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The Guide to U.S. Legal Analysis and Writing

THIRD EDITION

Deborah B. McGregor, Indiana University McKinney School of Law
Cynthia M. Adams, Indiana University McKinney School of Law
Katrina J. Lee, The Ohio State University Moritz College of Law

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Introducing new co-author, Katrina Lee:

Katrina Lee is a Clinical Professor and the Director of LL.M. Legal Writing at The Ohio State University Moritz College of Law. She is a former President of the Association of Legal Writing Directors.

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To my parents, William A. Matson
and Mary Katharine Geimer Matson.
— CMA

To my sons, Geoff and Dan, for their love, patience,
and never-ending humor, and to my grandsons, Blake
and Evan, who light up my life every day.
— DBM

To my mom, and to Phoebe, Sabrina,
and Dennis, for everything.
— KJL

SUMMARY OF CONTENTS

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PREFACE

The world is indeed becoming smaller. With the world becoming more interconnected through business, technology, and the need to address global-scale problems like climate change, understanding one another's legal systems is critical. Our goal is to help you, the international lawyer from a different legal system, to understand how U.S. lawyers communicate and how the U.S. legal system works.

Many of you work in a civil or mixed legal system and are most interested in learning about the U.S. common law system. While many texts exist that include instruction on common law analysis, there has been no book to date that provides the level of detail that this one does.

We wanted to focus on the types of communications that you are most likely to read from U.S. lawyers or need to write to U.S. lawyers. Cultural differences and tradition may influence how a single document — a contract, for example — is written in any individual country. With an introduction to the techniques U.S. lawyers use when drafting communications, you will have a better understanding of why something is written the way it is, and how, in turn, to most effectively communicate with U.S. lawyers. For these reasons, we have introduced techniques for drafting an objective legal analysis; writing persuasively and drafting documents to the courts; and crafting expository writings, such as client letters, demand letters, and email communications. We chose not to explore research sources and techniques in the United States, knowing there are other exceptional books available that provide that guidance. We are delighted that this edition will eventually be accompanied by online supplementary student learning materials, available at no additional cost on the Aspen Publishing website (www.AspenPublishing.com).

We are thankful to our assistant, Janice White, for her help throughout this process. We would also like to thank ESL Specialist M. Catherine Beck for her advice and support. Thanks, too, to Aspen Publishing's anonymous reviewers, who offered valuable commentary. And a special thank you to our research assistants, including Hongbin Bao, Shishir Deshpande, Anna Dyuzheva, Kristen Davis Edmundson, Nathan Lundquist, Koichi Nishioka, James Porter, and Thomas Vandenabeele, who helped with our first edition, and Stephanie Rivas, who assisted with the second edition. We are grateful to The Ohio State University Moritz College of Law research assistants Marissa Diver, Arata Kaku, and Katie Potrzeboski, who assisted with the third edition. Everyone

named here helped shape the final version of this text. Thanks also to students at both of our law schools who were assigned editions of this book over the years and, through their comments and reactions, helped us refine both the substance and the style for this edition. Professor Lee is grateful to the Moritz College of Law for the summer research grant support.

Professors McGregor and Adams welcome as a co-author on this third edition Katrina Lee, a former law firm equity partner and the Director of the pioneering LL.M. Legal Writing Program at The Ohio State University Moritz College of Law. An experienced legal writing professor and the Immediate Past President of the Association of Legal Writing Directors, Professor Lee taught with the first and second editions and has brought refreshing perspective and energy to the third edition.

We welcome feedback from faculty and students who use this book. You may contact Professor Lee at katrinalee@osu.edu, Dean Adams at cmadams@iupui.edu, and Professor McGregor at dmcgreg@iu.edu.

In the meantime, enjoy!

Deborah B. McGregor, Cynthia M. Adams, Katrina J. Lee
November 2021

CHAPTER

1

The System of Government and the Litigation Process in the United States

A. Introduction

This chapter will provide an overview of the system of government and the litigation process in the United States. The U.S. has a dual system of government, consisting of the federal and state systems. At both the state and federal levels, the government operates through three branches: judicial, legislative, and executive. The judicial branch is made up of the courts. When someone has a problem in need of resolution and brings it to the attention of the court by filing a legal document called a complaint, they start the litigation process. That process can result in a judicial opinion, also known as a case. In U.S. law schools, students read cases produced by the courts.

B. A Dual System

The United States has a dual system of government: the federal system and the state system. The federal system derives its law from four main sources: the

U.S. Constitution, federal statutes, administrative regulations promulgated by federal agencies, and federal court decisions. State law is derived from four main sources: state constitutions, state statutes, administrative regulations promulgated by state agencies, and state court decisions. (See Figure 1-1.) Although states make their own laws, they still cannot disregard federal law.

Primary Sources of the Law

Federal System	State System
• United States Constitution • Statutory laws enacted by the United States Congress • Common law found in federal court decisions • Administrative regulations created by federal agencies (e.g., the Environmental Protection Agency)	• State constitution • Statutory laws enacted by a state legislature • Common law found in state court decisions • Administrative regulations created by state agencies (e.g., the Bureau of Motor Vehicles)

Figure 1-1

C. The Constitutionally Created Three Branches of Government

The U.S. Constitution, which consists of 7 articles and 27 amendments, is the foundation of the U.S. legal system. The Constitution allocates responsibility for governance between the federal and state governments. The Constitution has been amended 27 times. The first 10 amendments, known as the Bill of Rights, mandate fundamental rights and protections for people. The Bill of Rights limits the federal government's power by guaranteeing certain rights to the people, including freedom of speech, freedom of religion, freedom of assembly, freedom of the press, the right to bear arms, the right to be secure from unreasonable searches and seizures, the right to a speedy trial, the right not to make incriminating statements against one's self, the right to a trial by jury, and the right to protection against cruel and unusual punishment. A state constitution can grant additional or greater rights and protections than the U.S. Constitution to individuals within that state's boundaries. At a minimum, though, a state constitution must provide the same degree of rights and protections as is afforded under the U.S. Constitution.

Both federal and state constitutions also provide a framework for governing. The constitutions divide the responsibility of governance into three branches: the executive branch, the legislative branch, and the judicial branch. (See Figure 1-2.) Each branch is assigned a particular role, but all branches may create law. Each branch serves as a check over the other two to maintain a balance of power among the three branches.

U.S. Dual System of Government

The Constitutionally-Created Three Branches of Government

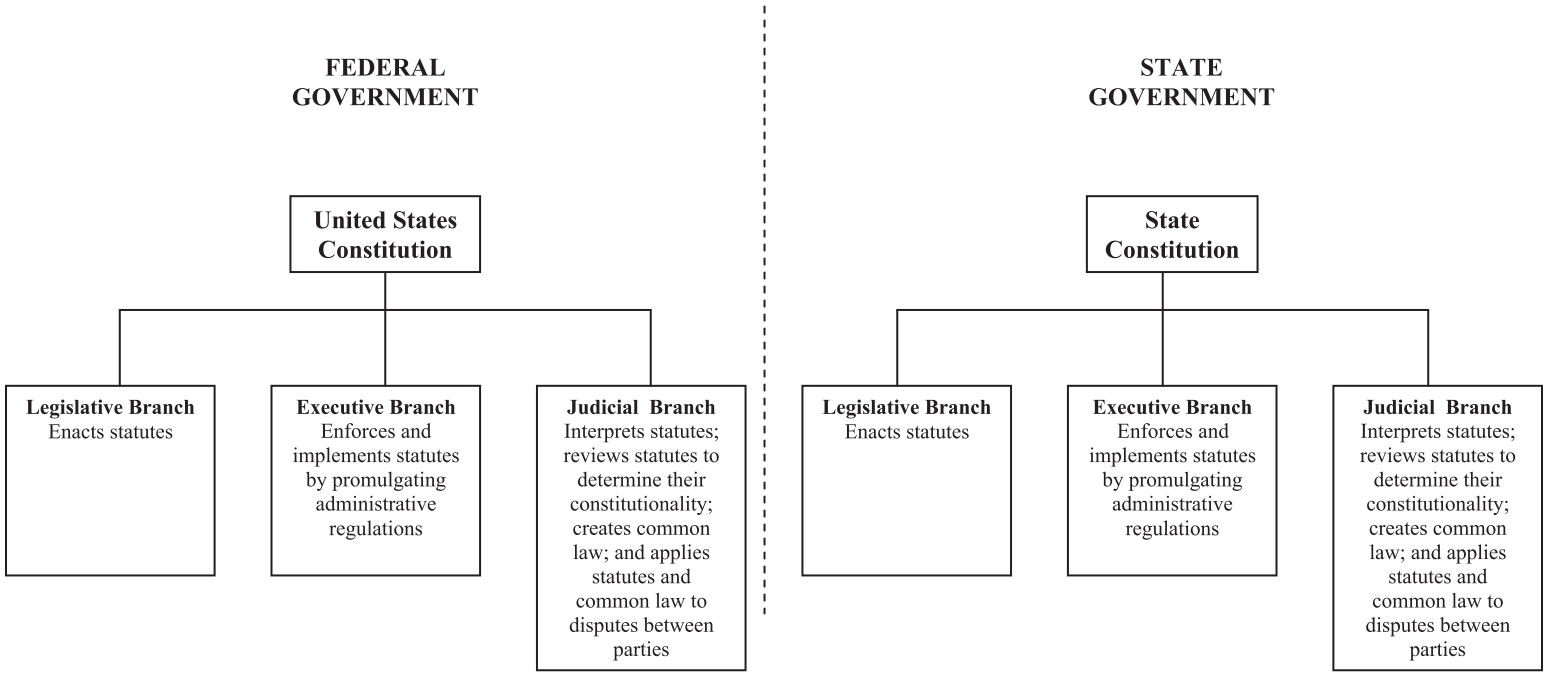

Figure 1-2

The legislative branches in both the federal and state legal systems possess supreme law-making powers. The legislative branch may respond to issues and problems by enacting statutes that protect the welfare of the public. These statutes are subject only to the limitations laid down by the federal and state constitutions.

The executive branch's primary role is to enforce the statutes created by the legislative branch. The executive branch's administrative agencies may be called on by the legislative branch to enforce and implement statutes by putting in place regulations that further define a statute. In 1991, for instance, the U.S. Congress enacted the Telephone Consumer Protection Act (TCPA) and mandated an independent administrative agency known as the Federal Communications Commission (FCC) to create regulations protecting residential telephone subscribers from receiving unwanted telephone solicitations.[1] The regulations created by the FCC under the TCPA have the same force and effect as statutory laws.[2]

The judicial branch plays a strong role in the U.S. legal system. The judiciary interprets existing statutes and may review statutes to determine whether they are consistent with the federal and state constitutions. The judiciary can declare a statute unenforceable if it finds the statute unconstitutional.[3] In addition, the judiciary possesses the power to create law by establishing rules and principles that respond to issues not otherwise addressed by statute. This body of law created by the judiciary is called the common law.[4] In this way, the U.S. legal system is quite different from civil code legal systems in countries where the courts may only interpret and apply the civil code. Because of the judiciary's unusually strong law-making role in the U.S. legal system, the next section will focus on the hierarchal levels in the federal and state court systems.

D. A Dual Court System: Federal and State

The dual law-making authority of the federal and state governments is reflected in a dual court system. Generally, the federal courts interpret and apply federal law, while the state courts interpret and apply state law. The federal court system and the state court system each comprise a pyramid-like hierarchy of courts, with the trial courts at the base of the pyramid, usually followed by intermediate courts of appeals, and then a court of final appeal at the apex of the pyramid. (See Figure 1-3.)

1. 47 U.S.C. § 227(c)(1-4).
2. 47 U.S.C. § 227(c)(5).
3. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
4. Although the United States Supreme Court in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) stated there is no "federal general common law," federal courts have continued to develop federal common law in limited circumstances involving important federal interests, such as in admiralty and maritime cases and international disputes.

Court Hierarchy

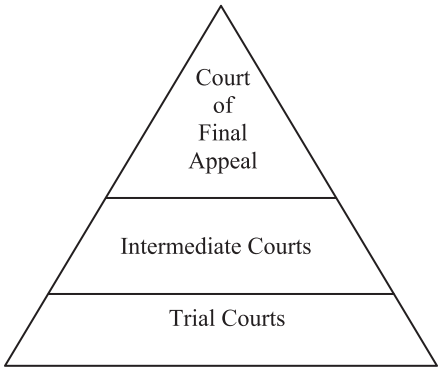

Figure 1-3

1. The federal court system

The federal courts hear disputes involving federal law, including disputes arising from the U.S. Constitution, federal statutes, and federal regulations. A federal court will also hear disputes where the United States is named as a party and can hear state law issues if the parties are citizens of different states and the dispute involves more than $75,000. For example, if two people, a citizen of Oregon and a citizen of California, are involved in a car accident resulting in injuries and damages exceeding $75,000, a lawsuit can be brought in federal court.

Issues involving federal law are usually heard in a federal trial court, called a district court.[5] Each state has at least one district court. The more sparsely populated states may have only a single district court and the more densely populated states may have several district courts. Oregon, for example, has only one district court, but California has four district courts. These courts may hear civil or criminal cases. The district court's jurisdiction is limited to the area within the territorial boundaries of its district. There are 94 judicial districts located in the United States, the District of Columbia (D.C.), the Commonwealth of Puerto Rico, and the 3 territories of the United States — Guam, the Virgin Islands, and the Northern Mariana Islands. (See Figures 1-4 and 1-5.)

A party has a right to appeal the final judgment of a district court or, if permitted by statute, certain orders of the court made during the course of the trial to the intermediate court of appeals having jurisdiction over the district court. In the federal court system, the intermediate courts of appeals are

5. In addition to district courts that hear disputes involving general federal law, the federal court system includes courts that have jurisdiction over special disputes, such as the military courts, the bankruptcy courts, and the United States Tax Court.

known as the United States Circuit Courts of Appeals. Congress has divided the United States into 13 circuits.[6] Eleven of these circuits are numbered 1–11. The two other federal circuits are the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Federal Circuit. (See Figures 1-4 and 1-5.) The total number of judges serving on the court of appeals in each circuit varies from 6 judgeships in the First Circuit to 29 judgeships in the Ninth Circuit,[7] but appeals are generally heard only by three-judge panels.

Each of the numbered circuits includes district courts from various states and sometimes territories, such as Guam. For example, the United States Court of Appeals for the Ninth Circuit hears appeals from district courts located in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington. The United States Court of Appeals for the Second Circuit hears appeals from district courts located in New York, Connecticut, and Vermont. The numbered circuits and the D.C. Court of Appeals also hear appeals from decisions of some federal administrative agencies. (See Figures 1-4 and 1-5.)

Unlike the jurisdictions of the numbered circuits and the D.C. circuit that are based on territorial boundaries, the jurisdiction of the Court of Appeals for the Federal Circuit is nationwide and is based on special claims, such as those involving international trade disputes and patents. (See Figures 1-4 and 1-5.) In some instances, the Court of Appeals for the Federal Circuit also may hear cases against the U.S. government, including disputes arising out of U.S. government contracts, claims for money from the U.S. government, and claims related to veterans' benefits.

The U.S. Supreme Court has nine justices and is the court of last resort for appeals in the federal system and for appeals of state court decisions involving federal issues. (See Figure 1-5.) Most of the cases on the U.S. Supreme Court's docket[8] are discretionary. Thousands of petitions for appeal are filed each year with the Court. The Court is constrained by time, however, and grants permission to hear only a small number of these cases, usually those requiring an interpretation of federal constitutional or statutory provisions, or those requiring the resolution of pressing issues of federal law.[9]

---

6. 28 U.S.C. § 41.

7. 28 U.S.C. § 44.

8. A court docket refers to a record of the cases pending in the court.

9. In the 2012 Term, 7,509 cases were filed with the U.S. Supreme Court, and only 77 cases were argued before the Court. United States Supreme Court Chief Justice Roberts, *The 2013 Year-End Report on the Federal Judiciary* 12, http://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf. In the 2019 term, the U.S. Supreme Court received 5,411 case filings, and 73 cases were argued before the Court. United States Supreme Court Chief Justice Roberts, *The 2020 Year-End Report on the Federal Judiciary* 5, https://www.supremecourt.gov/publicinfo/year-end/2020year-endreport.pdf

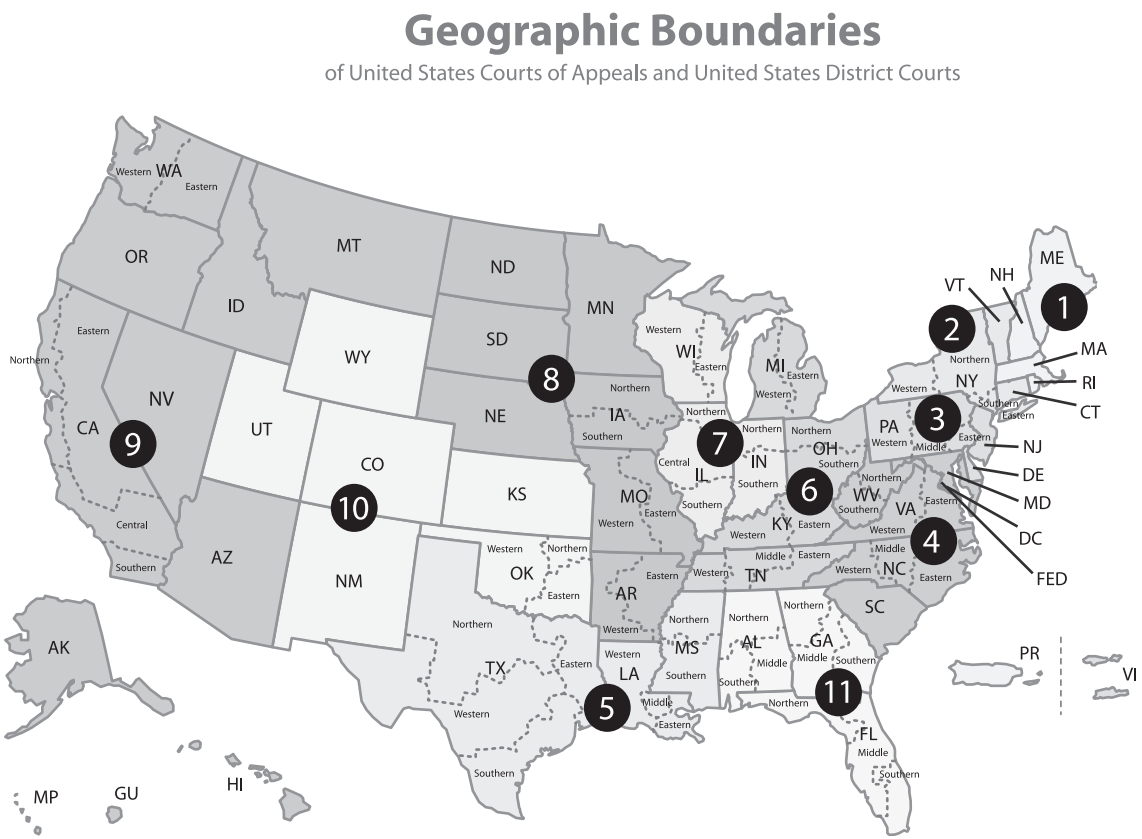

Figure 1-4

Source: Administrative Office of the United States Courts, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (last visited, Aug. 13, 2021).

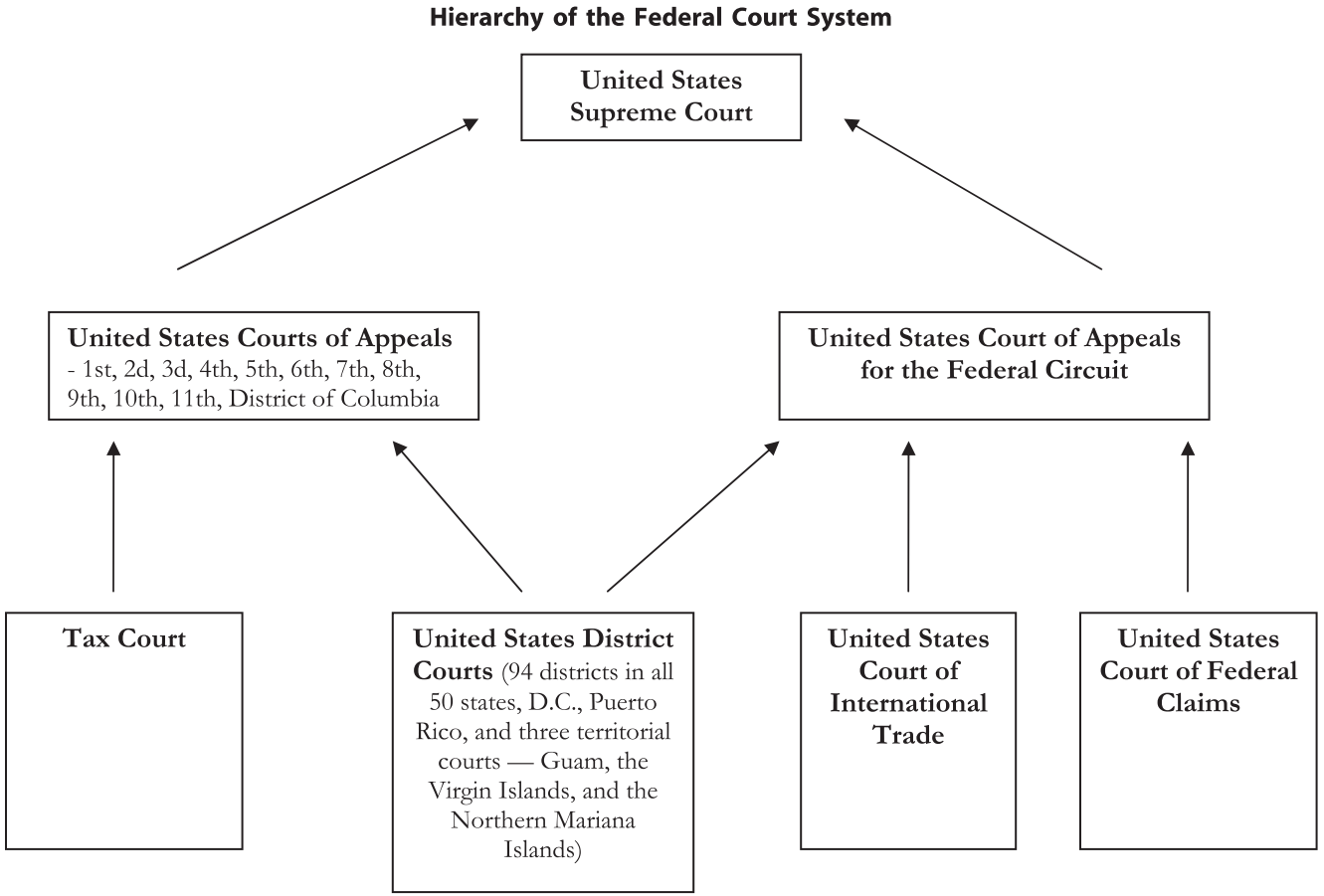

Figure 1-5

Source: Administrative Office of the United States Courts, http://www.uscourts.gov/

Note: Military, Bankruptcy, and Veterans Claims Courts are not shown.

2. The state court system

Each of the fifty states, as well as the District of Columbia and the Commonwealth of Puerto Rico, has its own court system. Similar to the federal system, many state court systems are composed of a three-tiered hierarchy consisting of a trial court, an intermediate court of appeals, and the highest court of appeals or the court of last resort. A minority of states with smaller populations, such as Maine, have two-tiered systems only, with trial courts and appellate courts. The names of the appellate courts vary from state to state. For example, California refers to its intermediate court of appeals as the court of appeal and its court of last resort as the supreme court. (See Figure 1-6.) Conversely, New York refers to one of its intermediate courts of appeals as the supreme court and its court of last resort as the court of appeals.[10]

A state trial court may be of general or limited jurisdiction. A court of limited jurisdiction can hear only certain types of cases. For example, a small claims court might hear only cases involving claims for small debts, and a state criminal court of limited jurisdiction might hear only criminal cases. Still other courts have specialized roles, such as domestic relations court, which might hear cases involving divorce, custody, and child support.

Similar to the federal court system, most states allow a right of appeal to the intermediate appellate court. A party that is dissatisfied with the outcome of a civil case decided by a state trial court may ask an appellate court in the state to review the trial court's judgment, order, or decision to determine whether the trial court committed a legal error that requires a reversal, a modification, or a new trial. If there is a third tier to the state court system, a party dissatisfied with the outcome in the intermediate appellate court may appeal the intermediate appellate court's decision to the state's highest court. In most instances, the highest court in a three-tiered court system is not required to hear an appeal. Like the United States Supreme Court, most dockets are discretionary in state courts of last resort. Unless the decision of a state court involves a federal constitutional question or federal law, the decision of the highest state court is final and cannot be appealed to any other court. For an example of one state's court system (California), see Figure 1-6.

10. A quick way to determine the names of the courts in the various state jurisdictions is to refer to Table 1 in The Bluebook: A Uniform System of Citation (21st ed. 2020) or Appendix 1 in Carolyn Williams, ALWD Guide to Legal Citation (7th ed. 2021). The states are listed alphabetically, and as a part of each state entry, the names of the courts in the state that publish decisions are identified along with the names of the reporters in which these decisions are published.

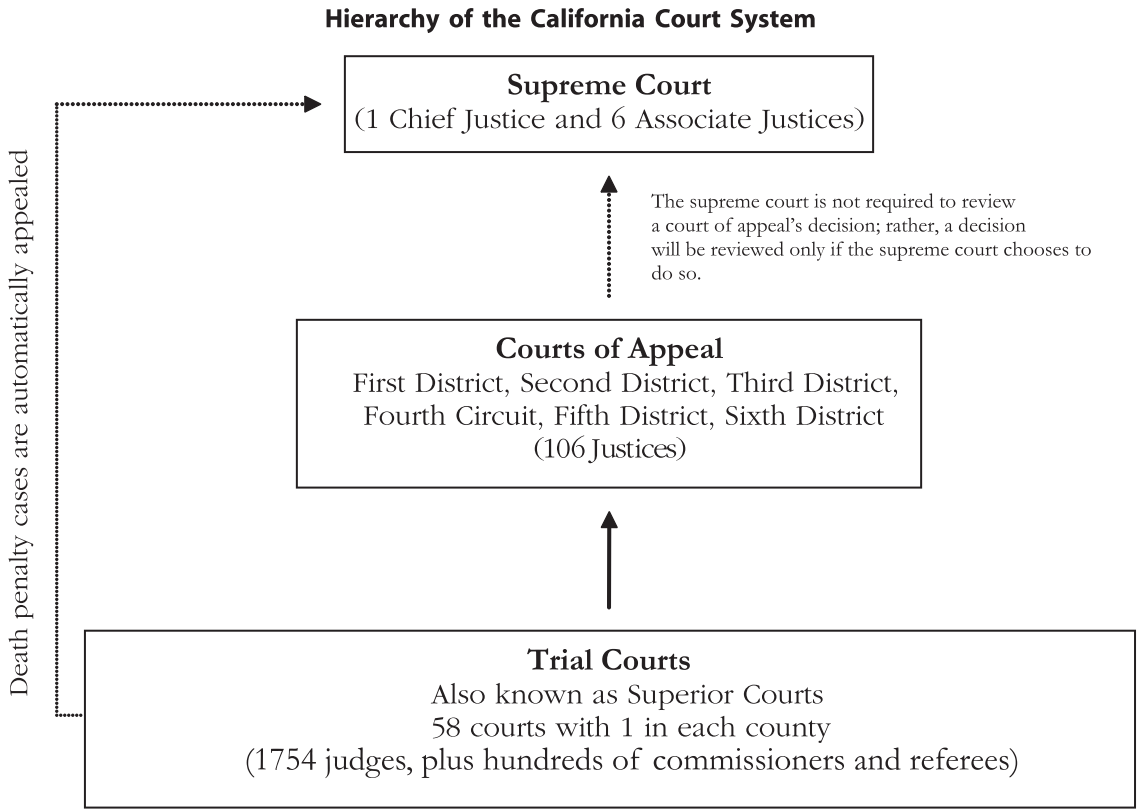

Figure 1-6

Judgeship numbers are current as of 2020. Source: The Judicial Council of California, http://ww.courts.ca.gov/2113.htm, and https://www.courts.ca.gov/documents/California_Judicial_Branch.pdf.

E. An Overview of the Litigation Process

Following is an overview of the basic civil litigation process. Not intended as an exhaustive discussion of civil procedure, this section is meant to help provide an understanding of the trajectory of a typical litigation matter.[11] Unless otherwise noted, this section focuses on the rules of procedure for a civil matter in federal court, though many states pattern their rules of procedure after the federal rules.[12]

1. The client interview

From a lawyer's perspective, the civil litigation process in the United States usually begins when a client meets with the lawyer for the first time to discuss a legal problem. The objectives of the client will vary. The client may want the lawyer to bring on their behalf a legal action against another person or entity. Alternatively, the client may have been named a party in a lawsuit and may want the lawyer to represent them in the matter. Or the client may want the lawyer to negotiate on their behalf a resolution to the legal problem without court involvement. In any event, the lawyer will want to collect the following information:

(1) The identification of the parties involved, including (if possible) addresses, telephone numbers, and email addresses.
(2) Where the key events of the problem arose.
(3) All facts related to or giving rise to the legal problem.
(4) When the events related to or giving rise to the legal problem occurred.
(5) Copies of all writings, papers, and documents related to the legal problem.

As part of assessing the client's case, a lawyer may summarize the major facts of the case gathered from the client before researching the problem. In this way, the lawyer brings some order to the interview notes, identifies follow-up questions that they need to ask, and becomes more familiar with the facts.[13]

---

11. This section does not focus on procedure in criminal law cases or special cases such as those presented in military court, bankruptcy court, and tax court.

12. *See, e.g.*, Charles Alan Wright, Law of Federal Courts 386 (8th ed. 2017). ("They [the Federal Rules of Civil Procedure] provide for the federal courts a uniform procedure in civil actions. . . . The impact of the rules has not been limited to the federal courts. The excellence of the rules is such that in more than half the states the rules have been adapted for state use virtually unchanged, and there is not a jurisdiction that has not revised its procedure in some way that reflects the influence of the federal rules.")

13. Those interested in learning more about client interviewing can consult books focused on lawyer counseling and advising, including Marjorie Corman Aaron, Client Science: Advice for Lawyers on Counseling Clients Through Bad News and Other Legal Realities (2012).

Lawyers meeting with clients should take great care to engage in active listening to elicit all relevant facts from a client. The client should be allowed time to tell the story of their problem without interruption, while the lawyer listens and takes notes. Often, the lawyer may wish to follow up with the client after reviewing materials from the client and their own notes. Only after communicating with the client and reviewing client materials can the lawyer have a preliminary grasp of the issues and sufficient information.

2. Assessing the law and a course of action

Once the lawyer has communicated with the client and reviewed client materials, the next step usually is to research the law to gain a stronger grasp of the legal issues and the strengths and weaknesses of the client's case.[14] Sometimes, a junior lawyer will be asked to do the research and write for a supervising lawyer's review a memorandum analyzing the client's legal question in light of the controlling law.[15] In a private meeting virtually or in person, or in a letter, the supervising or junior lawyer may discuss their analysis and conclusions with the client and make recommendations for possible courses of action. (Chapter 14 discusses drafting a client letter.)

A U.S. lawyer who finds that a client has a viable legal action may not always immediately file a complaint with the court. At this early stage, the lawyer's role is sometimes to be a negotiator on behalf of the client. As a negotiator, the lawyer may attempt to seek a resolution to the client's problem before initiating a legal action or proceeding to trial. For example, if the client wants another party to take a particular action, the lawyer may write a letter on the client's behalf to the other party insisting on this action. (Chapter 14 discusses drafting a demand letter.) Negotiating a resolution to the client's problem also can involve oral communication between the lawyer and the other parties or, if the other parties are represented by legal counsel, the other parties' attorneys. This informal negotiation process may continue even if the parties engage in the litigation process.

3. Alternative dispute resolution

Alternative dispute resolution (ADR) is commonly used to resolve civil disputes in the United States. For many reasons, parties may be reluctant to

14. While this book does not focus on legal research, many books do. *See, e.g.,* Amy E. Sloan, Basic Legal Research: Tools and Strategies (8th ed. 2021); Kent C. Olson, Aaron Kirschenfeld & Ingrid Mattson, Principles of Legal Research (Concise Hornbook Series) (3d ed. 2020).

15. *See* Chapters 6–12 for discussion of writing a predictive memo.

resolve a dispute through formal litigation. Litigation in court can be costly, time-consuming, and inconvenient. In addition, pleadings and accompanying documents are usually available to the public. This can give rise to concern if parties wish to keep certain information private. In some circumstances, ADR methods can lead to quicker private resolution of the dispute and result in less cost than court-centered litigation. Also, as legal technology, court processes, and laws evolve to allow people to access dispute resolution processes on their mobile phones or laptops, ADR may become more convenient and accessible.

ADR methods that can be used prior to or instead of commencement of formal litigation in court include mediation and the more structured process of arbitration. In mediation, the parties seek to resolve issues through cooperation and problem-solving with a neutral third party acting as a mediator. Arbitration follows a process similar to formal litigation in the courts, but the parties have more control over the arbitration procedure. In arbitration, the parties present their respective positions to a neutral party (one or more arbitrators) who then issues a decision in the matter.

Mediation and other ADR processes are also available in some jurisdictions after formal litigation has commenced. For example, courts may order parties to engage in mediation. The case would remain on the court's docket while mediation is pursued. The court may issue orders to ensure that the parties continue to participate in the ADR process. If no resolution can be reached, the ADR process may be abandoned, and the case would then move forward in court.

In the interest of conserving judicial resources in a busy court system, some jurisdictions also may allow parties to agree to additional ADR processes, such as mini-trial or summary jury trials.[16]

4. Formal litigation in the U.S. civil court system

Sometimes, the only way to obtain relief or bring public attention to an issue is to bring a matter to court. The following is a brief introduction to aspects of the civil litigation process. *See also* Figure 1-7, which charts the basic stages in the civil litigation process.

16. This section is not designed to provide an exhaustive review of ADR processes. Interested readers can consult books on ADR. *See, e.g.,* Stephen B. Goldberg, Frank E. A. Sander, Nancy H. Rogers, & Sarah Rudolph Cole, Dispute Resolution: Negotiation, Mediation, Arbitration, and Other Processes (7th ed. 2020).

Basic Stages in Formal Civil Litigation

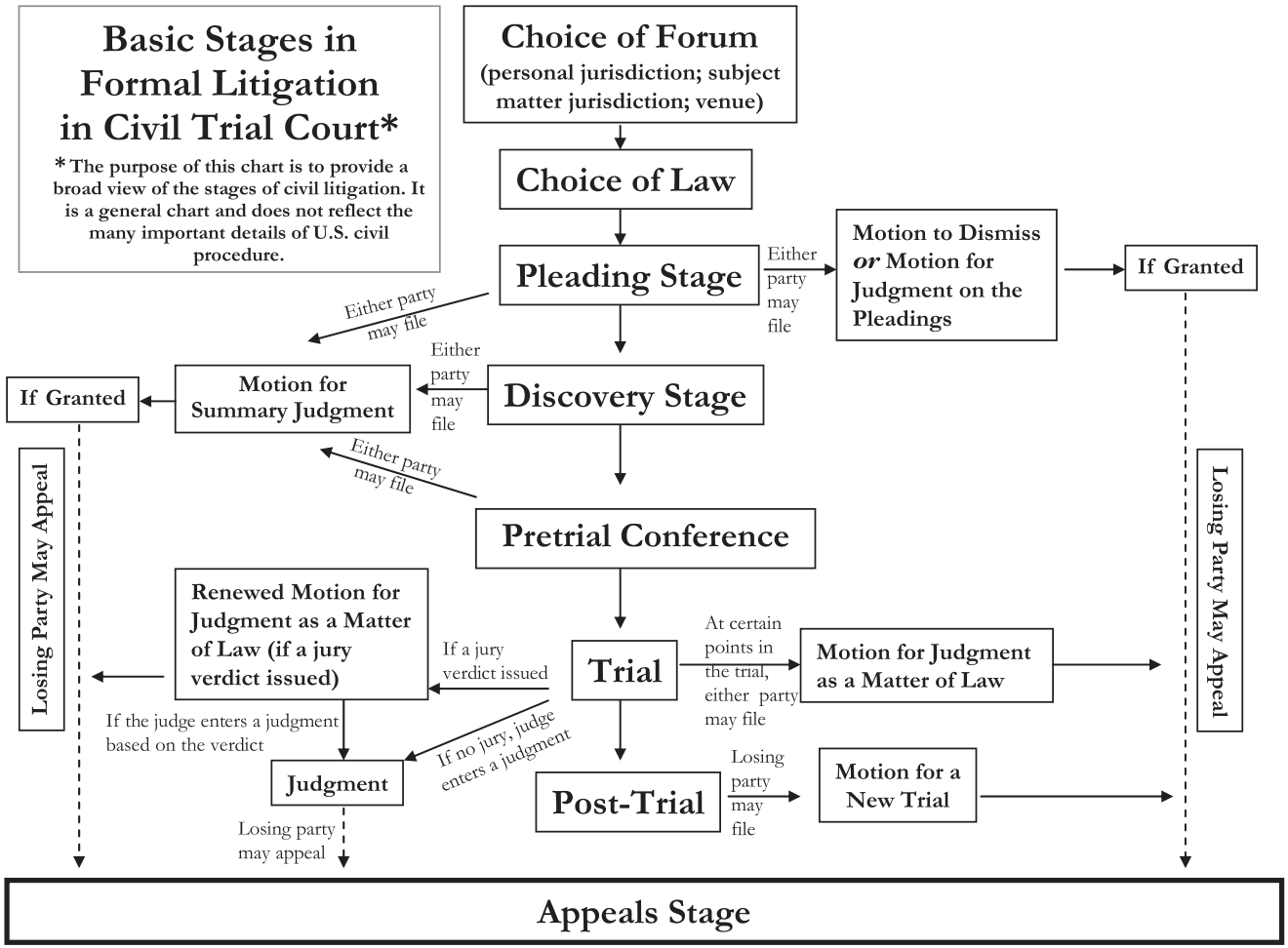

Figure 1-7

a. Choice of forum

In the preliminary stage of the formal litigation process, the parties must decide in which court to bring the lawsuit, known as the choice of forum. A court must have personal jurisdiction over the parties so the judgment reached by the court will be enforceable as to the parties.[17] A court must also possess the power to adjudicate the disputed claims, more commonly referred to as subject matter jurisdiction.[18]

In addition to the personal jurisdiction and subject matter jurisdiction requirements, the parties must give some thought to a variety of venue[19] considerations when deciding which court should hear the controversy. Considerations may include trying the case in a court presided over by a sympathetic judge, in a court that follows more favorable procedural court rules, or in a court situated in a location convenient to the parties, testifying witnesses, or physical evidence.[20]

The plaintiff, as the party bringing the action, will choose the court in which to file the complaint. The defendant in the action may object to the forum chosen by the plaintiff for a variety of reasons and may try to convince the court in the original forum that another court is more suitable to hear the dispute. For example, a defendant may request removal of a case originally filed in a state court to a federal court if the case involves a federal law question.

b. Choice of law

When deciding on a court in which to litigate a case, the lawyer must consider the procedural and substantive laws the court will apply to resolve the controversy. Substantive laws determine the parties' rights and obligations that are at issue in the pleadings. Procedural law governs the process that will determine these rights and obligations. A court applies the law of its own forum to procedural matters. But predicting which substantive law a court will apply is not always straightforward. It would be understandable to assume that a court will always apply the substantive law of its own forum. Indeed, this is the case where a state court is faced with a state law question, and the parties and the events giving rise to the dispute are within the state's jurisdictional boundaries.

In some instances, however, a court will use the substantive law of another jurisdiction. A federal court, for example, will apply state substantive law to a

17. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999).

18. *Id.* (citing Fed. R. Civ. P. 12(h)(3)).

19. *See Japan Gas Lighter Ass'n v. Ronson C*orp., 257 F. Supp. 219, 224 (D.N.J. 1966) ("Venue deals with the locality of the suit, that is, with the question of which [c]ourt, or [c]ourts, of those that possess adequate personal and subject matter jurisdiction may hear the specific suit in question.")

20. *See, e.g., Goggins v. Alliance Capital Mgmt.*, 279 F. Supp. 228 (S.D.N.Y. 2003).

state law question raised in a diversity jurisdiction action.[21] A state court will apply federal substantive law in actions where federal statutes permit a claimant to bring an action in state court for a violation of federal law.[22] And where transactions or occurrences surrounding the dispute have significant connections to more than one jurisdiction, the court will decide which jurisdiction's substantive law will determine the parties' rights and obligations.

c. The pleading stage

Once the plaintiff has determined the most appropriate forum for the dispute, the plaintiff will file a pleading with the court setting out the claims against the defendant, the basis for the court's jurisdiction, and a request for the court to grant specific relief.

In federal courts, a legal action commences with the filing of the complaint.[23] What constitutes the official commencement of an action in a state court varies from state to state. In some states, the legal action begins with the filing of the complaint. In other states, the action begins when all defendants to the action are served with a copy of the complaint along with a summons to appear in court and respond to the plaintiff's claims ("service of process"). The Federal Rules of Civil Procedure set out federal compliance requirements for service of process.[24] What constitutes adequate service of the complaint and summons on all state court defendants varies from state to state.

A defendant may respond to the complaint by either filing with the court an answer to the complaint, a motion for the court to dismiss the complaint, or both.[25] If the defendant fails to respond to the complaint in one of these ways within the period of time specified by the court rules, the clerk of the

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21. The exercise at the end of this chapter provides an example. In the exercise, a client from Illinois seeks the return of a painting stolen from her home. The painting is in the possession of a doctor, a citizen of the fictitious state of East Carolina, who refuses to return the painting. The client will have to bring a legal action in a court that has jurisdiction over the doctor so that, if the client prevails, the court will have the power to order the doctor to return the painting. The client and the doctor are citizens of different states, and the painting is valued at more than $75,000. Therefore, although the return of personal property (such as the painting) is governed by state law, the client may consider bringing the action in a federal district court located in East Carolina, rather than a state trial court in East Carolina. Federal district courts located in the citizen's home state are sometimes viewed as being more impartial to a citizen than a state court from that citizen's home state. If the client brings the action in federal district court, the court will need to decide whether to apply the law of Illinois or East Carolina to determine the respective parties' rights to the painting.

22. *Schneider v. Susquehanna Radio Corp.*, 581 S.E.2d 603 (Ga. Ct. App. 2003), provides an example of a state court applying federal law. In this case, claimant filed a cause of action against a radio station for allegedly violating the federal Telephone Consumer Protection Act (TCPA). Under 47 U.S.C.S. § 227(b)(3) (LexisNexis, Lexis Advance through Public Law 117-47, approved October 8, 2021), a claimant can bring an action in state court for a violation of the TCPA.

23. Fed. R. Civ. P. 3.

24. Fed. R. Civ. P. 4.

25. Fed. R. Civ. P. 12.

court will enter a default judgment in favor of the plaintiff.[26] Obviously, the defendant will want to avoid this outcome.

The defendant's answer will specifically respond to each allegation raised in the plaintiff's complaint. As to each allegation, the defendant may elect to admit, deny, or plead that they "lack knowledge or information sufficient to form a belief about the truth of an allegation. . . ."[27] The last response will be treated, in effect, as a denial.[28]

In addition, the defendant may raise available affirmative defenses.[29] An affirmative defense pleads a new matter not raised by the allegations in the complaint. An affirmative defense asserts that if this new matter is true, the defendant will prevail regardless of whether the plaintiff's allegations are true. For example, most claims have statutorily imposed time limits, or statutes of limitations, for filing a complaint. These statutes of limitations protect defendants from loss of evidence that might have helped defeat the claim and from "the emotional stress and financial uncertainty" of possibly being brought into court on an old claim.[30] The expiration of a statute of limitations is an affirmative defense that can be raised if the plaintiff fails to file the claim within the statute of limitations period. Rule 8(c) of the Federal Rules of Civil Procedure provides examples of affirmative defenses.

A defendant also may assert a claim against any codefendant, called a crossclaim, arising from an opposing party's claims.[31] A defendant may also bring claims against a plaintiff, called a counterclaim, which may or may not relate to the claims arising from the plaintiff's complaint.[32] In turn, the party against whom the counterclaim or crossclaim is asserted must file a reply to the claim.[33]

As an alternative or in addition to filing an answer, the defendant may file a motion to dismiss the plaintiff's complaint or a motion to dismiss some of the claims contained in the plaintiff's complaint.[34] A judge may dismiss a complaint because the complaint failed to state a valid claim on which relief can be granted; the court lacked personal jurisdiction over the defendant; or the court lacked subject matter jurisdiction over the dispute.[35]

In a motion to dismiss, the defendant asserts that even if the facts alleged in the plaintiff's complaint are true, the complaint must be dismissed as a

26. Fed. R. Civ. P. 55(a).
27. Fed. R. Civ. P. 8(b).
28. *Id.*
29. Fed. R. Civ. P. 8(c).
30. Gene R. Shreve & Peter Raven-Hansen, Understanding Civil Procedure 342 (3d ed. 2002).
31. Fed. R. Civ. P. 13(g).
32. Fed. R. Civ. P. 13(a) & (b). A counterclaim is litigated between opposing parties in the original action, whereas a crossclaim is litigated by parties on the same side in the original action.
33. Fed. R. Civ. P. 7(a).
34. Fed. R. Civ. P. 12(b).
35. Fed. R. Civ. P. 12(b).

matter of law because there is no legal basis for the claim.[36] If the court grants the defendant's motion to dismiss, a judgment is entered in favor of the defendant, dismissing the entire complaint or specific claims stated in the complaint. If the judge denies the motion to dismiss, the defendant must respond to the allegations in the complaint, if they have not already done so.

Additionally, any time between the close of pleadings[37] and prior to trial, a party may move for a judgment on the pleadings.[38] The party moving for a judgment on the pleadings asserts that, based on the pleadings filed by the parties, the court should enter judgment for the moving party as a matter of law. The basis for this motion and the standard the court uses for determining whether to grant the motion are the same as for a motion to dismiss. If the court grants the motion, a judgment is entered for the moving party. If the court denies the motion, the litigation proceeds with discovery or, if discovery has already begun, the discovery process continues.

d. The discovery stage

During the discovery stage, the parties have the opportunity to gather information related to any claims or defenses raised in the pleadings. The discovery stage not only assists the parties in preparing for trial but also helps the parties identify issues and determine the strengths or weaknesses of their respective positions.

There are several methods of discovery. Interrogatories are a series of written questions that must be answered in writing by the opposing party.[39] Depositions are a tool of discovery where a party or witness is questioned under oath about matters related to the controversy and the deposed person responds orally to the questions. A court reporter records the questions and answers, and then prepares a transcript of the deposition for the parties.

In addition to interrogatories and depositions, a party also may request documents relating to the dispute, such as a contract in the case of a contractual dispute.[40] A party also may request an inspection of a physical site, provided it is relevant to the controversy.[41]

As part of discovery, a party may also issue requests for admission to an opposing party. The requests for admission contain written fact statements, which the opposing party must admit or deny.[42] If any statement is admitted, then the admission is binding at trial, meaning that the court will treat the fact as established, making it unnecessary to prove it at trial.[43]

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36. *See, e.g.*, *Rippy v. Hattaway*, 270 F.3d 416, 419 (6th Cir. 2001).
37. Pleadings are deemed closed when the defendants have filed their answers to the complaint and the parties have filed replies to any crossclaims and counterclaims.
38. Fed. R. Civ. P. 12(c).
39. Fed. R. Civ. P. 33.
40. Fed. R. Civ. P. 34.
41. *Id.*
42. Fed. R. Civ. P. 36.
43. Fed. R. Civ. P. 36(b).

e. Resolution of the dispute prior to trial

Most cases do not go to trial.[44] For example, a dispute can be resolved without going to trial if the plaintiff voluntarily withdraws the complaint as permitted under the trial rules or if all parties agree to dismiss the case because they have reached an out-of-court settlement.[45] A court also has the power to dismiss an action before it reaches trial in situations where the plaintiff fails to timely pursue the case or fails to comply with trial rules or court orders.[46]

An action can also be resolved prior to trial if the court grants a party's motion for summary judgment, and the judgment resolves all claims and requests for relief.[47] In a summary judgment motion, the moving party asks the court to enter a judgment in its favor on some or all of the claims. The moving party must assert that there are no genuine issues of material fact as to these claims and thus the moving party is "entitled to judgment as a matter of law."[48]

Either party may move for summary judgment. If the court grants summary judgment as to any or all claims, the court will enter judgment in favor of the moving party as to those claims. If the court denies the motion, the parties continue with discovery or, if discovery is complete, the trial may begin.

f. The pretrial conference

Prior to trial, the judge may order the attorneys representing opposing parties to attend a pretrial conference.[49] Pretrial conferences can help in the management and expedition of the trial. For instance, a conference gives the parties the opportunity to discuss such matters as limiting or restricting testimony at trial, stipulating matters of law, narrowing issues, identifying witnesses and documents, and reaching a settlement of the dispute.[50]

g. The trial

In situations where a party fails to make a timely demand for a jury trial or where a party waives the right to a jury trial,[51] the case will be tried before the judge in a "bench trial" unless the court, in its discretion, orders a jury trial.[52] In bench trials, the judge will make findings of fact[53] and issue rulings of

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44. *See generally* Brooke D. Coleman, *The Efficiency Norm,* 56 B.C. L. Rev. 1777, 1783 (2015) (percentage of civil cases that go to trial "hovers around 1.1%").

45. Fed. R. Civ. P. 41(a).

46. Fed. R. Civ. P. 41(b).

47. Fed. R. Civ. P. 56(a).

48. *Id*.

49. Fed. R. Civ. P. 16(a).

50. Fed. R. Civ. P. 16(c)(2).

51. Fed. R. Civ. P. 38.

52. Fed. R. Civ. P. 39(b) & (c).

53. Findings of fact "generally respond to inquiries about who, when, what and where." Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 235 (1985).

law.[54] In jury trials, the jury makes findings of fact, and the judge issues rulings of law.[55]

The number of people serving on a civil jury varies. For example, the federal courts require at least 6 but not more than 12 jurors.[56] The members of a jury are determined by a proceeding known as voir dire. In voir dire, the attorneys or the judge asks questions of potential jurors and, based on the potential juror's response, the judge determines whether the potential juror will be fair and impartial when weighing the evidence.[57]

After the selection of a jury (if there is one), the trial begins with the attorney for the plaintiff making an opening statement, which is then followed by the opening statement by the attorney for the defendant. Next, the attorney for the plaintiff presents the plaintiff's case by asking questions of the plaintiff's witnesses on direct examination and introducing evidence to prove the claims alleged in the complaint. Throughout the trial, the judge supervises the conduct of those in the courtroom and determines what evidence is admissible. The attorney for the defendant may cross-examine any of the plaintiff's witnesses. Cross-examination of each witness occurs immediately after direct examination of each witness.

After the plaintiff's attorney has introduced all testimony or other evidence necessary to prove the allegations in the complaint, the attorney will "rest," or end their presentation of the plaintiff's case. At this point, the attorney for the defendant may move for a judgment as a matter of law (JMOL), asking the court to direct a verdict in the defendant's favor based on the argument that "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the plaintiff]. . . ."[58] If the court grants the JMOL, then a judgment is entered in favor of the defendants. In essence, the matter for adjudication is taken away from the jury (if there is one), and the judge enters a judgment for the defendant as a matter of law. In the event the court denies the JMOL, however, the trial will proceed with the defendant's attorney presenting their case.

The attorney for the defendant will present the defendant's case through direct examination of the defendant's witnesses and by offering evidence into the record. This time, the attorney for the plaintiff has the opportunity to cross-examine any of the defendant's witnesses. Again, the judge presides over courtroom conduct and determines whether any evidence is admissible.

After the close of the defendant's case but before the case is given to the jury, either party can move for a JMOL, directing the court to rule in their

54. "Rulings of law" determine what law will apply to the facts.

55. To learn more about civil jury trial strategy and mechanics, readers can consult various publications on the topic. *See, e.g.,* Tyler G. Draa, Doris Cheng, Maureen Harrington, & Franklin E. Bondonno, Mastering the Mechanics of Civil Jury Trials: A Strategic Guide Outlining the Anatomy of a Trial (2015).

56. Fed. R. Civ. P. 48.

57. Fed. R. Civ. P. 47(a).

58. Fed. R. Civ. P. 50(a)(1).

client's favor.[59] If the judge grants the motion, then the judge will enter a judgment in favor of the moving party, and the trial ends. If the judge denies a JMOL after the close of the defendant's case, the plaintiff has the opportunity to present evidence that rebuts any evidence introduced by the defendant. The defendant, in turn, is given a chance to present evidence that rebuts the evidence introduced in the plaintiff's rebuttal. Finally, the attorneys for the plaintiff and defendant present their closing arguments to the jury or to the judge when serving the role of the fact-finder in a bench trial.

After the closing arguments in a bench trial, the judge considers the evidence presented in the case in light of the applicable law, reaches a decision, and enters a judgment. If it is a jury trial, the jury will deliberate over the facts of the case in light of instructions of law from the judge to reach a decision about the case.

When the jury returns its decision, called a verdict, the losing party may renew its motion for JMOL (often referred to at this stage as a renewed JMOL or RJMOL). The losing party moving for an RJMOL requests the judge to enter a judgment in that party's favor, despite the jury's verdict against that party.[60] If the judge finds insufficient evidence to support the verdict, then the judge grants the RJMOL.[61] If the judge finds the verdict reasonable, the judge enters a judgment reflecting the jury verdict.[62]

h. Post-trial stage

At the trial court level. The losing party may make a motion to the trial judge for a new trial.[63] This motion can be filed as an alternative motion at the same time as the filing of an RJMOL.[64] Although the trial judge has broad discretion to order a new trial, a judge will not liberally grant new trials in deference to the jury and in light of the time and cost of conducting a new trial.[65]

At the appellate court level. The losing party can also appeal any final judgment[66] of the trial court to a higher court in that court system. With some limited exceptions, judicial orders made by a judge during a trial, including most denials of summary judgment or partial summary judgments, may not

59. Fed. R. Civ. P. 50(a).
60. Fed. R. Civ. P. 50(b).
61. *Id.*
62. Fed. R. Civ. P. 50(b)(1).
63. Fed. R. Civ. P. 59(b).
64. Fed. R. Civ. P. 50(b). In the case of alternative motions, the judge can decide whether to grant the RJMOL or the motion for a new trial, or to deny both motions.
65. *See also* Fed. R. Civ. P. 61. ("Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.")
66. Fed. R. App. P. 4.

be appealed until the trial concludes and final judgment has been entered in the case.

i. The appeals stage

Usually the party seeking appellate review is the losing party. A prevailing party, however, may also seek appellate review if, for example, the prevailing party wants an increase in the amount of damages awarded by the trial court in its judgment. The party seeking the appeal must give notice of appeal in the manner and within a time period specified in the applicable appellate rules.[67]

On the federal level and in states where there are both an intermediate court of appeals and a final court of appeals, the case will be reviewed first by the intermediate appeals court. A copy of the trial court record, including witness testimony and documents marked as trial exhibits, will be sent to the appeals court for review. The court of appeals will not hear any additional testimony or admit new evidence into the case. The parties will also write briefs to the courts, arguing their respective positions. Sometimes the court will want to hear oral arguments to have an opportunity to ask the parties' attorneys questions about the issues raised on appeal.

The decision of the appeals court is issued in the form of a written opinion, explaining the court's reasons for affirming or reversing the trial court's decision and perhaps "remanding the case" (sending the case back to the trial court) for retrial. An appeals court reverses or modifies the trial court's decision only if it finds the trial court committed an error that affected the substantial rights of the parties, meaning that it must have affected the outcome of the case.[68]

The losing party on appeal may request the highest court in the court system to review the case. Except in strictly limited circumstances, the highest court, however, is not required to grant a review. In the event that the highest court in its discretion agrees to review a case, its judgment is final. On appeal, the parties again file briefs in support of their respective positions, and the court may hear oral arguments on the matter. The highest court then issues a written opinion, explaining the reason for its decision.

j. Res judicata

Once a claim has been fully litigated and a valid, final judgment on the merits has been issued, the parties cannot relitigate in a subsequent action an issue raised or an issue that could have been raised in this case.[69] The doctrine precluding relitigation of issues is referred to as res judicata.[70]

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67. *See, e.g.*, Fed. R. App. P. 3, 4, & 5.

68. *Beck v. Haik*, 377 F.3d 624, 634 (6th Cir. 2004) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)); *Crabtree v. National Steel Corp.*, 261 F.3d 715, 719 (7th Cir. 2001).

69. *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

70. Res judicata is based on "the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court." *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946).

For example, a golfer (A) sues a homeowner (B) whose land abuts a golf course for injuries sustained when he went on the defendant B's land to retrieve his golf ball and was bitten by the homeowner's dog. This issue has never been decided by a court in defendant B's state. The trial court finds that defendant B owed no duty of care to A to protect him from B's dog. Plaintiff A appeals the case of *A v. B* all the way to the highest court in the state, and the highest court affirms the trial court's decision. The case is now res judicata, which means that plaintiff A can never sue defendant B again for these particular injuries.

Let us say that, after the decision in *A v. B*, another golfer (X) is injured when he is bitten by defendant Y's dog while retrieving a golf ball from Y's property. Plaintiff X pursues his claim to the state's highest court, which, after agreeing to hear the case, decides that its prior decision in *A v. B* does not reflect current public policy and so overturns the decision by finding that defendant Y owed a duty to plaintiff X to protect him from the dog. Plaintiff A (from the previous case of *A v. B*) cannot bring a new action against defendant B for his prior injuries, even though the law has changed in his state to allow for such an action. It would be possible, however, after the decision in *X v. Y* for plaintiff A to bring an action against defendant B if he is again injured by defendant B's dog while retrieving another golf ball from defendant B's land, since res judicata applies only to the injuries alleged in the original dispute.

• Exercise 1-A

You recently met with Edina Broward. Ms. Broward has asked your help in obtaining the return of a painting stolen from her home. You taped the interview. The following is a transcript of the interview. Prepare a summary statement of the situation. Include in your summary (1) the identity of the parties, (2) any important "when" facts, (3) any important "where" facts, and (4) all other facts you believe might be relevant.

Transcript of the Interview with Edina Broward

Lawyer: Good afternoon, Ms. Broward. We have talked briefly about your problem over the phone, but now I'd like to start at the beginning, if you don't mind.

Edina: Yes, that would be fine.

Lawyer: Good. Let's start by getting your full name and where you live.

Edina: I'm Edina Lawton Broward. I live at 303 Forest Drive, in Oak Park, Illinois.

Lawyer: And is this the same residence where you lived when the painting was stolen?

Edina: Yes. It happened in 1985 when I was moving out of my house. A temporary move, you see. The house was in need of repairs and major renovation. I thought it would be best to move everything out of the house so the workers could do their job, and I wouldn't have to worry about their

ruining my antique furniture and rugs. I inherited the house from my father when he passed away in the 1970s. It's a lovely home; the famous architect Frank Lloyd Wright built it in 1903. Unfortunately, my father didn't keep up repairs during his final years.

Lawyer: Before we talk any further, tell me about the painting.

Edina: I inherited the painting from my father, just like the house. He was an attorney, just like yourself, though he practiced law in Chicago. Samuel Bryce Broward IV. He was the founding partner in the firm Broward & Fromm. He loved practicing law, but his real passion was art, especially the sketches and paintings of the Impressionists. The stolen painting was by the American Impressionist James Singer Sargent and had been his pride and joy. It was an oil on canvas of the Rialto Bridge, which Sargent had painted in 1913 during one of his many visits to Venice, Italy.

Lawyer: Do you remember when your father acquired it and how much he paid for it?

Edina: He kept documents on it. The records show he purchased the painting in 1925 for $800.

Lawyer: Did you ever have the painting appraised for insurance purposes?

Edina: No. I really don't know why. I thought the painting was covered by the insurance policy on the house. I didn't realize until the painting went missing that it wasn't covered under the policy. I do know that Dr. Warren, the man who has the painting now, paid $200,000 for it.

Lawyer: Let's go back to when the painting was stolen. You told me earlier that the painting was stolen when you moved your furnishings from the house.

Edina: Well, I didn't know immediately that the painting had been stolen. For several days, I thought the painting had just been lost in the move.

Lawyer: Do you remember the date you moved from the house?

Edina: October 5, 1985.

Lawyer: And can you tell me what you remember about that day?

Edina: I had taken the painting down from the wall. And I had wrapped it in brown paper and had tied it with a string. I wrote on the front of the paper, "Don't Move" in black marker and placed it in the corner of the room. I had planned for the movers to transport some of the furnishings down to my winter home in Florida, rather than risk putting them in storage. But I had planned to take the painting with me when I traveled to Florida. There were a lot of men from the moving company, packing and taking things out to the van. Also, some workers from the home restoration company were there that day, working on the second floor of the house. The workers sometimes passed through the front hall, next to the parlor, to get equipment and supplies from their truck. I was busy directing the movers on which furnishings to take to storage and which furnishings would be sent to Florida. When the movers were ready to leave, I noticed that the painting was missing. I asked the movers whether they remembered seeing the painting, and I even asked the workers from the restoration company whether they had seen the painting, but no one could recall. I assumed the painting must have

been inadvertently put into one of the vans. The moving supervisor said that they would take careful inventory of my furnishings when they moved them off the truck into storage. If they found the painting, he would contact me. When the other van arrived at my Florida home several days later, they unloaded my furnishings, but the painting was not there.

Lawyer: Had the van stopped en route to Florida to pick up other transports?

Edina: No. The movers said that they had closed the van before it left my home, locked it, and had not reopened it until they arrived at my Florida home.

Lawyer: And what about the van going to the storage facility?

Edina: The moving supervisor told me that the painting had not been found in that van, either.

Lawyer: So what did you do?

Edina: I called a partner from my father's old firm, William McIntyre. He called the police. We filled out a theft report with the police. The police wanted a photograph of the painting, but I didn't have one. I just gave them a description of the painting. Mr. McIntyre also helped me hire a private investigator to track down the painting.

Lawyer: And what was the investigator's name?

Edina: James Morgan. He had done some work for Mr. McIntyre in the past. I doubt he is still in business. He was an older person. I suppose he's retired now.

Lawyer: Did Mr. Morgan find any leads?

Edina: No, he spent several weeks investigating the moving company, the restoration company, and their workers. He also questioned neighbors to determine whether they saw anything. He really didn't do any more than what the police did. Neither Mr. Morgan nor the police were able to turn up any information. It was about this same time that the insurance company told me that the painting was not insured.

Lawyer: When was that?

Edina: January of 1986. The police continued to investigate, though not as actively as before. I called them in October 1986, almost one year after the painting had disappeared, to see if they had turned up anything. But after talking with a detective, it became clear to me that finding the missing painting was not a top priority for them. I guess that the file remains open to this day. I was so sad. It wasn't so much the loss of the value of the painting. I'm not an art collector or art fan, and I don't subscribe to art magazines or regularly visit museums. For me, the painting had sentimental value. My father adored the painting. It was like losing a part of my father when I lost that painting.

Lawyer: Did you do anything else to try to find the painting?

Edina: Mr. McIntyre wrote the local museums, including the Art Institute of Chicago, the Terra Museum of American Art, and the Smart Museum of Art, and some local art dealers and auction houses. In the letters, he described the missing painting and requested that anyone who may have seen the painting or knew of its whereabouts contact the police, Mr. McIntyre, or

me. I even offered an award of $25,000 for information that would lead to finding the painting. Mr. McIntyre followed up his letters with telephone calls to these places. No one had any helpful information.

Lawyer: Did you just give up looking for the painting at that point?

Edina: No, no. I never gave up looking for the painting. But Mr. McIntyre died in September of 1986. He was a close family friend, and, after he was gone, I never felt comfortable hiring another attorney. I never married, and I didn't have any family living nearby. I just didn't know who to ask to help me. Then I started suffering periodic dizzy spells that left me bedridden for days. I was only 55, but the doctor said that I had a disease of the inner ear. I had hoped that the police and Mr. McIntyre's letters would result in someone finding my painting.

Lawyer: But you, personally, haven't done anything else to find the painting?

Edina: Last year, I was reading the *Chicago Tribune* and came across an article reporting on the renewed popularity in artwork of American Impressionist painters. The article made me think that maybe, with the renewed popularity, whoever had my painting would try to sell it or exhibit it. I had kept copies of Mr. McIntyre's letters to the museums, auction houses, and art dealers. I wrote my own letters to these places, reminding them about my stolen painting and asking them to contact me if they saw or heard about my painting.

Lawyer: And did anything come of this?

Edina: No, but a curator at the Art Institute of Chicago recommended that I file a theft report with IFAR.

Lawyer: What is IFAR?

Edina: The International Foundation for Art Research. It's a global organization that reports stolen art to museums, galleries, auction houses, and other businesses and experts that deal in fine art.

Lawyer: Why didn't you do this earlier?

Edina: I didn't know about IFAR until then. It wasn't in existence when my painting was stolen.

Lawyer: When did you file the report?

Edina: July 25 of last year.

Lawyer: And is that how you learned about the painting's whereabouts?

Edina: No. My grand-niece, Susan Broward, has a friend, Mary Carter, who is an art student at the University of East Carolina. She attended an art exhibit last month at the university and saw my painting. She had talked with Susan some time ago about my stolen painting. A painting on exhibit at the university reminded Mary of my painting. Mary called Susan and told her about the painting. Susan gave my phone number to Mary, and Mary called me. Mary told me that the plaque by the painting noted that it was "owned" by Dr. Thomas Warren of Flora, East Carolina. I was able to track down Dr. Warren's phone number and called him. I explained to him what had happened to my painting and described my painting to him.

Lawyer: And what did he say?

Edina: He admitted that the painting I described was the painting in his possession. But, when I asked him to return the painting to me, he refused. He said that he had purchased the painting in June of 1988 from a reputable art gallery in Flora, the Nigel Townsend Gallery. The painting had been sold as part of the estate of Jeremy Thorne, a wealthy Flora art collector who had a special interest in American Impressionists. He died in 1987. There were no existing records as to where or how Mr. Thorne had acquired the painting. Dr. Warren purchased the painting for $200,000.

Lawyer: Did you ask Dr. Warren whether he looked into the prior history of the painting's ownership before he purchased it?

Edina: Dr. Warren said that Mr. Thorne was well respected. He didn't think Mr. Thorne would have a stolen painting in his collection, and the painting was in perfect condition. Dr. Warren said he had no reason to suspect the painting was stolen.

Lawyer: Was last month the first time Dr. Warren had publicly exhibited the painting?

Edina: He had exhibited the painting several times since he purchased it. He said that he had exhibited the painting in 1990, 1995, 2000, and 2005, mostly at local art galleries in Flora but once at the East Carolina Museum of Art. Each time the painting was on exhibit for about a month, except at the Museum of Art, where it was on exhibit for six months as part of a special show celebrating American Impressionist artists. Otherwise, the painting has been kept at Dr. Warren's private residence in Flora.

Lawyer: Is there anything else you can tell me about the painting and your search for it?

Edina: Not that I can think of. I want the painting back. It was my father's, and it was stolen from me. I don't care how much Dr. Warren paid for it or how long he has kept it, he bought a stolen painting. The painting belongs to me. If he refuses to give it back to me, I want to take him to court. Surely, a judge will order him to return it to me.

Lawyer: I will look into the matter and get back with you, Edina. Then, we can discuss what action you may want to take.

CHAPTER SUMMARY

- The United States has a dual system of government, composed of a federal system and a state system.
- Law in the United States, at the state and federal levels, comes from four main sources: (1) constitutions, (2) statutes, (3) case decisions, and (4) administrative regulations.

- The federal and state constitutions provide a framework for three branches at federal and state levels: the legislative branch, the executive branch, and the judicial branch.
- The legislative branch enacts statutes.
- The executive branch enforces and implements statutes.
- The judicial branch comprises courts that decide matters brought before them; the courts may interpret statutes and create law in situations not addressed by statute.
- The rules and principles created by courts are referred to as the common law.
- The federal system and the state system each have a set of courts including trial courts and appellate courts.
- Parties to a legal dispute may seek resolution of a dispute through informal negotiations, mediation, or arbitration, or a party may seek to resolve a dispute by filing a complaint in court and thereby initiating a lawsuit.
- At trial, each party to the dispute has an opportunity to present their case through witness testimony and the presentation of evidence.
- A losing party may appeal the trial court's final judgment.
- Once a dispute has been fully litigated and a final judgment is entered, the same parties are barred from re-litigating the same legal dispute.

CHAPTER

2

The Common Law in the United States

A. What Is the Common Law, and Why Does It Matter?

The judiciary in the United States plays a vital role in the law-making process. The judicial system in the United States differs from that of some other countries, since judges in the United States must look to previous decisions as part of their decision-making process. Even if there is an applicable statute, judges in the United States deciding a case cannot look only to the relevant language in a statute; they must also consider if judges in prior cases with similar legal issues or facts have applied the statute. The prior case decisions are referred to as precedent. Precedent makes up the common law. And so, the work of lawyers in either advising clients on a matter or preparing to argue before a court often does not consist of simply identifying a statute that might or should apply in their client's situation. The lawyer must also review judicial decisions.

B. The Judicial Doctrine of Stare Decisis

A judicial doctrine known as *stare decisis* underlies the decision making of courts in the United States. In Latin, *stare decisis* means "to stand by things decided."[1]

A court abiding by the doctrine of stare decisis is mindful of precedent and reconciles new decisions with its own prior decisions or with those of a higher court. Over the years, many reasons have been offered to support the use of the doctrine of stare decisis. Those reasons include:

1. *Certainty in the law:* When judges consistently apply the same rules to substantially similar fact situations, people can plan their actions with a measure of confidence because they are better able to predict the legal consequences of their actions.[2]
2. *Fairness:* The consistent application of rules will result in equal treatment of parties similarly situated.[3]
3. *Court efficiency:* Relying on precedent frees judges from the burden of recreating rules and principles with each new case.[4]
4. *Justice and judicial impartiality:* Judges who base their decisions on precedent promote the appearance of justice and judicial impartiality in the decision-making process. The public has greater confidence in the judiciary when there is less opportunity for judges' personal opinions to influence their decisions.[5]

Precedent that a court is bound to follow is called mandatory or binding precedent. Courts, however, can also seek guidance from non-binding precedent, which is frequently referred to as persuasive precedent.

1. Mandatory precedent

In the state court system, a trial court is bound by the previous decisions of the higher courts within its jurisdictional borders and federal statutory and constitutional decisions of the United States Supreme Court. If the state has a three-tiered court system, the intermediate appellate court is bound by (1) its previous decisions, (2) previous decisions of the court of last resort in the state, and (3) previous federal statutory and constitutional decisions of the United States Supreme Court. The state court of last resort — that is, the highest state

1. *Stare decisis,* Legal Information Institute, https://www.law.cornell.edu/wex/stare_decisis.
2. *See* Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 597-98 (1987).
3. *See id.* at 595-97.
4. Justice Benjamin N. Cardozo, a renown U.S. judge, noted that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Benjamin N. Cardozo, The Nature of the Judicial Process 149 (1921).
5. Earl Maltz, *The Nature of Precedent*, 66 N.C. L. Rev. 367, 371 (1988).

court — is bound only by (1) its own previous decisions, and (2) the previous federal statutory and constitutional decisions of the United States Supreme Court. (See Figure 2-1 for a chart of a state court system's general appeals hierarchy.)

For example, in the State of California, which has a three-tiered court system, a California trial court must abide by (1) previous decisions of the California Court of Appeal for its region, (2) the previous decisions of the California Supreme Court, and (3) the previous federal statutory and constitutional decisions of the United States Supreme Court. A California Court of Appeal, however, is bound only by (1) previous decisions within its own region,[6] (2) previous California Supreme Court decisions, and (3) previous federal statutory and constitutional decisions of the United States Supreme Court. The California Supreme Court is bound only by (1) its own previous decisions and (2) previous federal statutory and constitutional decisions of the United States Supreme Court. (See Figure 1-6 in Chapter 1 for a chart of the California court hierarchy. Please note that the California court system is used here as an example and that there can be variations among three-tiered state court systems.)

In the federal court system, a district or trial court is bound by (1) the previous decisions of the United States Supreme Court, (2) the previous decisions of the court of appeals of the circuit in which the district court is located, and (3) its own previous decisions. (See Figure 2-1 for the federal court system's general appeals hierarchy. A more descriptive federal court hierarchy chart is found in Figure 1-5 in Chapter 1.) Therefore, a federal district court in California must abide by (1) the previous decisions of the United States Supreme Court, (2) the previous decisions of the United States Court of Appeals for the Ninth Circuit (the circuit in which the California district courts reside), and (3) its own previous decisions.

Courts of appeals, such as the United States Court of Appeals for the Ninth Circuit, are not bound by previous decisions of district courts (federal trial courts) or previous decisions from other circuit courts of appeal. Nevertheless, these courts of appeals are required to abide by (1) their own previous decisions and (2) those of the United States Supreme Court. Of course, the United States Supreme Court is bound only by its own previous decisions.

A special situation, however, arises when a federal court is deciding a matter of state law. A federal court may have jurisdiction over certain disputes arising under state law when the claimed losses exceed $75,000 and the dispute is between:

> "**(1)** Citizens of different [s]tates;
> **(2)** citizens of a [s]tate and citizens or subjects of a foreign [country] . . . ;

6. *See, e.g., Cleveland v. Thomas*, 17 Cal. App. 4th 1700, 1709 (2d Dist. 1993) (the California Court of Appeal for the Second District stated that it was not bound to follow a prior decision of the California Court of Appeal for the Sixth District on a similar issue and rejected the Sixth District's decision). Also, another helpful source on mandatory and persuasive authorities is Barbara Bintliff, *Mandatory v. Persuasive Cases,* 9 No. 2 Persp.: Teaching Legal Res. & Writing 83 (Winter 2001).

Hierarchy of Appeals

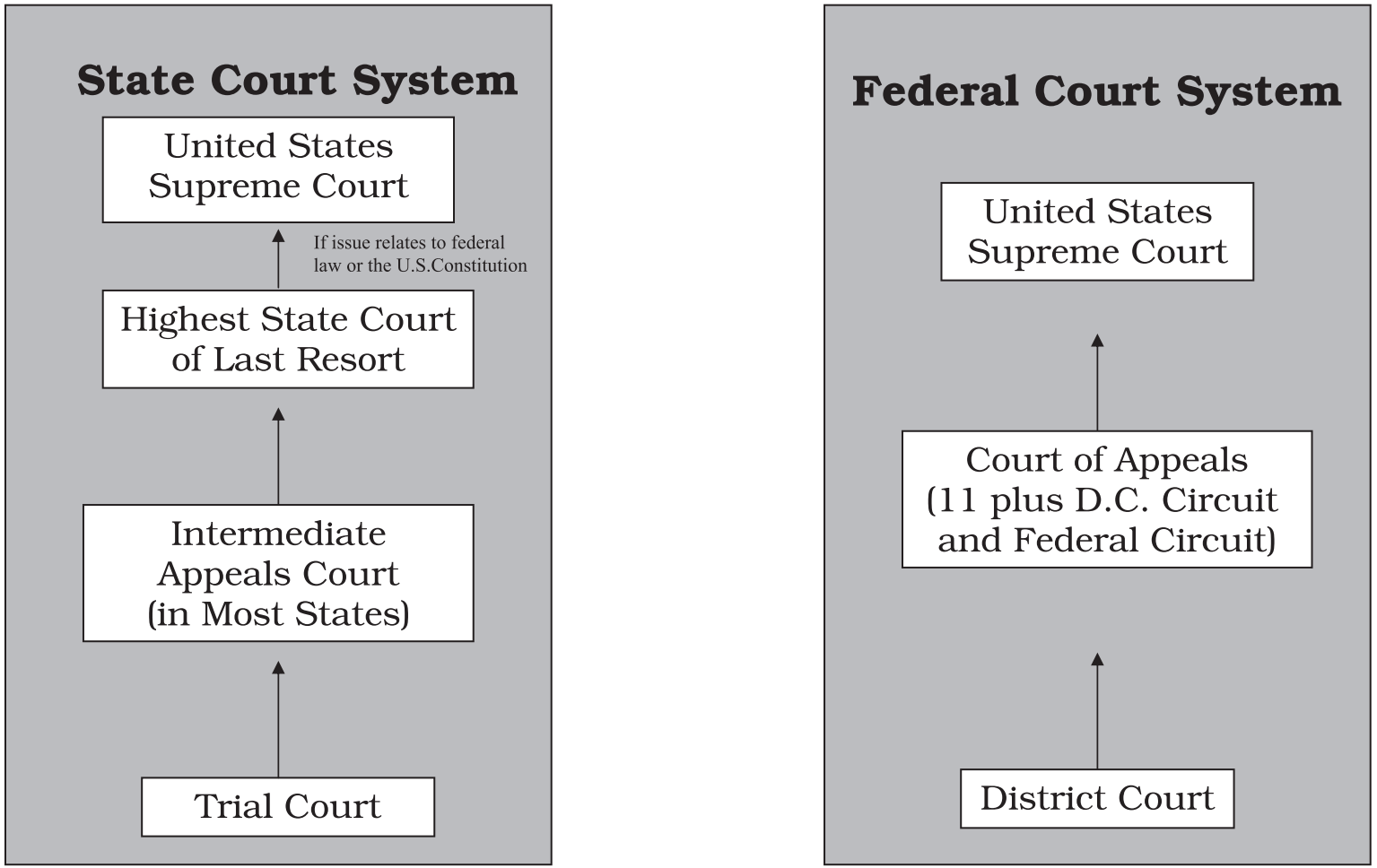

Figure 2-1

(3) citizens of different [s]tates and in which citizens or subjects of a foreign state are additional parties; [or]
(4) a foreign state . . . as plaintiff and citizens of a [s]tate or different [s]tates."[7]

A federal court's jurisdiction in these cases is based on the different citizenships of the parties and the amount in controversy. Here, the federal court applies the law that it determines the state's court of last resort would apply if the state court was faced with the same issue. While the federal court's decision is binding on the parties in that dispute, the state court is not bound by the federal court's decision. Remember, a state court is bound only by (1) previous decisions of its own court, (2) previous decisions of higher courts within its jurisdiction, and (3) previous federal statutory and constitutional decisions of the United States Supreme Court. The federal court is not within a state court's jurisdiction. As previously mentioned, the federal court system is a separate court system from the state court system. (See also Figure 2-1.) For example, assume a federal district court in California issued a decision in Case A based on the California state right of publicity and cases interpreting it. Assume that a year later a California state court was deciding a case concerning a similar right of publicity issue. That state court is not bound to follow the California federal district court decision from the previous year.

2. Persuasive precedent

If no mandatory precedent exists, a court may seek guidance from persuasive precedent, in addition to other sources.[8] Persuasive precedent is precedent that is not binding on the court. For instance, the California Supreme Court, especially when faced with a case presenting an issue the court has not addressed before, may be persuaded by a decision of the California Court of Appeal, even though it is not bound to follow that decision. A court may also look at persuasive case decisions outside its jurisdiction. The California Supreme Court, for example, may look to an Arizona decision on the same issue for guidance. In the federal court system, a comparable example would be the United States Court of Appeals for the Ninth Circuit being persuaded by a decision from the United States Court of Appeals for the Second Circuit.

7. 28 U.S.C. § 1332(a)(1)&(2).

8. For example, courts may seek guidance from statutes from other jurisdictions and from secondary authorities, including law review articles or treatises. Research texts provide extensive discussion of secondary authorities. *See* Christina Kunz et al., The Process of Legal Research (8th ed. 2012); Amy Sloan, Basic Legal Research: Tools and Strategies (8th ed. 2021).

C. The Evolving Common Law

1. Creating and developing the common law

The judge's role in creating and developing rules and principles that compose the common law can be challenging. The conscientious judge, when creating a new rule, will strive to do so in a way that brings a just result to the current dispute but also makes clear which future factual situations may be subject to the rule. During this decision-making process, the judge also may consider public policy — that is, the interest of the public and whether or not the rule will promote social, economic, moral, or other types of societal or legislative goals.

If a judge creates a rule using language that is drawn too narrowly, the rule will give insufficient notice to the public of its application. This could result in courts being overwhelmed with litigation involving similar situations. For the sake of certainty in the law and judicial efficiency, a court generally strives to create a rule that is not too narrow. For example, suppose Landowner A's property has an apple tree situated near the boundary line with Landowner B's property. Apples drop off the tree, and some fall in the yard of Landowner B. Landowner A walks onto Landowner B's property, picks up the apples, and takes them home. Landowner B sues Landowner A for trespass, claiming Landowner A entered onto Landowner B's property without permission. A court deciding this issue must first determine whether there is a statute governing this situation. If there is no applicable statute, a court will rely on prior similar court decisions to determine whether there is mandatory common law precedent on this issue. If no mandatory precedent exists, the court is faced with a new, unresolved issue in its jurisdiction, often referred to as an issue of first impression. During the decision-making process, the court may look to persuasive precedent and other law resources for guidance.[9] In addition, the court will consider how the decision will serve justice in the immediate situation and how the decision will support or further the goals of the public's interest in the future.

In Landowner A's situation, let's say the court decides that in the interest of fairness and in the interest of the public, Landowner A should have the right to go onto Landowner B's property to pick up the apples fallen from Landowner A's trees. In reaching its decision, the court should draft the language of the rule. A rule that states, "Owners of apple trees have the right to walk onto adjoining property to pick up apples that have fallen from their trees," certainly addresses the current case. But how does this rule affect future situations? Would this rule be too narrow? Should an owner of peach trees, for example, have the same right to pick up peaches that have fallen onto a neighboring

9. *See supra* text accompanying note 8.