

Chapter 6

Litigation Process (Federal and State)

Now that you know about the structure of the court system, now you will learn about the process.

PART A: Federal Litigation Process

PROCEDURAL RULES FOR CONDUCTING LITIGATION

There are federal rules of evidence,¹ and rules of civil,² criminal,³ bankruptcy,⁴ and appellate⁵ procedure that must be followed in the federal courts.⁶

FEDERAL CIVIL CASES

A federal civil case involves a legal dispute between two or more parties. The person who initiates the law suit is the plaintiff. The person or entity the plaintiff brings the law suit against is the defendant.

¹ <http://www.law.cornell.edu/rules/fre/>

² <http://www.law.cornell.edu/rules/frcp/index.html>

³ <http://www.law.cornell.edu/rules/frcrmp/>

⁴ <http://www.law.cornell.edu/rules/frbp/>

⁵ http://www.law.cornell.edu/uscode/html/uscode28a/usc_sup_05_28_10_sq3.html

⁶ They are designed to promote simplicity, fairness, the just determination of litigation, and the elimination of unjustifiable expense and delay. The rules are drafted by committees of judges, lawyers, and professors appointed by the Chief Justice. They are published widely by the Administrative Office for public comment, approved by the Judicial Conference of the United States, and promulgated by the Supreme Court. The rules become law unless the Congress votes to reject or modify them.

Stages of a Federal Civil Case		
STAGE	ACTION	EXPLANATION
COMMENCEMENT	FILE & SERVICE	The plaintiff files a complaint with the court, and serves a copy of the complaint on the defendant
	COMPLAINT (Plaintiff's requirements for claim)	(1) a short and plain statement of the grounds for the court's jurisdiction; (2) a short and plain statement of the claim showing that plaintiff is entitled to relief; and (3) a demand for the relief sought.
	RELIEF	Compensation: Money to compensate for the injury, or Injunction: May ask the court to order the defendant to stop the conduct that is causing the harm.
	ANSWER (Defendant's answer in response to the claim)	Defendant's answer: (1) must admit or deny every element of the plaintiff's claim and (2) state any affirmative defenses.
▼		

STAGE	ACTION	EXPLANATION
PRE-TRIAL	PRETRIAL MOTIONS: (Defendant motions)	Possible grounds: <ul style="list-style-type: none"> ■ lack of subject matter jurisdiction ■ lack of personal jurisdiction ■ improper venue ■ insufficient process ■ insufficient service of process ■ failure to state a claim ■ failure to join a party
	DISCOVERY	The process whereby civil litigants seek to obtain information both from other parties and from non parties (or third parties). The whole idea is not to be surprised at trial. It takes place outside of court.
	DISCOVERY INSTRUMENTS:	(1) DOCUMENT REQUESTS: a party seeks documents and other real objects from parties and non-parties (2) INTERROGATORIES: Require other parties to answer written questions (3) REQUESTS FOR ADMISSIONS: Requires other parties to admit or deny the truth of certain statements (4) DEPOSITIONS: Requires individuals or representatives of organizations to make themselves available for questioning under oath, without obtaining leave of court (i.e., court intervention)

STAGE	ACTION	EXPLANATION
	COURT'S ROLE IN DISCOVERY	<p>NO ROLE: If each side requests that they are legally entitled to get from the other party and the other party complies, the court does not get involved.</p> <p>ROLE: When it does not go as above, parties file motions with court to either force the other side to comply or to prevent the other side from getting the information they request.</p>
▼		
TRIAL	SETTLEMENT	<p>Most cases are settled — it is encouraged.</p> <p>Alternative dispute resolution (ADR) (e.g., mediation and arbitration) is used</p>
	JURY TRIAL	Either party is entitled under the Constitution [7th amendment] to request a jury trial.
	NON-JURY TRIAL	If the parties waive their right to a jury, then the case will be heard by a judge without a jury.
	BURDEN OF PROOF	“Preponderance of the evidence”
	PLAINTIFF MUST PROVE	defendant is responsible for the harm plaintiff has suffered

Federal Criminal Cases

The judicial process in a criminal case differs from a civil case in several important ways. At the beginning of a federal criminal case, the principal actors are the United States Attorney (the prosecutor) and the grand jury. The US Attorney represents the United States in most court proceedings, including all criminal prosecutions. The grand jury reviews evidence presented by the US attorney and decides whether there is sufficient evidence to require a defendant to stand trial.

Stages of a Federal Criminal Case		
STAGE	ACTION	EXPLANATION
COMMENCEMENT	ACCUSATORY INSTRUMENT	Needed to commence a criminal action Complaint, Indictment or Information
	COMPLAINT	written statement of the facts constituting the criminal offense(s) charged. made under oath before a magistrate judge
	INDICTMENT	
	• NECESSITY	if it is punishable: (A) by death; or (B) by imprisonment for more than one year.

STAGE	ACTION	EXPLANATION
	<p>• FORM</p>	<p>The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government</p> <p>For each count, the indictment or information must give the citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.</p>
	<p>AFTER ARREST</p>	<p>must take the defendant goes before magistrate judge and must be informed about:</p> <p>(A) the complaint;</p> <p>(B) right to retain counsel or to request that counsel be appointed if indigent;</p> <p>(C) the circumstances, if any, under which defendant may obtain pretrial release;</p> <p>(D) right to a preliminary hearing; and</p> <p>(E) defendant's right not to make a statement, and that any statement made may be used against the defendant.</p>

STAGE	ACTION	EXPLANATION
	ARRAIGNMENT	<p>An arraignment must be conducted in open court and must consist of:</p> <ol style="list-style-type: none"> (1) ensuring that the defendant has a copy of the indictment or information; (2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then (3) asking the defendant to plead to the indictment or information.
	BILL OF PARTICULARS	<p>The court may direct the government to file a bill of particulars.</p> <p>The defendant may move for a bill of particulars within 10 days after arraignment</p>
	PLEAS	<ul style="list-style-type: none"> ■ not guilty ■ guilty ■ nolo contendere (with the court's consent) <p>If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.</p>

STAGE	ACTION	EXPLANATION
PRE-TRIAL	DISCOVERY AND INSPECTION	Limited Defendant's Oral Statement Defendant's Written or Recorded Statement
	MOTIONS	<ul style="list-style-type: none"> ■ A defect in instituting the prosecution ■ A defect in the indictment or information — but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense ■ to suppress evidence ■ to sever charges or defendants; and ■ for discovery
TRIAL	STANDARD OF PROOF	Beyond a reasonable doubt
	JURY TRIAL	Trial must be by jury unless <ol style="list-style-type: none"> (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves. Jury Size is 12 persons

STAGE	ACTION	EXPLANATION
	JURY VERDICT	<p>The jury must return its verdict to a judge in open court.</p> <p>The verdict must be unanimous.</p> <p>NOT GUILTY: defendant is released and the government may not appeal. Double Jeopardy attaches and s/he cannot be tried again.</p> <p>HUNG: If jury cannot agree on a verdict on one or more counts, court declares mistrial on those counts. The government may retry.</p> <p>GUILTY: Proceed to sentencing.</p>
	SENTENCE	<p>Possible sentences:</p> <ul style="list-style-type: none"> ■ time in prison, ■ fine to be paid to the government, and/or ■ restitution to be paid to victim.

The Appeals Process

The losing party in a decision by a trial court in the federal system normally is entitled to appeal the decision to a federal court of appeals. Similarly, a litigant who is not satisfied with a decision made by a federal administrative agency usually may file a petition for review of the agency decision by a court of appeals. Judicial review in cases involving certain federal agencies or programs — for example, disputes over Social Security benefits — may be obtained first in a district court rather than directly to a court of appeals.

In a civil case either side may appeal the verdict. In a criminal case, the defendant may appeal a guilty verdict, but the government may not appeal if a defendant is found not guilty. Either side in a criminal case may appeal with respect to the sentence that is imposed after a guilty verdict. The government may appeal a decision of the court dismissing the criminal action.

A litigant who files an appeal, known as an “appellant,” must show that the trial court or administrative agency made a legal error that affected the decision in the case. The court of appeals makes its decision based on the record of the case established by the trial court or

agency. It does not receive additional evidence or hear witnesses. The court of appeals also may review the factual findings of the trial court or agency, but typically may only overturn a decision on factual grounds if the findings were “clearly erroneous.”

Appeals are decided by panels of three judges working together. The appellant presents legal arguments to the panel, in writing, in a document called a “brief.” In the brief, the appellant tries to persuade the judges that the trial court made an error, and that its decision should be reversed. On the other hand, the party defending against the appeal, known as the “appellee,” tries in its brief to show why the trial court decision was correct, or why any error made by the trial court was not significant enough to affect the outcome of the case.

Although some cases are decided on the basis of written briefs alone, many cases are selected for an “oral argument” before the court. Oral argument in the court of appeals is a structured discussion between the appellate lawyers and the panel of judges focusing on the legal principles in dispute. Each side is given a short time — usually about 15 minutes — to present arguments to the court.

The court of appeals decision usually will be the final word in the case, unless it sends the case back to the trial court for additional proceedings, or the parties ask the U.S. Supreme Court to review the case. In some cases the decision may be reviewed en banc, that is, by a larger group of judges (usually all) of the court of appeals for the circuit.

A litigant who loses in a federal court of appeals, or in the highest court of a state, may file a petition for a “writ of certiorari,” which is a document asking the Supreme Court to review the case. The Supreme Court, however, does not have to grant review. The Court typically will agree to hear a case only when it involves an unusually important legal principle, or when two or more federal appellate courts have interpreted a law differently. There are also a small number of special circumstances in which the Supreme Court is required by law to hear an appeal. When the Supreme Court hears a case, the parties are required to file written briefs and the Court may hear oral argument.

Part B: Litigation in New York

PART 1:	Commencement and Pre-Trial Criminal Cases in New York
PART 2:	Commencement and Pre-Trial Civil Cases in New York State
PART 3:	New York Trial Procedure
PART 4:	Appeals in New York

PART 1: Commencement and Pre-Trial Criminal Cases in New York

Criminal Cases are different from civil cases in many respects. The biggest difference between the two types of cases is liberty. Criminal cases are the only types of cases where the defendant can lose his or her liberty, or even life. In the constitution, the fourth, fifth, sixth and eighth amendments apply almost exclusively to criminal cases.

Introduction

In order to be charged with a crime by New York State, a defendant must be accused of committing a criminal offense. Criminal offenses are defined by law through statutes. These statutes are found in the Penal Law (with some exceptions [e.g., Driving While Under the Influence of Alcohol is found in the Vehicle and Traffic Law]).

Criminal offenses consist of crimes and petty offenses.

Levels of Crimes in New York	
Felonies	A criminal offense for which a prison sentence exceeding one year may be imposed
Misdemeanors	A criminal offense for which the maximum prison term is one year

Felonies and Misdemeanors can be further divided into classes. The class of a criminal offense has to do with the sentencing for the defendant convicted of a particular criminal offense.

Dividing Levels into Classes				
Felony	Class A	Class A-I	Misdemeanor	Class A
		Class A-II		Class B
	Class B			Unclassified
	Class C			
	Class D		Petty Offenses	Violations
	Class E			Traffic Infractions

Division of Offenses — Degrees. Crimes may be subdivided into several degrees based on the seriousness of the conduct involved. For example, an assault charge may be first-, second- or third degree, depending on the extent of the injury, whether a weapon was used, the defendant's intent and the specific conduct involved. Categorizing crimes in varying degrees is intended to ensure that "the punishment fits the crime."

Example of Division of Criminal Offenses

DEGREE	CLASS	POSSIBLE SENTENCE
Assault in the First Degree	Class B Felony	5 to 25 years
Assault in the Second Degree	Class D Felony	2 to 7 years
Assault in the Third Degree	Class A Misdemeanor	Up to 1 year

Most of the time, a person will be arrested by the police for committing a crime. The arresting officer will then go to the county's District Attorney's Office (the local prosecutor). It is the District Attorney that determines what the defendant will be charged with (if anything). The accusations will be written on an accusatory instrument (most likely either a misdemeanor complaint or a felony complaint depending on whether the prosecutor is charging the defendant with misdemeanors or felonies). This accusatory instrument, is then filed with the local criminal court (i.e., New York City Criminal Court, a town or village justice court, district court, or a city court having criminal jurisdiction). Once an accusatory instrument is filed with the criminal court, the criminal action is deemed to have commenced and the court has preliminary jurisdiction which allows the court to do everything but conduct a trial.

After the accusatory instrument has been filed, the defendant will be arraigned in the local criminal court. Arraignment is a proceeding with the defendant will be informed of the criminal charges filed and the rights s/he has (e.g., the right to counsel).

After arraignment, the criminal action will proceed to the pre-trial stage. During this stage three things will occur: (1) filing of an accusatory instrument that give the court the jurisdiction to go to trial (i.e., trial jurisdiction); (2) disclosure; and (3) pretrial motions. If the defendant is charged with a misdemeanor, the criminal action will remain in the criminal court. If the defendant is charged with a felony, the case will then proceed to the supreme court through the grand jury.

The Three Steps in the Pre-trial Stage						
STAGE		EXPLANATION				
1	Filing of the Trial Accusatory Instrument	<p>Before a case can go to trial, the People must file with the court the proper accusatory instrument. In order to do this the People will get lab tests on drugs (to make sure that they are controlled substances as opposed to a white powder) or guns (to make sure the gun is operable)</p> <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="text-align: right; vertical-align: top;">FELONY:</td> <td style="border-left: 1px dotted black; padding-left: 10px;">Indictment (through the Grand Jury Process)</td> </tr> <tr> <td style="text-align: right; vertical-align: top;">MISDEMEANOR:</td> <td style="border-left: 1px dotted black; padding-left: 10px;">Information</td> </tr> </table>	FELONY:	Indictment (through the Grand Jury Process)	MISDEMEANOR:	Information
FELONY:	Indictment (through the Grand Jury Process)					
MISDEMEANOR:	Information					
2	Disclosure	<p>Bill of Particulars</p> <p>Discovery</p>				
3	Motion Practice	<table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="text-align: right; vertical-align: top;">MOTION TO SUPPRESS:</td> <td style="border-left: 1px dotted black; padding-left: 10px;">Defendant moves to keep certain evidence out of trial (e.g., physical evidence [contraband], and statements)</td> </tr> <tr> <td style="text-align: right; vertical-align: top;">MOTION TO DISMISS:</td> <td style="border-left: 1px dotted black; padding-left: 10px;">Defendant moves to end the criminal action (e.g., defendant has been denied his/her right to a speedy trial).</td> </tr> </table>	MOTION TO SUPPRESS:	Defendant moves to keep certain evidence out of trial (e.g., physical evidence [contraband], and statements)	MOTION TO DISMISS:	Defendant moves to end the criminal action (e.g., defendant has been denied his/her right to a speedy trial).
MOTION TO SUPPRESS:	Defendant moves to keep certain evidence out of trial (e.g., physical evidence [contraband], and statements)					
MOTION TO DISMISS:	Defendant moves to end the criminal action (e.g., defendant has been denied his/her right to a speedy trial).					

Trial jurisdiction

Whether the offense is a felony or misdemeanor, the written felony or misdemeanor complaint must clearly set forth the nature of the charge and the time, date and place of the alleged criminal act. It may contain hearsay. However the complaint will not allow this action to proceed to trial. If the highest count is a misdemeanor, the misdemeanor complaint must be replaced by an information, which will not have any hearsay. If the highest count is a felony, it must be replaced by an indictment.

The Grand Jury

When a defendant is charged with a felony, the only way that felony can proceed to trial is with an indictment. The only way to get an indictment is through a grand jury.

Grand Jury					
COMPOSITION	<p>23 members</p> <p>Summoned by the county clerk in counties within the New York City</p>				
PROCEEDINGS	<p>Private and secret</p> <p>Judge not present</p> <p>Defendant and defense counsel not present (except if/when defendant testifies)</p> <p>Testifying witnesses receive immunity from prosecution</p> <p>If defendant testifies s/he waives immunity from prosecution.</p> <p>Hears and examines evidence relating to commission of any criminal offense</p>				
ROLE OF PROSECUTOR	<p>Evidence concerning these matters is presented by the prosecutor</p> <p>Supreme Court and the prosecutor are legal advisers to grand jury (judge not present in grand jury room)</p>				
ROLE OF GRAND JURY	<p>Does not prosecute</p> <p>Determines whether there is sufficient evidence to indict for a criminal offense</p> <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 30%; vertical-align: top; border-right: 1px dotted black;">TRUE BILL:</td> <td>Where grand jury determines there is sufficient evidence, an indictment is filed</td> </tr> <tr> <td style="vertical-align: top; border-right: 1px dotted black;">NO TRUE BILL:</td> <td> Where grand jury determines there is insufficient evidence to support any criminal charge, grand jury may: <ul style="list-style-type: none"> • dismiss the charge and return no indictment. • direct prosecutor to file an accusatory instrument in the local criminal court. • direct prosecutor to remove the mater to Family Court </td> </tr> </table>	TRUE BILL:	Where grand jury determines there is sufficient evidence, an indictment is filed	NO TRUE BILL:	Where grand jury determines there is insufficient evidence to support any criminal charge, grand jury may: <ul style="list-style-type: none"> • dismiss the charge and return no indictment. • direct prosecutor to file an accusatory instrument in the local criminal court. • direct prosecutor to remove the mater to Family Court
TRUE BILL:	Where grand jury determines there is sufficient evidence, an indictment is filed				
NO TRUE BILL:	Where grand jury determines there is insufficient evidence to support any criminal charge, grand jury may: <ul style="list-style-type: none"> • dismiss the charge and return no indictment. • direct prosecutor to file an accusatory instrument in the local criminal court. • direct prosecutor to remove the mater to Family Court 				

Disclosure

Disclosure consists of (1) bill of particulars; and (2) discovery.

Bill of Particulars.

The accusatory instrument (i.e., information or indictment), must include facts sufficient to support the elements of the offenses charged, so that the defendant is made aware of the charge against him or her and can prepare his or her defense, if warranted. In order to provide more information, the prosecutor will file a bill of particulars.

“Bill of particulars” is a written statement by the prosecutor specifying items of factual information not in the indictment or information pertaining to the offense charged and including the substance of each defendant’s conduct encompassed by the charge that the people intend to prove at trial on their direct case, and whether the people intend to prove that the defendant acted as principal or accomplice or both. The prosecutor is not be required to show how the people intend to prove the elements of the offense charged or how the people intend to prove any item of factual information included in the bill of particulars.

Discovery.

The discovery in criminal proceedings is limited. The defendant is entitled to get the following:

1. Any statement⁷ of the defendant⁸ made to the police;
2. Any transcript of testimony relating to the criminal action or proceeding pending against the defendant, given by the defendant (and anyone else being charged in this case) before any grand jury;
3. Any written report or document concerning a physical or mental examination, or scientific test or experiment⁹;
4. Any photograph or drawing¹⁰;
5. Any other property obtained from the defendant¹¹;

⁷ It can be written, recorded or oral.

⁸ Defendant can also get the transcripts of anyone else being charged in this case who will be tried with the defendant.

⁹ The report must have been conducted at the direction of law enforcement, or made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial.

¹⁰ The phot or drawing must have been made at the direction of law enforcement, or made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial.

¹¹ This includes the property of a co-defendant to be tried jointly.

6. Any tapes or other electronic recordings¹²;
7. Any favorable or exculpatory evidence¹³
8. The approximate date, time and place of the offense charged and of defendant's arrest.

The procedure for a bill of particulars and discovery is the same. The defendant, within 30 days of arraignment, serves on the People a request for a bill of particulars and/or a demand for discovery. The People have 15 days either to comply, refuse or ask the court for permission not to comply (i.e., a protective order).

Pre-Trial Motions.

A motion is a request for an order. There are several different types of pre-trial motions available to the defendant. The two most frequently made are motions to dismiss and motions to suppress.

Motions to dismiss are motions made in order to end the criminal action (e.g., the defendant was denied his/her right to a speedy trial).

Motions to suppress are made by defendants in order to exclude evidence obtained by the state in violation of the defendant's rights (e.g., motion to suppress physical evidence that was obtained in violation of the defendant's fourth amendment rights).

If the request for a bill of particulars and demand for discovery does not go smoothly (i.e., the People refuse to comply), the defendant can make a motion for court-ordered bill of particulars and/or discovery.

¹² The defendant is only entitled to the tapes if the prosecutor intends to introduce at trial or the tapes are favorable to the defendant.

¹³ This is required to be disclosed, prior to trial, to the defendant by the prosecutor, pursuant to the constitution of this state or of the United States (*Brady v Maryland*, 373 US 83 (1963)).

Motion Process			
1	Defense Motion	The defendant moves for a court order (e.g., to dismiss the case or to suppress evidence). The motion will contains the grounds for the relief and the facts to support those grounds.	
2	People's Answer	The People's answer will either:	<p>Show how the law defendant uses in their motion, does not apply in this case</p> <p>Controvert the facts the defendant uses to support the grounds.</p>
3	Court Interim Order	Summarily Grant	<p>✓ Sufficient grounds in defendant's motion; AND</p> <p>✓ Sufficient facts in defendant's motion ; AND</p> <p>✓ People do not contest motion or controvert facts</p>
		Summarily Deny	<p>✗ Insufficient grounds in defendant's motion; OR</p> <p>✗ Insufficient facts in defendant's motion</p>
		Order Hearing	<p>✓ Sufficient grounds in defendant's motion; AND</p> <p>✓ Sufficient facts in defendant's motion ; AND</p> <p>✓ People controvert facts</p>
4	Hearing	Purpose	To resolve factual disputes by questioning witnesses

5	Post-Hearing Memoranda	Once the hearing concludes, the parties may submit to the court arguments showing how the law applies to the facts from the hearing.
6	Post-Hearing Decision	The court will <ul style="list-style-type: none">■ Make findings of fact based on the witnesses presented, the court determines the facts■ Make conclusions of law■ Applying the law to the findings of fact■ Decide<ul style="list-style-type: none">■ GRANT motion■ DENY motion

Part 2: Commencement and Pre-Trial Civil Cases in New York State

New York Civil cases are those in which individuals, corporations or government agencies seek to recover damages, enforce their rights or otherwise protect a legal interest from interference by another.

Essentially, the civil law enables people to assert or defend their rights in an orderly, nonviolent manner and enables them to resolve legal disputes in a fashion which society finds acceptable.

In your Civil Litigation I and II classes — both required classes — you will learn in greater detail about how civil cases proceed from the commencement to the end.

Introduction

What is a civil case? It is not a criminal case.¹⁴ Civil cases encompass a broad range of legal subjects, such as breach of contract, injury to person or property, divorce proceedings and a contest of the validity of a will.

The purpose of a civil case will vary depending on the nature of the matter involved.

¹⁴ As previously stated, criminal cases involve a prosecution for violations of statutes that define particular crimes, such as murder or robbery. Because criminal conduct is a breach of the public order and a violation of the public interest, the prosecution is brought on behalf of the people by the state or federal government.

Examples of Civil Actions	
ACTION	RELIEF
Automobile accident were to bring an action against the other driver	Recover damages for the physical injury suffered
Breach of contract	Recover money damages caused by the breach or, if feasible, seek to have the other party fulfill the terms of the contract
Trespassing on the property of another	Seek an injunction to prevent that conduct from happening again

Thus, many remedies are available, with the appropriate choice depending upon the circumstances involved.

A civil case in New York develops in accordance with procedures in the Civil Practice Laws and Rules¹⁵. Similar to criminal cases, the civil cases follow a particular path. Example: A person believes he or she has been injured or damaged by another. That person, who will be the plaintiff, consults an attorney. The lawyer will first obtain the necessary information from the client, including all facts and circumstances that may serve as the basis for a legal action. The attorney may then take statements of witnesses, secure pertinent documents (e.g., medical reports) and research the applicable law to determine if the client has a valid case.

Timeliness — The Statute of Limitations

As part of the initial review, the attorney may have to determine whether the action is timely, especially if the client has waited a number of years before seeking legal assistance. Because the memories of witnesses dim and evidence may be lost with the passage of time, a statute of limitations fixes the time period within which actions may be brought. The limitation varies with the type of case.¹⁶

¹⁵ This is one of the books you will learn to use in Civil Litigation I and II.

¹⁶ Under certain circumstances, the time period to bring an action may be extended, as, for example, in cases involving the infancy (i.e., status as a minor) or insanity of the injured party. In some situations, the time may be extended if the potential defendant has left the state or is residing in the state under a false name unknown to the injured person.

New York Statute of Limitations for Civil Cases: Examples	
ACTION	WHEN AN ACTION MUST BE COMMENCED
Intentional Torts ¹⁷	1 year from the incident
Medical Malpractice	2 ½ years from the incident
Negligence	3 years from the incident
Sales Contracts	4 years from the incident
Divorce on the Ground of Adultery	5 years from discovery of adultery
Contracts	6 years from the incident
Adverse Possession	10 years from the incident

Jurisdiction and Venue

If an attorney determines that the client has a case, a summons and complaint will be prepared and served on the other party. The lawyer's client is called the plaintiff in the action, and the person against whom the action is brought is called the defendant. Probably the most common means of effecting service is to deliver the summons personally to the defendant. Depending on the circumstances, other means may be permitted to accomplish service, such as publication in local newspapers. Proper service will give the court personal jurisdiction.

In beginning the action, the plaintiff's attorney must select the proper court. Some courts have jurisdiction only over specific types of matters. For example, Family Court is designated to handle questions relating to alimony, custody or child support, while Surrogate's Court deals with the settlement of estates and related matters. Even where a court has jurisdiction over a particular type of case, it may be limited by the monetary amount of the action. Thus, if an attorney wanted to institute an action for \$50,000 on behalf of a client, such a case could not be commenced in a county court with a \$25,000 jurisdictional limit. In this instance, the attorney would bring the action in Supreme Court — the court of general, original jurisdiction in New York State, which means its jurisdiction is broader than that of other courts.

¹⁷ For example, assault, battery, defamation (libel or slander)

The plaintiff's attorney also must select the proper venue for the action by bringing it in the appropriate county, which generally, is the plaintiff's county of residence.¹⁸

Under certain circumstances, an action's venue may change.¹⁹

Pleadings

Pleadings are written documents that enable the parties to present the significant facts concerning each side of the case to the court. The *complaint*, for example, indicates the nature of the plaintiff's case by setting forth the allegations concerning the claim against the defendant and the relief demanded.

After receiving the complaint, the defendant is required to submit a responsive pleading called an *answer*. In the answer, the defendant may admit or deny the various allegations made by the plaintiff and raise any defenses that might be appropriate. Any claim the defendant wishes to make against the plaintiff may be included with the answer and is known as a counterclaim. For example, if two individuals were involved in an automobile accident, the plaintiff might bring an action against the defendant for personal injuries and damage to the vehicle. It might be the defendant's position, however, that the plaintiff was responsible for the accident. In such a case, the defendant might wish to file an action for injuries against the plaintiff, which could be included with the answer as a counterclaim. This process enables related claims to be heard together, rather than requiring the parties to litigate the same incident twice in separate cases.

If several defendants are involved in an action, one defendant may claim against another defendant by what is known as a *cross-claim*. A defendant who desires to claim against a person not already a party to the action, who may be liable to the defendant for all or part of the plaintiff's claim, may file a *third-party complaint*, where, for example, the plaintiff purchases an item of equipment that proves to be defective and institutes an action against the merchant who sold the item, the merchant might assert that the equipment was improperly constructed, and thus would file a third-party complaint against the manufacturer.

If a counterclaim is filed against the plaintiff, a reply to the allegations is required. Where a third-party complaint has been made, the party served must file an answer. In this manner, the position of all parties is made known to the court.

If the defendant fails to appear after having been served with the summons and complaint or fails to file a responsive pleading, the plaintiff may then be able to secure a default judgment, since the defendant is acknowledging liability by not responding. If the plaintiff seeks a specified

¹⁸ Certain actions, such as those involving municipalities or school districts, must be brought in the county where those entities are located.

¹⁹ If, for example, the plaintiff has selected the wrong county for trial of the case, the defendant may request that the venue be changed. Or, if the plaintiff has designated the proper county but there is reason to believe an impartial trial cannot be obtained in that county, this would constitute grounds for a change of venue. A change of venue may also be secured for the convenience of material witnesses.

amount of money damages that can be readily computed (or money due on an unpaid promissory note), a judgment for that amount, plus interest and costs, may be obtained. If the claim is not for a certain sum or cannot be computed, then the court will take proof on the question of damages, which it will then determine.

After the pleadings have been filed, it may be necessary to modify, correct or supplement them. Defects also may be present in a party's case which entitle the other side to relief. Such matters are usually resolved by means of motions that are heard and decided by the court. For example, a defendant's attorney, after reviewing the complaint, may want more specific information concerning the allegations. In that event, the attorney would request a bill of particulars from the plaintiff's lawyer, specifying the desired items. By means of various motions, the parties may be able to establish the issues or determine points of dispute which otherwise would have to be resolved by trial, or terminate a case that is legally insufficient. In a personal injury action, for example, the defendant is entitled to information about the date and approximate time of the occurrence, a statement of the injuries and a description of those claimed to be permanent.

Upon reviewing this information, the defendant's attorney may discover that the plaintiff cannot succeed in the action, as, for example, when the plaintiff's pleadings are defective or the time limit for filing the particular action has expired. In such an instance, the defendant would be entitled to move for dismissal, bringing the case to a conclusion without a trial.

Disclosure

Disclosure is the process of obtaining facts or information to help attorneys prepare for trial. By such proceedings, attorneys may obtain copies of pertinent documents, view physical evidence or, where relevant, request that a party undergo a physical or mental examination.

A party also may take the depositions of other parties or witnesses, which typically involves questions that are both asked and answered orally under oath. The attorneys for both sides have an opportunity to question the individual whose deposition is being taken, and the questions and responses are recorded by a stenographer. In some instances, when a potential witness is located out-of-state, written questions (called *interrogatories*) are used.

In this way, the attorneys are informed of the testimony that various individuals may be expected to give at the trial, possibly enabling them to resolve some of the issues before trial. Also, under certain circumstances, the deposition may be introduced at trial if the witness is unavailable to testify or makes contrary statements at the trial.

Pretrial Conferences

After the pleadings have been filed, motions decided and disclosure of evidence completed, the attorneys will meet with the court before the trial takes place. At this meeting, the attorneys may stipulate which items they agree upon and also clarify those areas where there is dispute.

The pretrial conference helps to ensure that only the relevant issues will be raised at the trial. The conference may also disclose grounds for a reasonable settlement between the parties without having to resort to trial. If settlement is not possible, the case will go to trial.

PART 3: New York Trial Procedure

A comparison of civil and criminal trials reveals many areas where procedures are similar, but also several where they differ. Regardless of procedural differences, criminal and civil trials share a common purpose affording a fair and impartial hearing to both sides. This objective can be achieved only through organized and established procedures.

Introduction

Essentially, a trial is a means of resolving a factual dispute between two parties in a civil case or of determining whether the defendant is guilty²⁰ in a criminal case.

A civil case may involve such questions as whether an injury was negligently caused, a contract breached or an item that was purchased is defective.

In a criminal case, the dispute is whether the defendant committed the offense charged.

Not all cases are tried by a jury. In some kinds of cases, neither party has a right to a trial by jury; even when a right to a jury exists, it may be waived by the parties in a civil action or by the defendant in a criminal prosecution, other than one for murder in the first degree.

In a trial before a jury, the jury is responsible for making the factual determination. To ensure that the jury reaches its decision fairly and according to established legal principles, a judge presides over the trial. The judge will rule on questions of law, objections, the admissibility of evidence and other procedural matters.²¹

²⁰ A criminal defendant is never found “innocent.” The burden is on the government to prove the defendant guilty of the criminal offense(s) charged beyond a reasonable doubt. The role of the jury is to determine whether the government met that burden. If the government met that burden, the defendant is found “guilty”; if the government did not meet that burden, the defendant is found “not guilty.” The jury will never find the defendant “innocent.”

²¹ Even a judge has an attorney to provide him or her with legal advice. That person is known as the judge’s law (continued...)

After both sides have completed their proof, the judge instructs or charges the jury concerning the applicable law. If there is no jury, the judge alone will both determine the facts and rule on questions of law.

Who else is in the courtroom?

Court personnel assist the judge in the orderly conduct of the trial.

People in the Courtroom					
TITLE	RESPONSIBILITIES				
Court Clerk	Administratively runs the courtroom (e.g., maintains the calendar) and administers oaths anyone who needs to be sworn in (e.g., jurors and witnesses)				
Court Officers	Maintain order in the courtroom and perform other services assigned by the judge, which can include calling witnesses or taking charge of the jury when it is not in the courtroom				
Court Reporter, or Court Stenographer	Records all proceedings in the courtroom. This record includes the testimony of witnesses, all objections and motions made by the attorneys and rulings made by the judge. The stenographer also records the judge's instructions (or charge) to the jury concerning the law. In addition, the court reporter marks for identification any exhibits and notes their receipt into evidence, if the judge rules them admissible.				
The Attorneys	Two types of Attorneys in criminal cases: (1) Prosecuting Attorneys and (1) Defense Attorneys <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="text-align: center; width: 30%;">Prosecuting attorney</td> <td>Assistant District Attorney, represents the People of the State of New York, and has an ethical duty to seek justice, not just to seek a conviction.</td> </tr> <tr> <td style="text-align: center;">Defense Attorneys</td> <td>Represent defendants. They have an obligation to represent their clients competently, safeguarding the client's rights and interests.</td> </tr> </table>	Prosecuting attorney	Assistant District Attorney, represents the People of the State of New York, and has an ethical duty to seek justice, not just to seek a conviction.	Defense Attorneys	Represent defendants. They have an obligation to represent their clients competently, safeguarding the client's rights and interests.
Prosecuting attorney	Assistant District Attorney, represents the People of the State of New York, and has an ethical duty to seek justice, not just to seek a conviction.				
Defense Attorneys	Represent defendants. They have an obligation to represent their clients competently, safeguarding the client's rights and interests.				
Judge's Attorney	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="text-align: center; width: 30%;">Law Clerk or Court Attorney</td> <td>This attorney works in the Judge's chambers (office) and advises the judge on the law. This attorney will drafts court opinions for the judge, draft jury instructions, draft jury verdict sheet and may conference cases with the attorneys. This person is the judge's legal counsel.</td> </tr> </table>	Law Clerk or Court Attorney	This attorney works in the Judge's chambers (office) and advises the judge on the law. This attorney will drafts court opinions for the judge, draft jury instructions, draft jury verdict sheet and may conference cases with the attorneys. This person is the judge's legal counsel.		
Law Clerk or Court Attorney	This attorney works in the Judge's chambers (office) and advises the judge on the law. This attorney will drafts court opinions for the judge, draft jury instructions, draft jury verdict sheet and may conference cases with the attorneys. This person is the judge's legal counsel.				

²¹(...continued)
clerk, law assistant, law secretary or court attorney depending on which court the judge sits on.

ETHICS ALERT!!!

Our system of justice could not function properly unless attorneys were willing to represent clients or causes considered unpopular by the general public. Consequently, an attorney may ethically represent an accused person whom the community assumes is guilty, since that individual is entitled to every protection afforded by both the state and federal constitutions.

Jury Selection

Similar procedures are followed in both civil and criminal cases to select a jury. To qualify as a trial juror, a person must be a United States citizen, over the age of 18 and a resident of the county in which the trial is held. Prospective jurors also must be able to understand and communicate in English and must not have any felony convictions.

The trial jury in New York is known as the *petit jury*, and the prospective jurors for each term of court are drawn at random by the commissioner of jurors from the names obtained from various sources.²²

Occasionally, an attorney may object to an entire panel of prospective trial jurors. This is known as a challenge to the panel and is usually directed at its composition, alleging that members of a particular group have been systematically excluded from jury service.

In criminal cases, a jury of 12 persons is required for felonies, while six is the number fixed for misdemeanor trials. In both types of cases, provisions are made for alternate jurors to replace a regular juror who may become ill or disabled during trial.

In a civil case, the trial jury is composed of 6 persons, with provision for the selection of alternate jurors.

The trial jury is selected from the group previously described. A panel is called, and they take their place in the jury box (criminal) or impaneling room (civil). The process of questioning and selecting jurors is the *voir dire*.

²² The names of prospective jurors are selected at random from lists of registered voters, state and local taxpayers, licensed drivers, people on public assistance and people receiving unemployment compensation.

In civil cases, the attorneys, and sometimes the judge, describe the nature of the case and ask questions to determine the suitability of the jurors. For example, a juror who is related to one of the parties or who has personal knowledge of the case may be unable to judge the evidence impartially.²³

In criminal cases, the judge presides over the *voir dire*, which is conducted in a courtroom.

The purpose of the questioning to allow the parties to eliminate potential jurors because they think they cannot be impartial (i.e., challenges for cause) or they don't want that particular potential juror (i.e., peremptory challenges).

Eliminating Potential Jurors	
Challenges for Cause	During the course of questioning the jurors about their qualifications, it may become apparent that a particular juror possesses a bias, prejudice or opinion which will affect his or her ability to judge the evidence impartially (e.g., For example, in a criminal case involving the sale of narcotics, for example, a prospective juror may assert his or her belief that narcotics should be legal and as such the law should not be enforced. Or there may be a person who thinks that everyone arrested by the police must be guilty of something.). Under these circumstances, the juror could be challenged for cause. The number of challenges that may be made for cause is unlimited in both civil and criminal cases.
Peremptory Challenges	In addition, each party has the right to exercise a certain number of peremptory challenges, which allows an attorney to excuse a juror without having to state a reason. The number of peremptory challenges is fixed by statutory law and varies according to the type of case. For example, in a criminal case involving the sale of narcotics, for example, a prospective juror may assert his or her belief that narcotics should be legal and as such the law should not be enforced. Or there may be a person who thinks that everyone arrested by the police must be guilty of something.

In a criminal case, each party may have as many as 20 peremptory challenges, depending on the seriousness of the crime charged; in a civil case being tried in Supreme Court or a county court, each side has at least three such challenges.

²³ In civil cases, the *voir dire* is supervised by a judge but usually is subject to general supervision by a judicial hearing officer (retired judge) in a courtroom or, more often, in an impaneling room.

The *voir dire* continues until the attorneys for both parties are satisfied with the composition of the jury or have exhausted all challenges permitted by law. Once the full jury and alternates have been selected, they will be administered an oath and the trial may then proceed.

Civil Cases

After the jury has been selected and before any evidence is offered, the attorney for each party is entitled to make an opening statement. Generally, the party having the burden of proof (usually the plaintiff) opens first. In these statements, attorneys normally will outline their respective cases and possibly indicate some of the witnesses who will be called to testify, so that the jurors may more easily follow the proof as it is introduced.

After the opening statements, the presentation of evidence begins. The plaintiff will call witnesses to testify and, in conjunction with such testimony, may offer into evidence pertinent exhibits such as reports or photographs.

Witnesses may testify about matters of fact—that is, anything perceived by means of their physical senses. Testimony usually concerns what the witnesses observed, such as what occurred at the scene of an automobile accident. As part of their testimony, witnesses may be asked to identify photographs, documents or other physical exhibits.

Witnesses, however, usually cannot state an opinion or give a conclusion, unless they are experts or otherwise qualified to do so. Such opinion evidence generally is provided by persons with specialized training, such as doctors or engineers. A witness qualified as an expert in a particular field may give an opinion based on the facts in evidence and state the basis for the opinion. In some instances, a layperson may be able to testify concerning a matter of opinion if the subject lies in an area of common knowledge, such as whether a particular person was intoxicated.

An attorney usually may not ask leading questions (i.e., those suggesting the desired answer, such as “Isn’t it true that...”) of his or her own witness. This insures that the jury hears the facts as the witness recalls them.

The opposing counsel may object to a particular question on various grounds, such as calls for an opinion, is leading or is immaterial to the case. Objections are based upon rules of evidence, and the judge will decide them. If the objection is overruled, the witness may answer the question; if it is sustained, he or she need not. Frequently, the attorney will rephrase the question to overcome the objection.

When the plaintiff’s attorney completes his or her direct examination of the witness, the defendant’s attorney may then cross-examine concerning those matters covered on direct examination. On cross-examination, leading questions are allowed to establish any inaccuracies or inconsistencies in the facts as related by the witness. During cross-examination, the opposing counsel is permitted to object to any questions that may be improper, and the judge will rule on them in the same manner as on direct examination.

After cross-examination has been completed, the attorney who called the witness has the right to ask questions on redirect examination. Generally, the purpose of these questions is either to strengthen the testimony of a witness which was weakened by cross-examination or to elaborate on new facts that arose on cross-examination.

At times during a trial, disputes may arise concerning a question of law or legal procedure. On such occasions the attorneys may approach the bench and confer with the judge out of the hearing of the jury. Or, the judge may send the jurors from the courtroom while he or she listens to the legal argument and rules on the matter in question. The jury is excluded from these sessions to avoid being prejudiced or otherwise influenced by a discussion of matters not in evidence.

After completing his or her testimony, including direct and cross-examination, the witness is excused and the next one is called. This process is repeated until all the plaintiff's witnesses have been heard, at which time the attorney will advise the court that the plaintiff rests.

At this point, the judge, outside the presence of the jury, will entertain motions from the attorneys. The defendant's attorney, for example, may move for a dismissal if he or she believes that the plaintiff has failed to establish a case. The judge may then rule on the motions or reserve decision — that is, wait until some later time to decide the motion. If he or she sustains a motion to dismiss, the case will be concluded. If the judge denies a dismissal motion, the trial will continue, and the defendant then has the opportunity to present evidence on his or her behalf.

The defendant, in presenting proof, follows the same procedures and rules for the examination of witnesses and introduction of exhibits as were applied to the plaintiff. The sequence of direct and cross-examination of witnesses is the same as for the plaintiff's case.

After the defendant's case has been concluded, the court will then hear and rule on any motions the parties wish to make. As before, the motions are argued and decided outside the presence of the jury. If a dismissal motion is granted at this point, the case will be concluded. If denied, the case is then almost ready for submission to the jury.

The attorneys are entitled to make closing statements to the jury, commenting upon the exhibits and testimony which the jurors have seen and heard. These closing arguments are made in inverse order of the opening statements. Thus, the attorney for the plaintiff, who has the burden of proof, usually opens first and is the last to give a closing statement. Should an attorney comment improperly on the evidence, the lawyer for the other party may object; if the objection is sustained, the judge will instruct the jury to disregard the improper remarks.

When the attorneys have finished their statements, the judge charges the jury concerning the applicable law. In giving these instructions, the judge outlines the issues the jury should consider and defines any legal terms, as appropriate. The jurors are told of the possible verdicts that can be returned, depending on the factual findings made. They are advised that

they are the sole judges of the facts and the credibility of the witnesses, and that their verdict must be based upon a preponderance of the credible evidence.

After the judge has completed his or her charge, the jury is then taken to the jury room to deliberate. Court officers or attendants will wait outside the jury room to ensure that no one attempts to tamper with the jury. During the course of its deliberations, the jury may request that portions of the testimony or the judge's charge be reread to refresh its collective memory. In such instances, the jury will be returned to the courtroom, with counsel for the parties present.

The jury's verdict need not be unanimous in civil cases, since agreement by five of the six jurors is all that is required. If five of the jurors cannot agree after deliberating for as long as the judge deems reasonable, he or she will then discharge the jury and direct that a new trial be held before another jury.

Criminal Cases

The trial of a criminal case follows the same general pattern as a civil case, with certain exceptions.

As noted earlier, in felony cases, a defendant is entitled to trial before a jury of 12 persons; a jury of 6 is prescribed for misdemeanor cases. A defendant may waive trial by jury and be tried before a judge only, except on a charge of first-degree murder.

When the jury, including alternates, has been selected, the jurors are sworn and the judge then gives them preliminary instructions concerning their basic functions, duties and conduct.²⁴

After the jurors receive their preliminary instructions, the prosecution must deliver an opening address to the jury. In the opening, the prosecutor generally outlines the charges and the evidence that will be produced to sustain the case. The defendant's attorney is then entitled to make an opening statement. However, since the defendant has the presumption of innocence until proven guilty, he or she does not have to make any statements or even present evidence in his or her defense.

Upon conclusion of the opening statements, the prosecution presents its proof through the testimony of witnesses and the introduction of exhibits. The process of examination and cross-examination, with the right of opposing counsel to object to improper questions, is the same as that for civil trials.

After the prosecutor has completed his or her case, the court will entertain motions outside the presence of the jury. The defense attorney usually will make a motion to dismiss at this point. If the prosecution has not established a case and the motion is granted, then the trial will be over and the charge dismissed. If the dismissal motion is denied, the accused will then be allowed to present evidence in his or her own defense.

²⁴ These include admonitions not to read or listen to news accounts of the trial, to visit the scene of the alleged offense or to discuss the case with outsiders or fellow jurors.

The defendant does not need to take the stand or offer any evidence in his or her own defense. As previously mentioned, he or she is cloaked with the presumption of innocence; the burden rests with the state to prove him guilty. The defendant also is constitutionally protected against self-incrimination and cannot be required to testify against himself.

When the testimony for both sides has been concluded, the defense may renew its dismissal motion or make any other motions that may be appropriate. If a dismissal motion is sustained at this point, the trial will be over; if not, then the case will be submitted to the jury.

Both sides may deliver a summation and closing arguments to the jury. The defense attorney makes his or her argument first, and the prosecutor — who has the burden of proof — then gives his or her closing statement. The attorneys will summarize the evidence, comment upon the testimony and draw whatever inferences may be proper from the proof presented. These closings are not evidence but only the arguments of the lawyers for their respective parties, and the jury is instructed accordingly by the judge.

After the summations, the judge charges the jury concerning applicable legal principles, including the defendant's presumption of innocence and the burden of proof. The judge explains the application of the law to the facts of the case, and specifies the offenses and possible verdicts the jury is to consider.

The jury then retires to deliberate. Guilt must be established beyond a reasonable doubt, and the verdict of all the jurors must be unanimous. If necessary, the jury may return to the courtroom to have portions of the testimony or charge reread.

If the jury fails to reach a verdict after deliberating for an extensive period of time, the judge will discharge the jury, declare a mistrial, and the defendant may be retried on the charge before a different jury.

If a not-guilty verdict is returned, the defendant is set free. If he or she is found guilty, then the judge will set a date for sentencing. The range of possible sentences is fixed by statute and depends upon the seriousness of the crime.

Criminal Trial Stages	
STAGE	EXPLANATION
Voir Dire	Selection of Jury
Opening Statements	Prosecution must make an opening statement Defense has the option to make an opening statement

STAGE	EXPLANATION
Presentation of the People's case	<p>The People present witnesses, one at a time</p> <p>Direct Examination: The prosecutor asks the witness questions</p>
	<p>Cross-Examination: Defense counsel then asks the witness questions.</p>
Presentation of the Defense (optional)	<p>The defendant present witnesses, one at a time</p> <p>Direct Examination: Defense counsel asks the witness questions</p>
	<p>Cross-Examination: The prosecutor then asks the witness questions.</p>
Closing statements	<p>Defense counsel goes first</p> <p>Prosecutor goes last</p>
Judge's Final Instructions	<p>Judge instructs the jury on the law pertaining to how to evaluate evidence and how to apply the facts to the elements of each criminal offense charged.</p>
Jury Deliberation and Verdict	<p>The jury in private deliberates.</p> <p>If there are multiple defendants, each defendant is considered separately.</p> <p>If there are multiple charges, each count, must be considered separately. The jury can find the defendant guilty on some counts and not guilty on others.</p> <p>They must come up with a verdict that is unanimous.</p>
	<p>The Standard of proof: Beyond a reasonable doubt.</p>
	<p>Not Guilty: The People failed to prove every element of that criminal offense beyond a reasonable doubt.</p>
	<p>Guilty: The People proved every element of that criminal offense beyond a reasonable doubt.</p>
	<p>Hung Jury: If the jury cannot come up with a verdict because they all can't agree, then the judge has the power to declare a mistrial.</p> <p>If there is a hung jury, it is up to the prosecutor whether to retry the case.</p>

STAGE	EXPLANATION
Sentencing	If the defendant is found guilty, the defendant will be sentenced according to the law.
Post-Judgement motions	The convicted and sentenced defendant can make motions to vacate the judgement.

Part 4: Appeals in New York

The parties to a civil case may appeal based on errors committed at trial. In a criminal case, a defendant may appeal the conviction, but the prosecution may not appeal a not-guilty verdict because the principle of constitutional double jeopardy bars a defendant from being tried for the same offense after an acquittal. Generally, the basis for an appeal rests on possible errors of law or procedure during trial, including prejudicial statements made by opposing counsel.

Introduction

The appellate process is governed by statute and rules established by the appellate courts, including the fixing of time limits for the filing of papers. The party appealing is called the appellant, and the other party is designated the respondent.

So that the appellate court will have full knowledge of the case and the claimed errors, the parties must submit a record on appeal to the court. This record consists of a transcript of the testimony, plus other pertinent papers which were part of the proceedings in the lower court, such as an indictment in a criminal case or the pleadings in a civil case.

The attorneys for the appellant and respondent then prepare and submit briefs in support of their respective positions. The appellant's brief will describe the errors upon which he or she is seeking reversal of the lower court's determination, citing relevant statutes or prior similar cases, known as precedents, in support of his or her argument. The respondent will submit a brief similar in form, outlining the legal authorities favorable to his or her position.

In some instances, the parties will submit the case to the appellate court for a decision based upon the record and briefs that have been filed. On other occasions, they will also argue the case orally before the appellate court, especially if the issues are novel or complex.

The appellate court will then consider the case in light of the applicable law. If no errors are found or if the errors claimed are insubstantial or harmless, the appellate court will affirm the decision of the lower court. If prejudicial error is found, the appellate court will reverse the lower court decision and correct the error or remand the case to the lower court for appropriate action consistent with the opinion of the appellate court, including retrial of the case where warranted.

Appeals are not limited to challenging the outcome of a trial. Errors of law committed in other situations may also be appealed. For example, a defendant in a criminal case may appeal an illegal or excessive sentence imposed after a guilty plea, which eliminated the need for a trial.

