought before a judge. Usually, this appearance is called an arraignment. At the arraignment,

the person is informed of the charges and the judge determines whether there is an adequate reason to charge the person with having committed a crime.

The judge also usually will set bail. Bail is the amount of money that a person must give to the court to be released before trial. The basic purpose of bail is to give the criminal defendant a strong incentive to show up for trial; if the person flees or does not appear at the trial, the bail is forfeited.

The Eighth Amendment to the United States Constitution prohibits excessive bail. The amount of bail depends on the nature of the offense, the defendant's prior criminal record, and the court's assessment of the likelihood that the defendant will flee or pose a continuing threat to the community.

### **The Plea**

At the arraignment, or at a subsequent hearing, the defendant is asked for an initial plea of "guilty" or "not guilty." If a defendant pleads guilty, there is no trial and the defendant will have a sentencing hearing where the judge will determine the appropriate punishment.

In most criminal cases, trials are avoided through a process called "plea bargaining." The prosecutor offers the defendant a compromise where the defendant pleads guilty in exchange for a reduction of the charges or a lessened sentence.

Over 90% of all criminal cases are resolved through guilty pleas. Plea bargaining can occur anytime before the trial begins, and occasionally even during the trial itself.

## **Discovery**

At both the federal and state levels, prosecutors must disclose to the defendant any evidence that would help the defendant to establish his or her innocence.

For example, if a prosecutor learns of a witness who can verify a criminal defendant's alibi, the prosecutor must disclose this to the defense.

## **THE STAGES OF A CIVIL LAWSUIT BEFORE TRIAL**

### **The Pleadings**

A civil case proceeds quite differently before trial. A civil suit begins with the filing of a complaint in court. The person who files the complaint is called the plaintiff, and the person who is sued is called the defendant.

For example, a person injured in an automobile accident is the plaintiff in a suit against the person driving the other car, the defendant, to recover money to pay for doctors' bills and car repairs.

Occasionally, the terminology is different. In divorce cases in California (actually called marriage dissolutions), the person filing for divorce is called the petitioner, and the other spouse is the respondent; the divorce proceeding is initiated by filing a petition for dissolution of the marriage.

After a civil suit is filed in court, the defendant must be served with a copy of the complaint and a subpoena to appear in court. The defendant then can

move to have the case dismissed as lacking any legal basis or the defendant can answer the plaintiff's complaint.

The answer is the defendant's opportunity to file a paper with the court responding to the complaint and asserting any claims that the defendant might have against the plaintiff.

### **Discovery**

In civil cases, each side has the opportunity before trial to obtain all of the evidence possessed by the other. This process is called discovery. A deposition is one type of discovery where the lawyer for one side questions a witness, under oath, outside of court to hear that person's story.

In most civil cases, there is a pretrial conference where the attorneys, and sometimes the parties, appear before a judge. A pretrial conference is an opportunity for discussion about settling the case without a trial and also a chance to resolve any issues that need to be decided before the trial.

## **THE TRIAL**

### **The Purpose of Trials**

A trial exists to determine the facts: what happened; who did what to whom when? The rules for trials are designed to assure a fair proceeding, one where both sides have an equal chance to present their arguments and evidence.

Thus, a trial is an orderly presentation of evidence according to preset rules to determine in a criminal case whether the defendant violated the law or in a civil case whether the defendant is liable.

Many of the rules for trials are specified in the United States Constitution. For instance, the Constitution guarantees a criminal defendant the right to confront his or her accuser and the right to a jury trial.

In past times, many different methods of determining the facts have been employed. Long ago, there literally was trial by combat as individuals with a dispute were put into a ring and instructed to fight until one side conceded by crying "craven."

In Salem, those accused of being witches were immersed in water, and if the person did not drown, she was deemed to be a witch and executed. Over time, societies became dissatisfied with such decision-making methods and devised orderly fact finding procedures.

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## **Steps in a Trial**

### ***Opening Statement by Plaintiff or Prosecutor***

Plaintiff's attorney (in civil cases) or prosecutor (in criminal cases) explains to the trier of fact the evidence to be presented as proof of the allegations (unproven statements) in the indictment or complaint.

### ***Opening Statement by Defense***

Defendant's attorney explains evidence to be presented to deny the allegations made by the plaintiff or prosecutor.

### ***Direct Examination by Plaintiff or Prosecutor***

Each witness for the plaintiff or prosecution is questioned. Other evidence (e.g., documents, physical evidence) in favor of the plaintiff or prosecutor is presented.

### ***Cross-Examination by Defense***

The defense has the opportunity to question each witness. Questioning is designed to breakdown the story or to discredit a witness in the eyes of the jury.

### ***Motions***

If the prosecution/plaintiffs basic case has not been established from the evidence introduced, the judge can end the case by granting the defendant's motion to dismiss (in civil cases) or by entering a directed verdict (in criminal cases).

### ***Direct Examination by Defense***

Each defense witness is questioned.

### ***Cross-Examination by Plaintiff***

Each defense witness is cross-examined.

### ***Closing Statement by Plaintiff***

Prosecutor or plaintiff's attorney reviews all the evidence presented (noting uncontradicted facts), states how the evidence has satisfied the elements of the charge, and asks for a finding of guilty (in criminal cases) or for the plaintiff (in civil cases).

### ***Closing Statement by Defense***

Same as closing statement by prosecution/plaintiff has the right to make additional closing arguments.

### ***Rebuttal Argument***

Prosecutor or plaintiff has the right to make additional closing arguments.

### ***Jury Instruction***

Judge instructs jury as to the law that applies in the case.

### ***Verdict***

In most states, a unanimous decision is required one way or the other. If the jury cannot reach a unanimous decision, it is said to be a hung jury, and the case may be tried again.

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## **The Adversary System**

Trials in the United States are based around the adversarial system. This concept simply means that all proceedings are a competition between the two sides -- prosecutor and defendant in a criminal case, plaintiff and defendant in a civil suit. In the adversary system, the parties are responsible for initiating the proceedings, conducting the investigations, and presenting the evidence in court.

Adversary proceedings are designed to allow each side to question the other's witnesses (called cross-examination) and to respond to the other's arguments.

The rationale for the adversary system is that it is thought to be the best way to ascertain the truth.

In many countries, a government investigator determines the facts. This approach has great risks: lacking a personal stake in the outcome, the person



might not do a thorough job; the investigator's biases might unduly influence his or her determinations.

In contrast, in an adversary system, each side has an incentive to investigate thoroughly and to do its best to make a persuasive case. Also, the adversary system rests on the premise that truth is most likely to emerge from the competition of ideas. If both sides present their case, the trier of fact is well-equipped to decide what happened.

### **The Events at a Trial**

Therefore, trials are very much structured in a point, counter-point format. The trial itself begins with the prosecutor (in a criminal case) or the plaintiff's lawyer (in a civil case) making an opening statement.

The opening statement is the opportunity for the attorney to explain to the judge and/or jury what evidence will be presented, The defense attorney then usually gives his or her opening statement, although the defense lawyer could chose to wait to do this until after the prosecutor or plaintiff has presented its case.

After the opening statements, the prosecutor or plaintiff then presents his or her case. The prosecutor and plaintiff are required to present evidence to support each element of a case.

For instance, in a murder case, the prosecutor must present evidence that the defendant killed the victim intentionally, with premeditation. Evidence is

simply information that helps establish a fact. Evidence might take the form of witnesses' testimony.

For example, there might be a witness who saw the defendant shoot the victim. Evidence might be tangible, such as a bullet that matches the defendant's gun. A videotape or photograph of the incident, if they are available, also could be used as evidence.

The defense attorney has the opportunity to cross-examine every witness presented by the prosecutor or plaintiff. After the prosecutor or plaintiff has completed presenting his or her case, the defense attorney then has the opportunity to respond. Actually, the defense attorney is never obligated to say anything. The burden of proof is on the prosecutor in a criminal case and on the plaintiff in a civil proceeding.

In other words, the benefit of the doubt -- presumption -- always rests with the defendant. If the prosecutor or plaintiff cannot meet its burden, the defendant wins. The defendant is never required to prove himself or herself innocent in a criminal case or not liable in a civil case.

In criminal cases, defendants are presumed innocent and the prosecutor must establish the defendant's guilt "beyond a reasonable doubt," which is a very difficult burden to meet.

The criminal justice system rests on the notion that it is better to release 10 guilty people rather than convict one innocent person. The system is thus very much designed to prevent the government from wrongly taking away a person's liberty.

"Beyond a reasonable doubt" does not mean that the government must establish to a certainty that the defendant committed the crime; however, the jury is always instructed that it cannot convict if it has a serious doubt as to the defendant's guilt.

In civil cases, the plaintiff generally must prove his or her case with a "preponderance of the evidence." In other words, the plaintiff must show that it is more likely than not that the events occurred in the manner described by the plaintiff.

Therefore, because the defendant does not have the burden of proof, the defendant could decide not to present a case and simply argue that the plaintiff or prosecutor did not meet its burden.

Usually, though, defendants will present their evidence. Again, the evidence can be testimony from witnesses or tangible evidence. In a criminal case, the defendant never is obligated to take the witness stand and answer questions.

The Fifth Amendment's privilege against self-incrimination gives the criminal defendant the right to refuse to testify and prevents any negative inference from being drawn from the defendant's silence.

After the trial is complete, the defense attorney presents his or her closing argument. The closing argument is the opportunity to argue for the desired result based on the evidence presented at trial. The trial concludes with the plaintiff or prosecutor presenting its closing statement.

## THE ROLE OF ATTORNEYS

Throughout this description of our legal system, reference has been made to attorneys. Lawyers, of course, are individuals trained in the law who represent the interests of their clients.

Under the rules of the profession, attorneys must do everything for their clients, within the bounds of the law, that they would do for themselves under the circumstances. Attorneys are required to keep secret what they are told by their clients.

Contrary to the image of lawyers presented in television and movies, most lawyers do not spend the majority of their time in court. In fact, many attorneys never set foot in a courtroom, spending their time giving legal advice, drafting contracts, negotiating agreements, and helping clients solve their legal problems.

No person is required to have a lawyer. (*Visit the California Courts Self-Help Site at <http://www.courtinfo.ca.gov/selfhelp/>*)

A person always can represent himself or herself in court. But there is much truth in the adage that a person who represents himself or herself has a fool for a lawyer. A corporation, however, must be represented in court by a lawyer.

### The Right to an Attorney

In criminal cases, no defendant can be imprisoned on the basis of a conviction where he or she did not have counsel. The Supreme Court has interpreted the right to counsel in the Sixth Amendment as requiring the

government to provide a free lawyer to those who cannot afford an attorney in criminal cases where the sentence can include imprisonment.

In civil cases, there generally is not a right to counsel, though on rare occasions an attorney might be appointed for an indigent litigant and legal aid offices exist throughout the state.

### **Your Rights and Responsibilities as a Client**

When you hire an attorney, there are certain rights and responsibilities in the relationship.

#### **As the client, you should:**

- o Understand the kind of work the lawyer will do for you.
- o Be totally honest and provide all the facts that are relevant to the situation, as well as keep your attorney up-to-date with developments.
- o Get an estimate of how long your case may take.
- o Help your case along by promptly giving your lawyer all the information and papers you have. Continue to give your lawyer additional papers as you receive them.
- o Find out how the lawyer will keep you informed on the progress of your case and how often.
- o Ask your lawyer for a written fee agreement. By law, your attorney must have a written fee agreement if your costs are anticipated to be more than \$1,000. Lawyers use various kinds of fee arrangements; make sure you understand how and for what you will be charged. Also, find out if you are

- responsible for certain expenses, such as court costs of if you will be charged each time you telephone your lawyer.
- o Ask for the bill at least once a month if the lawyer charges by the hour. Then you'll know how much the case is costing as it moves along, and avoid a surprise at the end. You are entitled, by law, to a detailed bill from the lawyer every thirty days.
  - o Make sure you understand what is involved if a lawyer takes your case on a "contingency" basis. Contingency means you won't be charged lawyer fees if you lose (but you may be responsible for costs such as filing fees, investigators or transcripts). If you win, you will pay the lawyer a percentage of the money the court awards you. Make sure that the lawyer's percentage is included in the written fee agreement, what it will be and if it will be taken from the amount before or after the court costs are subtracted.
  - o Request copies of all materials prepared on your behalf.

*The State Bar of California has numerous consumer education pamphlets on its Web site, [www.calbar.ca.gov](http://www.calbar.ca.gov), including "How Can I Find and Hire the Right Lawyer?"*

## **WHO DECIDES**

In the American judicial system, there are two possible decision makers: judges and juries. Unless jury trials are requested, the judge tries all aspects of the case. In a civil case, either side can request a jury trial; in a criminal case, there is a jury if the defendant requests one.

### **How Judges are Selected**

In the United States, judges are virtually always attorneys. Judges preside over all aspects of the trial. Judges always are responsible for deciding the questions of law, and when there is a jury, the judge instructs the jury as to the law to apply to the facts of the case.

Federal judges are nominated by the President of the United States and must be confirmed by the Senate. Generally, presidential choices for the federal district courts and the courts of appeals are approved without controversy, but often there are heated battles over nominations to federal courts, including the United States Supreme Court.

Overall, nearly 20 percent of all presidential nominees to the federal court or to the U.S. Supreme Court (or both together) have been rejected by the Senate. Once confirmed, a federal judge has life tenure, that is, the judge has a job for life unless he or she is impeached and removed from office.

State court judges are selected by a variety of different means depending on the state. In most Southern states, for example, judges are elected in partisan elections. Candidates run as Democrats or Republicans and are elected to fixed terms.

In California, members of the California Supreme Court are nominated by the governor and approved by a three-person committee comprised of the chief justice of the California Supreme Court, the attorney general of California, and the most senior judge on the Court of Appeals.

Once confirmed, judges are evaluated by the voters in retention elections. In a retention election, voters cast ballots solely on the question of whether the judge should be retained or not; there is no opposing candidate.

## **JURY SERVICE**

In California, to qualify for jury service, a person must be a citizen, at least 18-years-old and physically able to serve. Potential jurors must possess ordinary intelligence and sufficient knowledge of the English language. People may not serve if they have been convicted of a felony or of wrongdoing in a public office.

### **Why Juries are Important**

A jury is a group of people drawn from a cross-section of the community. The function of the jury at trial is to decide the facts. In a criminal case, the jury decides if the defendant is guilty or not guilty; in a civil case, the jury decides whether the defendant is liable to the plaintiff.

The Sixth Amendment to the United States Constitution guarantees a jury trial in criminal cases, and the Seventh Amendment imposes the same requirement in civil cases.



There are many explanations for the institution of the jury. In part, the jury system embodies the value of collective wisdom. A group, reflecting various views, is thought to produce better decisions than one person.

Also, juries offer the advantage of a fresh perspective. Judges, who repeatedly hear the same type of matters, might be biased by their other trials and verdicts. A jury hears each case without such an institutional memory.

Historically, jury trials were a means of checking the power of the government. In England, judges were beholden to the king. In fact, one of the grievances stated in the Declaration of Independence concerned the king's control of the judiciary. Therefore, the jury — a group of citizens free to decide according to their conscience — was thought to be a way of limiting the king's power.

### **How Juries are Selected**

The government takes names from voter registration lists and motor vehicle registrations, in calling people for jury duty. Every person has the legal duty to report for jury duty in response to a summons to serve.

Before the trial starts, prospective jurors are questioned to ensure their fairness and impartiality. This process of questioning prospective jurors is termed "voir dire."

In federal courts, questioning is usually exclusively done by judges, though the judges often will ask questions suggested by the lawyers. In many state courts, lawyers conduct the voir dire. Judges vary as to how they conduct this process.

Each lawyer is allowed to excuse prospective jurors for "cause." For example, a juror who is related to one of the parties, or has a personal stake in the outcome of the litigation, or has a strong predisposition as to the verdict can be excluded for cause.

Additionally, each lawyer can excuse a specified number of jurors without explaining the basis for the exclusion. These are termed "peremptory challenges." A peremptory challenge can be exercised on any basis the attorney wishes, except that a person cannot be kept off a jury because of his or her race or gender.

The Supreme Court has held that race and gender discrimination in peremptory challenges is unconstitutional. The court has ruled that race bias in this area is impermissible in both criminal and civil cases.

Most commonly a jury consists of 12 individuals, though six person juries also exist. Historically, jury verdicts had to be unanimous in criminal cases. If the jury cannot come to a consensus, it is regarded as a hung jury and the matter can be retried before a new jury. The Supreme Court, however, has held that non-unanimous verdicts are permissible in state courts, for criminal cases, so long as the jury consists of 12 individuals. California, however, continues to insist on unanimous verdicts in state court criminal trials.

### **Civil Cases Tried Without Juries**

Some types of civil cases are never tried before a jury. Most notably, domestic relations matters such as divorces and issues concerning child custody and child support are always handled by judges alone.

Likewise, probate matters, the approval and administration of wills, are not presented to juries. Additionally, requests for court commands, such as injunctions, are dealt with solely by judges.

For instance, if a person wanted an injunction to stop a factory from polluting in the future, a judge would decide.

### **Constitutional Requirements**

The Sixth and Seventh Amendments guarantee an impartial jury of one's peers. These concepts of "impartiality" and a "jury of one's peers" are inherently difficult to define.

If Mike Tyson is being tried for a crime, does a jury of peers require a jury of heavyweight boxing champions? Did O.J. Simpson have a right to a jury of former football players? Obviously not -- the jury need not match the demographic or socioeconomic characteristics of the defendant.

Instead, a jury of one's peers is defined quite abstractly; the jury is acceptable so long as it is fairly chosen from the entire community and is screened to prevent undue bias.

Likewise, an impartial jury is one that promises to decide solely on the basis of the evidence presented and offers every reason to believe that it can do so. One threat to an impartial jury is pretrial publicity in cases that receive a

great deal of media attention. There is a substantial danger that prospective jurors will decide cases based on what they have read in the newspapers or heard in the broadcast media, rather than on what is presented at trial.

There are many things that a court might do to counteract the effects of pretrial publicity including carefully screening the jury to uncover biases, delaying the start of the trial, changing venue (the location of the trial), and sequestering the jury (keeping them in isolated quarters with no access to outside reports).

Research on the jury indicates that juries are extremely conscientious, listening carefully to the evidence and deciding only after serious reflection.

Certainly, at times, juries render verdicts which seem wrong; juries are comprised of human beings who bring prejudices and preconceptions with them. Yet, over the course of history, juries repeatedly have demonstrated their care in deliberating and deciding.

### **The Verdict**

At the completion of the trial, the jury (if there is one) is instructed by the judge as to the law and then retires to the jury room to deliberate. The jurors are always instructed that they are not allowed to discuss the case with anyone and are required to render their decision entirely on the basis of the evidence presented during the trial.

The jury's deliberations are secret; no one other than the jury is allowed in the jury room while it is making up its mind.

During its deliberations, the jury can ask the judge for clarification of the law, can ask to see the evidence again, and can have transcripts of the testimony

read back to it. There is no time limit imposed on the jury; the decision-making process can last minutes or days.

The jury is instructed to keep discussing the case until it reaches a decision or until it is clear that the disagreements are insurmountable and that there will be a hung jury. If there is a hung jury, the case can be retried before a new jury.

### **Criminal Cases**

In a criminal case, the jury (or if there is no jury, the judge) renders one of three verdicts: not guilty, not guilty by reason of insanity, or guilty. In many criminal cases, the defendant is charged with more than one crime.

For each and every alleged offense, the decision-maker must render a verdict. Each type of verdict has quite different consequences.

A verdict of not guilty means that the defendant cannot be criminally punished for that alleged crime. As explained earlier, a not guilty verdict does not mean that the jury or judge necessarily believed that the defendant was innocent; rather, it signifies that the government did not prove beyond a reasonable doubt that the defendant committed the crime.

The Fifth Amendment to the United States Constitution prohibits double jeopardy, meaning that once the defendant is acquitted of a crime, he or she cannot be retried for the same offense.

It would be unfair for the government to try a person repeatedly for the same actions and to force a person to bear the emotional and financial costs of repetitive trials.

However, an important exception to the prohibition against double jeopardy is that a person can be tried by the federal government after a state court acquittal or by a state court after a federal court acquittal.

For example, the individuals accused of killing civil rights workers in Mississippi years ago were acquitted in state court, but then convicted in federal court of violating federal civil rights laws.

Also, a verdict of not guilty in a criminal prosecution does not preclude a later civil suit. For instance, if a person suffers a beating, the government could criminally prosecute the assailant for battery.

Regardless of the outcome of that trial, the victim could bring a civil suit for damages against the assailant to recover expenses such as medical bills and for pain and suffering.

Another possible verdict in a criminal case is "not guilty by reason of insanity." In the American criminal justice system, individuals only are punished if they are found to be morally responsible for their actions.

Simply stated, a person is found not guilty by reason of insanity if he or she was not capable of understanding right from wrong. A verdict of not guilty by reason of insanity does not mean that the defendant will go free.

Usually, a defendant found not guilty by reason of insanity will be confined to a mental institution for treatment and to protect the community.

A verdict of guilty means that the court can impose punishment. There are many different types of punishments which can be ordered. The court can

require that the defendant pay a fine -- a sum of money collected by the government.

However, no person can be sent to jail because of an inability to afford the cost of the fine. In addition, courts often order convicted defendants to pay "restitution," that is giving the victim of the crime money to compensate for any monetary losses.

**Probation** means that the individual is allowed to go free, with monitoring, on the condition that the person not violate the law or other conditions of probation. If the person commits another offense, probation is revoked and the person is sentenced to prison.

Frequently, individuals convicted of crimes are sentenced to prison. The length of the sentence is based on many factors, including the range of imprisonment permitted under the law, the nature of the crime, and the defendant's record, especially focusing on past crimes, if any.

Traditionally, imprisoned individuals could apply for parole after serving a portion of their sentence. Sometimes, though, individuals convicted of particularly serious crimes are sentenced to life in prison without the possibility of parole.

Obviously, the most severe punishment that can be inflicted is the death penalty. Not all states allow the death penalty, although California does and federal laws provide for capital punishment for specified offenses.

In California, persons sentenced to death can select the type of execution to be used, either execution in the gas chamber or death by lethal injection. Some other states use the electric chair.

Usually, the judge determines the punishment to be imposed. However, in capital cases, the jury is allowed to decide whether to impose the death penalty. Typically, the jury will first consider whether the defendant is guilty of murder and then, after reaching this conclusion, will hear arguments from both sides as to the appropriateness of punishment by death.

The prosecutor will explain to the jury why the death penalty is justified. The Supreme Court recently ruled that this explanation can include telling the jury about the victim and the impact of the victim's death on his or her family and community.

The defense attorney will present any mitigating circumstances to the jury and argue for mercy. The jury then will decide whether to impose capital punishment.

## **WRIT OF HABEAS CORPUS**

An order directing a jailer or warden to bring a person in custody before a court to challenge the legality of the restraint. A court hearing a writ of habeas corpus can overturn a conviction if it finds a violation of the Constitution or laws of the United States.



## **Civil Cases**

In civil cases, the verdict is usually whether to hold the defendant liable. Usually, civil cases are for money damages, and a verdict for the plaintiff can lead to two kinds of damages: compensatory and punitive.

As the term implies, compensatory damages are meant to compensate the plaintiff for any actual losses. For example, the victim of an automobile accident can recover from the responsible party the costs of car repair, reimbursement for any medical bills, and damages to compensate for pain and suffering.

Punitive damages, which are allowed in certain types of cases, are damages meant to punish the defendant for particularly wrongful behavior. In other words, in addition to compensating the plaintiff for any losses, the defendant is punished by being ordered to pay more money.

After the jury renders its verdict in a civil case, the judge can be asked to set it aside as inconsistent with the law or evidence, or to increase or decrease the money award. The judge usually will disrupt the verdict only if the judge believes that no reasonable jury could have come to that conclusion.

As explained earlier, some types of matters are not tried before a jury. In divorce cases, the judge decides the amount of alimony (now called spousal support in California) and child support to be paid.

In most civil cases, the trial court is finished with the case after the verdict is rendered and approved by the court.

But in many divorce cases, the court will continue to have jurisdiction to assure that support payments are made and to modify payment orders if there is a change in circumstances.

## **THE APPEAL**

After the trial is complete, the loser usually can file an appeal to a court of appeal, except in a criminal case where the government cannot appeal if the defendant is found innocent. A court of appeal does not retry the case. No witnesses testify in a court of appeal proceeding, and no evidence is presented.

Instead, the court of appeal reads the briefs (the papers filed by attorneys presenting arguments) and hears oral arguments from the attorneys. Almost always, a court of appeal changes the decision only if the trial court judge made an error as to the law.

In other words, courts of appeal usually accept the fact-finding by the trial court and determines only whether an error was made in applying the law.

Usually, if a court of appeal finds that the trial court made a serious mistake, the decision is reversed and the case sent back to the trial court for additional proceedings. In criminal cases, this does not mean that the defendant will go free.

The government can retry the defendant without committing the error. The Supreme Court long has held that such a retrial does not violate the prohibition against double jeopardy.

For example, if the court of appeal reverses a defendant's conviction on the ground that evidence was admitted in violation of the defendant's rights, the case can be retried without the admission of the illegally obtained evidence.

After the appeals are completed, a final judgment is entered. No more legal proceedings in the case are allowed. The loser cannot go to any other court, ever, about the matter.

The only exception is that a person convicted of a crime can file a writ of habeas corpus in federal court if the individual believes that his or her constitutional rights were violated.

In a criminal case, a defendant convicted of a crime can remain in jail while the appeals are pending or can be released on bail during this time. Judges have discretion concerning whether to set bail pending appeal and also as to the amount of bail to require.

After the appeals are completed, a defendant serves his or her sentence if the conviction has been upheld. In a civil case, a ruling in favor of the plaintiff usually means that the defendant has to pay money. If the defendant fails to pay, the court can send the sheriff out to seize property to satisfy the judgment.

In California, appeals are filed (except in cases where the death penalty has been imposed) in the California Court of Appeal. In capital cases, the appeal is filed directly in the California Supreme Court.

The California Court of Appeal is required to hear all appeals filed with it unless they are clearly frivolous. After the California Court of Appeal decides a case, the loser can seek review in the California Supreme Court.

The California Supreme Court virtually never is required to take cases (except where the death penalty has been imposed), but instead gets to decide what appeals to hear.

Finally, the loser can seek review in the United States Supreme Court if there is some issue present about the meaning of the United States Constitution or a federal law. The Supreme Court always has total discretion whether or not to hear an appeal from a state court system.

The Supreme Court hears relatively few cases a year. For example, in 2000, the Supreme Court decided only 73 cases.

The loser in a federal court proceeding, except for the government in a criminal case, can file an appeal in the United States Court of Appeals. There are 13 United States Courts of Appeals, with each hearing appeals only from a specific geographic area.

Cases appealed from federal district courts in California are heard in the United States Court of Appeals for the Ninth Circuit. The loser there can seek review in the United States Supreme Court, which again has the authority to choose whether or not to hear the case.

Courts of appeal usually have three judges hearing a case. The California Supreme Court has seven Justices, and the United States Supreme Court has nine.

## **CHANGING THE SYSTEM**

The American legal system is constantly changing and evolving. Countless problems confront the judiciary as it tries to provide justice for those who are parties to court proceedings. The current system is terribly overburdened.

There simply are not enough judges and courtrooms to accommodate all of the cases that must be handled. As a result, there are often long delays, especially in civil cases, before matters come to trial.

Additionally, although equal justice for all is the goal, all too often the reality is much different. Many of the poor and middle class simply cannot afford the costs of the legal system.

While no person can be put in prison without representation by an attorney, there virtually never is a right to a court-appointed lawyer in civil cases. Efforts must increase to improve the system to make it fair and accessible to all.

There are many ways that people can become involved to improve the system. First, laws can be changed to better achieve justice. Above all, courts exist to apply and enforce the law and if people are dissatisfied, one important thing to do is change the law.

People should become involved in elections to choose candidates who will bring about needed reforms and also participate in groups that work through the legislatures to improve the laws.

Second, state court judges in California are reviewed by voters on a regular basis. Bar associations evaluate judicial candidates and citizens should read reports of judges's records in deciding how to vote in judicial elections.

Although there is no electoral review of federal judges, U.S. Senate approval of presidential nominees is required. Public opinion often is crucial in shaping Senate decision-making, as in the controversies over nominees such as Robert Bork and Clarence Thomas.

Third, one of the most important contributions that people can make to the system is to serve on jury duty. Participating on a jury lets people witness the judicial system first-hand.

Also, the ideal of an impartial jury, drawn from a cross-section of the community, is only possible when all people sacrifice a small amount of their time for jury duty.

The judicial system has its imperfections, as any institution devised by people and staffed by people will have its failings. But overall, for all its problems, it is a system devoted to providing justice and much more often than not succeeds.

*For additional information, visit the Web site of the California Courts*

<http://www.courtinfo.ca.gov/jury/> )

# GLOSSARY

## A

### **ACQUITTAL**

A verdict (decision) after a trial that a defendant in a criminal case has not been proven guilty beyond a reasonable doubt of the crime charged.

### **ADJUDICATION**

Giving or pronouncing a judgment or decree.

### **ADMISSIBLE**

Evidence which can be legally and properly introduced in a civil or criminal trial.

### **ADVERSARY PROCEEDING**

One having opposing parties; contested.

### **ADVERSARY SYSTEM**

The trial methods used in the U.S. and some other countries, based on the belief that truth can best be determined by giving opposing parties full opportunity to present and establish their evidence, and to test by cross-examination the evidence presented by their adversaries, under established rules of procedure before an impartial judge and/or jury.

### **AFFIDAVIT**

A written statement of fact given voluntarily and under oath.

## **AFFIRMED**

In the practice of appellate courts, the word means that the decree or order at issue is declared valid and will stand as rendered in the lower court.

## **AFFIRMATIVE DEFENSE**

Without denying the charge, defendant raises extenuating or mitigating circumstances such as insanity, self-defense, or entrapment to avoid civil or criminal responsibility.

## **ALLEGATION**

The statement in a pleading of what a party expects to prove.

## **ALTERNATIVE DISPUTE RESOLUTION (ADR)**

Settling a dispute without a full, formal trial. Methods include mediation, arbitration, conciliation, settlement, among others.

## **AMICUS CURIAE**

A friend of the court; one not a party to a case who volunteers to offer information on a point of law or some other aspect of the case to assist the court in deciding a matter before it.

## **ANSWER**

The defendant's response to the plaintiff's allegations as stated in a complaint.

An item-by-item, paragraph-by-paragraph response to points made in a complaint; part of the pleadings.

## **APPEAL**

A request by the losing party in a lawsuit that the judgment be reviewed by a higher court.



**APPEARANCE**

Coming into court; the formal act by which a defendant submits to the jurisdiction of a court.

**APPELLANT**

The party who initiates an appeal. Sometimes called a petitioner.

**APPELLATE COURT**

A court having jurisdiction to hear appeals and review a trial court's procedure.

**APPELLEE**

The party against whom an appeal is taken. Sometimes called a respondent.

**ARBITRATION**

A form of alternative dispute resolution, in which the parties bring their dispute to a neutral third party and agree to abide by his or her decision. In arbitration there is a hearing at which both parties have an opportunity to be heard.

**ARRAIGNMENT**

In a criminal case, the proceeding in which an accused person is brought before a judge to hear the charges filed against him or her and to enter a plea of guilty or not guilty. Sometimes called a preliminary hearing or initial appearance.

**ARREST**

To take into custody by legal authority.

**ASSAULT**

Threat to inflict injury with an apparent ability to do so. Also, any intentional display of force which would give the victim reason to fear or expect immediate bodily harm.

## **ATTACHMENT**

A proceeding in which a creditor secures rights to real or personal property and holds it pending the outcome of a law suit.

## **ATTORNEY-AT-LAW**

An advocate, counsel or official agent employed in preparing, managing, and trying cases in the courts. An officer in a court of justice, who is employed by a Party in a cause to manage it for him or her.

## **ATTORNEY OF RECORD**

The principal attorney in a lawsuit who signs all formal documents relating to the suit.

# ***B***

## **BAIL**

Money or other security (such as bail bond) given to secure a person's release from custody, which is at risk should he or she subsequently fail to appear before the court.

## **BAIL BOND**

Often referred to as bond - the obligation, signed by the accused to secure his or her presence at trial, which he or she may lose by not properly appearing for trial.

## **BAILIFF**

A court attendant who keeps order in the courtroom and has custody of the jury.

## **BAR**

Historically, the partition separating the general public from the space occupied by the judges, lawyers and other participants in a trial. More commonly, the term means the whole body of lawyers.

## **BATTERY**

A beating, or wrongful physical violence. The actual threat to use force is an assault; the use of it is battery, which usually includes an assault.

## **BEYOND A REASONABLE DOUBT**

The standard in a criminal case requiring that the jury be satisfied to a moral certainty that every element of the crime has been proven by the prosecution. This standard of proof does not require that the state establish absolute certainty by eliminating all doubt, but it does require that the evidence be so conclusive that all reasonable doubts are removed from the mind of the ordinary person.

## **BILL OF RIGHTS**

The first ten amendments of the Constitution, ratified in 1791, protecting individual rights such as freedom of religion, freedom of expression, the right to a fair trial and the right to be secure from unreasonable searches and seizures.

## **BOOKING**

The process of photographing, fingerprinting, and recording identifying data of a suspect following arrest.

## **BREACH OF CONTRACT**

A legally inexcusable failure to perform a contractual obligation.

## **BRIEF**

A written statement prepared by one side in a lawsuit to explain to the court its view of the facts of a case and the applicable law.

## **BURDEN OF PROOF**

In the law of evidence, the necessity or duty of affirmatively proving a fact of facts in dispute on an issue raised between the parties in a lawsuit. The responsibility of proving a point - the burden of proof is not the same as the standard of proof.

"Burden of proof" deals with which side must establish a point or points;

"standard of proof" indicates the degree to which the point must be proven.

# **C**

## **CAPITAL CRIME**

A crime punishable by death.

## **CASE LAW**

Law based on previous decisions of appellate courts, particularly the Supreme Court.

## **CERTIORARI**

A means of getting an appellate court to review a lower court's decision. The loser of a case will often ask the appellate court to issue of writ of certiorari, which orders the lower court to convey the record of the case to the appellate court and to certify it as accurate and complete.

## **CHALLENGE**

An objection, such as when an attorney objects at a *voir dire* hearing to the seating of a particular person on a jury, civil or criminal.

## **CHALLENGE FOR CAUSE**

Objection to the seating of a particular juror for a stated reason; the judge has discretion to deny the challenge.

## **CHAMBERS**

A judge's private office. A hearing in chambers takes place in the judge's office outside of the presence of the jury and the public.

## **CHANGE OF VENUE**

Moving a lawsuit to another place for trial, often because pretrial publicity makes it difficult to empanel or select an impartial jury.

## **CHARGE TO THE JURY**

The judge's instruction to the jury concerning the law which applies to the facts of the case.

## **CIRCUMSTANTIAL EVIDENCE**

Evidence which merely suggests something by implication. Circumstantial evidence is indirect, as opposed to eyewitness testimony, which is direct.

## **CIVIL ACTIONS**

Non-criminal cases in which one private individual or business sues another for redress of private or civil rights.

## **CLASS ACTION**

A lawsuit brought by one or more persons on behalf of a larger group.

**COMMON LAW**

Law arising from tradition and judicial decisions, rather than from laws passed by the legislature. The common law originated in England and has been followed as the law in most American jurisdictions. It is also called case law.

**COMPLAINT**

The legal document that usually begins a civil lawsuit. It states the facts and identifies the action the court is asked to take.

**CONCURRING OPINION**

An appellate court opinion by one or more judges that agrees with part but not all of the majority opinion in the case.

**CONSERVATORSHIP**

Legal right given to a person to manage the property and financial affairs of a person deemed incapable of doing that for him or herself.

**CONTEMPT OF COURT**

Willful disobedience of a judge's command or of an official court order.

**CONTRACT**

A legally enforceable agreement between two or more competent parties made either orally or in writing.

**COUNTERCLAIM**

A claim made by the defendant in a civil lawsuit against the plaintiff - in essence, a counter lawsuit within a lawsuit.

## **COURT COSTS**

The expenses of prosecuting or defending a lawsuit other than attorney's fees.

An amount of money may be awarded to the successful party (and revocable from the losing party) as reimbursement for court costs.

## **CROSS-EXAMINATION**

The questioning of a witness produced by the other side.

# ***D***

## **DAMAGES**

Money awarded by a court to a person injured by the unlawful act or negligence of another person.

## **DECISION**

The judgment reached or given by a court of law.

## **DECREE**

An order of the court. A final decree is one which fully and finally disposes of the litigation; an interlocutory decree is a preliminary order that often disposes of only part of a lawsuit.

## **DEFAULT**

A failure to respond to a lawsuit within the specified time. When a defendant does not respond in a timely fashion or does not appear at the trial, a "default judgment" is entered against him or her.

**DEFENDANT**

In a civil case, the person being sued. In a criminal case, the person charged with the crime.

**DEPOSITION**

The testimony of a witness taken under oath in preparation for a trial.

**DIRECT EXAMINATION**

The first questioning of witnesses by the party on whose behalf they are called.

**DISCOVERY**

The pretrial process by which one party discovers the evidence that will be relied upon at trial by the opposing party.

**DISSENT**

An appellate court opinion setting forth the minority view and outlining the disagreement of one or more judges with the decision of the majority.

**DOUBLE JEOPARDY**

Putting a person on trial more than once for the same crime; forbidden by the Fifth Amendment to the U.S. Constitution.

**DUE PROCESS OF LAW**

The right of all persons to receive the guarantees and safeguards of the law and the judicial process. Includes such constitutional requirements as adequate notice, assistance of counsel, and the rights to remain silent, to a speedy and public trial, to an impartial jury, and to confront and secure witnesses.



## **EQUAL PROTECTION OF THE LAW**

The guarantee in the Fourteenth Amendment to the U.S. Constitution that all persons be treated equally by the law. Court decisions have established that this guarantee requires that courts be open to all persons on the same conditions; that persons be subject to no restrictions in the acquisition of property, and the pursuit of happiness, which do not generally affect others; that persons are liable to no other or greater burdens than such are laid upon others; and that no different or greater punishment is enforced against them for a violation of the laws.

## **EX PARTE**

On behalf of only one party, without notice to any other party. For example, a request for a search warrant is an ex parte proceeding, since the person subject to the search is not notified of the proceeding and is not present during the hearing.

## **EXCLUSIONARY RULE**

The rule preventing illegally obtained evidence to be used in any trial.

## ***F***

### **FELONY**

A crime (such as murder, rape and robbery) of graver nature than a misdemeanor, usually punishable by imprisonment in a penitentiary for more than a year and/or substantial fines.

## ***G***

### **GRAND JURY**

A group of citizens, usually numbering 23, who are assembled in secret to hear or investigate allegations of criminal behavior. A grand jury has authority to conduct criminal investigations and to charge a crime by indictment; also may have power to issue a report, or presentment, without charging a crime.

## ***H***

### **HABEAS CORPUS**

A writ that commands that a person be brought before a judge. Most commonly, a writ of habeas corpus is a legal document that forces law enforcement authorities to produce a prisoner they are holding and to legally justify his or her detention.

## **HARMLESS ERROR**

An error committed during a trial which was corrected or was not serious enough to affect the outcome of a trial, and therefore was not sufficiently harmful to be reversed on appeal.

## **HEARSAY**

Evidence that is not within the personal knowledge of the witness but was relayed to the witness by a third party. Hearsay evidence generally is not admissible in court, although there are many exceptions under which it can be admitted.

## **HUNG JURY**

A jury that cannot reach a verdict.

**/**

## **INADMISSIBLE**

That which under the rules of evidence cannot be admitted or received as evidence.

## **INDICTMENT**

An accusation by a grand jury charging a person with a crime.

## **INJUNCTION**

A preventive measure by which a court orders a party to refrain from doing a particular act. A preliminary injunction is granted provisionally, until a full hearing can be held to determine if it should be made permanent.

## **INSTRUCTIONS**

Also called charge—judges direction to the jury regarding the law in the case and its authority to determine the facts and to draw inferences from the facts in order to reach a verdict.

## **INTERROGATORIES**

Written questions asked by one party of an adverse party for which written answers must be provided.

# **J**

## **JUDGMENT**

The final disposition of a lawsuit. Default judgment is a judgment rendered because of the defendant's failure to answer or appear. Summary judgment is judgment given on the basis of pleadings, affidavits, and exhibits presented for the record without any need for a trial. it is used when there is not dispute to the facts of the case and one party is entitled to judgment as a matter a law.

Consent judgment occurs when provisions and terms of the judgment are agreed on by the parties and submitted to the court for its sanction and approval. A judgment n.o.v. is a judgment notwithstanding the verdict, it is a judge's decision to decide a case contrary to the verdict of the jury.

## **JUDICIAL REVIEW**

Authority of a court to review the official actions of other branches of government; also, authority to declare unconstitutional the actions of other branches.

## **JURISDICTION**

The nature and scope of a court's authority to hear and/or decide a case. Also, the territory from which a court is authorized to hear cases.

## **JURY**

A certain number of persons selected according to law and sworn to inquire into matters of fact and declare the truth about matters laid before them. A petit jury is an ordinary or trial jury, composed of six to twelve persons, which hears either civil or criminal cases. (See also GRAND JURY)

# **L**

## **LIEN**

A legal claim against another person's property as security for a debt. A lien does not convey ownership of the property, but gives the lienholder a right to have his or her debt satisfied out of the proceeds of the property if the debt is not otherwise paid.

## **LITIGANT**

A party to a lawsuit.

## **LITIGATION**

A case, controversy or lawsuit.

# ***M***

## **MAGISTRATE**

Judicial officer exercising some of the functions of a judge; also, refers in a general way to a judge, as in the phrase "neutral magistrate."

## **MANSLAUGHTER**

The unlawful killing of another without intent to kill; either voluntary — upon sudden impulse, i.e., a quarrel erupts into a fist-fight in which one of the participants is killed; or involuntary — during the commission of an unlawful act not ordinarily expected to result in great bodily harm, or during the commission of a lawful act without proper caution, i.e., driving an automobile at an excessive speed resulting in a fatal collision.

## **MEDIATION**

A form of alternative dispute resolution, in which the parties bring their dispute to a neutral third party, who helps them agree on a settlement.

## **MIRANDA WARNING**

Requirement that police tell a suspect in their custody of his or her constitutional rights before they question him/her, so named as a result of the Miranda v. Arizona ruling establishing such requirements.

## **MISDEMEANOR**

Criminal offenses considered less serious than felonies. Misdemeanors generally are punishable by a fine or a limited local jail term, but not by imprisonment in a state penitentiary.

## **MISTRIAL**

A trial which is terminated before a verdict is reached, either because of some extraordinary circumstance, because of fundamental error prejudicial to the defendant, or because of a hung jury.

# **N**

## **NEGLIGENCE**

Failure to exercise that degree of care which a reasonable person would exercise under the same circumstance.

## **NOLO CONTENDRE**

A plea of no contest. In many jurisdictions, it is an expression that the matter will not be contested, but without an admission of guilt. In other jurisdictions, it is an admission of the charges and is equivalent to a guilty plea.

# ***O***

## **OBJECTION**

The process by which one party takes exception to some statement or procedure. An objection is either sustained (allowed) or overruled by a judge.

## **OPINION**

The written decision of an appellate court. The majority or plurality opinion expresses the court's decision. (See also concurring opinion and dissenting opinion.)

## **ORDER**

A written or oral command from a court directing or forbidding action.

## **ORDINANCE**

A local law adopted by a municipality (city).

## **OVERRULE**

Judge's decision not to allow an objection; also, decision of a higher court finding that a lower court decision was in error.

# ***P***

## **PARDON**

A form of executive clemency, preventing criminal prosecution or removing or extinguishing a criminal conviction.



**PAROLE**

The supervised conditional release of a prisoner before the expiration of his or her sentence. If the parolee observes the conditions, he or she need not serve the rest of his or her term.

**PARTY**

A person, business, or government agency actively involved in the prosecution or defense of a legal proceeding.

**PEREMPTORY CHALLENGE**

A challenge which may be used to reject a certain number of prospective jurors without giving a reason. Differs from challenge for cause.

**PERJURY**

The criminal offense of making a false statement under oath.

**PERMANENT INJUNCTION**

Court order requiring that some action be taken, or that some party refrain from taking action.

**PLEA**

In a criminal proceeding, it is the defendant's declaration in open court that he or she is guilty or not guilty—the defendant's answer to the charges made in the indictment or information.

**PLEA BARGAINING**

The process through which an accused person and a prosecutor negotiate a mutually satisfactory disposition of a case. Usually it is a legal transaction in which a defendant pleads guilty in exchange for some form of leniency. It often

involves a guilty plea to a lesser charge or involves a guilty plea to some of the charges if other charges are dropped.

### **PLEADINGS**

The written statements of fact and law filed by the parties to a lawsuit.

### **POLLING THE JURY**

The act, after a jury verdict has been announced, of asking jurors individually whether they agree with the verdict.

### **PRECEDENT**

The decision of a court in one case that controls, guides, or influences the decision of a later case with similar facts and legal issues.

### **PRELIMINARY HEARING**

In criminal law, the hearing at which a judge determines whether there is sufficient evidence against a person charged with a crime to warrant holding him or her for trial. The Constitution bans secret accusations, so preliminary hearings are public unless the defendant asks otherwise; the accused must be present, accompanied by legal counsel.

### **PREPONDERANCE OF THE EVIDENCE**

Greater weight of the evidence, the common standard of proof in civil cases.

### **PRE-TRIAL CONFERENCES**

A meeting between the judge and the lawyers involved in a lawsuit to narrow the issues in the suit, agree on what will be presented at the trial, and make a final effort to settle the case without a trial.

## **PRIMA FACIE CASE**

A case that is sufficient—that is, that has the minimum amount of evidence necessary to allow it to continue in the judicial process.

## **PROBABLE CAUSE**

Sufficient legal reasons for allowing the search and seizure or the arrest of a person.

## **PROBATE**

The process of proving that a will is valid and should be carried out. Also refers more generally to the law governing estates.

## **PROBATION**

An alternative to imprisonment allowing a person found guilty of an offense to stay in the community, usually under conditions and under the supervision of a probation officer. A violation of probation can lead to its revocation and to imprisonment.

## **PROSECUTOR**

An attorney, working for the state or federal government, who brings a legal action to punish a crime.

## **Q**

## **QUASH**

To vacate or void a summons subpoena, etc.

# **R**

## **REBUTTAL**

Evidence disproving other evidence previously given or reestablishing the credibility of challenged evidence.

## **REMAND**

To send a dispute back to the court where it was originally heard. Usually it is an appellate court that remands a case for proceedings in the trial court consistent with the appellate court's ruling.

## **REMEDY**

Legal or judicial means by which a right or privilege is prevented, redressed or compensated.

## **REMOVAL**

The transfer of a state case to federal court for trial; in civil cases, because the parties are from different states, in criminal and some civil cases, because there is a significant possibility that there could not be a fair trial in a state court.

# **S**

## **SEARCH WARRANT**

A written order issued by a judge that directs a law enforcement officer to search a specific area for a specific piece of evidence.

## **SELF-DEFENSE**

Claim that an act otherwise criminal was legally justifiable because it was necessary to protect a person or property from the threat or action of another.

## **SELF-INCRIMINATION**

The constitutional right of people to refuse to give testimony against themselves that could subject them to criminal prosecution. The right is guaranteed in the Fifth Amendment to the U.S. Constitution.

## **SENTENCE**

A court's determination of the punishment to be inflicted on a person convicted of a crime.

## **SENTENCING REPORT**

Document containing background material on a convicted person, prepared to guide the judge in the imposition of a sentence.

## **SEQUESTRATION**

Keeping all of the jurors together during a trial to prevent them from being influenced by information received outside the courtroom. Sequestered jurors are usually housed in a hotel, have their meals together, and are given edited copies of newspapers and magazines, all in an attempt to keep them free from outside influences.

## **SEQUESTRATION OF WITNESSES**

Keeping all the witnesses (except plaintiff and defendant) out of the courtroom except for their time on the stand, and admonishing them not to discuss their testimony with other witnesses.

**SERVICE**

The delivery of a legal document, such as a complaint, summons or subpoena notifying a person of a lawsuit or other legal action taken against him or her.

Service, which constitutes formal legal notice, must be made by an officially authorized person in accordance with the formal requirements of the applicable laws.

**SETTLEMENT**

An agreement between the parties disposing of a lawsuit.

**SMALL CLAIMS COURT**

A court that handles civil claims for small amounts of money. People often represent themselves rather than hire an attorney.

**STATUTE OF LIMITATIONS**

The time within which a lawsuit must be brought. There are different statutes of limitations for different kinds of lawsuits.

**STIPULATIONS**

An agreement by attorneys on both sides of a case about some aspect of a lawsuit, id., to extend the time to answer, to adjourn a trial date, etc.

**STRIKE**

Highlighting in the record of a case, evidence that has been improperly offered and will not be relied upon.

**SUBPOENA**

A court order compelling a witness to appear and testify

## **SUMMONS**

A notice to a defendant that he or she has been sued and is required to appear in court. A jury summons requires that the person receiving it report for possible jury duty.

# ***T***

## **TEMPORARY RESTRAINING ORDER**

A judge's order forbidding certain actions until a full hearing can be held. Usually of short duration. Often referred to as a T.R.O.

## **TESTIMONY**

Evidence given by a witness under oath; does not include evidence from documents and other physical evidence.

## **TORT**

An injury or wrong committed on the person or property of another. A tort is an infringement of the rights of an individual, but not founded on a contract. The most common tort action is a suit for damages sustained in an automobile accident.

## **TRANSCRIPT**

The official record of all of the testimony and events that occur during a trial or hearing.

# V

## **VACATE**

To set aside, such as when a judge "vacates" (sets aside) a jury's verdict or a court of appeals vacates a lower court decision.

## **VERDICT**

Conclusion, as to fact or law, that forms the basis for the court's judgment. A general verdict is a jury's finding for or against a plaintiff after determining the facts and weighing them according to the judge's instructions regarding the law.

## **VENIRE**

A writ summoning persons to court to act as jurors. More popularly, the term is used to refer to the people summoned for jury duty.

## **VENUE**

The proper geographical area - county, city, or district - in which a court with jurisdiction over the subject matter may hear a case.

## **VOIR DIRE**

Process of questioning potential jurors so that each side may decide whether to accept or oppose individuals for jury service.



# W

## **WARRANT**

Most commonly, a court order authorizing law enforcement officers to make an arrest or conduct a search; an affidavit seeking a warrant must establish probable cause by detailing the facts upon which the request is based.

## **WITNESS**

One who testifies what he or she has seen, heard, or otherwise experienced.

## **WRIT**

A judicial order directing a person to do something.

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