REAL ESTATE LAW

11TH EDITION



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ELLIOT KLAYMAN

REAL ESTATE LAW

ELEVENTH EDITION

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Dearborn™
Real Estate Education

ELLIOT KLAYMAN

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REAL ESTATE LAW ELEVENTH EDITION
©2022 Kaplan, Inc.
Published by DF Institute, Inc., d/b/a Dearborn Real Estate Education
332 Front St. S., Suite 501
La Crosse, WI 54601

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ISBN: 978-1-0788-2246-6

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INTRODUCTION

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INTRODUCTION

The fundamental principles of real estate law have developed because of land's historic importance as a source of wealth. Many of the principles are difficult to characterize because they were formulated under different economic, social, historical and environmental conditions. The vocabulary is often antiquated and hardly part of our daily lexicon. To add to the complexity, attitudes regarding some areas of real estate law are shifting because of changing environmental and social perspectives.

To overcome these obstacles to learning, we have written in a nontechnical style. We provide key terms, case examples, and review questions to reinforce understanding. We present legal cases with a simplified statement of the background, while at the same time preserving the accuracy of the dispute and issues through the actual language of the court's opinion. We include internet resources to help the student do further research and further clarify areas of interest. We have tried to anticipate future developments as outlined in the Changing Landscape sections at the end of each unit. Additionally, we have included practical ethical dilemmas in each unit, to illustrate real-world experiences within the legal environment.

THE ELEVENTH EDITION

Content

We continue to build on our previous editions, while revising textual material to conform to the changes in the legal environment of real estate law. Contemporary topics such as stigmatized housing, fracking, seller assist, constitutional taking, discount brokerage services, creative rentals, and many more are explored, ensuring that Real Estate Law continues to provide the most up-to-date and comprehensive coverage possible.

The Ethical Dilemma scenarios pose a few questions to the reader. They are designed in a way that forces a student to look beyond the law to a position that leads to decision-making based on ethical challenges. The Changing Landscape commentaries in each unit present a big-picture framework for envisioning the larger context of the issues presented in the text and reflect the real estate legal environment today. With this feature, we are asking the reader to step back from the nitty-gritty of existing rules to reflect creatively and progressively in the hope that, as the architects of the future, the student will see the proverbial forest and not just the individual trees.

Updates

- A preface has been added to highlight ethical content.
- Relevant portions of the textual material have been revised and updated.
- Case examples have modified and added to illustrate the issue under discussion.
- Figures have been revised and added to update and help clarify the material.
- Reviewers' comments and suggestions have been incorporated.
- The text has been simplified in places to make it more accessible to students at various levels.
- Ethical dilemmas have been added to each unit to put the student in ethical roleplay situations.

ABOUT THE AUTHOR

Professor **Elliot Klayman** taught business law and real estate for over 30 years at the University of Cincinnati, Indiana University, and The Ohio State University, where he retired with emeritus status. He resides in San Diego, California, with his wife of 48 years and enjoys visits with his two children, Seth and Rhena, and his four grandchildren. He is especially concerned about the environment and ecological condition of the planet and hopes that smart stewardship will ensure enjoyment of the rich heritage for generations to come.

Professor Klayman continues to practice law, with a specialty in real estate, and has added history and religion to his teaching portfolio at the graduate, college, and adult education levels. He participates in sports activities, including tennis, weight training, race walking, swimming, and tae kwon do, for which he holds a second-degree black belt. He enjoys writing, reading, and running into former students, which, having taught about 10,000, he seems to do from time to time.

This edition is dedicated to the hope that our students will be well prepared to stay the onslaught of challenges to our environment by exercising the moral fiber required, and thereby participate in its preservation in the personal, local, and global realms. The hope is that this will contribute to enviornmental protections and enjoyment for the generations of children to come. He particularly has in mind his grandchildren—Anya, Shai, Lena, and Tali—who, along with the many other grandchildren in the world, hold the social and political keys to global survival.

ACKNOWLEDGMENTS

Dedication

This book is dedicated to four medical doctors who specialize in nephrology-related issues and practice in San Diego, California: Mark Boiskin, Tepsiri Chongkrairatanakul, and Guy Lund, who are part of Balboa Nephrology, and Jeffrey Halldorson, a transplant surgeon. Their personal attention and treatment of an end-stage kidney

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failure condition and transplantation made it possible for me to produce this 11th edition and to continue to live a joyful and productive life. To them I am forever indebted.

The author recognizes the contribution of the late Professor Emeritus Frank Gibson, the first author and the visionary of this work. It is upon his vision that subsequent editions are built. The author also recognizes Professor Emeritus James Karp, who left an indelible imprint on this book, which retains his passion for environmental and ecological concerns.

In addition, the author extends a debt of gratitude to the reviewers who contributed valuable comments and suggestions, which substantially improved this edition; and to my wife, Joyce Klayman, who has applied her usual strong library skills and assistance in preparing this text.

Elliot Klayman, J.D. (University of Cincinnati), LL.M. (Harvard Law School), M.A. (The Ohio State University), B.B.A. (University of Cincinnati)

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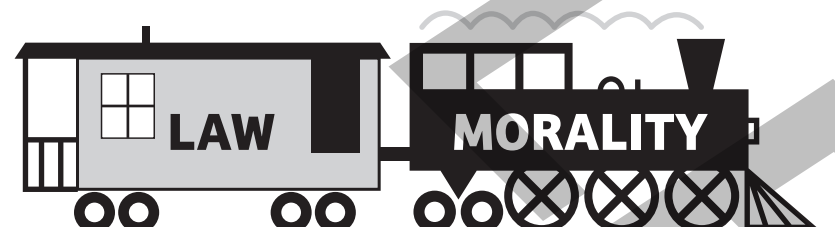
Ethics: Beyond the Law

The practice of real estate often involves situations that require decisions based on law and ethical considerations. To understand the impact of ethics on real estate practice, we need to examine law and morality.

Laws are enacted to bring order to society. In essence, law seeks to move society in a positive direction. Ideally, it does this by regulating society in a balanced way among "stakeholders" across the economic, sociological, and political spheres. Toward that end, law is influenced by moral principles. Morals are a set of beliefs from which we derive what is right and fair under the totality of circumstances.

Law and morality are, therefore, related. Consider the relationship between a train's locomotive and its caboose. The locomotive sets the direction for the caboose. The caboose follows the locomotive, and though traveling on the same track, it never catches up to it. The caboose represents the law and the locomotive, morality. The law looks forward to attain the morality ideal. (See Preface Figure 1 illustrating the engine/caboose relationship of law and morality.)

FIGURE P.1: Law & Morality



Origin of Law

From where do laws come? Philosophy and religion are two main sources from which we derive law. There are two major theories for the origin of law: natural law and positive law.

Natural law

Natural law is based upon a philosophical understanding that law is inherent in nature and is discoverable. There is an ideal orderly body of truths and principles that exist (independent of our own subjective notions) to which the law should conform.

According to its proponents, natural law is the ideal for which a society should strive to replicate and codify. Emanating from nature, it is knowable by humans, derived from the "natural order" or the divine. Natural law, then, is a reasoned approach to discovering the perfect law. It is fixed and not necessarily dependent on what we think is best for society, or even what is fair and right. In a perfect world of natural law, uniformity among the globe of nations would prevail, because ultimately every society would adhere to the same natural laws. For those who embrace natural law, an unjust or immoral law may be the subject of civil disobedience. These types of laws include laws permitting slavery and the edicts made under the reign of Nazi rule to imprison and murder Jewish people, and other minority groupings.

Positive Law

Legal positivists adhere to laws enacted by law-making bodies, such as state and federal legislatures, municipalities, and townships. Law is the conscience of society. It reflects that conscience through the voices of the legislative bodies who have the power to enact law, and to adjust it in accordance with the times and culture. It is not absolute but rather subject to change. Governments or rulers may impose laws through their law-making process and enforce those laws against violators. For a positivist, even an immoral law is one that must be obeyed.

Morality

Certain crimes may be universally condemned by civilized cultures as evil in and of themselves because they are in direct opposition to a society's morals. These crimes are designated *malum in se*. They include murder, theft, and arson. These crimes require a specific intent to commit, sometimes called the *mens rea* — an intention or knowledge of the wrongdoing.

Other crimes may be characterized as regulatory breaches, and are designated *malum prohibitum*. These crimes are unlawful because of a statute, ordinance, or regulation designed to adjust societal interests and to promote harmony and order. However, they are not evil by virtue of universal consensus and conscience. For example, some country's laws require that you operate a motor vehicle on the left side of the road, while others require you to drive on the right side of the road. These are not based upon moral beliefs, but rather a need for orderliness regulated by cultural norms and uniform road etiquette.

Other malum prohibitum laws include failure to pay property taxes or failure to comply with professional licensing procedures. Real estate licensees are required by state regulatory bodies to obey licensing laws in order to represent clients in real estate transactions. There are requirements to complete prescribed education, pass an examination, and meet continuing education and moral requirements. People would not feel an inherent moral conviction that representing another in a real estate transaction without a license is wrong, but the law makes it illegal to do so.

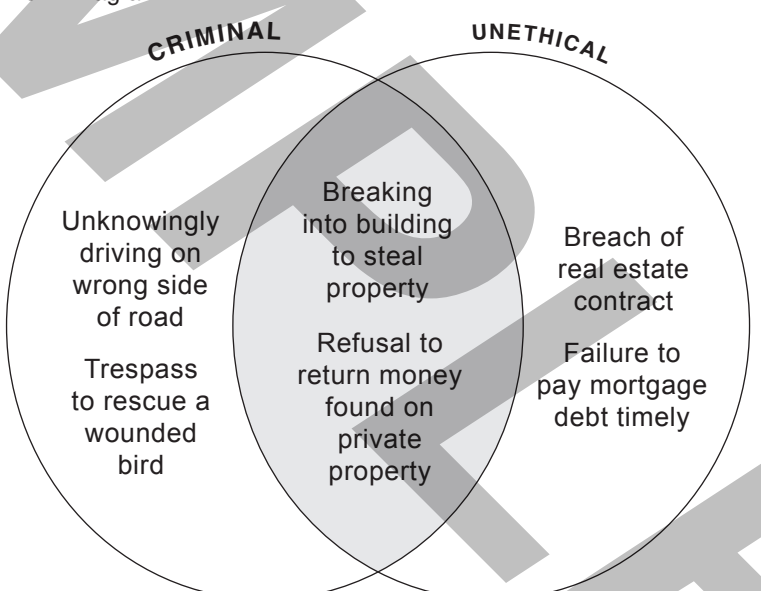
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Ethics

Having examined how law and morality are related, we now examine ethics. Ethics is applied morality. For example, "love your neighbor" would be a moral principle and its ethical application would be helping a neighbor with yardwork. One who refuses to offer shelter to a friend during a time of need does not commit a crime. The inaction, however, could be considered unethical. Hence, ethical or unethical conduct can be seen as morality in action or inaction — ethical conduct or misconduct.

Criminal law and ethics do not always intersect. Some actions are criminal but do not constitute unethical conduct. Violating a zoning ordinance prohibiting a fence on the property higher than four feet may constitute a crime. Even though the action may be unintentional because of a lack of knowledge of the zoning ordinance, it may still result in a criminal fine. Yet, it does not constitute an ethical breach, because of its regulatory nature and lack of a guilty mind. In other cases, law does overlap with ethics. Consider a real estate agent who misappropriates a client's money from trust funds the agent is holding. That action is clearly unethical and criminal. (See Preface Figure 2 for an illustration of the interplay of law and ethics.)

FIGURE P.2: Criminal/Unethical Venn Diagram



Application of Real Estate Ethics

This book contains materials that involve an analysis of the relationship between real estate law and personal and professional ethics. At times, stakeholders in transactions find themselves facing ethical dilemmas. An ethical dilemma is not one that is wholly controlled by the law. It is controlled by morals, our conscience, our view of the world, and a balancing of various alternatives that come into play. Resolution of a

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dilemma should not be guided by the outcome alone, everyday common morals, or self-service, but rather by the principles of fairness, integrity, and professionalism.

Case Example

Jenny and Jon Hurray entered into a real estate purchase contract to sell Realacre to Noah and John Balstrum. The contract provided for the transaction to finalize within 60 days from the date of the contract. The Balstrums, newly married, fell in love with the home and were very excited about moving in and building a family. Thirty days before the closing, Jenny's husband, Jon, and their two children were in a horrible multicar accident on the freeway. Jon was instantly killed and their children were injured, one so severely that she is expected to be a paraplegic for the rest of her life. Jenny, with incessant sobs, tearfully begs her real estate agent to request that the contract be canceled. The agent consults the brokerage firm attorney who opines that there is no legal way of breaking the contract without exposing Mrs. Hurray to a lawsuit.

What are the possibilities for resolution here?

An Ethical Sketch

We have examples throughout history of those who stood up for morality in the face of conflicting forces, regardless of popularity or self-interest—from Muhammed to Buddha, Lincoln to Ghandi, Harriet Tubman to Rosa Parks. Approximately 100 hundred years after the abolition of slavery, emboldened by those who came before them, the U.S. Congress passed the Fair Housing Act (1968), protecting an expanded classification of persons from discrimination in housing, and imposing penalties upon those who violated those protections. These housing protections against discrimination were further expanded by additional legislation, discussed fully in Unit 23.

Real estate practice involves a growing number of types of transactions, creative financing, and lawful means for overcoming obstacles. It is increasingly more difficult for real estate professionals to navigate the moral and ethical predicaments they often face. These situations require a resolution through decision-making. Real estate professionals periodically face the need to choose among a number of options, none of which would necessarily constitute a crime or a civil wrong. Consider the ethical and legal predicament of the following real estate professional.

Case Example

Haley Frontier listed a home in an area of an upper middle-class suburb for $600,000. Homes are hot in this market. Buyers are scrambling to move into the area because it is a very eco-friendly community with many transportation options; and a highly-ranked school system. The average home is on the market for ten days and it sells for an average of 5.5% above the asking price. Several offers are usually made on a home listed. Sellers' agents consider multiple offers; they are not bound to inform the prospective buyers that there are other offers pending. Haley, with her sellers' consent, informs two prospective buyers that there is another offer on the table, but does not disclose any details of the offers:

- The Tokyotos submitted an offer of $645,000, conditional on securing a conventional bank loan.
- The Abramsons submitted an offer for $640,000, conditional on securing an FHA, government-backed loan.

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The sellers were ready to accept the Tokyotos' offer because it was higher than the Abramsons' and they were confident that the Tokoyotos could secure the conventional loan based on an appraisal and their intent to make a 30% down payment. The sellers were less confident that the Abramsons could satisfy all of the FHA conditions, and they felt it would take them longer to secure financing than the Tokyotos. Haley received a call from the Tokoyotos while she was in the process of drawing up the paperwork to accept their offer. They explained that they really loved the house and were afraid of losing it. They communicated that they were getting ready to increase their $645,000 offer to $665,000 in hopes that it would outbid the competing offer and be accepted. Haley was flabbergasted.

Should Haley inform the Tokyotos that this would not be necessary since the sellers are getting ready to accept the original $645,000 offer? Or should she say nothing? What should the sellers who have the ultimate decision on it, do? How should Haley advise? What is ethical under the circumstances?

The sales agent owes a duty of loyalty to the principal (in this case the sellers), and there is also a duty owed to the buyers to exercise good faith. Ethical dilemmas of this nature require models for ethical decision making.

Models for Ethical Decision Making

When faced with an ethical dilemma, there are a number of models a person may apply to make a decision. One such model is to follow these six steps:

- Phrase the ethical issue as a question.
- Identify all the stakeholders who may be affected by the decision.
- List all possible solutions/decisions to resolve the dilemma.
- Assess the impact on each stakeholder.
- List the positives and negatives of each solution.
- Make a decision.

A similar approach would be to pose the following questions:

- *What* should I do?

  What options are good or right in this context?
- *Why* should I do it?

  Explore the values and reasons that support each option.
- *How* should I do it?

  What plan of action best aligns with these values and reasons?

  Make a decision based on these factors.[1]

Many professionals also take into account the universal "golden rule." How would we want others to treat us under the same circumstances? Still another way of approaching these decisions is to think about which decision you would prefer to be publicized in the national news with your name attached to it. How would you like to be remembered? What does high ethical behavior and a reputation of integrity look like?

1. Identifying and Analyzing an Ethical Issue, https://www.physio- pedia.com/Identifying_and_Analysing_an_Ethical_Issue

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Real estate professionals are constantly confronting situations that require them to consider the law, their licensing responsibilities, and the right thing to do under the circumstances. Sometimes the answer is to make full disclosure to the stakeholders and explain the decision. Other times acting prudently and fairly as governed by one's conscience is sufficient. We each must live and sleep with the consequences of our decisions. We should keep in mind that others must live with them as well.

Choosing to treat people with kindness is a simple idea, but life is not always that easy when confronted with hard and difficult choices. Lying under oath is punishable as a crime, but private lies and deception are not ordinarily criminal. People may be more likely to lie or to deviate from the ethical path when no one is looking. Should our conduct be governed by what we can get away with?

An Ethical Dilemma: What Would You Do?

Sales commissions are often negotiable in real estate transactions. Gloria Angleston has three properties listed in Anytown, USA, where homes sell from $160,000–240,000. The three listed homes are pretty comparable. Gloria has some large debts and would like to pay them down substantially. There are several homebuyers in that area who have seen the listings, which advertise brokerage commissions at 4.25%, 5.0%, and 5.75%, respectively. Angleston is inclined to push the homes that have a higher commission attached to them. She has the power to "steer" the clientele in that direction.

1. What should she do?
2. How would her firm react to a front-page article the next morning that says "Sales Agent Opens up New Way to *Steer* Homebuyers for more Favorable Commissions"?

Ethical Standards

People ordinarily do not set out to do evil or breach fundamental ethical principles. Yet at times, even though our intentions are good and right, weakness seeps into our follow-through. We can borrow language from a case decided by Justice Benjamin Cardozo in *Meinhard v. Salmon*[2], which decision has been lauded, and frequently cited as the ethical standard, ever since its decision in 1928. It dealt with the obligations between partners in a real estate joint venture, but the highlight here is the language employed in the case, and its ethical applicability to the area of real estate partnership relationships. Regarding fiduciary duties owed by these joint venture partners to each other the court stated:

> Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of honor the most sensitive, is then the standard of behavior.[3]

2. Identifying and Analyzing an Ethical Issue, https://www.physio-pedia.com/Identifying_and_Analysing_an_Ethical_Issue
3. 164 N.E. 545, 249 N.Y. 458(1928).

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Not every transaction in the real estate world comes with the obligation of the fiduciary duty of the highest care, as owed to those who hold the highest trust. Yet, this duty of exercising care is the height to which t we ought to strive. Reputation depends upon how we act in relation to others. Excellent reputations are hard to earn, but they are worth the effort. As Warren Buffett said, "It takes 20 years to build a reputation and 5 minutes to ruin it."

Reducing the Risks of Ethical Breaches

Some of the principles of ethical behavior include avoiding conflicts of interests, maintaining confidentiality, dealing fairly, and exercising diligence in transactions and relationships, both professional and social. These are indicators of best professional practices. When it comes to ethical dilemmas in the real world, enlisting professionals, family, or friends to offer advice may help prevent an ethical mishap. Each of the 26 chapters in this book present an "Ethical Dilemma: What Would You Do?" hypothetical scenario. Class discussion may lead to a variety of possibilities and solutions. This approach can help prepare students to better resolve real world ethical problems.

More and more we are seeing companies adopt ethical codes, employ an ethical ombudsman, conduct ethical training programs, and participate in regular webinars on ethics. How we govern our lives makes a difference. Each of us can be a positive spoke in the ethical wheel to improve community well-being by improving our own ethical behavior.

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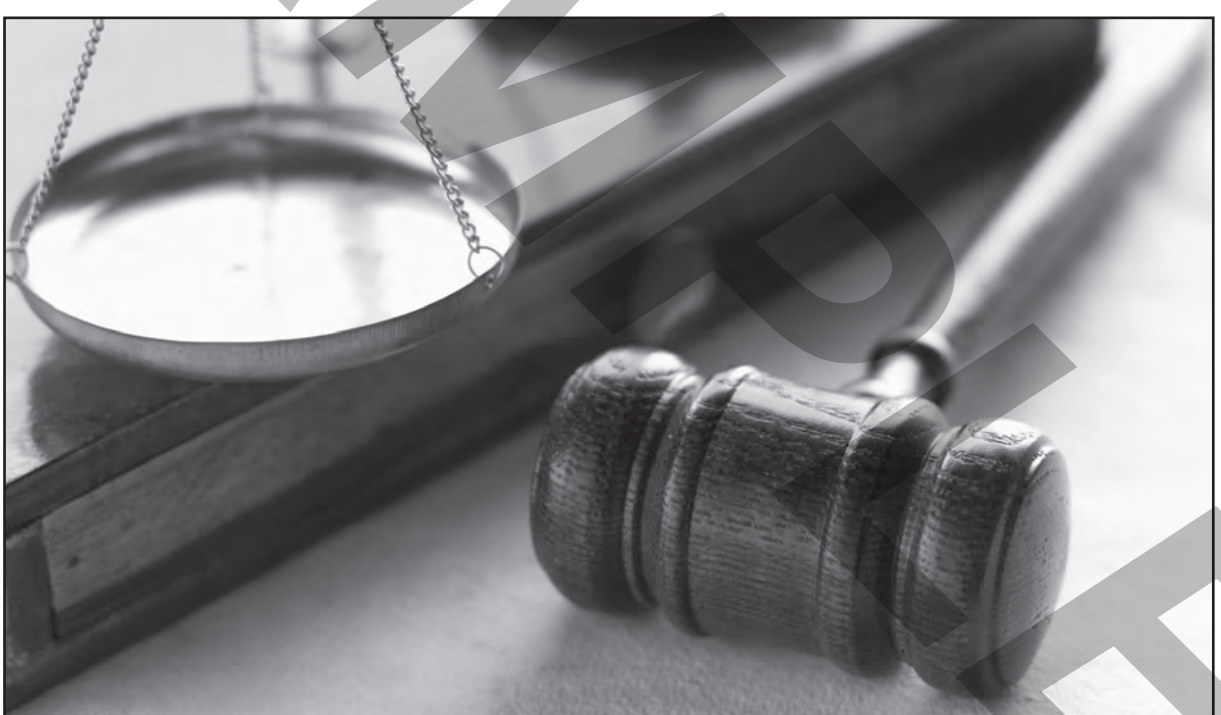
PART ONE

Nature of Real Estate Law

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UNIT 1

Introduction to Law and Legal Systems



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LEARNING OBJECTIVES

When you have completed this unit, you will be able to accomplish the following.

- List and explain the sources that a person might consult to determine the answer to a question regarding real estate law.
- Define *diversity jurisdiction* and *federal question jurisdiction*.
- Diagram the relationships and describe the function of each of the following: state supreme court, intermediate appellate court, courts of general jurisdiction, and special courts.
- Describe the benefits of alternative dispute resolution, the forms it may take, and how it may be imposed.

KEY TERMS

alternative dispute resolution (ADR)
appeal
common law
diversity jurisdiction
judge-made law
jurisdiction
preemption doctrine
precedent
statutory law
trial court

LAW AND THE REAL ESTATE BUSINESS

Many aspects of the real estate business are closely associated with law. Almost any professional activity of a real estate broker, salesperson, appraiser, or investor involves certain legal restrictions. Thus, people in these positions and many others connected with real estate transactions have a genuine need to know about the law and legal systems. The knowledge will help them understand legal terminology and be conversant with legal and allied professions. The more extensive their knowledge, the more effective their job performance.

Real estate professionals deal not only with lawyers but also with recording clerks, building inspectors, tax officials, planning board members, and personnel from state and federal housing agencies. All these people perform specialized functions in the legal system. Understanding what they do and some of the responsibilities of their jobs increases the real estate professional's ability to work effectively with them. Many individuals with whom salespeople and brokers come in contact also have specialized knowledge of the law; loan officers, appraisers, and zoning board officials are examples. Real estate professionals who have similar knowledge will be able to work more effectively with other specialists and thereby improve their professional image.

Legal knowledge is especially important to professionals involved in buying and selling real estate. Clients and customers will often question them about legal matters or the advisability of consulting an attorney. Although sales personnel should never give legal advice, knowledge of the law will help them develop an awareness of situations in which a lawyer should be consulted. Because legal knowledge is considered so important, all states require that salespeople and brokers engaged in selling real estate complete a formal course that includes real estate law.

Although this book is devoted to a study of real estate law, to some extent that designation is misleading because real estate law cannot really be separated from other types of law. A famous jurist once said, "Law is a seamless web." Nevertheless, because of the complexity of law, people who want to understand it often consider it in small segments. The boundaries of these segments are never exact, nor is there general agreement on what each segment includes. Hence, the reader must realize that although much of what is said about real estate law applies to law in general, some portions of the "seamless web" are more related to the real estate business than others. This book deals primarily with these portions.

Most of this book discusses specific rules important to those people involved in real estate transactions. In this first unit, however, the book takes a broader look at law and the legal system, attempting to clarify the law by examining where law is found and the structure within which it operates.

SOURCES OF LAW

Knowledge concerning many legal questions comes from life experiences. As people learn in school, on the job, or through daily living, laws important to them become part of their knowledge of the manner in which things operate. Sometimes legal questions arise that are not answerable from experience. How does one find the

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answers to these questions? To what source does the student, the real estate professional, the lawyer, or the judge turn to find out what the law is?

One prevailing myth about law is that all laws are found in nicely indexed, officially published volumes of statutes enacted by a legislative body. According to this belief, all a person has to do to answer a legal question is to locate the correct page in the right book, and the law will be there in clear black letters. Unfortunately, few legal questions are answered this simply.

Thousands of cases, statutes, and administrative regulations are published each year. As a result, determining what the law is has become increasingly difficult. Computers enhance the potential for legal professionals and the public to access sources of law more effectively. The speed and manipulative power of computers allow increased control over the burgeoning quantities of legal information.

To answer a legal question involving real estate, a person might have to examine one source or a number of different sources. Sometimes an answer will be found in a state constitution or the federal Constitution. Most often, however, the answers to real estate law questions are found in court opinions (often referred to as *case law*), statutes, and the regulations of administrative agencies. The different sources of law are discussed in the following sections.

Constitutions

"[W]e must never forget that it is a constitution we are expounding," wrote John Marshall, Chief Justice of the United States Supreme Court.[1] He was referring to the United States Constitution, which has endured the rigor of time and the test of social, political, and economic upheaval. The Constitution's two-hundred-year-plus longevity is due in part to the foresight of its framers, who provided for flexibility through an orderly process, enhanced by a system of checks and balances.

A basic source of law, *constitutions* provide the framework within which federal and state governments must operate.

> **An Ethical Dilemma: What Would You Do?**
>
> The United States Constitution establishes three branches of government and balances the power of government through them so that no one branch has total power and control over all facets of government. Apparently, the framers of the Constitution knew that absolute power corrupts absolutely. Nothing is perfect and it is possible that the framers did not see everything and could not address every issue perfectly.
>
> A constitutional crisis occurs when two branches of the government clash. Hence, there was a constitutional crisis during President Richard Nixon's term in office when defendants in a criminal trial connected to the democratic national headquarter break-in at the Watergate Hotel subpoenaed the Watergate tapes that were under the control of President Richard Nixon. The court ordered the president to turn over the tapes. As the chief executive officer, Nixon asserted executive privilege and refused

1. *McCulloch v. Maryland*, 17 U.S. 316 (1819), 316, 407.

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to turn over the tapes. This constitutional crisis was resolved by the United States Supreme Court, which held that the specific constitutional right of a fair and impartial trial prevailed over the general executive privilege. President Nixon was forced to turn over the tapes.

Vested in the president is the right and the ability to make law through executive orders. The executive orders are directed to federal administrative agencies, which can have the effect of encroaching on the federal legislative branch of government. Some presidents have exercised this rule by executive orders more than others. During President Franklin Roosevelt's term, when he needed to pull the country out of the Great Depression and put workers back to work, he exercised his authority to issue executive orders to accomplish this objective, thereby bypassing the legislative branch of government.

Presidents are exempt from conflict of interest rules with which other government employees must comply. They are also not required to divest their holdings or to give up management of them.

1. *Construct a scenario where the president by executive order creates a personal conflict of interest.*
2. *How would you resolve the ethical issue?*

Ordinarily, real estate law is not associated with constitutional problems, but at least two functions of constitutions are important to the real estate business. First, the U.S. Constitution allocates power between the states and the federal government. Because the states generally have retained power over local matters, most real estate law is state law. However, because the states have constitutionally ceded to the federal government power to regulate businesses affecting interstate commerce, numerous federal statutes apply to the real estate business. At present, many people in the field are concerned about how federal statutes relating to mortgage banking are affecting real estate. Bankruptcy statutes and consumer protection laws, such as the Truth in Lending Act, the Real Estate Settlement Procedures Act, and environmental protection legislation, are other examples of federal law that apply to real estate.

A second function of constitutions—both state and federal—is the protection of individual rights, including private property. Constitutional provisions require that the law be applied equally to all; in addition, they prohibit the government from depriving a person of life, liberty, or property without due process. This means that an individual's property can be taken by the government only under limited circumstances. But the protection accorded the individual is far from absolute. Both the power of eminent domain and the police power allow the government to restrict private property ownership.

Case Law

A distinctive feature of the law of English-speaking countries is its reliance on case law decided by appellate courts as a source of law. Reports of these cases are published as opinions, which provide the answers to many legal questions.

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Case Example

Clayborne and his adult daughter lived in a house that Clayborne owned. At the request of the daughter, Dexter painted the house. Clayborne did not authorize the work, but he knew that it was being done and raised no objection. Clayborne refused to pay Dexter, arguing that he had not contracted to have the house painted.

Dexter asked his attorney if Clayborne was legally liable to pay him. The attorney told Dexter that, in their state, several published appellate court decisions had established that, when a homeowner allows work to be done on his home by a person who would reasonably expect to be paid, a duty to pay exists. The attorney stated that, based on these cases, it was advisable for Dexter to bring a suit to collect the reasonable value of the work that he had done.

In the legal system of countries that follow the English system, judges are obligated to follow principles established by prior cases, or **precedents**. This obligation, also referred to as *stare decisis* (let the decision stand), is ingrained in our system. The extent to which a court is governed by precedent is difficult to assess. Although the practice of following precedent is not a legal duty, it is definitely more than a tradition. A judge who failed to follow precedent would not be convicted of a crime, but ordinarily the case would be reversed, and, in extreme cases, the judge could be censured or possibly impeached. People trained in our system generally consider reliance on precedent an effective and fair way to reach a decision, and the concept is fundamental to U.S. law.

The obligation to follow precedent is limited by a number of factors. A court need not follow precedent established in another state, although in reaching decisions, courts sometimes consider case decisions from other states when their own state has no case law on the subject. Lower courts are bound to follow decisions rendered by higher courts of their state. Again, failure to do so may result merely in the lower court's decision being reversed. The highest appellate court in a state can overrule its own precedent. Although this occurs on occasion, most state appellate courts overrule reluctantly because they believe that certainty is a desirable characteristic of law. The reluctance to overrule is often seen in private areas such as real estate law because certainty is deemed very important where property rights are involved. A court will overrule a prior decision when the rule of law was applied incorrectly in the first place or when the rule is no longer considered applicable because of social changes. Therefore, there is the certainty that *stare decisis* preserves, as well as the flexibility that overruling presents. This tension between certainty and flexibility keeps the law in a healthy state of equilibrium.

In addition, only that part of a court's opinion that is necessary to resolve the dispute between the parties, called the *holding*, creates precedent for future cases. Reasoning not necessary to settle the legal issue in question is referred to as *obiter dictum* and has no precedential value.

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Case Example

Henrietta Douser lived in a neighborhood adjacent to a lake where neighbors often came together to swim. While looking toward the lake from her back porch, she noticed that there was someone in the lake who seemed to be in distress, yelling for help. She abruptly ran to the lakeside and indeed saw a young boy, about fifty yards from the lake's bank, drowning. Henrietta was a good swimmer, but instead of attempting to save him, she ran back into the house and called 911. When the first responders arrived, they pulled the victim out of the water. Jack Willington, age 9, who lived in the neighborhood, had wandered into the lake water. Unfortunately, the rescue team was unable to save him. The Willingtons sued Douser for negligently failing to go to their son's aid. The trial court found in favor of the Willingtons and awarded damages in the amount of $1 million dollars against Douser. Douser appealed and the appellate court reversed the trial court and reasoned:

> *We adopt the rule that there is no duty to go to the aid of another who is in peril. A volunteer does not have to expose herself to the risk of harm by placing her own life in jeopardy to save another. This is the rule in all such cases, even when a person negligently puts another in harm's way, or even recklessly does so.*

The holding of the court was that there is no duty to go to the aid of another when a person did not place that other person in peril. The statement about negligently or recklessly exposing another to danger is an extension of the holding since it goes beyond the facts of the case, which involves one who did not create the danger. Hence, those extended statements would be considered ***dicta*** (plural). Consequently, if another case arises involving facts of one who places another in peril through reckless horseplay, there may be a different result.

Consider a case where Hannah recklessly pushes her boyfriend off a diving board in a rough manner, causing that person to fall and hit his head on the ledge of the pool and slip down into the water unconscious. The *Willington v. Douser* case would not operate as precedent because the gratuitous statement extending the case beyond its facts of an innocent person in the face of another's peril is *dicta.* The court could ignore the *dicta* and apply a new rule of law on its facts that states: "When a person imperils another by a reckless act, there is a duty to go to the aid of that person in a reasonable attempt to rescue the victim from the peril that person created."

Courts and attorneys frequently avoid the effect of a previous case by distinguishing it from the case under consideration. A case is distinguished when a significant factual difference can be pointed out between the two situations. For example, assume that, in defending Clayborne in the suit brought by Dexter, Clayborne's attorney asks the court to dismiss the case because she has found the published decision of a case with like facts where the appellate court held that the homeowner was not required to pay. Dexter's attorney argues that, in that case, the homeowner was on vacation and did not know the work was being done. Because Clayborne knew that his house was being painted, the two cases are different and can be distinguished. If the court agrees that the two cases are significantly different—that is, can be distinguished—it will decide

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that the earlier decision is not precedent and therefore not controlling in deciding the case before the court.

Law that originates and evolves from published opinions of appellate courts, or precedent, is often called **judge-made law**, *decisional law*, or *case law*. In England, reliance on previous decisions or cases and on custom and tradition created a law that was common to the entire country. Therefore, the law based on prior opinions is often referred to as **common law**. Sometimes people have difficulty accepting the idea that, in these opinions, statutes are not involved in any manner. In fact, often no statute exists that may be used to settle the dispute. The United States adopted the English common-law approach. Most of the non-English-speaking nations have civil law systems relying exclusively on statutory or code law.

A modern example of common law, or judge-made law, is found in those appellate decisions that impose responsibility on builders of defective homes. Before World War II, the builder of a defective home had little legal responsibility for injury or property damage once the home was sold. Buyers were required to make their own inspection of the premises. On the basis of this inspection, buyers accepted responsibility for all defects, thus relieving builders of responsibility for any defective construction. The courts were applying the ancient doctrine of *caveat emptor*—let the buyer beware.

During the 1950s and the 1960s, courts began to recognize the unfairness of this rule. They began to allow buyers of new homes to recover for personal injury and property damage resulting from defective construction. In numerous states, this modification of the law from caveat emptor to *caveat venditor* (let the seller beware) was accomplished without legislation. One state court commented as follows:

> If at one time . . . the rule of caveat emptor had application to the sale of a new house by a vendor-builder, that time is now past. The decisions and legal writings herein referred to afford numerous examples and situations illustrating the harshness and injustice of the rule when applied to the sale of a new house by a builder-vendor. . . . Obviously, the ordinary purchaser is not in a position to ascertain when there is a defect in a chimney flue, or vent of a heating apparatus, or whether the plumbing work covered by a concrete slab foundation is faulty.
>
> The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent purchaser but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work. (*Humber v. Morton*, 426 S.W.2d 554 [Tex. 1968])

Statutory Law

The Role of Statutes

Although for many years the opinions of courts were the chief source of real estate law in English-speaking countries and for the legal system generally, during the past 100 years, statutes have gradually assumed this role. Among the many reasons for this trend are that statutes are more comprehensive, can modify the law more rapidly, can treat an entire problem rather than just a part, and are usually more understandable than cases. This legal system is called **statutory law**.

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During the past 80 years, statutes have been used to bring greater uniformity to state law. Economic expansion since the Civil War has been characterized by the growth of regional and national markets. States, however, have often adopted different laws to solve common problems occurring in these markets. This practice has increased the cost of doing business and caused confusion and uncertainty.

In 1890, the National Conference of Commissioners on Uniform State Law was established to alleviate this problem. The commission is charged with determining what uniform laws are necessary, drafting a uniform statute, and trying to get states to adopt it. More than 100 uniform laws have been recommended. About 100 of these laws have been adopted by at least one state, but few have been adopted by all or even a majority of the states.

The commission has proposed a number of laws that deal with real estate. These include a uniform condominium act, a uniform residential landlord-tenant act, a uniform simplification of land transfers act, and a uniform eminent domain code. The impact of these uniform laws on real estate has been minimal to date.

Court Interpretation of Statutes

Despite the growing importance of statutes as a source of law, court opinions continue to play a significant role in shaping the law. Many statutes are broadly written. Often their meaning is not clear until they have been interpreted by a court. It is probably safe to say that in a majority of instances, a lawyer looking for the answer to a legal question will first check for an appropriate statute and then review relevant court opinions interpreting that statute.

Codification of Appellate Judge-Made Law

Another reason that court opinions continue to be important is that statutes often are merely a codification of the cases dealing with a particular legal problem. When a legislative body codifies the law, it adopts a statute that reflects the decisional law. For example, when the courts in some states decided that the act of selling real property implied a warranty of fitness for habitation, the state legislatures in those states passed statutes mirroring the court's decisions.

Administrative Rules and Regulations

In our dynamic, complex society, much of the work of government is accomplished by administrative agencies. Both Congress and state legislatures create administrative agencies as part of legislation that aims to cure some social ill. The agency is empowered to enforce and implement the goals of the legislation. A substantial number of administrative agencies significantly influence the real estate business. Among such federal agencies are the Department of Housing and Urban Development, the Environmental Protection Agency, and the Federal Home Loan Bank Board. State administrative agencies also have a far-reaching influence on the real estate business. They are the source of rules pertaining to such matters as licensing and disciplining real estate sales personnel, zoning, safeguarding the environment, and landlord and tenant rights.

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Administrative agencies perform several functions. They are authorized to settle disputes and, in doing so, act like courts; this is called *administrative adjudication*. The procedures used in administrative adjudication are generally much less formal than those used by the courts, making reaching a settlement less time-consuming and costly. Another benefit of administrative adjudication is that the agency personnel resolving the dispute are experts in the subject area of the dispute and can therefore resolve the case more effectively than is sometimes possible in a court.

Many agencies also have the power to make rules and regulations that have the force of law. In this respect, they act as legislatures. An agency's authority to make rules and regulations is granted in the legislation that created the agency. If the rule or regulation issued by the agency is constitutional and reasonable, if proper procedures have been followed, and if the agency has not exceeded the power and authority granted to it by the legislature, the rule or regulation will not be overturned by the courts.

COURT STRUCTURE

People in the real estate business sometimes become involved in litigation, so it is helpful for them to know something about the structure of the system that applies the law.

Trial and Appellate Courts

Two types of courts are fundamental to the operation of the legal system: trial and appellate courts.

Trial Courts

The function of a **trial court** is to determine the facts and to apply the relevant law to these facts. A jury makes the factual determination, but in some cases the parties are not entitled to a jury or they waive this right. Disputed facts are then decided by the judge. Whether a judge or a jury makes the factual determination, findings are based on evidence. In most instances, evidence includes the oral testimony of witnesses who are questioned by attorneys for the parties and the documents admitted into the proceedings.

The testimony of most witnesses is valuable because they have personal knowledge of the facts. Other witnesses, referred to as expert witnesses, do not have personal knowledge of the situation but do have expertise related to a disputed fact. The testimony of the expert witness is not permitted until the trial court judge is convinced that the witness is qualified. When qualified, the expert witness may answer a hypothetical question that covers technical aspects of a disputed fact or render an expert opinion based on an examination of the relevant evidence in the case. Real estate brokers and appraisers often testify as expert witnesses in cases involving disputed land values.

The decision of the trial court awarding a judgment to one party is termed *res adjudicata*. That means the matter has been decided and neither party may file a new lawsuit against the other party regarding the same issues decided by the court. However, a

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party who is unhappy with the decision and believes there to be a legal error committed by the trial court judge may appeal the case to a higher court.

Appellate Courts

If either party thinks that a legal error has been made by the trial court judge, the party may ask a higher court to review the case. This procedure is called an **appeal**, and the court hearing the case is an *appellate court*. The function of the appellate court is quite different from that of the trial court. This court is not concerned with deciding disputed facts; rather, it corrects legal mistakes. For this reason, there is no jury in an appellate court; there is a panel of judges. Instead of hearing the testimony of witnesses, the judges read briefs in which the parties explain what they believe the law to be. The attorneys may also present oral arguments. After the judges decide which party is correct, one of the judges will write an opinion presenting the views of the majority. If the court finds that an error has been made, the court may, in its opinion, order the lower court to correct its mistake. These opinions constitute the judge-made law that establishes precedent.

State and Federal Courts

A first step in understanding the American legal structure is to recognize that both the federal government and each of the states' possessions and territories have their own systems of trial and appellate courts. Each of the judicial systems—state and federal—is the final authority within its own **jurisdiction**. An exception to this principle is that federal courts do have authority over state courts in questions involving federal law.

Jurisdiction of State Courts

The authority of state courts is extensive. It includes cases involving violations of the state's criminal statutes, as well as statutes that involve matters as diverse as divorce, education, public health, and social welfare. Most contract cases and those involving personal injuries are also heard in state courts. In fact, state courts have jurisdiction over all matters except those that the Constitution or Congress have ceded exclusively to the federal courts or have denied to the states.

Jurisdiction of Federal Courts

The jurisdiction of federal courts is limited to that given to them by the Constitution and federal statutes. As a result, federal courts hear only cases that involve constitutional questions, treaties between the United States and a foreign nation, federal statutes, and citizens of different states.

Case Example

McClain and others (petitioners) brought a class action on behalf of real estate purchasers and sellers. The action was against real estate trade associations, firms, and brokers (respondents). The complaint stated that the respondents had engaged in a

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price-fixing conspiracy in violation of the Sherman Antitrust Act, a federal statute that prohibits unreasonable restraints on trade, including price-fixing.

The petitioners' complaint alleged the following: (1) the respondents' activities were "within the flow of interstate commerce and have an effect upon that commerce" and (2) respondents assist their clients in securing financing and insurance involved with the purchase of real estate and much of this financing and insurance comes from outside the state. The purpose of these allegations is to show the interstate connection of the respondents' activity, thereby raising a federal Sherman Act issue.

The U.S. District Court dismissed the complaint, finding that the respondents' activities involving real estate were purely local in nature and did not substantially affect interstate commerce. The U.S. Court of Appeals affirmed, and the petitioner appealed.

In vacating the judgment and remanding the case, the U.S. Supreme Court reasoned that it is possible for the petitioners at the evidentiary stage of the case to demonstrate that the local real estate brokerage activities have a not insubstantial effect upon interstate commerce, and thus may violate the Sherman Act:

> [I]t cannot be said that there is an insufficient basis for petitioners to proceed at trial to establish Sherman Act jurisdiction. It is clear that an appreciable amount of commerce is involved in the financing of residential property in the Greater New Orleans area and in the insuring of titles to such property. The presidents of two of the many lending institutions in the area stated . . . that those institutions committed hundreds of millions of dollars to residential financing during the period covered by the complaint. The testimony further demonstrates that this appreciable commercial activity has occurred in interstate commerce. Funds were raised from out-of-state investors and from interbank loans obtained from interstate financial institutions. Multistate lending institutions took mortgages insured under federal programs which entailed interstate transfers of premium and settlements. Mortgage obligations physically and constructively were traded as financial instruments in the interstate secondary mortgage market. Before making a mortgage loan in the Greater New Orleans area, lending institutions usually, if not always, required title insurance, which was furnished by interstate corporations.

McClain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232 (1990).

The power of federal courts to hear cases that arise under the Constitution, treaties, and federal statutes is called *federal question jurisdiction*. Most federal question matters involve the application or interpretation of one of the many federal statutes, such as the Clean Water Act, the Civil Rights Act, or the Internal Revenue Code.

The power of federal courts to hear cases involving citizens of different states is called **diversity jurisdiction**. Diversity jurisdiction exists because at the time the Constitution was adopted, many people believed that a citizen of one state would not get a fair trial if sued in another state. Consequently, those who drafted the Constitution included in it a provision extending federal judicial power to disputes between citizens

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of different states. Diversity jurisdiction places a substantial burden on the federal courts because they are often applying state law; therefore, Congress has limited the diversity jurisdiction of these courts to cases in which the dispute involves more than $75,000, exclusive of interest and court costs.

Case Example

Able was a resident of New Hampshire and Baker a resident of New York. The two entered into a contract in which Baker agreed to purchase a large resort hotel in New Hampshire from Able. Baker breached the contract, and Able sued her in a New Hampshire court for $850,000 in damages. Baker may transfer the case to the federal district court because the parties are residents of different states and the amount in controversy exceeds $75,000.

Legal entities such as corporations and LLCs are citizens of the state where they are organized and where they have their principal place of business (dual citizenship). Thus, in order to satisfy diversity of citizenship for federal jurisdiction, there must be complete diversity, such that no party has citizenship in a state where the other party possesses citizenship.

Case Example

Harrington Gas & Hair Blowers, Inc., is incorporated in Ohio and has its principal place of business in California. It sues Keough Moorman in Ohio for nonpayment of contractual work for $65,000. The suit cannot be brought in federal court because the amount in controversy is not more than $75,000 and both parties are citizens of Ohio.

Federal Preemption Doctrine

Ours is a system of federalism. In this system, there is a dual governmental structure: federal and state. There are separate court systems based on federal and state jurisdiction. In the matter of substantive law, it is sometimes necessary to determine whether the federal government, the state, or both have the power to legislate in an area (for example, housing). This may involve a delicate matter of balancing aided by constitutional principles, controlled by Article VI, Section 2, of the U.S. Constitution, which provides that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." This Supremacy Clause has evolved to mean that the national government, in exercising any of the powers enumerated in the Constitution, must prevail over any conflicting or inconsistent state exercise of power.

The conflict between state and federal legislation is expressed in the federal **preemption doctrine**, which holds that certain matters are of such a national, as opposed to local, character that federal laws preempt or take precedence over state laws. As

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such, a state may not pass a law inconsistent with the federal law. For example, Congress has passed comprehensive laws in the area of anti-discrimination in housing. States and their local jurisdictions are precluded or preempted from passing laws in this area that would be less protective than the federal laws.

Generally speaking, a federal law will preempt a state or local regulation when

- Congress expressly states in the statute that it preempts state law,
- congressional intent to preempt is inferred from the existence of a comprehensive federal regulatory scheme in the area, or
- state law conflicts with federal law or its purposes.

The next case examines the preemption doctrine in light of a conflict between a city's desire to regulate housing and the federal government's legislation in the area of unauthorized immigrants.



Villas at Parkside Partners v. The City of Farmers Branch

United States Court of Appeals
675 F.3d 802 (Fifth Cir. 2012)

Background. A housing ordinance required all adults living in rental housing within the City of Farmers Branch, Texas (the City), to obtain an occupancy license from the building inspector conditioned upon the occupant's citizenship or lawful immigration status. The federal district court found that the ordinance was preempted by federal law and, thus, infringed upon Congress's constitutional power. The City appealed the district court's summary judgment decision.

Decision. The Fifth Circuit Court of Appeals upheld the district court's decision striking down the ordinance as contrary to the U.S. Constitution.

Judge Reavley: We conclude that the ordinance's sole purpose is not to regulate housing but to exclude undocumented aliens, specifically Latinos, from the City of Farmers Branch and that it is an impermissible regulation of immigration. We hold that the ordinance is unconstitutional and presents an obstacle to federal authority on immigration and the conduct of foreign affairs.

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. . . [The City previously] express[ed] frustration over the federal government's purported failure to enforce immigration laws and to prevent the "influx of illegal aliens . . . estimated in the millions" that were "coming in across our most southerly border." The resolution declared the City's intent to "take whatever steps it legally can to respond to the legitimate concerns of our citizens." . . .

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In the field of immigration, the power to regulate "is unquestionably exclusively a federal power." The exclusivity of Congress's power stems from multiple constitutional sources, "including the Federal Government's power '[t]o establish [a] uniform Rule of Naturalization,' . . . its power '[t]o regulate Commerce with foreign Nations,' . . . and its broad authority over foreign affairs." It is clear from these sources of the federal power that immigration is inextricably tied to national interests in many areas, one of the most significant of which is foreign relations. . . . Given the breadth of the Constitution's understanding of immigration

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as a domain of the federal government, state and local laws that attempt to affect aliens will, with limited exceptions, be preempted by the national interest. . . .

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The text of the Ordinance, and the circumstances surrounding its adoption, show that its purpose and effect are to regulate immigration, an area of federal concern, rather than to regulate housing. The preamble to the Ordinance specifically states that the Ordinance is intended to aid the enforcement of "federal immigration law," not housing law. . . .

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. . .The regulatory scheme created by the Ordinance has none of the indicia one would expect of a housing regulation. For example, the Ordinance says nothing about the location, design, construction, maintenance, ownership, or alteration of residential rental units. It also provides no regulation for the number of residents or the permitted uses of rental housing. The Ordinance creates an application process for an occupancy license, but the applicant is not required to submit information about his employment or credit history, his past residence information, or his criminal history. All that is required, besides standard information such as one's name and address, is one's citizenship information. . . .

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The removal of illegal immigrants is thus the precise and intended effect of the Ordinance. Although the Ordinance provides no express removal mechanism, removal is the practical result of the Ordinance because it regulates who may be an occupant based solely on immigration status. This functional denial to aliens of access to rental housing based on their immigration status is "tantamount to the assertion of the right to deny them entrance and abode," an area that is historically one of federal, not state, concern.

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As noted above, the national government is entrusted with significant constitutional power to regulate immigration flowing from . . . its power over foreign affairs. In light of this close relationship between immigration and foreign relations, then, it is necessary that the federal government, rather than individual states, have "broad" power over the presence of aliens, including the power to "determin[e] what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." Indeed, Congress has exercised its exclusive power by enacting the Immigration and Nationality Act ("INA"), which "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" . . .

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Because the Ordinance has no other purpose than to exclude undocumented aliens who are in the city seeking residence, it adds to the serious national federal problem with immigration and the relations of this country with other countries, especially Mexico. Growing evidence of this national problem can be seen in federal court litigation, as numerous state and local governments seek to target problems, real or imagined, with illegal immigrants. . . .

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This country has a large Latino population and millions of Latinos live here without legal permission. However, the great majority live quietly, raise families, obey the law daily, and do work for our country. For all that they contribute to our welfare, they live in constant dread of being apprehended as illegal aliens and being evicted, perhaps having their families disrupted. As unsatisfactory as this situation is it is the immigration

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scheme we have today. Any verbal and legal discrimination against these people, as Farmers Branch exemplifies by this ordinance, exacerbate the difficulty of that immigration scheme. This is a national problem, needing a national solution. And it impacts the nation's relations with Mexico and other nations. . . .

Because the sole purpose and effect of this ordinance is to target the presence of illegal aliens within the City of Farmers Branch and to cause their removal, it contravenes the federal government's exclusive authority over the regulation of immigration and the conditions of residence in this country, and it constitutes an obstacle to federal authority over immigration and the conduct of foreign affairs. The ordinance is unconstitutional, and the judgment of the district court is affirmed.

Affirmed.

Update: The Fifth Circuit Court of Appeals **[726 F.3d 524 (2013)]** reviewed this case ***en banc***—that is, the full bench of the Fifth Circuit heard the case. In affirming the district court, the majority came to virtually the same reasoning and the ordinance was preempted by the federal immigration laws.

Note: The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) grants the Department of Homeland Security's Immigration and Customs Enforcement (ICE) Agency the authority to issue detainer requests to any local governments. In opposition, hundreds of urban, suburban, and rural communities have adopted sanctuary policies. Citing states' rights, unconstitutionality of IIRIRA, and safety concerns that would otherwise deter unauthorized immigrants from reporting crimes, these sanctuary cities (also called ***safe cities***) do not notify ICE or hold unauthorized immigrants for ICE pickup when they are stopped for minor criminal offenses. For a complete list of the original sanctuary cites see http://ojjpac.org/sanctuary.asp.

Affirmed.

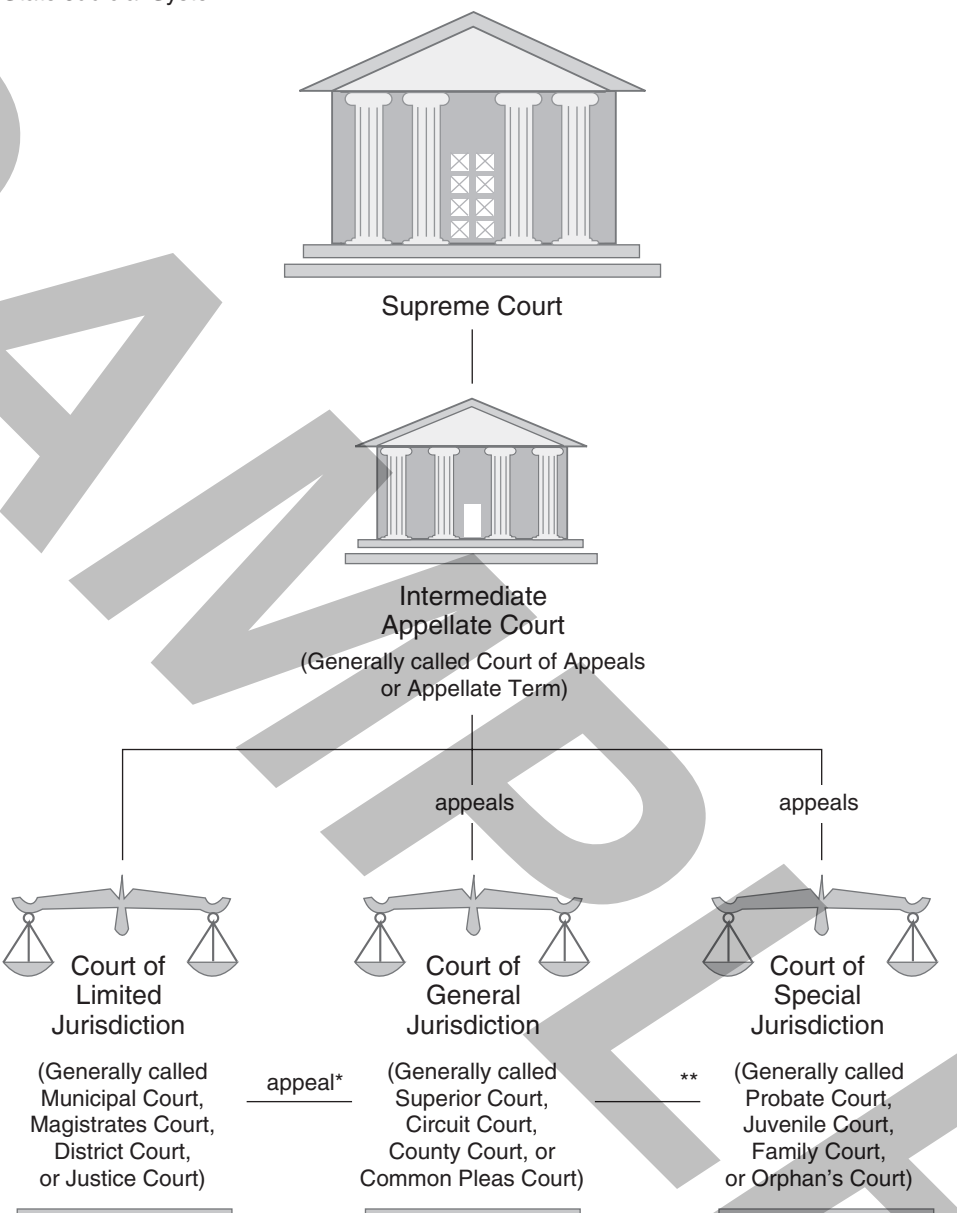
1. *Why was the ordinance deemed to be unconstitutional?*
2. *Could the ordinance have been modified to avoid an unconstitutional result and yet achieve the same objective? Explain.*
3. *Should a city or a state have the right to remove unauthorized immigrants from its borders when they are having a negative impact on its economy? Why or why not?*

State Court System

Because there are 51 independent court systems (50 states plus the District of Columbia) operating within the United States, understanding the structure of American courts might seem an impossible task. The task is, however, simplified by the existence of a pattern common to both the federal and the state systems. This structure can be visualized as a pyramid with two or sometimes three levels (see Figure 1.1).

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FIGURE 1.1: A Typical State Judicial System



* In a number of states, courts of general jurisdiction consider appeals from courts of limited jurisdiction.

** In many states these courts are part of the court of general jurisdiction.

State Trial Courts

Trial courts are at the base of the structural pyramid. Trial courts may be classified into three broad groups. This classification is based on the court's power to hear a case, which is termed its *jurisdiction*.

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Courts of general jurisdiction

Each state usually has a trial court of general jurisdiction. In some states, these are called *superior courts*. Other states call them *county courts*, *district courts*, *circuit courts*, or *courtsof common pleas*. These courts have the power to hear a wide variety of civil and criminal cases. Ordinarily, there are no limits on the court's monetary jurisdiction, and the court has the power to grant extraordinary remedies, such as injunction and specific performance. An *injunction* is an order forbidding a person to perform a particular act. Conversely, an order for *specific performance* commands that a particular act be performed.

In a number of states, these courts hear appeals from administrative agencies and courts of limited jurisdiction (see Figure 1.1). Trial by jury is available for most cases. The court generally has statewide jurisdiction but is organized on a district or county basis. These courts are generally considered the cornerstones of judicial administration.

Courts of limited jurisdiction

Many of the more populous states have created trial courts that are limited to hearing cases in which the damages are less than a certain amount, fixed by statute. Depending on the state, this amount ranges from a few hundred to thousands of dollars. These courts also generally have criminal jurisdiction over cases involving petty crimes and misdemeanors. These courts are commonly called *municipal courts*; other states call them *justice courts*, *magistrates' courts*, or *district courts*. Generalizations about courts of limited jurisdiction are difficult to make. Their authority differs widely from state to state. In metropolitan areas, their ceiling is sometimes as little as $10,000 or as high as $100,000. Their jurisdiction in criminal cases is ordinarily limited to misdemeanors, and the courts are operated by full-time judges with large staffs. In some rural areas, these courts hear only the most trivial cases and may be presided over by part-time judges or other legal officials with no legal training. Courts of limited jurisdiction are important to the legal system because they take pressure off of the courts of general jurisdiction.

Courts of special jurisdiction

Either because of tradition or because of the peculiar needs of judicial administration, many states have established special courts to resolve a wide variety of disputes. Traffic cases are generally tried in a special court or a special division of a trial court because so many traffic offenses are processed that they would clog the regular judicial machinery.

Juvenile and domestic relations cases are also heard by special courts. These courts provide privacy and informal procedures that are effective in dealing with juvenile and family matters.

Numerous states also have separate probate courts that exercise jurisdiction over the administration of decedents' estates. A real estate broker or sales associate who is involved in a transaction that involves a decedent's real property often has to deal with a probate court. In some states, probate courts have jurisdiction in guardianship, adoption, and competency proceedings.

All jurisdictions have some type of small claims court, which resolves controversies below a specified amount (e.g., $5,000). These courts tend to charge smaller filing fees, are on a faster track, are less formal than the other courts, and thus the parties are seldom represented by lawyers.

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State Intermediate Appellate Courts

About 80% of the states have, by constitution or statute, established an intermediate level of appellate courts. Five states have two intermediate appellate courts. The purpose of these courts is to lighten the burden of the state's supreme court. Some intermediate appellate courts have limited powers to act as trial courts. However, the primary function of these courts is to provide appellate review. Although the extent of appellate jurisdiction is generally broad, some states place limits on the appeals that can be heard, possibly on the type of case. An intermediate appellate court, for example, might be permitted to hear all civil appeals or civil appeals only where the amount in controversy is less than a fixed dollar amount.

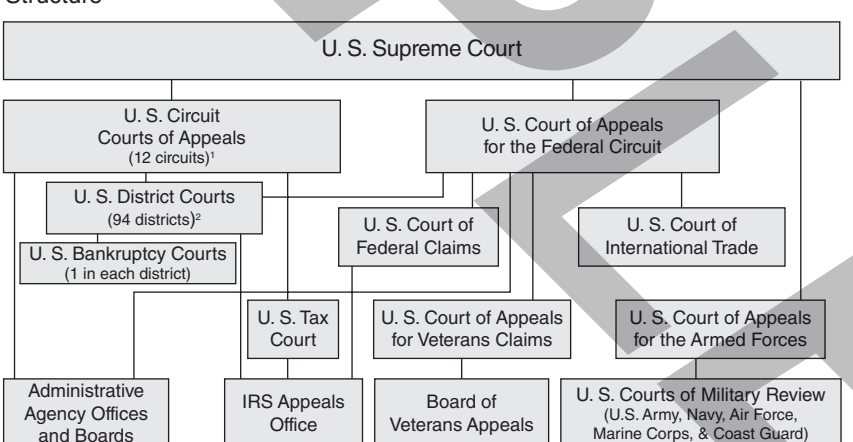
State Supreme Courts

At the apex of a state's judicial system is the state supreme court, which in most states hears appeals in all civil and criminal matters. Because of the extensiveness of the review process and the large number of appeals, most states allow their court of last resort to accept for review only cases that the justices or judges consider most important. Appeals as a matter of right may, however, often be taken in some specific cases, such as those that involve constitutionality of a state or federal statute or the death penalty.

Federal Court System

The federal court system is organized into district courts, courts of appeal, and the supreme court (see Figure 1.2).

FIGURE 1.2: Federal Court Structure



[1]There are 11 circuit courts of appeals throughout the United States, plus one in the District of Columbia.
[2]Each state has at least one district court; Puerto Rico and the District of Columbia also have a district court.

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U.S. District Courts

The U.S. district courts are the trial courts of the federal system. The United States is divided into 94 districts, each with a single district court. Almost all federal cases are initiated in these courts because they have the power to hear all types of federal cases except those assigned by Congress to special courts, such as the tax court. Each federal district court has a bankruptcy court attached to it.

U.S. Courts of Appeal

The federal intermediate appellate courts are called *U.S. courts of appeal*. The United States is divided into 12 geographic areas called circuits, with a court of appeals for each. Each court hears appeals from the federal district courts that are included in its circuit. They also hear appeals from administrative agencies. In addition, there is a court of appeals for the federal circuit that hears special appeals—for example, those from the U.S. Court of International Trade and the U.S. Court of Federal Claims, which has jurisdiction over claims against the United States.

U.S. Supreme Court

The U.S. Supreme Court is the final appellate court in the federal system. Most of the cases the Supreme Court reviews come from the U.S. courts of appeal and from the state supreme courts. The Supreme Court may review state supreme court decisions involving the federal Constitution or a federal statute.

In certain cases, the Supreme Court must hear an appeal. One example is a case in which a U.S. court of appeals has held a state statute unconstitutional. Another is when a lower federal court has held a federal statute unconstitutional and the United States is a party. In most cases, the party seeking review must first ask the Supreme Court to hear the case by petitioning for a *writ of certiorari*. This is a writ in which a superior court orders a lower court to supply the court record of a particular case. The Supreme Court denies most petitions for certiorari because it does not have the time to hear every case and therefore chooses only what it considers the most important cases. Currently the court hears about 80 cases per term out of 7,000–8,000 petitions.

The Civil Process

Legal actions may be broken down into criminal, civil, and regulatory. In real estate, a criminal court action may occur when a sovereign—federal, state, or municipality—prosecutes a crime against an individual or an entity for violating a statute, ordinance, or administrative rule or order. A prosecutor or a district attorney who works for the prosecuting jurisdiction ordinarily initiates the criminal action against the accused. For example, assume that a real estate salesperson embezzles money from a client's escrow fund. Embezzlement occurs when someone who has a special relationship of trust with another and holds that client's monies or something of value converts it to his

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or her own use. This constitutes a crime; in all jurisdictions, embezzlement is illegal. Defendants (the accused) may be charged with the crime and will have an opportunity to defend themselves in court and be afforded constitutional due process of law. Due process of law includes the right to an attorney, to assist the attorney in defending the charge, the right to confront and cross-examine witnesses, the right to a jury trial (in felony and serious misdemeanor cases), and the right not to testify. Other crimes that occur within the field of real estate include arson, theft, rental fraud, rent skimming, forged deeds and real estate–related documents, fraudulent real estate schemes, and securities fraud associated with real estate investments.

In contrast to criminal wrongs and actions, civil wrongs within the real estate industry are more common. Most of the material, including the cases and case examples contained in this book, are civil in nature. The process within the civil arena involves four stages: the pleading stage, the discovery stage, the trial stage, and the appellate stage.

The Pleading Stage

The suit is filed by an aggrieved party as a civil complaint (called a petition in the federal court). The complaint is the first pleading. It states concisely the factual allegations that constitute the civil action the plaintiff (the aggrieved person) has against the defendant (one who defends the action) and the remedy or relief the plaintiff seeks. An example of a complaint is found in Figure 1.3. The defendant is then required to file an answer with the court within a period of time ordinarily ranging from 20 to 30 days, depending upon the jurisdiction's rules of civil procedure. This answer, the second pleading, responds to each of the paragraphs contained in the complaint by admitting, denying, or stating an inability to answer for lack of knowledge necessary to form a belief as to the truth or falsity of the allegation. The defendant may also include a counterclaim, which asserts a cause of action against the defendant and delineates the factual allegations to support that claim. In such case, the plaintiff will need to respond by the pleading designated as a reply by similarly asserting an admission, a denial, or a statement that he or she is unable to respond due to a lack of knowledge. After the complaint and the answer, and in some cases a reply, is filed, the question that must be resolved to decide the case should be apparent.

Two common motions may be interjected at this stage of the process: the motion to dismiss and the motion for judgement on the pleadings. The motion to dismiss is filed by a defendant and attacks the legal sufficiency of the opponent's cause of action. This includes a contention that it was filed in the wrong court or by a wrong party, or beyond the time of the statute of limitations. It may also claim that the stated allegations do not constitute a civil wrong. A second motion that may be interposed after all the pleadings have been filed is the motion for judgment on the pleadings. In essence, this motion is similar to the motion to dismiss except it looks at all the pleadings and on that basis asserts that it is clear that one party should prevail. For example, the answer states that in a breach of real estate contract action, the plaintiff maintains that there was a breach and injury in the amount of $600,000. The defendant admits to the breach but

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maintains that damages were $400,000. In this case, a motion for partial judgment on the pleadings would be in order. Because the question of breach of contract is admitted, the court would grant the judgment on that issue and the case would proceed on the issue of damages to the next stage. Of course, the parties may agree to a settlement at any stage of the proceedings.

The Discovery Stage

At the discovery stage, each party seeks to learn as much about the other party's case as possible. This is accomplished through the discovery rules, which are available in the state and federal courts. Rule 26 of the Federal Rules of Civil Procedure triggers some automatic discovery that requires the parties to produce the names of witnesses, including expert witness reports, and documents supporting alleged damages.

The deposition is a discovery tool whereby parties and witnesses may be questioned in person or remotely and are required to answer under oath questions that are relevant or may lead to relevant evidence. Written documents of questions may also seek the same type of information as a deposition; however, these are fixed questions, not immediately susceptible to follow-up questions, and are restricted to a set number of questions. Requests for production of documents, such as deeds, wills, leases, mortgage statements, and other documents relevant to the lawsuit are within the discovery rules. The request to physically inspect the premises may be essential in a boundary dispute case and the request for a mental examination may be essential in a case that involves determining the mental competency of a person who signed a will, a deed, or a mortgage.

After the discovery information has been disclosed, parties often file a motion for summary judgment based on the facts as discovered. This motion tests the sufficiency of each party's case. Each side would argue that there remains no dispute on the facts and that, based on the facts applied to the law, the court must find in the movant's favor. The court evaluates a memorandum of law and, in some cases, oral arguments by viewing them in the light most favorable to the respondent. Should the court agree with one of the parties, it would issue a judgment in favor of that party. It is not unusual at this stage for there to be a status report or a pre-trial conference for the court to evaluate where the parties are in their trial preparation and in their settlement negotiations.

The Trial Stage

The parties are ordinarily entitled to a jury trial if money damages are at issue. They may, however, choose to waive the jury trial and have the case tried before a judge. Nonmonetary cases, referred to as cases of equity, are ordinarily not decided by a jury. In the event that a party is looking for an injunction (an order by the court to stop polluting its property, for example) the matter would be decided by a judge. Similarly, should a party be looking for some affirmative remedy (an order of the court to transfer property into the plaintiff's name, for example) this would be decided by the court without a jury.

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Here are the segments of the trial stage:

- **Voire dire.** The questioning of the jurors and the seating of the jury are carried out.
- **Opening statements.** The plaintiff, who has the burden to prove the case by the greater weight of the evidence, goes first and outlines what the evidence will show. Then the defendant delivers an opening statement, which outlines its version of the evidence that will be presented.
- **Cases-in-chief.** The plaintiff presents evidence by way of witnesses and exhibits. Each side has an opportunity to cross-examine the other side's witnesses. Exhibits may be any relevant documents such as spreadsheets, property surveys, plat maps, or photographs. Exhibits also include audio files, video files, soil samples, and any other tangible or intangible evidence. Then the defendant goes forward with its case in chief.
- **Closing arguments.** Each side has an opportunity in a closing argument to tie the facts together and suggest findings and inferences that are in the light most favorable to their client. The plaintiff has the last word with its closing argument.
- After the arguments, either party may file a motion for a directed verdict, arguing that there is nothing for the jury to consider because, based on the evidence, there can only be one logical conclusion. The judge will rule on the motions and either permit the case to go to the jury or agree with a party and enter judgment in that party's favor.
- **Instructions to the jury.** The judge will then instruct the jury on the law, which the jurors are bound to follow.
- **Verdict.** The jurors are the finders of the facts, and they apply the facts based on the evidence and apply it to the law that the court delivered in its instructions. After deliberations, the jury returns with a verdict for either the plaintiff or defendant. The losing party has an opportunity to interject a motion for judgment notwithstanding the verdict (NOV). Similar to the motion for a directed verdict, the attorney argues that even though the jury entered a verdict unfavorable to the client, it was wrong because it was contrary to the verdict that reasonable minds would otherwise reach.
- **Judgment.** The judge will rule on the motion NOV. If overruled, the court will proceed to enter judgment in accordance with the jury verdict. The losing party may then proceed, usually within 30 days, to file a motion for a new trial based on alleged errors the judge made when instructing the jury or ruling on motions or objections.

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The Appellate Stage

Each party has the right to appeal an adverse decision to a higher court. The appeal is heard by a panel of at least three judges. It is based on alleged errors that the judge made uring the trial. Such errors include when a judge

- permitted a witness to testify as an expert when the witness did not meet the proper qualifications,
- failed to instruct the jury on the law of legal descriptions within the deed,
- excluded significant evidence about the broker's agreed-upon commissions, or
- admitted hearsay evidence about what a witness said about the decedent's desire to dispose of his property.

Appellate courts rule on the outcome of the appeal based on written and oral arguments. They do not hear new testimony. The appellate court may decide to affirm or uphold the trial court's judgment, reverse the judgment, send it back to the trial court for reconsideration or modification, or modify the judgement itself. In many states, the losing party may seek review by a higher appellate court, usually the supreme court of the state or of the United States.

Alternative Dispute Resolution

Because of the length of the process and the expense of litigation through the courts, it is not uncommon for disputants to avail themselves of alternative forms of dispute resolution. **Alternative dispute resolution (ADR)** may take many forms. For example, it can take the form of *mediation*, when a neutral third party listens to both sides and tries to facilitate a settlement. The mediator cannot force the parties to reach a compromise. The mediator focuses the parties on what they are willing to do to settle the dispute. The mediator may adopt a facilitative posture, urging the parties to find their own solution, or the mediator may provide the parties with an advisory opinion suggesting a solution to the dispute. Many argue that ADR is faster, cheaper, and less emotionally draining than traditional litigation.

Arbitration is another form of ADR. It may involve the formal submission of the dispute to a nonlawyer arbitrator. The expertise of the arbitrator may be as a business professional. The expertise of the judge in litigation is the law. A person may choose arbitration by statute, by court order, or by contractual agreement. Usually the arbitrator's decision is binding on the parties. Contractual agreement to arbitrate a dispute is very common today.

Frequently, mediation and arbitration clauses are included in contracts covering the sale of real estate, especially in construction contracts. There is a strong tendency of the courts to uphold those clauses as long as they manifest the intent of the parties to

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the transaction. A typical alternative resolution dispute clause contained within a real estate purchase contract reads as follows:

> The parties agree that any dispute arising prior to or after Closing, related to this Real Estate Purchase contract, shall first be submitted to mediation. If mediation fails, the parties agree that all disputes arising out of or related to this Purchase Contract shall then be submitted to mandatory binding arbitration which shall be conducted by the American Arbitration Association. Nothing in this Section shall prohibit any party from seeking a judicial decree compelling arbitration or judicial enforcement of an arbitration award.

Case Example

Plaintiffs contracted to purchase two condominiums to be built by Morinda and paid $256,400 in earnest money to reserve the properties. The two purchase contracts included a dispute resolution clause providing for a two-step process of formal mediation and, if necessary, binding arbitration. The contracts required Morinda to substantially complete construction within a specified period. Eventually, delay in construction brought the parties into mediation, pursuant to the contractual dispute resolution provision. When mediation failed to resolve the matter, plaintiffs filed a complaint in court for breach of contract. Morinda responded to the complaint by moving for the court to compel arbitration pursuant to the agreement. The trial court denied arbitration on two grounds: there was no dispute because Morinda did not deny that it breached the contract in response to the complaint, and Morinda waived the arbitration by accepting service of the complaint. Morinda appealed.

The court reversed the judgment, finding that a dispute was presumed because both parties had submitted to mediation and that mere acceptance of the complaint did not constitute a waiver because Morinda moved the court for arbitration in his response to the plaintiffs' complaint.

See *Lamkin v. Morinda Properties Weight Parcel*, No 11-4022 (10th Cir. Court of Appeals, 2011).

The National Association of REALTORS® provides some helpful hints on its website about mediation and conflict resolution. The American Arbitration Association offers arbitration and mediation services and provides a list of qualified experts from which to select. Similarly, the Better Business Bureau offers formal and informal alternative dispute resolution services. Performing an internet search for "real estate organizations that do mediation" will yield scores of professionals who do this service privately. Another possibility is to call the local real estate association and inquire about conflict mediation programs (see Figure 1.3 for a demand for mediation form).

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FIGURE 1.3: Demand for Mediation Form

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California Association of REALTORS® Real Estate Mediation Center for Consumers

DEMAND FOR MEDIATION (FORM DM)

Notice Provided To: Date: _____

_____
(Name(s))

_____
(Address)

_____
(City, State, Zip)

RE: Demand for Mediation

_____
(Address of property that is the subject matter of the demand for mediation)

1. Under paragraph 26A of the California Association of REALTORS® California Residential Purchase Agreement and Joint Escrow Instructions (C.A.R. Form RPA-CA) (or ☐ _____ _____("Agreement"), dated, _____, Buyer and Seller agreed to mediate any dispute or claim arising out of the Agreement.
2. This letter is to inform you that mediation is demanded as required under the Agreement. We have elected to mediate at the California Association of REALTORS® Consumer Mediation Center. Full details, including a list of mediators and fee schedule is available at: www.consumermediation.org.
3. The following mediators are proposed for the mediation of this dispute:_____ _____; however, you are invited to propose your own recommendations as well.
4. Please confirm your agreement to mediate our dispute at the C.A.R. Consumer Mediation Center on or before 5:00 p.m. (or ☐ _____) on _____(date) to the Contact Party listed below.
5. A failure to timely respond to this demand may be interpreted as a refusal to mediate. Also, according to the Agreement, if any party "refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to the party in any such action."
6. Mediation is hereby demanded to resolve the following dispute(s):_____ _____ _____ _____ _____ _____ _____.

FIGURE 1.3 (CONTINUED): Demand for Mediation Form

7. Contact Party: (Check all acceptable methods of contact)
   (Name) _____
   ☐ (Address) _____
   ☐ (Phone) _____ ☐ (Fax)_____
   ☐ (E-mail) _____
8. This demand is made with a reservation of all rights and remedies under the Agreement and shall not be construed as a release or waiver of any such right or remedy. A refusal to respond to this demand for mediation may force the undersigned to seek legal representation to enforce the terms and obligations of the Agreement.

Sincerely,

_____ _____
(Signature of Party Demanding Mediation) (Print Name)

_____ _____
(Signature of Party Demanding Mediation) (Print Name)

CC:
_____
_____
_____
_____

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THE CHANGING LANDSCAPE

Our legal system is modeled after the English system, referred to as a common-law system. Based heavily on case law and precedent, it is designed to provide certainty and fairness and a judicial process that is orderly. Society needs to have its conflicts and grievances aired and resolved so there is finality. Citizens need to have a trust in the system of law in order to feel that they have been given a "fair shake" under the law.

For every case that ends in a trial, 99 cases are settled short of trial. For every case that is filed in court, thousands of disputes are resolved short of filing a lawsuit. Conflict is just a part of human nature and life, but some are questioning whether there is a better system. In the post-modern society, there are those who are suggesting that our present jurisprudential system is worn out and needs to be replaced with a better approach. Our current model is constructed for an adversary system—lawsuits, motions, discovery, briefs, trials, appellate arguments are all based upon winning through the best arguments and skills. This requires a costly infrastructure with a burgeoning bureaucracy to support the system, not to mention the costs to litigants, taxpayers, and society.

Ours is not the only system. Some primitive systems solved disputes by dueling, or ordeal. Thankfully, we have moved away from those methods. Still, perhaps we can be creative in developing an alternative to a system that is fraught with advocacy. Some people argue for a system that has greater incentive for, and emphasis on, alternative dispute resolution approaches that would economize and civilize our society. Such a system would require restructuring the very sociological foundation and core, undergirded with early education that emphasizes conflict prevention and resolution by cooperation, negotiation, mediation, and other creative alternatives to full blown litigation. In support of a streamlined approach, some advocate that the jury system should be abolished in the United States, at least for noncriminal cases.

The courthouse may look very different in the future. Already there are attempts in larger counties to rely less on human personnel and in-person filings by moving to electronic filings and distant court appearances through telephonic, video, and other remote conferencing methods. This is only a start to changing the mindset of the populace and directing it toward constructive ways of dealing with the friction that arises in a pluralistic society where competing interests is more common than cooperative approaches to avoiding and resolving disputes.

- *How might a courthouse be structured so there is more emphasis on alternatives to advocacy and more on cooperative alternative resolution?*

STUDY QUESTIONS

1. Name the courts in your state having general jurisdiction, limited jurisdiction, and final jurisdiction.
2. Define the doctrine of precedent and indicate limitations on the use of precedent.

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3. During the past 50 years, statutory law has gradually replaced some judge-made or decisional law. Explain the reasons for this.
4. When should federal regulation be permitted to preempt state law?
5. Do you think that alternative dispute resolution (ADR) clauses in contracts undermine the right to a day in court? Explain.

CASE STUDIES

1. Sorensen, a licensed real estate broker, entered into a listing agreement with Schomas. Sorensen located a buyer who submitted a purchase offer. Schomas refused to accept the offer or to pay Sorensen the commission that was clearly owed. Enraged, Sorensen threatened to "take the case to the United States Supreme Court, if necessary." Explain why Sorensen would be unable to do this.
2. Taylor was involved in litigation involving a real estate problem. Taylor's friend Bennett testified on Taylor's behalf at the trial. Bennett's testimony was critical to the outcome of the case. Taylor lost the case and decided to appeal. When Taylor informed Bennett of his intention to appeal, Bennett told him that he could not testify a second time because the experience had drained him emotionally. Taylor told Bennett that it would not be necessary for him to testify again. Explain why.
3. Stanley Beck purchased a remote farm to which he moved with his family. After living there for a time, Beck became disturbed because his children had a long walk to the school bus. The walk was especially dangerous during the winter because there were no sidewalks and the road was often icy. Beck asked an attorney whether the purchase could be rescinded on the grounds of fraud. Beck contended that the seller, knowing Beck had school-age children, should have informed him that the walk to the bus stop could be dangerous in winter.

   The attorney told Beck that, in their state, silence could not be the basis for fraud unless the seller, knowing of a hidden defect in the property that could cause injury, failed to disclose it. The attorney stated that there was no precedent for the proposition that a long walk on an icy road to a school bus is a hidden defect that a seller is bound to reveal. Explain what the attorney meant by precedent and why the fact that no precedent existed was significant.
4. Howery's house burned down. When he demanded payment from his insurer, Allstate, it refused to pay, accusing him of arson. Howery sued Allstate in Texas state court to recover under his insurance policy. Subsequently, Allstate made a motion to remove the case to a federal district court. Federal law permits a defendant to remove a case from state to

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federal court, provided the plaintiff could have brought the suit in federal court at the start. What would Allstate have to show in order to remove to federal court? *Howery v. Allstate Insurance Company*, 243 F.3d 912 (2001).

5. Jayne Ridings was out for a casual morning horse gallop around her property when she saw a greyhound dog transverse her path. Feeling rather sporty, she followed the greyhound onto Julius Neighbor's property and consequently ran over a number of shrubs and newly planted flora, causing damage to the property.

   Neighbor filed a lawsuit seeking $4,000 in damages. The court found for Neighbor, a ruling Ridings appealed to the highest court of the jurisdiction. The appellate court ruled: "One who enters another's land intentionally when following a stray animal in sport is guilty of trespass and must bear any damages that results from the entry."

   The court continued to reason: "An innocent intrusion into another's property that causes injury would likewise be actionable. However, entry upon the property for emergency purposes would not result in actionable damages." Would this statement be deemed precedent or dicta?

6. Ohav Shalom Synagogue hired a concrete contractor to install a walkway from the parking lot to the building entrance. Within three months after the installation, the custodian of the synagogue noticed that the concrete was cracking, pocking, and crumbling in various places. The contractor refused to do anything about it and Ohav Shalom sued. What type of evidence would strengthen Ohav Shalom's case against the concrete contractor?

7. In May 1990, the Lees purchased a home from Cecil and Joyce Heftel for the purchase price of $3,100,000. On May 23, 1990, the parties executed a Deposit Receipt, Offer, and Acceptance (DROA) contract for the sale of the aforementioned residential property. Paragraph 5.3 of the DROA's Addendum No. 1 provides the following:

   On July 7, 1992, the Lees filed a complaint in circuit court alleging intentional or negligent misrepresentation, fraudulent concealment, breach of warranty, dual agency, and malicious and wanton conduct. On September 1, 1992, the Heftels filed a motion contending that the DROA expressly provided that "any dispute or claim in law or equity must first be submitted to mediation and then, if necessary, binding arbitration under the rules of the American Arbitration Association." The Lees opposed said motion and argued that "when a [p]laintiff seeks 'revocation' of a contract that an arbitration clause should not be enforced." Which is the winning position? *Lee v. Heftel*, 911 P.2d 721 (Hawaii 1996).

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FURTHER READING

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ISBN: 978-1-0788-2246-6