A Comprehensive Study Guide for *Learning Civil Procedure*: Understanding Law and Legal Conventions Important to Civil Litigation and Dispute Resolution

Key Concepts

- Ways of reading and reviewing course material
- Citation conventions, types of authority, and legal jargon
- The distinction between primary and secondary legal authority
- Judicial geography and court hierarchy
- The nature of the adversary system
- What it means to talk of "the law"
- Cognitive learning and litigation
- Some practical considerations in case intake, case planning, and law office management
- Judicial ethics, legal ethics, and disqualification of court and counsel
- Other influences on litigation: administrative law; philosophy; politics; history; sociology; economics

An Overview for Understanding Civil Procedure and Other First Year Classes

Law school hits incoming students with a lot of information at once, often failing to take the time to explain new jargon or concepts to the overwhelmed students. In this accompaniment to the *Learning Civil Procedure* textbook, we address important aspects of law study as well as providing a historical and policy overview. In addition, we use this extended study guide to briefly address a number of important concepts that are not strictly part of civil procedure but will greatly aid examination of the topic and law in general as well as facilitating entry into law practice law. Reviewing both before and after your study of the book's chapters will help solidify your overall understanding.

There's Reading—And Then There's Reading. Already your have probably noticed that compared to most undergraduate courses, law school requires a great deal of reading. In addition, much of the reading for law school must be considerably more precise than skimming an assigned novel just enough to understand where it fits in the genre being discussed by the professor. In law school, you will often be expected to pay attention to particular language in a statute or rule, particular details of a case, or specific aspects of a hypothetical question. Generalities will be insufficient.

Some law school reading is more painstaking than other law school reading. Statutes, rules, and problems require the most care. Real lawyers reviewing a contract or encountering an unfamiliar statute may read at a rate of about 80 words a minute, or perhaps even less. By contrast, a reader taking on *The Hunger Games* or the latest Elmore Leonard or Jo Nesbo thriller will move at speeds of 300-600 words per minute. Important court decisions are often read at a faster rate than rules or statutes, but not appreciably faster. Less important cases that are read largely to make sure they are consistent with important precedents can be read at a somewhat faster pace. Books or articles about legal issues may be either a slow read or a comparatively fast read depending on the subject matter, whether the treatment is specific or general, and whether the reader has an initial base of knowledge about the legal issue under review.

Particularly good news is that you will dramatically improve your reading speed and comprehension of legal materials during the first year (indeed, even during the first semester) of law school as you gain familiarity with the substance and jargon involved.

"Jargon": Don't Be Too Dismissive Too Quickly.

We use the term "jargon" as a shorthand reference for technical language particular to a specific discipline. Unfortunately, the term has a strong negative connotation among laypersons, perhaps because weaker practitioners of a discipline often use a wall of jargon to mask their insecurity or lack of knowledge. We've all had the experience of dealing with an officious bureaucrat or professional who uses jargon as a substitute for real communication and explanation (e.g., "Your bill seems high but it is correct because of the confluence of STIs and VADs in combination with retro-assessment of tangential ROLs relative to the DABs carried over from the predecessor legacy proto-account.").

Properly used among professionals familiar with the terminology, jargon has a proper place in facilitating quick and efficient conversation among the professional group. For example, "in *Hertz Corp. v. Friend*, __ U.S. __, 130 S. Ct. 1181 (2010) (discussed in Ch. 1), the Court essentially adopted the "nerve center" test for determining principal place of business under 28 U.S.C. § 1332(c). This statement will actually mean something to you after reading Chapter One and to any law student who has studied diversity jurisdiction. For lawyers, the term cuts to the heart of the decision in more efficient way than describing it in lay terms.

We suggest you read the Overview chapter of the textbook and this comprehensive study guide at something of a faster pace, one that gives you the gist of the topic but does not require the painstaking acquisition of particular knowledge on which you will be specifically tested in class or a final exam. This is not to say we don't think the material is important. Rather, we view it as background material over which you should have a general grasp in order to understand the more specific and technical material you will encountered later in the text.

With that in mind, be not intimidated by the relative length of this study guide as compared to the others. This chapter is designed to be read in the manner of a good newspaper (e.g., *New York Times*, *Wall Street Journal*, maybe even the *Huffington Post*) rather than with the care (and slower speed) of the federal statute on subject matter jurisdiction, a Federal Rule of Civil Procedure, or one of the cases excerpted in the book.

As noted in the Overview chapter, civil procedure is regarded by many as the most difficult course in law school, perhaps because it involves learning a new language of procedural jargon and an unfamiliar set of procedural rules as well as unfamiliar doctrinal rules and notions of public policy and jurisprudence. Civil procedure also intertwines with questions of evidence and persuasion as well as touching on dispute resolution generally.

What Do We Mean by "Primary" and "Secondary" Authority?

As also noted in the Orientation chapter, this book frequently cites to important "secondary" literature (as compared to "primary" authority) that

can be consulted for further reading either in this course or later in law school or in practice.

"Primary" sources are those with **actual binding legal authority** such as a **constitutional provision, statute, rule** (such as the Federal Rules of Civil Procedure) or **case precedent.** All of these are "the law" and must be followed or there can be a range of consequences to the violator. If the Constitution says there is a right to a jury trial and the judge fails to give a requesting party that right, the judge's decision can be reversed on appeal. If the statute (or a local ordinance) says "don't walk on the grass," you can be fined, ejected from the park, or perhaps even arrested for violating that law. If a recent court decision states that a particular provision in a contract violates public policy, businesses that continue to use the provision in their standard form contracts may find the terms unenforceable.

By contrast **"secondary" authority** is information shedding light on the primary authority, analyzing it, or commenting upon it. But unlike primary authority, secondary authority has no coercive power to bind anyone. There is no legal penalty for disagreeing with a treatise or law review article.

A particularly important type of secondary authority is the background and drafting history of positive law provisions such as the Constitution or statutes. As you will see in constitutional law class, courts frequently consult the writings of the founders to assist in construing constitutional provisions. Similarly, legislative history is an important tool of statutory construction even though only the statute itself is "the law."

The official **legislative history** includes prior **drafts** of the bill that becomes law, **hearing testimony** or other materials formally submitted to the drafters, **committee reports, floor debate,** the history of attempted and successful **amendments** to the bill, **conference committee reports** (where the House and Senate reconcile different versions of the bill) and (somewhat more controversially) **signing statements** by the executive that signs the bill into law. What might be termed "unofficial" or "informal" but important legislative history is the **background** of the law, what prompted its enactment, the **purpose** it was designed to achieve, and what it was understood to accomplish.

Another form of secondary authority is **legal scholarship** directed at assessing law, understanding it, or even criticizing it. Legal scholarship not only includes primarily **treatises** (books collecting and synthesizing the law in organized fashion) and **law review articles** or other **scholarly journal articles** touching on law but also can include casebooks, books on individual aspects of the law or legal theory, short **monographs,** and even **blogs** or **CLE** (continuing legal education) **materials**.[1]

The Rationale, Role, and Reality of Legal Scholarship. A law review article is a scholarly examination of a legal issue that often also contains significant public policy analysis as well, often utilizing the teachings of other disciplines. It may also include empirical data (both statistics and case studies) about legal, economic, or social events. In addition to law review articles, legal scholarship takes the form of treatises or **"hornbooks"** that seek to set forth controlling principles of legal doctrine in clear fashion, casebooks such as this one that are used for teaching law, "regular" books on legal issues, and even blogs or ***white papers*** making a critical analysis of an important legal concern.

Legal scholarship has some prominent critics, among them Chief Justice John Roberts ("[w]hat the [legal] academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law.")[2] We acknowledge that some scholarship can be pretty obscure but dispute the proposition that the genre as a whole is not useful.

Some legal scholarship is just what the doctor ordered for practitioners. For example, you might be facing the issue of whether conversations between an accident victim and a paramedic are privileged and there is no specific statute or controlling case precedent in your state. Finding a law review article or treatise chapter surveying the existing law throughout the

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[1] "CLE" refers to Continuing Legal Education. All state bar associations (and bar admission is governed by individual states; there is no national bar regulation, although many reformers advocate it) require that lawyers enroll in a minimum amount of CLE courses in order to keep their skills current. A typical CLE program (which can be via webcast or on-line as well as live) includes written materials and a lecture or panel discussion followed by audience questions.

[2] Interview with Chief Justice John Roberts (Mar. 2, 2007), in *Interviews with United States Supreme Court Justices* (Bryan A. Garner, interviewer), published in 13 The Scribes Journal of Legal Writing 5, 37 (2010).

country is like striking gold for the researching lawyer and paves the way to a better brief at lower cost to the client.

Similarly, a treatise can be highly instructive for lawyers practicing in a given area but outlining applicable law and prevailing practice in a manner that is not apparent from the statutes, rules, and cases. This is why (brace for the shameless self-promotion) some of the best treatises are written by a team of law faculty and practicing lawyers. *See, e.g.*, Steven Baicker-McKee, William M. Janssen & John B. Corr, A Student's Guide to the Federal Rules of Civil Procedure (2012); David F. Herr, Roger S. Haydock & Jeffrey W. Stempel, Fundamentals of Litigation Practice (2012); Rogers S. Haydock, David F. Herr & Jeffrey W. Stempel, Fundamentals of Pretrial Litigation (9th ed. 2013). As the conclusion of the Overview chapter in the course textbook, we list popular reference sources about civil procedure that students may profitably consult for further information on all of the topics addressed in this textbook.

Subsequent history nomenclature. When a court decision is rendered, it has force of law, at least for the litigants (more on case law hierarchy below). If the decision is altered on appeal, it is **"reversed"** or **"modified"** and often **"remanded"**—sent back to the trial court for further proceedings in light of the appellate result. By contrast, the legal principle or doctrine set forth in a case transcends the litigants and the specific litigation and has either persuasive or perhaps even controlling impact on subsequent case. When an authoritative court alters this aspect of a case, the decision has been **"overruled"** in whole or in part.

In addition, a critical scholarly article (although perhaps detested by judges who were involved in the opinion under attack or others who endorse the opinion) can give counsel good ideas for responding to or avoiding the worst aspects of the decision. Counsel, of course, must work within the system while academics have more freedom to criticize judicial work head on without much regard for the diplomacy that is essential for lawyers. In some cases, a groundswell of negative scholarly commentary can be marshaled to convince a court or legislature that the existing law must be modified or even that a particular statute should be repealed and a court decision overruled.

What, then, is the role of legal scholarship in all of this? Although there is of course some ground for criticism (even if legal scholarship has value, perhaps it has less value than other things law professors could do with their time and the law school's money . . . which is the tuition-payer's money or the donor's money or the taxpayers' money), most observers find legal scholarship valuable for collecting and synthesizing the law as well as criticizing it and suggesting improvements. But both defenders and critics of legal scholarship probably agree that it is underutilized by practicing lawyers (who could be using it more often in briefs and motion arguments) and courts (who seldom cite it or often cite less respected scholarship that just happens to have been in the winning side's brief or was easily available to the court).

Jargon tip: the term "overruled" is also used when the court rejects a proffered objection to evidence as opposed to "sustaining" the objection, which precludes receipt of the evidence or requires the proponent to revise the method of attempted introduction of evidence (see Ch. 17).

As you study law, consider whether different approaches to and uses of legal scholarship would improve both the scholarship and legal outcomes. Consider whether some scholarship is more useful than other types and whether some theoretical work is sufficiently practical to be of use in real civil litigation.

Remember as well that although full-time law professors generate the bulk of legal scholarship, especially in law reviews, much legal scholarship is done by active practitioners. Does this require more caution when reading a practitioner's scholarship? For example, what about a medical malpractice treatise authored by a lawyer whose clientele is exclusively hospitals defending such claims—or a lawyer whose practice is exclusively composed of clients claiming injury from substandard care? What, if anything, prevents practitioner scholarship from being so unbridled in its advocacy that it cannot be relied upon?

Use of primary and secondary authority by law students and lawyers. As discussed above, lawyers working on a case often find secondary authority useful, even though primary authority will usually be what wins or loses a case. Law students should be even more open to secondary authority than practitioners in that by definition students usually have more to

learn about an area of law than experienced lawyers. But in addition to "here is the law" or "this is how to do it" treatises, students should not be afraid to research and read widely secondary legal authority that provides historical background on the law or that criticizes existing law and suggests improvements. You may well disagree with the author's suggested change but evaluating criticisms and proposals in the secondary legal literature is great mental exercise that will strengthen your legal reasoning skills as well as enhancing your broad knowledge of the law, which will in turn give you more of an internal mental database for assessing cases.

Because we have endeavored to streamline the traditional civil procedure coursebook, we seldom excerpt law review articles or treatise entries. We will, however, be citing to such sources on occasion and they are readily available through Westlaw and other internet sites.

The Hierarchy of Primary Legal Authority. Not all law is created equal. Some legal authority has more authority because of its place in the legal hierarchy. For example, under the ***Supremacy Clause***, the ***U.S. Constitution*** takes precedence over contrary state law. Similarly, ***state constitutional provisions*** trump inconsistent state ***legislation*** or ***local ordinances***. ***Federal statutory law*** is more powerful than ***state law*** if the two are in either direct conflict (***"conflict" preemption***) or where the federal law occupies the field leaving no room for the state law at issue (***"field" preemption***). Federal ***administrative regulations*** also have force of law unless found to exceed the scope of the agency's authority or to be inconsistent with federal statutory law or the Constitution.

If founded on the U.S. Constitution or a controlling federal statute, federal court decisions cannot be countermanded by state court decisions. But in areas of law where states have the final authority, a state court's decision may be authoritative. For example, insurance law is generally state law. There is even a federal statute (the McCarran-Ferguson Act, 15 U.S.C. § 1101, passed in 1947) that provides that insurance is to be regulated by the states unless the national government specifically steps in to take over an aspect of insurance law or regulation. For that reason, the final word on the meaning a standardized insurance policy term is usually the state's supreme court.

Federal courts facing such issues in the absence of authoritative state precedent are required, pursuant to the ***Erie* Doctrine** discussed in Chapter 4, to attempt to predict what that state's supreme court will do. In the alternative, a federal court might "certify" the question to the state supreme court and seek its authoritative opinion, although the state high court need not accept the certification. *See* David F. Herr & Haley N. Schaffer, *Why Guess?* Erie *Guesses and the Eighth Circuit*, 36 Wm. Mitchell L. Rev. 1625 (2010).

Beware court nomenclature (but not too much).

We use the term "state supreme court" a bit loosely here in that we of course mean the highest final juridical authority in the state. But not every state high court is officially called the "supreme" court. Sometimes, the nomenclatural pitfall is minor. For example, the high court in West Virginia is the "Supreme Court of Appeals," which is not likely to fool anyone. But things are a bit tricky in Maryland where the high court is the "Court of Appeals," the intermediate appellate court is the "Court of Special Appeals," and trial courts are the "Superior Court." Trickier still is New York, where the trial court is the "Supreme Court," the intermediate court is the "Appellate Division" and the high court is the "Court of Appeals." Although most readers can safely assume that their state's high court is a "Supreme" court, some care and local knowledge is required.

As referenced in the note on court nomenclature, there is not only federal-state hierarchy but also hierarchy within judicial systems. A trial court decision is important but technically it binds only the litigants, although its reasoning and decision is usually considered important by other judges. Appellate court decisions bind not only the litigants but any trial courts within the appellate court's jurisdiction.

For example, in the federal system, trial court decisions by judges sitting in California (which is further divided into the Northern, Central, and Southern Districts) and eight other western states (Washington, Oregon, Idaho, Montana, Wyoming, Nevada, Arizona, and Hawaii) are reviewed by the U.S. Court of Appeals for the Ninth Circuit, which also includes Guam. When the Ninth Circuit issues an opinion, it is binding precedent

on all judges in the Circuit unless it is inconsistent with U.S. Supreme Court precedent.[3] However, federal trial judges just "over the border" in states such as New Mexico, Utah, and Colorado, are not bound by Ninth Circuit precedent but instead must follow the law set forth by the U.S. Court of Appeals for the Tenth Circuit. Likewise, District Courts in South Dakota are not bound by Tenth Circuit precedent but by Eighth Circuit caselaw.

An Additional Word on Appellate Precedent

For the most part, U.S. Courts of Appeals do their work in three-judge ***"panels"*** that hear and decide cases. Occasionally, the Circuit will decide to hear or rehear a case ***"en banc"*** before the entire Appeals Court (although in the very large Ninth Circuit, an 11-member assembly of judges counts as the Court en banc). Normally, en banc review is not granted unless there is a strong dissent from the panel decision or something else important enough about the case so that the full court (which must vote on whether to grant en banc review) is persuaded by the losing side's request for review by the full Court. In the absence of *en banc* review, the panel opinion not only resolves the case but also is normally treated as binding precedent not only by trial courts in the Circuit but also by subsequent panels hearing similar cases.

For example, if Eighth Circuit Panel One in 2008 decides there is no personal jurisdiction in Arkansas over a Texarkana, Texas hot dog vendor despite regular sales to residents of Texarkana, Arkansas who frequently walk to the vendor's hot dog stand that sits just over the state line, Eighth Circuit Panel Two will follow this precedent when faced today with a similar case involving a Kansas ice cream stand on the edge of the Missouri

[3] A trial judge who is something of a rugged individualist might on occasion determine that a Circuit Court decision is inconsistent with Supreme Court precedent that existed at the time of the Appeals Court decision and boldly decline to follow Circuit precedent. But don't hold your breath that this decision will withstand appellate review. The Appeals Court was most likely quite aware of the Supreme Court decision(s) on which the bold trial judge relied and simply interpreted it differently, making it likely that on further review, the Appeals Court will agree with prior Appeals Court precedent rather than a trial decision that in essence accuses the Appeals Court of having erred. But if the Supreme Court decision used by the trial judge post-dates the appellate precedent at issue, it is not so unrealistic to think that a District Court could find itself in good conscience not to be bound by the Circuit Court precedent.

border regularly dishing out cones to Missourians. The judges on Panel Two may privately think that the Panel One judges were dead wrong in their analysis (and they are; see Ch. 2 on personal jurisdiction) but they will follow the panel—at least most of the time in most Circuits.

After Panel Two issues its decision, losing counsel can seek ***en banc*** review, but this will be difficult unless Panel Two (or at least one judge on the panel) expresses disappointment at being bound by the Panel One opinion. Law and courts value predictability and consistency, which can result in subsequent courts occasionally feeling bound by what they perceive as incorrect decisions of earlier courts.

Citation conventions and what they reveal about court decisions and other laws

We have already cited cases and other authority but perhaps some explanation is in order. There are certain citation conventions in law, although legal communities vary in their adherence to the conventions. We suggest that new lawyers proceed "by the book" unless they are practicing before a tribunal that has a different citation convention. The main "book" to go by is *A Uniform System of Legal Citation*, in its 19th edition as of 2012. More popularly known as "***The Bluebook***," it is a collaboration by four major legal periodicals (*The Harvard Law Review*, the *University of Pennsylvania Law Review*, the *University of Virginia Law Review*, and the *Yale Law Journal*, with the various editorial boards taking turns in the production of each new edition). The Bluebook sets forth "the rules" for citation of cases, statutes, other laws, books, legal periodicals, non-legal periodicals, and other sources that a practicing or academic lawyer may use, providing in some instances different rules for situations. For example, case names in the body of a law review article are italicized while case names in footnotes are not.

Why is the Bluebook so Hard to Displace? Consider some of the cognitive traits discussed below such as "status quo bias." Students with business or IT backgrounds might analyze the Bluebook's success as a type of "legacy system" that, despite having faults, is easier to work around than replace completely.

The Bluebook is lengthy and involved, which has spawned some opposition seeking a simpler citation system. A major competitor is the ***ALWD Citation Manual*** promulgated by the Association of Legal Writing Directors (ALWD)(in

its fourth edition as of 2012), which is taught in some schools in lieu of the Bluebook. The Bluebook continues to dominate, even though the ALWD Manual is authored by law professors rather than law review students and many who have used both find ALWD clearer and more logical than the Bluebook. For better or worse, the Bluebook is the coin of the realm and we will generally use Bluebook citation throughout this text, deviating occasionally for clarity or because of author preference.

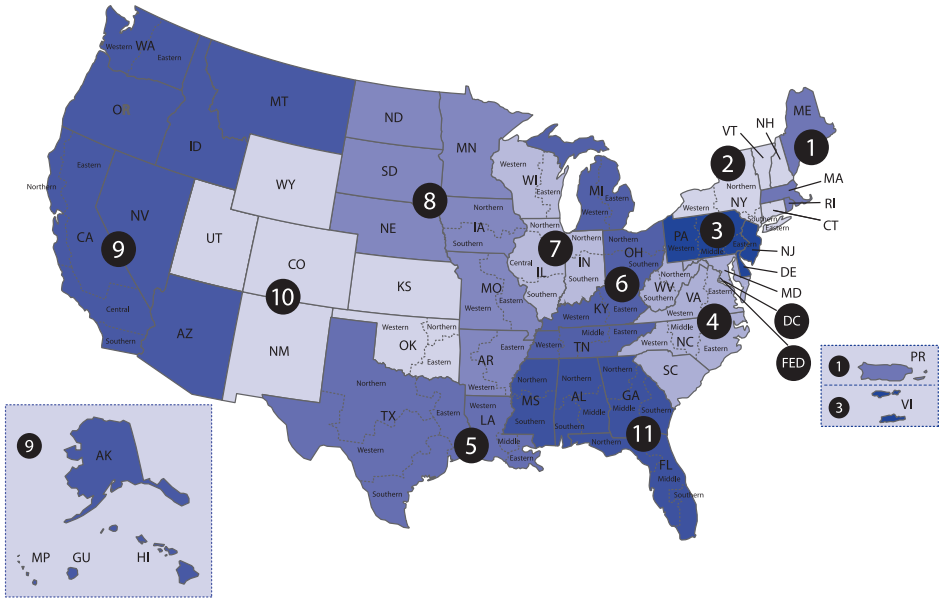
Notwithstanding the dominance of the Bluebook there is plenty of individual deviation by judges and lawyers (so long as this does not annoy the judges before which they appear). For example, a standard Bluebook case citation is *Smith v. Jones*, 123 F.3d 456 (2d Cir. 2010). By seeing this citation, you immediately know the lead plaintiff (Smith), the lead defendant (Jones), that the opinion can be found in volume 123 of the Federal Reporter, Third Series, beginning on page 456, and that the case was decided by the U.S. Court of Appeals for the Second Circuit in 2010. Not bad for such a short citation. This format is something like currency or a universal size plug for recharging electronic devices. It works throughout the U.S. legal system and is a common language.

Oddly enough, perhaps the chief deviator from this format, although it has done so inconsistently over the years, is the U.S. Supreme Court, which often cites the same case as *Smith v. Jones*, 123 F.3d 456 (CA2 2010), a form we find comparatively unsightly. Papers submitted to Court appear to use both Bluebook form and the Court's own variation and as far as we know, no advocate has ever lost a case because of the citation format used. This is true in lower courts as well. Judges may get annoyed when they receive non-conforming citations in court papers but they will not consciously punish counsel with an adverse decision on the merits. Just the same, your credibility as an advocate will be enhanced by proper citation form. Judges will at least subconsciously think of you as a more professional attorney whose submissions carry more authority.

As the Supreme Court example shows, citation is to some degree a local preference. For example, the Bluebook tells attorneys to cite a Nevada statutes as Nev. Rev. Stat. §123—but courts and experienced lawyers in that state instead to use NRS §123 or even NRS 123. You have to know the Bluebook but you also eventually have to know local custom and practice. Do not overly compartmentalize what you're learning in your legal writing

class and what you're learning in civil procedure. Pay attention to what cited cases, statutes, rules, books and article indicate regarding the source and type of law, the type of author and his or her perspective, the time of the writing, and the type of the writing.

Location, Location, Location. The map below reflects the largely geographic organization of the U.S. Courts of Appeals. An exception is the Federal Circuit, which is physically located in Washington, DC but has jurisdiction based on the type of case at issue (patent, trademark, copyright, and claims against the government rather than on the location of the District Court decisions under review. The D.C. Circuit hears cases from the federal district courts physically located in Washington but its jurisdiction tends also to bend boundaries because certain administrative law decisions can be reviewed in the D.C. Circuit regardless of the location of the initial decision.



Regarding the hierarchy of law itself (as opposed to the hierarchy of courts), constitutions constitute the highest law, followed by statutes, administrative regulations (so long as they are consistent with the statutes pursuant to which the regulations were promulgated), rules, and court decisions.

We offer a further word of caution based on years of experience reading the drafts of students, associates, and law clerks. Please pay attention to the judicial hierarchy when conducting legal research or evaluating cited cases in a textbook or treatise. A decision from the Western District of Oklahoma may support your client's position in a case in Pennsylvania but unless the Oklahoma case is really "on all fours" factually with your Pennsylvania dispute or has a zinger quotation, there is probably better precedent for you to rely upon. At least look for something from the Pennsylvania Supreme Court, the U.S. Court of Appeals for the Third Circuit, a federal trial court in Pennsylvania or a neighboring state, or lower court decisions in Pennsylvania.

We think this a fairly obvious proposition. But year after year, we see student work treating the Western District of Oklahoma case as if it were hot off the presses from the U.S. Supreme Court. At the risk of stating the obvious: Pay most attention to Supreme Court precedent, followed by that of the Circuit Court in which your case is litigated, followed by similar and persuasive authority from other circuits, federal district courts in the district where your case is litigated, state intermediate appellate courts, and state trial courts—in the state with the law governing the dispute.

Even though trial judges in a given district are not bound by other trial judges in the district, judges tend to develop friendship and respect for fellow judges with whom they are familiar as well as something like a sense of loyalty. If in 2011 Judge Smith of District A rules that a litigant facing a large document production request may use predictive coding to search for electronically stored information that may be responsive to the request (see Ch. 13), this makes if very likely that Judge Jones from District A will rule the same way in 2012.

Where the issue is relatively new or unsettled generally (such as the permissibility of predictive coding or robo-review of documents rather than using traditional human reviewers), Judge Jones may be more inclined to take a different path than Judge Smith.

In some cases, Judge Smith, Judge Jones, and others on the bench in District A may loathe one another and wear their disagreement with pride, but this is rare. Normally, the judges credit one another's analysis even if they are not openly deferring to it. In addition, treating the first judge's decision

as presumptively correct makes less work for the second judge, who can essentially say "me, too" rather than researching and writing the longer, more time consuming opinion that goes in a different direction.

But even friendly judges operating under a presumption of correctness are duty bound to decide each case independently and on the merits. And, unlike most appellate panels, they are not bound by earlier decisions although there is an informal tendency in this regard among trial judges that mimics the more rule-like appellate court deference.

In addition to the formal hierarchy of precedent, there is an informal hierarchy based on the prominence and reputation of the judge authoring the precedent. In the mid-20th Century, for example, Second Circuit Judge Henry Friendly and Southern District of New York Judge Edward Weinfeld were so respected for their judicial craft that their opinions enjoyed a particularly strong following, even among courts outside the Second Circuit and in courtrooms far from Manhattan. The opinions of California Supreme Court Justice Roger Traynor, a former Cal-Berkeley law professor, enjoyed similar stature.

Today, opinions by Seventh Circuit Judge Richard Posner, Second Circuit Judge Guido Calabresi, and others have a substantial following because of the respect these judges enjoy. To a degree, however, these modern judicial "stars" do not enjoy the same perch as mid-Century icons like Friendly, Weinfeld and Traynor because modern jurisprudence is more divided on lines of ideology and legal theory. For example, many in the profession disagree with Judge Posner's largely conservative slant while others find fault with Judge Calabresi's mostly liberal orientation, making it hard for even these giants (both were very prominent scholars before becoming judges) to enjoy the same acclamation received by their predecessors who presided during an era when law was less politicized, in part because the legal issues and politics of the time were different[4] and because there was less diversity in the profession (ethnic, racial, religious, ideological, economic).

[4] A prominent scholarly book of the earlier era was Daniel Bell, The End of Ideology (1960). It is hard to imagine a book with this title reflecting current society, just as it is hard today to imagine the relative unity of the nation during the Eisenhower presidency and the uniformly high approval ratings President Eisenhower enjoyed. Today as yesterday, someone wins elections and someone wins lawsuits—but there seems to be considerably more disapproval registered by losers and bystanders than in the past. That said, consider the cognitive science findings discussed in this Chapter. Is it possible that the conventional wisdom set forth here is vastly overstated? Perhaps due to some subconscious nostalgia?

EXAMPLES & ANALYSIS

Example: Consider the hot dog/ice cream stand hypothetical used above. Judge Smith issues the first decision (Texarkana, Texas borderline hot dog vendor cannot be sued by patron ingesting adulterated dog on the Arkansas side of the line after purchase on Texas side of the line). Judge Jones faces a second case involving a Texarkana, Texas ice cream stand sued by a patron ingesting bacteria from a cone purchased by reaching over the state line, which was consumed on the Arkansas side of the line. Will Judge Jones follow Judge Smith and find no Arkansas jurisdiction over the vendor?

Analysis: As is apparent after reading Ch. 2, Judge Smith erred in Case One, the hot dog lawsuit. The hot dog vendor was intentionally inviting Arkansans to come to Texas to buy his food in order to earn revenue and reasonably expected that customers from the Arkansas side of the line would come to the Texas side of the line, buy hot dogs, and often eat them back in Arkansas, where they would (if the hot dogs were tainted) get sick, need medical care, miss school or work, and perhaps even become permanently injured. Defending the claim in Arkansas will not be inconvenient because of the proximity of the states, the hot dog stand, and the customer. Under these circumstances, Judge Smith should have found these volitional contacts with Arkansas to be sufficient to require the hot dog vender to defend a customer's claim brought in Arkansas.

In Case Two involving ice cream, the facts are a little better for the vendor in that the customer only reached across the state line rather than actually setting foot in Texas. But this is only a minor factual distinction that does not change the facts regarding the vender's intentional efforts to attract expected Arkansas customers. On the merits, an Arkansas court has power over the Texas vendor.

But will Judge Jones expressly reject Judge Smith's decision? Because trial courts are independent of one another and not bound by prior trial court precedent, Judge Jones is free to disagree. If the law is clear, he should do so, even if it puts a strain on his relationship with Judge Smith.

Although the 1950s are generally described as a time of comparative national unity in politics and law, it was also the era of controversial school desegregation decisions and enforcement, and vigorous legal debate over the rights of communists and others outside the sociopolitical mainstream.

Example: Assume Judge Smith in Case One correctly finds personal jurisdiction when the customer on the Arkansas side of the line walks over to Texas, buys a hot dog, takes it home, eats it, and gets sick and sues. Assume another change in that in Case Two, a Kentucky family relocating to San Diego stops for lunch at the Texarkana hot dog stand, eats the food in the car, and makes it to Arizona before getting sick. The family is hospitalized for two days in Phoenix before eventually making it to San Diego, where it sues the hot dog vender in California state court. The vendor files a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction over the vendor in California. How will Judge Jones in California rule?

Analysis: In Case Two, Judge Jones is presumably not encumbered by friendship with Judge Smith. He need not reject Judge Smith's finding of personal jurisdiction but will most likely distinguish Case Two from Case One on their facts. In Case One, the vender was sued by the type of nearby customer the vendor solicited for business. In Case Two, the vender received some surprising business from persons simply passing through town. The vendor did not actively or significantly solicit their business. And the plaintiff family now wants to sue many miles (about 1,500) and four geographically large states away from the hot dog stand. This puts a substantial logistical burden on the vendor and makes for a much closer case, one that probably will not be answerable by you until after studying Chapter Two. This hypothetical is similar to *Worldwide Volkswagen Co. v. Woodson*, 444 U.S. 268 (1980), which is excerpted in Ch. 2.

What We Mean by "The Law"

As noted above, legal scholarship is "secondary" source of information about the law. Primary legal authorities are by contrast expressions of "***positive law***" such as constitutions, treatises, statutes, rules, cases, administrative codes, and regulatory rulings by government agencies. "Positive" law does not necessarily mean that the law is beneficial or upbeat but connotes that the law is the actual (positive) command of the duly recognized sovereign. When, for example, Congress legislates, the resulting statute is positive law that must be obeyed unless one is willing to suffer the consequences. In contrast to positive law, many legal theorists argue for the existence of

"natural law" based on principles that exist apart from the commands of the sovereign. Natural law is often derived from religion tenets but may be secular in origin and based on philosophical precepts as well.

Although perhaps still open for debate in legal theory, in the material world, the legal positivists have won the debate. Most everyone thinks of law primarily as a rule or standard imposed as part of the official legal or political structure with consequences for noncompliance. Most people today agree with Oliver Wendell Holmes, who famously observed that law is not some "brooding omnipresence in the sky" but instead derives from tangible lawmaking by duly constituted authorities. Although few today argue that God-given law or innate law governs society, positivism occasionally has low moments, forcing us to consider exactly where law comes from and what laws we should obey.

EXAMPLE & ANALYSIS

Example: You reside in a totalitarian state in which all citizens are under an obligation to always cooperate with the authorities. This state also has made disagreement with the government a crime punishable by death. Your cousin has been active in a dissident guerilla movement hoping to overthrow the government and is on the run after many of her comrades were killed during the government's most recent anti-insurgency campaign. She is hiding in your basement along with your uncle, who is on the government's most wanted list for publishing anti-government pamphlets and was displaced from his home when it was burned by government-supported thugs. The state police arrive at your door and ask if you know anything about their whereabouts or that of any other political dissident. You reply that you hate your cousin and all others questioning the authority of a government that has brought so much peace and prosperity to your country—and you do not reveal his whereabouts. Are you breaking the law, obeying the law, or something else?

Analysis: The answer to this question depends on which law you are talking about. By refusing to "finger" your cousin, you have clearly violated

the positive law of the sovereign. But because the sovereign assumed political and legal control by questionable or even immoral means, you would appear to be obeying a concept of natural law shared by many. Call us anarchists or scofflaws if you will, but we think you're doing the right thing by not giving your cousin up to a totalitarian government that will likely mistreat or even murder her—even though we are legal positivists more than we are natural lawyers of either religious or secular strip. Perhaps the only way out of this jam is to concede that there perhaps should be breathing space for natural law ideas even in a positive law system.

As positivists, we treat legislation duly enacted by the political process as the law. We have a consistency problem, of course, in that the totalitarian government is nonetheless the sovereign and with sovereignty comes the power to create positive law through the political process. This government just happens to have created some loathsome positive law. But either you're a positivist or you're not. You can't claim to be a positivist and then drop out when you don't like what the sovereign does, can you?

If the sovereign did not achieve power legitimately, perhaps this provides an escape hatch. But let's close it by assuming that the totalitarian government was freely elected and that it keeps getting returned to office by 90 percent majorities that are not the product of coercion or election fraud. The vast majority of people in this hypothetical society just prefer a police state. The totalitarian government does not need to crush every little bit of dissent that exists but it is so thin-skinned about criticism that it can't help itself.

In this context, what does "the law" require you to do when the police come knocking? It would seem inhumane to rat out your uncle, who if caught will rot in jail or worse merely for expressing his opinion. He's already lost his house and much else. A natural law precept might provide a way out: all sovereigns, even if immensely popular, must permit peaceful dissent without punishment. Otherwise, we will never know whether the sovereign deserves continued popularity. This in turn undermines or even destroys the legitimacy of the sovereign, even one rolling up big majorities at the polls.

But where did we get this principle about permitting dissent? Even if it is a good one, it has a quality of making up the rules as we go along. There's

a cop at my door, I love my uncle and think he's done nothing wrong. So I "invent" a natural law principle to override my positive law duties.

Although that seems justified for the uncle, what about your trigger-happy cousin? Frustration with the totalitarian government is understandable. But does that justify hiding a fugitive who has advocated violence or even engaged in violence, causing injury to others (even if the others were uniformed soldiers of the totalitarian government? Perhaps. She turned to violence because dissent was suppressed, right? But we still would like some axiom for determining when it is permissible to step away from our normal respect for positive law.

Religious natural lawyers can say that God condemns totalitarians and demands political freedom of expression for people. But this seems like a cop-out or magic trick if every time we dislike positive law we say that God (or at least our version of God) opposes it and that this justifies our refusal to follow the law. What if the totalitarian government has an official clergyman who has concluded (after study of scripture, "talking" to God, etc.) that God really wants all who oppose the government to be subjected to a painful and violent death. Who is to say which set of "divine" instructions should take be given more credence.

The philosopher John Rawls had perhaps the best secular answer to the dilemma. He asked that persons constructively place themselves in a veil of ignorance in which they were unaware of their actual position in life. They would not know whether they would they be born rich or poor, strong or weak, in the majority or the minority, etc. *See* John Rawls, A Theory of Justice (1970).

If placed in this position of not knowing one's lot in life, what kind of society would you want to live in? Undoubtedly, it would be one in which one could life a reasonably good life regardless of economic, political, or social status. Under this construct, wouldn't we all want a society in which the government tolerates peaceful dissent (and does not force dissenters to take up arms)? Although we can generally live with a government that adopts policies we oppose, we cannot live a decent life if the government permits no criticism and harshly punishes critics. Under the Rawls approach, we can find a way to remain silent (or even lie) about the uncle and perhaps even the cousin.

The Rawls original position is sometimes criticized as too radically egalitarian and pointing in the direction of socialism. Students will need to make up their own minds on this but we tend to think Rawls is perfectly compatible with a capitalist or market-oriented democracy. Not knowing on what side of the tracks we will be born probably leads all but the most over-confident risk-takers to support a society that is not too dog-eat-dog, winner-take-all.

But neither would most of us want a society in which overall wealth is paltry, there is no opportunity to advance, or where incompetent freeloaders are just as well off as the talented and hard-working. If nothing else, our cognitive biases make us likely to see ourselves as winners rather than losers in the merit-based achievement game, making it unlikely that people will choose relentless equality that holds back as much as it lifts up.

Consequently, many see the Rawls approach as compatible with a democracy that tolerates free expression and even dissent, that supports market efficiency and wealth creation, but that also supports sufficient taxation of the economic winners to support an adequate social safety net for the less fortunate. Depending on one's politics, this can sound like Heaven or Hell.

As this thought exercise suggests, there remain misgivings about legal positivism even though it is the prevailing school of jurisprudential thought. The hypothetical about the journalist uncle and the gun-toting cousin is of course is based in part on the Nazi experience and was lived out by many in Europe, including the family that sheltered Anne Frank. The success of the Nazis, Mussolini's fascism, the Soviet Union, and other totalitarian governments posed a challenge to positivism that has not been fully met.

Lest we be too smug as Americans, consider the history of racial equality and school desegregation. For decades, states in the South had racially discriminatory laws enacted by the sovereign. When protesters defied those law, most (but not all) outside the Old Confederacy cheered while most (but not all) in segregation states jeered. How can this be squared with positivism?

When black college students from the North sat down at the "whites only" lunch counter in the South, were they criminals or heros? When South-

erners fought integration ordered by the national government, where they being scofflaws or simply following what they viewed as a superior positive law (that of the state) or higher philosophical law, however misguided? One answer is that the legitimacy of Southern states on this issue was open to serious question since it restricted the voting rights of most if not all black residents of the state.

More recently, we can look to the abortion issue. Where the law permits abortion, does positive law demand that those obstructing access to clinics or harassing providers be dealt harsh punishment under the law? Or are these persons, however misguided, simply embracing a natural law that differs from the positive law. Conversely, when abortion opponents gain sovereignty and impose burdens on the pursuit of an abortion, does positivism demand that we respect this or may advocates of choice invoke natural law to disregard abortion restrictions and perhaps even do violence to those seen as restricting women's rights?

These questions admit of no easy answers. Fortunately, one can learn a lot of civil procedure and successfully represent clients in litigation without definitively answering these difficult theoretical questions or having a completely coherent philosophy as a positivist. But lawyers should at least be aware of these issues and sensitive to situations in which they may invade civil procedure.

EXAMPLE & ANALYSIS

Example: You represent a client in a patent dispute. The opponent has requested proprietary information that your client is convinced will destroy the company if given to the opponent, who cannot be trusted to refrain from using the information to compete in business. The court orders production of the information, a decision you believe is erroneous but arguably within the court's discretion.

Courts usually refuse to assume the worst in a litigant without proof. Unless you can show that the opponent has previously misused trade secret material, the decision is at least reasonable even if not unquestionably correct. Rulings of this sort are not final appealable orders and are

subject to an abuse of discretion standard. As a result, you are not sure whether you could prevail in a petition for mandamus, which is the only way to get immediate review of the decision unless you are held in contempt for refusing to comply with the court's order.

Your client refuses to obey the order and supply the information sought. Should you (1) join him in solidarity, even though this likely means being held in contempt, (2) withdraw as counsel because your client refuses to follow a court order, or (3) work really hard at persuading the client to follow the court's order?

Analysis: As is almost always the case, it would be nice to have more facts and a better sense of whether the judge's discovery order is sufficiently incorrect that it can be overturned if reviewed in a mandamus petition or on appeal of a contempt decision. If the client is right, playing by the rules could cost him much business or even the company because of loss of the trade secrets. But if you're a positivist, you're supposed to play by the rules and the rules are to obey the court's order.

However, the rules also allow certain challenges—such as disobeying the order and being held in contempt to get immediate appellate review. Disobeying this way is still be playing by the rules. But do you want to risk the monetary fines or other sanctions that the trial court will impose upon you for contempt and which may not be erased on appeal, even a successful appeal? Again begging the question of the correctness of the trial court order, we think that if there is a good argument against the order, the high stakes involved with disclosure of trade secrets in a situation where the other litigant is perceived as an untrustworthy business competitor, that counsel should make reasonable efforts and take reasonable risks in challenging the order. Going into contempt is not for the faint of heart—but neither is lawyering generally.

When a court decides a case, this also creates positive law under the Anglo-American system of common law. Case precedent is "the law" just as much as are statutes and both must be adhered to—although the precise application of statute and precedent are often sufficiently unclear that they

provide substantial leeway to social and commercial actors, at least until a definitive decision is handed down in their particular cases.

U.S. Supreme Court Justice Oliver Wendell Holmes once described law as simply a prediction about what a court will do. Although many thought this view unduly cynical and insufficiently deferential to the "majesty" of the law (sentiments like these have many viewing Holmes as the original "legal realist" even though the legal realism movement in academia did not begin in earnest until decades later), it was and remains a pretty accurate assessment. Until the court adjudicates a particular case to finality, one cannot say with certainty what the outcome will be. But intelligent, experienced lawyers nonetheless can have pretty good predictions as to the likely outcome of a case. Making these predictions and transmitting them to clients or prospective clients in ways they understand is an important aspect of lawyering.

The Overarching Problem of Indeterminacy. We know this brief overview begs the question of whether the primary authority is clear. A simple example illustrates. The local park is posted with signs that read "Do Not Walk on the Grass," reflecting a local ordinance that forbids walking on the grass in any city park. What if you go jogging in the park and are arrested by the local constable? Will your defense of "I wasn't walking on the grass, I was running" be successful? Common sense suggests not but after a semester of law school, you should be able to make this argument in legal terms.

If you were the town prosecutor, it would be your burden to prove a violation of the ordinance. Criminal defendants are entitled to a "rule of lenity" in statutory construction in which statutes are strictly construed so that they cannot be used to punish unless they are sufficiently clear. If you should somehow win this case, how should the Town Council change the ordinance and sign?

Construction of language (e.g., constitutional, statutory, administrative regulation, contracts) is at the heart of what lawyers do. During the first year, law school implicitly is teaching you how to construe language and craft arguments for clients based on the language of primary sources of law and documents. Cementing or enhancing these skills by taking a course

specifically focusing on interpretation is never a bad idea when making upper class course selections.

An Introduction for Cognitive Pitfalls of Which Lawyers Should Be Aware

Be wary of even your own "common sense." The problem of constructed preferences, bounded rationality, and implicit biases and the heuristics of thought and decisionmaking. In this coursebook (and in law school generally), you will see frequent references to "cognitive science" or "cognitive psychology" learning. This is a relatively new field (that also travels under the banner of "behavioral economics" or "heuristics and biases" or "implicit bias") positing (we think correctly) that people are not nearly as rational and self-aware as historically thought when making decisions or assessments.

Framing. The manner in which a choice is framed can have great influence in the decisions made. Mass advertising is just the tip of this iceberg. Two bestsellers written for lay audiences provide a wonderful introduction to the field and would make good reading for law students on a break from cases or classes. *See* Daniel Kahneman, Thinking Fast and Slow (2011); Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth and Happiness (2008).[5]

[5] All three of these authors are prominent in hard core scholarly literature as well, Kahneman (a Nobel Prize winner) and Thaler as economists and Sunstein as a law professor. Students wishing more depth in the field will be rewarded by consulting almost any of works of these authors. *See, e.g.*, Judgment Under Uncertainty: Heuristics and Biases (Kahneman, ed., with Paul Slovic and Amos Tversky); Behavioral Law and Economics (Sunstein, ed.). Similarly, the work of law professor Dan Kahan on "cognitive illiberalism" addresses these influences on human thought and assessment and is well worth consulting. *See, e.g.*, Dan Kahan, *The Cognitively Illiberal State,* 60 Stan. L. Rev. 115 (2007). A wonderful, clearly written overview geared toward law practice is Jean Sternlight & Jennifer Robbenolt, Pyschology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making (2012).

Law: The Magnificent Scavenger.

One prominent scholar once described law as "a scavenger" that does not create its own ideas but instead borrows from other disciplines.[6] Although there is a good deal of truth to this observation, we think it is overstated. Many of the law's most ***important concepts*** such as ***justice, due process***, ***individual rights,*** and ***finality of adjudication*** appear to have emerged from law itself rather than having been appropriated from other fields (although philosophers may seek to claim first dibs on justice).

More important, there is nothing wrong with being a scavenger if that means that law incorporates useful learning from other fields in order to inform that content and application of the law. Knowing something about psychology, sociology, economics, politics, and public policy tends to make law and legal actors better. In that vein, the following discussion of cognitive theory, although not part of the traditional canon of civil procedure, is useful information for civil proceduralists.

Although not psychotically irrational, most people much of the time are subject to unconscious influences and socially constructed preferences that shape and often distort their reasoning. We have only "bounded rationality" rather than the type of fine-tuned, calculator-like rationality we think we have. Among these are:

- **status quo bias** (the preference for the current situation);

Example: A committee suggests renumbering the Federal Rules of Civil Procedure to give greater prominence to the issues most likely to consume attorney and court time. Because lawyers are used to the current numbering system, they will resist this proposed change (and practically any change) unless they are really unhappy with the status quo (a condition in which the bias does not work as it normally does) or really convinced that the change will be an improvement.

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[6] *See* E. Donald Elliot, *The Evolutionary Tradition in Jurisprudence,* 85 Colum. L. Rev. 38 (1985). *See also* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 Harv. L. Rev. 38 (1987) (prominent federal appellate judge and legal scholar makes similar observations).

- **self-serving bias** (a sense that we are better than we are across almost all dimensions);

Example: A prospective client walks into your office. After an hour interview and review of medical records, it becomes clear she is a victim of medical malpractice by the most prominent, politically connected surgeon in town, someone who regularly plays golf and consorts socially with the local judges. Although you have never litigated a medical malpractice case before, you reject your law partner's suggestion of affiliating more experienced (and socially and politically prominent) co-counsel for the case, even though more experienced counsel will also have more available funds for retaining expert witnesses, which are usually essential for successfully prosecuting a medical malpractice claim. Even though you might prevail in the end, you have almost certainly made a mistake by going it alone—and have done so because of the impact of self-serving bias.

- **false consensus bias** (the view that everyone sees things our way when there is in fact substantial divergence in viewpoints across the population);

Example: Judge Smith reads Fed. R. Civ. P. 13, which defines a compulsory counterclaim as one arising out of the "same transaction or occurrence" as the subject matter of plaintiff's complaint and concludes that where the complaint pleads failure to pay for a used car, the a defense based on the car breaking down on the way home from the dealership does not arise out of the same transaction or occurrence. He is certain that any reasonable person reading the rule in this context would come to the same conclusion. In addition to being really wrong (most court decisions come out the opposite way on such issues; see Ch. 7), Judge Smith has fallen victim to false consensus bias.

- **extremeness aversion** (a tendency to avoid options perceived as too extreme);

Example: You are considering selling your home and approach two realtors about the prospective listing. Realtor One suggests a listing price of $20,000. Realtor Two thinks you should list the place (a three-bedroom, two-bath ranch house in a middle income suburb of a regional city) for $2 million. You are likely to get a third realtor's opinion because both of these suggestions just seem too extreme and outside the spectrum of reasonable pricing for the property. If Realtor One and Realtor Two had given similar assessments, you would not only be more confident of the accuracy of the estimates but would not be forced to make an uncomfortable choice among extremes.

- **hindsight bias** (a tendency to think that things that happened (such as an injury-causing accident) were inevitable or much more likely that was actually the case);

Example: Your ner-do-well cousin is working on a installing a back yard deck for a neighbor on a Tuesday and steps out to grab a sandwich at noon without locking up the back yard fence. During the 30 minutes he is gone, neighborhood elementary school kids, who were released early from school because of parent-teacher conferences in the afternoon (something about which your cousin was unaware), got into the back yard and hurt themselves on the power tools being used for the deck project. Regarding your cousin, you think "what a negligent idiot!" But on an ordinary Tuesday at noon the only serious risk would be theft of the power tools by a passerby or soiling of the tools by a neighborhood dog on the loose.

Now you know one legitimate reason defendants complain about jury verdicts for plaintiffs. After knowing what happened, it is hard not to think that the cousin's conduct was both negligent and the cause of injury

for which the law should afford relief. But were the cousin's actions really all that bad? Note also that if the cousin has a history of goofing up, you will be quicker to assume he goofed up this time. That's why in litigation certain Rules of Evidence (like F.R.E. 404(a)) tend to exclude evidence of past miscues—the issue in *this* case is whether the cousin was negligent on *this* occasion (not whether the cousin is generally a goof-up or a competent person).

- **optimism bias** (a tendency to undervalue the risks of a bad outcome or the prospects for a good outcome);

Example: The corner of Fifteenth & Elm downtown in your regional city has been the home to eight failed restaurants during the past five years. But you think it would be the perfect location for the Syrian restaurant you want to start. You're certain the eight previously unsuccessful restaurant owners were simply bad managers and that there's nothing wrong with the location. You're also sure that all the bad press surrounding the human rights abuses of the Assad regime in the real Syria will not create consumer aversion to eating at your new restaurant. You are suffering from optimism bias. Prospective bankers will probably agree and be reluctant to lend money for the project.

- **the availability heuristic** (thinking risks are greater when called to mind by press coverage or other familiarity with such events);

Example: While swimming in the Gulf of Mexico, a former college classmate is bitten by a shark. You are going to Miami Beach next week and decide sitting on the sand and staying outside the water will be just fine for this vacation. You are almost certainly overreacting and overestimating the risk of a shark attack off of South Beach because of the availability heuristic. Because of the injury to someone you know, Shark attacks are now on your brain and almost no amount of statistical information will reverse the effect until your friend's experience fades from memory.

- **the anchoring heuristic** (allowing an initial value to warp our thinking about the actual reasonable value that should be assigned);

Example: You are asked to evaluate a claim for physical injuries sustained in a car collision and recommend a settlement amount. Plaintiff demands $500,000. Defendant concedes that plaintiff, who was hospitalized and missed work for weeks, had serious injuries but thinks $250,000 is a more apt figure. The higher plaintiff's demand serves as an anchor for most people (even lawyers and judges who in theory are trained to resist the pull of such anchors) and results in a higher settlement evaluation than if the plaintiff had demanded $300,000. Evaluators are also likely to produce an estimate somewhere between the plaintiff and defendant estimates unless there is an apparent credibility problem with one of the estimates (e.g., a $10 million demand in a hangnail case). In this way, extremeness aversion may work in concert with anchoring to distort assessment. Note that in this hypothetical, we have no solid evidence about plaintiff's lost wages, medical bills, drug bills, pain, lost opportunity, etc. But given anchoring parameters, most people will proceed to at least attempt an evaluation, no matter how unsupported by evidence.

- **loss aversion** or **the endowment effect** (the tendency to be more upset with a loss than a thwarted gain); and

Example: At the beginning of civil procedure class, the professor holds up a standard issue coffee mug and asks a student how much he would pay for the mug. The student likes the mug but hardly needs it. She offers $5. After class a week later, the professor awards the student the mug as a prize for class preparation but then remembers that he needs a mug for his other class the next day and offers to buy it back from the student. She is willing to sell the mug back to the professor—but not for anything less than $7.

We kid you not. Experiments like this have produced results like this time and time again. We "charge" more to part with something than we will pay to get it in the first place (absent significant wear-and-tear or other deterioration of the item). Similarly, most of us are much more upset about losing $1,000 through a bad investment than oversleeping and failing to get to the stadium when the team sponsor was giving $1,000 to the first 200 fans to arrive.

- **the halo effect** (ascribing additional positive traits to someone or something viewed positively on one particular dimension).

Example: Badger Bannister is the best golfer of the era and as a result is a ubiquitous presence on television advertisements for various products, often starring his telegenic wife and children in the commercials. Badger is subsequently recruited to run for U.S. Senate (we won't even speculate as to which political party would do such a thing) and wins in a landslide despite complete lack of government experience, no degree beyond high school, and a lackluster performance on the campaign trail. He's just so overwhelmingly popular that his election was almost foreordained because the voters, who have swooned over his athletic prowess for years, have overwhelmingly positive associations toward him.

When Badger is caught naked with a prostitute in a hot tub at an orgy in a Caribbean resort on a trip funded by the nation's most polluting chemical company, people are shocked—but they shouldn't be. Just as they shouldn't be shocked if it turns out that (less salaciously), Badger fails to do his homework on proposed legislation and has no idea what is going on in Congress. There was never any rational basis for thinking that athletic talent (or even athletic training and discipline) would translate into political, legislative, public policy, or constituent services talent. The voters were taken in by the halo effect.

The Criminal-Civil Difference

This is a course in civil dispute resolution, not criminal law or procedure. Criminal cases not only involve the obvious difference of prosecution by the government but also involve **different standards of proof** ("beyond a reasonable doubt" rather than civil litigation's "preponderance of the evidence" standard) and potential implication of **different constitutional issues** (e.g., right to counsel, against self-incrimination, and against unreasonable searches or seizures in criminal litigation vs. right to jury trial and due process in civil litigation, although due process is often an issue in criminal litigation as well).

The Adversary System

United States adjudication is based on **adversarial model** of justice. By this, we do not mean that litigation is warlike or that attorneys must be in constant conflict. On the contrary, because litigation is to some degree a socially approved alternative to combat, the legal system places a high value on civility and playing by the rules. War is at least in theory subject to rules as well (e.g., the Geneva Convention) but litigation, although adversary, is supposed to be conducted with civility and fairness within the bounds of rules taken seriously. Many people may argue that a "win at all costs" approach may be justified in war (although we realize this position is controversial), but no legitimate member of the legal profession takes this position regarding litigation. Lying, destruction of evidence, duress, etc. are not permitted.

"Adversary" in the legal context means that that the disputing process is **controlled by the parties** acting through counsel (attorneys are agents of their clients). The case is investigated, commenced and administered by the actions of the parties and counsel seeking relief from the court.

In other legal systems (usually called **"inquisitorial"** by American lawyers in spite of its negative connotation), the government, acting through the presiding judge, has much more control over the events and pace of the case. This is the case in continental Europe. Unsurprisingly, England (the source of much of the U.S. system), is an exception and follows a more adversarial approach. In continental Europe, investigation and discovery is largely conducted by the judge rather than by the lawyers in the case.

To Americans, the continental system seems odd and a little unsettling because of concerns that the judge may not be all that motivated to prove up someone else's difficult case. By contrast, an attorney for a client is thought to have strong motivation to work hard to develop and prove facts helpful to the client as well as researching and arguing favorable law with some zeal.

A Word About Fees and the Adversary System. For attorneys working on a contingency fee, the motivation of the adversarial system is obvious. If they don't win, they don't eat. Under a **contingency fee,** the attorney collects no fee less the claim is successful. Where the claim results in a monetary award, the attorney is paid a percentage of the amount, usually a percentage of one-third to 40 percent based on the gross recovery. In addition, the client is responsible for the expenses of the case such as filing fees or expert witness costs, although if the case is lost, attorneys who have advanced costs on behalf of a client often forgo seeking reimbursement.

Contingency fee lawyers obviously have some "skin in the game" in that their compensation is tied rather directly to case outcomes. But this hardly means that lawyers billing on an **hourly fee** basis (the most common fee arrangement) or on a **flat fee** basis are without motivation. In addition to often having a bonus or success fee added for exceptional results, the hourly fee lawyer still must represent the client effectively or the client will not return with future business or may spread word of its dissatisfaction with counsel to existing or prospective clients. Client satisfaction is an important factor an attorney's success, particularly if the lawyer's business is built on "institutional" clients such as businesses, governments, or insurance companies. Although client satisfaction has been important for centuries, modern communication techniques such as Facebook, Twitter, texting, and websites have made "word of mouth" louder and more important than ever.

Some criticize the contingency fee as creating undue incentive to win at any cost or of overcompensating lawyers in big cases. For example, a lawyer who faces the prospect of no compensation after revealing a document incriminating the client may begin to get cold feet about producing the document even though this is required by the rules. A lawyer may work just as hard proving a client's right to compensation for a comparatively minor injury as she does obtaining a recovery for someone killed in a car

accident but under the contingency fee, the recovery in the latter case is far greater.

Notwithstanding these concerns, the U.S. legal system has for the most part embraced the contingency fee in spite of these concerns because it expands access to the court. Many individuals and small entities have few resources other than the estimated value of their legal claims. They could not afford to pay a lawyer on an hourly basis as do large and medium sized entities such as business, governments and insurance companies. And lawyers may charge anywhere between $100/hour to more than $1,000/hour depending upon the lawyer's skill and reputation (experienced, excellent or famous lawyers cost more than inexperienced, average, or unknown lawyers). The nature of the matter also impacts the fees charged. Complex antitrust or intellectual property matters tend to command higher rates that garden-variety tort claims such as intersection collisions.

Why should the prominence of the attorney matter? Although fame may be correlated with skill, assume for a minute it is not. Would a rational client (assuming it had the funds) nonetheless be willing to pay more for a famous lawyer? Why?

Even with the contingent fee, there may be some difficulty obtaining counsel. If someone is badly hurt in an auto accident and thus likely to obtain a large damage award, contingent fee lawyers will want the case, assuming that the victim was not primarily at fault in causing the accident (no matter how badly injured, the victim cannot recover unless the accident was the fault of another). One-third of $600,000 (a verdict resulting from medical bills, lost earnings, and the pain and suffering incurred by the accident victim) is enough money to make a plaintiff's lawyer interested in the case. But one-third of $30,000 (the verdict likely to result if the victim suffered only minor injury), although hardly mere pocket change, is not a lot of money relative to the work involved in prosecuting the case. A successful plaintiff's attorney would rather spend his time on the $500,000 victim. There can be a proportionally larger fee even though the work required is relatively equivalent.

Lawyering as Problem Solving and Litigation as One Means of Problem Solving

"Client" Intake and Status. Regardless of the larger social and political picture, lawyering is about helping a client resolve or at least mitigate a problem or concern. But what do we mean by a "client"? A **client** is someone who engages a lawyer to provide legal services. When someone first walks into a law office, he or she (or the entity represented) is a prospective client. The **lawyer-client relationship** is not formed until the parties agree to the relationship. Lawyers need to be careful to make sure that prospective clients do not become actual clients until there is an agreement. But if the lawyer is not careful, the prospective client making an inquiry could be treated as a "real" client to whom the lawyer owes substantial duties even if it was never the lawyer's intent to take on a matter.

Lawyers need to make sure that those they reject as clients understand that they cannot rely on the lawyer for legal services. Failure to do so can result in **legal malpractice** liability for the lawyer even though the attorney never intended to represent the individual who made an inquiry. Once common saying among experienced attorneys is that most legal malpractice can be avoided through shrewd judgment at the outset of an inquiry. Avoid taking on difficult persons or companies as clients and avoid taking on problematic cases or cases beyond the attorney's competence and resources.

Lawyer Regulation. When providing legal services, the attorney is subject to the rules of lawyer professional conduct prevailing in the jurisdiction in which the attorney practices or is admitted. For the most part, ***bar admission*** and ***lawyer regulation*** is handled by the states. An attorney admitted in California may practice in California but may not appear in court in Nevada without specific permission from the Nevada courts. This is known as **pro hac vice** (for this purpose or matter) admission.

Generally, a lawyer in good standing in another state will be granted pro hac vice admission as a matter of course so long as he or she affiliates local counsel in the mater—but the generosity of the forum state court is not endless. States are concerned about lawyers avoiding state regulation and

bar admission but nonetheless practicing law in the state through the "back door" of "serial" pro hac vice admission.[7]

Unauthorized Practice and the Question of Role Differentiation. A lawyer may work for a client or customer but not in a legal capacity. For example, the attorney may also have a real estate or accounting license. If the attorney sells a home for the client or balances the books of a client's business is this the "practice of law?" The answers are not always clear and provide some additional grist for the mill for professional responsibility course you will take later in law school. In general, a lawyer practices law when he or she brings to bear **legal judgment** on behalf of a client. This is a pretty broad definition that requires lawyers to be careful to avoid "unauthorized" practice of law if they counsel clients in states in which they are not admitted.

EXAMPLE & ANALYSIS

Example: A lawyer/realtor sells a house for a real estate client and in the course of the closing fills out a number of form documents for the transaction. The lawyer/realtor also tells the seller that he can represent to the buyer that the restrictive covenant against selling the home to a Muslim family is unenforceable because of it would involve the legal system in illegal discrimination. The seller in turn relates this to a prospective buyer who is Muslim and eventually buys the house. What, if any, of this activity constitutes the practice of law?

Analysis: The mere sale of the property and completion of form documents probably will not be considered the practice of law in most states even though these are legally operative documents. As a practical matter,

[7] Nevada actually has a presumptive limit of five pro hac vice admissions in a three year period in order to encourage out-of-state attorneys to become admitted to the State Bar if they wish to conduct frequent business in the state. Although there is of course an element of protectionism in all of this (less out-of-state competition for Nevada attorneys), there is also a legitimate reason for the restriction in that by successfully passing the state bar examination, the attorney has presumptively demonstrated adequate familiarity with state law and by being subject to regulation, the attorney can be policed by the State Bar as necessary.

realtors who are not lawyers do this all the time and are never prosecuted for unauthorized practice of law (which is a felony in some states). However, the legal analysis and advice about the enforceability of the restrictive covenant in the deed, although clearly correct and a relatively easy question, clearly is law practice. Thus, our lawyer/realtor should, at least as a technical matter, be admitted to the bar in the state where she is selling the house if she wants to be able to give the advice without fear of adverse consequences. And if the advice was wrong and our Muslim buyer was evicted from the home, the lawyer/realtor would have committed legal malpractice (if the advice was so wrong that it fell below the accepted standard of conduct for attorneys in the community). In addition, most states have rules limiting the ability of an attorney to combine a law practice with another business.

Whew! Now you know why law school is three years and why not just anyone can be admitted. Even seemingly simple decisions like whether to take on a matter and whether one's conduct is "lawyering" can be uncertain. A California lawyer moonlighting as a carpenter or lounge singer in Las Vegas certainly is not practicing law without a license in Nevada—but if the carpenter gives legal advice to a coworker or a member of the audience, there may be unauthorized practice.

Assuming that the attorney is duly admitted and that a prospective client has come for legal services (rather than some other type of work such as the lawyer's carpentry or real estate acumen), what needs to be done regarding client intake? Generally, the first meeting with the prospective client should include:

- Getting basic background information about the prospective client and the matter, including the other people involved and (if known) their lawyers.

- Getting enough information to adequately understand the case. Who did what to whom? What happened? When and Where did operative events occur? How did it happen? What, if any, documents exist reflecting the matter? Do you have them? Do they support the prospective client's narrative? What about medical records? Is there actual physical evidence that needs to be reviewed such as a car or a building? Are there witnesses? Are they accessible? What do they say? Is it consistent with

the prospective client's narrative? Is there information in the public domain that sheds light on the matter (e.g., a newspaper account? property records? Tax records?).

- Once this basic information has been assembled, the attorney must provide some basic legal analysis to determine whether the prospective client has a case and whether the case is strong enough to interest the attorney.

Getting this information at the outset is very important to conducting a **"conflicts check"** to determine whether accepting the prospective client as a client would create an impermissible conflict of interest. The prospective client may have a strong case and one economically attractive to the attorney, but if it involves suing a current client, the lawyer must decline the case. You will spend several class periods or perhaps even several weeks discussing conflicts of interest in your professional responsibility course. For now, just remember that a good conflicts check at the outset is vital to avoiding legal malpractice, bar discipline, or other problems (e.g., angry clients upset to be sued by the person thought to be his or her attorney).

Federal Rule of Civil Procedure 11, discussed at length in Chapter 5, requires that an attorney conduct an adequate fact investigation and sufficient legal research before bringing a claim. During client intake, counsel should be satisfied that the screening of a prospective client is sufficient to comply with the Rule.

Counsel probably has a sufficient working knowledge of the law to form a preliminary impression of the strength of a prospective client's potential case—but counsel must nonetheless perform enough case-specific research to comply with Rule 11 and to give counsel comfort that the case is worth taking. Counsel may have handled dozens of auto accident cases but such research is required to make sure that the law has not changed since the last such case handled.

For example, the prospective client's car collision with a county vehicle may have taken place the day after a new law went into effect immunizing the county or drastically limiting the amount recoverable against the country. The lawyer who files suit in the former situation will have Rule 11

problems while the lawyer in the latter case may find the case is economically a loser for the law firm.

A Candid Word about the Business of Practicing Law. Your coursebook authors admit to being traditionalists. We think law is an honorable and even occasionally noble profession in spite of what you may occasionally read in the papers. But lawyers have to make a living. Some cases have legal merit but are not cost-effective. By that we mean that it will consume more resources to prosecute the claim than the client is likely to recover. Lawyers who take such cases on a contingency basis might go broke in a hurry (although a financially secure lawyer may wish to take such cases as a matter of low fee or pro bono service to the community).

"Pro Bono" is short for "pro bono publico" which roughly translates as "for the good of the community." Lawyers have a privileged status in society (notwithstanding that the economics of practicing law have become more difficult in recent years) and have the advantage of being part of a profession (critics might call it a "guild" in restraint of trade) with limited entry due to the licensing aspects of bar admission. In return, lawyers are expected to give back to the community and have long done so informally (some very famous law reform cases where brought by attorneys working pro bono because the client was unable to pay). Today, all state bar associations require some level of pro bono activity or support (such as contributing to a legal aid organization or making a financial contribution to legal services in lieu of the attorney's own pro bono activity) as a condition of continued membership in the bar.

Pro bono is wonderful but lawyers must be careful not to take on so many pro bono responsibilities that paying clients suffer and be equally careful that cases they take do not unwittingly become quasi-pro bono cases because the case is uneconomical on a contingent basis or the client fails to pay a promised hourly or flat rate fee. For this reason, lawyers taking on a regular client but not working on a contingency should generally obtain a **retainer** fee from the prospective client who becomes a client (it would be unethical to take a retainer and then fail to take the case unless lawyer and prospective client agree that the lawyer is retained only for the limited purpose of investigating the matter and deciding whether to take the case).

In some cases, a comparatively wealthy prospective client may want you to take on the case as a matter of principle and be willing to pay your regular hourly rate even though it will mean spending more

in disputing costs than what can be recovered at trial. As long as this prospective client's retainer check clears and the case otherwise has merit, lawyers should have no qualms taking such cases and may even by contributing to the public good (some important cases establishing valuable legal principles undoubtedly saw the light of day only because someone was willing to forge ahead in spite of the economics of the claim).

A word on lawyer autonomy—before and after taking on a client. Lawyers are not common carriers such as the city bus or a subway line. They do not have to take on every prospective client who walks in and may decline representation in which they are uninterested just as they must decline representation if the matter is beyond their competence or resources. If the lawyer finds the prospective client or cause repugnant, it's okay to say no. But it is not okay to discriminate. In dealing with prospective clients, lawyers must follow the law.

EXAMPLE & ANALYSIS

Example: Paul Chauvinist walks into your office. His wife, Donna Decent, is seeking a divorce. And no wonder. Paul has been having multiple affairs since their marriage, has drug and alcohol problems, anger management issues, and is constantly on the edge of being re-incarcerated (his rap sheet reads like a phone book). Despite this, Paul is holding down a reasonably well-paying job as a machinist (his hand-eye coordination is good in spite of his substance abuse). He doesn't want to pay any alimony or child support to Donna, who sidelined her career as an accountant to raise their four young children during their 10-year marriage. He is willing to pay your ordinary hourly fee and plop down a retainer before he leaves the office. Your law office could stand more business—but you find Paul repulsively self-centered. Can you decline to represent Paul?

Analysis: Yes. In declining the case, you are not discriminating against Paul because of his gender but because you are not in agreement with his litigation goals or because you think it will be difficult or unpleasant to have him as a client. You might even have concerns that taking his no alimony/no child support position is unwarranted under existing law (re-

member that family law is not federalized and varies from state to state), which provides an additional reason for rejecting him as a client.

Because Paul can pay legal fees and is not a community outcast like Communists were during the 1950s, he is unlikely to have a problem obtaining competent counsel. One of the chauvinist lawyers down the street will be happy to receive Paul and his money. So you don't have to worry that rejecting him as a client denies him access to the courts. If, however, you rejected Paul because of a fixed office policy of never representing men, this could constitute improper gender discrimination by an attorney. Indeed, there is a Massachusetts ethics opinion to this effect, ruling that a law office is a "public accommodation" that cannot discriminate on the basis of gender. *See Nathanson v. Commonwealth*, 16 Mass. L. Rep. 761 (Mass. Super. Ct. 2003). The decision has been criticized and there might be a different result in other states, particularly those with different laws regarding discrimination in public accommodations.

A Word About Division of Labor. Under the Rules of Professional Conduct (ABA Model Rule 1.2 in particular), clients have an absolute say about the goals and objectives of representation such as whether to accept a settlement or plead guilty in a criminal case. Lawyers, however, have wide discretion about the means by which those goals are pursued. So it is usually the lawyer, rather than the client, who decides what arguments are made in motion papers and at trial, what objections are made to evidence, and so on. Nonetheless, it remains a good idea to alert clients to major strategy and tactics decisions of the lawyer and, if possible, to make sure the client approves or at least does not object. If the client does object, counsel should explain planned actions.

The client has the power to discharge the attorney at any time but must pay legal fees due. Where the discharged lawyer was working on a contingent fee, the lawyer is entitled to compensation based on the value conferred (**quantum meruit** compensation), which at a minimum would be a reasonable hourly rate but could also be a proportion of the total legal fees generated based on the contributions the lawyer made to the case before being discharged.

Determining Where to Sue

In the Overview chapter, we briefly discuss forum selection as a significant part of lawyering. Often, a prospective claimant may sue in more than one jurisdiction. In choosing between different states and court systems, counsel needs to consider not only what the law permits but which forum might provide advantages to the client. Practical factors include the composition of the bench and jury pool as well as the venue within the state that would obtain (e.g., rural v. urban). Some places are more plaintiff-friendly and others tend to be more supportive of defendants. Some jury pools are known for high awards and others are stingy. Common sense and logic alone can be pretty instructive.

Notwithstanding that common sense usually goes a long way, don't forget the cognitive science discussed earlier in this chapter. The conventional wisdom may not be correct. Or counsel's unconscious biases, prejudices, and stereotypes may be getting in the way. Don't rely on gut feelings alone. Research jury outcomes and verdict size. Study the bench (but remember even if you want a bench trial, your opponent can insist on a jury trial pursuant to the Seventh Amendment and state analogs and see if the judges in State A or District B lean in any particular direction. If seriously considering a jurisdiction other than your home state, consult counsel from the other jurisdictions and get their assessments. You will ultimately need someone local on your team even if you are admitted pro hac vice to prosecute the case.

Considering State Court vs. Federal Court. State Courts tend to be organized on a county basis. Urban state court districts are usually one county but some state court districts in rural areas can encompass several counties. But even the largest state court districts are usually not as large as federal trial court districts. This means that the federal jury will usually be drawn from a larger geographic area (but not always; the Southern District of New York federal district is contiguous with Manhattan, which is also the boundary of the corresponding state court district). Because state court districts are usually smaller and more compact, you have a better idea of the demographic characteristics of the jury pool and whether they match up with the demography you would prefer for a jury that hears your client's case.

Federal court judges are appointed. District court trial judges and appellate court judges are appointed for life and can only be removed for misbehavior such as conviction of a crime. Bankruptcy judges and magistrate judges (who often preside over discovery disputes and other pretrial matters) are appointed for a term of years rather than for life but otherwise enjoy similar job security. State court judicial selection varies. Although several states follow something close to the federal model, 80 percent of the states have judicial elections of some type and in perhaps 20 states judicial elections seem close to indistinguishable from the rock-em, sock-em world of electoral politics generally. State judges, having less insulation from electoral politics, may be less independent and lawyers always have concerns that a judge's rulings may be influenced by the power, prominence, and wealth of a litigant—particularly if the litigant can retaliate against a disliked judge at the next election through campaign contributions and the like.

The "Missouri Plan" for judicial elections and the infamous *Caperton v. Massey* litigation.

Approximately half the states have a mode of judicial selection and retention that mixes the appointment and electoral processes. It often travels under the banner of "merit selection" as well, although there are other methods of merit selection. Named for Missouri as the first state to use it prominently, the approach involves a selection committee recommending several candidates for a judicial vacancy on the basis of "merit" (generally defined as good credentials and reputation). The governor then selects an appointee from this short list of merit candidates. This new judge serves one term but must then stand for re-election, which is achieved so long as the judge is not voted out. There is not an incumbent-vs-challenger contest as such but rather a referendum on whether the public is sufficiently satisfied with the sitting judge.

As a practical matter, judges are almost always retained unless they do something controversial. For example, in 2010, three well-respected Iowa Supreme Court Justices of varying jurisprudential views were turned out of office because they were part of a decision that found a state constitutional right to same sex marriage. When these vacancies were created, the process for filling them proceeded under Iowa's version of the Missouri plan.

Caperton v. A. T. Massey Coal Co., 556 U.S. 868 (2009). shows what can happen in free-for-all judicial elections—and it wasn't pretty. A controversial liberal Justice of the West Virginia Supreme Court was running for re-election and being challenged by a conservative attorney. Predictably, labor unions and Democrats backed the incumbent while businesses and Republicans backed the challenger. Direct contributions to either campaign were limited to the state's maximum of $1,000 per person.

But one wealthy (and controversial) coal company executive was especially interested in the race and set up a separate support group that was exempt from campaign contribution limits and personally bought advertisements attacking the incumbent, supporting the challenger to the tune of $3 million. The challenger won and then as a sitting Justice participated in casting the deciding vote in favor of the executive's company in a case worth tens of millions of dollars. The U.S. Supreme Court ruled that this new Justice's participation violated the plaintiff's rights to due process of law and the case was remanded for rehearing. Despite the disqualification and remand, the West Virginia high court nonetheless eventually ruled 4-1 in favor of the coal company. See *Caperton v. A. T. Massey Coal Co.*, 690 S.E.2d 322 (W. Va. 2009).

Regardless of one's view on the merits of the case or coal companies generally, cases like *Caperton v. Massey* leave a bad taste in everyone's mouth because of the prospect that decisions are made on the basis of money, politics, personal loyalty, or other illegitimate factors (such as the state court's possible defensiveness on remand after having been told that it had improperly failed to remove a tainted justice before and that this error was so egregious that it violated a party's constitutional rights).

Traditional legal education tends to shy away from discussing the sociology and politics of adjudication. The legal system aspires to consistency and tends to pretend that cases will come out the same way in any forum, in front of any jury, or before any judge. Lawyers know better, which is why they pay a good deal of attention to forum selection. The differing likely outcomes one might get in different forums and situations is a fact of life in litigation. Lawyers attempt to plan for it and also consider it in determining whether litigation is preferable to alternative means of attempting to solve a client's problem.

The fact that law to a large extent reflects the larger society is both inevitable and nothing about which to be ashamed. But it cautions that effort must be made to keep adjudication as fair as possible under the circumstances even if it can never be made perfect or uniform. For example, the system accepts campaign contributions to state judicial races as a fact of life but balks at the prospect of a single individual with business before the court acting as a kingmaker in selecting members of the court.

Judge vs. Jury

Once within a chosen forum, one needs to decide whether a bench trial with the judge not only presiding over case presentation but also making findings of fact is preferable to a jury trial, assuming that you otherwise have right to a jury trial (see Ch. 15). This decision is not totally within your control. Your client may elect to waive its right to jury trial (this is probably the type of decision that needs to be cleared with the client pursuant to Professional Conduct Rule 1.2 rather than made by the attorney alone as part of the lawyering task) or, more commonly, simply forgo demanding a jury trial (if jury trial is not demanded in timely fashion, the right to a jury is constructively waived). But if one of the other parties to the case demands its right to jury trial, your desire for a bench trial is ineffective.

In spite of the bilateralism of the right to jury trial, there may be agreement on a bench trial (or at least a failure to object). The conventional wisdom is that plaintiffs want juries while defendants are inclined more toward judges—but again, be careful of the conventional wisdom. Consider the type of case, the jury pool, and the characteristics of the bench. You may even know the identity of the specific judge assigned to the before the time for demanding jury trial has lapsed.

Disqualification of Judges

This raises another point: what if you don't like the judge assigned to the case? This can result from concern about the judge's predispositions (e.g., Judge Smith favors plaintiffs, Judge Jones leans toward defendants, Judge Johnson thinks all employment discrimination cases involve lazy workers looking for an excuse after they're fired) or about the judge's competence

(e.g., Judge Smith if fine for most matters but is in over his head if the dispute involves scientific evidence).

In many state court systems, you are allowed one automatic change of judge, a peremptory challenge of sorts just as all systems give each side a right to remove some potential jurors without giving a reason. But after this initial right is exercised or time for using it has lapsed, you can only remove a state court judge if you can satisfy certain criteria for the judge's disqualification. In federal court, this is the case throughout the proceeding. Under ABA Model Rule of Judicial Conduct 2.11, 28 U.S.C. § 455, and state analogs, a judge is automatically disqualified upon motion if certain family or financial ties exist or if the judge's impartiality is subject to reasonable question.

EXAMPLE & ANALYSIS

Example: Judge Smith has granted summary judgment for defendant employers in ten of the dozen employment discrimination cases where he has rendered an opinion. Is this ground for his removal from the case?

Analysis: Almost certainly not. The outcomes of the case just do not reveal enough about whether Judge Smith was unfair. He may have been absolutely correct in ruling for the employer 80 percent of the time in such a small sample of cases.

If this pattern persists for 100 or 200 cases, the odds for disqualification or **"recusal"** (the terms have some slight difference in meaning for purists, but are essentially synonyms), there is a better chance for disqualification but still not a very good one. The statistical scoreboard alone is generally not accepted as definitive proof. But some courts might find it enough to raise a reasonable question regarding impartiality.

Footnote of sorts: In most jurisdictions, including the federal courts, the challenged judge is the one who gets to decide whether the challenge is meritorious. That's right, judges get to judge themselves regarding their

impartiality—at least in first instance. In many states, the chief judge of the district can then review the decision and in some states the initial decision goes to the chief judge. There is a right to appellate review, but only after the case is completed, which by then may be too late. As you will learn in Ch. 19, there are ways of getting an earlier appeal, but none are guaranteed to work if a judge wrongly decides that her impartiality is beyond suspicion.

EXAMPLES & ANALYSIS

Example: Judge Smith, while speaking at a Chamber of Commerce dinner with the cameras rolling states that "things would be a lot better for America's small businesses if they weren't being dogged by meritless lawsuits by disgruntled employees. A few of these might have some merit, but most of them are total hogwash." Disqualifying?

Analysis: Some courts would now conclude that Judge Smith has crossed the line, particularly because of the intemperate "hogwash" language. But many would permit Judge Smith to remain on the case on the theory that his comments are too general to preclude his impartiality in a specific case, especially if he has made other statements to the effect that he decides each case on its merits or focus on the evidence rather than the general nature of particular cases.

Example: After a fired Ms. Bureaucrat sues for gender discrimination, the case is assigned to Judge Smith. At a pretrial conference, he looks at plaintiff's counsel and observes that "you've got a problem in that I have concerns about plaintiff's credibility after the evasive, inconsistent, and contradictory testimony she gave in the City Hall funding abuse cases over which I presided last year. I hope you have some evidence besides just her testimony." Should Judge Smith recuse if asked?

Answer: Judge Smith may be biased against Bureaucrat, at least on the issue of her veracity, but it is a **"judicially acquired" bias**. Judge Smith did not form a bad opinion of Bureaucrat based on her public comments or election campaign but instead formed his opinion based on her testimony

made in front of him while he was acting as a judge. This type of judicially acquired bias is not disqualifying because it springs not from extrajudicial bias or prejudice but from experience in court.

Just the same, we might all fee better if Judge Smith has the case assigned to someone with whom Bureaucrat has a clean slate (defense counsel will have a chance to cross-examine her on a variety of matters, including past perjury convictions, but probably will not be able to bring her prior trial testimony before the court). Nothing in the rules prevents this, although ABA Model Rule of Judicial Conduct 2.7 states that judges have a "responsibility to sit" and may not step aside without at least a colorable basis for concern about their impartiality.

Example: Judge Smith, at the same Chamber of Commerce dinner noted above states that recently fired City Manager Bea Bureaucrat "wouldn't know the truth if it bit her." Disqualifying?

Analysis: Here, Judge Smith probably has a problem. Even if his low opinion of Bureaucrat is derived from prior judicial activity, he is making these seemingly gratuitous attacks in a public forum unrelated to the judging task and using intemperate language, all of which suggests that he has more animosity towards Bureaucrat that would be expected even from a judge who had questions about her prior testimony.

Disqualification of Counsel

In addition to consideration of disqualification of judges, counsel must consider whether to consider seeking disqualification of other counsel involved in the case. Although, like judicial disqualification, it is not frequent, neither is it all that rare. Clients change firms and lawyers move between firms, creating situations where a conflict of interest precludes the attorney's involvement in a case. All states have similar rules of lawyer professional responsibility, most largely patterned after the ABA's Model Rules of Professional Conduct. The relevant state version of these rules applies in federal court as well as state court.

Lawyer conflicts can involve either current or former representation and may be direct or indirect. In professional responsibility class, you will probably spend weeks on these issues. Rather than belabor them in civil procedure, we merely note them and provide some common illustrations.

EXAMPLES & ANALYSIS

Example: Percy Plaintiff retains Stewart Stainless of the Stainless, Sterling & Gold law firm to commence suit against Donna Defendant. Donna seeks to retain Stewart, who of course refuses. She then retains Gary Gold, Stainless's partner, to defend the case. Percy and Stewart move to disqualify Gary. What result?

Analysis: This is one where common sense gives you the same outcome as do the Rules of Professional Conduct. Rule 1.7 states that a lawyer cannot represent directly adverse parties. Percy and Donna are directly adverse in the same lawsuit. Rule 1.10 states that Rule 1.7 conflicts apply to law firms in situations where lawyers are in a firm and an individual lawyer in the firm would be disqualified. This is the rule of "imputed" disqualification. Stewart could not represent both Percy and Donna. His conflict is imputed to Gary and all lawyers in their law firm. Even if Stewart and Gary are highly professional (or better yet, hate each other and are highly competitive), the legal profession has decided that such situations simply have too much potential for mischief. However, as we will see, where the issue is one of a conflict based on previous involvement in related but different case, a conflicted lawyer may sometimes be "screened" form a case so that the entire law firm is not disqualified.

Example: Percy Plaintiff, with the help of the Stainless Law Firm, successfully sues Donna Defendant and obtains a money judgment due to Donna's failure to pay for a truckload of widgets. Donna also defaults on payment due for a second truckload of the same model of widgets that was part of a long-term supply contract. Percy sues again, this time using Perry Manson as counsel. Donna, having been shellacked by Stewart Stainless in the first case, retains Stainless and his firm to defend her in the second case. Percy moves to disqualify. What result?

Analysis: Although this hypothetical does not put Attorney Stainless or his firm on opposite sides of the same case, the two widget debt collection suits sure appear to be "substantially related." To the extent they are, they are subject to Model Rule of Professional Conduct 1.9, which forbids counsel in a former matter from being involved in a later matter that is substantially related. The fear is that through involvement in the earlier case, the attorney has acquired ethically protected information that can be used against the former client in the second case. For example, Stainless might have learned in confidence from Percy that there were quality control problems with some factory runs of widgets and Donna may be contending that she should not have to pay the full price because the widgets were of inferior quality. Because of the rule of imputed disqualification (Rule 1.10), neither can Donna hire Gary Gold (or anyone else at the Stainless Firm) to defend her in the second case.

Example: Assume the second widget case is in the middle of discovery. Gary Gold leaves the Stainless Firm to join Crush, Kill & Destroy—Donna's current defense counsel. Gary was not involved in either widget case. When he arrives at the Crush Law Firm, he is screened from anything to do with the widget case. He has no access to files (electronic or paper), which are locked or passcode protected. All the Crush Law Firm employees have been instructed never to discuss the widget case in Gary's presence. Percy nonetheless moves to disqualify the Crush Law Firm on the ground that Gary has tainted his entire new law firm with a conflict of interest. What result?

Analysis: This appears to be the type of situation in which the new law firm's screening of Gary is sufficient to prevent its disqualification since Gary was not involved in the case prior to coming to the new law firm. If he had been directly involved, most state legal ethics law would support disqualification of the firm. But because he was not part of Percy's "team" while at the Stainless Firm, Gary can be effectively screened. If the Crush Firm effectively keeps him from learning about the case or transmitting Stainless Firm knowledge of the case, disqualification will not be required. The preventative devices put in place by the Crush Firm appear to be adequate according to most case law on this subject.

Caveat: judges facing this type of disqualification motion have a good deal of discretion.

Additional Caveat: many are critical of the use of screening, contending that it simply puts lawyers and law firms on too much of an honor system. For example, what is to prevent Gary Gold from spilling his guts to his new partners about what he overheard about the case while at the Stainless Firm even though he was not actively working on the case? The short answer is nothing—except for the lawyer's professionalism and the risk that if discovered, he could face serious bar discipline and even disbarment. That's usually enough to keep lawyers on the straight and narrow even if their internal moral compasses might be tempted to waiver.

Also, as a practical matter, there is no guarantee that Gold might not leak to Crush even while still at the Stainless Firm if he is (a) angling for a job with Crush, (b) jealous of Stainless's litigation success, (c) trying to impress his new girlfriend who is an attorney at the Crush Firm, or (d) not good at holding his liquor or tongue. Although Gold may have a financial motive after joining the Crush Firm this is of course significant, it is only one factor to consider, one usually considered to be countermanded by professionalism that lawyers acquire in law school and years of practice (which they can enter only after satisfying the state bar's character and fitness examination), backstopped by the risk of severe sanctions if they fail to protect ethically protected information.

Considerations of Applicable Law. As you will learn in Chapter 4, courts do not ordinarily apply general legal principles but usually apply specific federal law or the law of a particular state. The applicable state law may not be that of the court's home state but in deciding what law to use, the court will use the **"choice of law"** approach of the state in which the court is located. In addition, the conventional wisdom is that if the issue is close, most judges opt for applying forum state law because it is the law with which they are more familiar and comfortable and because this creates less work and reduced risk of error (e.g, a good judge can learn a lot about a different state's law in a relatively short time but will almost certainly be more proficient in applying familiar law).

In many cases, state-to-state differences in law are minimal. Where there are material differences in potentially applicable state law, counsel must think harder about which law will apply and whether the choice of law rules of one court are more likely to yield favorable law than those of another court.

Administrative Law and Government Regulation: The Brooding Omnipresence of Administrative Law

The nation may be relatively divided over whether there is too much or too little government but regardless of who is correct, reasonable people certainly agree that there is a lot of government regulation. In addition to statutes, there are many non-statutory regulations such as those found in the Code of Federal Regulations and various state administrative codes. These may govern anything from permissible types of water hoses to the licensing requirements for cosmetologists. Typically, these regulations are devised and enforced by government workers at the relevant agency.

Under the federal administrative law scheme and those of most states, administrative agencies (created by the legislature but managed by the executive) are entitled to promulgate and enforce rules implementing or maintaining a statutorily established regulatory scheme. If the agency's rules and enforcement are consistent with the statute, they will be upheld, with courts tending to show deference to the expertise of the agency and its role in the regulatory process, provided the agency is acting with the scope of its authority. Much, perhaps even most, law in an industrialized nation is administrative law, making it an important to practice and the education of a well-rounded lawyer. Administrative law decisions (both rulemaking and enforcement) are generally subject to judicial review, making it important that litigators be able to master this type of litigation when necessary to address client needs.

When there is controversy, disputes will often be heard (at least in first instance) by an administrative agency or an **administrative law judge** (ALJ). The regulators and judges—who derive their power from Article I of the Constitution (the legislative article) and state counterparts—do not enjoy the independence of judges appointed pursuant to Article III (the judicial article). Similarly, state court trial judges of general jurisdiction tend to have more power and independence than most state regulators.[8] Although administrative agencies are created by the legislature, they are run by the

[8] But not all. Many would argue for example that the members of Nevada's Gaming Control Board or Gaming Commission have more power and authority than the average state court trial judge, and certainly have more independence and power than the average regulator. Nevada's gaming authorities have particularly great authority because of the particular importance of that industry to this particular state.

executive, an interesting mix that can lead to interesting legal questions regarding authority and permissible behavior.

Constitutional issues aside, as a matter of procedure, regulation, and dispute resolution, administrative agencies tend to operate almost as a separate adjudicatory system—but one that is subject to judicial review by the "regular" or "real" courts after administrative proceedings have run their course. However, the standard of review is often quite deferential to the agencies, particularly regarding their rulemaking activities but also as to their adjudicatory actions.

In industrial societies such as the U.S. and Europe, most law is probably administrative law and attorneys should have at least a basic understanding of administrative law, its doctrines, and the interaction of administrative law and civil litigation.

Historical and Political Underpinnings of the Legal System

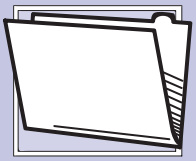
Civil disputes do not exist in a vacuum but are part of the society and political system in which disputes arise. Historical and social factors often go a long way toward explaining what otherwise might seem an odd or arbitrary division of federal-state judicial power, particular rules, customs, and legal doctrines, and the relative role of courts vis-à-vis other institutions such as legislatures, executive agencies, churches, public schools, and private entities such as businesses. These historical, political, economic, social, psychological, and philosophical factors that shape civil litigation and the views of the legal profession and the public regarding legal issues.

The Relationship of Fact, Law and Perspective

Lawyers of course perform the important role of ascertaining the legal rules and doctrine applicable to a given dispute. They also perform important tasks that are at least as grounded in fact as in law: investigating facts, assessing the relative strength and persuasiveness of facts, attacking the opponent's version of the facts, and classifying salient facts according to relevant legal standards.

A good lawyer, in addition to being a good researcher, analyst, and psychologist, must also be a good detective—or at least must be able to manage nonlawyer personnel (e.g., investigators and legal assistants) so that they can bring this factual information to the lawyer, who then applies applicable law to assess a case, craft presentation, and argue that the law compels a result favorable to the client.

Quick Summary



- There is a geography of civil litigation that lawyers should know in order to best serve client needs, particularly as regards forum selection.
- Different forums can produce different results—as might whether the facts are adjudicated by a judge or jury.
- Judges assigned to a case may be disqualified for lack of impartiality while lawyers may be disqualified due to conflict of interest or other problems. As an advocate, counsel often has the unpleasant task of seeking such disqualification in order to protect the client.
- Civil litigation is an adversary process—but one with distinct rules of fairness and civility.
- Certain conventions exist regarding the use and citation of legal authority. Distinguish in particular between primary and secondary authority and appreciate the hierarchies of the state and federal courts.
- Law is a specialized field with a certain amount of unavoidable—and often useful—jargon that counsel must understand and be able to use fluently.
- Cognitive science learning can provide valuable insights to counsel, both for presenting the case and mitigating against counsel's own unconscious biases and prejudices in assessing a case.

- Although law aspires to neutrality, predictability and a "science" status of sorts, the aspiration is met only in part in that law and litigation do not exist in a vacuum but instead are products of the society in which they operate. Psychology, sociology, economics, politics, and even partisanship affect law. Although this is most pronounced (and permissible under the rules of the game) with legislation and executive administrative action, it occurs with adjudication as well.

- Law is also a business as well as a profession. Lawyers can better serve clients and enjoy a successful practice if they sufficiently appreciate the practical aspects of screening, accepting, and processing cases as well as the nuts and bolts of running a law office.