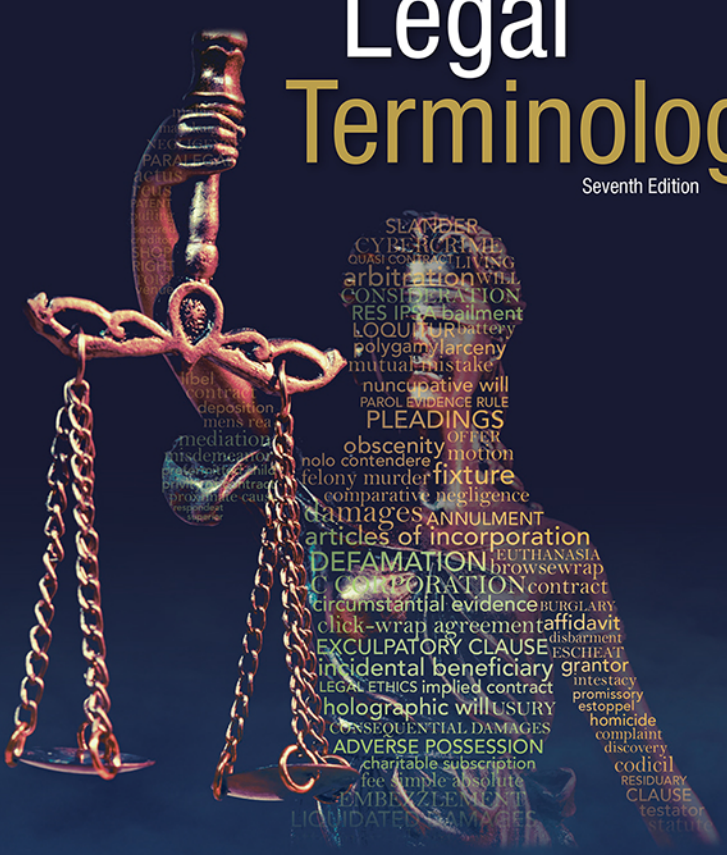
Legal Terminology

Seventh Edition



Kent D. Kauffman | Gordon W. Brown

Seventh Edition

LEGAL TERMINOLOGY

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This is dedicated to my wife, Karen, and my son, Reagan. Karen, your radiant spirit refreshes me every day, and without your encouragement I would never have the privilege to have my name on this book's cover. Reagan, no earthly honor could ever make me more proud and no adventure could be more rewarding than being your father.

KENT D. KAUFFMAN

For the 30 years that I taught full time at North Shore Community College, practiced law part time, and wrote textbooks such as this, I have many people to thank. Among them are talented people in the fields of education, publishing, and law. The ones who bore the burden of my efforts, however, are my wife, Jane, for her never-ending support and encouragement, and my children, Steven, Matthew, Deborah, Jennifer, Timothy, and David. They grew to be outstanding people even without my being with them during many of their growing-up activities because of my strong work ethic. It is to these wonderful family members that this book is dedicated with many thanks and much love.

GORDON W. BROWN

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PREFACE

Legal Terminology, Seventh Edition has been revised to improve accuracy and currency. This text is designed to develop your understanding of legal terms in concert with their usage in the legal field. Emphasis is placed on learning terms in context through the study of law itself and on using legal terminology in many different ways, rather than relying on rote memorization of terms. The short easy-to-understand chapters are written in a lively manner to hold your attention and engage your interest in the law.

NEW TO THIS EDITION

- Major revisions and updates to the primary legal authority or legal doctrines presented in every chapter.
- "Learning Objectives" are now included and begin each chapter.
- More legal citations added to existing statutes and case law throughout the text.
- New chapter on the Uniform Commercial Code.
- New "Terms in Action" added throughout the chapters.
- New "Web Wise" features throughout the chapters.
- New material on e-Contracts and cyber law.
- New additions to the Glossary, including over 20 new terms with definitions.
- Updated Instructor's Materials, including a new test bank.

INSTRUCTOR SUPPLEMENTS

Instructor's Manual with Test Bank. Includes content outlines for classroom discussion, teaching suggestions, and answers to selected end-of-chapter questions from the text. This also contains a Word document version of the test bank.

TestGen. This computerized test generation system gives you maximum flexibility in creating and administering tests on paper, electronically, or online. It provides state-of-the-art features for viewing and editing test bank questions, dragging a selected question into a test you are creating, and printing sleek, formatted tests in a variety of layouts. Select test items from test banks included with TestGen for quick test creation, or write your own questions from scratch. TestGen's random generator provides the option to display different text or calculated number values each time questions are used.

PowerPoint Presentations. Our presentations are clear and straightforward. Photos, illustrations, charts, and tables from the book are included in the presentations when applicable.

To access supplementary materials online, instructors need to request an instructor access code. Go to **www.pearsonhighered.com/irc**, where you can register for an instructor access code. Within 48 hours after registering, you will receive a confirming e-mail, including an instructor access code. Once you have received your code, go to the site and log on for full instructions on downloading the materials you wish to use.

ALTERNATE VERSIONS

eBooks. This text is also available in multiple eBook formats. These are an exciting new choice for students looking to save money. As an alternative to purchasing the printed textbook, students can purchase an electronic version of the same content. With an eTextbook, students can search the text, make notes online, print out reading assignments that incorporate lecture notes, and bookmark important passages for later review. For more information, visit your favorite online eBook reseller or visit www.mypearsonstore.com.

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Our hope is that this book will provide to instructors a clear roadmap for navigating the courses for which this book is used, and to the students a treasure chest of terms and principles that will assist you throughout your legal courses and into your careers.

ABOUT THE AUTHORS

Kent D. Kauffman is Associate Professor of Business Law at Purdue University Fort Wayne (formerly called Indiana University Purdue University-Fort Wayne), in Fort Wayne, Indiana. He is licensed to practice law in Indiana and is certified as a mediator in Indiana. He is a summa cum laude graduate of Temple University and a graduate of The Dickinson School of Law of the Pennsylvania State University. For 15 years, Professor Kauffman was the Chair of the Paralegal Studies Department at Ivy Tech Community College in Fort Wayne, Indiana.

Professor Kauffman is the author of various academic journal articles and other books, including *Legal Ethics*, in its third edition and published by Delmar Cengage Learning. He is a multiple recipient of Who's Who in American Education® and Who's Who in American Law®. Professor Kauffman is the recipient of various teaching awards, including being inducted into the Indiana University Faculty Academy on Excellence in Teaching (FACET), as well as being awarded on multiple occasions as Professor of the Year by Delta Sigma Pi, his university's co-educational business fraternity.

Gordon W. Brown, is a Professor Emeritus of North Shore Community College, Danvers, Massachusetts, where he taught for 30 years. He also taught for two years at Pepperell High School, Pepperell, Massachusetts, and for six years at Endicott College in Beverly, Massachusetts.

In addition to writing the first five editions of this book, Professor Brown is the author of the first three editions of *Administration of Wills, Trusts, and Estates* published by Delmar Cengage Learning. Over a 30-year period, he co-authored eight editions of *Understanding Business & Personal Law* and seven editions of *Business Law with UCC Applications*, published by McGraw-Hill.

In 1998, Professor Brown was awarded the Outstanding Educator Award from his alma mater, Salem State University. He received his law degree from Suffolk University and practiced law part time while teaching full time. He is a retired member of the Massachusetts and federal Bars.

PART ONE

Terms Used in Practice and Procedure

1

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CHAPTER 1
Court Systems and Jurisdiction

CHAPTER 2
Criminal Trial Procedure

CHAPTER 3
Civil Trial Procedure

CHAPTER 4
Defensive Pleadings in Civil Trials

CHAPTER 5
Methods of Discovery

CHAPTER 6
Pretrial Hearing and Jury Trial

CHAPTER 7
Steps in a Trial

CHAPTER 8
Legal Ethics

Whether you work as a court reporter, an office technician, a paralegal, or a business executive, knowledge of the procedures involved in taking a case to court is important. Indeed, people outside of the legal field also have an interest in court procedure, stemming either from their own personal experiences or from reading about trials and watching them in movies and on television. After differentiating between the federal and state court systems, Chapter 1 examines the subject of selecting the court, including the matters of jurisdiction and venue. This chapter also explores alternative dispute resolution mechanisms available for those who wish to settle disputes outside the traditional court system of litigation. Chapter 2 explains criminal trial procedure, beginning with the arrest, preliminary hearing, indictment, and arraignment, followed by sentencing and defendants' rights. Chapter 3 discusses civil trial procedure including court selection, pleadings, service of process, and attachments. Chapter 4 explains defensive pleadings including the demurrer, five commonly used motions, the defendant's answer, the counterclaim, the cross-claim, and the cross-complaint. Methods of discovery, including interrogatories, and depositions, are examined in Chapter 5. The process of impaneling the jury, including the examination and challenging of jurors, is explained in Chapter 6, and the steps in a trial are outlined in Chapter 7. Finally, Chapter 8 discusses how legal ethics rules affect the professional behavior of lawyers and their nonlawyer employees.

CHAPTER

1

Court Systems and Jurisdiction

ANTE INTERROGATORY

(literally means "the before question" and is a sneak preview of the chapter)

The power of a court to review a lower court's decision is called (A) original jurisdiction, (B) in rem jurisdiction, (C) exclusive jurisdiction, or (D) appellate jurisdiction.

LEARNING OBJECTIVES

LO 1: Describe the federal court system

LO 2: Explain when the U.S. supreme court takes cases for review

LO 3: Distinguish the three types of courts in the state court system

LO 4: Define jurisdiction and categorize the types of jurisdiction

LO 5: Contrast an in personam action from an in rem action

LO 6: Explain how jurisdiction is different from venue

LO 7: Compare and contrast negotiation, mediation and arbitration

KEY TERMS

admiralty
alternative dispute resolution (ADR)
appeal
appellate courts
appellate jurisdiction
arbitration
arbitrator
arbitrator's award
binding arbitration
caucus
cert. den.
change of venue
circuits
code
compulsory arbitration
conciliation
conciliator
concurrent jurisdiction
court
courts of appeal
diversity of citizenship
exclusive jurisdiction
federal district courts
federal question
forum non conveniens
in personam action
in personam jurisdiction

in rem action
jurisdiction
justice
local action
long-arm statutes
mandatory arbitration
maritime
mediation
mediator
mini-trial
negotiation
nonbinding arbitration
ordinance
original jurisdiction
plenary jurisdiction
quasi in rem action
res
statute
transitory action
venue
writ of certiorari

WEBSITES FOR PRONUNCIATION HELP

http://dictionary.cambridge.org/us/pronunciation/english/audio
https://www.howtopronounce.com

A **court** is a body of government organized to administer justice. There are two court systems in the United States—the federal court system and the state court systems.

FEDERAL COURTS

The federal court system, established by Article III of the U.S. Constitution, includes the U.S. district courts, the U.S. courts of appeals, and the U.S. Supreme Court. Those courts hear cases that raise a **federal question**—a matter that involves the U.S. Constitution, acts of Congress, or treason. Federal courts also decide cases that involve **diversity of citizenship**—a term used to describe cases between persons from different states, between citizens of the United States and a foreign government, and between citizens of the United States and citizens of a foreign country. Diversity cases must exceed the sum of $75,000. In addition, federal courts hear bankruptcy cases, patent and copyright cases, and **admiralty** or **maritime** cases—those pertaining to the sea.

U.S. District Courts

There are 94 U.S. district courts in the federal court system and they are the trial courts. Each state and federal territory (Puerto Rico, for example) and the District of Columbia have at least one U.S. district court within its boundary. These courts are also called **federal district courts**, and there are both civil and criminal district courts.

Sources of Law

There are five principal sources of law in the United States:

1. Federal and state constitutions
2. English common law
3. Federal and state **statutes** (and **ordinances**, which are laws passed by local or municipal legislative bodies)
4. Court decisions (when made by appellate courts, they are also called "common law," but not "English common law")
5. Administrative regulations

The federal government and many state governments consolidate, or otherwise codify, their statutes, administrative regulations, and other laws into a systematic collection called a **code**. The

(Continued)

United States Code (the U.S.C.) and the California Civil Code are examples. Legislative codes, like the U.S.C., are similar in structure to administrative codes, like the Code of Federal Regulations (the C.F.R.), but their sources are different. Legislative codes are created by legislatures, while administrative codes are created by administrative agencies, sometimes called bureaucracies.

U.S. Courts of Appeals

The United States is divided into 13 judicial **circuits**. Eleven of the federal circuits are regional and numbered. There is also a D.C. Circuit for the District of Columbia, and a circuit for specialized federal cases, like patent cases, called the Federal Circuit. With exception for the Federal Circuit, which only has a court of appeals and whose jurisdiction is based on subject matter rather than geography, each circuit has at least one U.S. district court and its corresponding circuit court of appeals. U.S. circuit courts of appeals decide cases that have been appealed from their respective federal district courts. A group of three judges decides most cases that are appealed to a Federal Circuit of appeals court. For example, the 7th Circuit hears federal cases from a total of seven districts in Illinois, Indiana and Wisconsin, and the 7th Circuit Court of Appeals is located in Chicago, IL.

Word Wise
Different Meanings for "Court"

The court officer announced, "The court is now in session!" Used in this way, the term "court" means a body, including judge and jury, organized to administer justice. Lawyers are officers of the court.

"May it please the court" is a sentence often used by lawyers when addressing a judge. The term "court" as used here means "judge."

"I'll see you in court," the attorney said to her fellow attorney. Here, the term "court" probably refers to the courthouse building.

U.S. Supreme Court

The U.S. Supreme Court is the highest court in the land. It hears appeals from both the U.S. courts of appeals and also from the highest state courts when those cases involve federal law or issues of national significance. Coming from the Latin word *supremus* (the last), the term *supreme* means "superior to all other things."

In the U.S. Supreme Court, appeals are heard when four out of the nine **justices** (the title given to the highest appellate court judges) believe that the case is important enough to be heard. When it agrees to hear a case on appeal, the U.S. Supreme Court issues a **writ of certiorari**, an order from a higher court to a lower court to deliver its records to the higher court for review. When the Court decides not to hear an appeal, as it does with most cases, the Court denies issuing the writ of certiorari by writing the abbreviation "**cert. den.**" on the court record. Generally, the Supreme Court grants certiorari to 70–80 cases each year from over 7,000 petitions.

TERMS IN ACTION

The **U.S. Supreme Court** has nine **justices**, who have their job for life. As of 2016, each justice earns $249,300 per year, but the Chief Justice earns $260,700. President Washington nominated the judges for the first Supreme Court, which had six justices. Because the Constitution doesn't state how many justices the Supreme Court should comprise, the number is determined by Congress. The first Congress chose six (one chief justice and five associate justices) as part of the Judiciary Act of 1789, which also established three **circuit courts** and 13 **district courts**.

One of the Supreme Court's early cases, *Chisholm v. Georgia*, concluded in 1793 that the individual states were within its **jurisdiction** and could be sued in a federal court. From 1789 until 1869, Congress increased the size of the Court to seven justices, then nine, and even ten. But in the Judiciary Act of 1869, Congress set the number of justices at nine, where it has remained.

Source: judiciary.senate.gov; supremecourt.gov

STATE COURTS

Each state in the United States—and the District of Columbia—has its own court structure that is separate from the executive and legislative branches of state government. Like federal courts, state courts are divided into three broad categories—trial courts, intermediate appellate courts, and supreme courts.

State Trial Courts

State trial courts have general authority to hear cases involving activity that occurred in a particular state. Called superior courts, circuit courts, or courts of common pleas, they are typically arranged so there is one in each county. Major civil and criminal cases, both jury and non-jury, are tried in these county courts.

In addition, somewhat lesser courts with limited jurisdiction (authority), including district, or municipal, courts; juvenile courts; traffic courts; housing courts; and probate courts, are located throughout each county. Each county also has special courts that handle such matters as adoption, divorce, and the settlement of estates.

State Intermediate Appellate Courts

Following a court's decision, either party may file an **appeal**—that is, a request to a higher court to review the decision of the lower court that tried the case. Courts that review the decisions of lower courts are called **courts of appeal** or **appellate courts**. Many states have intermediate appellate courts where appeals must be taken and heard by a three-judge panel before deemed being eligible to go to the state's supreme court.

State Supreme Court

Each state has a court of last resort—a state supreme court. Parties aggrieved by lower state court decisions may appeal to their state's supreme court, whose decision is usually final. Petitions for certiorari from state supreme court decisions may be made to the U.S. Supreme Court but, as earlier stated, those petitions for an appeal are granted only when a federal or U.S. constitutional question is raised. State supreme courts also regulate the practice of law and oversee the administration of the justice system in their states.

JURISDICTION AND VENUE

Jurisdiction is the power or authority that a court has to hear a particular case. Such power is given to the court either by the federal or a state constitution or by a federal or state statute. If, by chance, a court without jurisdiction should hear a particular case and make a decision, the party who lost the case would certainly win an appeal on the grounds the decision is void because of lack of jurisdiction.

Some courts have **original jurisdiction** over certain cases, meaning that they have the power to hear the case originally—when it first goes to court. Other courts have **appellate jurisdiction**, which means that they have the power to hear a case when it is appealed—that is, when an aggrieved party is petitioning an appellate court to review the decision of a lower

court. When only one court has the power to hear a particular case, to the exclusion of all other courts, the court is said to have **exclusive jurisdiction**. When two or more courts have the power to hear a case, they have **concurrent jurisdiction**. A court with concurrent jurisdiction has the right, under a doctrine called **forum non conveniens**, to refuse to hear a case if it believes that justice would be better served if the trial were held in a different court. Some courts have exclusive original jurisdiction or exclusive appellate jurisdiction over particular cases. Similarly, some courts have concurrent original jurisdiction or concurrent appellate jurisdiction over certain cases.

Word Wise
To Speak

"Dic," "dict," and "dit," whether used as prefixes or suffixes, mean "to say" or "to speak," as in these words:

verdict
jurisdiction
edict
indictment
dictation
dictator
contradict

When considering the question of jurisdiction, one of the first points that must be determined is whether the case is an in rem, quasi in rem, or in personam action.

In Rem Action

An **in rem action** is a lawsuit that is directed against property rather than against a particular person. The action usually concerns title to real property and, if so, is called a **local action**. It seeks to settle some questions about the property, and the court's decision affects everyone in the world, not merely the parties in the case. For a court to have jurisdiction over an action in rem, the property (called the **res**) must be located in the state (and, usually, in the county) where the court sits. In addition, some kind of notice must be given to people who may have an interest in the proceeding.

Quasi in Rem Action

If a defendant owns real property in one state and lives in another, the court where the real property is located has jurisdiction over the property only, but not over the person. If suit is brought in that court and the out-of-state defendant does not appear, the plaintiff's recovery will be limited to an amount up to the value of the property in question located in that state. Such a lawsuit is called a **quasi in rem action**. In such a case, the court has jurisdiction over the defendant's property, but not over the defendant's person; therefore, the most the defendant can lose is the out-of-state real property. Usually, when this type of jurisdiction prevails, the dispute the court is asked to settle has nothing to do with title to the property.

In Personam Action

In an **in personam action** (personal action), the plaintiff must select a court that has jurisdiction over not only the subject matter, but also over the parties involved in the case. **In personam jurisdiction** (personal jurisdiction) means jurisdiction over the person. A court automatically has personal jurisdiction over the plaintiff because the plaintiff has submitted to the court's jurisdiction by filing a complaint in that court. In contrast, a court has jurisdiction over a defendant only if the defendant lives in the jurisdiction, has a business in the jurisdiction, or engages in

legally significant behaviors, such as driving in the jurisdiction. An exception is that state courts will obtain personam jurisdiction over anyone who is served by process while inside the state's boundaries. Service of process is explained in Chapter 2.

Not every would-be defendant resides in the jurisdiction where a plaintiff would file suit. So, how would a court have personal jurisdiction over the defendant? Some so-called **long-arm statutes** allow one state court to reach out (with its long arm) to obtain personal jurisdiction over a person in another state if that person does much business in the state where the court is located, or performs other significant actions in that state. For example, a person from Indiana driving a vehicle in North Carolina can be sued in North Carolina over allegations related to his or her driving in that state. The term **plenary jurisdiction** refers to the situation in which a court has complete jurisdiction over the plaintiff, the defendant, and the subject matter of a lawsuit.

An action that does not concern land is called a **transitory action** and may be brought in more than one place as long as the court in which it is heard has proper jurisdiction.

Venue

The place where the trial is held is called the **venue**. Each state has established rules of venue for the purpose of providing convenient places for trials. Such rules state exactly where particular actions may be brought. If the plaintiff's attorney begins an action in a court of improper venue, the defendant's attorney may have the case transferred or dismissed by filing a motion for that purpose or by raising that issue in the defendant's answer (a document discussed in Chapter 18). If the defendant's attorney does not raise the question of improper venue, the court may hear the case as long as it has jurisdiction. The difference between venue and jurisdiction is that jurisdiction relates to the power of the court to hear a case, whereas venue relates to the geographic location where the action should be tried.

Sometimes, for the sake of justice, one of the parties will ask the court to change the place of the trial. The court, in some cases, has the power to order a change of venue. A **change of venue** is the removal of a suit begun in one county or district and the replacement of it to another county or district for trial. Pretrial publicity is often a reason for a defendant to seek a change in venue. In those instances, the defendant will argue in a pretrial motion that, because of negative media coverage, the defendant will be unable to be tried by an impartial jury unless the trial is moved elsewhere.

TERMS IN ACTION

Near the finish line of the Boston Marathon on April 15, 2013, two bombs made out of pressure cookers exploded 12 seconds apart, killing three and injuring over 250 others. A few days later, the FBI announced that two Chechen brothers, Dzhokhar and Tamerian Tsarnov, were the primary suspects. After killing an MIT police officer and carjacking an SUV, the brothers eluded police until Dzhokhar was captured on April 19. However, before Dshokhar was captured, the brothers killed a Boston police officer in a shootout that included Tamerian dying when Dzhokhar ran him over in the stolen SUV while fleeing. Upon Dzhokhar's subsequent capture, some U.S. Senators thought that he should be treated as an enemy combatant for his terroristic acts, rather than a criminal, but eventually 30 criminal charges were brought against him in the **U.S. District Court** for the District of Massachusetts. Tsarnov's public defenders sought a **change of venue** for the upcoming trial, arguing he couldn't receive a fair trial in Boston, in light of the nature of the charges and the accompanying overwhelming publicity. The prosecutors responded that the publicity, which included a cover on "Rolling Stone" magazine and various articles on Tsarnov's normally American upbringing, had the effect of humanizing, rather than demonizing him. The district judge refused to grant the change of venue and the trial took place in Boston in the spring of 2015. Tsarnov was convicted of all 30 charges on April 8, 2015 and sentenced to death on June 24.

Sources: bostonglobe.com, latimes.com, politico.com, weeklystandard.com

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ALTERNATIVE DISPUTE RESOLUTION

In civil cases, rather than take their disputes to court, some people prefer to use quicker, less complicated, and less expensive methods to resolve disputes. The distinct and alternative processes for settling legal disputes by means other than litigation are known collectively as **alternative dispute resolution (ADR)**. The various forms of alternative dispute resolution include negotiation, mediation, arbitration, and mini-trials.

Negotiation

Negotiation is a two-party process by which each side, without the help of a neutral third party, attempts to conclude its dispute by bargaining with the other until one side agrees to the other side's offer of settlement. One doesn't have to be represented by an attorney in a negotiation; but, often those involved in legal disputes being negotiated do have legal representation. Negotiated settlements are evidenced by a written agreement (a contract), which frequently requires the terms of the negotiated settlement to remain private.

Mediation

Mediation sometimes called **conciliation** is an informal process in which a neutral third person, called a **mediator (or conciliator**) listens to both sides and makes suggestions for reaching a solution. The mediator tries to persuade the parties to compromise and settle their differences. Often, the mediation takes place in stages; both sides meet together with the mediator and then break into private sessions called caucuses. In a **caucus**, the mediator uses his or her listening skills and the ability to ask probing questions in an attempt to learn what the interests are behind each side's demands. From that point on, the mediator seeks small gains from each side and works to try to bring the disputing parties together so that a mutually acceptable agreement (the settlement) can be reached. Although the mediator is not empowered to make the parties settle, the mediator has authority over the mediation process.

Arbitration

In contrast, **arbitration** is a method of settling disputes in which a neutral third party, called an **arbitrator** makes a decision after hearing the arguments on both sides. Arbitration takes place when parties contractually agree to resolve their dispute according to a predetermined arbitration process. Although arbitration is quicker and cheaper than a trial, parties can still agree to engage in a limited form of discovery and gather evidence in preparation for the arbitration hearing. At the hearing, documents can be submitted to the arbitrator or arbitration panel and witnesses can be called to testify. If the parties agree in advance to **binding arbitration**, the decision of the arbitrator or arbitration panel will be final and must be followed. The arbitrator's decision must be in writing and is commonly known as the **arbitrator's award**, regardless of which side the arbitrator rules in favor of. One of the serious consequences of binding arbitration is that the right to appeal a binding arbitration decision is nearly impossible to secure.

If, instead, the parties agree to **nonbinding arbitration** the arbitrator's decision is simply a recommendation and need not be complied with. Arbitration that is required by agreement or by law is called **compulsory** or **mandatory arbitration**.

Mini-trial

An increasingly popular method of settling disputes is an informal trial, sometimes referred to as a **mini-trial** run by a private organization established for the purpose of settling disputes out of court. Retired judges and lawyers are often used to hear the disputes, and the parties agree to be bound by the decision.

Reviewing What You Learned

After studying the chapter, write the answers to each of the following questions:

1. What types of cases are heard by federal courts?

2. Under what circumstances may an appeal be made from a state supreme court to the U.S. Supreme Court? _____

3. What types of cases do U.S. courts of appeals decide?

4. For a court to have jurisdiction over an in rem action, where must the property be located?

5. If a defendant owns real property in one state and lives in another, which court has jurisdiction in an in rem action?

6. In a situation such as that described in question 5, if suit is brought against the defendant in the state where the property is located and the out-of-state defendant does not appear, to what will the plaintiff's recovery be limited?

7. To bring a lawsuit against a person and hold that person personally liable, what kind of action must be brought?

8. If the plaintiff's attorney begins an action in a court of improper venue, what may the defendant's attorney do?

9. What is the difference between jurisdiction and venue?

10. What is the difference between mediation and arbitration?

11. Explain what negotiation is and how it is settled.