

# Chapter 4: Legal Terminology

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### § 4.1 LAYING A FOUNDATION

The paralegal profession is still a relatively new one, with many questions still to be resolved before the profession is clearly defined. We cannot foresee what your career will be like in 25 or 30 years, but we do know that to achieve a strong start as a paralegal you will need a firm foundation of marketable skills. There is no better place to start than with legal terminology.

The legal terminology in this chapter is separated into civil and criminal sections. The terms are introduced within a story, based on a real case.

This technique puts the terms into the context of a legal problem. This approach makes the study more interesting and facilitates student understanding of both the formal definitions of terms and how the concepts behind those terms function in a real world context.

After studying terminology, students will study state and federal court structure. Every state has its own court system, and students should make a point of learning their particular state's layout as quickly as possible.

Such diverse areas as authority, research, and citations all depend on a working knowledge of court structure, and a full understanding of court structure requires an in-depth familiarity with legal terminology. Because the following terms are presented in the rough order of the judicial process, studying this chapter will provide a strong foundation for later discussions regarding state and federal courts.

These areas of study are not independent. They are, instead, interrelated.

## **§ 4.2 THE CASE OF THE NEAR-SIGHTED OWL**

A student has laid a solid foundation for a paralegal education when he has knowledge of basic legal terminology. The following is loosely based on an actual case. As the facts are presented, the civil and criminal process will be illustrated and legal terms introduced and defined.

### **The Case of the Nearsighted Owl**

James Leroy is 18 years old. He owns an older model, modified car that some would call a "low-rider." In his effort to be "ultimately cool," James had the interior, including the ceiling and dashboard, carpeted in green shag carpet. James placed a large rubber snake on the dashboard to give the effect of a snake slithering through grass. Hanging from the rearview mirror on an elastic string was a rubber bat. When the elastic gently stretched up and down, the bat appeared to fly. Despite the strange outfitting of the car, everything mechanically was legal.

On August 1 of last year, James was driving in a mountainous area of Colorado, coming down a winding road from the Royal Gorge, the world's highest suspension bridge. At 8:15 p.m., around dusk, James approached a broad, sweeping curve in the two-lane road. A witness later stated that James appeared to be traveling below the 35 mph speed limit. As he entered the curve, an owl suddenly swooped down from a nearby tree, apparently took aim at the vehicle and crashed into the windshield. The glass shattered, according to James, and obstructed his view. James reflexively jerked the steering wheel to the left, heading into the oncoming traffic lane.

At the same time, a 65-year-old woman named Louise Taggart was driving up the road in the opposite direction. A witness stated that Louise appeared to freeze; if she had simply pulled five feet to the right, the accident would have been avoided. The cars hit head-on and Louise was killed instantly. Two possible legal actions can be generated from this situation. The following is a breakdown of the process for both civil and criminal court actions.

### § 4.3 LEGAL TERMINOLOGY: THE CIVIL PROCESS

**Narrative:** Louise's **estate** has decided to sue James in **civil** court with the goal of convincing the **court** that James is **liable** for Louise's death and should pay **damages**. The attorneys considered recommending that the windshield manufacturer be sued as well under the **doctrine** of **joint and several liability**, but decided against it.

**estate**

All the property left by someone who has died.

**civil law**

A violation of civil law does not directly harm the community; the person harmed sues the violator.

**court**

The tribunal or forum where the trial occurs, as well as the judge himself. The judge is the trier of law at the trial.

**liable**

Legally responsible.

**damages**

An amount of money paid to atone for injury or economic loss.

**doctrine**

A legal concept generally accepted by most courts which, although often not law, offers guidance to the court. Legislatures will sometimes codify, or make into law, a popular doctrine.

**joint and several liability**

When multiple defendants may be found liable as a group (jointly) or separately (several).

**Narrative:** James **retained** an attorney, who would **appear** in court as the **attorney-of-record** in the case. The **venue** had not yet been determined. Since Louise was from a different state, the attorney was concerned that the case would be moved into federal court because of **diversity of citizenship**. It turned out, however, that both parties wanted the case in state court.

**retainer**

Money paid to an attorney to secure her services; also refers to the contract between the attorney and the client. When an attorney has been “retained,” she works in a representative capacity on behalf of the client.

**appearance**

When an attorney acts on behalf of a client in court. This action may be either a personal appearance in front of the judge or the filing of a document (such as a complaint or motion) with the court on behalf of the client.

**attorney-of-record**

Once an attorney has entered an appearance, he or she is the attorney-of-record in the case.

**venue**

The place of trial; the physical location.

**diversity of citizenship**

When a federal court hears a case based upon the fact that the parties are from different states, and that the amount of money claimed as damages exceeds a minimum set by federal statute, which is currently \$75,000.

**Narrative:** The **plaintiff's** attorney wanted to ensure that the **statute of limitations** did not run out on the case, so the **summons** and **complaint** were prepared by the paralegal. The attorney checked that the complaint had clearly set forth the **cause of action** in the case, and that, based upon the **information and belief** of the plaintiff, the **defendant** was at fault. In addition, the **ad damnum clause** stated the specific damages being requested. There were no other **parties**, such as **co-defendants**, in the case since the **allegations** were against James only. The attorneys for the estate demanded a **jury trial** when the summons and complaint were **filed** with the court.

**plaintiff**

The party who initiates the action by filing a complaint, claiming injury or harm.

**statute of limitations**

The time limit for filing suit. Suits filed after the time limit has run out will be dismissed. The clock generally starts to tick at the time the damages occurred.

**summons**

Document that informs the defendant that he is being sued and that he has a specific amount of time to respond.

**complaint**

The pleading that initiates litigation. Filed by the plaintiff, the complaint contains the general allegations against the defendant. It is served with the summons. (*See definition of "service" below.*)

**parties**

Individuals or groups involved in a legal action.

**cause of action**

A legally valid reason to sue; one of the required elements of a complaint.

**information and belief**

A common legal phrase that qualifies a statement as being a fact only to the best knowledge of the person making the statement. Equivalent to saying, "This is what I believe happened."

**defendant**

The party against whom a complaint is filed.

**ad damnum clause**

Element of a complaint that asks for damages; also called "wherefore clause" or "prayer for relief."

**co-defendants**

Multiple defendants in a legal action.

**pleading**

A document filed with the court asking the court to take some specific legal action. A motion asks the court to rule on a procedural matter. A pleading states a party's position in a legal action.

**allegation**

A fact claimed by a party.

**jury trial**

A jury is a group of citizens selected from the community to determine the outcome of a case. In most cases, either party has the right to demand a jury trial, but if both parties agree, the judge may act in place of the jury. This is most common in very technical cases, such as a complex contract situation.

**filed**

A document is filed when it is presented to the clerk of the court. All documents and any copies are date stamped by the clerk of the court at the time of filing.

**Narrative:** *The paralegal arranged for **service of process** and for that process to be personally **served**. The process server signed an affidavit, swearing that the documents had been served. The affiant's signature was attested to by a notary public.*

**service or served**

The presentation of legal papers.

**service of process**

Process is the *summons and complaint*. Service of process is the delivery of the summons and complaint upon the defendant in a court action. Service is usually done in person. However, service may, in some circumstances, be made by mail, by publishing a notice in a newspaper or by serving a company. Serving a company is often accomplished by serving a registered agent (someone who accepts service on behalf of a company).

**personal service**

Service of legal papers upon an individual, as opposed to a business or registered agent.

**process server**

A person who is permitted by law to serve legal documents; must be at least 18 years of age and not a party to the action.

**affidavit**

A written statement of fact sworn to under oath.

**affiant**

One who signs an affidavit.

**attest**

To swear.

**notary public**

A person authorized to administer the oath and to verify that an individual signs a legal document.

**Narrative:** *The plaintiff chose to file the case in the court where the accident occurred. However, there were at least three courts that could have had **jurisdiction**. For instance, the court in the county and state where Louise lived could have heard the case through **in personam jurisdiction**, as could the court where the defendant lived. The court in the county where the accident occurred was able to hear the matter through **in rem jurisdiction**. The plaintiff learned that the defendant, James, had inherited a cabin and 30 acres in the mountains of Colorado. Since the attorneys were concerned that James would try to transfer the title or sell the property before the trial took place, they decided to file a **lis pendens** in the county where the property was located. This way, if the plaintiff was successful at trial and was awarded damages, the plaintiff could petition the court to take possession of the property under **quasi in rem jurisdiction**. The plaintiff could not file a **lien** at this point because in order to file a lien, a judgment is ordinarily required.*

**jurisdiction**

Authority of a court to hear and decide a case.

**in personam jurisdiction**

Jurisdiction over a person.

**in rem jurisdiction**

Jurisdiction over the controversy, often property.

**quasi in rem jurisdiction**

Jurisdiction over property, even though the property is not the controversy.

**lis pendens**

Attachment to the title of a piece of property notifying any potential purchasers that the title is subject to the outcome of litigation.

**lien**

Attachment to the title of a piece of property preventing its sale until a previous financial obligation has been satisfied.

**Narrative:** The **rules of court** stated that James had 20 days to **answer** the complaint. One problem with the allegations in the complaint was that they did not explain the entire situation. Within the answer, the attorneys for James listed "act of nature" as an **affirmative defense**, since he had no control over the actions of the owl. In addition, the defense attorneys prepared a **counterclaim**, alleging that the plaintiff had contributed to her own damages and that she had actually damaged James by not moving out of harm's way. In addition, the defense decided to file a **cross claim** in the form of a **third-party complaint**, alleging that the windshield manufacturer was partly liable due to the defective windshield.

**rules of court**

Laws that govern the procedures of trials.

**answer**

The pleading filed by the defendant in response to the allegations contained in the complaint.

**affirmative defense**

An admission that a specific act did occur, arguing that the fault lies not with the defendant. Intended to eliminate or reduce a plaintiff's damages.

**counterclaim**

A claim by the defendant against the plaintiff. Sometimes the only determining factor as to whether a claim is an affirmative defense or a counterclaim is whether the defendant is alleging damages. If this is the case, it becomes a counterclaim. A counterclaim is, in essence, a pleading presenting the defendant's complaint against the plaintiff.



**cross claim**

A claim by one defendant against a co-defendant. One form of cross claim occurs when one original defendant sues another original defendant, but third-party complaints (see below) are also cross claims.

**third-party complaint**

Pleading where a defendant sues someone not yet a party to the action.

**reply**

This pleading is the plaintiff's response to a defendant's counterclaim.

**Narrative:** *The defendant's attorneys were careful to file the answer within the 20-day period to avoid a **default judgment**. They considered filing a **motion** to dismiss, but decided against doing so at this point.*

**default judgment**

A judgment by the court in favor of the plaintiff, based on the fact that the defendant failed to respond in a timely fashion.

**motion**

A request that the court take a specific procedural step. Pleadings usually state specific legal positions about the matter before the court, while motions (such as a *motion to extend time to respond*) are procedural in nature, and act as a request for an order.

**Narrative:** *During the pretrial stage of **litigation**, the parties exchanged **discovery** requests. Each discovery request had a **certificate of mailing** attached that recorded the date the documents were sent. The defense **contested** two of the **interrogatories**. A **hearing** was set to settle the matter. (All discovery had to be completed 45 days before trial in the jurisdiction where this case was being heard.) After hearing arguments from both sides, the court issued an **order** stating that the questions did not have to be answered because the questions involved **privileged** information.*

**litigation**

The process of asking a court of law to decide the outcome of a dispute; a lawsuit.

**contest**

To challenge.

**discovery**

The methods whereby one party obtains relevant information on a case from the other party. The method that attempts to even the playing field between parties by exposing all relevant facts upon which the court will ultimately base its decision. Discovery is between the parties and does not directly involve the court, although the *Certificate of Mailing* for each document is often filed. The five common methods of discovery are:

**1. Interrogatories**

Written questions to the opposing party that must be answered under penalty of perjury.

*Example:* Describe the events leading to the accident.

**2. Request for Admissions**

Written statements the opposing party must admit or deny under penalty of perjury. Failure to respond within a specified period of time (in most cases, 30 days) means that the statements are assumed to be admitted.

*Example:* Admit or deny you had been drinking alcohol shortly before the accident.

**3. Request for Production**

A request that documents or other physical items be provided for inspection. Also referred to as a *Request for Production or Inspection of Documents or Property*.

*Example:* Please produce any and all receipts for Acme Dry Cleaning between February 1 and February 14, 2011.

**4. Request for Mental or Physical Examination**

Request that the other party (usually the plaintiff) be subjected to a mental or physical examination. This is a form of discovery that may require court approval so that it cannot be used to intimidate.

**5. Depositions**

Oral questions that must be answered under oath. Depositions take place out of court, most often in an attorney's office, with a court reporter transcribing the testimony. A court reporter is a person

trained to use a stenography machine to take testimony, verbatim, in court or at a deposition. Attorneys from both sides must be present and will have the opportunity to ask questions. Depositions can take place for the purpose of questioning the opposing party or for questioning witnesses. Depositions are sometimes videotaped and audiotaped.

**certificate of mailing or certificate of service**

When a document is filed with the court or when discovery is sent to a party, a certificate of mailing is usually attached. This certificate attests that a true and correct copy of the document was sent to all parties involved in the litigation. The certificate should be signed by the person who places it in the mail, unless the state requires an attorney's signature. This is often replaced with a *Receipt of Copy* (ROC).

**order**

An official command by the court, usually demanding that one or both of the parties perform an act.

**hearing**

A proceeding in court, where the judge and both parties are present.

**privilege**

The right to refuse to testify or to prevent someone else from testifying.

**Narrative:** *About a month before trial, the plaintiff requested **an ex parte hearing**. The plaintiff's attorney claimed to have information that James was going to leave the country. However, the information was so sketchy that the judge held its credibility in doubt. In addition, the **third-party defendant** filed a **motion to dismiss** the third-party complaint brought against the windshield manufacturer, with a **trial brief** in support of the motion. The plaintiff also filed a **motion for summary judgment** with a brief in support of the motion. The judge ruled that the case against the third party should be dismissed, but denied the summary judgment motion.*

**ex parte hearing**

A hearing at which only one party is present, such as a hearing on a motion for a restraining order. Ex parte hearings are not common.

**third-party defendant**

The party against whom the third-party complaint was filed. The defendant in the original complaint becomes the "third-party plaintiff."

### **motion to dismiss**

Asking the court to end a case without going to trial.

#### *dismissal with prejudice*

A case is dismissed and may not be brought again, because the court has made up its mind about the case.

#### *dismissal without prejudice*

A case is dismissed but may be filed again, because the court has not made up its mind about the matter (i.e., “dismissed without prejudice to re-file”).

### **trial brief**

Also called a *trial memorandum* or *points and authorities*, this document is filed with the court to argue a legal issue, relying on law to support the party’s position. Often filed in support of a motion, it attempts to convince the reader and only argues points favorable to the client.

### **motion for summary judgment**

A pretrial motion asking the court to determine the outcome of the case based on the pleadings and motions rather than going to trial with a jury. The argument is that there are no material facts in dispute, only law, and since the jury is the trier-of-fact (as we will see later), there is no need for a jury or trial. A *motion for summary judgment* may also refer to a motion to limit the issues that will be dealt with at trial, referred to as a *partial summary judgment*. A successful *partial summary judgment* determines the outcome of some, but not all, of the issues before the court.

**Narrative:** Had this case been heard in federal court, a **magistrate** most likely would have heard any discovery disputes. In this case, however, the matter remained in the state courts. During the **pretrial conference**, the parties were able to **stipulate** to several matters, but were unable to reach a **settlement agreement**. The matter would have to be determined by the jury, which would answer the **issues** before it, considering all the **evidence** that was deemed **admissible**.

### **magistrate**

A judicial officer who may preside over hearings, a magistrate does not have all the powers of a judge. He or she ordinarily deals with procedural matters.

**pretrial conference**

A meeting between the court and the parties for clarification of procedural matters and to promote settlement.

**stipulation**

An agreement between counsel for the parties regarding a fact, issue, or point that will not be disputed at trial.

**settlement agreement** (settlement)

An agreement to end the litigation for an agreed-upon consideration, usually money.

**at issue** or **in issue**

A legal question to be answered by the court.

**evidence**

That which tends to establish or disprove a fact.

*direct evidence*

Evidence (from personal observation) that tends to establish a fact without the need for an inference. *Example:* A witness who sees a gun fired can give direct testimony as to a shooting.

*circumstantial evidence*

Evidence of one fact that requires an inference to establish another fact. *Example:* A witness who hears a shot, turns around and sees a man holding a gun can give circumstantial evidence as to a shooting.

*oral evidence*

Evidence given orally, also called testimonial evidence.

*physical evidence*

Evidence that can be touched, also called *tangible* or *demonstrative* evidence

**admissible**

The evidence that will be allowed to be considered by the jury. The jury will decide whether or not to believe the evidence.

**Narrative:** After checking the court's **docket**, the matter was **set for trial**. Prospective **jurors** were selected from the **jury panel**, with both lawyers allowed to ask written questions of the prospective jurors, as well as to conduct **voir dire**. The attorney for the plaintiff used one **challenge for cause** because a panel member was a police officer, and used three **peremptory challenges**. The **bailiff** swore in the members of the jury. Two **alternate jurors** were also sworn in.

**docket**

The court's official calendar for trials and hearings to take place in that courtroom.

**set for trial**

To set a date for trial upon which the attorneys, parties, and court agree.

**jury, jurors**

A group of citizens who will be called upon to hear the evidence and render a verdict. The jury is the *trier of fact*.

**jury panel**

The group from which a jury will be selected.

**voir dire** (for the jury)

To question prospective jurors.

*challenge for cause*

A method of dismissing a juror for good cause shown. Challenges for cause are unlimited in number.

*peremptory challenge*

A method of dismissing a juror for which no reason need be given. These challenges are limited in number, commonly three or six.

**bailiff**

Court employee who keeps order in the courtroom.

**alternate juror**

A person who sits to hear the entire case with the jury, but who will not deliberate or vote on a verdict unless one of the jurors is dismissed. Civil cases in many jurisdictions have no alternates. Instead, the parties and judge agree on the number of original jurors and on how many may be dismissed.

***Narrative:** The attorneys each made an **opening statement**, during which they are not allowed to argue. Instead, they set forth the facts they intend to prove during the trial. The defense attorney, in his opening statement, reminded the jury that the **burden of proof** was on the plaintiff, that the plaintiff was required to prove her case by a **preponderance of the evidence**. Before calling his first witness, the plaintiff's attorney asked that the **rule on witnesses** be applied. The three people who had been subpoenaed to testify were then led out of the courtroom. One witness had been served with a **subpoena duces tecum** and had brought the requested documents with him.*

**opening statement**

Presentations made by the attorneys at the beginning of a trial, stating the facts they intend to prove during the trial.

**burden of proof**

The degree to which something must be proved at trial. The party making an allegation or claim generally bears the burden of proof.

**preponderance of the evidence**

The burden of proof in civil cases means that it is more likely than not that a fact is as a party alleges it to be. The burden of proof in criminal matters is beyond a reasonable doubt, a higher standard.

**rule on witnesses**

A rule that states that a witness in a case may not be in the courtroom during the testimony of other witnesses. Mostly used in criminal cases, it may be used in civil cases at the judge's discretion.

**subpoena**

The document issued under authority of the court to compel the appearance of a witness.

**subpoena duces tecum**

A document issued under authority of the court to compel the appearance of a witness, and ordering the witness to provide specific documents.

***Narrative:** Early in the trial, the plaintiff called Louise's widowed husband to the stand, but the defense **objected**. During a **bench conference**, the defense told the judge that the only purpose for this witness was to elicit sympathy and anger and that the **prejudicial** effect would outweigh the **probative value** of the testimony. Even though the defense was sure the objection would be overruled, the attorney needed to preserve his right to appeal the issue later. By objecting, he **preserved the record** for later appeal.*

**objection**

A formal challenge by opposing counsel to evidence or questions asked of a witness.

**bench conference**

A discussion between the judge and attorneys, usually conducted at the judge's bench so the jury cannot hear what is said.

**prejudicial**

The tendency to cause bias even where no bias has existed previously.

**probative value**

The value of pursuing an investigative or probing line of questioning.

**preserving the record**

An attorney making statements, or repeating a previously overruled motion, to protect any right to appeal at a later point.

***Narrative:** When the plaintiff called Louise's four-year-old granddaughter to the stand, the defendant objected again. The court **sustained** the objection, ruling that the little girl was not **competent** to testify. As the trial progressed, each attorney conducted an **examination**, either **direct examination** or **cross examination**. If the plaintiff's attorney wanted to clear up testimony on cross, he would conduct **redirect examination**. The plaintiff's goal was to establish that the **proximate cause** of the death was the **negligence** of the defendant.*



**sustain**

To affirm an objection.

**competency**

Legal capacity to testify. The elements of competency are:

- *Understanding the obligation to tell the truth*
- *Knowledge of the topic of the testimony*
- *Ability to communicate.*

**examination**

Questions directed at a witness who is under oath in court or at a deposition.

*direct examination*

Questioning the witness first. The party calling the witness to the stand conducts the direct examination.

*cross examination*

After direct examination, the other party may cross-examine the witness, but is limited to the topics brought up under direct questioning (within the "scope").

*redirect examination*

The party conducting *direct examination* conducts the *redirect examination* to clarify matters brought up during *cross*. The party conducting *redirect* cannot introduce a new line of questioning, but is limited to matters discussed during *cross*.

*recross examination*

The party conducting *cross examination* conducts the *recross examination*, but is limited to matters brought up during *redirect* (Many courts do not typically allow *recross examination*).

**proximate cause**

The event or point at which a series of incidents begins ultimately resulting in an event with damages.

**negligence**

Establishment of a duty, followed by a breach of that duty, resulting in damages. In order to be actionable, the negligence must have been the

proximate cause of the damages. Negligence generally means an act is accidental, not intentional.

**Narrative:** At one point during the trial, a witness was called by the plaintiff who testified that James had a drinking problem. The judge **excused the jury** and heard arguments. The defense argued that no **grounds** existed for such a line of questioning since a breath test at the scene of the accident indicated no alcohol in the defendant's system, and therefore his drinking habits were not **relevant** to the matter before the court. The court agreed and prohibited the testimony. When the jury returned, the judge instructed the jury to disregard the testimony regarding James' drinking habits and had the statement **stricken from the record**.

**excuse the jury**

The judge instructs the jury to leave the courtroom temporarily.

**grounds**

Reason or reasons.

**relevant**

Tending to prove or disprove a fact in issue.

**to strike from the record**

To have certain testimony removed from the record of the trial. This is usually accompanied by an admonition to the jury that, when deliberating, they are not to consider the testimony they just heard.

**Narrative:** At one point, the plaintiff's attorney **introduced into evidence** the rubber bat that had been hanging from the rearview mirror, having it labeled by the **court clerk** as an **exhibit**. The plaintiff presented evidence that established that every state has laws against hanging anything from the rearview mirror because hanging objects obstruct the view. Attaching the bat to the rear window attracted the owl and led to the accident. Thus, the defendant should be found liable.

**clerk of court**

The person or persons responsible for the court files and exhibits.

**exhibit**

A physical item presented to support an argument.

**introduction of evidence**

Attorneys must “move” for a piece of evidence to be admitted into evidence. If the motion is granted, the evidence will be assigned a number or letter and labeled.

**Narrative:** *After the plaintiff’s attorney called his last witness, the plaintiff **rested**. The jury was excused and the defense **moved** for a **directed verdict**, arguing that the plaintiff had not established a prima facie case. The judge **adjourned** for the day, taking the motion under **advisement**.*

**resting a case**

When a party is finished presenting evidence, it rests.

**move**

To present a motion to the court.

**motion for directed verdict**

The court is asked to decide the outcome of a case because the plaintiff has failed to establish a prima facie case.

**adjourn**

To halt temporarily, but not end, the trial.

**prima facie case**

A case that is sufficient on its face. This means that, if all facts alleged by the plaintiff are eventually proved true at trial, the plaintiff deserves to be awarded damages. A prima facie case must exist at all stages of the proceedings from the filing of the complaint through trial. If, at any point during litigation, a party can establish that a prima facie case does not exist, the case should be dismissed.

**take under advisement**

The court delays a ruling on a motion so that the motion may be considered.

**Narrative:** The next morning, the judge ruled against the motion for directed verdict, and the defense began presenting its case. One of the witnesses called by the defense was an expert on animal diet from the Cheyenne Mountain Zoo in Colorado Springs. The defense wanted this witness **qualified** as an **expert witness** by the court. In response, the plaintiff's attorney conducted a brief **voir dire** of the witness. The plaintiff stipulated to the witness's qualifications. The witness testified that owls don't eat bats. They do, however, eat snakes.

### **expert witness**

A person who has been qualified by the court to have experience and knowledge in a specific area and who will be allowed to express opinions related to his area of knowledge.

### **qualify**

To establish a witness's expertise in a specific area.

### **voir dire** (of witnesses)

To question a potential witness to determine his or her competency or the appropriateness of his or her testimony.

**Narrative:** After the defense rested, both parties made **closing arguments**. During his closing argument, the defense attorney admitted that James had hung the bat from his rearview mirror in violation of the law. The owl, however, was not interested in the bat. If anything, the owl was going after the snake on the dashboard and there is no law prohibiting snakes. The judge provided **jury instructions** before the jury began its **deliberations**.

### **closing argument**

Each attorney addressing the jury or the court at the end of the trial, attempting to persuade prior to deliberations.

### **jury instructions**

Guidelines to the jury about how the law is to be applied, and the facts that may be considered during its deliberations. May also be referred to as a *charge to the jury*.

### **deliberations**

A jury's discussion of the case, in private, following the trial, with the goal of rendering a verdict.

**Narrative:** After several hours of deliberation, the jury returned its **verdict**. The **foreperson** read the result to the courtroom. The jury found the defendant not liable, and the estate of Louise Taggart liable for damages resulting from the counterclaim in the amount of \$5,000. The plaintiff's attorneys had discussed the possibility of a not-liable verdict. They immediately filed a **motion for judgment NOV**. The defense argued that the jury had awarded the client damages in an insufficient amount and moved for an **additur**. After hearing arguments from both sides, the judge entered the jury's verdict into **judgment**. Within ten days, the plaintiff filed a **motion for a new trial**, which was denied.

**verdict**

The final conclusion of the jury.

**foreperson** (foreman or forewoman)

The member elected by the jury to lead the deliberations and speak for the jury.

**motion for judgment NOV** (notwithstanding the verdict)

A motion asking the court to disregard the jury's verdict and replace it with the court's own verdict. NOV stands for *Non Obstante Verdicto*.

**judgment**

The final conclusion of the court. In civil cases, the judge usually enters the jury's verdict into judgment. However, the judge has the power to alter or overturn the jury's verdict. In criminal cases, the judge cannot overturn a jury's finding of not guilty, but the court may overturn a guilty verdict in the interest of justice.

**additur**

When the judge adds to the amount a jury has awarded. Typically, the judge will give the party who must pay the award the choice of an increased award, or a new trial will be granted to the other side.

**remittitur**

The process whereby a judge subtracts from the amount of damages a jury has awarded. In effect, the judge gives the party awarded damages the choice of either accepting a lesser amount, or a new trial will be granted to the other side. (The inverse of an *additur*.)

**motion for new trial**

A request that the judge order a new trial because of procedural errors. A party must generally file this motion in order to later appeal, fulfilling the obligation to exhaust all available remedies.

***Narrative:** The plaintiff decided to **appeal** the verdict. The **notice of appeal** had to be filed within 30 days to avoid **waiving** the **right to appeal**. The court granted a **stay** of the judgment, but required a **bond on appeal** by the plaintiff. Could the plaintiff have filed a suit in one of the other jurisdictions? No. The doctrine of **res judicata** acts as a **bar** to retrying a case once a verdict has been rendered.*

**appeal**

To ask the court at the next higher level to determine whether the trial court erred.

**appeal as a matter of right**

A party who loses in the trial court has the right to have his or her case heard by the next highest appellate level court in civil court. There are circumstances in which an appellate level court has no choice but to hear the appeal, such as some death penalty cases in state criminal courts.

**waive**

To give up a right. A waiver may be either voluntary or the result of an action, or inaction, by the party.

**stay**

To delay the implementation of a court's order.

**notice of appeal**

Written notification in motion form that a party intends to appeal. Most court rules require that the motion be filed with the trial court, the appellate court, and sent to any other parties involved in the action. A party has the automatic right to one appeal to the next highest court.

**bond on appeal**

A sum of money held by the court to ensure that the funds from the award will be available after the appellate process.

**res judicata**

Doctrine stating that a case that has been decided on its merits may not be re-litigated.

**to bar**

To prevent or stop.

**Narrative:** On appeal, the **appellant** is generally responsible for the transmission of the **record**, including the **transcript** of proceedings, to the appellate court. The **appellant** filed an **appellate brief**, which argued **points of error** that occurred at the trial. The **respondent** filed a **response brief**.

**appellant** or **petitioner**

The party initiating an appeal.

**appellee** or **respondent**

The party responding to an appeal.

**record**

The official collection of all pleadings, exhibits, motions, orders, and transcript of the trial.

**transcript**

The word-for-word typed record of what occurred at trial.

**appellate brief**

A written argument by a party covering the issues, called "points of error," on appeal. The brief by the appellant is usually referred to as the "appellate brief." The brief filed by the respondent is usually referred to as the "response brief."

**points of error**

The questions that are the basis for the appeal. Also called "issues on appeal," these questions point to potential errors of the trial court.

**response brief**

A written answer to the appellate brief.

**Narrative:** The plaintiff requested permission to present **oral argument** to the appellate court, but the motion was denied. The appellate court assigned the appeal to a **panel of justices**, as opposed to hearing the case **en banc**. The panel then wrote its opinion of the matter. In this case, the **majority opinion** was unanimous. There was no **concurring opinion** or **dissenting opinion**.

**oral argument**

An oral presentation to an appellate court. The party must request an oral argument; that request is not always granted.

**panel of justices (or judges)**

The portion of an appellate-level court that hears a case. Usually, a panel is made up of three judges.

**en banc**

When the entire appellate level court sits to hear and decide a case, indicating the case has a high level of importance.

**opinion**

Written decision of the court.

**majority opinion**

The strongest form of opinion. When more than fifty percent of the court agrees on a decision. A majority opinion is law until it is superseded or overturned.

*affirm*

The appellate court agrees with the decision of the trial court.

*reverse*

The appellate court disagrees with and nullifies the decision of the trial court.

*modify*

The appellate court alters the decision of the trial court.

*remand*

The appellate court sends the case back to the trial court for further deliberation.



**concurring opinion**

Opinion of one or more judges that agrees with the results of the majority, but arrives at that result for different reasons.

**dissenting opinion**

Opinion that disagrees with the majority opinion.

**Narrative:** *The appellate court upheld the trial court's decision. The appellant **petitioned** the court for a **rehearing**, but this petition was denied. The attorney for the appellant informed the client that Louise's estate could ask the next highest court for permission to appeal, but that the appeal was no longer a matter of right. Instead, a **petition for a writ of certiorari** could be filed. The appellant decided not to appeal further.*

**petition**

To make a formal request to the court. Some states refer to complaints as petitions depending on the type of action filed. For example, a "Petition for Dissolution of Marriage" would involve a petitioner and respondent rather than a plaintiff and defendant.

**rehearing**

A second chance to present arguments to the court on the same issues.

**petition for writ of certiorari**

The vehicle by which the case is taken from the court of appeals (state or federal) to the supreme court (state or federal). Also, the means by which a case is taken from a state supreme court to the U.S. Supreme Court. The *writ of certiorari* is issued by the higher court. If the higher court approves the petition, the higher court will review the case. If the higher court denies the petition, the decision of the lower court stands. This is frequently referred to as a *petition for writ of cert.*

## § 4.4 LEGAL TERMINOLOGY: THE CRIMINAL PROCESS

**Narrative:** Although the civil case was decided in favor of the defendant, the **state** chose to bring **criminal** charges for reckless driving and reckless endangerment. The **prosecution** had a **warrant** issued for the defendant's arrest.

### **criminal law**

A violation of criminal law is viewed as harming the community. Therefore, the state acts against the violator. Penalties for violating criminal law include fines, community service, and imprisonment. One can be sued civilly and charged criminally for the same event.

### **prosecution**

The bringing of criminal charges against a defendant; also the party presenting the Government's case at a criminal trial.

### **state or government**

In a criminal case, these terms mean the prosecution.

### **warrant**

An order from a judicial officer or the court authorizing an arrest or a search or seizure of property.

**Narrative:** At the **initial appearance**, the defendant was advised that one of the charges was a **misdemeanor** and one was a **felony**. He was provided with **assigned counsel**, and although the State had asked for **bail**, he was released on his own **personal recognizance** and thus no **bond** was required.

### **initial appearance**

The first court appearance by a defendant to a criminal charge, during which the court informs him or her of the charges, decides whether bail is appropriate, and sets the date for the next court proceeding.

### **misdemeanor**

A crime punishable by a sentence of less than one year.

### **felony**

A crime punishable by a sentence of a year or more in prison.

**bail**

Money or property deposited with the court to procure the release of a defendant and to ensure the appearance of the defendant at trial.

**bail bond**

A written agreement to pay the full bail amount to the court if the defendant fails to appear when required.

**personal recognizance**

A defendant is released without being required to post bail, on the promise that he or she will appear in court at designated times.

**assigned counsel**

An attorney who is ordered to represent a defendant, usually because the defendant cannot afford an attorney.

***Narrative:** At a meeting in the prosecutor's office, defense **counsel** proposed that the state issue a determination of **nolle prosequi** or accept a **nolo contendere** plea in return for no jail time. However, the **district attorney** insisted that James **plead** guilty to at least one of the charges. The defense attorney could not agree to this **plea bargain**, so the prosecutor decided to pursue the case.*

**counsel**

Legal representative. Attorney.

**nolle prosequi**

The decision of the prosecutor not to prosecute, even though he or she believes that there is sufficient evidence to do so.

**district attorney**

Prosecutor for the state.

**plead**

To declare a defendant's position in a criminal trial, usually either "guilty" or "not guilty." Other possible pleas include "nolo contendere" (See definition below).

**plea bargain**

A defendant in a criminal case agrees to plead guilty, usually to a lesser charge, in return for a reduced sentence.

**nolo contendere** (or *no contest*)

When a defendant decides not to contest the charges, but does not admit guilt. The defendant may be sentenced as though he had pleaded guilty.

**Narrative:** At the **preliminary hearing**, the Court determined that there was sufficient **probable cause** to have the case **bound over** to the **grand jury** for consideration. The grand jury, in turn, returned an **indictment**. This was not particularly surprising, since the district attorney ran the grand jury. At the subsequent **arraignment**, the defendant pleaded not guilty.

**preliminary hearing**

A hearing requiring the State to produce sufficient evidence to establish that there is probable cause to believe that a crime has been committed by the defendant.

**probable cause**

A reasonable basis to believe that a crime has been committed.

**bound over**

Submitted to; sent.

**grand jury**

An investigatory panel that determines whether probable cause exists to return an indictment.

**indictment**

A formal charge by a grand jury alleging a criminal act.

**arraignment**

Formal hearing in court where the defendant is informed of charges being brought and generally pleads *guilty*, *not guilty*, or *nolo contendere*.

**Narrative:** The standard for conviction in a criminal trial is much higher than in a civil trial. The jury must find the defendant guilty **beyond a reasonable doubt**. The jury in the case above decided to **acquit** the defendant. The **adverse judgment** upset the prosecutor, but he could not appeal. In criminal matters, the prosecution is prevented from appealing a not-guilty verdict. The state is barred from re-filing the same charges against the same defendant, since to do so would constitute **double jeopardy**.

**beyond a reasonable doubt**

The degree of proof required in a criminal prosecution usually requiring unanimous agreement of the jury. The jury may have some doubt and still find the person guilty, but the doubt cannot be reasonable. If the doubt is reasonable, the verdict must be not guilty.

**acquit**

To find a defendant not guilty.

**adverse judgment**

A judgment against your client.

**double jeopardy**

In a criminal case, the state cannot retry a defendant on the same charges once a not-guilty verdict is rendered by a judge or jury.

**§ 4.5 LEGAL TERMINOLOGY: ADDITIONAL TERMS**

**chain of custody**

For evidence to maintain its integrity, there must be chronological documentation of each person having possession of the evidence (custody) from the point of collection (or seizure) until admission at trial, including how it has been controlled, transferred, analyzed, or otherwise handled. Applies to physical and electronic evidence and may be relevant in civil or criminal cases.

**full faith and credit**

Article IV, Section 1 of the U.S. Constitution establishes that individual states within the United States must respect the "public acts, records, and judicial proceedings of every other state." In short, any state must give "full faith and credit" to the laws and judgments of other states.

**precedent**

A prior case (usually a written court opinion) that a subsequent court may rely upon when deciding a matter with similar facts and/or issues.

**stare decisis**

The principle that a court should follow previous court decisions unless there exists a compelling reason not to. Related to the concept of precedence. *Stare decisis* means "let the decision stand."

**due process**

Legal principle that the government must safeguard the legal rights owed to a person according to the law, including notice of proceedings and a chance to be heard prior to the loss of life, liberty, or property. Also, a constitutional guarantee that a law shall not be unreasonable.

**notice**

To provide, or to gain, knowledge of legally relevant information. Notice is a critical concept applicable in almost every area of law. For instance, a defendant in any legal action, whether civil, criminal, or administrative, has a right to be “noticed” as to that matter. In civil law, having “notice” of certain facts can indicate or increase a person’s liability (such as when a person is aware of a dangerous condition on his or her property).

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**CHAPTER 4 WRAP-UP**

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**WHAT YOU SHOULD KNOW...**

After reading this chapter you should know the following:

- Terminology related to civil law
- Terminology related to criminal law
- The general process related to civil law
- The general process related to criminal law

**ASSIGNMENTS**

There are no assignments for this chapter.