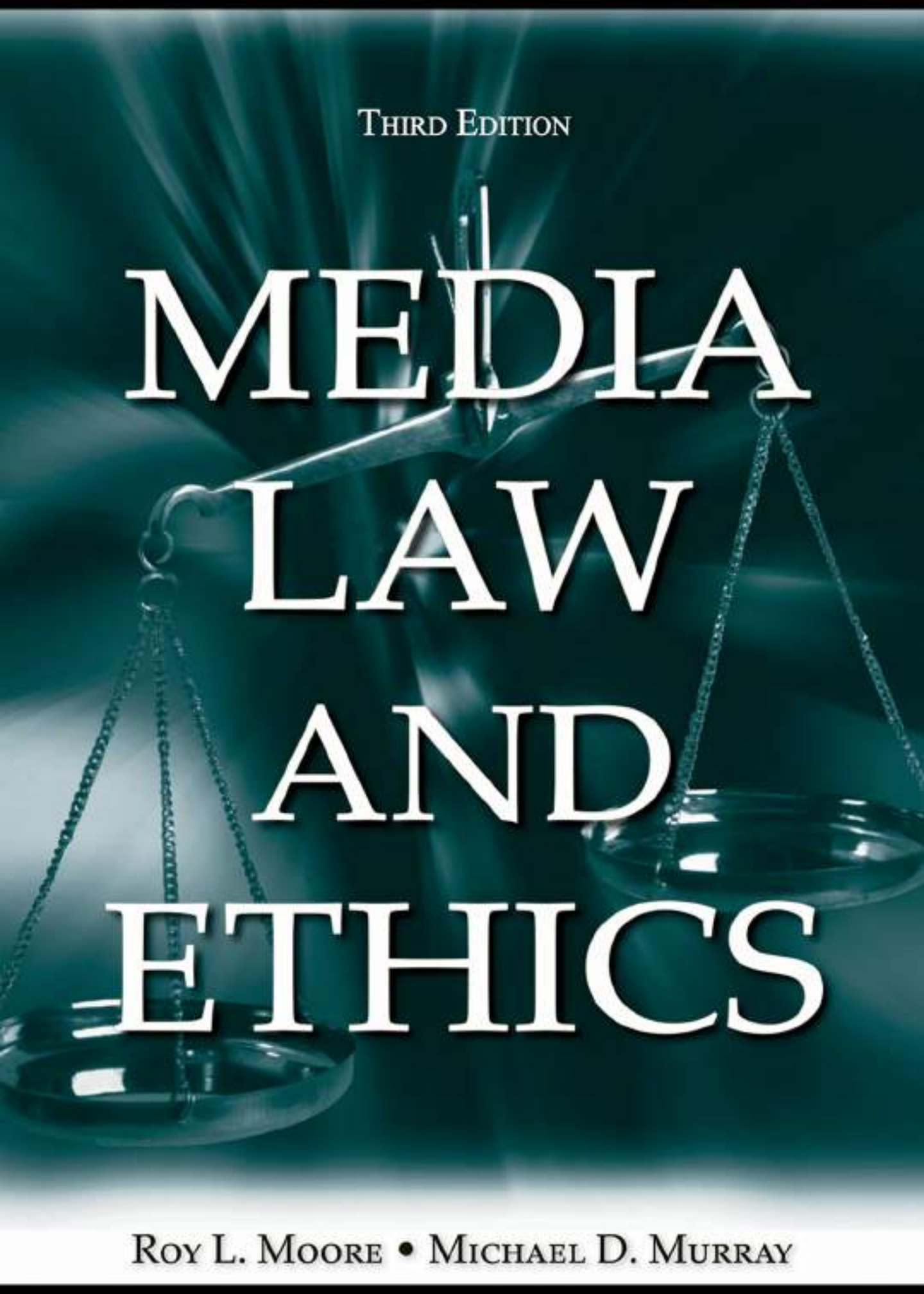
THIRD EDITION
MEDIA LAW AND ETHICS
ROY L. MOORE • MICHAEL D. MURRAY

CHAPTER
# 3

# The Judicial Process

This chapter introduces you to the basics of the judicial process, including descriptions of a typical civil lawsuit and trial and a typical criminal lawsuit and trial. Put aside any images you may have from television shows and movies—you are now in the real world of law. You will encounter some strange new terms, but take them to heart because you will find them indispensable later, especially if you become a practicing journalist. You will also be introduced to important ethical considerations, particularly in covering criminal cases.

## The Civil Lawsuit

The vast majority of lawsuits never reach trial but are either dropped by the plaintiff or settled out of court by the parties. The courts could never handle the load if all or even half of all cases went to trial because they are extremely busy processing and ruling on motions and other pretrial proceedings. Most cases resolved in the courts are civil, although criminal cases often attract the most intense media attention. For example, during the 2004 fiscal year, 255,851 new civil cases and 70,746 new criminal cases were filed in the federal district courts.[1]

In the federal courts, the *Federal Rules of Civil Procedure* and the *Federal Rules of Evidence* (that also apply to criminal cases) generally dictate the procedures and rules governing civil litigation, both for actions within the courtroom and for those outside the courtroom. Most states have either adopted the federal rules for their state courts or use similar rules with modifications. This chapter relies primarily on the federal rules, but you should consult your own state's rules if you plan to cover state courts.

### The Complaint

Figure 3.1 illustrates the civil case process for Kentucky, which is similar to the processes in most other states. As the diagram indicates, a civil suit typically is formally

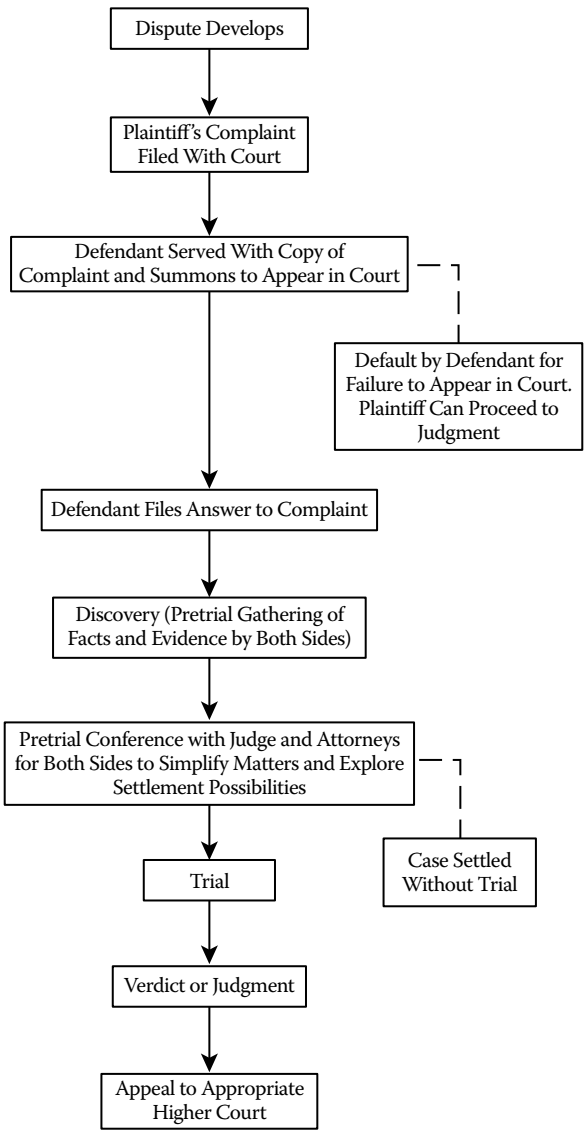


**Figure 3.1** Kentucky civil case process. (Compiled by Administrative Office of the Courts, Frankfurt, Ky. Reprinted by permission.)

initiated with the filing of a legal document known as a *complaint*. The primary purposes of the complaint are to give the defendant notice and to inform the person or organization of the nature and basic facts of the case. A complaint states the specific claim(s) against the defendant, the basis on which the court can exercise jurisdiction over the case, the basic facts, and the particular relief sought (which need not be stated in specific dollar amounts but instead can indicate the type of damages requested, such as punitive and actual).

All of the claims are mere allegations and should never be cited in a news story without attribution and qualification. For example, if a plaintiff says in a complaint that her telephone was wiretapped by the defendant without her permission, do not

assume that her statement is a proven fact. Instead, you should note in the story: "According to a complaint filed today in state circuit court, Jane Smith's home telephone was bugged by her ex-husband. Mrs. Smith is seeking $125,000 for alleged invasion of privacy."

A complaint in a civil suit is nearly always a public document and thus available under state and federal open records laws. Simply go to the clerk for the appropriate court and ask to see the case files. If you have a case number, you will save some search time, but court clerks are usually helpful in tracking down particular documents if you have a name of one of the parties. Local attorneys, who can often be found perusing documents in the courthouse, can also be helpful, but the best way to learn the system is to practice a few trial runs before you have to find a document under deadline pressures.

Once the complaint has been filed, the court clerk will issue a signed *summons* with the seal and name of the court. Under the federal rules, called the *Federal Rules of Civil Procedure*, the summons must also contain the name and address of the plaintiff's attorney, the time frame within which the defendant must respond under the federal rules, and a statement that if the defendant fails to answer ("failed to plead or otherwise defend"), judgment by default can be entered against the defendant.[2]

Under the federal rules, the complaint and the summons must be served together[3] in person by an individual who is not a party to the suit and who is at least 18 years of age. Service can also be made under certain conditions by a U.S. marshal, deputy marshal, or other person specially appointed by the court for that purpose. Personal (i.e., in hand) service to the named defendant is known as *actual service*. It is usually not necessary that the defendant be served so long as a "person of suitable age and discretion" within the dwelling is handed the copy. Appointed agents and individuals specified under the law can be served in lieu of the actual defendant in some cases, and federal and state agencies can sometimes be served via certified mail.

Service methods such as mail and delivery to an agent or other representative are called *substituted service*. The rules are quite complex because they are designed to assure compliance with the due process clause of the 14th Amendment to the U.S. Constitution. The rules are also complicated by the fact that each local federal district court can set its own rules and because state statutes frequently come into play in federal courts because the federal rules permit federal courts to adopt local (i.e., state) rules for service. In some limited circumstances, *constructive service*—service via publication in an official organ—is permitted, such as when a defendant cannot be found or actual or substituted service is not possible.

Service via e-mail is permissible under some circumstances, at least according to one U.S. Circuit Court of Appeals. In the first federal court appellate ruling on this new substitute service, the 9th Circuit U.S. Court of Appeals allowed a plaintiff in a case to serve the defendant, a foreign-based Internet gambling firm with no physical location, with the complaint by e-mail. The court allowed such service under Rule 4(f)(3)[4] but only after the plaintiff had tried to serve the complaint via several other means including snail mail and personal service.[5]

Filing a complaint is obviously a very serious matter because the allegations become public record and therefore subject to public scrutiny. Thus sanctions are in place for individuals and their attorneys who file frivolous or unsubstantiated claims. Rule 11 of the Federal Rules of Civil Procedure requires that every "pleading, written motion, and other paper shall be signed by at least one attorney of record."[6] With their signatures, attorneys certify that they have read the document and have made a reasonable inquiry into the merits of the case to assure that the pleading or motion "is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[7] The court can exercise various sanctions, including fines, when the judge believes the rule has been violated.

Congress added more teeth to the rule, including revisions in 1983 and 1987, and federal judges have been enforcing the rule more rigorously. The result has been a noticeable increase in the number of attorneys sanctioned and considerable controversy among legal authorities over how and when the rule should be enforced. Because attorneys are certifying that their purpose in filing the suit or motion is not "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,"[8] it is not unusual for federal judges to cite delaying tactics and harassment in imposing fines. Many states have adopted the federal rules, complete with Rule 11, for their courts, and most of the other states have at least a parallel rule.

Another remedy for the problem of frivolous lawsuits that can be more effective than Rule 11 sanctions, when available, is *malicious prosecution of a civil suit*, which requires that the defendant win the original suit and prove that the plaintiff had no probable cause in initiating legal action.

## The Answer

The next typical step in a civil suit is the filing of an *answer* by the defendant. Under the federal rules, a defendant generally has 20 days from time of service to file an answer or other appropriate *pleading*. If the defendant is the United States or a federal officer or agency, the maximum time for an answer is 60 days. Similar time constraints apply in most state courts, although the periods do vary among states.

The defendant has a host of options in answering the plaintiff's complaint. These options are generally not mutually exclusive and thus can be used alternatively or in combination. The primary purpose of the answer, also called the defendant's *responsive pleading*, is to counteract the plaintiff's allegations. In other words, the defendant should demonstrate why the plaintiff should not prevail. The defendant can also enter various denials, as discussed shortly, plead an affirmative defense and even file a *counterclaim*, asking for damages from the plaintiff or other individuals or entities.

## Denials

Denials fall into five general categories: general, specific, qualified, insufficient knowledge, and denial on information and belief. A *general denial*, asserting that all of the averments in the complaint are false, was once rather commonly used. But,

because Rule 8(b) now requires that "denials shall fairly meet the substance of the averments denied,"[9] general denials are rare in the federal courts today. Typically, the defendant will file a *specific denial*, which designates the specific statements and/or paragraphs being denied and usually the specific statements and paragraphs admitted.[10] Under Rule 8(d), if the defendant does not deny those averments "to which a responsive pleading is required" (except the amount of damage), the averments are deemed to have been admitted. In other words, those allegations and other statements made by the plaintiff in the complaint that are not denied by the defendant are generally considered to have been admitted by the defendant. There are certain exceptions to this rule, but these are beyond the scope of this book.

An example of a specific denial would be a media defendant in an invasion of privacy suit denying that it had subjected the plaintiff to public ridicule when it published a story about his financial dealings. On the other hand, the paper would probably admit that the story was actually published on January 25, 2007, and that it contained the statements cited in the complaint.

Another fairly common type of denial is a *qualified denial* in which the defendant denies some but not all of the statements in particular paragraphs or denies a portion of a specific sentence but admits other portions.

The federal courts and most state courts also allow a defendant to make a denial on the basis that the person or company "is without knowledge or information sufficient to form a belief as to the truth of an averment."[11] Attorneys are justifiably cautious about asserting this type of denial because of the requirements of Rule 11.

Finally a defendant may make a *denial on information and belief*, on grounds that only second-hand information about the truth or falsity of the allegations is available at the time the answer is filed. It is unusual to see this type of denial in media law cases. It is fairly common for defendants, including those in media law cases such as libel and invasion of privacy suits, to include affirmative defenses in lieu of or in addition to denials in the answer. An *affirmative defense* is, in effect, saying that defendant admits that the plaintiff's allegations are true (for purposes of the defense only), but that there are additional facts that, when proven, will mean dismissal of the suit.

The wide range of affirmative defenses have technical names such as assumption of risk, accord and satisfaction, and estoppel, but the most common asserted in media law cases is the *statute of limitations*, which is the specified time period during which that particular cause of action must be filed after the right to sue occurs. In other words, if the suit is not filed within that time frame, the court will automatically dismiss the case when it is filed later. For example, the typical statute of limitations for a libel or invasion of privacy suit is one year, although some states have longer periods. Under Rule 12(b), if affirmative defenses are to be asserted by the defendant, they must be included in the answer or be effectively waived. In some cases such as "failure to state a claim upon which relief can be granted," the defense can be made by motion (in this case a motion to dismiss, as discussed below). Affirmative defenses usually do not play a major role in media law cases, but, when they are available, they can have a significant impact on a case—for example, permitting

the judge to dismiss the suit before trial. Affirmative defenses can be particularly determinative in criminal cases, where many such defenses can be invoked.

## Counterclaims

One more item sometimes included in an answer is a *counterclaim*. A counterclaim is simply a claim made by a defendant against a plaintiff, which, if proven, may cancel or decrease the amount of damages to which the plaintiff would be entitled. For example, if a defendant in an auto accident (personal injury) case also suffered personal injuries and property damage, he or she could file a counterclaim against the plaintiff, alleging that the plaintiff was at fault and, therefore, should be required to pay damages to the defendant. Counterclaims are relatively rare in media law cases, especially in libel and invasion of privacy suits. Counterclaims represent a fairly complex topic. Counterclaims can be filed with an answer or as a separate document. If a counterclaim is filed, the plaintiff is generally required to respond in the same manner as any defendant would to a claim and thus must follow the usual procedural rules.

## Motions in General

The next step for both sides is usually filing motions, which is known as *challenging the pleadings*. Although journalists sometimes confuse pleadings with motions, the two processes are not the same. Pleadings are always written statements of fact and/or law filed by the parties, whereas motions are requests ("applications") made to a judge or a court. Under Rule 7 of the Federal Rules of Civil Procedure, pleadings are limited to a complaint; answer; and if appropriate, a reply to a counterclaim; an answer to a cross-claim (a claim by co-defendants or co-plaintiffs against one another rather than someone on the other side); and a third party answer (if a third party complaint has been filed).[12]

Although the federal rules and most state rules are rather strict about the types of pleadings that can be made, those same rules are quite flexible in allowing rather liberal supplementation or amendment of pleadings, in contrast to the old days of common law pleadings when the requirements were rather rigid. The idea of modern pleadings is to allow cases to be tried on their merits, not on technicalities.

Motions are typically filed throughout the judicial process, including during and after the trial, but certain specific motions are commonly filed pretrial. Space limitations do not permit a discussion of all of these motions, but it is important that you be familiar with the most common ones.

## Pretrial Motions

The two most common pretrial motions in mass communication law suits, especially libel and invasion of privacy cases, are the *motion to dismiss* and the *motion for summary judgment*. *A motion to dismiss* simply requests that the court dismiss

the case because the plaintiff has failed in the pleadings "to state a claim upon which relief can be granted."[13] In other words, the defendant is contending that the plaintiff's suit has no legally sound basis even if all of the allegations made by the plaintiff are true. The defendant is, of course, not admitting that the allegations are true, but is, in effect, saying, "Even if the plaintiff were to prove all of the facts, so what?" This motion is commonly referred to as a 12(b)(6) motion (the number designated under the federal rules) by lawyers in the federal courts. A similar one is available in the state courts.

Here's an extreme but useful hypothetical case in which a motion to dismiss would almost certainly be granted. Suppose a television viewer is highly offended by some grisly videos she sees on a cable news network that show mangled bodies of American soldiers fighting in the Middle East. The viewer becomes so upset with the videos that she instantly experiences a psychological breakdown. She recovers long enough to see an attorney, who files suit on her behalf, claiming intentional infliction of emotional distress. Let's assume, for purposes of argument, that this individual suffered emotional damages as a direct result of exposure to the news reports, and yet we know her suit will be immediately dismissed. Why? There is simply no legal basis for her suit. No court has ever recognized a cause of action under such circumstances, and there is no law—common, statutory, administrative, or constitutional—establishing a cause of action. Therefore, the judge will grant the news network's motion to dismiss.

There are other bases on which a case can be dismissed at this stage or later under certain conditions including lack of subject matter jurisdiction, improper venue, lack of personal jurisdiction, and insufficiency of service of process.

A second common motion filed by a defendant in a media law case is a *motion for summary judgment*. This motion is a much-debated topic in libel and was the focus of a 1986 U.S. Supreme Court libel decision.[14] Briefly, this motion is frequently filed in libel suits when no dispute exists between the parties about the substantive facts in the case, but the two sides differ on the applicable law. A summary judgment has the major advantage that it is made prior to the trial. Thus a potentially expensive trial is avoided, saving both sides considerable time and money. Why then does so much controversy surround this type of judgment? Summary judgments are far more likely to be decided in favor of defendants, whereas full-blown trials in libel and invasion of privacy suits are much more likely to result in an award of damages to a plaintiff, especially if the trial were before a jury.

A summary judgment can be granted only when the judge or court is convinced that there is no dispute of facts, only a difference regarding the law. Even though a summary judgment is made without a trial, it is a binding decision and thus can be appealed to a higher (i.e., appellate) court. A motion for summary judgment can usually be made any time after the pleadings have been closed, including up to the time of the trial, so long as the motion is made "within such time as not to delay the trial."[15]

Although the motion to dismiss and most other pretrial motions are granted based on the pleadings alone, the court is not limited to the pleadings when deciding a summary judgment and can certainly consider other evidence. In fact, under the

federal rules, if matters outside the pleadings are presented to the court in making a decision on whether to grant a motion for judgment on the pleadings, the motion is automatically converted into a motion for summary judgment.[16]

Two other less common motions need to be briefly considered. A *motion for more definite statement* would be filed when a pleading such as a complaint or answer is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading."[17] The idea is that the party filing the motion cannot make sense of the particular contentions of the other side, whether factual or legal, and thus those statements must be made clear before the party can be expected to respond to them.

Finally, a *motion to strike* is sometimes used. This is a request that the court strike (i.e., delete) certain statements from the pleadings, including "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."[18] If the court rules in favor of the party filing the motion, the statements will be officially struck from the records.

## Discovery in General

The next step in the judicial process, which has no exact parallel in a criminal case even though it is permitted on a limited basis, is *discovery*. This is the much-publicized, formal process by which each side discovers the information and evidence to be presented at trial by the other side. The primary purpose of this often lengthy and expensive process is to avoid surprises at the trial. In a nutshell, when both sides do their homework, there are likely to be few, if any, surprises at trial. Although surprise witnesses and last-minute revelations pervade television shows and movies with law themes, the real world is much different. You have probably heard the axiom for lawyers: do not ask a question of a witness at trial to which you don't already know the answer. Those answers are already known, thanks to discovery. A check of recent issues of law journals, such as *Trial* and the *American Bar Association Journal*, will usually reveal several articles on discovery—a clear indication of the importance of this process. Literally dozens of how-to books on discovery and numerous workshops focus on the topic every year.

Ideally, most of the discovery process takes place extrajudicially (i.e., outside the courtroom). This is made possible by the very liberal discovery rules adopted by the federal courts and most state courts. Twelve of the 86 *Federal Rules of Civil Procedure* deal directly with depositions and discovery. Although sometimes complex, they are designed to facilitate the process, not to make it more difficult. The rules are also geared toward keeping discovery from becoming unreasonably long or unduly burdensome.

For example, Rule 16(b) requires a scheduling conference, followed by a scheduling order from the judge that, among other matters, limits the time for filing motions and completing discovery. The order must be made within 90 days after the defendant appears in court or 120 days after the complaint has been served on the defendant. Federal Rule 26(b)(2) specifically permits a court to limit the number

of depositions and interrogatories, the length of depositions and the frequency or use of discovery methods under certain conditions. Rule 26(f) mandates, except in rare cases, a discovery planning conference at least 21 days before the scheduling conference or order under Rule 16(b) at which the attorneys must try in good faith to agree on a proposed discovery plan. Most state courts have adopted similar rules limiting time for discovery. In the past, discovery occupied so much time that what was supposed to be a battle of the facts and the wits became an endurance contest instead. The picture has dramatically changed over the decades, but discovery still remains the most time-consuming and expensive part of the civil judicial process, with the trial often being an anticlimax.

Federal Rule 37 permits the court to impose various sanctions from paying the other side's attorney's fees and other expenses to charges of contempt of court for parties, witnesses, and attorneys who fail to appear at or to cooperate in discovery.

## Depositions

The two most common methods of discovery are depositions and interrogatories, with depositions clearly leading the pack. A *deposition* is technically any out-of-court statement made under oath by a witness for use at trial or for preparing for trial. This device is by far the most expensive of the two but is the most useful and effective. Generally, either side may depose the other side and any witnesses. For example, a plaintiff in a copyright infringement suit would almost certainly orally depose the defendant and vice versa. Depositions can be taken orally or in writing, but are usually oral.

The procedure is for the plaintiff's attorney to file a formal notice of deposition with the defendant's attorney, specifying the exact day, time, and location. Because both sides have the right to be present during the deposition, attorneys for both usually appear. The plaintiff's attorney then questions the defendant under oath. The party or witness being deposed is administered the oath, usually by an independent court reporter at the beginning of the deposition. No judge is present, but a court reporter hired by the deposing attorney records the proceedings. A common procedure today is to record depositions on videotape, which can save the considerable cost of transcription. Depositions can be taken via phone as well and many state and all federal courts now permit them to be taken with new technologies such as satellite television.

The primary purpose of depositions is to enable the attorney to learn before trial the content of the testimony that witness will offer at trial. For example, if a defense attorney in a libel suit wants to know what the plaintiff's expert witness is going to testify at trial about the defendant's alleged negligence, the lawyer would depose that witness. This information would be particularly useful in deciding how to use one's own expert witnesses, who would likely be deposed by the plaintiff's attorney.

The procedure in an oral deposition is relatively simple. The witness and that person's attorney or the attorney representing the side using the witness at trial appear at

the designated time and place. The deposition is often taken in a law office, usually that of the attorney who is deposing the witness, although this can certainly vary. After the usual courtesy introductions, the court reporter then swears in the witness. The witness is questioned by the deposing attorney (a process known as *direct examination*), with the attorney for the other side present only to object if the questioning becomes improper, such as when the deposing attorney poses a question that would require a lay witness to assert a legal opinion or when the deposing attorney badgers the witness.

It is not unusual for even expert witnesses to find depositions stressful because the questioning can be intense and long. Once the deposing attorney has completed questioning, the opposing attorney has the option of conducting a *cross examination* of the witness. Unlike in a trial in which cross examination is conducted by the attorney representing the side opposite the one that called the witness, cross examination in a deposition is typically conducted by the attorney who has selected that witness to testify at trial. Cross examination is particularly important when the direct examination has severely damaged the credibility of a witness and thus some "restoration" is in order, or when a deposing attorney has failed to elicit information that could be favorable to the other side.

## Interrogatories

*Interrogatories* are written questions submitted to an adverse party to be answered under oath. The procedure is for the attorney interrogating the witness to submit a series of questions in writing to the opposing party or a witness for the opposing party through the opposing party's attorney. Federal Rule 33 permits parties only (not other witnesses) to be deposed, and requires that the interrogatories be written under oath. Only 25 items, including discrete subparts, may be served under Rule 33(a). The attorney for the party being questioned is permitted to work with the party in composing the answers, although all answers must represent the views and direct knowledge of the party. A few state jurisdictions permit interrogatories directed to all witnesses—not only parties—but most follow the federal model.

The major advantage of interrogatories is cost. They are much less expensive to administer than depositions. However, you get what you pay for, as the old saying goes. It is easy for a party to manipulate answers or be evasive, and because the questions are prepared in advance without benefit of previous answers, it is difficult to anticipate a party's answers. Thus interrogatories are used principally as a means of getting the discovery process started. Because of the burdensome nature of interrogatories, attorneys can make objections in lieu of answers if reasons are also provided. Conversely, an attorney submitting an interrogatory can request that the judge order that an answer be given or that a party who refuses to cooperate in an interrogatory be forced to respond.[19]

## Written Depositions

Written depositions (depositions upon written questions) are sometimes confused by journalists with interrogatories, but they are not the same. Unlike interrogatories that

are limited to parties, written depositions can be submitted to any witness including a party to a suit. They are much less expensive than oral depositions because no attorneys need to be present, and they can be answered over a longer period.

In the case of a written deposition, the deposing attorney submits a list of proposed questions to the attorney for the other side who then makes any objections known and submits proposed questions for cross examination. The witness then appears before a court reporter, usually in the home or office of the witness rather than in an attorney's office, and answers the questions under oath. The answers are recorded by the reporter and the word-for-word transcript or videotape is then made available to the attorneys for both sides. The process takes some time, but a witness has an opportunity to prepare responses. Written depositions are rarely taken of parties or of major witnesses.

Except for accepting motions or considering objections to the scope or conduct of the process, the court is rarely involved in discovery, especially in the federal system. The idea is for the attorneys to cooperate in seeing that each side is fully informed before trial. In most cases, an attorney has no obligation to make information available to the other side unless the opponent has made a formal request, but does have a duty to provide such information if requested. There are exceptions to this requirement, but most attorneys cooperate with one another, even though they represent clients on different sides.

Witnesses are important in any case, but witnesses alone are usually not sufficient to build a case. Discovery also permits access to and copying of documents and other evidence. The usual procedure for obtaining documents and other items from a party is for the attorney to file a formal request through the attorney for the other side that specifies the documents or other materials sought. The federal rules and all state court rules also permit an attorney for one side to have the party on the other side submit to a physical examination under certain circumstances, such as when the party's physical or mental condition is an issue in the case.

## Subpoenas

For nonparties, a subpoena is traditionally used to compel them to testify or produce documents or other materials. If a witness is to appear to simply testify and not to bring documents or other physical evidence, an ordinary *subpoena* would be issued, notifying the witness of the specific time, place, and type of information sought. If the witness is to produce "books, papers, documents, or tangible things," a *subpoena duces tecum* would be served on that individual. The process of serving a subpoena or a subpoena duces tecum is fairly similar to that of serving a complaint and summons. In the federal courts, a federal marshal, deputy marshal, or anyone who is not a party to the suit and is at least 18 years old simply delivers the subpoena to the witness. In the federal courts, all subpoenas must be issued by the district court clerk.[20] The power of the federal district courts to subpoena nonparty witnesses extends within a 100-mile radius of the court. There is no 100-mile limit for parties. The subpoena power of state courts traditionally resides within the state boundaries, although all

states have some form of a *long-arm statute*, which permits personal jurisdiction, including subpoena powers, beyond the borders under certain conditions.

The rules for subpoenaing witnesses and documents for a hearing or trial are similar to the authority covering subpoenas for depositions. Both federal and state rules allow courts to cite an individual for contempt for failing to comply with a valid subpoena. However, those same rules permit a subpoenaed witness to make objections, usually in writing, within a specified period—typically 14 days—which the court will ultimately decide whether to sustain or overrule.[21]

Journalists have been plagued in recent decades by a considerable increase in the number and scope of subpoenas in both civil and criminal cases. All journalists, whether or not they cover the courts, must have a strong, basic knowledge of subpoenas because they are routinely called and forced to testify and produce documents, despite the vehement and vociferous protests of their employers and news organizations. There is no federal shield law to protect journalists and state shield laws, where they exist, are often ineffective in offering protection. One type of protection that journalists sometimes successfully seek is a protective order. Federal Rule 26(c) allows a court to issue a *protective order* "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[22] The court has several options affecting the impact of such an order including prohibiting the discovery entirely, allowing the discovery only under certain terms and conditions, and limiting the scope of the discovery matters.[23]

Although various constitutional, statutory, and common law rights cover public and press access to court documents, no such rights have been established thus far for access to discovery materials including depositions. On rare occasions, a court will order that a transcript or videotape of a deposition be made public, but usually only when a strong public interest—for example, when the government is a party in a suit—is involved. Thus depositions are almost always conducted in private, with journalists and the public having no access to the proceedings or to the transcripts or videotapes.

## Privileged Discovery

In general, any relevant evidence can be discovered. However, there are certain exceptions. The federal rule notes, "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[24] The two major exceptions are privilege, including attorney–client privilege and attorney work product. *Privileged communications* are statements made within a particular context or relationship and protected from disclosure because the nature of that relationship is so sacred that the benefits of disclosure (viz., revelation of the truth) are outweighed by the need to preserve that type of relationship. Typical protected relationships are attorney–client, husband–wife, physician–patient, and clergy–penitent.

Federal and state rules of evidence, rather than rules of civil procedure, govern when privileged communications are permitted (i.e., when the content of such communication does not have to be disclosed). For example, the federal courts and all

state courts protect attorney–client communications, although the protection is not absolute, whereas some state courts do not allow physician–patient privilege which is available in the federal courts. Reporter–source privileges exist in some form in more than half of the states, but the federal courts do not recognize this privilege, although the federal Privacy Protection Act of 1980 does offer some procedural protection for federal and state searches for evidence held by journalists.

Finally, the *attorney work product doctrine* recognized in most states and now incorporated in the federal rules places strict limits on the discovery of information specifically prepared for litigation or for trial by a party or a party's attorney. Under the Federal Rules of Civil Procedure, such information can be discovered "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without due hardship to obtain the substantial equivalent of the materials by other means."[25] The federal rule offers absolute protection "against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."[26]

In *Swidler & Berlin et al. v. United States* (1998),[27] the U.S. Supreme Court ruled in a 6 to 3 decision written by Chief Justice Rehnquist that attorney–client privilege survives a client's death even in the criminal context. The Court noted that this privilege is "one of the oldest recognized privileges for confidential communications." The case arose after independent counsel Kenneth Starr tried to force Washington attorney James Hamilton to turn over three pages of notes he had taken during a meeting with Deputy White House Counsel Vincent Foster nine days before Foster committed suicide. Starr wanted the notes as possible evidence in his criminal investigation of then First Lady Hillary Rodham Clinton.

In overturning the decision of the U.S. Court of Appeals for the D.C. Circuit, the U.S. Supreme Court said that case law overwhelmingly supported the principle that this common law privilege did not end when a client died. While acknowledging that a client might consult an attorney regarding possible criminal liability, the Court said that was only one of many reasons for consultation such as seeking advice on personal and financial problems.

## Pretrial Conferences

The debate among legal scholars and jurists over the appropriate point at which a case should come into focus—so the issues and facts are jelled or at least clear to both sides and the court—has been going on for many decades. Some courts have opted for rigid pleadings, an approach designed to hone the issues and facts early in the case. The federal courts and many state courts have chosen more liberal pleadings, but obviously at some point the issues and facts must congeal. The pretrial conference is typically the point at which the judge begins to establish firm control over the case by requiring the attorneys to establish time parameters for pretrial proceedings and/or agree on undisputed facts or issues. Most judges hold several pretrial conferences with the attorneys in a case, but two types of pretrial conferences are

frequently employed in the federal courts. After all the initial pleadings have been filed, a *scheduling and planning conference* is held among the judge or magistrate and attorneys for both sides to establish time limits for various proceedings including discovery and schedule dates for further pretrial conferences.[28]

The second type of pretrial conference is the *issue conference*. The attorneys and the judge hammer out the issues and facts in the case so an agreement can be reached on undisputed facts and law, also known as *stipulations*. The primary purpose is to narrow the case to the point at which either an out-of-court settlement can be reached or, at the very least, the issues and the facts in the case are crystallized so that the trial itself can focus on important matters and not be bogged down with trivial and undisputed points. Some judges apply more pressure than others, but all of them are certainly interested in having cases settled before trial, if possible. Most courts are overloaded with cases, and trials can be quite expensive. Thus it is not unusual for a case to be settled before trial.

One type of pretrial conference is nearly always required by federal district court judges—the *final pretrial conference*. Federal Rule 16(d) provides that this conference be held close to the time of the trial and that a plan for the trial be established by this point. Cases are sometimes settled at this conference, but the chances of a settlement have usually decreased by this point; both sides have probably expended considerable time and expense and virtually all that remains is the trial itself. After the final pretrial conference, the judge will issue pretrial orders including a list of trial witnesses, stipulations, and other agreements reached at the conference.[29] Under the federal rules, the pretrial orders can be changed only "to prevent manifest injustice."[30]

## The Civil Trial

The vast majority of cases, for one reason or another, do not make it to the trial stage. Once a case is placed on a court's trial docket with a specific date set, the wheels of justice begin moving again. It is not unusual for at least one *continuance* or postponement to occur before a trial begins.

Both civil and criminal cases can be tried before a jury and a judge or before a judge alone. The latter is known as a *bench trial*. Obviously, jury trials are substantially more time consuming and expensive, both for the parties and for the court, but many litigants and their attorneys prefer jury trials. Although the reasons for this preference vary, there seems to be a widespread belief among trial lawyers and their clients that juries render better or fairer verdicts. The general rules of order are virtually the same for jury and bench trials regardless of jurisdiction. Rather than separate the two types of trials, this chapter analyzes them together and notes differences where applicable.

According to the 7th Amendment to the U.S. Constitution, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Although this right to a trial by jury is binding only on the federal government, not on the states, every state recognizes such a right in its own constitution or by statute. The difficulty lies in knowing what suits existed at common law

in determining when the right can be invoked. In 1970, the U.S. Supreme Court, for the first time, enunciated a constitutional test for deciding when the right exists.[31] The test focuses on whether the issue in a case is primarily equitable or legal. As discussed in Chapter 1, no jury trials are held in equity cases, but cases can become complicated when they appear to involve issues of both law and equity. The Supreme Court has adopted the rule that when legal and equitable claims are intertwined, the legal issue will be tried first by the jury (if a jury trial is chosen) and then the equitable claim will be tried by the judge alone.[32]

When most people hear the term *officers of the court*, they immediately think of judges, clerks, and bailiffs. The judge presides over the trial, and the court clerk helps the judge administer and keep track of the trial, including the various exhibits. The bailiff has the responsibilities of maintaining order in the courtroom, calling witnesses, escorting the jury and, in some jurisdictions, administering oaths to witnesses and jurors. Lawyers are also officers of the court and are thereby bound by its rules and procedures.

## Jury Selection

One of the most critical stages in a jury trial is the jury selection process. In the past, courts and legislators paid relatively little attention to the process as a whole, although everyone knew that successful jury selection was extremely important in a trial. Over the decades, the topic of jury selection attracted extensive Supreme Court attention, with the Court handing down several decisions related to the process. Two of the most important decisions were issued in the early 1970s. In 1970, the Supreme Court held that nonunanimous verdicts in criminal cases did not violate the 6th Amendment.[33] Three years later, the Court ruled that juries with fewer than 12 members (in this case, 6 members) were permissible in civil cases.[34]

As a result of these decisions, many jurisdictions including the federal courts now routinely opt for 6-member juries because of the savings in time and expense. More states also allow, either by experiment or by statute, jury verdicts based on agreements of three-fourths or five-sixths of the members, especially in civil and misdemeanor cases.

In 1991 the United States Judicial Conference, the governing body of the federal courts, revised Rule 48 of the *Federal Rules of Civil Procedure* to explicitly allow juries of fewer than 12 members. The rule still requires that the verdict be unanimous, unless the parties agree otherwise, and sets a minimum of 6 members.[35] Five years later, after extensive debate, the Conference decided to stick with the current rule rather than return to mandated 12-person juries.[36]

In both civil and criminal cases, jurors are selected at random from a pool or list (also called *venire facias*), usually compiled from property tax rolls, automobile registration lists, and voter registration printouts. In the federal district courts, potential jurors are chosen at random solely from voter lists or combined lists of voters and drivers licensed in that particular judicial district. A court official, usually a jury commissioner appointed by a judge, initially screens the prospective jurors to narrow the list to only qualified and eligible individuals based upon their answers on questionnaires they

complete. At one time, a fairly long list of occupational exemptions allowed many people to escape serving as jurors. People in these occupations (e.g., physicians, teachers, students, and lawyers) were never prevented from serving, but they were allowed to exempt themselves. Many of them exercised the exemption because serving usually meant taking time from work with little or no pay. In the 1970s, however, many states began revising their statutes to eliminate or severely limit exemptions.

Once the *array*, as it is sometimes known, of qualified *veniremen* (prospective jurors) is in order, the process of selecting the actual jurors for trial begins. On rare occasions, an attorney will move that the court disqualify the entire array because the list was compiled in violation of some constitutional or statutory right. For example, the list may have somehow excluded all minority group members. Any systematic exclusion of a particular community group may be grounds for violation of that defendant's 6th Amendment right in a criminal case to a trial by an impartial jury of the state or district where the alleged crime was committed or, in the case of a civil suit, the 7th Amendment right of trial by jury. The motion in such a case is known as *challenge to the array*, and is more likely to occur in a criminal suit.

The jury selection process begins when panels (usually 12 people at a time) of individuals selected from the array are called. With each panel, the court clerk calls the set of names or numbers and then has the individuals sit in the jury box. To preserve anonymity, more courts are now assigning potential jurors numbers for identification. After offering the panel a brief overview of the case, the judge then asks that any juror who feels unable to serve for any reason to make it known. Occasionally, potential jurors will be excluded at this point for poor health, personal acquaintance with one of the parties, or on another basis.

The next step in the process varies depending on the particular jurisdiction. In *voir dire,* potential jurors are questioned about a variety of matters from their names and occupations to their views on the particular type of case. In the past, most federal judges conducted voir dire themselves, preventing the attorneys from playing an active role, except for giving them opportunities to provide the court with potential questions in advance. Now federal judges generally follow the state court model that allows the attorneys to do most of the questioning.

The types of questions that can be asked, whether by the attorneys or the judge, can be highly personal and intimate. Depending upon the subject matter of the case, potential jurors may be asked during voir dire about their religious beliefs, their views on capital punishment, whether they have ever been victims of a crime, the political parties to which they belong, and whether they are married or single.

Dozens of legal treatises and hundreds of articles have been published about voir dire, and several companies offer advice on jury selection, some of which will, for a fee, sit with counsel during voir dire to observe the verbal and nonverbal communications of prospective jurors and make recommendations regarding which jurors should be struck during the peremptory challenges, discussed shortly.

Most attorneys no doubt still rely on experience and instinct or "gut feelings" in their juror challenges, but scientific techniques are making headway in the process,

as indicated by the growing use by attorneys of psychological and sociological experts (and occasionally even communication specialists) for consultation during voir dire. One of the criticisms leveled at the prosecutors in the 1995 murder trial in which O.J. Simpson was acquitted was that they had turned down an offer from a pro bono jury consultant to help in voir dire. The defendant's legal team, on the other hand, hired trial consultant Jo-Ellen Dimitrius, a former college professor, who became widely known as a result of her work in the Simpson case.[37]

Jury consultants are no longer unusual, particularly in high profile cases. For example, defense attorneys hired them in both the 1991 William Kennedy Smith rape trial in which Kennedy was acquitted and in 1994 in the separate trials of Lyle and Erik Menendez for the murders of their parents. The first Menendez trials led to hung juries, but the brothers were later convicted at retrial.

The major goal of voir dire is to weed out those prospective jurors who may have biases or prejudices that would prevent them from making a fair and independent decision in the case. After a panel has been questioned, the attorney for either side can request the judge to dismiss individuals *for cause*. Suppose in a libel case against a newspaper a prospective juror indicates during voir dire that she believes newspapers never tell the truth and are always out to get prominent people. The defense attorney would clearly have grounds for asking the court to dismiss the individual for cause, and this request would very likely be granted.

Judges and attorneys are not necessarily looking for uninformed jurors but for fair and impartial jurors. Only the judge can dismiss jurors for cause, but this can be done either at the request of an attorney or on the judge's own initiative. There is no limit on the number of individuals an attorney can challenge for cause, nor on the number of dismissals a judge can make.

The judge will continue calling prospective jurors until a panel of qualified jurors twice the size of the jury (including alternate jurors) actually needed for trial survives voir dire without dismissal for cause. If there are to be 12 jurors at trial plus an alternate, the final panel would have 26 members. In highly publicized cases involving concern about pretrial exposure of jurors to potentially highly prejudicial information in the mass media, voir dire can take days or even months. Typically, the process occupies only a few hours.

Art, science, and gut instinct tend to play major roles in the next step of the jury selection process—*peremptory challenges*. In civil cases, each side usually gets to "strike" (i.e., make a peremptory challenge of) an equal number of jurors. An attorney can excuse a juror for any or no reason. In fact, the attorney need not state a reason. However, there are two exceptions to the general rule that peremptory challenges can be made for any reason. In 1986 in the landmark case of *Batson v. Kentucky*,[38] the U.S. Supreme Court held that the equal protection clause of the 14th Amendment to the U.S. Constitution[39] prohibits a prosecutor in a criminal trial from exercising peremptory challenges against jurors solely because of race or because the attorney believed that members of that racial group would not be able to render a fair and impartial decision.

The Court established a three-prong test for determining whether a peremptory jury strike violated the 6th Amendment. First, the challenger of the strike (typically the criminal defendant) must make a prima facie case for discrimination. Second, the proponent of the strike (typically the prosecution) must then offer an acceptable race-neutral explanation for the strike. Finally, the challenger of the strike must prove that the discrimination was intentional.[40]

In 1994, the U.S. Supreme Court took another significant step toward what some critics predict will eventually lead to the elimination of peremptory challenges altogether. In *J.E.B. v. Alabama ex rel. T.B.*,[41] the justices ruled 6 to 3 that litigants may not strike potential jurors solely based on gender. In the majority opinion written by Justice Blackmun (joined by Justices Stevens, O'Connor, Souter, and Ginsburg with Justice Kennedy concurring in the judgment), the Court held that the Equal Protection clause of the 14th Amendment bars discrimination in jury selection based on gender or on the assumption that a potential juror will be biased in a case because of his or her sex. The Court applied the logic and reasoning of *Batson*, noting that it had already extended the *Batson* rule to include civil cases.[42] However, the justices were careful to note:

> Our conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges. Neither does it conflict with a State's legitimate interest in using such challenges in its effort to secure a fair and impartial jury. Parties may still remove jurors whom they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias. Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to *rational basis* review.[43]

The gist of this decision is that if it is apparent that a potential juror may have been struck by a party in either a civil or a criminal suit because of that person's race or sex or because the party believed the person would be biased because of his or her race or sex, the selection process will be subject to the heightened scrutiny test of the 14th Amendment rather than the traditional rational review. Both potential jurors and litigants enjoy this right under the Equal Protection clause "to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." Thus, just as a litigant has a right to keep the other side from excluding a potential juror from a case based on sex or race, a potential juror also has the right not to be excluded.

*J.E.B. v. Alabama* arose from a paternity and child support trial in which the state of Alabama, at the request of the mother of a minor child, filed a complaint against J.E.B. for paternity and child support. *Voir dire* began with 36 potential jurors but 3 were struck for cause. Only 10 of the remaining individuals were men, and the state used 9 of its 10 strikes to eliminate males. Consequently, the trial jury was all women. The trial court judge overruled the defendant's objection to the

state's use of the peremptory challenges to eliminate men. The jury found that the defendant was the child's father and had to pay support.

In a highly critical dissent, Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, concluded:

> In order, it seems to me, not to eliminate any real denial of equal protection, but simply to pay conspicuous obeisance to the equality of the sexes, the Court imperils a practice that has been considered an essential part of fair jury trial since the dawn of the common law. The Constitution of the United States neither requires nor permits this vandalizing of our people's traditions.[44]

In a separate dissent, the Chief Justice distinguished sex discrimination from race discrimination in peremptory challenges:

> The two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely *stereotyping* to say that these differences may produce a difference in outlook which is brought to the jury room. Accordingly, use of peremptory challenges on the basis of sex is generally not the sort of derogatory and invidious act which peremptory challenges directed at black jurors may be.[45]

In 1995, the Court appeared to be backing away from *Batson* in a 7 to 2 *per curiam* opinion. In *Purkett v. Elem*,[46] the Court overturned an 8th Circuit U.S. Court of Appeals reversal of a robbery conviction in a case in which a prosecutor had said he dismissed an African-American potential juror because he had "long, curly . . . unkempt hair" and a "mustache and a goatee." According to the Court, a facially neutral reason is a proper basis for a peremptory challenge even if it is "implausible or fantastic." The general consensus among legal experts is that, at the very least, *Purkett* made it more difficult for an attorney to challenge a peremptory strike based on race.[47]

In 2000, in *United States v. Martinez-Salazar*,[48] the U.S. Supreme Court held that a criminal defendant's 5th Amendment due process rights were not violated when he was forced to exercise one of his peremptory challenges after the trial court judge denied his request to strike a prospective juror for cause. The defendant, who was on trial in federal court for a variety of federal offenses, had asked the judge twice to dismiss a prospective alternate juror who had indicated several times during voir dire that he favored the prosecution. When the judge refused to grant the request, the defendant exercised one of his ten allotted peremptory challenges to eliminate the prospective juror. First, the Court said no constitutional right was involved because peremptory challenges are products of Rule 24 of the Federal Rules of Criminal Procedure, not creations of the 6th Amendment. The Court then went on to say that the defendant's rights under Rule 24 also were not violated so long as the end result was an impartial jury. If exercising the peremptory challenge had somehow led to an unfair trial, the defendant then had the option of challenging the verdict on appeal on the ground that his 6th Amendment rights had been violated. According to the Court in its unanimous decision, "A hard choice is not the same as

no choice. Martinez-Salazar received and exercised 11 peremptory challenges. That is all he is entitled to under the Rule."[49]

Three years later, the Court in an 8 to 1 opinion in *Miller-El v. Cockrell*[50] ruled that a Texas death row inmate had been wrongfully denied a hearing to determine whether his 6th Amendment rights had been violated after state prosecutors had used 10 of their 14 peremptory strikes to exclude all but one of the eligible African-American members of the jury pool. The convicted murderer had unsuccessfully appealed the jury's verdict to the federal courts, including the U.S. Court of Appeals, on a petition for a writ of habeas corpus.

The U.S. Supreme Court made it clear that federal courts should not blindly defer to the state courts in such situations, particularly when such strong evidence of potential discrimination is present. The evidence in the case, as pointed out by the Court, included the fact that African-American jurors, unlike white jurors, were offered descriptions of the execution process before they were asked about their attitudes toward capital punishment. Other evidence included an historical pattern of racial discrimination, confirmed by testimony from former prosecutors, including a 1963 circular from the district attorney's office instructing prosecutors to specifically exercise peremptory strikes against "Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated."[51] In its decision, the U.S. Supreme Court directed the 5th Circuit U.S. Court of Appeals to issue Miller-El a *certificate of appealability*, an order that would have given him the opportunity to make a full-blown case in the federal court.

Different jurisdictions have different rules regarding the number of peremptory challenges permitted by each, with some states, for example, permitting a criminal defendant to strike more jurors than the prosecutor, but the number of challenges in civil cases tends to be the same for both sides. All jurisdictions do limit the total number of peremptory challenges, however, unlike challenges for cause. In Kentucky, for example, each side in a civil case is entitled to three peremptory challenges, and in criminal cases involving a felony, each side has eight challenges. Once the two sides have exercised their strikes, the jurors, including any alternates, are sworn in by the court clerk. Those who were not selected are then permitted to leave.

One of the difficulties in getting jurors to serve is the perception that trials often go on too long. That perception may have some validity, as witnessed by a trial in 1994 in New York City in which the jurors told the judge that if the trial had not ended by January 1, 1995, they were quitting. The jury sat through four months of testimony in the libel case and the plaintiff's side had yet to rest its case. The judge ordered a mistrial after he realized the case could not end by the deadline. Some of the jurors later said they were merely bluffing.[52] Rule 16 of the Federal Rules of Civil Procedure allows judges to set reasonable time limits on trials.

Juries receive little compensation for their service—typically $25 to $50 per day. Jurors in federal court currently receive $40 daily plus meal and travel allowances under certain conditions.[53] Under federal law and the law in most states, employers are required to allow employees to take time off to serve as jurors, and they cannot fire an employee because of jury service.

## Ethical Concerns in Covering Juries

Careful thought should always be given to the ethical dimensions of covering a trial. The U.S. Supreme Court in 1984 unanimously held that there was a "presumptive openness" in voir dire so that the press and the public had a constitutional right to attend, except in rare circumstances.[54] Thus journalists frequently cover jury selection, especially in cases with strong public interest. One of the ethical concerns facing journalists is whether to publish names and other personal information about jurors including potentially embarrassing facts that may have been disclosed during voir dire. Some jurisdictions now allow judges, under certain circumstances, to impose prior restraint on reporters by issuing gag orders that forbid publication of names and other information about jurors. Although such orders could, in most situations, be overturned as a violation of the First Amendment, media outlets usually choose not to contest them, particularly when individual jurors might be adversely affected by disclosure.

In rare cases such as when a trial is likely to attract a lot of media attention or when a notorious or well known figure is on trial, judges will order that jurors' identities be kept secret. That was the case in the both the O.J. Simpson and Susan Smith murder trials in 1995. Simpson was acquitted of the murders of his ex-wife and her friend, although he was found liable in a jury trial two years later for their wrongful deaths and other civil offenses to the tune of $33.5 million in compensatory and punitive damages. Smith was tried, convicted, and given a life sentence for murdering her two young sons. When several jurors were dismissed in the Simpson case, each one held press conferences and one even wrote a book about his experience on the jury. Several jurors in the Smith case also spoke out after the trial ended.

## Sequestration

Both witnesses and the jury can be sequestered during a trial, whether civil or criminal. Witnesses are sequestered by keeping them separated and out of the courtroom except when giving their testimony. The idea is to prevent one witness from being influenced by the testimony of a previous witness. In reality, sequestration of witnesses probably does not work so well because witnesses have often seen the depositions of the witness on the stand, especially in the cases of expert witnesses. But some judges apparently feel more comfortable separating witnesses than allowing them to interact. Parties (who can also be witnesses) have a constitutional right to be present during trial and thus cannot be involuntarily sequestered.

Sequestration of a jury is a somewhat different process. The jurors are allowed to interact with one another, but are not allowed to talk with other people, except under highly supervised circumstances. Sequestered jurors are kept together, usually in a local hotel, where they eat together, watch television programs, and read newspapers. All of their media content is edited so any prejudicial news is not disseminated to them. Jury sequestration is aimed at ensuring a fair trial by keeping the members from being exposed to outside prejudicial information. Obviously, jurors

will hear and see biased, or at least one-sided, information in the courtroom as both sides try to sway them, but this material is presented as evidence following strict rules to ensure fairness and relevance.

## Opening Statements and Burden of Proof

A trial begins with opening statements by each side. In a civil suit, the plaintiff's attorney is first, whereas in a criminal suit the prosecutor goes first. According to the rule, the party with the burden of proof begins the trial. *Burden of proof* is a term frequently confused with *standard of proof.* Both are evidentiary terms whose impact is dictated by the appropriate rules of evidence (civil versus criminal). State and federal rules of evidence place an affirmative duty on the party initiating the suit (the plaintiff in a civil case or the prosecuting attorney in a criminal case) to prove the facts on a particular issue.

For example, in a libel suit, the plaintiff has the burden of proving that the necessary elements of the tort occurred—defamation, identification, publication and, sometimes, special damages. The plaintiff also has the burden of showing the defendant was at fault by acting with negligence or with actual malice, depending on the status of the plaintiff and the jurisdiction, and that harm occurred as a result. In a criminal suit, a prosecutor must prove that the necessary elements of the particular crime or crimes with which the defendant is charged were present.

*Standard of proof*, a related but much different concept from burden of proof, is the extent or degree to which the evidence must be demonstrated by the party having the burden of proof. For most torts, the standard of proof is "a preponderance of the evidence," although occasionally other standards such as "clear and convincing evidence" apply. In criminal prosecutions, the standard is always "beyond a reasonable doubt." Figure 3.2 illustrates the concept.

The phrase *beyond a reasonable doubt* holds considerable mystique in the criminal justice system, but there has never been strong agreement, even among U.S. Supreme Court justices, on the precise meaning of the concept. This confusion was illustrated in two consolidated decisions in March 1994. In *Victor v. Nebraska* and *Sandoval v. California* (1994),[55] the Court upheld jury instructions in both cases that included archaic references with which the justices were clearly uncomfortable but nevertheless considered them *taken as a whole* to be constitutional. Justice O'Connor wrote the majority opinions in both cases. In *Sandoval,* the jury instructions defined *reasonable doubt* as including "not a mere possible doubt" but "depending upon moral evidence" so that the jurors could not say that they felt an abiding conviction "to a moral certainty" of the truth of the charge. Writing for a unanimous court in *Sandoval,* O'Connor noted that while the phrase *moral evidence* "is not a mainstay of the modern lexicon . . . we do not think it means anything different today than it did in the 19th century."

The jury instructions in both *Sandoval* and *Victor* were based on those enunciated by Massachusetts Supreme Judicial Court's Chief Justice Lemuel Shaw in 1850. The instructions in *Victor,* which the Court upheld in a 7 to 2 decision

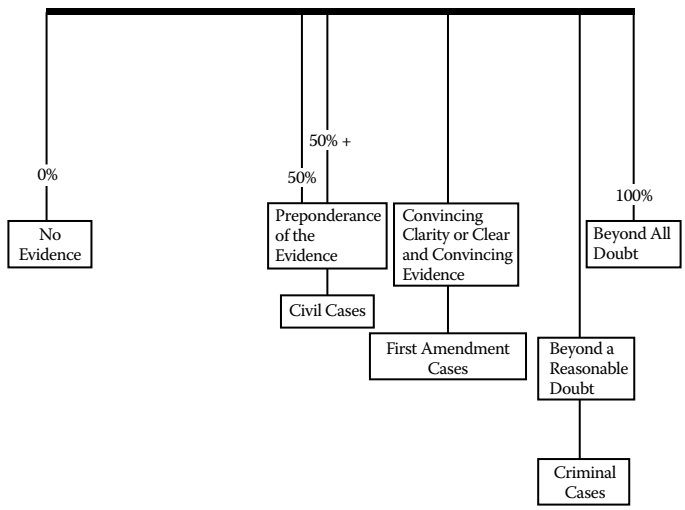


**Figure 3.2** Burden of proof.

(Justices Blackmun and Souter dissenting), also included reference to *moral certainty* and equated *reasonable doubt* with *substantial doubt:* "A reasonable doubt is an actual and substantial doubt arising from the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." Justice O'Connor agreed that this construction was "somewhat problematic" but felt that "[a]ny ambiguity, however, is removed by reading the phrase in the context of the sentence in which it appears."

The impact of the Court's decision in the two cases has been rather minimal. The message appears to be, as lawyer David O. Stewart contends, "After *Victor* and *Sandoval*, it is apparent that the Supreme Court will not lead an effort to rewrite reasonable doubt instructions, nor will the due process clause serve as a tool for prodding such an effort."[56]

No case would ever require proof beyond all doubt nor would any suit be permitted to go forward with absolutely no evidence. However, it is clear, as the chart illustrates, that preponderance of the evidence is a lower evidentiary standard than clear and convincing evidence, which is a lower standard than beyond a reasonable doubt. Preponderance of the evidence is definitely a burden on the plaintiff because the standard requires that the greater weight of the evidence be in favor of the plaintiff. If a judge (in a bench trial) or jury is convinced that the evidence is a dead heat for the two sides, the judge or jury ("trier of fact") must find in favor of the defendant. In other words, 50/50 is not enough for the plaintiff; the plaintiff must be at least slightly ahead.

Under the civil and criminal rules of evidence, opening statements cannot be argumentative and must be confined to the facts to be proven at trial. News stories sometimes call opening statements "opening arguments" but such a reference is inaccurate. Opening statements are usually relatively brief (typically 30 to 45 minutes

for each side) although some courts impose time limits to avoid lengthy statements. The tendency of some lawyers to be long in their opening statements is probably linked to the widespread belief, bolstered by a few scientific studies and pronouncements by some experienced attorneys, that most jurors have made up their minds by the end of the opening statements.

Opening statements are always optional, but it is rare for an attorney not to make an opening statement except in those jurisdictions that allow the defense attorney to postpone opening statements until the plaintiff's attorney or prosecutor has presented that side. Litigation expert James W. McElhaney says that "the first job in an opening statement is to tell the story, to make sense out of the facts. How you do that makes all the difference."[57]

Evidence is the core of any trial, and thus the rules of evidence, both criminal and civil, are enormously complex. Many lawyers will tell you the most difficult topic in law school was Evidence, especially Hearsay. (Not surprisingly, this topic is probably the most dreaded on the state bar exams.) An indication of this complexity is the fact that there are not only strict, complicated rules about what kinds of evidence can be presented, but even stricter rules about how evidence can be presented. In addition, there are so many exceptions to the general rule of hearsay evidence (second-hand information, i.e., information based on communication from a third party, not on personal knowledge) that some law professors are fond of saying the exceptions actually swallow the rule.

## Presentation of Evidence

After each side has presented an opening statement, the heart and soul of the trial—the presentation of evidence—begins. Opening statements may have an impact on the trial, but the evidence is what the jury or judge weighs in reaching a verdict. Evidence comes in two types and two forms. When most people think of evidence as presented at trial, they probably think of what is known as *direct evidence*, which *Black's Law Dictionary* defines as "that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact."[58] In other words, direct evidence directly proves a fact without having to be tied to other facts or presumptions. The best examples of direct evidence are oral testimony from an eyewitness, a confession (in a criminal case), an admission (in a civil or criminal case), and a murder weapon.

The other type is *indirect evidence*, also known as *circumstantial evidence*. *Black's Law Dictionary* defines circumstantial evidence as "testimony not based on actual personal knowledge or observation of the facts in controversy, but other facts from which deductions are drawn, showing indirectly the facts sought to be proved."[59] In other words, indirect evidence consists of facts that must be proven by inference or by implication. Examples in an invasion of privacy suit in which a defendant is accused of taping a private phone conversation (a tort known as "intrusion") would be the receipts showing the defendant had purchased such equipment and the fact that the person had been fired from a previous job for listening in on

other employees' phone conversations. An example in a criminal case would be the physical appearance of the scene of a crime.

The two forms of evidence are *oral testimony of witnesses* and *exhibits*, including documents. Both direct and indirect evidence can be presented in either form.

## Direct Examination versus Indirect Examination

Under the federal and state rules of civil procedure and criminal procedure, the side with the evidentiary burden of proof—the plaintiff in a civil case and the state in a criminal case—begins the presentation of evidence. This is accomplished by calling witnesses for *direct examination* or questioning by the attorney for the side that called the witness. Beginning journalists sometimes confuse direct examination with direct evidence. They are not the same. Direct examination deals with the interrogation process, whereas direct evidence relates to a type of evidence. The confusion arises from the fact that in a direct examination, the attorney can have the witness offer both direct and indirect evidence.

Direct examinations are usually fairly straightforward, with the attorney asking questions designed to induce the witness to make factual statements and identify documents, photos, and other physical items to be introduced into evidence. The particular rules of evidence (state or federal) dictate what evidence can be introduced and how and even the forms and types of questions that can be asked. For example, *leading questions*, which suggest specific answers, are not permitted under most circumstances in direct examination. In fact, Rule 611(c) of the Federal Rules of Evidence says that leading questions "should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." Exceptions include hostile witnesses[60] and questions designed to elicit basic information such as a witness' name, age and address.

The plaintiff or state (in a criminal case) presents its witnesses first. After each witness is sworn in and questioned by the attorney, the defense attorney has the opportunity to conduct a *cross examination* of that witness. Unlike in direct examination, during cross examination leading questions are not only permitted but expected. "Ordinarily leading questions should be permitted on cross examination," according to Rule 611(c) of the Federal Rules of Evidence. All states have similar rules permitting this type of interrogation. Cross examinations are generally "limited to the subject matter of the direct examination and matters affecting the credibility of the witness,"[61] so attorneys conducting them feel they must use leading questions if they are to accomplish the primary goal of destroying the witness' previous testimony during direct examination and if possible, making the witness give testimony favorable to their side. Another goal of cross examination, especially with expert witnesses, is to *impeach* or destroy the credibility (not just the content) of the witness' testimony.

Cross examination has become an art that few attorneys probably feel they have ever fully mastered, but nevertheless is often critical to a case, especially in media law suits such as those for libel and invasion of privacy. One litigation expert, Professor James W. McElhaney of the Case Western University School of Law, advises

attorneys not only to ask leading questions in cross examination but also to ask very short questions, use simple words, use headlines and to get one fact straight at a time.[62] According to McElhaney, "Cross examination is not for the witness. It is for you. It is your opportunity to present your side of the witness' story, punctuated by the witness' reluctant agreement that what you say is true."[63]

To help you understand the difference between leading versus nonleading questions, here are some examples of how the same information may be sought using both types of questions:

| Nonleading | Leading |
|---|---|
| How many years have you been a reporter? | You've been a reporter only two years, haven't you? |
| How reliable was John Jones as a confidential source? | You had reason to believe John Jones lied, didn't you? |
| When, if ever, do you record your phone conversations? | Don't you routinely record your phone conversations? |

As mentioned earlier, hearsay testimony is generally not admissible, although there are many exceptions. In fact, the federal rules of evidence specifically cite 23 exceptions, even when a declarant is available to testify, including a catch-all "other" category.[64] Five categories of exceptions are available if a declarant is unavailable as a witness.[65] Even hearsay within hearsay is permitted under certain circumstances.[66] Journalists sometimes get trapped by making statements under the pressure or heat of the moment that come back to haunt them.

For example, a reporter writing a story about a politician who is allegedly a drug trafficker may accidentally blurt out that he knows the person is a crook and all that's left is to prove it. That statement could be admitted as either an "excited utterance" (an exception to the general hearsay rule) or possibly as an "admission by a party-opponent" (which the federal rules do not even consider as hearsay anyway). *The moral of the story is to be very careful at all times about what you say because your statements may come back to haunt you later in a libel or invasion of privacy suit.*

The opposing counsel can always object to the court during direct examination and cross examination when impermissible questions are asked or irrelevant evidence is sought. If the judge overrules the objection, the witness is allowed to answer the question, but the judge's ruling may be the basis for an appeal if an unfavorable verdict is rendered. If the judge sustains the objection, the attorney may either rephrase the question or start another line of questioning.

## Following Cross Examination

After a witness has been directly examined by the attorney who called him or her and then cross examined by the attorney for the other side, the attorney who called

can then conduct a redirect examination, followed by a recross examination by the other side. Both steps are optional, although a recross can be conducted only after a prior direct examination. It should be noted that the recross can be followed by another redirect and so on, but such exchanges are rare, and the judge has the authority to end the process when deemed appropriate. Redirect and recross examinations are usually short because they can deal only with matters handled in the preceding step.

## Motion for Directed Verdict versus Judgment Notwithstanding the Verdict

Once the plaintiff or state (in a criminal suit) has rested its case after calling all of its witnesses, which have also been cross examined, and so on, the defendant can (and usually does) make an oral motion for a directed verdict. This motion is made outside the hearing of the jurors in a jury trial and can be made in both civil and criminal cases. In a criminal case, however, it is usually a motion to dismiss because acquittal in a criminal case either by a judge or a jury is final and the 5th Amendment bars double jeopardy ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

The concept of directed verdict is sometimes difficult for beginning journalists to understand, especially when coupled with the concept of *judgment notwithstanding the verdict* (also called *non obstante veredicto* or *jnov).* The two concepts—directed verdict and jnov—are the same, except for the timing. If the judge in a civil case determines *before* the jury renders a verdict that there is either (a) insufficient evidence for a case to go to the jury or (b) the evidence is so compelling that any reasonable person would clearly find for the plaintiff, the judge will issue a directed verdict. If the judge makes this determination after the jury has rendered a verdict, a jnov is issued. Obviously, a directed verdict or a jnov in a civil case can be in favor of either the defendant or the plaintiff. If the evidence is sufficiently weak so there is no question of fact for the jury to decide, the directed verdict will be for the defendant. If the evidence is so compelling that there is also no question of fact for the jury, the directed verdict or jnov will be in favor of the plaintiff.

Within the same jurisdiction, the test the judge applies is the same for both the directed verdict and the jnov, but, to add to the confusion, there are two different tests. Most jurisdictions, including the federal courts, now apply the *substantial* evidence test. When a motion for a directed verdict or a jnov is made, the judge is required to look at all of the evidence but view it in the light most favorable to the side *not* requesting the directed verdict or jnov—also called the *nonmovant*. If the evidence that would allow a jury to find in favor of the side not making the motion is insufficient, the judge will then deny the motion for the directed verdict or jnov. The second test, which is used in a minority of jurisdictions, is the *scintilla test* that allows the judge to deny the motion if there is *any* evidence whatsoever to warrant jury consideration.

One of the confusing aspects of the motion for a directed verdict and the jnov is the timing. The directed verdict may first be made by the defendant right after the plaintiff or state has rested its case. In a civil case, as mentioned earlier, the plaintiff must prove the case by a preponderance of the evidence, not beyond a reasonable doubt, as in a criminal case. How then would a judge be able to grant a directed verdict before the defendant has ever presented that side? Recall that the plaintiff or state has the burden of proof. If the proof is so weak that reasonable minds would not differ, the judge can obviously rule in favor of the defendant even though the defendant has not presented that side because there is so little evidence for the defendant to counter anyway. The defendant, of course, has no reason to contest the judgment because it favors that party.

Why can't a directed verdict be issued in favor of the plaintiff after the plaintiff has rested that side of the case? Even if the evidence is overwhelming, the defendant must be allowed to counter this evidence with other evidence that may substantially negate the plaintiff's case.

If a directed verdict and a jnov are granted on the same basis, then why would a judge wait until a jury had rendered its verdict before issuing a jnov? At first analysis, there would appear to be no real reason; one major purpose of issuing the directed verdict when it is warranted is to save the expense and time of continuing the trial. By waiting until the jury has made its decision, the judge would certainly defeat this purpose. However, many judges prefer to allow the jury to deliberate even though they know they would overturn a verdict if the jury did not decide in favor of the *correct* party for whom the judge would issue the directed verdict.

There are two major reasons for this preference. First, the jury may very well decide in favor of the correct side, thus negating the need for a jnov. The typical juror feels frustration and, perhaps, anger when he or she returns from a recess—after hearing the plaintiff (or state) present its side or hearing both sides in a civil suit when the directed verdict is in favor of the plaintiff—and is dismissed because the jury has no need to deliberate. Second, the odds of a directed verdict being overturned by an appellate court are typically much higher than for a jnov. In fact, even if a jnov is overturned on appeal, all the appellate court must do is reinstate the jury's decision. If a directed verdict is overturned on appeal, there is no jury verdict to reinstate and thus a new trial will be necessary.

A jury may never know that a jnov overturning its verdict has been issued because there is a period—usually 10 to 20 days after the jury's verdict—during which the motion can be filed, and the judge has some time to consider whether to grant the motion. Unless the judge's decision is reported in the media, the jurors will likely never learn their decision was overruled. The federal courts and most state courts do not allow a jnov unless the side requesting it has previously made a motion for a directed verdict at the appropriate time.

Assuming no directed verdict is granted in favor of the defendant after the plaintiff or state (in a criminal case) has presented all of its witnesses and the defendant has had the opportunity to cross examine each of those witnesses, the defense then calls its witnesses. The process is exactly the same as for the plaintiff except that the defendant conducts a direct examination of each witness, followed by the plaintiff's cross examination, the defendant's redirect (if exercised), and so on. It is quite possible that the plaintiff or state

may have already called some of the witnesses testifying on behalf of the defense. If so, the plaintiff is permitted to ask leading questions, even though conducting a direct examination. For example, in a libel or invasion of privacy case, the plaintiff's attorney may wish to build the case with testimony from the reporters who wrote the story, the managing editor, the copy desk chief, and other journalists in an attempt to establish negligence or even actual malice from the beginning and thus form a strong impression on the jury.

## Expert Witnesses

According to litigation expert James W. McElhaney, "The point of calling an expert is to put a teacher on the stand—an explainer who brings another set of eyes into the room through which the judge and jury can see the facts and understand your case."[67] Both sides may call expert witnesses, hired to offer their opinions on a particular aspect of the case. By definition, expert witnesses must possess special skills and/or knowledge not held by the average person but gained through specialized experience or education or a combination of both. In other words, the expert witness must be qualified to testify on a particular issue. For example, a professor of journalism may be hired in a libel case by the defendant to testify that the reporter was not negligent and that the story was not published with actual malice, just as the plaintiff could hire a similar expert to offer evidence of negligence or actual malice. An example in a criminal case would be a forensic psychiatrist hired by a prosecutor to testify that the defendant was mentally competent to stand trial.

Expert witnesses are usually paid for their services, and their fees generally range from fifty to several hundred dollars an hour plus expenses. Although the importance of expert witnesses varies from case to case (in both civil and criminal cases), sometimes the expert with the strongest testimony makes such a positive impression on the jury or judge (in a bench trial) that the decision sways in favor of the party for whom the expert testimony is offered. In most cases, however, the experts cancel out one another in the eyes of the jury. Thus it is not all that unusual for the attorneys for both sides to forego the experts.

The judge plays a major role in the conduct of any trial, including ruling on whether a particular piece of evidence is admissible under the federal or state rules of evidence. The difficulty is assuring that jurors do not hear inadmissible evidence. However, all too often, the inadmissible evidence is heard by the jury anyway because the other side is unable to object until after the fact. The judge must then admonish the jury to disregard the inadmissible evidence. Is such an admonition effective? If one study is any indication, the answer is "probably not." An American Bar Foundation researcher[68] found in an experiment with more than 500 adults called to jury duty in Cook County, Illinois, that jurors' decisions in a hypothetical civil case involving clear police misconduct in a raid were affected by the evidence police did or did not find. Even though the jurors were instructed by the judge to disregard the inadmissible evidence, their decision was affected by that evidence. Even the amount of damages was affected by the illegally obtained evidence, apparently because the information remembered by the jurors during their deliberations was influenced by what the police

found. For example, the study's participants who heard that the fruits of the illegal search included evidence that the plaintiff was guilty of selling heroin awarded the plaintiff an average of $7,359 in punitive damages versus an average of $23,585 if the evidence indicated the plaintiff was *innocent* of possession of marijuana.[69]

## Closing Arguments

In both civil and criminal cases, the trial ends with closing arguments by both sides. The opening statements, as mentioned earlier, are summaries of the facts to be presented, *not* arguments. The closing comments can, and indeed nearly always are, arguments designed to sway the jury to a particular side. Even though some studies indicate that jurors often make up their minds during the opening statements, attorneys know that closing arguments can play a key role in influencing jurors—especially those who may still be undecided after hearing all of the evidence. Thus, it is not unusual, especially in civil cases, for attorneys to make strong, emotional appeals. Indeed, some of the most colorful and memorable statements from great lawyers such as Clarence S. Darrow, who unsuccessfully defended public school teacher John T. Scopes in the famous Tennessee "Monkey" trial over the teaching of evolution, have come from closing arguments.

In fact, unless the opposing side objects, judges in both civil and criminal cases are generally lax in what they permit attorneys to say in closing.

Rule 61 of the Federal Rules of Civil Procedure and a very similar Rule 61 of the Federal Rules of Criminal Procedure are usually cited as the bases for ignoring potential errors in closing arguments because "the court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."[70] Consider the excerpts from the following closing arguments made by the plaintiff's attorney in a libel suit discussed in Chapter 8:

> Since he talked with you about the University of Georgia and when he was there, I think I likewise have a right to mention to you briefly that I probably have known Wally Butts longer than any man in this case. I was at Mercer University with Wally Butts when he played end on the football team there. He was in some respects a small man in stature, but he had more determination and more power to win than any man that I have ever seen in my life. I would not stand before you in this case today arguing in his behalf if I thought that Wally Butts would not tell you the truth when he raises his hand on this stand and swears to Almighty God that what he is going to tell you is the truth. . . .
>
> Somebody has got to stop them. There is no law against it, and the only way that type of, as I call it, yellow journalism can be stopped is to let the *Saturday Evening Post* know that it is not going to get away with it today, tomorrow, or anymore hereafter and the only way that lesson can be brought home to them, Gentlemen, is to hit them where it hurts them, and the only thing they know is money. They write about human beings; they kill him, his wife, his three lovely daughters. What do they care?. . . .

> I say, Gentlemen, this is the time we have got to get them. A hundred million dollars in advertising, would ten per cent of that be fair to Wally Butts for what they have done to him?. . . .
>
> You know, one of these days, like everyone else must come to, Wallace Butts is going to pass on. No one can bother him then. The *Saturday Evening Post* can't get at him then. And unless I miss my guess, they will put Wallace Butts in a red coffin with a black lid, and he will have a football in his hands, and his epitaph will read something like this: "Glory, Glory to old Georgia."[71]

The jury of 12 men awarded plaintiff Butts $60,000 in compensatory damages and $3 million in punitive damages. The trial court judge reduced the award to $460,000, the equivalent of two cents for each of the 23 million issues in which the story appeared. Both a U.S. Circuit Court of Appeals and the U.S. Supreme Court upheld the trial court's decision.

## Judge's Instructions to the Jury

After the closing arguments have been delivered, the judge instructs the jury on the appropriate law to be applied in deciding the case. In most jurisdictions including the federal system, the attorneys for both sides have the opportunity to submit to the judge specific instructions for the jury. Such requests must be filed and the judge must rule on them before the closing arguments are made, but the instructions are not usually given to the jury by the judge until *after* the closing arguments. Under Rule 51 of the Federal Rules of Civil Procedure and most state rules, the judge can instruct the jury before or after the closing arguments or both, although judges rarely depart from the tradition of waiting until the arguments conclude. In complex cases, these instructions can be long, complicated and intensely boring for the jury, but they are important in the judicial process.

A study by the Capital Jury Project (CJP), which included interviews with more than 500 jurors who served in trials for capital offenses, found that jurors often misunderstand or ignore instructions by the judge.[72] According to the research, more than half had already formed opinions before the sentencing hearing, and almost 40 percent of them had improperly discussed punishment while they were deliberating on guilt. (Under federal and state rules, guilt or innocence is to be determined before punishment is set.)

## Jury Deliberations

Once the jury instructions have concluded, the members deliberate behind closed doors. After a foreperson is elected by the body, a tentative vote is first taken, usually by secret ballot. If a unanimous verdict is required (often it is not) and the vote is unanimous with no undecideds on the first ballot, the jury returns to the courtroom to announce its verdict. Generally, however, the first vote will not be unanimous and deliberations will last from a few hours to days and even weeks. In criminal cases in

both federal and state courts, a unanimous verdict is required. In the federal courts and most state courts, civil cases require a unanimous verdict unless the two sides have agreed otherwise before the trial.

In most cases the same jurors serve throughout a trial but in rare instances substitutions may have to be made. In the highly publicized 1993 Los Angeles trial in which two defendants were charged with beating Reginald Denny during the 1992 L.A. riots, five of the original twelve jurors were replaced. Two became ill during testimony and were dismissed, one was removed for discussing the case with neighbors, and two were taken off the jury during deliberations. One of the latter was a woman about whom the other jurors sent a note to the judge indicating they could not work with her.[73] In the 1997 civil trial of O.J. Simpson for the wrongful deaths of Ronald Goldman and Nicole Brown Simpson, one juror was removed and replaced by an alternate after the jury had already begun deliberations. Only a handful of states give judges the discretion to replace a juror with an alternate any time during the trial and then only for "good cause."

## The Verdict

In a civil case, there are three major types of verdicts. The judge always determines which type of verdict is needed. The most frequent type is the *general verdict*; the judge instructs the jury on the applicable law and requests that the members apply that law to the facts in the case and determine which side wins and the amount of damages or other relief if the plaintiff wins. Thus the jury is granted considerable flexibility in reaching its decision. With a *special verdict*, the court requires the jury to render a verdict "in the form of a special written finding upon each issue of fact."[74] In other words, the jury is confined to making specific findings of fact, and the judge actually applies the appropriate law to the facts and renders the final verdict. The procedure is for the judge to submit to the jury a series of written questions, along with explanations and instructions, which the members answer in writing based on their findings during deliberations. Any party in a civil suit can request a special verdict, but the judge makes the final decision regarding the form of the verdict.

In the Simpson civil trial, the jury was asked to answer eight questions in its special verdict, including:

1. Do you find by a preponderance of the evidence that defendant Simpson willfully and wrongfully caused the death of Ronald Goldman?
2. Do you find by a preponderance of the evidence that defendant Simpson committed battery against Ronald Goldman?
3. Do you find by clear and convincing evidence that defendant Simpson committed oppression in the conduct upon which you base your finding of liability for battery against Ronald Goldman?
4. Do you find by clear and convincing evidence that defendant Simpson committed malice in the conduct upon which you base your finding of liability for battery against Ronald Goldman?

The next three questions were the same as questions 2, 3 and 4, except that they related to Nicole Brown Simpson instead of Ronald Goldman. The jury was not presented with the question of whether Simpson had willfully and wrongfully caused the death of Nicole Brown Simpson because her parents chose to file the suit on behalf of their daughter's estate to avoid putting the two grandchildren in the position of suing their father for their mother's death. The last question focused on the compensation of Goldman's parents for the loss of companionship of their son. (Nicole Simpson's estate sought no such damages.) A unanimous jury answered "yes" to all eight questions. In order to award punitive damages, the jury had to find that the defendant committed oppression and malice by clear and convincing evidence, not merely by a preponderance of the evidence.

Noting that it is an old procedure, one legal expert calls the special verdict "a valuable tool for lawyers involved in civil litigation" that, when used with care, "is helpful in defining issues, focusing the jury's attention on those issues, sorting out the liabilities of the parties, and producing a record of the jury's fact findings."[75]

A third type of verdict, a sort of compromise between general and special verdicts, is the *general verdict accompanied by answers to interrogatories*.[76] This form of verdict, in which the judge requests a general verdict accompanied by written answers to one or more factual issues, has the advantage that the judge can compare the answers to the interrogatories to see whether they are in line with the verdict. If they are consistent, all's right with the world, and the judgment is entered into the record. If the verdict and answers are at odds, the judge can either send the case back to the jury for further consideration or grant a new trial. This verdict form has the advantage that it allows the judge to head off the possibility of a successful appeal. Unfortunately, such a verdict can be very time consuming and potentially confusing to the jury.

Although its deliberations are secret, the jury verdict in both civil and criminal cases is announced in open court either by the jury foreperson or by the court clerk, depending on the tradition in that particular jurisdiction. If the jury has been unable to reach a verdict (for example, if it is unable to reach a unanimous verdict when required), the result is a *hung* jury. If the judge is convinced that the jury could reach a verdict if given more time, the judge may order the jury to reconvene to try to reach a decision. Otherwise, the judge may declare a *mistrial*. Mistrials are relatively rare in civil cases, but they do occasionally occur in criminal cases.

## 6th Amendment Ban on Double Jeopardy

Can a defendant be tried again if there is a mistrial? The answer is "yes" in both civil and criminal cases. The 6th Amendment ban on double jeopardy does not apply to civil cases, and there is no double jeopardy in a mistrial in a criminal case because no verdict has been rendered. However, if a defendant in a criminal suit is acquitted, the decision is final, and the defendant cannot be tried again for that same crime. However, if an individual has been acquitted of a federal crime but the same facts and circumstances support a trial on state charges, the person could face trial

in state court. No double jeopardy arises because the two alleged crimes are not the same even though the facts surrounding them are similar or even identical. The same would hold true if the acquittal were on state charges but the facts supported federal charges.

The judge always has the option in a criminal case of either granting an acquittal or a directed verdict, of course, before the case goes to the jury. In this case, the judge must be convinced that a guilty verdict cannot be reasonably supported by the facts. The court can also order a new trial because of substantive procedural errors, but such decisions are unusual in both civil and criminal cases.

## Impeachment of the Verdict

In rare situations, a jury verdict may be *impeached* based on juror testimony. The rule in most states, but not in the federal courts, is that juror testimony *cannot* be used to impeach a verdict. This rule, popularly known as the "Mansfield rule," does not prohibit the use of other evidence such as someone else's observations of jury misconduct for impeachment. A few states adhere to the "Iowa rule," under which jurors can testify regarding overt acts, but not opinions, of other members. For example, a juror could testify that another juror read newspaper stories about the trial even though the jurors had been instructed not to read such stories. Federal Rule of Evidence 606 allows inquiry into testimony by a juror only "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

## Debriefing Jurors

While jurors may be prohibited from discussing a case while a trial is in progress, they are certainly free to talk once they have rendered a verdict and the trial is over or otherwise concluded. Thus a journalist or anyone else can debrief a juror with that person's consent. Many news media outlets now routinely interview jurors when a trial is concluded to ascertain how the decision was reached and what factors influenced the jurors. Jurors are sometimes reluctant to discuss cases, especially because they were ordered not to do so while the trial was in session. However, a thoughtful and enterprising reporter can usually make such former jurors feel at ease and thus get an important "inside" story that helps readers better understand the verdict. Judges sometimes issue bans prohibiting post-verdict contacts with jurors by journalists. Whether such bans can pass constitutional muster is an open question, but the news media usually threaten to fight such bans in court, which usually discourages judges from imposing such orders. Although the jury may have come and gone, its decision is not final until the judge enters a judgment on the decision, which may come a few or even several days later. Any specified deadlines for filing appeals and other motions do not begin to run until the judgment is entered.

## Determining Damages

Unless there are applicable statutory limits, the jury has considerable discretion and leeway in setting damages in civil cases. However, in nearly all cases the judge has the authority to increase or decrease the amount of damages awarded by the jury and even to modify the judgment in other ways before the final judgment is actually entered. For example, when actress and comedienne Carol Burnett was awarded $1.6 million in 1981 by a California jury for libel against the *National Enquirer*, the judge cut the total to $800,000.[77] In the same year when a former "Miss Wyoming" won a total of $26.5 million in damages in a jury trial for libel against *Penthouse* magazine, the federal court judge immediately halved the damages,[78] which the plaintiff never collected because she ultimately lost before a U.S. Court of Appeals.

An exception to the general rule that judges have wide discretion to revise damages awarded by juries can be found in a 1910 amendment to the Oregon constitution providing that a judge cannot review the amount of *punitive damages* awarded by a jury "unless the court can affirmatively say there is no evidence to support the verdict." In 1994, the U.S. Supreme Court struck down this standard, which made it extremely difficult to alter punitive damage awards, as a violation of the 14th Amendment's Due Process clause. In *Honda Motor Co., Ltd. et al. v. Oberg*,[79] the Court held 7 to 2 in an opinion written by Justice Stevens that the amendment was unconstitutional because:

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger. Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time.[80]

The majority opinion pointed out, "Judicial review of the size of punitive damage awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." The Court further noted, "No Oregon court for more than half a century has inferred passion and prejudice from the size of a damages award, and no court in more than a decade has even hinted that courts might possess the power to do so." The Court was effectively saying that the standard for judicial review under the state constitution was so high that it essentially prevented any review of punitive damages by a judge.

The case arose when Honda Motor Co. appealed a jury's awards of $5 million in punitive damages and $919,390.39 (reduced to $735,512.31 by the judge because of the plaintiff's own negligence) in compensatory damages. The damages were awarded as a result of an accident in which a three-wheeled all-terrain vehicle overturned, resulting in severe and permanent injuries to the male driver. The U.S. Supreme Court

remanded the case back to the Oregon Supreme Court for reconsideration of the $5 million punitive award in light of the $735,512 compensatory damages.

Jury awards are typically small because the damages in most cases are not sizable. Occasionally, however, juries do award large damages and such cases receive considerable publicity. For example, in 2000 a Miami jury awarded $145 billion, primarily in punitive damages, against four major tobacco firms, but a state appellate court overturned the verdict, ruling that the case was inappropriately tried as a class action lawsuit.[81]

Most jury trials, whether civil or criminal, last no more than three or four days. However, some may go no longer than a few hours and others may continue for years. The record for the longest trial is the 3½ year *Kemner v. Monsanto* dioxin trial. The trial over whether 65 plaintiffs were injured when a half teaspoon of extremely toxic dioxin leaked from a railroad tank car during an accident began on February 22, 1984, and ended on October 22, 1987, with a jury verdict that ordered the defendant to pay $16.25 million in punitive damages.[82] The transcript in the trial was more than 100,000 pages, including testimony from 182 witnesses and some 6,000 exhibits. One report about the trial noted that one 27-year-old lawyer had worked on this single case since he graduated from law school,[83] and another article described how one juror was dismissed less than an hour before jury deliberations began after she had sat through all of the previous three years of trial proceedings.[84] The jurors awarded the 65 plaintiffs $1 each in compensatory damages.[85]

### Final Judgment

As attorney James R. Laramore points out, "To the uninitiated, a final judgment marks the end of lengthy and expensive litigation. It is, however, only the beginning of the end."[86] These procedures include various post-judgment motions such as motions for a *judgment notwithstanding the verdict* and a *directed verdict* (discussed earlier in this chapter) as well as the appeals process (see chap. 2) and also include enforcement of the judgment via garnishments and property liens.[87]

## The Criminal Trial

The procedures and proceedings in a civil trial and a criminal trial are quite similar, but there are a few differences. First, the pretrial procedures in criminal cases are substantially different, primarily because various constitutional rights come into play, as discussed earlier, such as the 6th Amendment right to a speedy and public trial and the 5th Amendment right of due process. There are three major ways in which criminal charges are brought against an individual or legal entity such as a corporation. First, a grand jury can issue an *indictment*, which is not a finding of guilt. It is merely a finding that there is sufficient evidence—defined as *probable cause*—to warrant a trial. Figure 3.3 illustrates the felony process for Kentucky, which is similar to that in most other states.

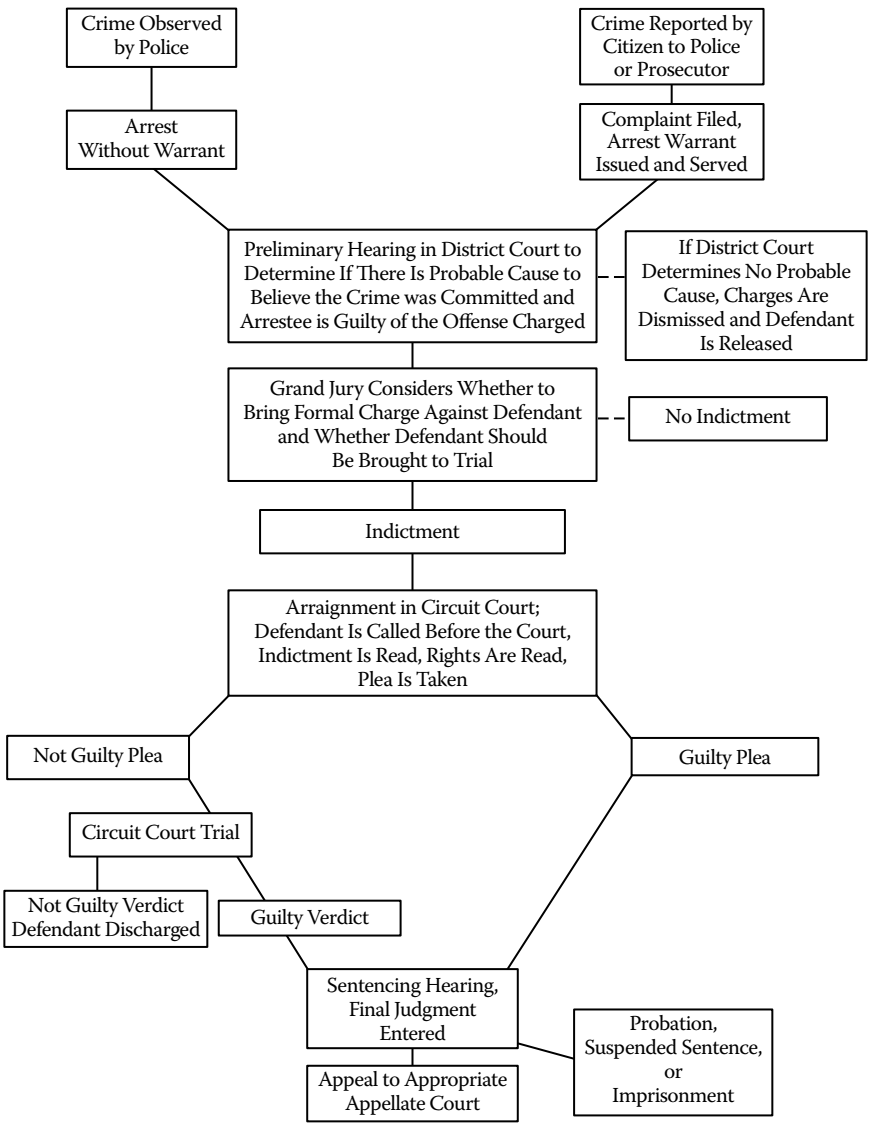


**Figure 3.3** Kentucky felony case process. (Compiled by Administrative Office of the Courts, Frankfurt, Ky. Reprinted by permission.)

## Grand Jury Indictments

The grand jury system has a long bloodline that goes back nine centuries ago to England and continues through colonial times in this country as a means of formally accusing the guilty. However, in the American colonies, grand juries also assumed the role of protecting innocent citizens from prosecutorial zeal.[88] The process has the advantage that it serves as a mechanism for filtering out criminal cases that have little merit. At the same time it can be argued that all too often grand juries have become mouthpieces for prosecutors. One common criticism of grand juries today is that they have "become prosecutors' weapons, using secrecy and immense subpoena powers to charge defendants."[89] Only the federal court system,

12 states, and the District of Columbia require grand jury indictments in all cases. Four states require indictments only in capitol cases or cases that carry potential life sentences.[90] The federal requirement comes from the 5th Amendment: "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 . . . [followed by exception]." The U.S. Supreme Court has yet to rule whether this clause applies to the states through the 14th Amendment.[91]

Unlike trial juries (technically known as *petit juries*), grand juries sit for more than one case. In the federal system, grand jurors may serve up to 18 months and can hear hundreds of potential cases during that time. The grand jury is also much larger than a trial jury—typically with 16 to 23 members in federal cases and a similar number in state cases.

Two characteristics of the grand jury system that could be criticized as inherent weaknesses are (a) deliberations are always conducted in secret, away from the scrutiny of the press and the public and (b) the prosecutor or, in the federal system, the U.S. Attorney for that district, presents the evidence to the grand jury, without the opportunity for any potential defendant or actual defendant to present the opposing side. Even the federal government acknowledges that it is rare for a grand jury not to issue an indictment requested by a prosecutor.[92]

According to the rationale for secrecy, witnesses will feel free to give their testimony without fear of revenge. By the same token, it could be argued that such a witness is more likely to exaggerate or even lie if that person knows the testimony will not be subject to public scrutiny. Not only are the grand jurors restricted from publicly disclosing any information about the proceedings while the grand jury is in session but even the U.S. Attorney or prosecutor is gagged.

In the federal system and in the few states that use the grand jury system, the press is usually allowed to watch witnesses as they enter and leave the grand jury room, but witnesses are not permitted to talk with anyone except authorized officials until after they have given their testimony. Once the witness has testified in secret, he or she can, if willing to do so, talk freely about the testimony. The enterprising journalist is always on the lookout for witnesses who volunteer to talk. Be careful! Witnesses can talk, if they wish, only *after* the testimony; the journalist who publishes information leaked by a grand juror or a prosecutor faces the real possibility of a subpoena to identify the source in court or may face contempt of court charges including a fine and/or a jail sentence.

After hearing the evidence in the forms of testimony and materials and/or documents, the grand jury votes to determine whether there is *probable cause* to believe that a person has committed a crime and thus should be tried. *Probable cause* is a relatively low standard. It simply means that there is more evidence as a whole for the grand jurors, acting as reasonably prudent individuals, to believe that the accused committed the crime than that the person did not. This is sometimes known as *reasonable cause* or *reasonable belief*. If the specified number of members (12 in the federal system) finds probable cause, the grand jury will issue a *bill of indictment*, also known as a *true bill*, charging that individual with a particular crime or

crimes. Unless the indictments have been ordered sealed, which occurs in rare circumstances, they are read and made available in open court and then filed as open records, usually in the court clerk's office.

Seasoned journalists know that all defendants' names appear on an indictment in all capital letters and that all charges are individually listed. Read names carefully because witnesses and other individuals may also be listed, but they are not defendants. (These names are not in all capital letters in the indictment.) For example, characterizing someone as a defendant who was merely a witness simply because you did not carefully read the indictment could bring you an unwanted suit for libel or false light.

## Filing of an Information

The second method by which criminal charges can be brought is *filing of an information* by a prosecutor such as a district or county attorney. This is simply a process by which the individual is formally accused without the use of a grand jury. Constitutional standards including the 6th and 14th Amendments, require, just as in an indictment, that the exact (or approximate if exact cannot be determined) date, time, and place of the alleged criminal act be specified. The information must also include the role the defendant played in the alleged crime and other known details. The idea is that defendants should be sufficiently informed so they can adequately defend themselves.

The filing of an information is often based on evidence obtained through a search warrant, which must conform to 4th Amendment standards enunciated by the U.S. Supreme Court in a series of complicated decisions over the years. Basically, the Court has said that a warrant must be specific and narrowly drawn to ensure that a constitutionally valid search is conducted. If a search warrant is improper, then the evidence garnered from the search generally cannot be used at trial, although the Supreme Court has carved out a series of "good faith exceptions" that some legal experts, especially criminal defense attorneys, find troubling.

One variation of the filing of an information occurs when charges are initiated by one individual filing a criminal complaint against another, such as a wife filing charges against her husband for assault. However, the prosecutor has the discretion on whether to act on the charges by a filing of an information. In other words, the original criminal complaint basically serves as a request to the prosecutor to take further steps. The prosecutor can always choose *not* to proceed further, especially if there appears to be no probable cause to do so.

## Citations

Finally, for certain misdemeanors and other relatively minor crimes such as traffic violations, but *not* felonies, charges can be brought via a *citation* from a law enforcement or other designated officer. No grand jury or filing of an information is required under these circumstances.

## Arrest Warrant

Once a grand jury has returned an indictment or a prosecutor has filed an information, the court clerk issues an *arrest warrant* if the person is not already in custody. For example, the individual may already have been charged with another crime and thereby arrested or may have been detained at the time the alleged criminal act took place. Since a 1966 U.S. Supreme Court decision in the case of *Miranda v. Arizona*,[93] police have been required, primarily under the 5th Amendment ban on forced self-incrimination, to inform suspects in police custody of their constitutional rights *before* any questioning can begin.

Television shows and movies are fond of including the Miranda warnings, probably as a way of lending authenticity to their products. Almost any first grader can utter, "Read me my rights." Television shows such as "Law and Order," "Cold Case," and "Crime Scene Investigation" have made the line "You have the right to remain silent . . ."[94] as familiar as some of the theme songs that accompany the shows. One stipulation to the requirement that the Miranda Rule be followed is that the suspect must be in custody or be in a situation in which the ability to voluntarily leave is significantly restricted by police. If police fail to give the warnings when the rule is in effect, any confession or other incriminating evidence disclosed by that person generally may not be used to convict the person.

## Preliminary Hearing

Unless a defendant has been indicted by a grand jury, the next major step in a criminal procedure is an *initial* or *first appearance*, which is known in some jurisdictions as a *preliminary hearing* or *arraignment*. (Journalists should learn the proper terminology in their jurisdictions.) First, the judge will inform defendants of the specific charges brought against them and then inform them of their legal rights. At this stage, a judge must also decide if there is *probable cause* (i.e., sufficient evidence) to warrant bringing defendants to trial. If the judge believes the evidence is insufficient, the judge will dismiss the charge(s) and order that the defendant be released.

If the judge finds probable cause to charge defendants, the judge will first determine whether they need legal representation. If the defendants cannot afford an attorney, the judge will make arrangements for a public defender to serve. Finally, the judge determines whether defendants will be allowed to post bail and, if so, how much must be posted prior to their release from custody.

The judge has several options, including allowing defendants to post a specified amount for *bail*, releasing defendants on their *own recognizance* (without having to post bond), and even denying bail in extreme circumstances such as when a defendant has a history of "jumping" bail.

The fact that dangerous individuals are frequently released on bail has drawn much criticism from the public over the years, but judges are bound by the 8th Amendment prohibition against excessive bail.

The rationale in granting bail is to allow the defendant to prepare adequately for defense while a stick is held over the accused's head in the form of a posted bail

bond that is forfeited if the defendant fails to appear at trial. A judge does have the option of imposing certain conditions on the bail such as restricting the defendant's travel and personal contacts, so long as the restrictions are reasonable. A judge can always set the amount of the bond sufficiently high to ensure that the defendant does appear at trial.

## Arraignment

If defendants have already been indicted, the first major step after indictment and arrest is *arraignment*. At this stage, the individuals are read the indictment, the judge explains the legal rights and the individuals enter a plea. If an initial appearance, as explained earlier, has already been made, the judge simply hears the plea. If the defendants plead guilty, they will either be immediately sentenced, especially in the case of misdemeanors and minor offenses, or a date will be set for sentencing. If they plead not guilty, a tentative trial date is announced. It is not unusual for a trial date to be postponed one or more times before the actual trial.

In the case of federal crimes and in some states, a judge can also entertain a plea of *nolo contendere* (from the Latin meaning "I will not contest it"). Federal Rule of Criminal Procedure 11(b) permits this plea only with the consent of a judge who must consider the rights of the parties and the public interest in effective administration of justice. Basically, the defendant is saying "I am neither admitting nor denying the charges but simply not fighting." Obviously, the judge in such a case can reject the plea or, if the judge accepts the plea, he or she can still fine and/or sentence the person. The major advantage for the defendant is that, unlike with a guilty plea, a plaintiff cannot use the plea as evidence against the defendant in a civil suit arising from the same actions as those associated with the criminal charges. In other words, a nolo contendere plea cannot be used as evidence in a civil suit.

A defendant may also enter an *Alford plea* in which the defendant claims innocence but agrees to plead guilty in exchange for a reduction in the charges. The plea owes its origins to the 1970 U.S. Supreme Court decision, *North Carolina v. Alford*.[95] The case involved a defendant who pled guilty after the prosecutor agreed to reduce the charge against him from first degree to second degree murder. After being sentenced to 30 years imprisonment, he appealed his conviction on the ground that he had pled guilty only to avoid the death penalty and thus his plea had been involuntary. According to the U.S. Supreme Court, "An individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."[96]

## Settlement Prior to Trial

The overwhelming majority of criminal and civil cases never go to trial because an agreement is reached between the two sides beforehand. For example, in 2001, only 2 percent of civil cases filed in federal court were tried, and only 15 percent of

defendants in criminal cases chose to go to trial.[97] For civil cases, this means out-of-court settlements. In criminal cases, the filtering process is called *plea bargaining*. Plea bargaining can occur at any stage, but most agreements are made after the arraignment but before trial. The courts could not begin to handle the caseload if even only twice as many defendants insisted on having trials to which they are constitutionally entitled. Plea bargaining has become *the* way of settling criminal cases.

The public is often appalled when an incorrigible has a prosecutor agree to ask a judge to charge the incorrigible with a lesser offense than in the original complaint and/or grant leniency in sentencing in exchange for a guilty plea. Some people are particularly concerned because the plea bargaining process takes place out of the public view. The agreement usually becomes public only when the defendant appears in court. It is not well known that a judge is not bound by any agreement between a prosecutor and a defendant. In other words, a judge can refuse to honor an agreement, although judges rarely override the recommendations of a prosecutor.

If a defendant does plead guilty, a judge can immediately impose a sentence, but will usually schedule a hearing instead for later. If a defendant pleads not guilty, the judge will then schedule a trial.

## Discovery

If a criminal case has not already been settled by a guilty plea or dismissal, the last major step before trial is *discovery*. The discovery process is somewhat different in criminal and civil suits. One of the most important differences is that depositions and interrogatories, which are almost essential in any civil case that goes to trial, are almost never conducted in criminal cases. They are usually unnecessary because (a) the 5th Amendment prevents a criminal defendant (but generally not a civil defendant) from being forced to give testimony and (b) the federal system and most states have fairly strong disclosure provisions that require each side to keep the other side informed, including exchanging lists of witnesses each side expects to use at trial. The prosecutor is also required to reveal to the defense any evidence found during the investigation or discovery that would reflect on the defendant's guilt or innocence. This requirement is usually enforced in the form of a judge's order and can encompass the defendant's criminal records; documents, photos and other materials to be used at trial; medical reports and results of other tests such as a polygraph examination; and any recorded statements made by the defendant to police or other officials. There are often restrictions that allow prosecutors to keep the identities of government informants and other witnesses who might face intimidation or harm confidential.

In the federal system and in most states, the prosecution also has the right of access to evidence to be used by the defense at trial, although, of course, the prosecution cannot get information that would be covered by attorney–client privilege or by some other exemption to the general rule of disclosure.

Much of the information exchanged by the two sides is public record, including discovery orders and responses. The astute journalist will frequently check with the

court clerk to see if new documents have been added to the case file. It is particularly a good idea to establish rapport with the clerk because processing a document that has been filed may take a while, especially if the clerk's office is overloaded at the time. Most court clerks are usually willing to allow a journalist to make a copy of a document as soon as it has been filed (i.e., officially received and stamped), but you should set up a cooperative arrangement with the clerk for doing this.

## Sentencing

If a judge or jury determines that a defendant is guilty beyond a reasonable doubt, a judge in the federal system determines the defendant's sentence, applying special guidelines established by the United States Sentencing Commission.[98] Until 2002, in five states, including Arizona, the judge, rather than the jury, decided whether to sentence a defendant convicted of a capital offense to death. In four other states, juries made sentence recommendations but the final decision was in the hands of the judge. In the other 29 states with the death penalty and in the federal system, juries decided whether there were aggravating circumstances and then balanced those against any mitigating circumstances before imposing a death sentence on a capital defendant.

In *Ring v. Arizona* (2002),[99] the U.S. Supreme Court held in a 7 to 2 decision that it was a violation of the 6th Amendment for a judge to have sole responsibility for deciding whether to sentence an individual to death in a jury trial. In issuing its ruling, the Court overturned *Walton v. Arizona*—1990 precedent[100] in which the Court upheld the same sentencing scheme as constitutional. As a result, in all 38 states with the death penalty and in the federal system, the decision is now in the hands of the jury. In 2000 in *Apprendi v. New Jersey*,[101] the Court had ruled that a defendant's 14th Amendment due process rights were violated in a hate crimes case by a New Jersey statute that removed the jury from determining whether a defendant could face an increase in the maximum sentence. According to the majority opinion, *Walton* and *Apprendi* were irreconcilable. "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[102]

## Twin Juries

California has experimented with a procedure that is relatively rare—using two different juries in the same courtroom for two different defendants. This system was used in the 1993 case of Erik and Lyle Menendez who were tried for killing their wealthy parents in 1989. Each defendant had a separate jury even though the brothers were tried in the same courtroom. Lyle's jury, however, was not permitted to hear testimony concerning Erik's confession, to which Erik's jury was exposed. Both of the cases ended in hung juries, but each defendant was convicted upon retrial two years later. Such procedures are typically reserved for complicated cases, usually to save the expenses of separate trials.

## Alternative Dispute Resolution

As the workloads of most courts continue to increase, alternatives will get more attention and thereby begin to look more attractive. Clearly, the courts remain the best forums for many types of cases, but there are indeed some viable alternatives, many of which have long, distinguished histories. These options go by colorful names such as summary jury trials, minitrials, facilitation, arbitration, and mediation. They all provide ways of resolving disputes outside the traditional trial. Some—such as summary jury trials—are more shortcuts than real alternatives, but they are becoming more popular as attorneys, judges, and other legal experts discover their advantages and begin to feel comfortable in recommending them to clients and parties.

Alternative dispute resolution (ADR) is not without critics. One of the most common criticisms is that in providing privacy for the parties, ADR, particularly arbitration and mediation, undermines the whole doctrine of *stare decisis*. Both the proceedings and the outcomes are shrouded in secrecy, preventing both trial courts and appellate courts from interpreting and applying law so that future litigants will have some guidance on how a case is likely to be decided. Journalists are often among the most vocal critics because they are prevented from gaining access to decisions in lawsuits that clearly have a strong public interest. As one U.S. District Court judge noted, "Everybody knows what is happening in a jury trial. It creates an open forum to understand how the law works. If we lose that, we lose something very important."[103] We will briefly explore the more popular alternatives so you will recognize their features and can learn, on your own if necessary, their inner workings.

## Summary Jury Trial

In 1980, a U.S. District Judge in Cleveland, Thomas Lambros, proposed a new process for encouraging negotiated settlements in civil cases. Several federal trial court judges have used the technique, known as a *summary jury trial*, usually with the consent of litigants on both sides. The idea of a summary jury trial is, at least intuitively, rather appealing. Instead of the usual drawn-out trial involving opening statements, direct examinations, cross examinations, closing arguments, objections, motions, and so on, the attorney for each side is granted a specific amount of time to summarize the case before a six-person jury, which then deliberates and renders a *nonbinding* verdict. Most summary jury trials take no more than a few hours to a day and they, theoretically at least, afford the parties an opportunity to see how a full jury would weigh the evidence and decide.

In 1987, however, this procedure received a serious, although certainly not fatal, blow when the U.S. Court of Appeals for the 7th Circuit held that federal judges lacked the authority to require parties and attorneys to use summary jury trials.[104] Because the issue in the case was whether litigants could be forced to use the technique, the court did not rule on the legality of such trials to which both sides consented.[105]

The case arose when an attorney was cited for contempt and fined $500 by the trial court judge after he refused to participate in a summary jury trial even though

ordered to do so. The trial court judge did not order that the case be settled with this process but merely that this alternative be used to attempt to induce a settlement. He used Rule 16 of the Federal Rules of Civil Procedure, which grants federal judges discretion in directing attorneys and parties to participate in pretrial conferences. The judge also cited a 1984 resolution by the Judicial Conference of the United States endorsing summary jury trials.[106] Nevertheless, the court of appeals noted that although the rule "was intended to foster settlement through the use of extrajudicial procedures, it was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation."[107] In 1990, Congress approved the use of summary jury trials through the Judicial Reform Act.[108]

Decades after Judge Lambros came up with the idea of summary jury trials, the process is still struggling to capture acceptance, with still relatively few judges using this alternative dispute resolution.[109] One of the most prominent critics of compulsory use of this technique is 7th Circuit U.S. Court of Appeals Judge Richard Posner, who argues that it can actually increase cost and that it bypasses the opportunity for jurors to judge the credibility of witnesses.[110]

## Arbitration

Certainly the oldest ADR mechanisms still in use today are arbitration and mediation. These processes are often confused with one another, but they are quite different. The Council of Better Business Bureaus (BBB) defines *arbitration* as "a process in which two or more persons agree to let an impartial person or panel make a decision to resolve their dispute."[111] Except in very unusual circumstances, such as when an arbitrator or panel violates established rules or when the arbitrators clearly exceed their legal authority, a court will not even hear an appeal of an arbitration decision, let alone reverse it. Thus arbitration decisions are legally binding on all the parties involved, unlike court decisions that can generally be appealed at least once. This is one of the major advantages of arbitration. The parties must agree to abide by the decision, regardless of whether it is favorable or unfavorable to a particular party, so both sides know from the beginning that the arbitrator's decision will settle the dispute once and for all. The savings in cost, time, and attorneys' fees can be considerable. In fact, for most arbitration hearings, parties are not required to be represented by attorneys although each side has the option of using legal counsel.

The Better Business Bureau is one of several private organizations that conduct arbitration hearings. The BBB provides both binding and conditionally binding arbitration as well as mediation and informal dispute settlement. In conditionally binding arbitration, the consumer does not have to accept the arbitrator's decision, although the business involved does. In informal dispute settlement the two parties present their sides to an impartial third party (hearing officer) who issues a nonbinding decision.[112] Even governmental agencies are involved in alternate methods, for example, the Federal Mediation and Conciliation Service (FMCS)[113] whose work includes resolving labor–management conflicts, and the Community Relations Service (CRS) whose primary concern is improving law enforcement–community

interactions.[114] Both are little known among the general public, but they provide services such as arbitration, mediation, and conciliation that are becoming more common each day. The FMCS was established in 1947 to mediate labor–management disputes, whereas the CRS was created via the Civil Rights Act of 1964 to provide help in resolving racial conflicts.[115] Many states now have public agencies for arbitrating and mediating disputes, usually connected with a state consumer protection agency.

## Mediation

Mediation is a process by which a neutral party or parties intermediate between two or more parties in conflict, with their consent, in an attempt to have the opposing sides settle a dispute on mutually satisfying terms. A mediator uses the power of persuasion, *not* coercion, to convince the two sides to reach an agreement. The mediator hears both sides, asks questions, and works hard to convince the parties to settle but does *not* issue a decision. If the parties, with the aid of the mediator, reach a final agreement, it is usually legally binding. With arbitration, on the other hand, the arbitrator, after hearing both sides, will actually render a legally binding decision, usually in favor of one side.

ADR has become so popular that many major law firms and attorneys in private practice now offer arbitration, mediation, and other forms of ADR as part of their service. Many prominent law schools such as Harvard University hold seminars in mediation and negotiation. Mediation has been particularly successful in family courts in some parts of the country. More states are now routinely referring cases involving divorce, child custody, and other domestic matters to mediation. In Kentucky, for example, all 22 jurisdictions that have family courts now use mediation and use of the process is growing as more mediators and judges are trained.[116] As mediation expert Carol B. Paisley notes in discussing family court mediation in Kentucky, "Mediation is here to stay. In family cases, the parties are empowered in the mediation process, and, therefore, generally satisfied with the results they reach."[117]

## American Arbitration Association

By far the most widely known, prestigious, and largest full-service ADR provider is the American Arbitration Association (AAA), founded in 1926. The AAA describes itself as "a not-for-profit, public-service organization committed to the resolution of disputes through the use of arbitration, mediation and other voluntary procedures."[118] Its corporate headquarters are in New York, and with 37 offices in the U.S. and Europe, it can provide service around the world. In 2002, more than 230,000 cases were handled by AAA, including disputes regarding construction, health care, energy, employment, insurance, and consumer finance.

Each type of arbitration—commercial, construction industry, securities, sports and so on—has its own set of rules, copies of which are always available from the organization under whose auspices the process is conducted. If, as a journalist, you are

assigned to cover the business, labor, or even the sports beat, it is likely that you will be assigned a story involving arbitration or mediation. Thus it would be well worth the effort to read and know the ADR rules governing a particular type of dispute.

Two services offered by the same ADR organizations, of which many individuals including lawyers are not aware, are divorce mediation and divorce arbitration. Divorce arbitration has been growing over the years, with two states—North Carolina and Michigan—leading the way by passing statutes that specifically permit arbitration in family law cases.[119] The typical arbitrator, who must undergo training, is a divorce lawyer or retired judge, and the going rate for the arbitrator's services is $250 to $450 an hour. Divorce arbitration provides many benefits including reduced expenses, assurance of privacy and quicker, more satisfying resolutions. However, arbitration is still relatively uncommon in divorce cases.[120]

Arbitration and mediation procedures are traditionally conducted in private, although parties will sometimes consent to opening them to the press and to the public, and a few states have statutes requiring that arbitration proceedings be public under specific conditions (such as when a governmental entity is an interested party). If you are a journalist doing a story about a dispute, do not hesitate to ask a party whether he or she is willing to talk about the conflict on the record. You can also ask the parties to consent to making the decision public. It is usually fruitless, on the other hand, to question arbitrators because they are bound to neutrality and fairness, and thus it is usually not appropriate for them to make any comments, no matter how objective such statements might be.

Some of the options offered by AAA are *mini-trials* ("a confidential, nonbinding exchange of information, intended to facilitate settlement"), *fact-finding* ("a process by which parties present the arguments and evidence to a neutral person who then issues a nonbinding report on the findings"), and mediation–arbitration (a neutral party serves as both a mediator and an arbitrator).[121]

The U.S. Supreme Court handed ADR proponents two major victories in 1995. The Court ruled 7 to 2 in a decision written by Justice Breyer that Section 2 of the Federal Arbitration Act should be read broadly to include the maximum authority granted Congress to regulate commerce under the Commerce Clause of the U.S. Constitution. *Allied-Bruce Terminix Companies, Inc. and Terminix International v. G. Michael Dobson* (1995)[122] began when Steven Gwin bought a lifetime termite protection policy from a local Allied-Bruce Terminix office. The plan's contract included a typical arbitration clause that said, in part, "any controversy or claim . . . arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration." Gwin and his wife sold their house to the Dobsons after an inspector from the termite company said there were no termites in the house. The lifetime contract was transferred to the Dobsons upon the sale of the house. The new owners immediately discovered termites and had the termite company treat and repair the house.

Because they were not satisfied with the repairs and treatment, the Dobsons sued the company and the Gwins. The termite company asked the court for a stay to permit arbitration as specified in the contract, but the court denied the request. On

appeal, the Alabama Supreme Court upheld the denial on the ground that a state statute made such written, predispute arbitration agreements invalid and also held that the Federal Arbitration Act did not apply even though it contains a provision preempting state law because there was only a minimal connection between the contract and interstate commerce. As the state court saw it, the federal statute applied only if the parties to the contract "contemplated substantial interstate activity" at the time they formed the contract.

The U.S. Supreme Court reversed the Alabama Supreme Court, noting that "the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." The Court also said that the phrase "involving commerce" in the Act is functionally equivalent to the phrase "affecting commerce" from the Constitution's Commerce Clause. The Court also said that such a broad interpretation is in line with the basic intent of the Act of putting arbitration terms on the "same footing" as the other terms in the contract. The Court concluded:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause *upon such grounds as exist* at law or in equity for the revocation of any contract. 9 U.S.C. §9 (emphasis added). What states may not do is decide that a contract is fair enough to enforce all its terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal *footing,* directly contrary to the Act's language and Congress's intent. [cite omitted][123]

The Supreme Court continued its support of arbitration less than two months following *Allied-Bruce Terminix* when it voted 8 to 1 (with only Justice Thomas dissenting) to reverse a U.S. Court of Appeals for the Federal Circuit decision upholding a district court ruling that disallowed punitive damages in an arbitration. In *Mastrobuono v. Shearson Lehman Hutton, Inc.,*[124] both lower courts killed the punitive damages because a choice-of-law provision in the contract said that New York law would apply, and New York law allows courts only, not arbitrators, to grant punitive damages. (An arbitration panel had awarded damages to the plaintiffs.) Citing *Allied-Bruce Terminix,* the Court once again emphasized that its previous decisions make it clear that contract terms involving arbitration, including the award of punitive damages, will be enforced even if they conflict with a state law, thanks to the Federal Arbitration Act. The Court noted that while the agreement did not specifically mention punitive damages, the agreement strongly implied punitive damages were appropriate. Thus the Court resolved the perceived conflict between the choice-of-law provision and the arbitration provision in the contract by interpreting the "laws of New York" phrase to include the substantive principles of state law but not any special rules affecting the authority of arbitrators. If state courts did not get the message from previous decisions, surely they heard the Court this time. This decision loudly and clearly says that when state laws conflict or are interpreted or misinterpreted to conflict with the Arbitration Act, the Act prevails.

### New Developments in ADR

A few companies such as E-jury.net, Virtualjury, and LitiComm are now offering online mock juries that can render inexpensive and quick opinions. The services they offer vary but generally they seek input from potential jurors who deliberate electronically and provide detailed feedback about legal strategies and other aspects of a case.[125]

In 2002, Idaho enacted the Small Lawsuit Resolution Act requiring dispute resolution in cases involving less than $25,000. The law does allow either side to appeal the outcome of the mediation or other form of ADR such as a *neutral evaluation* in which a neutral party hears both sides and decides how much the case is worth. Under the statute, if the court does not improve the challenger's position by at least 15 percent, the challenger must pay the attorney fees and court costs for the other side. The statute had wide support among both tort reform advocates and plaintiff attorneys.[126]

In 2002, the American Bar Association House of Delegates, the policy-making arm of the voluntary organization of attorneys, passed the Uniform Mediation Act (UMA) that had been adopted the previous year by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Under the UMA, strong protection is provided for confidentiality in mediation.[127] Although the UMA has no force of law, both the ABA and the NCCUSL are encouraging the states to adopt the UMA. It is expected that most states will eventually adopt the proposed act as law in some form, but by the end of 2004 only three states—New Jersey, Illinois and Nebraska—had done so.[128]

## Summary and Conclusions

Each jurisdiction, whether state or federal, has its own rules of civil procedure, criminal procedure, and evidence that determine the specific steps involved in a civil or criminal case. Most states, however, conform fairly closely to the federal rules, with which any journalist who covers legal matters should become quite familiar. The trial process for a civil matter is similar to that of a criminal case, whereas the pretrial procedures and evidentiary standards are rather different. For example, the typical civil case begins with the filing of a complaint; a criminal case can begin with an arrest, with the prosecutor's filing of an information, or with a grand jury indictment. Both types usually involve discovery whereby the two sides disclose to one another the witnesses, documents, and other evidence expected to be used at trial. In many jurisdictions, the prosecution has an affirmative duty to disclose to the defense any evidence uncovered during the investigation or otherwise found that would aid the defendant at trial. There is obviously no such duty imposed on attorneys in civil cases although a motion to discover is sometimes used to compel the other side to disclose books, records, and other documents relevant to the case.

The three most common evidentiary standards are *preponderance of the evidence* and *clear and convincing evidence* in civil cases and *beyond a reasonable doubt* in criminal cases. For example, in a libel suit by a public figure against a media defendant, the plaintiff must show by clear and convincing evidence that

the false information was published with actual malice. In any criminal case, the jury must be convinced beyond a reasonable doubt that defendants committed the alleged crime before it can find them guilty.

Because both civil and criminal trials absorb considerable time and resources including great strain on the courts, more judges and attorneys are using alternative ways of resolving disputes, popularly known as *alternative dispute resolution* (ADR). For criminal cases, the answer to the ever-growing backlog still remains plea bargaining by which a defendant pleads guilty in return for the prosecutor's agreement to ask the judge to reduce the alleged crime to a lesser offense, that the judge be lenient in sentencing, and so on. Viable alternatives in civil cases include mini-trials, arbitration, mediation, summary jury trials, and other forms of dispute resolution that are much faster, considerably less expensive, and less burdensome on the participants and the court systems. One downside to ADR is that such proceedings are nearly always closed to the press and to the public even when there is strong public interest in a case. The second concern is that by bypassing the trial process, decisions and settlements in ADR cases set no precedents and thus make no contribution to our understanding and interpretation of law.

## Endnotes

1. *See* "Judicial Caseload Indicators Calendar Years 1995, 2000, 2003 and 2004," downloadable free at the Web site for the Administrative Office of the U.S. Courts: www.uscourts.gov.
2. *See* Fed. R. Civ. P. 55(b) (2005).
3. *Id.* 4(c).
4. Rule 4(f)(3) allows service at locations outside U.S. jurisdiction such as in a foreign country via any manner "not prohibited by international agreement as may be directed by the court."
5. *See* Terry Carter, *Cyber-Served: E-Mail Delivery of Lawsuit is OK, 9th Circuit Says*, A.B.A. J. e-Report (Mar. 29, 2002).
6. Fed. R. Civ. P. 11(a) (2005).
7. *Id.* (b)(2).
8. *Id.* (b)(1).
9. *Id.* 8(d).
10. *Id.*
11. *Id.* 8(b).
12. *Id.* 7(a).
13. *Id.* 12(b)(6).
14. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d. 202 (1986).
15. Fed. R. Civ. P. 12(b)(6) and 12(c) (2005).
16. *Id.* 12(c).
17. *Id.* 12(e).
18. *Id.* 12(f).
19. *Id.* 33(b).
20. *Id.* (c)(2).
21. *Id.* 45(c).
22. *Id.* 26(c).
23. *Id.* 26(c).

24. *Id.* (b)(1)
25. *Id.* 26(b)(3).
26. *Id.*
27. *Swindler & Berlin et al. v. United States*, 524 U.S. 399, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998).
28. *See* Fed. R. Civ. P. 16(b).
29. *Id.* 16(c).
30. *Id.* 16(e).
31. *See Ross v. Bernhard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970).
32. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959).
33. *Apodaca v. Oregon*, 400 U.S. 901, 91 S.Ct. 145, 27 L.Ed.2d 138 (1970).
34. *Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973).
35. Fed. R. Civ. P. 48.
36. *See* Henry J. Reske, *Downward Trends,* 82 A.B.A. J. 24 (Dec. 1996).
37. Marc Davis and Kevin Davis, *Star Rising for Simpson Jury Consultant,* 81 A.B.A. J. 14 (Dec. 1995).
38. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).
39. §1 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."
40. *See* Edward D. Tolley and Jason J. Carter, *Striking Out in the Batson Box: A Guide to Non-Discriminatory Jury Selection in Georgia,* 8 Ga. B. J. 13 (Dec. 2002).
41. *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 114 S.Ct. 1419 128 L.Ed.2d 89 (1994).
42. The majority cited *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *Edmonson v. Leesville Concrete Corp.,* 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); and *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).
43. *J.E.B. v. Alabama ex rel. T.B.*
44. *Id.* (Scalia dissent).
45. *Id.* (Rehnquist dissent).
46. *Purkett v. Elam,* 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1965).
47. *See* Richard C. Reuben, *Excuses, Excuses,* 82 A.B.A.J. 20 (Feb. 1996).
48. *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000).
49. *Id.*
50. *Miller-El v. Cockrell,* 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).
51. *Id.*, citing manual titled "Jury Selection in a Criminal Case."
52. *See* Mark Hansen, *Jurors Demand a Speedy Trial,* 81 A.B.A. J. 26 (Mar. 1995).
53. *See Understanding the Federal Courts* downloadable free at the Web site for the Administrative Office of the U.S. Courts: www.uscourts.gov
54. *Press-Enterprise v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629, 10 Med. L.Rptr. 1161 (1984).
55. *Victor v. Nebraska* and *Sandoval v. California,* 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).
56. David O. Stewart, *Uncertainty about Reasonable Doubt,* 80 A.B.A. J. 38 (June 1994).
57. James W. McElhaney, *Opening Statements: To Be Effective with the Jury, Tell a Good Story*, 81 A.B.A. J. 73 (Jan. 1995).
58. *Black's Law Dictionary.*
59. *Id.*
60. Fed. R. Evid. 611(c).
61. *Id.* 611(b).
62. James W. McElhaney, *Cross-Examination*, 74 A.B.A. J. 117 (Mar. 1988).

63. *Id*.
64. Fed. R. Evid. 803(1)–(23).
65. *Id*. 804(b)(1)–(5).
66. *See* Fed. R. Civ. P. 50(b).
67. James W. McElhaney, *Terms of Enlightenment*, 83 A.B.A.J. 82 (May 1997).
68. Marcotte, *The Jury Will Disregard . . .*, 73 A.B.A. J. 34 (Nov. 1987).
69. *Id*. at 35.
70. Fed. R. Civ. P. 61 and Fed R. Crim. P. 61.
71. *Curtis Publishing Company v. Butts*, 351 F.2d. 702, 388 U.S. 130, 1 Med.L.Rptr. 1568 (5th Cir. 1965).
72. *See* Scott Burgins, *Jurors Ignore, Misunderstand Instructions,* 81 A.B.A. J. 30 (May 1995).
73. *See* M. Hansen, *Juror's Dismissal Debated*, A.B.A. J. 26 (Jan. 1994). The other jurors claimed the woman "doesn't use common sense" and "cannot comprehend anything that we've been trying to accomplish."
74. Fed. R. Civ. P. 49(a).
75. George H. Chamblee, *The Special Verdict: Old Procedure with New Applications*, 1 Ga. B. J. 18 (Oct. 1995).
76. Fed. R. Civ. P. 49(b).
77. *Burnett v. National Enquirer*, 144 Cal.App.3d 991, 193 Cal.Rptr. 206, 9 Med.L.Rptr. 1921 (Cal. App. 1983).
78. *Pring v. Penthouse*, 695 F.2d. 438, 8 Med.L.Rptr. 2409 (10th Cir. 1983).
79. *Honda Motor Co., Ltd., et al. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994).
80. *Id*.
81. Catherine Wilson, *Appeals Court Rejects $145 Billion Verdict*, Lexington (Ky.) Herald-Leader (Associated Press), May 22, 2003, at A3.
82. *See* Blodgett, *Longest Trial is Over*, 73 A.B.A. J. 22 (Nov. 1987) and Blodgett, *Longest Trial Verdict In*, 73 A.B.A. J. 34 (Dec. 1987).
83. Dadisman, *What Did You Do in Trial Today, Daddy?*, 14 Barrister 23 (Fall 1987).
84. Blodgett, *Juror Dismissed after 3 Years*, 73 A.B.A. J. 23 (Nov. 1987).
85. Marcotte, *The Longest Trial, Cont.*, 74 A.B.A. J. 30 (Sept. 1988).
86. James R. Laramore, *Final Judgment: The Beginning of the End,* Ky. Bench & Bar (Summer 1994), at 8.
87. *See id*. for a discussion of these procedures. Although the article is written from the perspective of Kentucky law, much of it is relevant to practice in other states.
88. *See* John Gibeaut, *Indictment of a System*, 87 A.B.A. J. 35 (Jan. 2001).
89. *Id*.
90. *Id*.
91. *Id*. at 36.
92. *Id*.
93. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
94. The Miranda warning states: "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer. Do you understand these rights?"
95. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d. 162 (1970).

96. *Id.*
97. Hope Viner Samborn, *The Vanishing Trial*, 88 A.B.A. J. 24 (Oct. 2002).
98. *See Understanding the Federal Courts*, *supra*, note 53.
99. *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).
100. *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).
101. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).
102. *Id.*
103. U.S. District Judge W. Royal Furgeson of the Western District of Texas, quoted in Hope Viner Samborn, *supra,* note 98.
104. *In Re Strandell v. Jackson County*, 838 F.2d 884 (1987).
105. Marcotte, *No Forced Summary Jury Trials*, 74 A.B.A. J. 32 (Apr. 1988).
106. Postell, *Summary Jury Trials: How Far Can Federal Judges Go?* 24 Trial 91 (May 1988).
107. *In Re Strandell, supra,* note 105.
108. Molly McDonough, *Summary Time Blues*, 90 A.B.A. J. 18 (Oct. 2004).
109. *Id.*
110. *Id.* (summarizing a 1986 University of Chicago Law Review article by Judge Posner).
111. *See The Commonsense Alternative* at the BBB Web site: www.dr.bbb.org.
112. *Id.*
113. *See* Schweber, *You're in Good Company: An Overview of Dispute Resolution Providers*, Cons. Arbitration 6 (Fall 1988) for a description of major ADR providers.
114. *See* 29 U.S.C.A. §172 *et seq.*
115. Schweber, *supra*, note 114 at 6.
116. Carol B. Paisley, *Family Court Mediation*, Ky. Bench & Bar (Nov. 2004), at 26.
117. *Id.*
118. *See* Rules and Procedures: Supplementary Procedures for Consumer-Related Disputes Questions and Answers, at the AAA Web site: www.adr.org.
119. Rachel Emma Silverman, *Making Divorce Quicker, Less Costly*, Wall Street Journal, Oct. 28, 2004, at D-2.
120. *Id.*
121. *See* AAA Glossary of Dispute Resolution Terms at the AAA Web site: www.adr.org.
122. *Allied-Bruce Terminix Companies, Inc. and Terminix International v. G. Michael Dobson,* 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).
123. *Id.*
124. *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S.52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995).
125. Brad L.F. Hoeschen, *The E-Alternative*, 87 A.B.A. J. 26 (June 2001).
126. *See* Stephanie Francis Cahill, *Idaho Law Eases Dispute Resolution*, A.B.A. J. e-Report (Mar. 29, 2002).
127. *See* Ellen E. Deason, *Uniform Mediation Act*, 8 Disp. Resol. Mag. 7 (Summer 2002).
128. *See* Mary P. Gallagher, *N.J. Adopts Mediation Confidentiality Statute*, Legal Intelligencer, Dec. 9, 2004, at 4.