

lawyers and the parties ... to require the parties to participate in a judicial settlement conference, a mediation, or a case evaluation.... In addition, with the consent of all parties, the trial court could refer the case for "non-binding arbitration, mini-trial, summary jury trial, or other appropriate alternative dispute resolution proceedings." ...

The original version of Tenn. S. Ct. R. 31, like the current version, specifically defined each of the alternative dispute resolution methods contemplated by the rule. Consistent with the Commission's recommendation that court-annexed alternative dispute proceedings should be non-binding ... each of these methods were intended to promote negotiated settlements between the parties themselves. They were not intended to require the parties to relinquish their decision-making right to any third party who would make the decision for them.

The fact that all proposed alternative dispute resolution methods are non-binding is an essential attribute of the court-annexed procedures.... The rule specifically defines mediation as "an informal process in which a neutral person... conducts discussions among the disputing parties designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute." ...The arbitration permitted by the rule must be "non-binding."... Likewise, a "case evaluation" is advisory only; a "mini-trial" envisions that "the parties or their representatives [will] seek a negotiated settlement of the dispute"... and a "summary jury trial" envisions only an "advisory verdict" followed by a "negotiated settlement."... In 1996, the Tennessee Supreme Court reaffirmed that all court-annexed alternative dispute resolution proceedings permitted by Tenn. S. Ct. R. 31 were premised on the principle of "self-determination."...

Another essential attribute of alternative dispute resolution is the neutrality and impartiality of the mediators, arbitrators, or other neutral persons conducting the process.... The importance of neutrality is reflected in the fact that Tenn. S. Ct. R. 31 refers to persons conducting court-annexed alternative dispute resolution proceedings as "dispute resolution neutrals."... It is also reflected in the Standards of Professional Conduct for Rule 31 Mediators adopted by the Tennessee Supreme Court... which state that "integrity, impartiality, and professional competence are essential qualifications of any mediator."...

A third essential attribute of the court-annexed procedures... is confidentiality. All parties in a mediation proceeding trust that the proceeding will be confidential because these proceedings permit them to "bare their soul" to the mediator and provide them

the opportunity to vent which, in some instances, is all that stands in the way of a negotiated settlement.... Accordingly, a vast majority of the proponents of alternative dispute resolution view confidentiality of the proceedings as a central issue....

The Tennessee Supreme Court recognized the importance of confidentiality when it first authorized court-annexed alternative dispute resolution. Tenn. S. Ct. R. 31,... required that a "mediator, settlement judge, or other dispute resolution neutral shall preserve and maintain the confidentiality of all alternative dispute resolution proceedings except where required by law to disclose the information."...

The principles of self-determination, neutrality, and confidentiality influenced the Tennessee Supreme Court's view of the role trial judges should properly play in court-annexed alternative dispute resolution proceedings. While the court gave trial courts the authority to require litigants, with or without their consent, to participate in a case evaluation, mediation, or judicial settlement conference ... the court carefully limited the trial court's role in these proceedings. First, the court permitted trial judges to participate only in judicial settlement conferences. All other proceedings being presided over by a "neutral person" or a "neutral panel."... Secondly, with regard to judicial settlement conferences, the court stated clearly that judges presiding over a pending case could not also conduct the judicial settlement conference. The definition of "judicial settlement conference" makes it clear that these proceedings must be "conducted by a judicial officer other than the judge before whom the case will be tried."...

The policy reasons for not permitting the trial judge who could eventually try the case to preside over the mediation or other alternative dispute resolution procedure ... are evident and compelling. A judge who presides over a judicial settlement conference is not acting as a judge but as a neutral.... The success of the settlement "depends largely on the willingness of the parties to freely disclose their intentions, desires, and the strengths and weaknesses of their case" with the neutral.... Thus, a judge conducting a settlement conference becomes a confidant of the parties ... with whom the parties share information that would normally be shared only with their lawyers.

Generally, knowledge gained in a prior judicial proceeding is not a sufficient ground to require the recusal or disqualification of a trial judge in a later judicial proceeding.... However, much of the information imparted during a mediation is not the sort of information that would normally be disclosed to the other parties or the court. Accordingly, should the judge who conducts the judicial settlement conference

later be called upon to decide the issues of liability or damages, it is impossible to avoid questions as to whether he or she can disregard the matters disclosed during the conference or put aside any opinions or judgments already formed based on this information....

The Tennessee Supreme Court recognized these confidentiality and predisposition concerns in its September 1996 revisions to Tenn. S. Ct. R. 31. The court added a provision to the rule stating:

A person serving as a Rule 31 dispute resolution neutral in an alternative dispute resolution proceeding shall not participate as attorney, advisor, judge, guardian ad litem, master or in any other judicial or quasi-judicial capacity in the matter in which the alternative dispute resolution proceeding was conducted....

B.

The “binding mediation” proceeding at issue in this case did not comply with... Tenn. S. Ct. R. 31 as it stood in early 1999 in four fundamental particulars. First, [it]... did not authorize “binding mediation”... as a method for court-annexed alternative dispute resolution.... Second, the procedure actually used by the trial court bore no resemblance to a judicial settlement conference or mediation because the parties’ decision-making rights were supplanted by the trial court, and there was no apparent effort to assist the parties in reaching their own voluntary settlement of their differences.... Third, the proceeding was conducted by the trial judge to whom the case had been assigned notwithstanding the clear requirement... that it be “conducted by a judicial officer other than the judge before whom the case will be tried.” Fourth, the judge who conducted the alternative dispute resolution proceeding entered a final order disposing of the parties’ claims even though it did not have the authority to do so....

These departures are not just minor deviations from Tenn. S. Ct. R. 31. Each of them is inconsistent with one or more of the fundamental principles that impelled the Tennessee Supreme Court to authorize court-annexed alternative dispute resolution in the first place. They undermined the principles carefully designed to preserve the parties’ right of self-determination. They also raised the specter of possible repercussions for the parties who objected to referring the case to alternative dispute resolution or who objected to its outcome. Accordingly, we have concluded that these deviations are substantive and material and that they affected the outcome of this proceeding.

A judgment is considered void if the record demonstrates that the court entering it lacked jurisdiction over either the subject matter or the person, or did not have the authority to make the challenged judgment.... A void judgment lacks validity anywhere and is subject to attack from any angle....

A trial court cannot exercise authority it has not been granted expressly or by necessary implication.... At the time of this proceeding, Tenn. S. Ct. R. 31 did not permit the judge who conducted the judicial settlement conference to enter an order disposing of the case. Accordingly, the order disposing of the parties’ claims entered on March 19, 1999, by the judge who conducted the mediation was void,... and the trial court erred when it declined to grant Intersound’s... motion....

We vacate the March 19, 1999 and April 29, 1999 orders and remand the case to the trial court for further proceedings consistent with this opinion. We tax the costs to Team Design; Harris Graphics, Inc.; Anthony Gottlieb; and Intersound Entertainment, Inc. and its surety for which execution, if necessary, may issue.

Case Questions

1. What was the mediator’s decision in this case?
2. Why did the state court of appeals vacate the trial court’s orders?

MINITRIALS

The **minitrial**, used primarily to resolve business disputes, actually isn’t a trial at all. It is a process in which each party makes an abbreviated presentation to a panel, generally consisting of a senior

manager or decision maker from each side and a judge (in the case of a court-ordered minitrial) or jointly selected neutral (in the case of a voluntary minitrial). The theory behind this process is that the presenters for each side will educate the managers about the dispute.²⁰ The strength of this process is

that the business managers, rather than lawyers, judges, and juries, make the decisions. The managers can often design creative solutions that make it possible to resolve the dispute. They are not restricted to the types of relief that courts can award after a trial. If the managers fail to agree, minitrial rules often require a judge or neutral to forecast what he or she believes would happen if the case were to go to trial and indicate what he or she believes to be a reasonable settlement proposal. The parties in a court-annexed minitrial can reject the judge's proposal but may incur a penalty. A party who insists on a trial but fails to recover a judgment more favorable than the judge's proposal may be assessed a substantial fine for each day that it takes to try the case.²¹ The parties in a voluntary minitrial can reject the neutral's proposal without a penalty.

Some courts schedule minitrials only after the parties agree to participate. Other courts require parties to take part. Minitrials are primarily used in complex, time-consuming cases where the substantial savings of money and time realized by limiting discovery and presentations are strong incentives. Minitrials are most likely to succeed when both parties are serious about resolving the underlying issues with a minimum of acrimony.

The parties in a minitrial have control over the procedures and can disregard the formal rules of civil procedure and evidence that apply in litigation. For example, they can set their own rules regarding the nature and scope of discovery and determine whether position papers will be exchanged prior to the hearing. They can also determine the procedures to be used at the hearing. For example, they can decide whether written summaries will be submitted in lieu of witness testimony, how many hours each side will have to present its case, how long opening statements will be, and whether cross-examination will be allowed.

The typical procedures for a minitrial include an abbreviated presentation of each side's case to a panel of decision makers selected by the parties and the neutral. The decision makers then meet privately after the presentations have concluded and work to negotiate a solution to the dispute.

SUMMARY JURY TRIALS

An Ohio federal district court judge developed the **summary jury trial** (SJT) process in 1980 as a court-annexed, mandatory procedure. It operates pursuant to local court rules and is used in cases that have proved difficult to settle—primarily damage cases. The key elements in the typical SJT are an advisory jury, an abbreviated, two-hour hearing, and a nonbinding verdict. The SJT procedure can be helpful when parties agree on the defendant's liability but disagree about the damages. In such cases, the plaintiff's attorney doesn't want to settle for less than what he or she estimates a jury will award. Similarly, the defendant's lawyer will not want to settle for more than what a jury would probably require.

SJT procedures are similar to those at trial.²² A judge presides, and each side has one or two hours to present its case. Case presentations include oral summaries of the evidence and the reading of witness depositions. Each side also has an opportunity to argue the case to the jury, which consists of five or six jurors. The judge gives the jury abbreviated oral instructions. The SJT juries are composed of persons summoned to court but not chosen to sit on a regular trial jury that day.

After the judge's instructions, the SJT jurors retire and deliberate on both liability and damages. The jurors often are asked to discuss the case with the attorneys and clients after they return with a nonbinding verdict. The process works best when the client or some person with settlement authority attends the SJT and participates in this settlement conference.

The SJT process allows the attorneys to have a practice trial and the opportunity to see how a group of regular jurors reacts to each side's presentation. It also gives the parties "a day in court," which helps to satisfy some litigants' emotional needs. The fact that neutral jurors establish a damage figure is an additional plus. The SJT has had an impact on insurance companies, as well as the attorneys and parties. Insurance companies are often more willing to settle after they have seen an SJT jury's verdict because they then have a dollar figure that can serve as a basis for settlement negotiations.

If the parties are unable to settle the dispute, the case remains on the calendar for a regular trial.

One criticism of summary jury trials is that SJT presentations compress cases to such an extent that the jurors can't absorb the evidence and argument. In response, a few judges now allow one-week summary "trials." Others permit the use of live witness testimony.

Introduction to *Griffin v. Yonkers*

The plaintiff and defendant in the following case were involved in a motor vehicle collision. The

lawyers for both parties stipulated to having the matter decided by a summary jury trial. The plaintiff won the summary jury trial and the defendant filed a motion asking to delay the entry of judgment. The defendant explained that he wanted the court to schedule a hearing and determine whether any third party (such as an insurance company) had a legal obligation to contribute along with the defendant to paying for the plaintiff's damages. The plaintiff urged the court to enter judgment immediately and opposed the plaintiff's motion, claiming that the motion was forbidden by the judicial district's summary jury trial rules.

Derik Griffin v. Richard A. Yonkers
891 N.Y.S.2d 896
Supreme Court, Bronx County.
December 21, 2009.

Lucindo Suarez, J.

Review of defendant Richard A. Yonkers's motion pursuant to CPLR 4545 (c) for a collateral source setoff with respect to the jury verdict concerning loss of earnings and medical expenses; and same defendant's [motion] ... to stay entry of the judgment pursuant to CPLR 2201 until defendant's motion pursuant to CPLR 4545 (c) for a collateral source hearing is determined.

The issue in these motions to stay enforcement of the judgment until a collateral source hearing is held is whether the court is precluded from conducting such a hearing where the parties have agreed to waive any motions for directed verdicts or to set aside the verdict pursuant to the summary jury trial rules and procedures of the Twelfth Judicial District. This court holds it is not so prevented, as such a motion is not addressed to the validity or sufficiency of the substantive evidence and proof adduced at trial, but to the quantum of compensation pursuant to the verdict; and upon consideration denies the application as defendant has not demonstrated that the relevant portion of the jury's verdict will, with reasonable certainty, be replaced or indemnified from any collateral source.

The underlying action arises from an automobile accident where plaintiff claims various injuries. The attorneys stipulated to a summary jury trial.

A summary jury trial is a voluntary, innovative and streamlined form of alternative dispute resolution that combines the flexibility and cost-effectiveness of arbitration with the structure of a conventional trial. The

primary mission of New York's Summary Jury Trial Program is to give cost-conscious litigants a reliable, trial-tested option guaranteed to resolve civil cases fairly, quickly and economically by one-day jury trials. Jury selection is abbreviated, each litigant may offer documentary, demonstrative, and limited testimonial evidence without calling expert witnesses, and the attorneys are permitted to deliver condensed opening and closing statements. The parties may stipulate to a summary jury trial providing for: the extent, dates and period for discovery; the mode and method of the trial; a waiver of the right of appeal and motions directed to the verdict; and high/low verdict parameters. In the absence of agreement of counsel and approval by the trial court, the process provided in the rules of the jurisdiction apply....

The summary jury trial achieves its economy of time by limiting the presentation by each side to one hour, absent a court rule or an agreement to the contrary. During the one hour, each side may call one or two witnesses, who are subject to cross-examination. Other testimony may be presented through deposition transcripts or sworn affidavits. The rules of evidence are relaxed but not abrogated. The key to the saving of time and especially expense is the submission of medical evidence through the affidavits or reports of providers, rather than through live testimony. Police, hospital, and accident reports, as well as other documentary or demonstrative evidence are allowed to be introduced without certification or authentication,

subject to all items having been exchanged, and objections to the introduction of evidence and rulings thereto having been made before trial at an evidentiary hearing.

The overarching theme to be borne in mind is that the parties themselves, with the permission of the trial judge, may fashion their own parameters for their summary jury trial, by using, augmenting and/or disregarding the rules existing in the jurisdiction, as well as by creating rules of their choosing. The parties are allowed to shape a format that will allow them to fully explore all the issues or to focus on a particular issue without spending the time and money to bring in myriad witnesses, doctors and other experts.

The parties here did not stipulate to abide by any parameters other than the rules of the Twelfth Judicial District... with respect to motion practice, which explicitly preclude motions for a directed verdict and motions to set aside the verdict, both of which are addressed to the sufficiency of the substantive evidence and proof at trial.... For example, a trial court may set aside a verdict "only if there was "no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented."....

A motion pursuant to CPLR 4545 (c), however, addresses the sufficiency and propriety of plaintiff's recovery of damages.... It does not question the validity or weight of the substantive evidence adduced at trial. "Under CPLR 4545 (c), if the court finds that any portion of a personal injury award for economic loss "was or will, with reasonable[e] certainty, be replaced or indemnified from any collateral source, it shall reduce the amount of the award by such finding."" (Brewster v Prince Apts.... [2000].)

The only New York cases answering this question are found in the Fourth Department, emanating from the Eighth Judicial District, the jurisdiction that pioneered the use of the summary jury trial in New York State. Although that jurisdiction's summary jury trial rules are essentially similar to those followed in the Bronx, the cases establish that posttrial motion practice

is not per se disallowed in the summary jury trial setting. For example, in *Conroe v Barmore-Sellstrom, Inc.* ... [4th Dept 2004]), the court allowed motion practice to challenge the admission into evidence of documents that had not been exchanged pursuant to the summary jury trial rules. In addition, where neither the parties' stipulation to submit the action to summary jury trial nor the administrative judicial materials in the jurisdiction addressed the particular type of motion made in the summary jury trial setting, and while dismissing the appeal, the court stated that it would not have been error to rule on the motion....

Accordingly, as collateral source motions are not specifically excluded by the rules under which the parties stipulated to submit the action to a summary jury trial, defendant's motion may be entertained. Furthermore, "[t]o assure that plaintiffs are fully compensated—but not overcompensated—a "direct correspondence between the item of loss and the type of collateral reimbursement must exist before the required statutory offset may be made.'" (*Fisher v Qualico Contr. Corp.*, ... [2002]...., Ordinarily, a hearing would be required to determine the amount of the collateral source offset, if any, from the jury's verdict.

Here, however, movant, pursuant to the court's directive, provided the insurance carrier's denial of benefits of proposed collateral source. As benefits were already denied, and the time to appeal the denial has long since passed, movant has not demonstrated that the relevant portion of the jury's verdict "will, with reasonable certainty, be replaced or indemnified ... from any collateral source."... Therefore, defendant's motion for a stay of enforcement of the judgment is denied as moot.

Accordingly, it is ordered that the motion...of defendant Richard A. Yonkers for a collateral source hearing and reduction of the verdict by collateral source payment is denied; and it is further ordered, that the motion ... of defendant Richard A. Yonkers for a stay of enforcement of the judgment is denied as moot.

Case Question

These parties had three choices. They could have chosen a bench trial, a regular jury trial, or a summary jury trial. Why do you think that the lawyers for both parties stipulated that their dispute be resolved via a summary jury trial as opposed to a regular jury trial?

Private Trials

Parties that have failed to resolve their dispute with mediation and/or arbitration may choose to litigate in a private court system. Provided by commercial firms that employ retired federal, state, and local judges, such trials are held in hotels, law schools, and even office buildings in which courtrooms that replicate public courtrooms have been constructed. These firms exist to provide timely, confidential, and affordable trials. In thirteen states, the parties can employ jurors selected from the public jury rolls to hear the case. The **private trial system** allows the parties to select a judge who has experience appropriate to the case. It also allows the parties to conduct their trial in private, an important advantage in many contract, employment rights, professional liability, and divorce actions. The parties to a private trial often contract to use simplified evidentiary and procedural rules and to cooperate in discovery, saving time and money for both parties. The parties also decide whether the decision of the private judge or jury will be final or appealable. Some private court systems even provide for private appeals.

Critics of the private court system maintain that it allows the wealthy to avoid the delays and conditions that others must endure in the public court system. They also express concern that the higher compensation that is paid to private judges could result in a two-tier system of justice. The best judges would handle the litigation of the wealthy in the private sector, while others would litigate before less able judges in underfunded, overworked public-sector courts.

Does ADR Really Work?

The question as to the extent to which ADR programs have produced the benefits that were advertised remains unresolved. In 1996, the Rand Corporation evaluated ten ADR pilot programs created pursuant to the Civil Justice Reform Act. Rand found no statistical evidence that the districts with pilot programs had been more successful than ten comparison districts in reducing cost or delay.²³

A 1997 study conducted by the Federal Judicial Center, however, was more favorable and encouraged continued federal participation.²⁴ Students interested in reading an excellent article summarizing the effectiveness of ADR in federal district courts and critiquing its use by federal administrative agencies should read a 1997 article in the *Duke Law Journal* written by Judge Patricia M. Wald of the U.S. Court of Appeals for the District of Columbia. This brief and very informative article can be found on the Internet.²⁵

In 2005, the National Arbitration Forum and the American Bar Association surveyed members of two of the ABA's thirty practice-oriented sections, the Tort Trial and Insurance Practice Section (TIPS) and the General Practice Solo and Small Firm Section (GPSolo), to ask their views about and experience with ADR techniques.

When asked about the extent to which they had used ADR techniques to resolve cases in 2004, slightly over 53 percent of the TIPS respondents indicated that they had done so in one to five cases, but only 4.5 percent reported using ADR methods in at least twenty-six cases (see Figure 14.2).

When TIPS respondents were asked if "clients' interests are sometimes served by offering ADR solutions," only 10.6 percent answered in the negative. And when asked about ADR's long-term prospects, almost 60 percent of TIPS respondents believed it would be utilized more frequently in the future (see Figure 14.3).

When GPSolo respondents were asked the same questions as the TIPS respondents, 65.4 percent indicated that they had used ADR techniques to resolve between one and five cases in 2004, but only 1.7 percent reported using ADR methods in at least twenty-six cases. Only 13.8 percent of GPSolo respondents answered that offering ADR solutions would not benefit their client's interest. And when asked about ADR's long-term prospects, over 66 percent of GPSolo respondents reported they expected it would be utilized more frequently in future years.

It is important to note that the lawyers participating in these two surveys were chosen because of their membership in the targeted ABA sections.

In your role as client counsel, how many cases did you resolve through ADR last year (mediation, arbitration, and other forms of ADR)?

Response	Percent
5 or fewer	53.2
6–25	39.0
26–50	4.5
Over 50	3.4
Total	100.0

FIGURE 14.2 Use of ADR in 2004 by Tort Trial and Insurance Practice Section Members of ABA

Source: National Arbitration Forum in collaboration with Tort Trial and Insurance Practice Section of the American Bar Association, "ADR Use and Preference Survey," Copyright 2006 by the American Arbitration Forum.

Overall View of ADR among TIPS Respondents

Response	Percent
Clients' interests are sometimes best served by offering ADR solutions	89.4
My practice will necessarily include offering ADR solutions to clients in the future	60.5
Offering clients ADR is an ethical obligation as a practitioner	59.8
ADR use will increase in the future	59.8
Offering clients ADR solutions has improved my law practice financially	21.4
Clients frequently inquire about ADR solutions	20.7

FIGURE 14.3 Overall View of ADR by Tort Trial and Insurance Practice Section Member of ABA

Source: National Arbitration Forum in collaboration with Tort Trial and Insurance Practice Section of the American Bar Association, "ADR Use and Preference Survey," Copyright 2006 by the American Arbitration Forum.

Their responses may or may not reflect the views of ABA member lawyers not surveyed. It is also important to note that mediation and arbitration were the only ADR methods explicitly included in either survey's questions. It can be said that

most respondents, while including ADR methods in their practices and professing confidence that ADR methods would play a more prominent role in the practice of law in the future, reported having used them infrequently to resolve cases in 2004.

INTERNET TIP

The contents of both surveys can be found on the Internet as follows:

- ADR Preference and Usage Survey (in collaboration with Tort Trial and Insurance Practice Section [TIPS] of the American Bar Association) (National Arbitration Forum, 2006; data collected by Surveys and Ballots, Inc.): <http://www.adrforum.com/users/naf/resources/2006TIPSSurvey.pdf>
- ADR Preference and Usage Report (in collaboration with General Practice Solo and Small Firm Section [GPSolo] of the American Bar Association) (National Arbitration Forum, 2006; data collected by Surveys and Ballots, Inc.): <http://www.adrforum.com/users/naf/resources/GPSoloADRPreferenceAndUsageReport.pdf>

CHAPTER SUMMARY

The chapter began with an explanation of some of the disadvantages of resolving disputes by public court trial. These include the public nature of the process, the length of time it often takes for a case to get to trial, the cost of preparing for a trial that will most likely never occur, and the potential dissatisfaction with the consequences of litigation's "winner-take-all" approach. Next, the chapter

covered the differences between voluntary participation in ADR and participation that is mandated by law (court-annexed ADR). The majority of the chapter focused on explaining various ADR methods such as settlement conferences, arbitration, mediation, minitrials, and summary jury trials. The chapter concluded with a brief discussion of how well ADR works.

CHAPTER QUESTIONS

1. Frances J. Vukasin was employed by D. A. Davidson & Co. in August 1979. The company implemented an annual performance review in 1985, which rated her performance in each of six areas, gave her an overall rating, and indicated a recommended salary increase. Included in Vukasin's 1986 and 1987 performance reviews, directly above the employee's signature line, was a provision that read, "Employment with D. A. Davidson & Co. is subject to arbitration." The review also provided that she or her employer could terminate employment at any time for any reason. There was also a statement that "I [the employee] ... acknowledge and agree that any controversy between myself and the Company arising out of my employment or the termination of my employment with the Company for any reasons whatsoever shall be determined by arbitration." On December 12, 1988, Vukasin filed a complaint in a state court against the company. She alleged in the complaint that another employee had assaulted and battered her at the company's offices on April 30, 1988. She claimed damages for mental and emotional distress, pain and suffering, loss of wages, and various medical and therapy expenses. Is the allegation of assault and battery outside the scope of the arbitration clause and appropriate for litigation?
Vukasin v. D. A. Davidson & Co., 785 P.2d 713 (Mont. 1990)
2. James Clawson contracted with Habitat, Inc., to build a retaining wall and driveway at his home. The contract contained an arbitration clause. A dispute arose regarding the construction, and the matter was submitted to binding arbitration. The parties continued negotiation throughout the arbitration process. When it appeared that they were close to a settlement, they entered into a new agreement. The new

agreement provided that the parties would retract the arbitration if they could negotiate a settlement by 3:00 P.M. on October 21, 1988. Clawson and Habitat disagreed about whether an agreement had been reached by that date. The arbitrator's decision was released on November 1, 1988. Both parties filed motions in the circuit court, Habitat to confirm the award, and Clawson to vacate the award. Should the circuit court confirm the award?

Clawson v. Habitat, Inc., 783 P.2d 1230 (Hawai'i 1989)

3. The Medford (Oregon) Firefighters Association and the City of Medford reached a stalemate while negotiating a collective bargaining agreement. They unsuccessfully tried to mediate their dispute. Pursuant to state law, the Oregon Employment Relations Board appointed an arbitrator, who held a hearing, prepared an agreement, and submitted it to the parties. The firefighters petitioned the circuit court for a writ of *mandamus* when the city refused to sign the agreement. The city claimed that the state law providing for binding arbitration was unconstitutional. Can the state legislature constitutionally delegate legislative power to a private person as an arbitrator?

Medford Firefighters Association v. City of Medford, 595 P.2d 1268 (1979)

4. Roger Lockhart, a teenager, lost the sight in one of his eyes. He alleged that this was due to the negligence of Dr. Ramon Patel. A summary jury trial was conducted, and the advisory jury awarded the plaintiff \$200,000. The court held several formal and informal settlement conferences following the SJT. The court directed that the defense attorney attend a settlement conference on November 3, 1986 and that he bring with him a representative of Dr. Patel's liability insurance carrier, who possessed authority to settle the case. The defense attorney appeared on November 3, but the insurance representative with settlement authority did not. The insurance carrier sent an adjuster instead. The court responded by (1) striking the defendant's pleadings, (2) declaring the

defendant in default, (3) setting the trial for the following day, limited to the question of damages, and (4) set a hearing to show cause why the insurance carrier should not be punished for criminal contempt of the court. Does the court have the right to strike the defendant's pleadings because of the insurance carrier's failure to send a representative to attend the settlement conference?

Lockhart v. Patel, 115 F.R.D. 44 (E.D. Ky. 1987)

5. Elizabeth Garfield brought suit against her former employer, Thomas McKinnon Securities, Inc., claiming that McKinnon had discharged her on account of her age in violation of the Age Discrimination in Employment Act. McKinnon moved to dismiss the complaint and compel arbitration because Garfield had agreed to arbitrate any controversy arising out of her employment. Garfield responded that she and all registered brokers are required to execute arbitration agreements as a condition of employment. She maintained that Congress did not intend to permit persons to waive their statutory right to sue for ADEA violations in federal court via the execution of an arbitration agreement. Should the court dismiss the complaint and compel arbitration?

Garfield v. Thomas McKinnon Securities, Inc., 731 F.Supp. 841 (N.D. Ill. 1988)

6. Irmis Achong was hired as a nursing attendant by the Cabrini Medical Center. He became a member of Local 1199 of the Drug, Hospital and Health Care Employees Union, which was party to a collective bargaining agreement. On November 4, 1986, a disoriented and distraught patient kicked Achong as he walked by her stretcher. Cabrini claimed that Achong, who had a perfect performance record at the time, responded by cursing the patient and striking her on the leg. Cabrini discharged Achong for abusing the patient. The collective bargaining agreement provided for binding arbitration whenever the union and Cabrini disagreed upon whether an employee was discharged for just cause. Achong's dismissal was

submitted to arbitration. The arbitrator made careful and detailed findings and conclusions. He ruled that just cause did not exist for Achong's discharge, because Cabrini failed to establish how hard Achong touched the patient. He believed that summary discharge was too harsh a penalty under the circumstances and based on the limited evidence. He ruled that Achong should be reinstated without back pay (thereby imposing a forfeiture of nine months' pay) and given a warning against future conduct. Cabrini brought an action in

federal court to set aside the award, and the union brought an action in state court to confirm. Cabrini removed the state action to federal court, where the two actions were consolidated. Cabrini argued that the award violated public policy based on a statutory provision that patients "shall be free from mental and physical abuse." Should the award be confirmed?

Cabrini Medical Center v. Local 1199 Drug, Hospital and Health Care Employees Union, 731 F.Supp. 612 (S.D.N.Y. 1990)

NOTES

1. R. Samborn, "In Courts: Caseloads Still Rise," *National Law Journal* (July 5, 1993).
2. Judicial Business 2009. Administrative Office of U.S. Courts. Statistical Table for the Federal Judiciary, Table S-7, September 30, 2009.
3. Judicial Business 2009. Administrative Office of the U.S. Courts. Statistical Table for the Federal Judiciary, Tables C-4 and C-4A, September 30, 2009.
4. As early as 1991, for example, Colorado amended its Code of Professional Responsibility and required lawyers to advise their clients of this option.
5. Massachusetts Supreme Judicial Court Rule 1:18, May 1, 1998.
6. W. H. Schroeder Jr., "Private ADR May Offer Increased Confidentiality," *National Law Journal* C14-16 (July 25, 1995).
7. J. H. Kennedy, "Merger Aimed at Settling Out of Court," *Boston Globe*, May 16, 1994, pp. 18-19.
8. D. M. Provine, *Settlement Strategies for Federal District Judges* (Federal Judicial Center, 1986).
9. H. N. Mazadoorian, "Widespread Disgust With Civil Justice Is Boon to ADR," *Corporate Legal Times* 17 (April 1994).
10. *Ibid.*
11. J. W. Keltner, *The Management of Struggle* (Cresskill, NJ: Hampton Press, 1994), p. 152.
12. J. W. Cooley, "Arbitration vs. Mediation—Explaining the Differences," *Judicature* 69, 264 (1986).
13. Federal Arbitration Act, 9 U.S.C. Sec. 1.
14. See *Eastern Associated Coal Corp v. United Mine Workers*, 531 U.S. 57 (2000) and *Circuit City Stores, Inc. v. Adams*, 99-1379 (2001).
15. Some states have, in the past, refused to enforce arbitration agreements entered into before the existence of any dispute.
16. *Shearson Lehman Hutton v. McMahon*, 482 U.S. 220 (1987).
17. R. C. Reuben, "Decision Gives Banking ADR a Boost," *American Bar Association Journal* 32 (December 1994), pp. 32-33.
18. Mazadoorian, p. 17.
19. Cooley, p. 266.
20. J. Davis and L. Omlie, "Mini-trials: The Courtroom in the Boardroom," *Willamette Law Review* 21, 531 (1985).
21. The extent to which judges can order parties to participate in a minitrial remains a hotly contested issue.

22. "Mandatory and Summary Jury Trial Guidelines for Ensuring Fair and Effective Process," *Harvard Law Review* 103, 1086 (1993).
23. J. S. Kakalik, *Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts*, Rand Institute for Civil Justice (1996).
24. Federal Judicial Center, *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990* (1997).
25. P. M. Wald, "ADR and the Courts: An Update," 46 *Duke Law Journal* 1445 (1997), www.law.duke.edu/journals/dlj/articles/dlj46p1445.

Appendix



The Constitution of the United States

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2

1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.
2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes¹ shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.² The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.
4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.
5. The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.
2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.⁴
3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.
4. The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.
5. The Senate shall choose their other officers, and also a president pro tempore, in the absence of the Vice President, or when he shall exercise the office of the President of the United States.
6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: And no person shall be convicted without the concurrence of two thirds of the members present.
7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualifications to hold and enjoy any office of honor, trust or profit under the United States:

Section 3

1. The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof,³ for six years; and each senator shall have one vote.

1. Altered by the 16th Amendment.

2. Altered by the 14th Amendment.

3. Superseded by the 17th Amendment.

4. Altered by the 17th Amendment.

But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

Section 4

1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof: But the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.
2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Section 5

1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.
2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.
3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.
4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

Section 6

1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.
2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

Section 7

1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.
2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall

be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and the House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Section 8

The Congress shall have the power

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;
2. To borrow money on the credit of the United States;
3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;
4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;
5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;
6. To provide for the punishment of counterfeiting the securities and current coin of the United States;
7. To establish post offices and post roads;
8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;
9. To constitute tribunals inferior to the Supreme Court;
10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;
11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
12. To raise and support armies, but no appropriations of money to that use shall be for a longer term than two years;
13. To provide and maintain a navy;
14. To make rules for the government and regulation of the land and naval forces;
15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;
16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.
17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and
18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or any department or officer thereof.

Section 9

1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.
2. The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.
3. No bill of attainder or ex post facto law shall be passed.
4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.⁵
5. No tax or duty shall be laid on articles exported from any State.
6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: Nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.
7. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.
8. No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

Section 10

1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and

reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: And the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.
3. No State shall, without the consent of the Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

Section 1

1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected as follows:
2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: But no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective States, and vote by ballot for two persons, of

5. Superseded by the 16th Amendment.

whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.⁶

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.
4. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not

have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.
6. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.
7. Before he enter on the execution of his office, he shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect, and defend the Constitution of the United States."

Section 2

1. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

6. Superseded by the 12th Amendment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointment are not herein otherwise provided for, and which shall be established by law: But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.
3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Section 3

He shall from time to time give to the Congress information of the state of the Union, and recommend to their considerations such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section 4

The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

Section 1

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2

1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;⁷—to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.
2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.
3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not

7. Cf. the 11th Amendment.

committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Section 3

1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attained.

ARTICLE IV

Section 1

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section 2

1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.⁸
2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

8. Superseded by the 14th Amendment, Sec. 1.

9. Voided by the 13th Amendment.

3. No person held to service or labor in one State under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.⁹

Section 3

1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as the Congress.
2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

Section 4

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments,

which in either case shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.
2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.
3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executives and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present the seventeenth day of

September in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness thereof we have hereunto subscribed our names. [Names omitted.]

. . .

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several States, pursuant to the fifth article of the original Constitution.

AMENDMENT I [FIRST TEN AMENDMENTS RATIFIED DECEMBER 15, 1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

AMENDMENT III

No soldier shall, in the time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause,

supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of the counsel for his defense.

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI [RATIFIED JANUARY 8, 1798]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

AMENDMENT XII [RATIFIED SEPTEMBER 25, 1804]

The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots, the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest

number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

AMENDMENT XIII [RATIFIED DECEMBER 18, 1865]

Section 1

Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV [RATIFIED JULY 28, 1868]

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participating in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to

the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including the debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5

Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV [RATIFIED MARCH 30, 1870]

Section 1

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2

The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI [RATIFIED FEBRUARY 25, 1913]

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.

AMENDMENT XVII [RATIFIED MAY 31, 1913]

The Senate of the United States shall be composed of two senators from each State, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

AMENDMENT XVIII¹⁰ [RATIFIED JANUARY 29, 1919]

After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is thereby prohibited.

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislature of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by Congress.

¹⁰. Repealed by the 21st Amendment.

AMENDMENT XIX [RATIFIED AUGUST 26, 1920]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have the power to enforce this article by appropriate legislation.

AMENDMENT XX [RATIFIED JANUARY 23, 1933]

Section 1

The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the year in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3

If, at the time fixed for the beginning of the term of President, the President-elect shall have died, the Vice President-elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, then the Vice President-elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President-elect nor a Vice President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be

selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5

Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT XXI [RATIFIED DECEMBER 5, 1933]

Section 1

The Eighteenth Article of amendment to the Constitution of the United States is hereby repealed.

Section 2

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited.

Section 3

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States as provided in the Constitution, within seven years from the date of the submission thereof to the States by the Congress.

AMENDMENT XXII [RATIFIED MARCH 1, 1951]

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once.

But this article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislature of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT XXIII [RATIFIED MARCH 29, 1961]

Section 1

The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators

and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2

The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXIV [RATIFIED JANUARY 24, 1964]

Section 1

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2

The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXV [RATIFIED FEBRUARY 10, 1967]

Section 1

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive departments or of such body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their

written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

AMENDMENT XXVI [RATIFIED JULY 1, 1971]

Section 1

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2

The Congress shall have powers to enforce this article by appropriate legislation.

AMENDMENT XXVII [RATIFIED MAY 7, 1992]

No law varying the compensation for the services of the senators and representatives shall take effect until an election of representatives shall have intervened.



Glossary of Selected Terms from *The Law Dictionary* with Augmentation by the Textbook Author*

Acceptance Agreement of the offeree to be bound by the terms of the offer.

Accession A natural increase in one's property. Examples include the interest earned on money deposited in a bank account, or crops grown on one's land, or newborn puppies delivered by one's dog.

Accord An agreement between two (or more) persons, one of whom has a right of action against the others that the latter should do or give, and the former accept, something in satisfaction of the right of action. When the agreement is executed, and satisfaction has been made, it is called accord and satisfaction, and operates as a bar to the right of action. Accord, Restatement (Second) of Contracts § 281(1).

Act of State Doctrine Provides that American courts should not determine the validity of public acts committed by a foreign sovereign within its own territory.

Actus Reus An overt wrongful act.

Additur A motion made by a prevailing party in state court asking that the trial court award the plaintiff an additional sum of money because the jury's verdict is grossly inadequate.

Adjudicative Power A delegated power contained in an enabling act authorizing an administrative agency to determine legal rights, duties, and obligations, and to impose sanctions on those subject to its jurisdiction.

Administrative Law Judges Administrative law judges (ALJs) are employed by administrative agencies to conduct adjudicatory hearings. Like judges, ALJs decide questions of fact and issues of law, and issue subpoenas, administer oaths, make evidentiary rulings, and conduct hearings. ALJs are not, however, members of the federal judiciary. They perceive their function as that of implementing and administering a legislative purpose rather than as judges impartially deciding between two litigants.

Administrative Procedure Act A 1946 federal statute enacted to improve and strengthen the administrative process. Section 553 of the APA establishes notice and comment procedures for informal rule making and Section 554 establishes trial-like procedures for formal rule making.

Adoption A social and a legal process by which the rights and duties accompanying the parent-child

**The Law Dictionary* (*Cochran's Law Lexicon*, Sixth Edition), revised by Wesley Gilmer, Jr., Anderson Publishing Co., Cincinnati. Reprinted by permission. Additional terms have been incorporated into this glossary by the author of this text, Frank A. Schubert.

relationship are transferred from birth parents to adoptive parents.

Adverse Possession Also known as “easement by prescription.” One whose possession of another’s realty is open and notorious, hostile, adverse, and continuous for a legally specified period of time can bring a “quiet title action” in court at the end of the time period and, if successful, obtain a marketable title.

Advisory Opinion (1) In some jurisdictions, the formal opinion of a higher court concerning a point at issue in a lower court. (2) The formal opinion of a legal officer, e.g., Attorney General, concerning a question of law submitted by a public official. (3) In some jurisdictions, the opinion of a court concerning a question submitted by a legislative body.

Aesthetics The study of beauty.

Affirm An appellate court affirms a lower court when it concludes that the lower court’s judgment is valid.

Affirmative Defenses Defenses in which a criminal defendant admits to the act but claims that special circumstances mitigate, justify, or excuse the defendant’s conduct.

Agency Adoptions Birth parents consent to the termination of their parental rights and surrender child to an adoption agency that selects the adoptive parent(s) and places the child.

Agent A person authorized by another (the principal) to do an act or transact business for him or her, and to bind the principal within the limits of that authority. An agent may be authorized to do all business of a particular kind, or limited to one particular act. The agent’s power to bind the principal is confined to the scope of his/her authority.

Agreement An expression of the parties’ willingness to be bound to the terms of a contract.

Alibi A defense in which a criminal defendant proves that he/she was somewhere other than at the scene of the crime on the date and time that the offense allegedly occurred.

Alimony Court order requiring that an economically strong spouse pay financial support to an economically dependent spouse where it is necessary and appropriate. Some jurisdictions deny alimony to a spouse whose marriage ended as a result of that person’s marital fault.

Alternative Dispute Resolution A term that refers to a variety of techniques adherents claim can in some cases resolve disputes more quickly, at less cost, and with less

acrimony than would be true if the case were litigated in a court.

Analytical Positivism Adherents of this philosophical approach view law as a self-sufficient system of legal rules that the sovereign issues in the form of commands to the governed. Judgments about the intrinsic morality of the sovereign’s commands are viewed as extra-legal.

Annulment An action in which a marriage partner seeks to prove that no valid marriage ever existed.

Answer (1) A pleading in which a civil defendant responds to the allegations of the complaint and states the defenses on which he/she intends to rely. (2) A statement under oath in response to written interrogatories, i.e., questions, or oral questions.

Appeal A process for obtaining review by a higher court of a lower court’s decision.

Appellant A person who initiates an appeal from one court to another.

Appellee The party in a lawsuit against whom an appeal has been taken.

Arbitration The voluntary submission of a matter in dispute to the nonjudicial judgment of one, two, or more disinterested persons, called arbitrators, whose decision is binding on the parties.

Arbitrator’s Award An arbitrator’s decision is called an award.

Arraign To bring a criminally accused person formally before a court for the purpose of having him/her answer charges brought by the prosecution.

Arrest (1) The seizing and detaining of a person in custody by lawful authority. (2) Taking of another into the custody for the actual or purported purpose of bringing the other before a court, or of otherwise securing the administration of the law. (3) The seizure and detention of personal chattels, especially ships and vessels libeled in a court of admiralty.

Assault (1) Strictly speaking, threatening to strike or harm. (2) A threatening gesture, with or without verbal communication. If a blow is struck, it is battery. (3) Attempting to cause or purposely, knowingly, or recklessly causing bodily injury to another, or negligently causing bodily injury to another with a deadly weapon, or attempting by physical menace to put another in fear of imminent serious bodily injury; also called simple assault.

Assignee The person to whom an assignment is made.

Assignment The transfer of contractual rights to another person.

Assignor The person making an assignment.

Assumpsit A common law writ used to remedy some breaches of duty (called undertakings) that had previously been actionable under the old writ of trespass on the case.

Assumption of Risk A defense to a claim for negligent injury to a person or property, i.e., a person who voluntarily exposes himself or his property to a known danger may not recover for injuries thereby sustained.

Attempt A crime committed by a person who has the intent to commit a substantive criminal offense and does an act that tends to corroborate the intent, under circumstances that do not result in the completion of the substantive crime.

At-Will Doctrine A legal doctrine in employment law that permits an employee who has no contractual rights to employment to quit without notice or be fired by the employer at any time, for any reason or for no reason at all.

Avoidable Harm Doctrine Also known as the rule of mitigation, this rule prevents the recovery of damages that could have been foreseen and avoided by reasonable effort without undue risk, expense, or humiliation.

Bail To set at liberty a person arrested or imprisoned, on written security taken for his appearance on a day and at a place named. The term is applied, as a noun, to the persons who become security for the defendant's appearance; to the act of delivering such defendant to his bondsmen; and also to the bond given by the sureties to secure his release. A person who becomes someone's bail is regarded as his jailer, to whose custody he is committed. The word "bail" is never used with a plural termination.

Bailment A broad expression which describes the agreement, undertaking, or relationship which is created by the delivery of personal property by the owner, i.e., the bailor, to someone who is not an owner of it, i.e., the bailee, for a specific purpose, which includes the return of the personal property to the person who delivered it, after the purpose is otherwise accomplished. In a bailment, dominion and control over the personal property usually pass to the bailee. The term is often used to describe, e.g.: (1) The gratis loaning of an automobile for the borrower's use. (2) The commercial leasing of an automobile for a fee. (3) The delivery of an automobile to a repairman for the purpose of having it repaired.

(4) The delivery of an automobile to a parking attendant for storage, when the keys are left with the attendant.

Bailor A person who commits goods to another person (the bailee) in trust for a specific purpose.

Bar and Merger A judicial doctrine which provides that claims made by the plaintiff and claims that could have made, but were not, merge into the judgment and are extinguished. A subsequent suit against the same defendant based on the same claim is barred.

Battery An unlawful touching, beating, wounding, or laying hold, however trifling, of another's person or clothes without his consent.

Bench Trial A case is litigated before a judge instead of a jury.

Benefit The receipt by the promisor of some legal right to which the person had not previously been entitled.

Benefit Rule When a plaintiff is both damaged and benefitted by the defendant's conduct, the plaintiff's damage award should be reduced by the amount of the benefit conferred.

Best Evidence A rule of evidence that requires the production of original documents in court unless they are unobtainable.

Best Interest of the Child Doctrine A rule requiring judges to show no gender preference and to act on ability to provide, and interest in providing, the child with love, a good home, food, clothing, medical care, and education.

Bifurcation A trial is broken up into segments.

Bilateral Contract Contracts in which the parties exchange mutual promises to do some future act.

Bill of Attainder A legislative act that declares a person guilty of a crime and imposes punishment (generally capital punishment). Used in lieu of the judicial process.

Breach of Contract A flexible term for the wrongful failure to perform one or more of the promises that a person previously undertook when he or she made a contract, e.g., failure to deliver goods.

Burden of Proof The duty of proving facts disputed in the trial of a case. It commonly lies on the person who asserts the affirmative of an issue, and is sometimes said to shift when sufficient evidence is furnished to raise a presumption that what is alleged is true. The shifting of the burden of proof is better characterized as the creation of a burden of going forward with the evidence; however, because the total burden of proof is not thereby changed, the burden of going forward with the evidence

is apt to revert to the other party and change from time to time.

Canon Law Church law.

Capacity Where a person is of legal age and is not otherwise so impaired as to be substantially incapable of making decisions for himself/herself.

Capias A writ that orders law enforcement to take a person into custody and bring him/her before the court.

Capture A method of obtaining title to previously unowned property such as catching fish on the high seas or netting a butterfly. Capture often requires that the captor purchase a license, such as when one goes hunting or fishing.

Case of First Impression A case presenting a legal question that has not previously been answered in a reported appellate opinion.

Cases And Controversies Article III, Section 2, of the U.S. Constitution requires that a matter must be a “case” or “controversy” to be within the federal judicial power. This means that the parties must truly be adverse, the plaintiff’s claims of having suffered legal injuries are real and not hypothetical, and the issues raised are neither abstract nor hypothetical.

Causation An element that must be proved in some, but not all, criminal cases and in negligence and some strict liability cases in tort.

Causation in Fact A causal connection does exist between the defendant and the plaintiff’s injuries—i.e., but for the defendant’s negligence, the plaintiff’s injuries would not have occurred.

Caveat Emptor Let the buyer beware.

Chancellor As used in this textbook, an equitable court judge, or a judge exercising the powers of an equitable court judge.

Child Support This term refers to a parent’s duty to provide necessities to one’s child and to the sum of money one parent must pay to the other pursuant to a court order in the aftermath of a divorce.

Civil Suit All legal actions other than criminal prosecutions.

Civil Union A legally recognized relationship that permits qualifying same-sex partners to obtain economic benefits that in some states are equal to those afforded married people. Only a few states recognize civil unions.

Clause A provision in a document such as a contract or constitution containing a subject and a finite verb, for

example, the Due Process Clause of the Fourteenth Amendment.

Code Napoleon A civil code developed at the direction of Napoleon Bonaparte in 1804. This code, as amended, is the basis of French law and is still a source of law in Louisiana.

Collusion A term used to describe parties to a lawsuit who are not truly adverse, for example, one party is financing and controlling both sides of a lawsuit.

Common Law This term is used in three different contexts in this textbook. (1) It refers to the right of judges, particularly in contract and tort cases, to declare the law based on principles and precedents established over several centuries in Anglo-American case law. (2) It refers to the system of law established in England and subsequently adopted in most American states that features judge-made law and considers case precedents as an important source of law. This text distinguishes the common law approach to lawmaking from the civil law approach, which is derived from detailed legislative codes rather than judicial precedents. (3) Lastly, this term refers to differences in rights, remedies, and procedures that distinguish the common law courts (law courts) from courts of equity.

Common Law Lien A legally enforceable claim against property recognized under the common law.

Common Law Marriage Informal marriage by agreement that dispenses with licenses and solemnization ceremonies. The parties must have established the relationship of husband and wife, live together as a married couple, and present themselves to the world as being married.

Community Property A system used in some states when apportioning property between the parties in a divorce. The earnings of both spouses and property rights acquired with those earnings during the marriage are lumped together and each party receives a percentage of the whole. State statutes usually exclude from community property any rights acquired prior to marriage and spousal inheritances and gifts received during the marriage.

Comparative Negligence The approach to determining damages in negligence cases followed by most states. These states apportion damages between the plaintiff and defendant in proportion to each party’s contributory fault. Thus the trier of fact in a case determines the total damages and then assigns a percentage of the total fault to the plaintiff, as well as well as the

defendant; the plaintiff's total damage award is usually reduced by that percentage.

Compensatory Damages Damages awarded to compensate the plaintiff for actual monetary losses resulting from the defendant's conduct.

Competent Legally adequate.

Competent Party A person who has the legal capacity to bind himself or herself contractually.

Complaint Under modern rules of civil and criminal procedure, a pleading that is filed to commence an action.

Concurrent Ownership Property held simultaneously by more than one person.

Concurring Opinion An opinion written by a judge who, while voting with the majority, has additional comments to make that go beyond what is included in the majority opinion.

Condition Precedent A contractual requirement that some specified event must occur before a duty to perform becomes operative.

Condition Subsequent A contractual requirement that discharges the parties from their duties if a specified event occurs.

Conflict of Laws The variance between the laws of two states or countries relating to the subject matter of a suit brought in one of them, when the parties to the suit, or some of them, or the subject matter, belong to the other.

Consideration An essential element of contracts. That which is bargained for and given in exchange for another's promise, usually consisting of the performance of an act or promise to do an act, or to refrain from doing an act or to give up a right.

Conspiracy A crime committed when two or more people agree to commit a criminal act and one or more of the conspirators takes a significant step in furtherance of the intended criminal objective.

Constructive Service Service is accomplished by publishing the notice of summons in the legal announcements section of newspapers.

Construe To interpret the meaning of words.

Consumer Credit Protection Act (CCPA) A statute enacted by Congress in 1968 to promote the disclosure of credit terms and to establish the rights and responsibilities of both creditors and consumers.

Contingent Fee Agreement A method of compensation for lawyers. The lawyer takes a contractually agreed upon percentage of the damages collected in lieu of other forms of compensation. The attorney receives nothing for his or her time if the client recovers nothing.

Contingent Property Rights Property rights that accrue only after the occurrence of some specified future event.

Contract A legally enforceable agreement containing one or more promises.

Contributory Negligence (1) The failure to exercise care by a plaintiff, which contributed to the plaintiff's injury. Even though a defendant may have been negligent, in some jurisdictions, contributory negligence will bar a recovery by the plaintiff. (2) Conduct on the part of a plaintiff that falls below the standard to which the plaintiff should conform for his or her own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm.

Conversion A flexible term. (1) The wrongful appropriation of the goods of another. (2) An intentional exercise of dominion or control over a chattel that so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.

Copyright A grant of rights to an author from the federal government. Authors of literary pieces, musical compositions, dramatic works, photographs, graphic works of various types, video and audio recordings, and computer software are protected against most unauthorized uses by placing a prescribed copyright notice on publicly disseminated copies of the work.

Corpus Juris Civilis Sixth-century Roman Code that was promulgated by the Emperor Justinian.

Counterclaim A defendant's claim against the plaintiff, which is usually included in the answer; it is essentially a defendant's "complaint."

Court of Equity Originally a court of equity headed by the Chancellor that came into being in the 14th century in England and lasted until 1875. Today, most states confer on their judges both the powers traditionally exercised by law judges as well as the powers traditionally exercised by the chancellor in the equity courts.

Court-Annexed ADR ADR participation is required either by legislation or court rule.

Covenant A common law writ initially used to enforce agreements pertaining to land and later used to enforce written agreements under seal; in other contexts, a promise contained in a deed or contract.

Creation A method for acquiring title to personalty. A person who manufactures products out of raw materials through physical or mental labor has title to the items created. However, someone who is employed to produce something does not take title to the thing produced.

Creditor Beneficiary A noncontracting person who is the intended beneficiary of a contract entered into between two other people.

Criminal Law Jurisprudence concerning crimes and their punishment.

Criminal Negligence A level of negligence greater than ordinary negligence in which the actor unconsciously creates risk of harm.

Cruel and Unusual Punishment A clause in the Eighth Amendment to the U.S. Constitution.

Curia Regis A 12th-century royal court established by Henry I which eventually became known as the Court of Kings/Queen's Bench.

Custodial Interrogation Police initiated questioning of a person who has been deprived of his liberty in a "significant" way. This term originated in the famous case of *Miranda v. Arizona*.

Custodial Parent A parent awarded primary physical placement of a child.

Damages A flexible term for the reparation in money that is allowed by law on account of damage. They may be general, such as necessarily and by implication of law arise from the act complained of; or special, such as under the peculiar circumstances of the case arise from the act complained of, but are not implied by law; compensatory, sufficient in amount to cover the loss actually sustained; exemplary, punitive, or vindictive, when in excess of the loss sustained and allowed as a punishment for torts committed with fraud, actual malice, or violence; nominal, when the act was wrong, but the loss sustained was trifling; substantial, when the loss was serious; liquidated, fixed by agreement of the parties, as when it is agreed beforehand what amount one shall receive in case of a breach of contract by the other.

Debt A common law writ used to collect a specific sum of money owed by another.

Declaratory Judgment A determination or decision by a court, which states the rights of the parties to a dispute, but does not order or coerce any performance relative to those rights. The procedural and substantive conditions of the usual action must be present. The relief that the court grants is the distinguishing characteristic.

Defamation (1) A flexible term for the uttering of spoken or written words concerning someone that tend to injure that person's reputation and for which an action for damages may be brought. (2) To create liability for defamation there must be (a) a false and defamatory statement concerning another, (b) an unprivileged publication to a third party, (c) fault amounting at least to negligence on the part of the publisher, and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Default Judgment The failure to plead or otherwise defend an action, by a party against whom a judgment for affirmative relief is sought.

Defendant A person against whom an action is brought, a warrant is issued, or an indictment is found.

Delegate (1) A person authorized to act for another. (2) A person elected to represent others in a deliberative assembly, such as a political convention.

Delegation The transfer of contractual duties to another person.

Demurrer A synonym for motion to dismiss.

Deposition A written record of oral testimony, in the form of questions and answers, made before a public officer for use in a lawsuit. They are used for the purpose of discovery of information, or for the purpose of being read as evidence at a trial, or for both purposes.

Detainer A writ requiring that a person be retained in custody.

Detinue A writ used to recover possession of personal property from someone who had possessory rights but refused to return it when requested.

Dicta Plural of dictum.

Dictum A statement by a judge concerning a point of law that is not necessary for the decision of the case in which it is stated. Usually, dictum is not as persuasive as its opposite, i.e., holding.

Direct Examination The initial questioning of a witness by the party who calls that witness.

Directed Verdict A determination by a jury made at the direction of the court, in cases where there has been a

failure of evidence, an overwhelming weight of the evidence, or where the law, as applied to the facts, is for one of the parties.

Disaffirm (A Contract) A party to a contract elects to back out of the agreement.

Discharge (1) A flexible term that connotes finality, e.g., cancellation, rescission, or nullification. (2) The court order by which a person held to answer a criminal charge is set free. (3) The court order by which a jury is relieved from further consideration of a case.

Discovery A pliant method by which the opposing parties to a lawsuit may obtain full and exact factual information concerning the entire area of their controversy, via pretrial depositions, interrogations, requests for admissions, inspection of books and documents, physical and mental examinations, and inspection of land or other property. The purpose of these pretrial procedures is to disclose the genuine points of factual dispute and facilitate adequate preparation for trial. Either party may compel the other party to disclose the relevant facts that are in his possession, prior to the trial.

Discretion The use of private independent judgment; the authority of a trial court that is not controlled by inflexible rules, but can be exercised one way or the other as the trial judge believes to be best in the circumstances. It is subject to review, however, if it is abused.

Dissenting Opinion An opinion written by a judge who disagrees with the court's majority. In the opinion the dissenting judge explains why he/she believes the majority has wrongfully decided the case.

Diversity of Citizenship Jurisdiction One of two categories of federal subject matter jurisdiction. For this type of jurisdiction to exist the lawsuit must be between citizens of different states or between a citizen of a state and an alien, and the amount in controversy must exceed \$75,000.

Divorce A term used to describe the entire process of concluding and reordering a couple's marital, parental, and economic relationships.

Doctrine of Forum Non Conveniens A judicial policy that permits a court to decline to exercise jurisdiction where it believes that the case can proceed more conveniently in another court.

Doctrine of Substituted Judgment An equitable doctrine that provides that a chancellor in equity has the right to act for an incompetent in the same manner as the incompetent would if he/she were competent.

Domicile The state in which the defendant has established his or her permanent home and to which the defendant returns after temporary absences.

Donee Beneficiary A noncontracting person who is intended to receive the benefit of an agreement between the contracting parties, i.e., if A and B contract to replace a window in C's house, C is the donee beneficiary.

Due Process A concept traced back to Magna Carta that has traditionally stood for the notion that government has to treat people fairly when attempting to deprive them of "life, liberty, or property." The determination of what fairness requires in any given context is determined by courts on a case-by-case basis. This principle of due process is included in both federal and state constitutions. This fairness requirement applies both in procedural and substantive contexts.

Due Process Clause Clauses found in both the Fifth and Fourteenth Amendments to the U.S. Constitution expressly providing that people are entitled to due process of law when government is seeking to deprive them of "life, liberty or property." The Fifth Amendment due process clause applies to the federal government and the Fourteenth Amendment applies to the state governments.

Duress (1) Imprisonment; compulsion; coercion. (2) Threats of injury or imprisonment.

Easement A nonpossessory property right in land; it is one person's right to use another person's land.

Egoist One who believes it is ethically proper to act on one's own self interest, irrespective of the consequences to others.

Ejectment Formerly a mixed action at common law, which depended on fictions in order to escape the inconveniences in the ancient forms of action. It was a mixed action, because it sought to recover both possession of land (a real property claim), and also damages (a personal property claim). Various statutory proceedings for the recovery of land, some of which bear the same name, have taken place in most of the United States.

Embezzlement A crime in which a criminal actor who has been entrusted with another person's money or property uses the money or property to his/her own advantage, without permission, and in a manner adverse to the true owner's interests.

Eminent Domain The right of the government to take private property for a public purpose over the objection of a landowner. This governmental right is limited by the Fifth and Fourteenth Amendments to the

federal constitution, which provide that government must pay just compensation to the objecting landowner whenever property is taken to benefit the public by way of the power of eminent domain.

En Banc All judges assigned to a court hear the case as a group

Enabling Act A statute defining and guiding an administrative agency's structure, functions, powers, and objectives.

Entrapment A defense raised in a criminal prosecution where an officer induces a person who was not otherwise so disposed to commit a criminal act. The purpose of this defense is to deter this form of police misconduct.

Epistemology The study of knowledge.

Equal Credit Opportunity Act (ECOA) A statute enacted by Congress in 1974 to eradicate discrimination in the granting of credit when the decision to grant it or refuse it is based on an individual's sex, marital status, race, color, age, religion, national origin, or receipt of public assistance.

Equal Protection Clause The Fourteenth Amendment's equal protection clause prohibits discrimination on the basis of race, national origin, gender, or religion.

Equitable Court A court with jurisdiction to decide equitable claims and award equitable remedies. Also known as a court of chancery.

Equitable Distribution An alternative method for apportioning property in a divorce. The court ignores which party has title to marital property and based on the totality of the circumstances treats each divorcing party "fairly" after considering each party's contributions, needs, and the duration of the marriage.

Equitable Lien An equitable remedy used to avoid an unjust enrichment that would otherwise result because no other lien is provided by statute or under the common law.

Equitable Maxims Short statements of principle used to determine if an equitable remedy should be awarded.

Equitable Remedy A remedy traditionally available in equity but not under the common law.

Equity (1) Fairness. A type of justice that developed separately from the common law, and which tends to complement it. The current meaning is to classify disputes and remedies according to their historical relationship and development. Under modern rules of civil procedure, law and equity have been unified. Historically, the courts of equity had a power of framing and

adapting new remedies to particular cases, which the common law courts did not possess. In doing so, they allowed themselves latitude of construction and assumed, in certain matters such as trusts, a power of enforcing moral obligations that the courts of law did not admit or recognize. (2) A right or obligation attaching to property or a contract. In this sense, one person is said to have a better equity than another.

Erie Doctrine A judicial policy that is applied in federal court when adjudicating state matters. This policy provides that where federal jurisdiction is based on diversity of citizenship, a federal court should normally apply the substantive law that would be applied in the state courts of the district in which the federal court is situated.

Estate The amount of interest a person has in land.

Ethics The study of morality.

Ex Parte Injunction An injunction granted without notice to the party being enjoined.

Ex Post Facto Laws that make acts criminal that were not criminal at the time they were committed.

Exclusionary Rule A judicial remedy that under some circumstances excludes from trial evidence obtained by the prosecution. The evidence is suppressed because it was obtained by the police as a byproduct of infringing a criminal defendant's constitutionally protected rights.

Excuse Defenses The defendant acted unlawfully, but argues that no criminal responsibility should be imposed, given the particular circumstances accompanying the act; examples include duress, insanity, and involuntary intoxication.

Executed Contract A contract in which both parties have performed as agreed; a completed contract.

Execution (1) The writ, order, or process issued to a sheriff directing him to carry out the judgment of a court. (2) To complete a contract.

Executory Contract A contract that is incomplete.

Exemplary Damages A synonym for punitive damages.

Exhaustion of Administrative Remedies A requirement that all aggrieved persons pursue to conclusion all opportunities for administrative relief prior to seeking relief from the judiciary.

Express Contract A contract in which none of the terms is implied.

False Arrest; False Imprisonment (1) A tort consisting of restraint imposed on a person's liberty, without

proper legal authority. (2) False imprisonment is a misdemeanor consisting of knowingly restraining another unlawfully so as to interfere substantially with his or her liberty.

Family There is no single universally accepted legal definition of family. The word is generally defined by statute in operational terms, within a particular context (i.e., to specify which people are entitled to specified economic benefits). In Vermont, two same-sex partners in a civil union can qualify for family leave benefits. Under Social Security, a step child can sometimes qualify for family benefits. The traditional notion that a family consists of people sharing kinship and cohabitation is outdated. It is common for people to recognize more than one type of family (notably the nuclear family and the extended family, the nuclear family plus the grandparents, cousins, aunts and uncles). Many employers today refer to their employees as members of a business “family.”

Federal Arbitration Act A 1925 federal statute that establishes a policy of favoring the arbitration of disputes over commercial transactions.

Federal Register This daily publication of the federal government is where administrative agencies give notice of proposed rule making, publish proposed rules, and publish promulgated substantive rules not less than thirty days before the rule’s effective date.

Fee Simple The maximum ownership right to land that is permissible by law. A person who holds an estate in what is known as fee simple can pass his or her interest on to heirs.

Felony Although jurisdictional variations exist, a felony is generally regarded as any criminal offense for which a defendant is subject to execution or may be imprisoned for more than one year.

Feudalism A military, political, and social structure that ordered relationships between people. Under feudalism, a series of duties and obligations existed between a lord and his vassals.

Final Decision A decision that is not or cannot be appealed.

Fixture Formerly, an article which was a personal chattel, but which, by being physically annexed to a building or land, became accessory to it and part and parcel of it. It was treated as belonging to the owner of the freehold, and passed with it to a vendee, and, though annexed by a tenant for his own convenience in the occupation of the premises, could not be removed by

him. The rule has been modified by statute in many of the states, and is significantly relaxed in practice, especially as between landlord and tenant. Trade fixtures and ornamental fixtures may usually be removed by the tenant at the end of his term, provided he does no material injury to the freehold. Written leases often make specific provisions concerning the matter.

Forbearance Refraining from doing an act, or giving up a right.

Foreign Laws Those enacted and in force in a foreign state, or country.

Foreseeability An individual is only responsible in negligence for those consequences that are reasonably foreseeable, and will be relieved of liability for injuries that are not reasonably related to the negligent conduct.

Formal Rule Making The procedural requirements that provide for a trial-like hearing process “on the record,” complete with witnesses and recorded testimony, as well as findings of fact and conclusions of law.

Forum (1) A court of justice; the place where justice must be sought. (2) Formerly, an open space in Roman cities, where the people assembled, markets were held, and the magistrates sat to transact their business.

Forum State The state in which a lawsuit has been filed.

Foster Care A child care placement with a family (the foster family) or group home, that is willing to provide an unadopted child with short-term “parenting” in the foster family’s home. Some parents voluntarily place their children in foster care for a brief time. Most foster placements, however, result from court intervention because of alleged child abuse or neglect.

Fraud Intentional acts of deception used by one individual to gain an advantage over another.

Full Faith and Credit The requirement that the public acts, records, and judicial proceedings of every state shall be given the same effect by the courts of another state that they have by law and usage in the state of origin. U.S. Const., Art. IV, Sec. I. Congress has prescribed the manner in which they may be proven.

Fundamental Liberties Fundamental rights are rights that have been given “heightened protection” by the U.S. Supreme Court. These include most of the protections expressly included in the Bill of Rights. The Court has also added other rights to the list that it has found by implication to be deserving of fundamental constitutional protection. Some examples include the

rights to marry, to determine how one's children are raised and educated, to marital privacy, and to abortion.

Garnishment A judgment enforcement process that results in the debtor's employer being ordered to deduct a percentage of the debtor's earnings from each paycheck.

General Appearance A person makes a general appearance by not objecting to in personam jurisdiction and by arguing the substantive facts of the case. Such a person is implicitly consenting to personal jurisdiction.

General Damages Damages that are the natural and necessary result of the wrongful act or omission, and thus can normally be expected to accompany the injury.

General or Residual Jurisdiction The authority of a court to hear and decide an action or lawsuit, except for those cases that are within the exclusive jurisdiction of another court.

Genuine Assent Agreement to contract that is not induced because of misrepresentation, fraud, duress, undue influence, or mistake.

Good Character Defense Defense proves character traits and argues that the defendant's character is so sterling that he/she would never have committed the crime as charged.

Grand Jury A body of persons, not less than twelve, nor more than twenty-four, freeholders of a county, whose duty it is, on hearing the evidence for the prosecution in each proposed bill of indictment, to decide whether a sufficient case is made out, on which to hold the accused for trial. It is a body that is convened by authority of a court and serves as an instrumentality of the court. It has authority to investigate and to accuse, but it is not authorized to try cases. It is a creature of the common law that was instituted to protect the people from governmental oppression. In a few states, it has been partially abolished, but in others it exists by constitutional mandate. No person shall be held to answer for a capital or otherwise infamous federal crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; U.S. Const., Fifth Amendment.

Grantee The recipient of a grant.

Grantor The person making a grant.

Guardian A person appointed by a court, to have the control or management of the person or property, or

both, of another who is incapable of acting on his own behalf, e.g., an infant or a person of unsound mind.

Habeas Corpus A writ used to require that a detained person be brought before the court. The purpose of habeas review is to test the legality of the detention.

Harmless-Error Doctrine A judicial doctrine that provides that a criminal conviction need not be automatically reversed just because it has been proved that constitutional error occurred during the trial. There should be no reversal, according to the U.S. Supreme Court, where the quantity and quality of the factual evidence introduced at trial is consistent with the jury's verdict and is so strong that appellate courts can forecast beyond a reasonable doubt that the error was not included in the jury's calculus in reaching its verdict. Errors of this sort are classified as "harmless."

Hearing A flexible term for a court proceeding or trial.

Hearsay Evidence A statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Usually, such evidence is inadmissible, but exceptions are made, e.g., in questions of pedigree, custom, reputation, dying declarations, and statements made against the interest of the declarant.

Hedonic Damages Damages awarded to compensate for the loss of enjoyment of life.

Historical Jurisprudence Adherents of this philosophical approach believe that law is only valid to the extent that the will of the sovereign is compatible with long-standing social practices, customs, and values.

Holding The rule of law that the court says applies to the facts of the case.

Hundred The lowest unit of governmental organization in Anglo-Saxon England. Its primary function was judicial. It operated a court that met monthly and handled civil and criminal matters according to local custom. Hundreds were grouped into shires.

Illegal Contract An agreement's formation or performance is criminal, tortious, or contrary to public policy.

Immunity Preferential protection from lawsuits.

Impeach (1) To charge a public official with crime or misdemeanor, or with misconduct in office. (2) To undermine a witness's testimony by proving lack of veracity, prior inconsistent statement, bias, or that the witness is otherwise unworthy of belief.

Implied Contract Contract presumed by law to have been made from the circumstances and the conduct of the parties.

Imputed Negligence A person can be held vicariously liable for the negligence of another when one person (the agent) acts for or represents another (the principal) by the latter's authority and to accomplish the latter's ends.

In Camera A hearing held in a judge's office or in a closed courtroom.

In Personam Jurisdiction Jurisdiction over the persons of the plaintiff and defendant.

In Rem Jurisdiction Jurisdiction over property.

Inchoate Crimes Solicitation, attempt, and conspiracy.

Independent Adoption Birth parent(s) interview and select prospective adoptive parents without agency involvement. Some states prohibit independent adoptions.

Independent Contractor A person who agrees with another to do something for the other, in the course of his or her occupation, but who is not controlled by the other, nor subject to the other's right to control with respect to the performance of the undertaking, and is thereby distinguished from an employee.

Indictment A written accusation that one or more persons have committed a crime, presented upon oath, by a grand jury. The person against whom the indictment is returned is said to be indicted.

Infamous Crimes An offense carrying a term of imprisonment in excess of one year.

Infliction of Mental Distress An intentional tort in which the tortfeasor's outrageous conduct intentionally and recklessly subjects someone to severe emotional distress. The tortfeasor's conduct must be serious in nature and cause anguish in the plaintiff's mind.

Informal Rule Making Procedural requirements in the Administrative Procedures Act that provide for "notice and comment" rule making. In informal rule making, agencies are required to publish proposed rules in the Federal Register, so that interested persons can receive notice of the agency's intentions and have an opportunity to submit written submissions in which they comment on the proposed rule, and if the agency so desires, make oral presentations.

Injunction A flexible, discretionary process of preventive and remedial justice, which is exercised by courts

that have equity powers. Courts issue injunctions when it appears that the ordinary remedy usually provided by law is not a full, adequate, and complete one. Injunctions are preventive if they restrain a person from doing something, or mandatory if they command something to be done. They are preliminary, provisional, or interlocutory if they are granted on the filing of a bill, or while the suit is pending, to restrain the party enjoined from doing or continuing to do the acts complained of, until final hearing or the further order of the court. They are final, perpetual or permanent if they are awarded after full hearing on the merits, and as a final determination of the rights of the parties.

Insanity Defendant claims to lack the capacity to commit the crime with which he/she is charged; the meaning of capacity varies by jurisdiction.

Insurance People contract with insurance companies and pay premiums in exchange for economic protection against specified risks. Common examples include automobile, property, life, health, and professional liability insurance.

Intangibles A kind of property that is nonphysical and not subject to being sensed (e.g., touched or felt), but which exists as a concept of people's minds (e.g., promissory notes, bank accounts, and corporate stock).

Integrity Quality of a person whose behavior is consistent with moral principles.

Intentional Torts Civil wrongs in which the defendant is alleged to have intentionally interfered with the plaintiff's person, reputation, or property.

Interference With Contract Relations An intentional tort in which a noncontracting party or third person wrongfully interferes with the contract relations between two or more contracting parties.

Intermediate Appellate Court An appellate court above trial courts and below the highest appellate court in a judicial system.

Interpretive Rule Administrative rule used to explain an agency's interpretation of an ambiguous statute or its understanding of the meaning of an important term which the legislature body has neglected to define.

Invasion of Privacy An intentional tort in which the tortfeasor invades someone's right to be free from unwarranted publicity that places the plaintiff in a false light, intrudes into the plaintiff's private life, discloses embarrassing private facts, or uses the plaintiff's name or likeness for the defendant's gain.

Investigative Power A delegated power contained in an enabling act authorizing an administrative agency to engage in fact-finding.

Investigatory Detentions (Stop and Frisk) An investigative stop is a warrantless, nonprobable cause based seizure of a person by police for investigative purposes. The U.S. Supreme Court approved brief seizures by police for investigative purposes where officers have reasonable suspicion to believe that a person has committed, is about to commit, or is committing a crime. The Court ruled that officers have the right to make such brief stops so that they can engage in brief questioning. The Court has further approved a limited frisk of the detained person if officers can articulate reasonable suspicion to believe that the detained person possesses a weapon. The officers are then permitted to conduct a pat-down of the detained person's outer clothing for self protection while questioning the suspect. If the frisk discloses anything that feels like a weapon, the frisking officer can reach into the detained person's garments to remove the object/s identified in the frisk. An officer who has finished questioning the detained person is required to return any seized object that was legally possessed, and can retain any object that was illegally possessed.

Invitee (1) A person who goes upon land or premises of another by invitation, express or implied. (2) Either a public invitee or a business visitor: (a) Public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. (b) Business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

Involuntary Adoption Adoption occurs after a court has formally terminated the parental rights of the birth parent(s) on grounds such as abuse, abandonment, or neglect.

Involuntary Intoxication A criminal defense available to a person who is not responsible for having become intoxicated due to the actions of others or circumstances beyond his/her knowledge and/or control.

Irresistible Impulse Test This test provides that a criminal defendant is not guilty by reason of insanity if the defendant, although knowing that an act is wrong and aware of the nature and quality of the act, cannot refrain from committing the act due to mental disease or defect. Used to determine insanity in some jurisdictions.

Joint and Severable Liability Persons who commit a tort at the same time are both individually and collectively liable for the entire harm.

Joint Custody Court grants custody to both parents instead of just one. Both parents share decision-making responsibilities in regard to their child's upbringing. The parents, although no longer married to each other, continue to share a family.

Joint Tenancy Each tenant takes an equal, undivided interest in the ownership of property from the same source and at the same time. Includes a right of survivorship, which means that a deceased joint tenant's rights automatically pass to the surviving joint tenants and not through the deceased's will.

Judgment A judgment determines the rights of the disputing parties and decides what relief is awarded (if any).

Judgment Creditor Person awarded a money judgment.

Judgment Debtor Person who has been ordered in a judgment to pay money to a judgment creditor.

Judicial Deference A court's willingness to show deference to an agency's competence. Courts generally sustain administrative findings if satisfied that the agency has examined the issues, reached its decision appropriately, and followed required procedures.

Jurisdiction The power or authority of a court to determine the merits of a dispute and to grant relief.

Jurisprudence The study of legal philosophy.

Justiciable A case is justiciable if it is well-suited for judicial determination.

Justification Defenses Criminal defenses in which the defendant claims to have acted correctly. Examples include self-defense, defense of others, defense of property, necessity/choice of evils, and duress/coercion.

Knowingly A criminally accused person is aware that a prohibited result or harm is very likely to occur as a result of his/her act, but does not consciously intend the specific consequences that result from the act.

Labor Management Relations Act A 1947 federal statute providing for the arbitration of disputes arising from collective bargaining.

Laches An equitable doctrine that can be used to bar equitable relief to a plaintiff who has unreasonably delayed filing suit under circumstances that unfairly prejudiced the defendant.

Larceny The unlawful taking and carrying away of another's personal property without color of right, and with intent to deprive the rightful owner of the same. Larceny is commonly classified as grand or petty, according to the value of the object taken. Usually defined and classified by various state statutes.

Leading Question An improper question on direct examination that suggests the answer to the witness.

Leasehold In general, a possessory interest in real property for a specified period of time (often a month or year) held by a person who leases property.

Legal Detriment The taking on of a legal obligation, the performance of an act, or the giving up of a legal right.

Legal Duty A legal obligation created by statute, contract, case law, or which has been voluntarily assumed.

Legal Realists Adherents of this philosophical approach focus on the extent to which actual practices vary from the formal legal rules. They believe that judges are more influenced by their personal convictions than by established and immutable rules.

Legal Separation Granted when lawfully married parties have actually separated and when adequate grounds for a legal separation have been shown. The parties remain married to each other but live apart. During the legal separation, the possibility of reconciliation still exists, as does the option to proceed with a final divorce. The separation period allows the estranged parties to try to work out their difficulties while living apart. Also known as a *mensa et thoro* divorce.

Legal Sociologists Adherents of this philosophical approach use quantitative methodological tools to explain legal outcomes. They use measurements of such factors as the financial standing, race, social class, respectability, and cultural differences of those involved in disputes to explain why some people win lawsuits and others do not.

Lex Fori The law of the place where the action was instituted.

Lex Loci Contractus The law of the state where the last act necessary to complete the contract was done and which created a legal obligation.

Lex Loci Delicti Commissi The substantive law of place where the last event necessary to make the actor liable takes place or where the person or thing harmed is situated at the time the wrong is committed.

Lex Loci Solutionis The law of the place where the contract was to be performed.

Libel (1) Defamatory writing; any published matter that tends to degrade persons in the eyes of their neighbors, or to render them ridiculous, or to injure their properties or businesses. It may be published by writing, effigy, picture, or the like. (2) Broadcasting of defamatory matter by means of radio or television, whether or not it is read from a manuscript.

License In property law, a temporary grant of authority to do specified things on the land of another.

Licensee A person who enters or remains on the land of another with express or implied consent.

Lien A security device, by which there is created a right (1) to retain that which is in a person's possession, belonging to another, until certain demands of the person in possession are satisfied; or (2) to charge property in another's possession with payment of a debt, e.g., a vendor's lien.

Life Estate An estate in land held for the duration of the holder's life but which cannot be passed on to heirs.

Line-Ups A police investigative procedure in which an array of people or an array of photographs of people, including the suspect, are displayed as a group before a victim or witness who may or may not be able to make an identification.

Liquidated Damages The exact amount of money, which the parties to a contract expressly agree must be paid, or may be collected, in the event of a future default or breach of contract.

Logic The study of correct reasoning.

Long-Arm Statute A state statute that permits the exercise of personal jurisdiction over nonresident defendants who have had sufficient minimum contacts with the forum state.

Magna Carta The first Magna Carta was issued in 1215 by the English monarch King John. It is the original source of the protections imbedded in the Due Process Clauses found in the U.S. Constitution.

Majority Opinion An opinion that explains the Court's decision in the case and the majority's reasoning for reaching that outcome.

Mala in Se Traditional label for criminal offenses that are intrinsically wrong.

Mala Prohibita Traditional label for illegal acts which are not intrinsically bad. They are criminal only because the law defines them as such.

Malicious Prosecution An intentional tort in which the plaintiff alleges that the defendant maliciously and without probable cause instigated a civil or criminal action against the plaintiff. The plaintiff must prevail in the original dispute and must have suffered legal injury due to the groundless nature of the defendant's original allegations.

Malpractice A nonlegal term for a professional person's negligence.

Mandamus A writ that commands a public official to perform a non-discretionary duty.

Mandatory Injunction A judicial order compelling a person to act in a specified way.

Marital Property Nonseparate property acquired during a marriage that is subject to distribution by a judge in conjunction with a divorce.

Marriage In 49 states, a state sanctioned relationship in which a man and woman after complying with relevant marriage eligibility requirements become husband and wife. In Massachusetts, a state sanctioned relationship between two people (irrespective of gender) who have complied with relevant marriage eligibility requirements.

Matching Investigative process in which agency ranks prospective adoptive parents in terms of how closely they match the agency's conception of the ideal family for the child.

Material Evidence that has significant probative value.

Maxim An axiom; a general or leading principle.

Mediation The settlement of disputes by the amicable intervention of an outside party who is a stranger to the controversy.

Medical Malpractice An allegation that a physician has either breached a contract or has been professionally negligent in diagnosing and/or treating a patient.

Mens Rea Criminal state of mind.

Mensa Et Thoro Divorce See legal separation.

Metaethics The study of ethical terms and arguments.

Metaphysics The study of the nature of reality or being.

Minitrial A misnomer because it is a process used in business disputes and is an alternative to a trial. In this process each party makes a short presentation to a panel comprised of senior managers or decision makers (i.e., employees of the respective parties who have been selected to participate by their employers) and a neutral.

After the presentations are concluded, the panel negotiates a resolution of the dispute.

Misdemeanor Generally, any crime or offense greater than an ordinance violation but not amounting to a felony.

Misprision A common law crime in which the accused failed to tell authorities about the commission of a felony of which the person had knowledge.

Misrepresentation One party to a contract either knowingly or unknowingly misrepresents a material fact that misleads the other contracting party into relying on false facts.

Mistake Where one or both contracting parties unintentionally misunderstand or are ignorant of a fact that is material to their agreement.

Money Damages A sum of money claimed by a plaintiff as recompense for injuries sustained as a result of an alleged breach of contract or the commission of a tort.

Moot Case A case that is no longer justiciable because no present case or controversy continues to exist. Mootness is an aspect of ripeness.

Moral Duty A universally accepted moral obligation.

Motion for Directed Verdict A motion made by the defendant at the end of all the evidence. The motion is granted if the court concludes that evidence favors one side to such an extent that no reasonable juror could find in favor of the other party. This motion is not available to the prosecution in a criminal case but is available to criminal defendants.

Motion for Judgment Notwithstanding the Verdict A motion made after a jury verdict is returned. It is granted when the judge decides that reasonable people could not have reached the verdict that the jury has reached.

Motion for New Trial This motion may be granted by a judge for a variety of reasons, including excessive or grossly inadequate damages, newly discovered evidence, questionable jury verdict, errors in the production of evidence, or simply in the interest of justice.

Motion for Relief from Judgment A motion for relief from judgment is granted only if the judge finds a clerical error in the judgment, newly discovered evidence, or that fraud induced the judgment.

Motion for Summary Judgment A motion made to dispose of controversies that can be decided without a full trial because either no genuine issues of material fact

exist or because facts necessary to prove the opponent's case are not provable or are not true.

Motion to Dismiss Sometimes also called a demurrer or a "12(b) motion." A motion used to challenge perceived defects in the plaintiff's complaint.

Natural Law Adherents of this philosophical approach believe that every person possesses a moral barometer that gives him or her the capacity to discover independently moral truth.

Natural Parent Birth parents.

Necessaries (1) Generally defined as the food, clothing, shelter, and medical care that one spouse is legally responsible for providing the other spouse. (2) What a parent is legally responsible to provide for his/her minor child's subsistence as measured by age, status, and condition in life, such as food, lodging, education, clothing, and medical services.

Negligence (1) A flexible term for the failure to use ordinary care, under the particular factual circumstances revealed by the evidence in a lawsuit. (2) Conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly in disregard of an interest of others.

Nominal Damages A token sum awarded where a breach of duty or an infraction of plaintiffs' rights is shown, but no substantial injury is proven to have been sustained.

Noncustodial Parent The parent in a custody dispute not awarded primary physical placement with a child.

Nonsuit A trial motion made by the defendant in a civil case at the end of the plaintiff's case-in-chief. It is granted where the court rules that the plaintiff's case is too weak to continue with the trial. The court must conclude that no reasonable person could find in favor of the plaintiff even if all disputed facts are found to be in the plaintiff's favor. If the motion is granted, the court awards a judgment to the defendant.

Normative Ethics The study of whether particular conduct should be classified as moral or immoral.

Notary Public A state official authorized to administer oaths and to authenticate documents.

Notice (1) Information given to a person of some act done, or about to be done; knowledge. Notice may be actual, when knowledge is brought home to the party to be affected by it; or constructive, when certain acts are done in accordance with law, from which, on grounds of

public policy, the party interested is presumed to have knowledge. It may be written or oral, but written notice is preferable to avoid disputes as to its terms. (2) A person has notice of a fact when he or she has actual knowledge of it, or has received a notice or notification of it, or, from all the facts and circumstances known to him or her at the time in question, has reason to know that it exists.

Novation The substitution of a new obligor or obligation for an old one, which is thereby extinguished, e.g., the acceptance of a note of a third party in payment of the original promisor's obligation, or the note of an individual in lieu of that of a corporation.

Nuisance A nuisance exists when one person's use of real property injures or infringes on another person's use and/or enjoyment of land or infringes on the general public's rights.

Occupational Health and Safety Administration (OSHA) An administrative agency created by Congress in 1970 to set and enforce environmental standards within the work place that would improve employees' safety and working conditions.

Offer A definite proposal to make a contract that is communicated to another person.

Offeree The recipient of an offer to contract.

Offeror A person who makes an offer to contract.

Open Adoption An adoption in which the adoptive parents permit the birth mother to remain in contact with the adopted child.

Option A contract in which an offeror is bound to hold an offer open for a specified period of time in exchange for consideration, usually a sum of money.

Oral Deposition A discovery tool in which a witness is examined under oath, by the lawyers for each party and the testimony is transcribed by a certified court reporter.

Pardon The remission by the chief executive of a state or nation of the punishment to which the person to be pardoned has been sentenced.

Parole Supervised suspension of the execution of a convict's sentence, and release from prison, conditional upon his continued compliance with the terms of parole. Statutes generally specify when and if a prisoner will be eligible to be considered for parole and detail the standards and procedures applicable.

Parole Evidence Rule Evidence of alleged prior agreements or terms not contained in the written document will be inadmissible if offered to change the terms of the document.

Patent A grant of rights to an inventor from the federal government. The inventor, or owner of the rights, has the exclusive right to make, use, license others to use, and sell an invention for a period of years (twenty years for most inventions). Patents are only granted for inventions that are beneficial, original, and involve ingenuity.

Penal Statutes Statutes that command or prohibit certain acts and establish penalties for their violation.

Per Curiam Opinion Usually a brief appellate court opinion for the entire court that does not identify any jurist as author. For example, if nine justices of the Supreme Court agree on the outcome of the case but completely disagree as to why that outcome is correct, the Court might announce its decision in a per curiam opinion and then each justice could write a concurring opinion explaining that justice's views as to the rationale supporting the decision.

Personal Property Tangible objects that are not realty or fixtures and all intangible rights, duties, and obligations arising out of the ownership of tangible objects. Personal property also includes intangible property, such as money, stocks, and bonds, that are paper substitutes for certain ownership rights.

Personal Service Delivering summons personally to a defendant.

Personalty Personal property.

Petitioner (1) A party wishing to have its case reviewed by the U.S. Supreme Court who has petitioned the Court for a writ of certiorari. (2) Someone who petitions a court.

Physical Custody Rightful possession.

Plaintiff A person who initiates a lawsuit.

Plea Bargaining A process by which the accused agrees to enter a plea of guilty, often to a lesser offense, in exchange for a promise by the prosecuting attorney to recommend a lesser sentence or a dismissal of part of the charges.

Plea of Nolo Contendere A plea that is equivalent to a guilty plea, except that it cannot be used as an admission in any subsequent civil action admission.

Pleadings The alternate and opposing written statements of the parties to a lawsuit. The typical pleadings include the complaint, answer, and occasionally a reply.

Police Power A flexible term for the authority of state legislatures to enact laws regulating and restraining

private rights and occupations for the promotions of public health, safety, welfare, and morals.

Political Question Doctrine Political issues should be resolved by the political branches of government and not by the judiciary.

Positive Law Legislated rules or law.

Possessory Interest The right of possession.

Preferred Custody Statutes Some states require that preference be given to a child's primary caretaker, when the primary caretaker can be established. Such an approach favors neither gender, and provides the child with continuity and stability in parenting.

Preliminary Hearing A hearing at which the prosecution must establish the existence of probable cause to believe that a felony was committed and that the accused was the person who committed the crime.

Pretrial Conference A meeting between the judge and counsel for the parties, preliminary to the trial of a lawsuit. Under modern rules of civil procedure, in any lawsuit, the court may in its discretion direct the attorneys for the parties to appear before it for a conference, to consider any matters that may aid in the disposition of the lawsuit.

Preventive Detention Preventive detention occurs when criminally accused persons are denied bail because they are alleged to have committed very serious crimes and because they allegedly pose a serious threat of danger to particular individuals or to the public safety in general.

Prima Facie Evidence Proof of a fact or collection of facts from which other facts can be presumed. In most situations the presumed fact(s) can be rebutted by other relevant proof.

Principal The leading, or most important; the original; a person, firm or corporation from whom an agent derives his authority; a person who is first responsible, and for whose fulfillment of an obligation a surety becomes bound; the chief, or actual, perpetrator of a crime, as distinguished from the accessory, who may assist him; the important part of an estate, as distinguished from incidents, or accessories; a sum of money loaned, as distinguished from the interest paid for its use.

Private Nuisance A tort that requires proof of an injury that is distinct from that suffered by the general public. (It differs from trespass because the offensive activity does not occur on the victim's property.) A party injured by a private nuisance can obtain both damages and injunctive relief.

Private Trial The parties to the dispute contract with a private business to conduct a private trial before a private judge (often well reputed and recently retired) who has experience appropriate to the case or a private jury. The news media and general public have no right to attend these trials. The parties often use simplified evidentiary and procedural rules, cooperate with discovery, and decide whether the decision of the private judge or jury will be appealable.

Privilege (1) An exceptional right, or exemption. It is either (a) personal, attached to a person or office; or (b) attached to a thing, sometimes called real. The exemption of ambassadors and members of Congress from arrest, while going to, returning from, or attending to the discharge of their public duties, is an example of the first. (2) The fact that conduct which, under ordinary circumstances, would subject an actor to liability, under particular circumstances does not subject him to liability. A privilege may be based upon (a) the consent of the other affected by the actor's conduct, or (b) the fact that its exercise is necessary for the protection of some interest of the actor or of the public that is of such importance as to justify the harm caused or threatened by its exercise, or (c) the fact that the actor is performing a function for the proper performance of which freedom of action is essential.

Privileged Communication A confidential communication that cannot be introduced at trial because the law recognizes the existence of a privilege. Privileges exist to protect legally favored rights (such as the privilege against self incrimination) and relationships (i.e., attorney-client, doctor-patient, clergy-parishioner). Because privileges permit the withholding of important evidence at trial, they are disfavored by courts.

Privy Participation in knowledge or interest. Persons who so participate are called privies.

Privy of Contract A legal term referring to the existence of a special relationship between the parties to a contract.

Privy of Estate The direct relationship between grantor and grantee.

Pro Se A person who appears without a lawyer and chooses to represent himself or herself appears pro se.

Probable Cause (1) A reasonable ground for suspicion, supported by circumstances sufficiently strong to warrant a cautious man to believe that an accused person is guilty of the offense with which he is charged. (2) Concerning

a search, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that the belief is correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required.

Procedural Due Process The premise underlying procedural due process is that justice is more likely to occur if correct procedures are employed when government seeks to deprive someone of life, liberty, or property. The U.S. Supreme Court has ruled that what procedures are due varies with the context. In criminal cases, for example, the procedures are quite extensive and the process is very formal. But when a school board decides to suspend a student for violating school rules, the procedures are much less extensive and the process is much less formal. But irrespective of context it is clear that procedural due process requires at a minimum an "impartial" decision maker, some kind of notice, some kind of hearing (although the Court has permitted the government in some contexts to take away financial benefits before conducting the requisite hearing).

Procedural Rule Administrative rule used to establish "standard operating procedures" within an agency.

Process The means whereby a court enforces obedience to its orders. Process is termed (a) original, when it is intended to compel the appearance of the defendant; (b) mesne, when issued pending suit to secure the attendance of jurors and witnesses; and (c) final, when issued to enforce execution of a judgment.

Production of Documents Showing of the documents in a court.

Prohibitory Injunction See prohibitory injunction.

Prohibitory Injunction A judicial order requiring a person to refrain from acting in a specified way.

Promisee The person to whom a promise is made.

Promisor The person making a promise.

Property Property includes the rights to possess, use, and dispose of things. These may be tangible objects, such as a car, book, or item of clothing, or they may be intangible, e.g., the technology in a camera, a song, or the right of publicity. Although many people refer to the objects themselves as property, "property" actually refers only to ownership rights and interests.

Property Right A person's ownership rights to things and to a person's interests in things owned by someone else.

Prosecutor A person who brings an action against another in the name of the government. A public prosecutor is an officer appointed or elected to conduct all prosecutions in behalf of the government.

Prospective Effect A new rule applies to all questions subsequently coming before that court and the lower courts of the jurisdiction.

Proximate Cause (1) Something that produces a result, without which the result could not have occurred.

(2) Any original event that in natural unbroken sequence produces a particular foreseeable result, without which the result would not have occurred.

Public Nuisance This exists when a land use poses a generalized threat to the public as a whole or to a substantial segment of the community. An action to redress a public nuisance is brought by government, oftentimes by criminal prosecution and injunctive relief.

Public Policy (1) A highly flexible term of imprecise definition, for the consideration of what is expedient for the community concerned. (2) The principle of law that holds that no person can do that which has a tendency to be injurious to the public, or against the public good.

Punitive Damages Damages awarded in excess of the general damages or economic loss, intended solely to punish the offender.

Purposely A conscious desire to produce a prohibited result or harm.

Quantum Meruit As much as he or she deserves. An equitable means for determining what sum is due where there is no actual agreement between parties but where fairness requires that a contract be implied in order to avoid an unjust enrichment.

Quasi-Contract An obligation that arises without express agreement between the parties; an implied contract.

Ratification of Contract An expression or action that indicates an intention to be contractually bound.

Realty Land and things that are attached permanently to land.

Recklessly Acts by a person with utter indifference to the welfare of others and that pose a significant and unjustifiable risk of harm to other people.

Recognizance An unsecured promise to appear in court when so required.

Record A written memorial of the actions of a legislature or of a court.

Recording System The process by which purchasers of realty can evaluate the quality of the seller's title to a parcel.

Redirect Examination A second direct examination of a witness conducted by the attorney or party who first called this witness to testify. This examination occurs after the cross-examination of the witness.

Reeve The official heading the hundred in Anglo Saxon England.

Reformation An action brought requesting that a judge correct a provision contained in a written instrument, so that the instrument expresses the true agreement or intention of the parties. Also known as rectification.

Rehabilitative Alimony A sum of money that, when appropriate, a judge will award a dependent spouse in a divorce action so that the recipient can obtain education or training to strengthen job skills.

Relevant Evidence that logically tends to prove or disprove some issue of consequence that is in dispute at the trial or hearing.

Remand Return of a case by an appellate court to a lower court with instructions to the lower court to take further specified action.

Remedy (1) The legal means to declare or enforce a right or to redress a wrong. (2) Any remedial right, to which an aggrieved party is entitled.

Remittitur For purposes of this textbook (because it has more than one meaning), remittitur refers to a non-prevailing party's post verdict motion to reduce a jury's award of money damages. The motion is granted by a trial or appellate court that has been convinced that the jury's verdict is grossly excessive.

Replevin A writ used to recover possession of personal property wrongfully in the possession of another.

Reply A pleading in which the plaintiff admits, denies, or raises defenses against the factual allegations raised in the defendant's counterclaim.

Request for Admissions A method of discovery in which one party sends to the other party a request that the other party admit that certain facts are true and/or that specified documents are genuine.

Request for Waiver Of Service Defendants who voluntarily waive their right to be formally served with

process are allowed 60 days, instead of just 20 days, to respond to the complaint.

Res Ipsa Loquitur A judicial doctrine which permits plaintiffs to circumstantially prove negligence if the following facts are proved: (1) the defendant had exclusive control over the allegedly defective product during manufacture, (2) under normal circumstances, the plaintiff would not have been injured by the product if the defendant had exercised ordinary care, and (3) the plaintiff's conduct did not contribute significantly to the accident. From the proved facts, the law permits the jurors to infer a fact for which there is no direct, explicit proof: the defendant's negligent act or omission.

Res Judicata In general, a judicial policy that once a valid judgment has been rendered on the merits in one jurisdiction, the claims adjudicated in that lawsuit cannot be relitigated by the same parties in some other jurisdiction.

Rescission The cancellation of or putting an end to a contract by the parties, or by one of them, e.g., for any reason mutually acceptable to the parties, or on the ground of fraud.

Residual Jurisdiction A court with residual jurisdiction exercises original jurisdiction over subject matter that has not been assigned by the legislature to a court of original, limited, subject matter jurisdiction.

Respondent (1) The name given one of the parties in a case before the U.S. Supreme Court. The petitioner is the party asking the Court to grant a writ of certiorari. The respondent is the party opposing the granting of the petition. (2) The name given a party in any court who is before the court in response to another party's petition.

Restitution The restoring of property, or a right, to a person who has been unjustly deprived of it. A writ of restitution is the process by which an appellant may recover something of which he has been deprived under a prior judgment.

Restoration in Specie The meaning of this term varies with the context in which it is used. In this textbook it refers to requiring a person wrongfully in possession of property to return the property or its monetary equivalent to the person who rightfully is entitled to possession.

Retroactive Effect A new rule applies to causes of action arising before the announcement of the decision.

Reversal An appellate court enters a judgment of reversal when it rules that a lower court's judgment should be overturned.

Ripeness A case is ripe if it has developed sufficiently to be before a court for adjudication. If a lawsuit has been filed prematurely it is not ripe for adjudication.

Rule of Mitigation An injured person must make a reasonable effort to avoid or minimize damages. Also called "avoidable harm" doctrine.

Rule-Making Power A delegated power contained in an enabling act authorizing an administrative agency to make, alter, or repeal rules and regulations on those subject to its terms.

Satisfaction The payment of owed money.

Separate Property Property not classified as "community property" because it was owned prior to the marriage or was received as a gift or inheritance.

Separation Agreement An agreement between divorcing parties as to the allocation of financial obligations and how property should be divided. It often contains recommendations on how the court should decide child custody and support, spousal support, and visitation rights. Although the court is ultimately responsible for determining each of the aforementioned issues, it is often greatly influenced by the proposals in a separation agreement.

Separation of Powers The federal constitution delegates the legislative power to the Congress in Article I, the executive power to the President in Article II, and the judicial power to the federal judiciary in Article III. The founders believed that dispersing power in this way would result in a system of checks and balances and prevent abuse.

Settlement Conference A pretrial meeting attended by the lawyers for the contesting parties and sometimes the judge to explore the possibility of settlement.

Severalty Ownership Property owned by one person.

Shire English counties are called shires.

Significant Relationship The law of the place that has the most significant contacts with the incident or event in dispute.

Slander The malicious defamation of a person in his reputation, profession, or business by spoken words. Usually, the truth of the words spoken is a defense. Statutorily defined in many states' statutes.

Sociological Jurisprudence Adherents of this approach believe that law is not just the formal rules, but also the informal rules that actually influence social behavior. The sociological school maintains that law can

only be understood when the formal system of rules is considered in conjunction with social realities (or facts).

Solicitation A specific intent crime committed by a person who asks, hires, or encourages another to commit a crime.

Sovereign Immunity A rule of law holding that a nation or state, or its political subdivisions, is exempt from being sued, without its consent, in its own courts or elsewhere. Often criticized as being erroneously conceived, anachronistic, and unjust. Occasionally modified by court decisions, and various state and federal statutes, e.g., Tort Claims Act.

Sovereignty The supreme authority of an independent nation or state. It is characterized by equality of the nation or state among other nations or states, exclusive and absolute jurisdiction and self-government within its own territorial limits, and jurisdiction over its citizens beyond its territorial limits.

Special Appearance If a person appears in court to challenge a court's in personam jurisdiction, he/she is making a special appearance for that limited purpose and is not consenting to personal jurisdiction by arguing that issue.

Special Damages Damages awarded for injuries that arise from the particular circumstances of the wrong.

Special Verdict A verdict that requires the jury to answer specific questions related to certain factual issues in the case.

Specific Intent An additional specified level of intent beyond the commission of the actus reus.

Specific Performance The actual carrying out of a contract in the particular manner agreed upon. Courts of equity will compel and coerce specific performance of a contract in many cases, where damages payable in money, the usual remedy at law, would not adequately compensate for its nonperformance, e.g., in the case of contracts concerning land, or for the sale of a unique chattel.

Spontaneous Declarations An exception to the hearsay rule that permits courts to admit in court spontaneous declarations uttered simultaneously with the occurrence of an act.

Spousal Privileges The right to refuse to testify against a spouse in a criminal trial and to refuse to testify about confidential communications that occurred between spouses during their marriage.

Standing To have standing a plaintiff must have a legally sufficient personal stake in the outcome of the

litigation and must be adversely affected by the defendant's conduct.

Stare Decisis In general a judicial policy that guides courts in making decisions. The doctrine normally requires lower-level courts to follow the legal precedents that have been established by higher-level courts.

Status Crimes Status crimes punish people for being in a condition rather than for what they are doing or have done. Examples include being without visible means of support and being found addicted to narcotics.

Statute of Frauds Various state legislative acts, patterned after a 1677 English act, known by the same name. Because of the variations in each state, reference must be made to the specific state statutes. The main object was to take away the facilities for fraud, and the temptation to perjury, that arose in verbal obligations, the proof of which depended upon oral evidence. Its most common provisions are these: (a) all leases, excepting those for less than three years, shall have the force of leases at will only, unless they are in writing and signed by the parties or their agents; (b) assignments and surrenders of leases and interests in land must be in writing; (c) all declarations and assignments of trusts must be in writing, signed by the party (trusts arising by implication of law are, however, excepted); (d) no action shall be brought upon a guarantee, or upon any contract for sale of lands, or any interest in or concerning them, or upon any agreement that is not to be performed within a year, unless the agreement is in writing and signed by the party to be charged or his agent; (e) no contract for the sale of goods for a certain price or more, shall be good, unless the buyer accept part, or give something in part payment, or some memorandum thereof be signed by the parties to be charged or their agents.

Statute of Limitations Various periods of time, fixed by different state and federal statutes, called statutes of limitations, within which a lawsuit must be commenced, and after the expiration of which, the claimant will be forever barred from the right to bring the action. Generally, a statute of limitations is a procedural bar to a plaintiff's action that does not begin to run until after the cause of action has accrued and the plaintiff has a right to maintain a lawsuit.

Statute of Repose A statute of repose is similar to a statute of limitation in that it sets a maximum time within which a lawsuit can be brought. A statute of repose, however, is often broader than a statute of limitations in that its cut-off date is rigidly enforced and

cannot be “tolled” as can a statute of limitations. For example, a statute of limitations begins to run in a products liability case when the plaintiff is injured as a result of the defendant’s breach of a legal duty. A statute of repose would begin to run when the plaintiff took possession of the product. If the plaintiff rarely uses a product and then several years later while using the product becomes injured, the statute of limitations may not have elapsed because it would start to run on the date of the injury. If the state has enacted a statute of repose it might well have elapsed and would then bar any suit against the product’s manufacturer. Statutes of repose are often included in proposals for tort reform in that they absolutely cut off liability on a date certain irrespective of any other considerations.

Statutory Lien A lien created by statute.

Strict Construction A rule of statutory construction, particularly used in criminal cases where the language of a criminal statute is vague. A court should not enlarge the meaning of a criminal statute by implication beyond the fair meaning of the language used nor construe its meaning so as to defeat the obvious intention of the legislature.

Strict Liability Crime A *mala prohibita* offense that requires no proof of *mens rea*.

Strict Liability in Tort Liability for negligence imposed on defendant irrespective of defendant’s lack of fault, where injury occurred as a result of defendant’s abnormally dangerous activities or because a purchaser of manufacturer’s product was injured as a result of a product defect (i.e., a product liability case).

Subpoena A writ that requires a person to appear in court to give testimony.

Subpoena Duces Tecum A writ requiring that a witness appear in court with a document that is in his or her possession.

Substantive Due Process A label that is used to refer to the ongoing constitutional debate over what should be included within the scope of the Due Process Clause of the Fourteenth Amendment. At this time, most but not all of the rights enumerated in the Bill of Rights have been incorporated into the Fourteenth Amendment Due Process Clause and made binding on the states. Far more contentious, however, is the debate about which unenumerated rights should also be incorporated into the Fourteenth Amendment Due Process Clause. Students can get a taste of this debate by reading the excerpts from the opinions written by Chief Justice Rehnquist and

Justice Souter in the assisted suicide case in Chapter One—*Washington v. Glucksberg*.

Substantive Rule Administrative rule used to establish and implement policies that assist an agency to accomplish its statutorily established objectives.

Substituted Service The summons and complaint are mailed to the defendant by certified mail; these documents are left at the defendant’s home with a person who resides there and who is of “suitable age and discretion.”

Summary Jury Trial An abbreviated “practice trial” allows disputing parties to see how a group of regular jurors reacts to each side’s presentation and produces an non binding “verdict.” Useful when parties agree about liability but disagree as to damages.

Supremacy Clause As a general rule, Article VI, Section 2 of the federal constitution makes the U.S. Constitution, federal laws, and treaties “the supreme law of the land” taking precedence over state constitutions and laws where a direct conflict exists.

Suspect Classification Legislatively established classifications based on race, religion, national origin, alienage, and classifications that trammel on fundamental rights are likely to violate the provisions of the Equal Protection Clause of the Fourteenth Amendment. Suspect classifications are subject to strict scrutiny and can be justified only by a compelling state interest.

Tangible Descriptive of something that may be felt or touched; corporeal.

Tenancy by the Entirety A tenancy by the entirety is limited to married husbands and wives and is ended only upon death, divorce, or mutual consent. When a tenant spouse dies, title passes to the surviving spouse. If a divorce occurs, the tenancy is converted into a tenancy in common.

Tenancy in Common Similar to a joint tenancy; however, there is no automatic passing of the deceased’s rights to the surviving tenants (right of survivorship). Instead, the deceased’s rights pass according to his/her will.

Tender Years Doctrine An outdated view that courts should generally award custody of young children to their mother.

Title Ownership rights in property.

Tort A wrongful act, not involving a breach of an agreement, for which a civil action may be maintained.

Tortfeasor A person who commits a tort.

Trade Secret A plan, process, tool, mechanism, or compound, known only to its owner and those of his employees to whom it is necessary to confide it, in order to apply it to the uses intended. It is distinguishable from a patent in that it may be used by anyone who is able to discover its nature.

Trademark A unique symbol, term, phrase, or design that a company uses to help customers identify and distinguish its products from competitors.

Trespass (1) At common law, any offense less than treason, felony, or misprision of either. (2) Especially, trespass quare clausum fregit, i.e., entry on another's close or land without lawful authority. (3) Trespass on the case. (4) Criminal trespass is entering or surreptitiously remaining in a building or occupied structure, or separately secured or occupied portion thereof, knowing that he or she is not licensed or privileged to do so.

Trespass on the Case A statutory writ created by the English Parliament to redress private wrongs not addressed by the writ of trespass where the failure to perform a duty resulted in harm to a victim.

Trial Court's Jury Instructions The judge's instructions explain to the jury the elements of the claims and defenses that were raised by the parties, which party has the burden of proof with respect to each issue, and the forms of verdict being submitted to the jury, etc. After the close of the evidence in a jury trial, the parties will submit suggested jury instructions to the judge. The judge then holds a hearing out of the presence of the jury and after argument, rules as to which instructions are accepted. The accepted jury instructions are subsequently read to the jury.

Trial De Novo In some jurisdictions, a party who has had a trial in a local court can elect to have a county court with general jurisdiction decide the case afresh. This second trial is called a trial de novo because this second trial proceeds "from the beginning" just as if the first trial had not occurred.

Unconscionable Contract A contract clause that is too unfair or one-sided.

Undue Influence The will of a dominant person is substituted for that of the other party, and the substitution is done in an unlawful fashion, resulting in an unfair agreement.

Unenforceable A contract that courts will not enforce. Examples include oral agreements that have not been reduced to writing under circumstances where a writing

is required and breach of contract lawsuits that are barred by a statute of limitations.

Uniform Commercial Code A model code which has been substantially adopted by all states except Louisiana (which has not adopted those portions of the UCC which are based on common law notions because they are incompatible with that state's civil law approach to commercial law).

Unilateral Contract A contract in which one party makes a promise in exchange for another person performing or refraining from performing an act.

Unjust Enrichment The doctrine that places a legal duty of restitution upon a defendant who has acquired something of value at the expense of the plaintiff.

U.S. Courts of Appeals Normally the court to which appeals are directed from the federal district courts. There are thirteen federal judicial circuits.

U.S. District Courts Federal courts of original jurisdiction that function as the trial courts for the federal judiciary. Federal district courts are given limited subject matter jurisdiction by the Constitution and by Congress.

Utilitarianism A philosophical approach that focuses on the social usefulness of legislation rather than on natural law ideas of goodness and justice.

Valid Contract A binding and enforceable agreement that meets all the necessary contractual requirements.

Venue The place where judicial authority should be exercised.

Vested Fully effective.

Vicarious Liability Substituted or indirect responsibility, e.g., the responsibility of an employer for the torts committed by his employee within the scope of his employment.

Void Contract No contract, because no enforceable legal obligation has been created.

Void For Vagueness Doctrine Legislation that fails to establish minimal guidelines that structure and confine police discretion and/or that fail to provide citizens with fair notice of what is prohibited. Such legislation is too vague and violates substantive due process.

Voidable Contract An agreement in which one or more of the parties can elect to avoid an obligation created by contract because of the manner in which the contract was brought about (such as fraud, duress, or lack of capacity).

Voir Dire A pretrial oral examination of prospective jurors conducted to determine their qualifications.

Voluntary Adoption Birth parent(s) consent to the termination of their parental rights and surrender the child either to an agency for placement or to adoptive parents of their choosing.

Waiver The voluntary relinquishment of a legal right.

Wanton Misconduct Behavior that manifests a disposition to perversity. It must be under such circumstances and conditions that the party doing the act, or failing to act, is conscious that his or her conduct will, in all common probability, result in injury.

Warrant A written order from a court to an officer, directing the officer to arrest a person, or search specified premises for items subject to lawful seizure.

Writ of Account An old common law writ used to obtain a reconciliation statement of receipts and payments and to recover any money due.

Writ of Certiorari (1) “To be more fully informed,” an original writ or action whereby a cause is removed from an inferior to a superior court for review. The record of the proceedings is then transmitted to the superior court. (2) A discretionary appellate jurisdiction that is invoked by a petition for certiorari, which the appellate court may grant or deny in its discretion. The petition for a writ of certiorari is the legal vehicle used to obtain review from the United States Supreme Court.

Writ of Covenant An old common law writ used to enforce agreements relating to land, especially leases.

Writ of Debt An old common law writ used to collect a specific sum of money owed.

Writ of Entry An old common law writ used to regain possession of land.

Writ of Execution A court order commanding the sheriff to take possession of a judgment debtor’s non-exempt property so that it can be sold to satisfy a judgment.

Writ of Right A twelfth-century common law writ that required communal/manorial courts to conduct a trial according to specified royal procedures to determine if the demandant (the previous possessor who sought the writ) had been wrongfully dispossessed.

Writ of Summons The summons warns the defendant that a default judgment can be awarded to the plaintiff unless the defendant responds with a pleading (usually an answer) within a specified period of time.

Written Deposition A deposition in which the questions and answers are written down. Written depositions are significantly less expensive than oral depositions but can be useful for third party discovery.

Written Interrogatories Written questions propounded on behalf of one party in an action to another party, or to someone who is not a party, before the trial thereof. The person interrogated must give his answers in writing, and upon oath.

Year Books Annual series of important cases collected by English lawyers and students during the fourteenth and fifteenth centuries.

Zoning Laws and regulations that restrict the use of real property. They serve many purposes including protecting housing districts from industrial pollution, and the preservation of historically significant landmarks and agriculture. Zoning has also been used to exclude low income housing and adult entertainment establishments, and to reduce population density (and therefore the need for additional schools).



Introduction to Law & the Legal System 1975–2010: A Short Chronicle

Authors

Harrold J. Grilliot	editions 1–3
Frank August Schubert	editions 4–10

Publisher

Houghton Mifflin Company	editions 1–9
Cengage Learning	edition 10

AUTHOR'S COMMENTARY

I assumed responsibility for the textbook in 1988 and since then have produced editions 4–10. I was a professor at Northeastern University when Harold Grilliot died, and was using the third edition of the textbook in my own classes. I greatly liked the book and how well it worked in the classroom. I liked the succinct textual discussions and the way Professor Grilliot's case selections captured my students and helped them to overcome their fear of law, legal jargon, and complex procedures. I particularly appreciated *DuPont v. Christopher*, Grilliot's first case in Chapter One of his first edition (it really was on page 3). I always enjoyed that second day of class when we would plunge into the case. My students were initially convinced they could never survive that case, let alone the course. Yet with help they discovered they could and did overcome the challenge and when they emerged from the fog, having survived this ordeal, they believed they could handle anything that was to come. Later on in the course, usually after discussing the Erie Doctrine, I would have students reread the DuPont case so that they

could appreciate how much they had learned in the interim. They could not believe how easy it then seemed.

I was honored to have been asked to become the textbook's second author. Because I believed in Grilliot's philosophy, I have retained most of Grilliot's structure and approach. Over the years I have made changes which I believed were necessary for undergraduates and reflective of what was happening in the country.

The biggest changes occurred in the fifth edition. English legal history, philosophy of law, and the sample brief were added to Chapter One. Criminal law was added to the criminal procedure chapter. Three new chapters were written

including property law, alternative dispute resolution, and employment discrimination. The sixth edition included a procedural primer and, because the economy and employment situation had improved by the mid-1990s, Family Law replaced Employment and Discrimination. The most recent "new" chapter was the Ethics chapter, which debuted in the seventh edition.

I have included two figures in the Appendix (Figures A.1 and A.2) that illustrate the comings and goings of the chapters and the cases that have made at least seven appearances in the textbook during the last thirty-five years.

F.A.S.

EDITION	Grilliot Era				Schubert Era					
	one 1975	two 1979	three 1983	four 1988	five 1992	six 1996	seven 2000	eight 2004	nine 2006	ten 2010
CHAPTER HISTORY BY EDITION										
Introduction	x	x	x	x	x	x	x	x	x	x
The Judicial System	x	x	x	x	x	x	x	x	x	x
Limitations on Judicial Relief	x	x	x	x	x	x	x	x	x	x
Judicial Remedies	x	x	x	x	x	x	x	x	x	x
Civil Procedure	x	x	x	x	x	x	x	x	x	x
The Administrative Process/Law	x	x	x	x	x	x	x	x	x	x
Torts	x	x	x	x	x	x	x	x	x	x
Judicial Decisionmaking	x	x	x	x	x					
Criminal Procedure	x	x	x	x						
Legislation	x	x	x	x						
Government Reg of Business		x	x	x						
Contracts			x	x	x	x	x	x	x	x
Property					x	x	x	x	x	x
ADR					x	x	x	x	x	x
Criminal Law & Procedure					x	x	x	x	x	x
Family Law						x	x	x	x	x
Institutional Sources of US Law						x	x	x	x	x
Ethics								x	x	x
Employment Law & Discrimination					x					
Antitrust Law					x					

FIGURE A.1 Chapters Appearing in the Textbook 1975–2010

CASE	<i>Grillot Era</i>					<i>Schubert Era</i>				
	one 1975	two 1979	three 1983	four 1988	five 1992	six 1996	seven 2000	eight 2004	nine 2006	ten 2010
Katko v. Briney	X	X	X	X	X	X	X	X	X	X
Strunk v. Strunk	X	X	X	X	X	X	X	X	X	X
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10

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