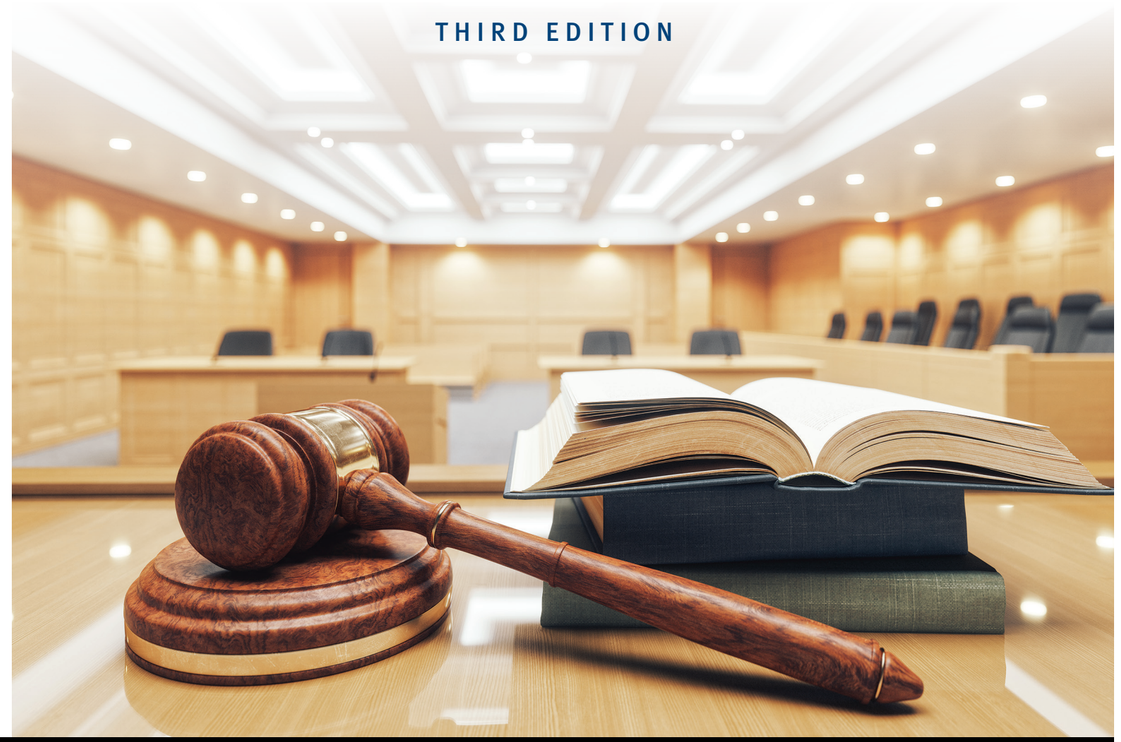
Neal R. Bevans

Civil Law and Litigation for Paralegals

THIRD EDITION



Wolters Kluwer

Bevans Civil Law and Litigation for Paralegals THIRD EDITION

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Neal R. Bevans

From client intake to bringing an appeal, *Civil Law and Litigation for Paralegals* focuses on the role of the paralegal at every stage of a civil litigation. Neal R. Bevans' accessible writing style describes the American legal system and provides incisive analysis of common civil law cases—including divorce, car accidents, and medical malpractice. Hands-on exercises, sample forms, and practice pointers create ample opportunities for students to develop essential career skills.

Designed for future paralegals, the Third Edition features:

- A clear introduction to the fundamentals of civil litigation
- Real-world examples and practice-based exercises
- Hypothetical questions and other scenarios to illustrate the points under discussion in each chapter
- Updated cases in each chapter that exemplify what paralegals see in practice
- Updated end-of-chapter questions, activities, and assignments to enrich learning
- Sample court documents to familiarize students with legal procedure
- Chapter Objectives that facilitate comprehension and review
- Bolded key terms with definitions in the margins
- References to web sites for further research
- An exploration of an important ethical question relevant to the day-to-day practice of law in each chapter

10053424-0002

ISBN 978-1-5438-2611-1

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Third Edition

NEAL R. BEVANS, J.D.

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Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

Cover image: iStock.com/imaginima

To contact Customer Service, e-mail customer.service@wolterskluwer.com,
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Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-5438-2611-1

Library of Congress Cataloging-in-Publication Data application is in process.

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For my wife, Nilsa, who continues to inspire me and for my late parents, Robert and Patricia Bevans.

Summary of Contents

Contents

Preface

Civil litigation is the lifeblood of private legal practice as well as an important part of government practice. Paralegal students are far more likely to be involved in civil lawsuits than criminal cases, business disputes, and intellectual property suits combined. Civil litigation courses are part of the core curriculum in every paralegal program in the country. In this third edition, the author has incorporated many of the electronic developments that have changed the day-to-day practice of civil law, especially in regard to e-discovery. In addition to discussing theoretical constructs, the text also offers extensive ancillary materials and supplemental material.

In *Civil Law and Litigation for Paralegals, Third Edition*, the author provides the student with an in-depth analysis of the wide variety of civil cases, laying out the basic foundation of the American legal system, proceeding through the investigation and implementation of a civil case, and following the case through to appeal. The author has supplemented the text with new features including sample questions for students — with answers provided in Appendix C. In addition, the author expanded on the role that technology continues to play in modern legal practice. The premise of the book is to teach the basics of civil litigation and to give students the chance to build a skill set and create materials that could go into a portfolio that they can then show to prospective employers.

The text also addresses the specific duties of paralegals in civil practice. Each chapter provides examples of the important role that paralegals play in every stage of civil litigation, from client intake to bringing an appeal. The text balances the theoretical underpinnings of the law with the practical examples and hands-on experience that all students need to completely understand the topic.

KEY CHARACTERISTICS OF *CIVIL LAW AND LITIGATION FOR PARALEGALS*:

—THE WRITING STYLE

The author's clear and coherent writing is one of the best features of the text. The author clearly communicates his enthusiasm for the topic throughout the text.

—CHAPTER FEATURES

Each chapter has a standard format, including:

- **Clearly stated chapter objectives**
  Each chapter sets out a minimum of five objectives for the student.
- **Introductory paragraph**
  The major topics in the chapter are set out in this introduction to the chapter.
- **Material presented in a logical way**
  The topics discussed in the chapter flow in a logical, commonsense manner.
- **Material supplemented by numerous sidebars, charts, and diagrams**
  The text contains numerous charts, diagrams and illustrations, and sidebars designed to illuminate specific topics throughout the chapter.
- **Learning styles are taken into consideration**
  The topics in the chapters are discussed in a variety of ways to take advantage of different student-reader learning styles.
- **Significant cases**
  The text places a strong emphasis on seminal or otherwise important cases in specific areas of practice to help demonstrate the importance of case law to civil litigation.
- **Terms and legal vocabulary**
  All terms and legal vocabulary are defined immediately for the student — the first time a key word or legal term is mentioned in the text, a definition of it appears in the margin. This helps students grasp the meaning without breaking into the flow of the reading by having to turn to the glossary.
- **Extensive use of hypotheticals**
  The author uses hypothetical questions and other scenarios to illustrate the points under discussion in each chapter. These scenarios also provide an excellent foundation for classroom discussion.
- **Case excerpts**
  Each chapter contains a significant case designed to expand on the topics discussed in the chapter. There are also questions for students based on the case to further assist their understanding of the case and its relevance to the chapter concepts.

- **"Real world" flavor**
  The text also places heavy emphasis on the practical aspects of civil litigation practice. Each chapter contains a wealth of information on the day-to-day practice in civil firms.

- **Ethical issues**
  Ethics is crucial for any legal professional. Each chapter explores an important ethical question and explains the relevance of ethical systems for the day-to-day practice of civil law.

- **Examples of court documents**
  The text presents numerous court documents for the student-reader, including contracts of representation, complaints, answers, discovery requests, motions, and many others. Each of these court documents is annotated with explanations of the various component parts.

- **Sample quizzes in different formats**
  The text has been revised to include new sections with sample quizzes in several formats that allow students to check their progress in their comprehension of the materials.

PEDAGOGY

The text has numerous features that take advantage of the varying learning styles that students bring to the learning process. Because students who apply their newly acquired knowledge often retain it much better than those who do not, this text requires students to exercise the knowledge that they have gained. Each chapter has practical examples of court documents, pleadings, motions, and other real-life exercises that emphasize the material discussed in each chapter.

The text is clearly written in easy to follow language that engages the student, keeps the reader's interest, and presents information in a variety of styles to take advantage of different learning styles. Each new concept is introduced and constructed in a multilayer fashion, first with the basic concepts and then adding greater complexity once the intellectual foundation is laid. Charts and diagrams are provided to illustrate concepts as they are discussed and to provide the instructor with additional material for class discussion. Sidebars, tables, and interviews are also presented to supplement the chapter information in a different format for students who may not fully grasp the concepts on initial presentation. Finally, practical hands-on assignments and discussion questions are presented to reiterate and emphasize the concepts. This allows for greater comprehension and retention by the student. The author fills the text with a balance of theoretical discussions and practical examples, all presented in a well-written, enjoyable style.

INSTRUCTOR'S MANUAL

The author has developed an impressive instructor's manual to accompany the text. Recognizing the needs of instructors for multiple resources, the author has provided the following features:

- **Suggested syllabi and lesson plans**
- **A new feature emphasizing the changes that the global pandemic has had on day-to-day legal practice, including the impact of judicial decrees on statutes of limitation, filing and service of process, among many others**
- **Annotated outlines for each chapter**
- **Answers to all end-of-chapter questions**
- **Test bank**
  The test bank includes a variety of test questions, including:
  - ☐ Essay questions (5 per chapter)
  - ☐ Short answer (10 per chapter)
  - ☐ Multiple choice (25 per chapter)
  - ☐ True-false (10 per chapter)
- **PowerPoint slides for each chapter**

Acknowledgments

The author would like to thank Betsy Kenny, David Herzig, Christine Becker, and Lisa Connery for their assistance in creating this book.

About the Author

Neal Bevans is a former assistant district attorney and private attorney. A veteran of over 150 trials, Bevans has tried every major felony from rape, murder, and narcotics to armed robbery. One of his cases was televised nationally on Court TV. He also worked in a private firm handling primarily medical malpractice and personal injury defense. He has a Juris Doctor degree from the University of Georgia (Order of the Barrister) and has been a college instructor for over 25 years. A multiple-year honoree in *Who's Who Among America's Teachers*, Bevans is the author of numerous textbooks and magazine articles.

1 Introduction to the Court System

Chapter Objectives

- **Explain the differences between civil law and other types of law**
- **Describe the burden of proof in civil cases**
- **Explain the role of pleadings in civil cases**
- **Explain the difference between a finding of liability and a finding of guilt**
- **Describe the function of damages in civil cases**
- **Define the role of the U.S. Constitution in the American legal system**
- **Explain the difference between statutes and case law**

Chapter Outline

INTRODUCTION

Before we can discuss the many fascinating aspects of civil litigation, we must begin with an examination of the American judicial system. The purpose of this chapter is to introduce you to the important distinctions between civil law and other types of law, as well as the sources of judicial authority. Finally, we will examine the major features of both the federal and state court systems. As you will see, there are many different sources of legal authority, and each plays an important role in the overall pattern of civil litigation.

CIVIL LAW

Civil law is a broad category encompassing an enormous variety of cases. Divorce actions, medical malpractice, child custody, and personal injury cases are all types of civil law. Because this is a book about civil litigation and procedure, we will touch on many of these disparate areas of law as we discuss the course of a civil case. Before we examine the details of civil litigation, however, we must address a more fundamental question: What is civil law?

Tech Topic
THE TECHNOLOGY GAP

Individuals who are new to the practice of law are often surprised to learn of the technology gap between this profession and nearly every other. Law is a conservative profession and has been traditionally very slow to adopt new technology. Devices that have found immediate acceptance in accounting and medicine have been slow to find their way into the legal field. Given the vast adoption of personal computers, it is surprising to learn that there is still a significant percentage of attorneys who have not used a laptop or desktop computer. Many still dictate memoranda and other items to secretaries, who transcribe them in much the same way that they did 30 years ago.

However, that predisposition against technology has finally begun to change. Younger lawyers who have used computers and other devices since childhood are in the forefront of this movement, but there are other reasons for law as a profession to adopt computer software and other labor-saving devices. Throughout this book, we will examine the expanding role of technology in the practice of law and show how you, as a paralegal, can increase your marketability to a firm by demonstrating your understanding of and ability to use various technological innovations.

A. WHAT IS CIVIL LAW?

Civil law refers to the large body of cases that are brought by individuals against other individuals. When a person sues someone for defamation or a corporation seeks to enforce an employment contract against an employee, these are both civil cases. What makes civil litigation so interesting is that there is an almost infinite variety of cases that falls under the general heading of civil law. Unlike criminal law or other specialized areas, legal professionals who work in civil litigation must be prepared for a wide assortment of cases. Fortunately, the rules that govern civil cases are uniform and relatively straightforward, even if they do apply to a myriad of case types.

B. HOW DOES CIVIL LAW DIFFER FROM OTHER AREAS OF LAW?

There are dozens of branches of law. Administrative law deals with the rules and regulations that manage government agencies. Admiralty law governs the rules of the sea. Bankruptcy law is concerned with discharging debts through a court proceeding. Criminal law focuses on punishing lawbreakers. Domestic law involves divorce, alimony, and child custody issues.

Civil law is different from these and other areas of law in several important respects. A civil action is usually based on a private wrong suffered by an individual, corporation, or other entity. The plaintiff brings suit when he or she has suffered a financial, emotional, or physical loss. The right to bring a civil suit is not limited to people. Corporations and businesses may also sue in their own right. There are even provisions that allow government agencies to bring civil suits. Civil actions encompass these and many other types of actions. We will address the many ramifications of these actions throughout this text.

In particular, civil cases differ from other types of cases in all of the following ways:

- Parties
- Pleadings
- Rules
- Burden of proof
- Outcome

1. THE PARTIES

In civil suits, private parties sue other private parties. Unlike criminal cases, which are brought by the government against an individual, a civil case involves private issues and grievances. Although government agencies can bring civil suits against individuals, the point of the litigation is to enforce a right or to sue for damages.

There are some important terms regarding civil suits that all legal professionals should know. The person who brings a civil suit is referred to as the **plaintiff**. The person who is being sued is the **defendant**. These terms are almost exclusively reserved for civil cases; other names are used to refer to the parties in noncivil cases. The person or business filing a bankruptcy, for instance, is referred to as a *petitioner*. In criminal cases, the government brings an action against an individual or corporation to enforce statutes and is simply termed *the state*, *the people*, or *United States* (among others).

Plaintiff
The individual, company, or institution that initiates a lawsuit

Defendant
The individual, company, or institution against whom a lawsuit is brought

Caption (Style)
The heading or title used in all legal pleadings

As you read pleadings in civil cases, you will see that the **caption** or **style** of the case always lists the names of the plaintiffs and defendants. Civil cases are captioned *Plaintiff A v. Defendant B*. By contrast, criminal cases are captioned *Government (or State) v. Defendant*, and bankruptcy cases are captioned *In re John Doe* (in the matter of John Doe). By examining the caption or style of the case, you can easily decipher if it is a civil or other type of action.

The caption of any pleading reflects the identities and status of all parties to the suit. The plaintiff is identified by full legal name when he or she is a person and by full title when it is a business or government entity. Similarly, the caption must correctly identify the defendant. A caption that lists the incorrect name of the defendant may be subject to dismissal for failing to correctly identify exactly who is the subject of the action. Beyond identifying the parties, the caption also identifies the court where the action is pending and provides information about the case file number, sometimes called the *civil action number*. This number is important because it is the docketing number assigned by the court system to that action. Case file numbers are unique to each case and must be included on all documents subsequently filed in the case. Many courts also require that in addition to identifying the parties, the court, and the case file number, the caption must also identify the document filed.

Complaint
Also known as a *petition*, it is the pleading filed by the plaintiff and served on the defendant that sets out the plaintiff's factual allegations that show the defendant is responsible for the plaintiff's injuries.

Petition
A request made to a government entity; often used synonymously with *complaint*, although *petition* is a more general term

Answer
The document filed by the defendant in a civil action that responds to each of the allegations raised in the plaintiff's complaint, denies or admits to the factual allegations, and denies or admits to responsibility for the plaintiff's injuries

2. THE PLEADINGS

Civil actions are also unique in the type of pleadings that are used to initiate lawsuits. In a civil case, the plaintiff files a **complaint**, also known as a **petition**. This complaint sets out the plaintiff's factual allegations against the defendant and asks a court to award monetary damages to the plaintiff as a result of the defendant's actions. The defendant, on the other hand, responds with an **answer**, also known as a *reply*. In the answer, the defendant denies the plaintiff's factual allegations and any responsibility for the plaintiff's injuries. See Figure 1-1 for an example of the caption of a civil case complaint.

FIGURE 1-1
Civil Case Caption

STATE OF EDWARDS
COUNTY OF PLACID
SUPERIOR COURT OF PLACID COUNTY

CIVIL ACTION FILE NO.: _____

Elizabeth Louise,)
)
Plaintiff,)
)
v.) COMPLAINT
)
Wilson Johnson,)
)
Defendant.)
)
_____)

It is important to note that the term *pleadings* has different meanings in different jurisdictions. For instance, in some areas, *pleadings* refers exclusively to the complaint and answer, while in others it broadly refers to all documents filed in the civil action.

LEGAL LEGWORK ■ FINDING SOURCES

You will find a section in each chapter where you will be asked to research specific legal topics raised in the chapter. The purpose of this feature is to emphasize specific material from the chapter and to assist you in learning about additional and important legal topics. For the purposes of this first assignment, research the available sources online as well as any print media you may have in your local law library. There are more and more online sites available every day and these can be a tremendous help in researching, organizing, and preparing for civil cases. Try an online search through Google, Yahoo!, or another search engine, using the search string "online legal research."

3. THE RULES

As we will see throughout this book, civil actions follow their own set of rules in regard to the filing of pleadings, the various stages of a civil action, and even the enforcement of the ultimate verdict. All states have enacted their own versions of the Federal Rules of Civil Procedure, which we will discuss throughout this book. See Figure 1-2 for an example of the Rules of Civil Procedure.

(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:
  (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
  (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
  (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

FIGURE 1-2

Federal Rules of Civil Procedure — Rule 8. General Rules of Pleading

4. THE BURDEN OF PROOF

Whenever a party brings an allegation in any type of case, that party must prove the allegation. The **burden of proof** varies depending on the type of case involved. In civil cases, for example, the burden of proof is usually a **preponderance of the evidence**. This is a standard that requires the plaintiff to prove that the allegations in the complaint are more likely true than not. Many commentators have described it as the plaintiff's burden to tip the scales of proof in the plaintiff's direction. Others have attempted to quantify it by saying that if the plaintiff can establish the facts to 51 percent, then the plaintiff has satisfied preponderance of the evidence.

There are different burdens of proof in different types of actions. Prosecutors in a criminal trial, for instance, must prove that the defendant is guilty **beyond a reasonable doubt**. Although legal commentators and authorities have wrestled for centuries over the exact meaning of this term, most define it as substantial or overwhelming evidence that

Burden of proof
The amount of proof that the plaintiff must present in order to substantiate his or her claims as made in the complaint

Preponderance of the evidence
The level of proof required in a civil case: "more likely than not to be true"

Beyond a reasonable doubt
Proof of the elements of a crime against the defendant to a point where a juror has no substantive uncertainty about the defendant's guilt

the defendant committed the crime charged. Proof beyond a reasonable doubt means that the individual jurors in the case are convinced of the evidence against the defendant and have no major objections to the case presented. If preponderance of the evidence is considered to be a slight tipping of the scale in the plaintiff's favor, proof beyond a reasonable doubt would require the plaintiff to swing the scale entirely to its side. This higher standard is required in criminal cases for the very simple reason that it should be more difficult to imprison a person than it is to assess monetary damages against him or her.

Clear and convincing evidence
Having a high probability of truthfulness; a higher standard than preponderance of the evidence

Although preponderance of the evidence is the most commonly seen burden of proof in civil law, there are situations where a civil litigant might have to prove his or her case by **clear and convincing evidence**. The standard of "clear and convincing evidence" is higher than preponderance of the evidence and less than proof beyond a reasonable doubt, falling somewhere between the two. Clear and convincing evidence requires the fact finder to determine to a substantial certainty that the party's allegations are true.

The question often arises, why would civil cases usually require preponderance of the evidence and then, in rare instances, require a higher degree of proof? Clear and convincing evidence is reserved for instances where the result for the parties will have a substantial impact on their lives. A court might require clear and convincing evidence in any of the following actions:

- Committing an individual to a mental institution
- Deciding to withdraw life support from a patient in a persistent vegetative state
- Determining parental rights
- Disbarring an attorney
- Committing fraud
- Alleging improper actions in an election

In each of the examples provided here, the issues involved have such a potential impact on the parties that courts routinely require a higher standard of proof before allowing the action. These actions will have such drastic consequences that many states require the standard of clear and convincing evidence before a judge is authorized to make a ruling on them.

PRACTICE POINTER ▶ RESOURCE FOLDER

One important aspect of working in the legal field is organizing all of the information that you will need on a daily basis. One way of doing this is to create your own paralegal resource folder. This can be an actual file folder or a computer folder on your computer. You need this folder for one simple reason: time. When you work in the legal field, time is money. The more time you can save on a particular job, the sooner you can move on to the next. Creating a paralegal resource folder is one of the best ways to save time and effort. The couple of hours that you spend creating one will save you hundreds of hours over your career. Besides that, having a resource that contains virtually everything you need, from telephone numbers to notes about how certain judges like their orders submitted, will make you look even better to your firm. In fact, having all of this information at your fingertips will make you seem almost superhuman.

Whether you create your resource in physical file folders, notebooks, or on a computer, a good resource should have all of the following information:

- Telephone numbers, addresses, and email contact information
- Calendar
- Relevant social media
- Where to find certain courthouse records
- Attorney and judge "peculiarities"
- Forms, forms, and more forms
- Brief and memo bank
- Frequently asked questions
- Computer passwords and login information
- Vendor/supplier information

If putting together your own paralegal resource folder sounds unusual, it isn't. Legal professionals have been creating their own handy references for decades. Many attorneys keep important data in manila file folders or word processing files or stored on digital devices. In the modern world, many paralegals keep all of this information in databases. Whatever method you currently use to hang on to important information, you will need to pull it all together and put it in one place. It might be a large file folder on your desk. It might just as easily be on your laptop, stored in a network folder, or backed up on a CD. However you decide to store it, you should organize your important information, put it in one place, and start using it to make your job easier.

5. THE OUTCOME

In a civil trial, jurors are asked to determine which side has presented a more believable version of the facts. Unlike criminal cases, where jurors are called upon to determine guilt or innocence, the juries in civil cases face a determination of **liability**. Civil juries determine whether one party is liable to the other party. A civil jury never determines, for instance, that a party is **guilty**. Instead, if the jury believes the plaintiff, it finds the defendant liable to the plaintiff. On the other hand, if the jury determines that the defendant has the more likely version of the truth, the jury might easily find that the plaintiff is liable to the defendant or that the defendant is not liable to anyone.

Once a determination of liability has been made, the next step in a civil case is the determination of **damages**. *Damages* refer to monetary payments made by one party to another that attempt to compensate the party for his or her losses. In situations where the jury believes that the defendant is not liable, the jury will order that no damages be awarded. On the other hand, if the jury sides with the plaintiff, the jury must make a determination about damages — specifically, how much money the defendant should pay to the plaintiff.

Liability
A jury's determination that one party is responsible for injuries to another party; the basis for an award of damages

Guilty
A verdict only available in criminal cases where the jury determines that the defendant is responsible for committing a crime

Damages
Monetary payments assessed against a party who has been deemed liable to another party in a civil case

SOURCES OF LEGAL AUTHORITY IN THE UNITED STATES

One of the first questions that any legal professional must answer is, "What is the law?" Is the law simply a body of statutes, or is it something more? As we will see throughout this book, there is no easy answer. For instance, one could easily argue that the source of all legal authority in the United States derives from the U.S. Constitution.

A. THE CONSTITUTION

The U.S. Constitution took effect in 1789. It is one of the most influential documents in world history. The Constitution sets out the basic framework for the federal and state governments, creates three separate branches of government, and details the rights allotted to citizens (Fig. 1-3). Constitutional law is a complex subject and not one that we will address in any depth here, except to say that all governmental authority flows from the provisions of the Constitution. In addition to the federal Constitution, each state also has its own constitution, setting out the rights, duties, and obligations of state governments.

Although the Constitution provides the framework for the government, it does not provide much guidance on issues such as bringing civil actions, prosecuting crimes, or enforcing judgments. For answers to those questions, we must turn to other sources of the law, including statutes, case law, and common law.

FIGURE 1-3

U.S. Constitution — Organization of Articles

Article I:	Legislative Branch
Article II:	Executive Branch
Article III:	Judicial Branch

B. STATUTES

Statute
A law that is voted on by the legislative branch and enacted by the executive branch

Statutes consist of legislative bills that are voted on by the legislative branch of government and enacted by the executive branch. On the federal level, the U.S. Congress is the legislative branch, and it votes on bills before sending them to the president (the executive branch) for signature. If the president signs the legislation, it becomes a binding law. On the state level, the legislature votes on bills and submits them to the governor for signature. In both instances, the laws that are created are referred to as *statutes*. But that is only one small part of the large body of what American legal scholars consider to be the *law*.

1. ADMINISTRATIVE RULES AND REGULATIONS

Once a statute has been created, a government agency may create an administrative rule or regulation to put the statute into effect. For instance, the Sixteenth Amendment gives the federal government the power to levy income taxes but provides no details

about the process of actually carrying out tax collection (Fig. 1-4). Instead, the Treasury Department, acting through its Internal Revenue Service, creates administrative rules and regulations that govern how, when, and who should pay income taxes. These rules and regulations carry the same force as a statute.

FIGURE 1-4

Amendment XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

PRACTICE POINTER ▶ WRITTEN COMMUNICATION

If there is one skill that all legal professionals should have in abundance, it is the ability to communicate clearly and succinctly in writing. Written communication is still the cornerstone of the legal profession, even in this era of email, faxes, and the Internet. We will examine written and other forms of communication throughout this text, but in this chapter, we will focus on written communication.

Why are written communication skills so important? For most people, clear writing indicates clear thinking. The ability to effectively communicate an idea or a position in writing is the core of what an attorney does. We all tend to think of attorneys as individuals who communicate through the spoken word, either in closing arguments to juries, motions before a judge, or simply discussing legal implications with clients. But the reality of legal practice is just the opposite of the popular impression. Attorneys spend large portions of every day reading and writing. They read case decisions, statutes, law reviews, and a wealth of other material, and they write letters to clients, briefs to appellate courts, complaints, answers, motions, and a myriad of other materials. If they cannot present themselves well in writing, their legal practice will suffer.

Attorneys expect the same high level of writing skills on the part of their staff. Paralegals and others who work closely with attorneys must have mastered the basics of written communication. That is one reason why we devote a section to it in every chapter of this book. In future chapters, you can anticipate assignments ranging from questions surrounding basic grammar to the development of motions that would be submitted to a judge. There are also interesting sites, such as Grammarly.com, that provide users with a computer editor. Although some would argue that the challenges and suggestions made by the program are not always correct, most would agree that another pair of "eyes" on a document can only be helpful.

2. ORDINANCES

As we have seen, statutes are laws passed by a state or federal government. However, there is an entire class of laws passed by local governments, such as municipalities and towns, that regulate behavior at a local level. These are not referred to as statutes. Instead, they are called **ordinances**. An ordinance has limited application. Ordinances have strict geographic limits, such as the town limits or the county boundary. Ordinances

Ordinance
A law passed by a local government, such as a town council or city government

cannot conflict with statutes. If they do, the ordinances are ruled unconstitutional and the statutes take precedence.

C. CASE LAW

Case law
The decisions written by appellate courts explaining the outcome of a case on appeal

In addition to statutory law, there is another, and equally important, source of law: **case law**. Case law is the huge body of decisions published by appellate courts. Laypersons do not realize the significance of case law. When an appellate court reaches a decision in a case on appeal, the reasons for the decision are encapsulated in a written opinion. In many instances, case law is synonymous with common law, discussed later.

An opinion discusses not only the facts of the particular case on appeal, but also the law that applies to those facts. For legal professionals, case law can be one of the most important sources of legal authority in the United States. The importance of case law can be demonstrated by reviewing a decision by the U.S. Supreme Court.

Suppose that the U.S. Congress passes a bill stating that the punitive damages available to civil litigants are limited to a specific formula. The formula set out by the federal legislation is that punitive damages (those monetary payments made above and beyond the monetary damages intended to compensate the plaintiff for his or her injuries) must be limited to twice the amount of proven actual damages. The statute is clear and unambiguous. The most that an injured plaintiff could receive in any case, no matter how egregiously the defendant acted, is a sum that is twice the plaintiff's actual damages. This means that if the plaintiff's proven damages are $1,000, the most that the plaintiff could receive in punitive damages is $2,000. However, if a litigant who falls under this statute appeals to the U.S. Supreme Court, that Court is free to rule that Congress overstepped its bounds by limiting awards in this way. The court's written opinion in that case would be vitally important case law for anyone else with a pending case involving punitive damages. That case law would be as important as any statute.

The significance of case law is that it both explains and expands on statutes and other sources of law. The true power of appellate courts is their ability to review the decisions of lower courts. All courts have the responsibility of interpreting the Constitution, statutes, ordinances, and even other case law, but the appellate courts can review the decisions of lower courts and modify those interpretations in accordance with their own views. The appellate court's interpretation of these issues is binding on the parties in a particular appeal and on all others who have similar issues. Once an appellate court, such as the U.S. Supreme Court, adopts a new interpretation of a law or rules that a particular statute is unconstitutional, that interpretation becomes the law of the land and is just as binding as any statute.

There are quite literally hundreds of examples of the impact that appellate decisions have had on civil litigation. A court's ruling on evidence may affect whether or not a plaintiff is permitted to introduce evidence of the defendant's previous driving record in a personal injury case. Another court's ruling on collateral source payments might well allow the defendant to present evidence to the jury that the plaintiff has already been compensated for some of his or her injuries through insurance.

One might be tempted to think that the only important source of case law in the United States is the U.S. Supreme Court. However, case law comes from every level of the court system. As we will see later in this chapter, both state and federal courts generate case law, and they do so at different levels, from trial courts, to appellate courts, to the U.S. Supreme Court.

D. COMMON LAW

The final category of sources of legal authority is **common law**. This is an ancient source of legal authority. Stretching back to our legal roots in England, common law was literally the law of the common people. In an age when most people were illiterate, judges were one of the few professionals who could read and write. As a result, there were very few statutes created by the government. Instead of using statutory law, judges were forced to create their own rules.

Common law
The large body of decisions and principles created by judges as they decide individual cases

For instance, the "year and a day" law stated that if a man was attacked and it took longer than a year for him to die of his injuries, then the person who attacked him could not be tried for murder. This rule was a common-law rule that governed English (and American) jurisdictions for years. The theory behind the law was simple: Given the standards of the medical profession in the Middle Ages, if a victim lingered for at least 12 months, then it was quite likely that he died from something other than the injuries he sustained in his attack. Similarly, as judges continued to reach decisions in cases, they amassed a huge body of legal principles and standards that came to be called *common law*.

Sidebar

The "year and a day" rule has been abolished in all jurisdictions in the United States, but only recently in some states.

The reason that we continue to focus on common law, even after many states have abolished it, is that it remains binding law in a small number of states and it also functions as a reservoir of legal knowledge that can be relied upon by courts. Common law exists alongside statutory law in states like North Carolina and Virginia. That alone would justify studying it. However, even in states where common law has long since been abolished, courts may still turn to the ideas and principles found in common law when they are wrestling with a new issue on appeal. It may be true that there is nothing new under the sun and over the centuries common law had addressed virtually every legal topic. This makes common law a great resource when other legal authorities come up short.

IV JURISDICTION

No discussion of judicial authority could be complete without an examination of the topic of jurisdiction. **Jurisdiction** refers to the power of a court to decide issues in the case and to impose those decisions on the parties. There are many different types of jurisdiction, including the two major types:

Jurisdiction
The power of a court to make rulings

- Subject matter jurisdiction
- Personal jurisdiction

A. SUBJECT MATTER JURISDICTION

Subject matter jurisdiction
The power of a court to consider specific types of cases

When a court has **subject matter jurisdiction**, it means that the court is permitted to entertain the issues raised in the suit and to make binding rulings on those issues. There are many examples of courts that lack subject matter jurisdiction to consider specific types of cases. Small-claims court, for instance, is often listed as a court of limited jurisdiction precisely because it is barred from considering criminal cases and may only consider litigation concerning civil cases for which a specific amount of money is contested. Besides small-claims courts, many other courts have strict rules about subject matter jurisdiction. If a person or business wishes to file bankruptcy, that filing must occur in the federal bankruptcy courts, simply because those are the only courts authorized to hear such actions.

On the local level, there are some courts that have broad subject matter jurisdiction. In states where the most powerful local court is referred to as *superior court* (also known as *district court* or *county court* in some states), this court may have the power to hear a broad range of actions, from felony crimes to divorce cases (Fig. 1-5). In fact, in many states, superior court was the original court and other local courts were created out of its vast powers.

FIGURE 1-5

Jurisdiction of Superior Court (Georgia)

The superior courts have authority:
(1) To exercise original, exclusive, or concurrent jurisdiction, as the case may be, of all causes, both civil and criminal, granted to them by the Constitution and laws;
(2) To exercise the powers of a court of equity;
(3) To exercise appellate jurisdiction from judgments of the probate or magistrate courts as provided by law.[1]

General jurisdiction
The power of a court to hear a broad range of case types, including civil and criminal issues

Limited jurisdiction
The expressly confined powers of a court to hear specific types of cases only

In addition to issues surrounding subject matter jurisdiction, there are other issues that litigants must address; these include the basic powers of the court. Courts of **general jurisdiction** are empowered to hear a broad range of cases, including civil, criminal, probate, divorce, and child custody issues, among many others. A court of general jurisdiction may consider any of these issues and make binding rulings. However, there are also many courts in the United States that are classified as courts of **limited jurisdiction**. A limited jurisdiction court may only hear specific types of cases. Small-claims court is one such example. This court is authorized to consider civil cases where the parties contest a monetary amount below a specific level. If the amount in controversy is higher than the threshold amount, or if the case involves additional issues outside of the court's authority, the court must transfer the case to another court. On the federal level, bankruptcy court is an example of a court with limited jurisdiction. It may entertain all issues associated with personal or business bankruptcies, but it is not empowered to consider other issues, such as criminal charges or wrongful death claims.

B. PERSONAL JURISDICTION

Personal jurisdiction
The power of a court to enter rulings that are binding on the parties to the action

In addition to subject matter jurisdiction, courts must also have power over the parties, called **personal jurisdiction**. Personal jurisdiction is often described as the court's

power to adjudicate the issues in the case and to reach a decision that affects the parties' legal rights. These jurisdictional issues are concomitant: They must exist together. A court may have subject matter jurisdiction, but if it lacks personal jurisdiction, it is barred from considering the case. The opposite scenario is also true. When both types of jurisdiction exist in a case, then the court may proceed to consider the issues. Both subject matter jurisdiction and personal jurisdiction must combine to provide the **forum** with the authority to consider the issues in the case. Here, the "forum" refers to the actual location where the case must be brought. A court with sufficient personal and subject matter jurisdiction becomes the forum where the action is brought and decided.

Forum
The location of the court; a court that possesses both personal and subject matter jurisdiction over the case

A court may acquire personal jurisdiction over a party by a number of methods, including:

- physical presence in the forum;
- domicile or residence in the forum;
- property ownership in the forum;
- consent; or
- minimum contacts.

1. PHYSICAL PRESENCE IN THE FORUM

When a party is present within the geographic limits of the court's power, the party may be served with service of process, and by the party's mere presence the court will acquire personal jurisdiction in the case. Although there are many extrapolations of this rule, including a prohibition against the use of trickery or deceit to get the party into the forum, we will limit our discussion to the fact that presence alone can equate to personal jurisdiction.

2. DOMICILE OR RESIDENCE IN THE FORUM

A court may also acquire personal jurisdiction over a party by the simple fact of the party maintaining a domicile in the county. In many cases, a **domicile** refers to a permanent residence in a particular area. For instance, when a person maintains several different homes in different areas, it may become necessary for the party urging the court to exercise personal jurisdiction to prove that the opposing party's main residence is in the forum.

Domicile
A party's permanent residence, where the party has lived and where the party intends to return

3. PROPERTY OWNERSHIP IN THE FORUM

There are provisions that allow certain types of cases to proceed simply because a party owns property in a particular forum. This is referred to as **in rem jurisdiction**. Although actions based on in rem jurisdiction are generally limited to litigation concerning real estate, such as boundary disputes, tax evaluations, and similar actions, the mere fact that real property is located within the forum may be enough to give the court personal jurisdiction over a party.

In rem jurisdiction
The power of a court to exercise jurisdiction based on the location of real property within the forum

4. CONSENT

A party may always consent to the court's jurisdiction. In its pleadings, for example, a party may decide to forgo a challenge to the court's jurisdiction, consent to personal jurisdiction, and then proceed to a defense of the allegations.

5. MINIMUM CONTACTS

All states have provisions that allow a forum to acquire jurisdiction, especially in business cases when a party has had sufficient minimum contacts with the forum state to justify a finding that the party has submitted to the court's personal jurisdiction. This rule was first announced in the case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), where the U.S. Supreme Court announced a complex test to determine if a specific party has availed itself of sufficient contacts with the forum to have essentially submitted itself to the court's authority. The bane of law students since it was decided, *International Shoe* remains a difficult case to decipher.

SEARCH SUGGESTION ● NOT ALL SOURCES ARE CREATED EQUAL

Throughout this text, you will be given specific tips and maxims to assist you in researching issues raised in the chapter. For instance, in this first chapter, you should be aware that not all online research services are created equal. Some online sources cover only a few years' worth of case decisions. For legal researchers, depth of coverage is always important, and you should always seek out sites that provide decades of case analysis, not simply the most recent cases from a state or federal court. For example, this chapter mentions the famous *International Shoe* case. If you are doing online legal research on a site that provides coverage for only the last 10 years or so, your research would never reveal this case. You would be hard-pressed to call your research complete if you were unable to locate one of the most important cases on jurisdiction.

V FEDERAL AND STATE COURT SYSTEMS

Now that we have discussed the important role played by case law in providing a source of legal authority, we will address the issue of how the court systems in the United States are organized. We will begin our discussion with the federal court system and then proceed to the various state systems.

A. LEVELS OF THE FEDERAL COURT SYSTEM

The federal court system is authorized under Article III of the U.S. Constitution. That article provides the structure for the federal court system and clearly establishes the judiciary as a separate and equal branch, moderating the power of the executive and

legislative branches. Federal judges are appointed by the president and confirmed by the Senate. Once appointed, federal judges serve for life. They cannot be removed from their positions unless they commit a crime or violate some other law. Federal judges are thus insulated from the day-to-day world of politics and are free to make unpopular decisions. Over the centuries, federal judges have made many controversial decisions, from forced desegregation to a woman's right to receive an abortion.

1. TRIAL COURTS: U.S. FEDERAL DISTRICT COURT

If we think of the federal court system diagrammed as a pyramid, then the U.S. District Courts would be at the bottom of the pyramid. These are the trial courts for the federal system, and they are empowered to hear both civil and criminal cases. There are 94 federal judicial districts scattered across the United States and Puerto Rico.

Federal district courts empanel juries, consider evidence, hear witness testimony, and reach verdicts. As we will see in Chapter 4, federal courts have limited jurisdiction; they are only able to hear certain types of cases. When a final verdict is reached in a federal district court, the losing party usually has the right to appeal to the U.S. Circuit Court of Appeals.

2. APPELLATE COURTS: U.S. CIRCUIT COURTS OF APPEAL

Because federal courts cover the entire nation, cases from federal district courts are appealed to specific appellate courts. There are 13 separate judicial circuits. As you can see in Figure 1-6, some judicial circuits cover large swaths of the United States,

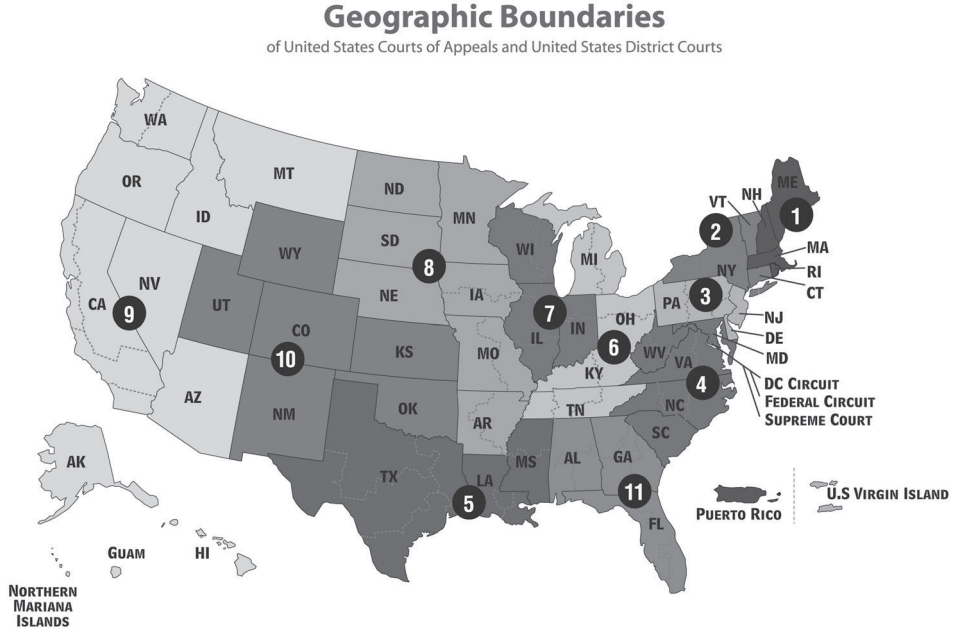

FIGURE 1-6

Geographic Boundaries of United States Courts of Appeal

while some, like the Second Judicial District, cover a relatively small geographic area. Population determines the boundaries of judicial circuits. The eastern seaboard of the United States has a denser population, and this accounts for the smaller size of its judicial circuits.

3. U.S. SUPREME COURT

The U.S. Supreme Court is one of the most famous courts in the world. In terms of authority and prestige, it is easily one of the most important. Decisions of the U.S. Supreme Court can affect everyone in the United States and can even have ramifications for other countries. The U.S. Supreme Court is the nation's highest appellate court. Its decisions on federal appellate issues are final. Composed of nine justices, the U.S. Supreme Court begins its term on the first Monday of each October and continues through June or July of the next year. Authorized by Article III of the U.S. Constitution, the U.S. Supreme Court is the final authority on issues related to the interpretation of the Constitution. The Court also has the power to rule federal statutes unconstitutional and therefore unenforceable. Although many cases are submitted to the U.S. Supreme Court, the vast majority never make it past the hurdle of certiorari.

The federal Supreme Court, like many State Supreme Courts, is vested with the authority to decide which cases it will hear. If the Court believes that a specific case lacks merit or does not present any significant issue for the justices to review, the Court will deny **certiorari** or *cert*. A denial of cert means that the Court refuses to hear the appeal. On the other hand, if the Court decides that the case should be heard, it will grant cert. The decision to grant cert does not mean that a party has won on appeal; instead, it simply means that the Court has agreed to consider the appeal.

Certiorari
The power of an appellate court to decide which cases it will hear

B. LEVELS OF THE STATE COURT SYSTEM

In many ways, the state court systems are a mirror of the federal system. However, state courts are limited to the geographic limits of the state, and therefore they have far less bureaucracy than the federal system. Just as we did with the federal system, we will start our discussion at the bottom of the court pyramid with trial courts.

1. TRIAL COURTS

Trial courts on the state level fulfill many of the same roles as federal district courts. These are the courts where witnesses testify, juries consider verdicts, and judges make rulings on evidence. Because there is a great deal of variation among the states, there is no clear consensus when it comes to the names applied to trial courts. Some states might refer to their trial courts as *superior court*, while others refer to them as *district court* or *state court*. Many states have different levels of trial courts, with one level empowered to hear only specific types of cases, while another is empowered to hear others. In any event, just as we saw with federal district courts, losing parties in trial courts on the state level have the right to appeal to an appellate court.

2. APPELLATE COURTS

All states have appellate courts. In many states, the layers are virtually identical to those found on the federal level, with a trial court, an intermediate court of appeals, and a State Supreme Court. However, it is important to note that not all states follow this arrangement. Some have only a single layer of appellate courts. In the states with two layers of appellate courts, most refer to the first layer as the state court of appeals. This is the court where losing parties from the trial court level appeal their cases. These courts have appellate justices who are empowered to review the issues on appeal and produce written opinions about the merits of the case. In most states, the losing party in the state court of appeals has the option of appealing to the state's highest court: the State Supreme Court.

3. STATE SUPREME COURTS

Just like the U.S. Supreme Court, all states have a court of final authority on appellate issues. Although this court is usually referred to as the *State Supreme Court*, this court may go by a different name in some states. In New York, for example, the state's highest court is referred to as superior court. State Supreme Courts share many similarities with the U.S. Supreme Court. For instance, these courts also have cert authority in most of their cases. This gives them the right to decide which cases they will hear and which they will not. See Figure 1-7 for a diagram of the typical state court system.

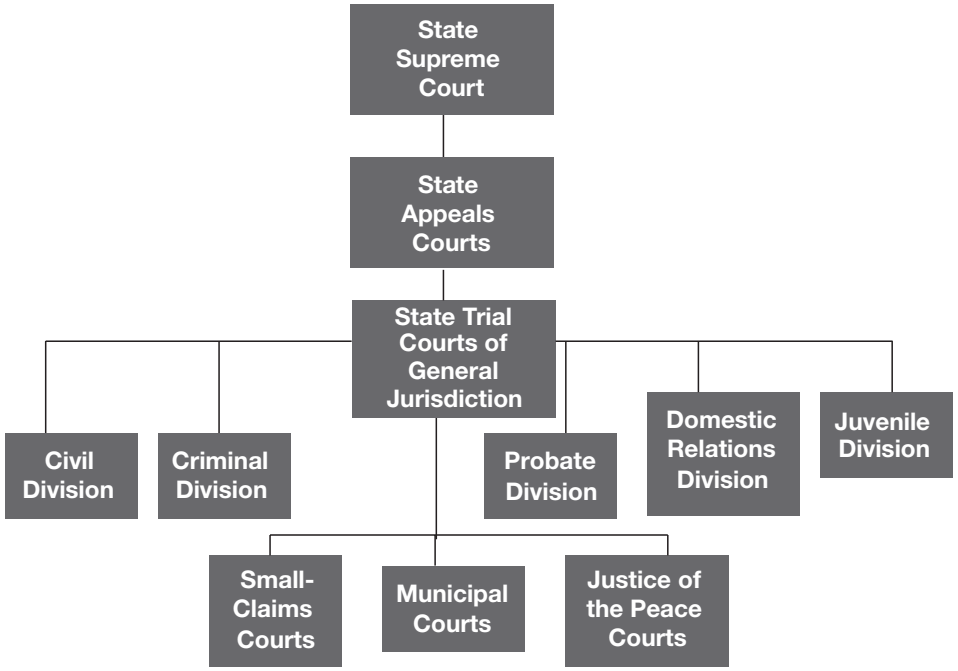

FIGURE 1-7

Diagram of Typical State Court System

Sidebar

There are some cases that are an exception to cert. Death penalty cases, for example, may be appealed directly to the state and U.S. Supreme Courts without first applying for cert.

C. FEDERAL VERSUS STATE LAW

The final point we must consider in this chapter regarding the legal system in the United States is the different layers of law that may affect the proceedings in any civil case. For instance, the United States is composed of states that have their own statutory and case law binding on cases brought in state courts, but each state is also a member of the union and is therefore bound by federal law. This often leads to a conflict, especially when an action may be filed as either a state or a federal action. Which court has precedence? Where should the plaintiff file a complaint?

The general rules, first promulgated in Article VI of the U.S. Constitution, establish that when there is a conflict between state and federal laws, federal laws will predominate. This "supremacy clause" controls the outcome in situations where there is a conflict between federal and state laws, giving preference to federal actions. Throughout the United States, the interplay of federal and state laws can be represented as two systems overlaid, with the federal on top and the state system below.

Tech Topic

PORTABLE, HIGH-CAPACITY DIGITAL STORAGE

Like any other business, law offices have realized that storage is a major issue. In the old days, it was file cabinets, sometimes hundreds of them, that would house the paper files of pending and past cases. But over the last 20 years, physical storage has given way to digital storage. These days, digital backup is common; in fact, it may be a violation of ethics and good practice to fail to keep current files on a backup. For small firms that can't afford off-site cloud storage of client files, one method is to purchase high-density, quick-transfer, portable hard drives. These can be programmed to back up once a day or even several times a day. The idea of backup storage has been around for a long time, with old tape backup systems connected to the firm's computer network, but the tapes often presented real issues. For one thing, they were not that convenient to use and often difficult to restore after a major network failure. These days, there are backup drives that store terabytes of data at rates of 400 MB per second; these can be accessed quickly and used to restore missing files in a matter of minutes. These drives are compatible with both Mac and Windows platforms and have a footprint that is as small as a iPad. The only real downside to such a system is that unless they are stored in a secure area, someone can unplug them and take them away quite easily. These days, digital storage prices are continually dropping, making it more cost-effective for even small firms to do cloud backup of their files to a secure, encrypted site.