

ASPEN COLLEGE SERIES

■ Laurel A. Vietzen

PRACTICAL CONTRACT LAW FOR PARALEGALS

An Activities-Based Approach

FOURTH EDITION



Wolters Kluwer

Practical Contract Law for Paralegals



An Activities-Based Approach

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Practical Contract Law for Paralegals



An Activities-Based Approach

Fourth Edition

Laurel A. Vietzen

Professor Emeritus
Elgin Community College



Wolters Kluwer

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Preface

Since 1989 I have been a teacher in, and (for more than 20 years) coordinator of, an ABA-approved paralegal program. Before that, I was a transactional lawyer in private practice and worked with many excellent paralegals. My experiences in practice, in surveying countless graduates and employers, and in working to obtain initial approval and reapproval by the ABA have taught me the importance of:

- Teaching students to be independent learners so that they can arrive on the job as self-starters
- Integrating ethics into every topic
- Integrating the use of research and communications skills into every topic
- Ensuring that students have adequate computer skills
- Encouraging students to engage with the material so that they retain what they learn
- Teaching state-specific law and procedures

It is not easy to achieve these goals with a traditional textbook. Many such books tend to speak in generalities. Many paralegal teachers are adjuncts and may not have the time or resources to create challenging, practical, state-specific assignments to supplement the texts. They may want to develop alternatives to the lecture format, or they may be trying to offer the class alternative formats: online, hybrid, or even independent study.

This book is intended to go beyond the limitations of the traditional textbook and lecture format to:

- Engage students by making them responsible for finding local law
- Require students to use computer skills to complete assignments
- Include enough hands-on assignments (and guidance for doing those assignments) to ensure that a course offered in an alternative format will be the equivalent of a traditional class
- Include assignments requiring student-led discussion of cases as an alternative to lecture in a classroom setting or to stimulate interaction in an online setting
- Ensure hands-on experience doing legal research, summarizing cases, and finding their own answers so that students can hit the ground running in a law office



- Make students aware of job opportunities and the skills required for those opportunities
- Be adaptable to schools that schedule in semesters, trimesters, or quarters and to schools that integrate contract law into a course that includes other topics

The sample cases are not cases that were highly controversial or that were landmarks in the development of law. Paralegals must understand legal theory, but they are not responsible for developing strategy or arguing cases. The cases were chosen to provide short, easy-to-read vignettes of the real-life practice of law. Many involve lawyers and paralegals as parties. They are intended to give students insights that will help ease the transition from school to the law office.

Textbook Resources

The companion Web site for *Practical Contract Law for Paralegals: An Activities-Based Approach*, Fourth Edition, at http://www.aspenparalegaled.com/vietzen_contracts offers additional resources for students and instructors, including:

- Study aids to help students master the key concepts for this course. Visit the site to access interactive StudyMate exercises such as flash cards, matching, fill-in-the-blank, and crosswords. These activities are also available for download to an iPod or other handheld device.
- Instructor resources to accompany the text
- Links to helpful Web sites and updates

Blackboard and eCollege course materials are available to supplement this text. This online courseware is designed to streamline the teaching of the course, providing valuable resources from the book in an accessible electronic format.

Instructor resources to accompany this text include a comprehensive Instructor's Manual, Test Bank, and PowerPoint slides. All of these materials are available for download from the companion Web site.

Laurel A. Vietzen

May 2016

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Note to Students


Students have historically demonstrated their mastery of course material by taking tests. Tests remain an important part of assessment. In this course, you will probably take several tests so that you and your instructor can determine how well you have achieved the knowledge-based goals outlined at the beginning of each chapter.

Employers want more. The paralegal field demands graduates who can apply that knowledge and perform assignments with little or no on-the-job training. To demonstrate your ability to do the job, you should assemble a portfolio of work. Your portfolio can be burned to a CD, uploaded to a Web site, or assembled into a folder or binder. The contents will depend on the job you are seeking. In interviewing for a job at a small general practice firm, you might submit a portfolio containing a selection of assignments from all of your classes. If you are looking for a job in contract compliance, you will want to include many of the assignments you do in this class.

The chart at the beginning of each chapter is intended to correlate the skills employers want with the assignments you will do. Knowing that employers value these skills should inspire you to do your best work and, when appropriate, follow your instructor's comments and suggestions to create an improved version for your portfolio. Of course, many of the skills, such as reading and briefing a case, require lots of practice. Assignments calling for those skills are, therefore, repeated in almost every chapter. Choose your best effort for your portfolio.



Introduction to Law and Preparation for Self-Guided Learning



This text requires that the student do a substantial amount of independent research to find the law applicable in the student's jurisdiction. This chapter provides an overview or refresher course on the concepts necessary to find and analyze law: sources of primary law, use of secondary sources, formulating a search query, reading and analyzing legal authority, and the consequences of bad research.

Skills-based learning objectives

Analyze a legal issue and develop search terms to use to find authority addressing that issue.

Identify ethical issues and find state-specific authority addressing those issues.

Read and brief a judicial decision.

How you will demonstrate your ability

Assignment: Brainstorm contract issues and prepare search queries.

Assignment: Find and discuss state ethical rules applicable to a contract situation.

Assignment: Prepare a case brief.

-
- A. Sources of Legal Authority
 - B. Steps in Preparing to Research a Legal Issue
 - C. Formulating a Query
 - D. Primary Authority
 - 1. Statutes



- 2. Judicial Decisions
 - a. Trial Courts vs. Appellate Courts
 - b. Reading Cases
 - c. Briefing Cases
 - E. Practical and Ethical Issues
-

A. Sources of Legal Authority

Criminal Law

Prosecuted by a governmental body involving a matter of concern to society as a whole

Civil Law

Pursued by an individual or group of people, a business, or a governmental body acting in a private capacity; result may be damages or court

Municipal Law

Local law (as opposed to federal or state law)

Constitution

One of five sources of legal authority

Legislation

Supreme source of legal authority; also called code or statute; enacted by an elected body (*e.g.*, Congress)

Code

Legislation; also called statute

Statute

Legislation; also called code

Judicial Decisions

Source of legal authority; also called common law or precedent

Common Law

Judicial decisions; also called precedent

Case Law

Judicial decisions

Some students will have taken an introduction to law or a legal research class before using this book. For them, the special features of this book will provide an unusual and very valuable opportunity to practice their research and writing skills. Students who have not taken those classes can learn enough about the basics of research to do well in this class just by reading this chapter. Those students will still have much to learn when they study legal research, but they will become comfortable with simple online research.

Let's start with some basics:

1. Success in law is not about enjoying a good argument; it is about having legal authority to support your arguments.
2. There are two types of law: civil and criminal. A **criminal law** matter is prosecuted by a governmental body, such as the district attorney, and involves a matter of concern to society as a whole, such as burglary or murder. The result may be prison time, probation, even the death penalty, if the defendant is found guilty. A **civil law** matter is pursued by an individual or group of private people, a business entity, or a governmental body acting in a "private" capacity. Breach of contract is an example of a civil matter and, if the defendant is found liable (don't use the word *guilty!*) the result is an award of damages (money) or a court order requiring or prohibiting specific actions.
3. Legal authority comes from five sources. These sources exist in federal and state law, and most exist even in local (**municipal**) law:
 - a. **Constitution** (even municipalities have a charter or other governing document);
 - b. **Legislation** enacted by an elected body such as Congress, a state legislature, a county board, or city council (also called **code** or **statute**);
 - c. **Judicial decisions**, also called **common law**, **case law**, or **precedent**;
 - d. **Administrative agency regulations and rulings**, such as the "rules and regs" of the Internal Revenue Service, Federal Trade Commission, your state environmental protection department, or a local planning board. An administrative agency is established to administer a particular law or program (*e.g.*, the National Labor Relations Board was created to administer the National Labor Relations Act); and
 - e. **Executive actions**, which are executive orders signed by the President or governor (or even the mayor) and treaties signed by the President and approved by the Senate.
4. Legal problems presented by clients are often unique. Lawyers and paralegals can memorize the basics of an area of law, such as contract law, but often don't know "the answer" to the problem presented. To find that answer they must research those sources of law to find authority to support their theories.



5. When you find authority, you must be able to understand, analyze, and write about it, and also **cite**¹ it so that those who read your work can find your sources.

B. Steps in Preparing to Research a Legal Issue

Before you start to research a legal problem you will ask yourself several questions:

1. Is this a matter of state law or federal law? By the time you finish your paralegal education, you will usually be able to answer this question without help. Most law relevant to contracts comes from state case law or state statutes. This book will guide you through the law of your own state.

2. What is the desired work product and how much time should be spent on the research? These are important questions on the job and in other classes. Paralegals often prepare **interoffice memos** (also called **objective memos**) that cite authority to analyze the client's situation without arguing a position; paralegals also work on **adversarial** memos and briefs that argue the client's position. This book will give you clear instructions on the work product.

3. Does this project require primary authority or secondary authority? When you are researching a question of law, you will generally be looking for **primary authority**—one of the five sources previously listed. **Secondary authority** is not, itself, the law; it includes textbooks and scholarly articles that help you understand primary law as well as form books, procedure manuals, and “practice” handbooks that help you accomplish a specific task. Many times a legal problem involves finding the right form or procedure, rather than finding the actual law. Secondary authority also includes material to help you find primary authority when you are using books; these “finding tools,” such as digests and encyclopedias, are not necessary when you look for primary law online.

4. Which of the five sources of law is likely to govern? Most contract law comes from code (statutes) and case law; there is some relevant administrative law, as discussed in Chapter 2. When a statute governs, it is often written in broad terms (*e.g.*, “seller shall have a reasonable time . . .”); you will need to find cases that provide insight on how courts interpret terms such as “reasonable” in specific fact situations. **Statutory interpretation (statutory construction)** is a major function of the courts and a major purpose of legal research.

5. Where will I do this research? At some point in your paralegal career you will learn to use books for legal research, but in this class you will probably complete your assignments using a subscription computer-assisted legal research (**CALR**) system. Your school may provide you with access to WestLaw, Lexis, or some other system. If you do not have access to a subscription CALR system, you can create an account at <http://www.lexisone.com> that will allow you to search for judicial decisions from all 50 states and the federal system, going back five years, without paying a fee. You can find statutes on a government-sponsored site, without paying a fee.

6. How should I describe the problem? As explained below, you must describe your problem in a few words that can be used in an index or to create a query to use in an online search engine.

Precedent

Judicial decisions; also called common law; past decisions used to justify current decisions

Administrative Agency

Source of legal authority; administers a particular law or program

Regulations

Established by administrative agencies

Executive Actions

Source of legal authority; including orders signed by the President or governor

Cite

Verb form of citation (*i.e.*, to cite)

Interoffice Memo

Also called objective memo, analyzes fact situation with citations to sources of law

Objective Memo

Also called interoffice memo, analyzes fact situation with citations to legal authority

Adversarial

Argues a position

Primary Authority

One of the five sources of law

Secondary Authority

Material such as textbooks and articles that help locate (finding tools) and understand primary law; form books, handbooks, encyclopedias, digests, and the like; not actual law

Statutory Interpretation

Interpretation of statute's terms; also called statutory construction

CALR

Computer-assisted legal research system

¹To cite authority is to give its citation, the address at which it can be found in law books or online.



Many people use the traditional questions of journalism—who, what, when, where, why, and how—to arrive at their search terms. Choosing terms is difficult because they have to be broad enough that they are likely to appear in most relevant cases and narrow enough that you won’t have to read 5,000 cases. Your choice of search terms will depend on whether you are using books or CALR. CALR works well with narrow, specific terms, but if you are using a printed index, you need to think in broader terms.

Example

If you were researching whether prescribing the drug Allegra has ever resulted in a malpractice case, you would find the term “Allegra” too narrow and unlikely to appear in a print index. However, using the word “Allegra” in a computerized search would probably get you to the most relevant material quickly. On the other hand, the term “prescription” would work well in a printed index, but would probably result in a list with hundreds of cases if used in a computerized search.

Another challenge in brainstorming a problem is the unique language of the law. As you take classes and read cases, this will become second nature to you, but it may seem foreign at first. For example, a problem involving marital property might be classified under “husband and wife” in a legal index; a problem involving a 17-year-old might fall into the category “infants.”

Here is a sample of how you might “brainstorm” a problem and develop a list of words and phrases that describe the problem:

Example

Several years ago, Dan Developer knew that he would want to build 50 houses on his vacant property. He wanted to “lock in” the costs, so he approached the local school district and asked whether he could prepay the school impact fees. School impact fees are paid by a developer to help the school district pay the cost of educating students who will enter the local schools because their families have moved into a new development. The district agreed and the parties entered into a contract, under which Dan paid \$65,000. Three years later, when Dan applied for permits to begin construction, he was told that the district had enacted a new fee. According to the district, the fee Dan had paid was for school buildings, and the new fee is for equipment and staff. Dan thought he had protected himself against all school fees and asks your firm to research the issue.

Who	School district, developer
What	Impact fees
Where	Subdivision
When	Prepayment
Why	Vested rights*
How	Contract

**An example of a term that may be unfamiliar, “vested rights” refers to rights that have become definite entitlements at a point in time.*

Identifying synonyms and similar terms is an essential part of the process. For example, in the chart, you might insert “builder” next to “developer” and “government agency” next to “school district.”



C. Formulating a Query

If you are going to conduct your search using a computer, you will connect several of your search terms to create a query. The **connectors** describe the relationship between your search terms. All of the major CALR services include some common connectors. Some examples of how they work:

- You decide to use “developer” and “impact fee” as search terms and enter the query [developer & “impact fee”]. You get a list of hundreds of cases because the “&” connector only requires that each term appear at some spot in the case.
- To narrow the search, use a “proximity” or “near” connector. Most CALR systems have connectors to require that terms be in the same paragraph [/p], the same sentence [/s], or within a specified number of words of each other [search term/# search term]. You might search [developer/25 “impact fee”] to find cases in which the word developer appears within 25 words of “impact fee.”
- The term “impact fee” is in quotes because some CALR systems require quotes to identify a phrase; failure to include quotes would cause the system to search for the word developer within 25 words of “impact” or “fee.”
- Still have too many results? Add terms: [developer/25 “impact fee”/25 subdivision].
- If you aren’t getting enough results, broaden your search to look for [developer or builder/25 “impact fee”]. The “or” connector is often used to search for synonyms.
- Suppose that your search pulls up several cases in which a developer challenged the existence of impact fees, claiming they were unconstitutional. To eliminate these cases, use the “not” connector [%], [developer/25 “impact fee” % unconstitutional].
- Use **root expanders** [!] to pick up variations such as subdivision or subdivide [subdivi!]. To find woman or women you might use a **wildcard** [wom*n]. Most CALR systems automatically search for common variants, such as court, courts, or court’s.

If you are not familiar with the connectors and wildcards for your CALR system, you can likely find its use guide when you sign on, usually by using the HELP tab. Many of the CALR providers have online tutorials you can use even before you sign on. Your instructor will show you how to sign on.² In addition, Chapter 1 specifically describes the steps taken to research particular problems.

Search Query

Terms and connectors or natural language used in CALR search

Connector

Symbol describing relationship between CALR search terms

Root Expander

Symbol used to pick up word variations in a CALR search

Wildcard

Symbol used to pick up word variations in a CALR search

Variants

Different forms of a root word

²The examples are “terms and connectors” searches; it is also possible to search using “natural language” on some systems, by entering a question without connectors. A “field search,” with which you search or limit the search by names of parties, judges, or lawyers; by citation; or by dates is also possible, but beyond the scope of this book.



Assignment Intro-1

Brainstorm the following problems and write a CALR search query for each. Remember, you are not trying to find an answer to the problem at this point, but are only practicing formulating queries.

- ◆ Jim has leased a building in a strip mall to operate a Francesca's Pizza restaurant. The contract provides that the landlord will not lease space to a "competing business" in the same shopping center, but it does not define that term or give examples. The landlord is planning to lease the space next to Francesca's to a take-out sandwich shop and claims that such a business would not compete with Jim's business. Jim disagrees.
- ◆ Dan Developer signed contracts to sell houses in his new subdivision. The contracts provided that each house would have King brand double-pane, vinyl, double-hung windows. Before construction began, King raised its prices substantially. Dan substituted Della brand double-pane, vinyl, double-hung windows and feels that they are substantially the same product. Some of the buyers are claiming that this violated their rights—they want a reduction of the purchase price.
- ◆ Dr. Hirsch is a successful psychiatrist (M.D.) and wants to expand her practice by hiring a psychologist (Ph.D.) to do counseling. She is concerned that the psychologist might work for her just long enough to become popular with her patients and then open his own office, and that she could lose patients. She wonders whether a court would enforce a clause, in the employment contract, prohibiting her employee from opening his own counseling business within 50 miles of her office for two years after leaving her employ.

D. Primary Authority

The following is an overview of the primary authority you will find when you use CALR. In later chapters, you will use secondary sources.

1. Statutes

Statutes (also called *legislation* or *code*) are enacted by a legislative body (Congress or a state legislature) and are generally organized by **topics**, which are divided into subtopics and sub-subtopics. You should be familiar with the major topics, often called **titles** or chapters, of the statutes for your jurisdiction. Knowing the major topics gives you a starting point for statutory research, even

Topic

Generally, statutes are organized by topic, breaking the code into titles, acts, chapters, or sections

Titles

See Topic



if the most recent amendments may not have been “**codified**” (*i.e.*, put into the topical system). To find your state statutes and look at those topics, start at <http://www.ncsl.org/public/leglinks.cfm>. Select your state and “statutes” in the boxes.

Citations to statutes do not use page numbers because the topics can expand or contract. Using references to titles, chapters, acts, sections, or paragraphs eliminates the need to change all references when a law is amended or repealed. For example, Section 17 might be one-half page long or it might grow to eight pages long, but it can still be cited as Section (§) 17. If Section 17 grows to 13 pages, Section 18 will begin on a later page, but it can still be called §18. A citation to a statute generally consists of the name of the law, an abbreviation indicating the source (*e.g.*, U.S.C. indicates that the statute was found in U.S. Code; ILCS indicates Illinois Compiled Statutes), and numbers indicating the title, chapter, act, and/or section.

If you examine an **annotated statute**, the text of the law as enacted by the legislature appears first, followed by references to cases, administrative regulations, law review articles, and other materials that explain and interpret the law. Statutes found on government sites on the Internet are not annotated.

Reading and comprehending statutes takes a lot of practice. Statutes often include nonspecific language, so that courts have discretion to interpret and apply the law. This is necessary because legislation is intended to govern large groups of people or situations; being too specific would create loopholes. Unlike judicial decisions, which deal with specific situations after they have occurred, statutes often govern conduct in advance. Think about the speed limit that applies in bad weather. It is not a specific number; in most states it is represented by the phrase “safe for conditions” or a similar description. Stating a specific speed would not govern all possible weather situations that could arise in the future on all possible roads. Statutes may also contain long, confusing sentences. A few tips for reading statutes:

1. Look at the index for the whole chapter or act (often located at the beginning of the chapter or act) to get a feel for the law as a whole.
2. Check whether the act has a “definitions” section that defines the terms used in the various sections.
3. Read the sections immediately before and after the section applicable to your research; they may shed light on the statutory scheme.
4. Write out the statute and break long sentences into “outline” form so that you can sort out the “ands” from the “ors.”

2. Judicial Decisions

With a few exceptions, print volumes containing judicial decisions (called **reporters**) are not organized by topic and you must use an encyclopedia, digest, or other index to find relevant cases. To avoid this two-step process, CALR is an efficient way of locating judicial decisions. Once you find cases, reading and understanding what you’ve found requires a solid understanding of court systems.

Codify

To enter a statute into a topical system

Annotated Statute

Statute with references to articles, cases, and other materials that explain and interpret the law

Reporters

Print volumes that contain judicial decisions



Trial Court

Court in which most cases start, generally concerned with deciding issues of fact

Issues of Fact

Trial courts use testimony and evidence to decide facts (*i.e.*, what happened)

Legal Issues

Determining appropriate consequences of the facts or whether a trial court handled a case properly

Affirm

Appellate or higher court's decision to support or uphold the decision of the lower court

Reverse

Appellate or higher court's decision to invalidate the decision of the lower court

Remand

Appellate or higher court's decision to send the case back to the lower court

Modify

Appellate or higher court's decision to change the decision of the lower court

Dissenting Opinion

Opinion written by a judge who disagrees with the majority; not law but provides interesting facts and opinions about case

Majority Decision

That which governs the outcome of cases; also called decision of the court

Decision of the Court

Majority decision, governs outcome of the case

Concurring Opinion

Written by a judge who agrees with majority decision but for different reasons

Synopsis

Summary of case, often provided in publishers' enhancements

a. Trial Courts vs. Appellate Courts

Most cases enter the legal system in a **trial court**. A trial court is most concerned with **issues of fact**. An issue of fact concerns what happened: Did he shoot the gun? Did she run the red light? Trial courts examine evidence and take testimony to make factual decisions. Factual determinations often resolve the case without any need for legal research. For example, in most situations, if she ran the red light, she is responsible for the collision. Because factual decisions do not make or interpret the law, most states do not report (publish) trial court decisions; therefore, when you find a reported state court case, it is often a case from an appeals court or the highest court in the system. These courts are concerned with **legal issues**: the appropriate consequences of the facts or how the lower court handled the case. Some federal trial decisions are reported.

When you read a decision from an appeals court or the highest court, remember that the court is not hearing a “new” case, but reviewing a decision made by a lower court. The appeals court can **affirm**, **reverse**, **remand**, or **modify** (or some combination thereof) the lower court's decision. For example, an appellate court could affirm the trial court's decision that a defendant was responsible for a collision, but find the award of damages unreasonable and reverse and remand on the determination of appropriate damages. If an appellate court determines that a trial court made an error in admitting evidence or making a calculation, the appellate court will generally remand—send the case back the lower court—because it will not accept evidence or make determinations of fact.

Appeals courts use panels of judges. The decision of the majority governs the outcome of the case (whether to affirm, reverse, or remand), but the other (non-majority) judges may write their own opinions. A **dissenting opinion** is written by a judge who disagrees with the **majority decision**; the majority decision is also called the **decision of the court**. A dissenting opinion is not the law, but often provides interesting facts and opinions about the case. A **concurring opinion** is written by a judge who agrees with the majority's decision, but for different reasons.

b. Reading Cases

The physical layout of cases can be confusing. Depending on your source, publishers' enhancements such as a **synopsis** (summary of the case) and **headnotes** (summaries of individual points made in the case) may or may not be included. If headnotes are included, they may include references to supplemental materials and serve as an outline of the case. As you read a case, keep a legal dictionary and a piece of paper close by. You will probably have to look up at least a couple of new legal terms with each case you read. You may also want to draw a timeline on a piece of paper so that you can visualize the events before and during the litigation. Judges usually do not give facts in the order in which they occurred (*i.e.*, chronological order), which can be confusing. Often the first paragraph in

the opinion recites **procedural history**, the court decisions that brought the case to its current position (*e.g.*, “Plaintiff-appellant sought review of summary judgment entered by the Circuit Court of Kendall County. The appellate court, second district, reversed. We granted certiorari . . .”). To a beginner, this usually makes no sense until the underlying facts are clear. Skip this paragraph, read the underlying facts and make a **timeline**, and then go back to the procedural history and add it to the timeline (at the end of the underlying facts, of course).

If there are multiple parties, particularly if the judges refer to those parties as “**appellant**” and “**appellee**,” jot down a quick way of identifying the parties (*e.g.*, you might note that appellant = employer; appellee = employee). The appellant is the party bringing the appeal; in other words, this party lost in the lower court. The appellee won in the lower court. Because courts frequently make different rulings on different issues, it is not uncommon for both sides to appeal. For example, the defendant might appeal, arguing that the trial court “**erred**” (made an error) in finding her responsible (**liable**) for a collision. At the same time, the plaintiff might appeal, arguing that the award of \$50,000 in damages was insufficient because of the extent of his injuries. Reading an opinion is particularly confusing when the court refers to “plaintiff, cross-appellee,” and the like.

One of the most difficult things about reading a judicial decision is that the opinion will contain discussions of several other decisions made by other courts. The primary function of an appeals court is to review the decisions of lower courts with respect to the case under consideration (also called the **case at hand**). An opinion may contain an extensive discussion of what the court below it did and why that was correct or incorrect.

In addition, the appellate-level court may discuss other cases decided in the past (**precedent**) in depth and either **analogize** or **distinguish** those cases—find them similar to or different from, respectively, the case being decided. The court may also discuss the meaning of a statute. It’s easy to get lost; it can be helpful to either take notes or physically mark your copy of the case.

When you find a case online, the body of the case may include numbers spaced at intervals to indicate where the page number would change if you were looking at print material. Sometimes you will want to know the exact page number on which a fact or quote appears in a case (**jump cite**). Online citations to precedent may include links, so that you can click on the citation and see the case being discussed.

c. Briefing Cases

The best way to practice reading and truly understanding cases is to write short case summaries, called **briefs**. Although case briefs are not part of the everyday practice of law, they are time-honored teaching tools. Law students must brief several cases for each class they attend daily. You can expect to brief many cases while you are in school.

You will find that each instructor has a preferred format for case briefs. Most instructors will want you to put a heading on the brief, including the name, **citation** (its official “address” within law books), and year of the case. You should also include a section for “facts,” a statement of the legal issue(s) on appeal,



Headnotes

Summaries of individual points made in the case, often a publisher’s enhancement; may provide references to additional authority

Procedural History

The history of the court decisions that have moved the case to its current position

Timeline

A schedule of the times at which certain events took place

Appellant

Party bringing an appeal; lost in the lower court

Appellee

The party that won in the lower court

Err

To make an error

Liable

Found responsible

Case at Hand

The case under consideration

Analogize

To compare cases and find them similar

Distinguish

To compare cases and find them to be different

Jump Cite

The exact page number on which a fact or quote appears in a case

Brief

Short case summary

Citation

Address at which authority is found in law books or online



the holding, and a summary of the reasoning. Some instructors also want separate sections reciting the procedural history and the contentions (arguments) of the parties. Be sure that you understand which sections your instructor wants included and your instructor's preferences regarding headings, spacing, and so on. A sample of a brief that follows the format described below can be found at the end of Chapter 1.

Facts Because a brief should be brief, one page if possible, it is not usually a good idea to copy the facts as stated by the court. Edit out all insignificant facts. To determine whether a fact is significant, ask yourself: "If this fact were changed, would it change the outcome?" For example, assume the case states that the plaintiff was driving her 2005 Ford Mustang to school, on Maple Street, when the defendant ran a red light and caused a collision. Ask yourself: "Would the result be different if the plaintiff had been driving her 2006 Chevy Aveo to the store on Elm Street when the defendant ran a red light and caused a collision?"

Recite the facts in chronological order, as they happened, and in past tense (because the facts are not continuing to occur). Your instructor may want you to include procedural history in the facts or in a separate section. In either case, the procedural history is important and should be included.

Find an easy way to refer to the parties. Using either plaintiff-defendant or the names of the parties (Smith-Jones) can be confusing, particularly if there are several parties. It is often possible to identify the parties by their roles (*e.g.*, landlord-tenant, husband-wife-child, employer-secretary, or buyer-seller).

Holding

Answer to the legal issue in a judicial decision

Issue and Holding The issue on appeal is never a factual issue such as "whether the light was red." That may have been the issue at trial, but the trial court made a decision. On appeal, something about how the lower court made that decision is in question. Try to identify the ruling or rulings in question and the arguments made by the parties and you will be able to spot the issue.

The **holding** is the answer to the question posed by the issue. It generally includes this court's disposition of the case (affirm, reverse, etc.) and a short summary of the court's conclusion. For example, if the issue is "whether the trial court erred in refusing to permit testimony of a blind witness," the holding might be "Reversed; a witness may not be considered incompetent to testify based on physical disability alone." Do not accidentally state the holding of a lower court.

Reasoning

Summary of the court's explanation of its decision

Reasoning The **reasoning** is a summary of the court's explanation of its decision—the "why" behind the holding. Most instructors prefer that you explain reasoning in your own words. It is almost never sufficient to simply state that the court based its decision on precedent. It is also not helpful to refer to cited cases unless a reader would know what the reference means. Try to explain how the unique facts of this case add to or clarify the law.

Instructors differ on whether dissenting or concurring opinions should be included in a brief. Read these opinions. If they make the facts or the legal arguments more understandable, write a short summary.



E. Practical and Ethical Issues

Contract law presents unique ethical and practical issues for legal professionals. This book includes material on these issues at the end of every chapter. The practice of law is regulated on a state-by-state basis, so ethical rules may be slightly different in different states. You can find your state's Rules of Professional Conduct by using the American Bar Association (ABA) Center for Professional Responsibility at <http://www.abanet.org/cpr/links.html>. The ABA promulgates "Model Rules," which can be found on the site, but has no enforcement authority, so it is important that you become familiar with the rules enforced in your state.

Assignment Intro-2

Find and print your state's Rules of Professional Conduct, relating to Competence and Candor Toward the Tribunal for use with the discussion questions that follow.

Read the *Moran* bankruptcy case, which can be found online at http://www.leagle.com/decision/1998521231BR290_1472/IN%20RE%20MORAN, and prepare a case brief. The case involves a contract between a lawyer and a client that is ambiguous and not in compliance with ethical rules. It is intended to show the need for good research and show how precedent is used in deciding cases. While most of the cases presented as samples in this book have been heavily edited, this case has only been slightly edited so that you can see how cases look when you find them online.

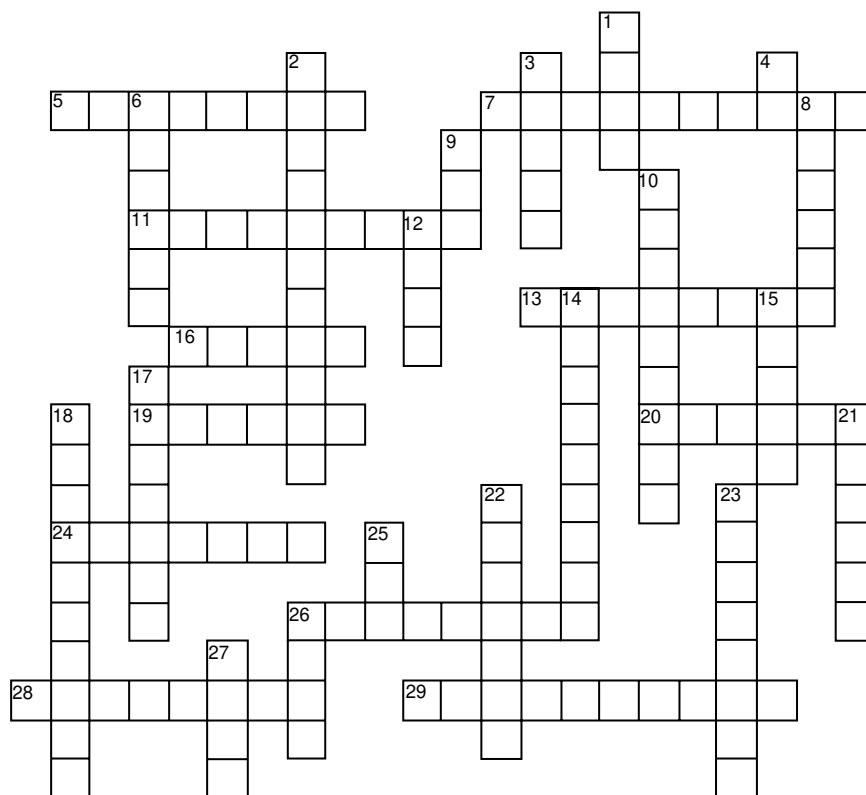
1. Read the case twice before you write anything.
2. Make a timeline showing the chronology: the accident, the signing of the contingency agreement, the change in the rules, the bankruptcy filing, and so on. You will notice that the court does not present the facts in the order in which they occurred, which can be confusing.
3. Consider the following discussion questions:
 - a. Because the original contingency fee agreement made no reference to expenses, it appears that the issue would not have come up if the Morans had not filed a bankruptcy petition. Did the trustee attempt to add a new term to the contract existing between the Morans and Coghlan? Why would that happen? Do you think the trustee was sloppy or deceitful? Should the trustee have been sanctioned?
 - b. What is your opinion about why the lawyers did not initially disclose the changes?
 - c. Although the decision refers to ethical rules, this is not a disciplinary proceeding under those rules. Do you think that the failure of the attorneys to discover or disclose the change in the rules could be a basis for discipline under your state's ethical rules?



- d. Do you think that failure to discover the changes could be considered malpractice if the Coghlan firm had been representing an outside client, rather than itself? Is there any possibility of the Morans suing the firm for malpractice? Did you notice that the Morans were acting without representation by a lawyer in this proceeding?
 - e. Do you think the sanction was adequate?
-

Review Questions

- 1. Identify the three main sources of contract law.
- 2. Is contract law primarily state or federal law?
- 3. Acme Builders realizes it underpriced its contract to build Jilly's Bakery and will lose money if it builds at the contract price. Acme intentionally breaches the contract by refusing to begin construction; this will cause substantial delay in Jilly's opening. Is this a civil or criminal matter?
- 4. While researching a legal question, you are lucky enough to find an article written by a prominent Harvard professor. The article discusses your precise issue in depth. Is the article primary or secondary authority?
- 5. When you find a statute that addresses your issue, you still might have to look for case law. Why?
- 6. Identify three types of connectors that can be used in a terms and connectors search and describe the functions of wildcards and root expanders.
- 7. Page numbers are not used in referring to a particular part of a statute. Why?
- 8. The relevant statute describes "DUI" as being in control of a "vehicle" while intoxicated. Your client was arrested for riding a horse while intoxicated. Describe strategies you would use to determine whether the horse should be considered a "vehicle."
- 9. Your DUI client is also claiming that he was not intoxicated while riding the horse, but was suffering a reaction to a prescription drug. What type of issue does this present, and would legal research be appropriate?



ACROSS

5. ! is the root
7. _____ history; court decisions that led to case's current position
11. party who lost in lower court
13. another term for decision of the court
16. _____ lawsuit generally results in award of money
19. to send a case back to lower court
20. uphold lower court decision
24. another word for legislation
26. for a statute to have been entered into topical system
28. * is the _____, used to find variations such as woman/women
29. _____ opinion; agrees with decision but may state different reasons

**DOWN**

1. issues of _____ dealt with in trial court
2. type of law made by agencies
3. _____ court decisions are often not published
4. connector useful for finding synonyms
6. quotation marks are used for _____ searching
8. IRS is an administrative
9. % is the _____ connector
10. _____ authority explains or helps locate the law but is not actually law
12. / is the _____ or proximity connector
14. _____ statute has references to cases, articles, etc.
15. statutes are organized by _____
17. _____ law comes from one of five sources
18. _____ opinion, by a judge who disagrees
21. change a decision
22. Loislaw automatically retrieves most _____ forms
23. _____ prosecution can result in prison sentence
25. connector that will find terms in case regardless of proximity
26. another word for legislation
27. initials; Loislaw is this type of research

Practical Contract Law for Paralegals



An Activities-Based Approach

1



What Is Contract Law?



This chapter explores the types of contract recognized by law: express, implied, unilateral, bilateral, formal, informal, enforceable, unenforceable, void, and voidable. The role of paralegals in contract law is introduced, along with some of the ethical problems unique to contract law. You will learn to recognize situations that are similar to contracts, but are treated differently: gifts, promissory estoppel, and quasi-contract.

At the end of the chapter is a sample brief of a case concerning issues discussed in this chapter. It includes an explanation of how the case was found, using computer-assisted legal research (CALR) techniques. Students who are not yet confident in their ability to find, read, and summarize cases may want to review the sample before attempting the assignments in this unit.

Skills-based learning objectives

Identify a contract as unilateral or bilateral and identify obligations that are implied rather than express.

Identify ethical issues and find state-specific authority addressing those issues.

Find a judicial decision addressing a particular issue in contract law; analyze and brief the case.

How you will demonstrate your ability

Assignments: Analyze sample contracts; describe common unilateral and implied contracts.

Assignment: Find and discuss state ethical rules applicable to a contract situation.

Assignment: Research a contract law issue; prepare a case brief.



-
- A. What Is a Contract?
 - 1. Types of Contract: Express or Implied
 - 2. Types of Contract: Unilateral or Bilateral
 - 3. Other Classifications of Contracts
 - B. Alternatives to Contract
 - 1. Gifts
 - 2. Promissory Estoppel
 - 3. Quasi-Contract
 - C. Practical and Ethical Issues
-

Introduction

Contract

Set of legally enforceable promises

Torts

Law applicable to injuries to people or property

What is contract law? The short answer is that all of law is related to contract law. That is why almost all law schools require that first-year students take a course in contract law. **Contracts** are, themselves, the subject of much litigation; contracts can be used to resolve matters involving crimes (plea agreements), property, **torts** (injuries to people or property), estates and inheritance, divorce and parenting, and businesses. Is it “dry” or boring? Only if psychology is boring; a real grasp of contract law requires a solid understanding of motives, patterns of behavior, communication, negotiation and the balance of power among parties, and probabilities.

Example

Understanding motivation is the key to understanding contract law. Consider: Client is entering a contract with Builder for construction of an office building and wonders how to set the price. A flat price for materials and labor would give Client peace of mind, knowing what the ultimate price will be. Client has limited funds available and wants certainty. But, will Builder be tempted to use the cheapest (perhaps low-quality) materials to maximize profit? Builder is also concerned about the bottom line. If the price of materials goes up as it did, for example, after Hurricane Katrina, he may be working for almost nothing. If the contract is structured so that Client will pay the cost of materials plus XX%, might Builder be motivated to use the most expensive materials? If Client wants to pay the cost of materials plus a set amount for labor, Client is assuming all of the risk with respect to the cost of materials. If Client decides to acquire materials independently, will the price be as good as the price Builder could negotiate? What is the value of Client’s time? Can you think of a solution?

Every lawyer must have a good understanding of contract law, and paralegals need to understand the theory and much more. Paralegals play important roles in negotiating, drafting, and implementing contracts and, when a contract is litigated, are often called upon to conduct factual and legal research and assist with trial preparation. To be an effective paralegal, you need to understand contract theory, be familiar with the vocabulary, be able to identify and research legal issues, and have the practical skills for drafting and implementing contracts.

The most important thing you can learn is to work independently. You could try to memorize every word in this book, including every reference to a case or statute, but that would not be of much benefit in the workplace. Many fact situations you encounter on the job will not have been addressed in this book; your state may have unusual contract precedents, or your local courts may have practices not addressed in this book. Most importantly, the law will continue to evolve after this book is finished. This book will give you the language and skills you will need to handle those issues. It's a do-it-yourself approach that should help you retain what you learn well past the final exam. You will be instructed to use the Internet and CALR to research certain issues and find your own answers.

Assignment 1-1

A basic understanding of contract law is essential to working in any area of law, as discussed above, but a higher level of knowledge can take your career to a higher level. Visit <http://www.nala.org> and answer the following:

1. Briefly describe the paralegal certification program.
2. Find the description of advanced certification for contract management. List the skills identified as necessary for the certification.
3. Find the most recent job analysis report. What percentage of certified paralegals report use of general contract knowledge?

Dealing with a contract in any context involves: determining whether a contract has formed or will form; knowing how to interpret and implement the agreement; and determining the consequences when something goes wrong. This book is organized according to those concerns. The first chapters deal with the elements of formation and are followed by chapters concerning implementation, interpretation, and remedies.

A. What Is a Contract?

When you think of a “contract,” do you picture the five pages of mind-numbing, tiny print you signed when you took a car loan? Do you picture yourself going through the cafeteria at work or school with a cup of coffee and toast on your tray, saying nothing, but handing the cashier a five-dollar bill? You should picture both. A contract is a set of legally enforceable promises, entered into by two or more parties, to make their dealings predictable and to allocate risk. The law of contracts will make more sense to you if you remember that people enter into contracts to keep their dealings and risk predictable. Very few people could enter into any relationship, whether buying toast and coffee or building a mansion, without having some way to predict the outcome and risk.

**Agreement**

“Meeting of the minds”

Manifestation of Mutual Assent

Appearance that an agreement has been reached

Consideration

The give and take that distinguishes a contract from a gift

Capacity

Ability, as determined by age and mental competence, to enter into a contract

Legality

An element of an enforceable contract

Express

Contract with significant terms stated orally or in writing

Implied

Contract formed without express statement of terms, by words and actions

Bilateral

Contract in which both parties make promises

Executory

Contract in which obligations have not been fulfilled

Executed

Contract in which all obligations have been fulfilled contract

Unilateral

Contract formed when one party acts in response to other party's promise

Not all promises are contracts. To be enforceable, a contract must meet certain requirements: **agreement** (also called **manifestation of mutual assent**), **consideration**, **capacity**, and **legality**. Those requirements are discussed in depth in later chapters. A promise that is not a contract might be enforceable under another theory such as completed gift, quasi-contract, or promissory estoppel; these theories are explained later in this chapter.

1. Types of Contract: Express or Implied

Contracts can be classified in many ways. An **express** contract has its important terms explicitly stated, either orally or in writing. The enforceability of oral contracts is discussed later. A contract can also be **implied** from the words and actions of the parties, even if they never expressed an agreement.

Example

Contract law does not favor the “gotcha” approach to doing business and includes a theory for most situations. Terry, a certified public accountant, has prepared Lee’s tax returns every March for the last six years. This year, Terry came back from lunch on March 2 and found an envelope containing all of Lee’s receipts and tax forms under the office door. Terry completed Lee’s returns and mailed them, along with a bill, to Lee. Can Lee refuse to pay on the grounds that they never entered into an agreement this year? Probably not; a contract was implied.

2. Types of Contract: Unilateral or Bilateral

Most contracts are **bilateral**, meaning that both parties made promises. It may be that nothing has been done yet; it may be some time before anything is done, but a contract has formed. Sam orally promises to paint Taylor’s building next month; Taylor agrees to pay \$3,000, but neither has taken any action beyond making promises. A binding contract exists between them. It is an **executory** contract because there are obligations that have not yet been fulfilled. When Sam paints the building and Taylor pays Sam, it will be a fully **executed** contract.

A **unilateral** contract does not form until one party acts in response to the other’s promise. A typical example is an offer of a reward. I may offer \$100 for the return of my missing cat, but there is no point in your promising me that you will find the cat. The contract forms when you find the cat.

Examples

Why does this distinction matter? Sometimes it is essential to know exactly when a contract forms.

Bilateral Contract: Sam orally promised to paint Taylor’s building next month; Taylor agreed to pay \$3,000. Two days later Taylor decided to cancel; it would be more economical to install vinyl siding. Taylor is in breach of contract, and Sam may sue for damages.

Unilateral: On the other hand, assume that Taylor said: “You know that old garage behind my house on Main Street? It needs painting, but I don’t want to get involved in any big contract deal. If you have any time next month, get over there and paint it. I’ve got all the paint and stuff in the basement. When you finish I’ll pay you \$3,000.” Sam just smiled and shrugged but planned to do the job. Two days later, Taylor called Sam and revoked the offer. Taylor has not breached a contract, because no contract had formed. A unilateral contract forms when there is an act in response to a promise, and Sam had not yet acted.

Assignment 1-2

In Exhibit 1-1 you will find samples of a consignment contract and an option contract. Don’t worry too much about the component parts of the contract, some of which are labeled. Those are discussed thoroughly in a later chapter. Read the contracts and determine the following:

1. Is the option contract a unilateral or bilateral contract? Think it out: As of the day the option was signed, what does the owner get and what does she give up? On that day, what does the buyer give up and what does she get? Might there actually be two contracts in this situation?
 2. Is anything obvious missing from the consignment agreement?
 3. Robin’s jewelry may be very ugly and overpriced; Betty may be unable to sell a single piece. If she never sells a piece, she never has to pay Robin anything. Does that mean that this is a unilateral contract, which will be accepted only when Merchandise is sold? Think it out: Identify specifically when the contract formed or will form and what each party gave or promised.
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EXHIBIT 1-1 **Sample Option and Consignment Contracts**

OPTION CONTRACT

OPTION AGREEMENT by and between Jan West (“Owner”) and Rene Miller (“Buyer”).

Buyer hereby pays to the Owner the sum of \$10 in consideration for this option, which option payment shall be credited to the purchase price if the option is exercised.

Identification and defined terms

EXHIBIT 1-1 (continued)

Buyer has the option and right to buy the vacant and undeveloped property commonly known as 140 S. Wood Road, more fully described on the survey attached to and made part of this Agreement, within the option period for the full price of \$70,000 (Seventy Thousand Dollars).

This option shall remain in effect until August 31, 201X, and thereupon expire unless this option is sooner exercised. To exercise this option, Buyer must notify Owner of same by certified mail within the option period. All notices shall be sent to the owner at 325 River Ave., Dundee, IN.

Time is of the essence in this agreement. Should the Buyer exercise the option, the Owner and the Buyer agree to promptly execute any and all documents necessary to consummate the sale on these terms.

The Buyer may extend this agreement, for a period of six months, by sending certified funds in the amount of \$100, by certified mail, to the Owner at the aforementioned address, within the option period.

This option agreement shall be binding upon and inure to the benefit of the parties, their successors, assigns, and personal representatives. Signed this _____ day of May, 201X.

Owner _____ Buyer _____

CONSIGNMENT CONTRACT

Consignee and Consignor
are defined terms

Agreement between Elizabeth Jones, owner of Betty's Boutique, "Consignee" and Robin Smith, "Consignor," made August 2, 201X.

WHEREAS:

Consignor designs and creates unique jewelry pieces "the Merchandise" and wishes to sell the Merchandise to the public, and

Consignee is the owner of a boutique store at 123 High Street, Geneva, "the Boutique" and wishes to be the exclusive area seller of the Merchandise,

Consignor and Consignee agree as follows:

This section is called
recitals

1. OBLIGATIONS OF CONSIGNOR

a. Consignor shall deliver to the Boutique, on the first Monday morning of each calendar month, a quantity of Merchandise so that the total marked prices of all Consignor's Merchandise on display at the Boutique shall be in the range of \$1,000 to \$1,200 at all times.

b. Consignor shall attach to each piece of Merchandise a tag on which Consignor has marked the price at which the piece may be sold.

EXHIBIT 1-1
(continued)**2. OBLIGATIONS OF CONSIGNEE**

a. Consignee shall at all times display all Merchandise in Consignee's possession in the glass display counter on which the cash register is located.

b. Consignee may display and sell other jewelry, but may not display other jewelry in the same display case as the Merchandise.

c. Whenever Consignee engages in print advertising, such advertising shall contain the statement, "Exclusive Kane County seller of Robin's Eggs jewelry."

d. Consignee shall use best efforts to sell the Merchandise at the marked price and shall not discount the Merchandise. Consignee shall display a sign and enforce a policy that no returns of the Merchandise will be allowed unless the Merchandise is defective. Any Merchandise returned as defective shall be returned to Consignor at the time of the next delivery of Merchandise and shall not be included in the accounting described below. Consignee may sell the Merchandise for cash, check, or credit, but Consignor shall not be responsible for any costs associated with selling on credit or any losses due to fraudulent use of credit or checks.

e. Consignee shall, on the first Monday of each calendar month, prepare an accounting of Merchandise sold during the previous calendar month, and deliver that account statement to Consignor along with a check representing sixty percent (60%) of the total amount paid for Merchandise (exclusive of sales tax) during the previous month.

3. RELATIONSHIP

a. Neither party is an employee of the other; neither has any interest in the business operation of the other except as described in this agreement. Consignee is Consignor's agent solely for the purpose of selling Merchandise.

b. Consignor shall retain title to Merchandise until sold to a customer and shall insure against loss by theft or casualty.

c. This agreement may not be assigned.

d. Consignor shall not sell or allow sale of Merchandise in Kane County except at Boutique.

Signatures

Date

**Formal**

A contract required to be in a particular form

Informal

Contract for which no particular form is required

Void

An agreement with no legal effect

Voidable

One party has power to invalidate contract

Unenforceable

A contract, otherwise valid, that cannot be enforced in court

Limitations Period

Time limit on bringing lawsuit, based on statute of limitations

3. Other Classifications of Contracts

Some contracts must be in a particular form, for example, a **letter of credit**. These are **formal** contracts. All contracts for which no particular form is mandatory are **informal**.

An agreement that has no legal effect is referred to as **void**. If a person enters into a contract to perform an illegal act, for example, the contract is void. Neither party can enforce the contract. On the other hand, a contract's enforceability may be in the hands of one of the parties. For, if an adult and a minor enter into a contract, that contract is **voidable** at the option of the minor. If the minor does not void the contract, it remains in force.

Finally, a contract might be valid, but **unenforceable**. For example, an otherwise valid contract might be unenforceable because the **limitations period** (time limit on bringing a lawsuit) has passed. The parties might choose to honor an unenforceable contract, but they cannot obtain a court order to enforce it.

EXHIBIT 1-2

Letters of Credit and Bills of Lading

Letter of Credit

An irrevocable promise by a buyer's bank to pay the seller when conditions are met

A **letter of credit** is an irrevocable promise by a buyer's bank to pay the seller (generally through the seller's bank) when certain conditions are met. Letters of credit are used, almost exclusively, in international business, to manage unique risks, such as unexpected governmental interference or control of export/import, as well as problems stemming from buyers and sellers dealing in different currencies. The formalities for an international letter of credit are generally dictated by the Uniform Customs and Practices for Documentary Credits established by the International Chamber of Commerce. Letters of credit may also be used in other situations involving a need for an assurance that the buyer can pay, such as auctions. For example, see http://www.arb.ca.gov/cc/capandtrade/auction/forms/example_loc.pdf.

Here is how it works. Suppose that Big Box imports computers manufactured by Shanghai Sal (Sal). Sal banks with the Beijing Business Bank (BBB). Big Box banks at Elgin Federal (EF) in Texas and wants to buy \$800,000 worth of computers from Sal. Understandably, Big Box does not want to pay in advance. Sal is willing to ship the computers and give Big Box 60 days to pay if Big Box provides a 90-day letter of credit for the full amount.

1. Big Box goes to EF and requests an \$800,000 letter of credit with Sal as beneficiary.
2. EF will issue the letter after Big Box either deposits \$800,000 plus fees or is approved for a loan in that amount.
3. EF sends the letter to BBB, which notifies Sal that payment is ready.