

TOPIC 6: CIVIL LITIGATION PROCEDURE

Overview

This chapter introduces the concept of civil litigation (“suing someone” or “bringing a lawsuit”). More specifically, it explores the methods and procedure for enforcing one’s rights in a civil lawsuit. It introduces the individuals involved in a civil trial and provides a detailed explanation of the mechanics of a proceeding. It explains the authority for a court to adjudicate certain types of actions and explains what elements must be present for a court to legally subject individuals to its authority. Lastly, the chapter will explore the post-trial stages and the remedies and enforcement mechanisms available to the litigating parties.

VIDEO LESSON - INTRODUCTION



VOCABULARY & CONCEPTS

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TOPIC 6: CIVIL LITIGATION & PROCEDURE - QUESTIONS & ANSWERS

1. What is a “civil lawsuit” or “civil action”?

A civil lawsuit is a private legal action between two or more parties addressing a legally recognizable dispute. A civil lawsuit can be grounded in tort, contract, property, or family law. One or more of the parties have allegedly suffered a harm or loss as a result of the actions or inactions of the other party. Those parties are seeking resolution of the legal dispute and an enforceable remedy from the court.

- **Discussion:** Why do you think the government provides a method by which individuals can settle disputes among themselves? Do you think litigation is an effective method of achieving these objectives?
- **Resource Video:** <http://thebusinessprofessor.com/what-is-a-civil-lawsuit/>

2. Who are the “parties” to a lawsuit?

A lawsuit involves (or may involve) the following parties:

- **Plaintiff** - The plaintiff is the party (individual or business) who files the action claiming that she has suffered a wrong at the hands of the defendant. Basically, the plaintiff is the individual suing or bringing a civil action against someone else.

- **Discussion:** Compare the plaintiff in a civil case to the prosecutor in a criminal case. Note: In criminal law, there is no plaintiff. The State (represented by the district attorney, a prosecutor) brings charges against a criminal defendant.

- **Defendant** – The defendant is the party being sued in the civil action. More specifically, a defendant is a party named by the plaintiff in the formal complaint filed with the court. Often times, the plaintiff will name multiple defendants. In some cases, each defendant’s conduct may subject her to potential liability independently of other defendants. In other cases, the collective actions of multiple individuals may subject them to liability collectively.

- **Discussion:** Compare the defendant in a civil case to the defendant in a criminal case. Note, in criminal law the person being prosecuted is also called the defendant.

- **Counterclaim** – A counterclaim is a claim by a named defendant against the plaintiff. The defendant alleges that the plaintiff is responsible for some loss or harm she has suffered. A counterclaim by the defendant against the plaintiff does not have to be related in any way to the claims alleged by the plaintiff against the defendant. This all happens within the same court case. In this situation, the defendant or “counter-plaintiff” is the one bringing the counterclaim against the original plaintiff or “counter-defendant”.

- **Discussion:** What do you think is the benefit for the defendant of allowing him or her to make any claims back against the plaintiff in the legal action? Are there any advantages to the original plaintiff?

- **Third-party Defendants** – A third-party defendant is a party who is not initially named as a defendant in the plaintiff’s complaint but is added to the case by a defendant. Basically, a defendant makes a claim against a third party alleging that she should be brought into the litigation as a co-defendant.

- **Discussion:** Why do you think that the rules of court procedure allow a defendant to add co-defendants to the lawsuit?

- **Practice Question:** David decides to sue Mary for destroying his lawn by pouring plant killer in a pattern spelling an offensive word. Mary was present at the time, but it was actually Mark who poured the chemical on David’s lawn. Mary was involved in the incident because she was angry at David for backing out of his agreement to sell her his car. What options exist for Mary in this situation?
- **Resource Video:** <http://thebusinessprofessor.com/parties-litigation/>

3. What is “standing” to sue in a civil trial?

Standing is the requirement that a person have a legally recognizable interest in a dispute before the court. In summary, to seek redress before the court, a person must suffer a loss or harm caused by the defendant(s). This rule seeks to ascertain that there is indeed an adversarial relationship between the plaintiff and defendant.

To have standing, a plaintiff must demonstrate two things to the court:

- **Legal Wrong** - The complaint, as written, must demonstrate a legal controversy. That is, there must be a legal wrong that took place. A legal wrong is an action that is prohibited by law and, if proven, may allow the plaintiff redress.
- **Personal Stake** - The plaintiff must show that she has a personal stake in the dispute or controversy with the named defendant. This means that she must be the one wronged. For example, a plaintiff cannot generally sue someone for harming another person who is not closely related to her. While she may be negatively affected, she is not the individual directly suffering the harm. Her harm is incidental.

Standing does not depend upon the validity or merits of the case. It only depends upon the relationship and nature of the controversy between the parties. Standing is determined at the time of filing the action. It does not matter if the plaintiff suffers harm at some time well after the dispute arises. She must have suffered the harm prior to the commencement of the action.

- **Discussion:** During the economic meltdown of 2007, many people suffered financially as a result of actions of others. Should those generally affected by the poor economy be able to sue those who played a major role in the downturn? Would granting standing to such people open the court to an unmanageable flood of cases?
- **Practice Question:** Angel is a big fan of Kim, a professional celebrity. Ryanne is a musician and celebrity who speaks ill of Kim on social media. Angel is so offended by Ryanne's conduct that she initiates a lawsuit against her for defamation. What is Ryanne's primary defense against Angel's action?
- **Resource Video:** <http://thebusinessprofessor.com/standing-sue/>

4. What is “personal jurisdiction” in a civil suit?

Personal jurisdiction means that the court has authority not only over the subject matter of the case but also over the parties to the case. This is also known as “*in personam* jurisdiction”, or jurisdiction over the person. In some instances a court cannot establish jurisdiction over a person, but it can establish jurisdiction over real or personal property located within its geographical boundaries. This is known as “*in rem* jurisdiction”. In practice a court obtains personal jurisdiction over the plaintiff when she files the legal action. By filing a lawsuit in a court, the plaintiff voluntarily submits to or grants the court personal jurisdiction over her. The plaintiff must generally allege in the complaint the grounds for the court's exercise of personal jurisdiction over the defendant. Otherwise, the defendant may voluntarily agree to be subject to the court's jurisdiction. Of course, the defendant is free to contest a court's personal jurisdiction. In fact, court procedure allows a defendant to appear before the court with the sole purpose of contesting personal jurisdiction without being subjected to jurisdiction in the process.

- **Note:** Personal jurisdiction, in this discussion, applies to civil cases. In criminal cases, a court only has personal jurisdiction over a party who commits a crime in that state. Other states will often extradite individuals charged with crimes to the state in which charges are filed.

- Resource Video: <http://thebusinessprofessor.com/personal-jurisdiction/>

Service of Process

The primary method of obtaining personal jurisdiction over a defendant is through service of process. This means that the court must deliver notice of the litigation (a summons) to the defendant. The summons provides notice to the defendant to appear in court. The plaintiff must also include a copy of the complaint at the time of delivering the summons. In some circumstances, a plaintiff may serve process on a defendant without personally delivering a summons. If, for example, a defendant is known to be in an area but cannot be found, court procedure may allow for the effective delivery of notice by other methods. This may include delivery to the last known address, delivery to immediate family members, and publication in a newspaper of general circulation.

- **Discussion:** A recent state case allowed for service of process *via* Facebook message. Do you believe that service of process should be delivered personally to a defendant? Or do you support alternative methods of notification, such as electronic posting? Do you think alternative methods of providing notice of litigation affect an

individual's due process rights?

The Long-Arm Statute

In order to serve the summons on the defendant, she must generally be within the state at the time of delivery. There is, however, a common exception that allows a court to serve process on a defendant located outside of the state's boundaries. This is known as the "long-arm statute". Limitations on the long-arm statute are as follows:

- *Due Process* - Serving process on a defendant is subject to the constitutional right to due process of law. As such, a state's long-arm statute must meet constitutional due process requirements.
- *Minimum Contacts* - To meet constitutional standards, the long-arm statute can only be used to serve process on a defendant who is located outside of the state if she has "minimum contacts" with the state. Minimum contacts means that the defendant has sufficient contact with the state to not "offend the notions of fair play and substantial justice".

What is Minimum Contacts?

A court may be able to legally serve a summons on a defendant who is out-of-state if one of the following are met:

- *Resident of State* - The defendant is a resident of the same state as the court.
- *Instate Activity* - The defendant committed the action within the state that is the subject of the litigation. The defendant may have committed a tort or entered into the business deal that was the subject of the litigation.
- *Owns Property* - The defendant may own property located in the state that is the subject of the litigation. This is known as "*in rem*" jurisdiction. This would include a lawsuit challenging property ownership rights.
- *Voluntary Submission* - The defendant may voluntarily submit to personal jurisdiction in the court. She can do this by written waiver or by just showing up to court and not contesting jurisdiction.
- *Presence in the State* - Remember, the court may serve process on a defendant if she is present in the state for any reason. The primary exception is that a party can appear in court for the purpose of contesting personal jurisdiction and not subject herself to the court's authority by doing so.
- *Registered in the State* - A business is subject to jurisdiction in its state of incorporation or any state in which the defendant business is registered.

- **Discussion:** Suppose a defendant technically committed the tort in a state, but really has very little contact or ties with the state otherwise. For example, Dave builds a product in Georgia and ships it to California. The product is defective and hurts the purchaser. Dave technically caused harm in California, but does not otherwise have any contacts with the state. Is this sufficient minimum contacts for the California court to exercise jurisdiction over Dave?

- **Practice Question:** Claire lives in Georgia and purchases a pair of shoes online from Waylon's Shoe Sales.

Waylon's is located in California. Waylon's only has physical locations in California, but he sells *via* the Internet throughout the United States. He does, however, routinely employ sales agents to attend trade shows and make sales calls in every state. When Claire's shoes arrive, she wears them out to diner. On the way out of the house, the heel of the shoe breaks and Claire falls to the ground. She suffers a torn ligament in her knee. She plans on suing Waylon's in Georgia's superior court for negligent manufacture of the product. What personal jurisdiction issues exist in this case?

5. What is a "class action" lawsuit?

A class action is a special type of lawsuit in which one or more plaintiffs file suit on their own behalf and on behalf of all other persons who have a similar claim against the defendant. The individuals represented by the lead plaintiff(s) are known as a "class" of plaintiffs. This type of lawsuit is popular when many individuals suffer the same type of harm by the defendant's conduct. Frequently, it involves matters in which no one member of the class has suffered a sufficient loss or harm to justify bringing the lawsuit alone. Basically, the damage suffered by one person is not enough to support the expense of litigation. Class status allows plaintiffs to aggregate their claims into one trial. It also avoids multiple legal actions involving the same issue. It provides advantages to the class of plaintiffs when the cost of litigation high and the issues are complex.

- **Discussion:** Do you think that class actions are valuable or detrimental to US society? Do you think that class actions have an impact on corporate behavior with regard to consumers?
- **Resource Video:** <http://thebusinessprofessor.com/what-is-a-class-action-lawsuit/>

Requirements for a Class Action

The requirements for a plaintiff to bring a class action against a defendant are as follows:

- **Certify the Class** - The primary hurdle for the plaintiff is to "certify" all potential plaintiffs as a class. To certify a class, the plaintiff(s) must present evidence of the following:
 - **Numerosity** - The class is so numerous that joinder of class members in a trial outside of a class action is impracticable;
 - **Commonality** - There must be questions of law or fact common to the class;
 - **Typicality** - The claims (harms suffered) or defenses of the class representatives are typical of those of the class;
 - **Adequacy** - The class representatives will fairly and adequately protect the interests of the class; and
 - Any of the following:
 - **Risk of Inconsistency** - Hearing separate actions risks either inconsistent adjudications and standards or any one action would be dispositive of cases by other parties;
 - **Defendant's Obstinacy** - The defendant fails to act on any grounds or causes of actions by the

defendants, or

- *Note:* Denying the class does not give rise to immediate appeal. The case must be tried to a result first. This procedural requirement places a significant hurdle in the way of individuals trying to get certified as a class.

- **Discussion:** In recent years, Wal-Mart was the subject of a class action lawsuit for gender discrimination in hiring, promotion, and salary. The court denied class status to the plaintiff on the grounds that all plaintiffs did not suffer the same type of harm. Gender discrimination in hiring is not sufficiently similar to discrimination in promotion and salary so that the plaintiffs are representative of all class members. Do you believe that the requirement that each plaintiff be representative of all class members should be construed more strictly or loosely?

- **Resource Video:** <http://thebusinessprofessor.com/class-action-lawsuit-certify-a-class/>

- *Notice to Opt-Out* - Once certified, the lead plaintiff must give notice of the litigation to all prospective members of the class who can be found through reasonable efforts. Once identified, the prospective members are then given the option of opting out of the litigation. Opting out means that they will not be included in the class of plaintiffs. In most cases, this reserves the ability of the potential class member to bring her own legal action against the defendant.

- **Discussion:** You may have gotten notice in the mail or *via* an email that you are a potential class action member. They are common with purchases of electronics, lending practices, and communications or data usage agreements. Do you believe that failing to opt out of such actions is in your best interest? Were you satisfied with the result from the class action suit?

- *Cost of Litigation* - The lead plaintiffs in the class action must generally pay all of the costs associated with bringing the suit. This includes the heavy fee associated with notifying all potential class members. This makes it prohibitively expensive for one individual or a small group of plaintiffs to serve as plaintiffs for the class. Aggregating the claims among a group of lead plaintiffs, however, makes the action more affordable. Further, if the class action is successful, the plaintiffs paying the cost of litigation may recoup those expenses from any judgment rendered.

- **Discussion:** Do you believe that plaintiff's attorneys should be able to pay the costs of certifying the class? Why or why not?

- *State or Federal Court* - Plaintiffs may be able to bring a class action in state or federal court. State class action suits must demonstrate the court's subject-matter jurisdiction over the case and personal jurisdiction over the defendants. For the court to have subject-matter jurisdiction over the class action, a cause of action claimed against the defendants (such as fraud) must arise under state law. The court has personal jurisdiction over all

defendants when they all have minimum contacts with the state. Issues arise when there are multiple defendants from different states and they have very little contact with the state of litigation. A class action in federal court avoids the issue of personal jurisdiction, but the plaintiffs must still demonstrate that the court has subject-matter jurisdiction. If the parties are not suing the defendant based upon a federal law, then there must be diversity between the plaintiffs and defendants. Generally two federal statutes allow for class actions involving “complete diversity” and “minimum diversity”.

- *Complete diversity* - This requires that all plaintiffs be from different states than all defendants. This is difficult to achieve when the plaintiff class is very large and some class members are located in the same state as the defendant.
- *Minimum diversity* - This allows for the diversity action in federal court when only one plaintiff is diverse from one defendant. In both complete and minimum diversity situations, the amount in controversy must be at least \$75K. In some situations, all claims can be aggregated to meet the \$75K amount. In other situations, a single plaintiff must have a claim of \$75K in order to meet the statutory amount in controversy requirement.

- **Practice Question:** Save-Mart is national retailer of consumer products. A large group of female employees seek to bring a class action against Save-Mart for discriminatory practices in the hiring, promotion, compensation, benefits, scheduling, and firing of female employees. Most of these employees received minimum wage during their period of employment, which averaged 6-8 months. Four women from California will serve as the representative plaintiffs. What issues exist here for the plaintiffs in bringing the class action?
- **Resource Video:** <http://thebusinessprofessor.com/class-action-procedural-requirements/>

6. What are “pleadings” in a civil lawsuit?

Pleadings are the legal documents that parties use to communicate their grievances and responses to each other and to the court. In summary, they are used to start the litigation process. The pleadings consist of the following documents:

- *Summons* - The summons is the document notifying a defendant of the pending litigation and directing her to respond or appear before the court on a given date.
 - *Note:* Recall that service of process (delivery of the summons) is the basis for a court exercising personal jurisdiction over a defendant.
- *Complaint* - The complaint lays out the plaintiff’s legal grievances or causes of action against the defendant. It must state legally recognized causes of action and be specific enough to allow the defendant to adequately respond (answer) to those allegations. Generally, the complaint lays out the following:
 - identification of plaintiff and defendant,
 - the basis for the court’s subject-matter jurisdiction,

- the basis for service of process (court's personal jurisdiction),
 - the cause(s) of action against the defendant(s), and
 - the request for damages (or other legal or equitable remedy).
- *Answer* - The answer is the defendant's response to the complaint. The defendant will generally address every point in the complaint in one of the three following ways:
 - *Admit* - Admit the truth of an individual point in the allegation,
 - *Deny* - Deny the truth of the allegation, or
 - *Lack of Information* - Claim a lack sufficient knowledge to admit or deny the allegation.

The defendant may present a counterclaim against the plaintiff. This generally happens within the defendant's answer to the plaintiff's complaint. The parties may also include motions requesting action from the court outside of the complaint and answer.

Default & Default Judgments

Under state and federal law, a defendant has a stated period of time to respond to the plaintiff's complaint. Most jurisdictions allow 30 days to respond. Many jurisdictions also allow an extended period of time to answer the complaint if the defendant is willing to accept service of the summons and complaint by some method other than personal delivery. For example, the statute may allow for 60 days to respond if the defendant accepts service of process through the mail. If the defendant fails to respond within the allowed period of time, the court will deem the defendant in default. This generally results in the court rendering a default judgment in favor of the plaintiff. Subject to the court's review and discretion, the default judgment will award the defendant the legal or equitable remedies sought in the complaint. A defendant who defaults may be able to later petition the court to set aside the entry of default and judgment. To do so, however, the defendant must provide the court with a justifiable reason for setting aside the default and letting the defendant answer the complaint.

- **Discussion:** Do you believe that holding a defendant in default is a justifiable action for failure to respond to the initial pleadings? If not, what would be another manner of compelling a response from the defendant?
- **Practice Question:** Olivia receives a summons and complaint from a process server. The documents indicate that Matthew is suing Olivia for breach of contract. Olivia is annoyed by the situation. She replies to the complaint in a long letter that describes a tort that Matthew committed against her several years ago. She fails to address any of Matthew's allegations against her for breach of contract. If this is the only response that Olivia makes to the summons and complaint, what is the likely result?
- **Resource Video:** <http://thebusinessprofessor.com/court-pleadings/>

7. What is "discovery" in a civil lawsuit and how is it used?

Discovery is the process of identifying and obtaining any information or evidence that is relevant and material to the dispute. The rules of procedure for federal and state court litigation allow a party to obtain any such evidence from the other party or third parties. The purpose behind discovery is to allow the parties to obtain the necessary information to resolve or litigate the dispute. The outcome of a case should be based upon all of the facts and evidence available. Several methods exist for requesting information between the parties:

- *Interrogatories* – Interrogatories are a series of written statements in question format and directed to the other party. The court will permit a limited number of relevant questions that directly relate to or will potentially lead to relevant evidence. The questions are generally presented in a yes/no or admit/deny format. The party receiving the interrogatories must answer these questions within a statutory period of time. A failure to answer the questions may result in the court deeming the interrogatory statements to be true.
- *Request for production* – Each party may request that one party produce any documents or other physical evidence that are relevant to the dispute or are likely to lead to relevant evidence. The party receiving the request for production must generally make the listed documents or evidence available for the other party's review.
 - *Note:* The request to produce documents can be directed to third parties who are not otherwise involved in the litigation.
- *Depositions* – A deposition is a formal interview of an individual taken when that person is sworn to an oath of truth (under oath). The court will permit parties to depose the other party and any third parties who may have relevant information or evidence. Depositions serve the purpose of formally recording an individual's testimony prior to trial. It can prevent an individual from intentionally or inadvertently modifying her testimony at trial.
- *Request for Admission* – A request for admission is a statement of facts presented to the other party. It seeks to identify and establish the facts that are not in dispute. This is made to save time and money.

Through these court-approved methods, parties to a civil suit have extensive authority to uncover evidence this is material to the litigation. The authority to demand evidence becomes controversial when the evidence demanded in some way discloses private or personal information of third parties.

- **Discussion:** Do you believe that this combination of discovery methods is effective in producing evidence relevant to a civil dispute? Can you think of other methods that could make the discovery process more effective?
- **Practice Question:** Carter sues Justin for defamation. Carter claims that Justin is spreading malicious lies about him that have harmed his career. What information and records might Carter seek to obtain from Justin? What methods might Carter employ to obtain those records?
- **Resource Video:** <http://thebusinessprofessor.com/steps-discovery-process/>

8. What is the “scope of discovery” in a civil lawsuit?

A party is permitted to seek evidence that is relevant to the dispute. Basically, the evidence requested through discovery

must have a tendency to lead to evidence that may be relevant and admissible at trial. This standard is construed very broadly. If one party fails to produce requested discovery, the other party generally files a motion with the court to mandate its production. Parties are free to contest any discovery request before the court. The court will determine whether the request is valid and the extent of the required disclosure. Failure to produce discovery can lead to sanctions from the court. In severe cases, it can lead to the court deeming certain allegations to be true and not subject to dispute.

- *Note:* A very hot topic in the field of discovery is E-discovery or electronic discovery. E-discovery concerns files stored electronically on computers, servers, hard drives, or in the cloud. Today, records are very easily destroyed and hidden. Individuals who are adept at scouring computer files to identify relevant information are very valuable.
- **Discussion:** Do you think the power of the court to order discovery in a civil suit is too limited or too broad? What are the justifications for allowing each party such broad discovery power? Are you convinced by these reasons?
- **Practice Question:** Amy is suing Michael's business for breach of contract. Amy requests all sorts of records of Michael's business activities. She also includes a request for production of his personal bank account statements. Will Michael have to surrender his personal bank account records to Amy?
- **Resource Video:** <http://thebusinessprofessor.com/scope-of-discovery-in-a-civil-lawsuit/>

9. What are “motions” and how are they used in a civil lawsuit?

A motion is a method by which a party asks the court to do something. That is, the party moves the court to take action. Motions are most often used to ask the court for some form of procedural action. Below are examples of common motions:

- *Motion to Compel Production* – This is a request to the court to force the other side to produce the requested information (discovery). It is extremely common for parties to litigation to ignore or not fully comply with the other party's discovery requests. The motion to compel is the procedural remedy available to the requesting party.
- *Statute of Limitations* - This is a request to the court to bar the other party from bringing a particular cause of action against the defendant. Basically, it argues that the statutory time period allowed for bringing the specific legal action has passed. Successfully demonstrating that the statute of limitations has passed effectively wins that claim for the defendant.
- *Judgment on the Pleadings* - This is a request by the defendant to the court to rule in her favor based upon the information in the pleadings. It states that, even if all pleadings are true, the defendant is entitled to judgment as a matter of law. At this point, neither party has presented any facts, but the defendant claims that the plaintiff has failed to allege sufficient facts to state a cause of action. Basically, the defendant claims that all of the facts, as alleged, do not establish a legal claim under the existing law.
- *Directed Verdict/Summary Judgment* - This is a request to the court by a defendant to rule in her favor based upon the plaintiff's presentation or the entire presentation of evidence. The request for directed verdict comes at the close of the plaintiff's presentation of evidence. The court will grant the motion if the plaintiff has failed to

present sufficient evidence to show that the defendant could be liable under the law. If granted, the defendant does not have to present a defense because the plaintiff did not show the minimal amount of evidence necessary to demonstrate liability. A motion for summary judgment is based upon the same grounds, but is made at the close of all evidence.

A motion can take many forms and can be for any purpose. In business cases, motions litigation is often the most intense aspect of a trial. The result of motions litigation will often be the determining factor as to whether parties continue on with litigation, dismiss the action, or settle the lawsuit.

- **Discussion:** Why do you think motion litigation is so important in business cases?
- **Practice Question:** Zara decides to sue ABC, Inc., in state superior court. ABC receives a summons and complaint containing lots of allegations. ABC believes that all of the allegations made by Zara, even if true, do not state a valid cause of action under state law. What process should ABC take in responding to these allegations?
- **Resource Video:** <http://thebusinessprofessor.com/motions/>

10. What is a “frivolous case” and how are such cases regulated?

A frivolous case is a civil lawsuit that lacks any factual merit. Basically, the plaintiff is suing the defendant based upon facts that do not amount to a cause of action. A frivolous case is based upon conjecture or false information. Any party can move to dismiss a frivolous suit or the judge can dismiss it unilaterally. Generally, the rules of procedure in civil trials seek to prohibit the filing of frivolous cases. Specifically, Rule 11 of the Federal Rules of Civil Procedure requires an attorney to sign an attestation that the case is filed in good faith. The attorney’s signature says that the facts and claims in pleading are meritorious and, to her knowledge, not for an improper purpose.

- **Discussion:** The idea of a frivolous case relates closely to the question of whether society in the United States is over litigious. What do you think? Is it better to allow frivolous suits or potentially block a valid dispute from resolution through the court system?
- **Practice Question:** Lydia walks into the office of attorney Greg. Lydia states that she has been in a car accident. She states that she is not injured and does not feel any pain. Greg immediately sends Lydia to a doctor, chiropractor, and physical therapist. He sends a letter to the other driver’s insurance company asking for \$100,000 in damages for pain and suffering. When the insurance company refuses to settle, Greg files a complaint to start a legal action against the driver and his insurance company. Greg signs an affidavit that all of the allegations are substantiated by facts known to him. Could Gregg potentially be subject to sanction by the court for filing a frivolous claim?
- **Resource Video:** <http://thebusinessprofessor.com/frivolous-cases/>

11. What is the process for selecting a jury (“jury selection”) in a civil case?

Individuals called to serve jury duty are referred to as the “jury pool”. The jury pool is a cross-section of the population

and each member is randomly chosen from government records. Jurors fill out a questionnaire and submit to a background check as part of this process. This procedure seeks to expose any biases or prior conduct that might disqualify the potential juror from service. For example, an individual who has previously been convicted of a felony may not serve on the jury. Once the final pool is selected, these individuals are eligible for selection to serve on a “trial jury” for any case in the court’s jurisdiction.

The trial jury is selected through a process known as “*voir dire*”. In this process, the plaintiff and defendant (through their counsel) ask questions to evaluate the jurors. The purpose of the questions is to identify any biases that may prejudice the juror’s ability to be fair and impartial in the execution of her duties. If the questions reveal any biases that disqualify the juror from service, the juror is stricken “for cause” from the jury pool. This is a procedural process to narrow the jury pool down to a group of eligible, non-biased individuals. Then, each party is given the ability to strike a limited number of jurors from the pool for any non-discriminatory reason. These are known as “preemptory challenges”. This allows the party to strike potential jurors that they simply do not want on the jury. The only limitation is that the preemptory challenge cannot be used to eliminate a potential juror based upon any protected classification (race, religion, gender, etc.).

- **Discussion:** Do you believe that the jury selection process is fair? Why or why not?
- **Practice Question:** Martin is defense counsel in a civil case against his client. During the jury selection process, Martin identifies a number of jurors who appear to have biases that would prejudice his client. He also gets the sense that a couple of the jurors do like him or his client. What are Martin’s options with regard to choosing jurors?
- **Resource Video:** <http://thebusinessprofessor.com/selecting-jury/>

12. What is the general process or steps involved in a civil trial?

A civil trial begins with the pleadings. Following the pleadings, the parties will generally submit a number of motions to the court for various reasons. This is generally known as pretrial matters. After the pre-trial matters conclude, the trial process begins. A jury trial begins with the parties selecting a jury through the *voir dire* process. Once the jury is selected, the trial commences. The judge opens the case by going on the record and announcing the case and the parties to the dispute. The pleadings become part of the official record of trial. The parties are then given the opportunity to make an opening statement to the jury. The plaintiff goes first and the defendant is given the opportunity to follow. Often, the defendant will defer delivering the opening statement until after the plaintiff has delivered her entire case.

Following the opening statement, the plaintiff will present all of the evidence and witnesses to support her case. Once the plaintiff completes her presentation of evidence, the Defendant will move the court for a directed verdict. If the motion is denied, the defendant is allowed to present evidence in rebuttal of the plaintiff’s case. Once the defendant completes her presentation of evidence, the jurisdiction may allow the plaintiff a chance to rebut the defendant’s case with any additional presentation of evidence. At the conclusion of the plaintiff’s “rebuttal”, the defendant is allowed to the opportunity to rebut the plaintiff’s rebuttal. This is known as the “surrebuttal”. At the conclusion of the surrebuttal, all parties rest. At this point, the defendant will again move the court for summary judgment based upon the presentation of all evidence. If the motion is denied, the court will then allow the parties to make a closing statement to the jury. After closing statements, the presentation of evidence is closed. The remainder of the case belongs to the judge and jury.

- **Discussion:** Which steps in the trial do you feel are most important or determinative of guilt or innocence?
- **Practice Question:** The company that you work for is being sued. You are going to be called to testify at trial. You do some research on the trial process. In a concise paragraph, explain the process for a civil action in a manner that anyone can understand it.
- **Resource Video:** <http://thebusinessprofessor.com/steps-trial-process/>

13. What is the “burden of proof” in a civil trial?

The burden of proof in a trial refers to the responsibility of a party to produce evidence in support of her allegations. The burden of persuasion refers to the strength of that evidence. The burden of proof in a civil trial is a finding of liability by either a “preponderance of the greater weight of evidence” or by “clear and convincing evidence”.

- *A preponderance of the greater weight of evidence* - Concerns how convincing is the available evidence. The jury should focus on the credibility and accuracy.
- *Clear and convincing evidence* - Is a slightly higher standard of proof than a preponderance of the evidence. It focuses on the greater likelihood or belief that the evidence is truthful and the fact finder’s belief in its truth.

In either case, the plaintiff must present evidence sufficient to meet this standard in order to demonstrate liability.

- **Discussion:** Compare the burden of proof in a civil trial to the burden of proof in a criminal trial? Why do you think the standard of proof is far lower in a civil trial than in a criminal trial?
- **Practice Question:** Donte is charged with criminal assault. Also, the alleged victim is suing Donte in civil court to recover damages. Donte is acquitted in criminal court. Is it possible that Donte will still be held liable in civil court?
- **Resource Video:** <http://thebusinessprofessor.com/burden-of-proof-in-a-civil-trial/>

14. How is a civil trial decided?

At the conclusion of all evidence and arguments, the judge instructs the jury on the applicable law to apply to the facts. This is known as “charging the jury”. The jury charge explains the state of the law to the jury. The jury will use this law when determining liability. Following the jury instruction by the judge, the jury will recess to deliberate about the facts and apply them to the applicable law. The jury must find that the facts demonstrate each element required by the statute consistent with the burden of proof. The jury must be persuaded that the facts have merit. After deliberation, the jury will return with a verdict of liable or not liable on all of the plaintiff’s claims. If the jury find’s liability, there may be a separate presentation of evidence by the parties regarding damages. The jury will deliberate to determine damages to award based upon the finding of liability. The jury will then deliver the verdict to the judge. The judge, if satisfied that all procedural requirements are met, will enter a judgment on the verdict. The losing party will generally move the court for a directed verdict in contrast to the jury’s findings, known as a “*judgment non obstante veredicto*”. This is also known a “judgment

notwithstanding the verdict” or (“JNOV”). Judges rarely grant JNOV motions. At the same time, the losing party will generally request permission from the court to file an appeal to the appellate court. If done in a timely manner, requests to appeal are routinely granted. The trial process is now closed. The appellate court will review the losing party’s request for appeal (along with the record of trial). If the appeal is denied, the case is closed. If the appeal is granted, the appellate process begins.

- **Discussion:** Do you think this is a fair and just manner of determining a party’s liability? Why do you think the judge has the authority to override the jury’s verdict? Why do you think the judge rarely exercises this authority?
- **Practice Question:** Todd is being sued by Nancy. The judge provides a clear description of the law to the jury, including all of the elements necessary to find Todd liable. The jury ultimately finds Todd liable to Nancy. After the jury announces its verdict, what are Todd’s options?
- **Resource Video:** <http://thebusinessprofessor.com/how-is-a-civil-trial-decided/>

15. What is “joint and several liability”?

Joint and several liability is a manner of apportioning liability among multiple parties. It will only apply when there is more than one tortfeasor. Parties that are jointly liable are assessed a certain amount of damages. Joint and severally liable individuals are all liable to the plaintiff, but the entire award of damages may be recovered from any defendant.

- **Note:** Joint and several liability is a windfall for plaintiffs who can seek recovery from one party and allow that party to seek any level of contribution from a joint tortfeasor.
- **Example:** Ann is a huge fan of Justin, the singer. She follows him all over the country and is somewhat of a stalker. She calls hotels when he is in town in an attempt to identify where he will be staying. She calls the hotel and learns that Justin will be staying on the third floor. She asks to rent the room next to him. When Justin arrives, she secretly records him singing in his room and posts it to YouTube. This severely hurts Justin’s career when folks learn that his singing is actually auto tune and he cannot carry a note. Justin sues Ann and the hotel. The court awards joint liability of \$1 million against Ann and the hotel. If the court awards joint and several liability, Justin can recover the \$2 million against the hotel or Ann. The hotel or Ann would then have to work to seek \$1 million contribution from the other.

- **Discussion:** How do you feel about the doctrine of joint and several liability? Is this fair to the defendants? Why or why not?
- **Practice Question:** Carrie and Doug are being sued by Edith. Carrie is rich, while Doug is of modest means. Edith is worried that, if she receives a verdict against Carrie and Doug, she will not be able to recover against Doug. Under what situation would Edith be able to recover the entire verdict, despite Doug’s lack of assets?
- **Resource Video:** <http://thebusinessprofessor.com/what-is-joint-and-several-liability/>

16. What is the process and procedure for appealing (“appeal”) the verdict in a civil trial?

The losing party in a case must file a request or notice of appeal with the trial court. This request allows the party to undertake the appeals procedure with the immediate appellate court. The request for appeal will generally include the grounds for appeal (allegations as to how the law was incorrectly applied or that the law is unconstitutional) and the record of trial. The appellate court will review and either grant or deny the request. If the court grants the appeal, the parties are allowed to file a brief in support of their position regarding the issues presented on appeal. The appellate hearing generally consists of 3-5 judges sitting together (“*en banc*”) to hear the parties’ arguments. In rare cases, all of the appellate judges will sit to hear a case. At the appellate hearing, counsel for each party is allowed to present an oral argument in support of her client’s position. The appellate court will take the briefs and arguments under consideration and deliberate on the case. The judges will then render an opinion as to the application of the law in the case and, sometimes, the constitutionality of the law. The appellate court’s written opinion about these matters becomes a part of the common law and serves as “precedent” for the future application of that law by subordinate courts. If the court finds that the trial court erred in the application of law, the trial court’s decision (or part of the decision) will be reversed and remanded for further action. The parties opposing the appellate court’s decision may request immediate appeal to the higher appellate court (generally the State or US Supreme Court). If the appeal is granted, the appellate procedure repeats itself. If the case is remanded to the trial court and the parties do not immediately appeal the appellate court’s decision, they may then re-litigate the issues that are remanded. At that point, the process repeats itself.

- **Discussion:** How do you feel about the system for requesting appeal of a trial court decision? Why do you think appellate procedure limits the information considered by the appellate court to the information in the the record of trial? Do you think the appellate court should review the evidence again (such as hearing testimony from witnesses).
- **Practice Question:** Mark is suing his former employer in state court for discriminatory firing. He loses his case at trial and immediately appeals to the state appellate court. What is the general process for requesting appeal? What will the court look for in deciding whether or not to grant an appeal? Under what situations could Mark appeal to the state and US Supreme Court?
- **Resource Video:** <http://thebusinessprofessor.com/appeal-case/>

17. How does a party enforce a civil judgment?

Collecting on a judgment can be a difficult process. There are three primary methods by which a party may enforce a court’s judgment.

- **Encumbrance** - A judgment holder may file a lien on property of the debtor, such as the real property registered to the debtor. The process requires an order from the court that the judgment be attached to available real property. The lien is then filed with the registrar of deeds in the county where the court is located. Holding a lien on the defendant’s property clouds title and makes it difficult for the debtor to sell or borrow money against it. Further, the lienholder can file a foreclosure action to sell the property to collect the judgment.
- **Execution** - Execution is the method by which a court’s judgment is enforced through the executive branch. Generally, a court official, such as a sheriff or marshal, seizes some property of the debtor, sells it at public auction, and applies the proceeds to the creditor’s claim. The responsibility for identifying property of the debtor upon which to execute is the responsibility of the judgment holder. If the sheriff is unable to identify or locate any

property of the debtor, there can be no execution and sale of the property.

- *Note:* The court may hold a special proceeding to inquire about the assets of the debtor.
- *Garnishment* - Garnishment is similar in nature to execution but involves a defendant's employee wages. It entails having a portion of the debtor's wages paid to the court, which is then released to the judgment holder. This process requires an order of garnishment from the court that the judgment holder can provide to the debtor's employer. The employer is legally obligated to withhold the ordered funds or risk contempt of court.

These methods vary in degree of effectiveness. Encumbering property does not immediately ensure payment. Executing on property and selling it is only available if the defendant owns property. Garnishment of wages provides greater certainty of payment but only if the debtor is employed.

- **Discussion:** Do you believe that the above methods of enforcing payment of a debt are fair? Do you believe these methods go far enough to protect the rights of the debtor?
- **Practice Question:** Diane has a civil judgment against Pete. Pete has refused to pay the judgment, leaving Diane with no other option but to pursue alternative methods of collecting the debt. What are some methods Diane may employ in collecting on her judgment against Pete?
- **Resource Video:** <http://thebusinessprofessor.com/enforcing-judgment/>

18. What is “*res judicata*” in civil trials?

Res Judicata is a legal expression meaning that the legal dispute between the parties is decided. This principle prevents successive lawsuits involving the same facts or occurrence. A plaintiff may not sue the defendant for the same conduct under the same or a separate cause of action. The separate cause of action should have been raised during the initial trial. It brings the dispute to a conclusion.

- **Discussion:** Compare the principle or *res judicata* to the principle of double jeopardy in criminal cases. How are they similar? Different?
- **Practice Question:** Tom is suing Isabelle for assault. Isabelle allegedly approached Tom in a public restaurant and slapped him in the face. The jury returns a verdict of not liable on the grounds that Isabelle was temporarily incapacitated by rage at seeing her boyfriend having dinner with another woman. Tom is outraged by the verdict and seeks to sue Isabelle a second time for battery. Can Tom sue Isabelle for battery after losing the first trial alleging assault?
- **Resource Video:** <http://thebusinessprofessor.com/res-judicata/>